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CHIEF JUSTICE JAMES PRENDERGAST AND THE ADMINISTRATION OF
NEW ZEALAND COLONIAL JUSTICE, 1862-1899

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submitted in partial fulfilment
of the requirements for the Degree
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Abstract

The New Zealand legal system during the nineteenth-century was in a state of rapid change and constant turmoil. After the signing of the Treaty of Waitangi between Maori and the British Crown in 1840, British immigration to New Zealand began in earnest. As a British colony, New Zealand gradually acquired the British legal system and adapted it to suit the colonial environment. These adaptations resulted in conflict with Maori and eventually the supremacy of British law in New Zealand.

This thesis explores the role of James Prendergast in helping to create the colonial New Zealand legal system. Prendergast served as Attorney-General of New Zealand from 1865 to 1875 and Chief Justice of New Zealand from 1875 to 1899. Firstly, the English background of Prendergast is analysed and provided as a context for his actions in New Zealand. Then, Prendergast's rise to power in New Zealand is explored, focusing primarily on his roles as Attorney-General and Chief Justice. Particular attention is paid to Prendergast's relationship with Maori, his enduring legacy in New Zealand statute and case law and the relationship between English law and the colonial New Zealand legal system. The recent vilification of Prendergast by modern scholars is detailed, especially in relation to Prendergast's decision in the case, *Wi Parata v Bishop of Wellington* (1877). Finally, an assessment is made of Prendergast's life, legacy and influence in New Zealand legal history.

Several important conclusions are reached through the study of the life of James Prendergast. Through his words, actions and judgments, Prendergast played a highly influential role in the development of the New Zealand legal system. Prendergast is more than just the two-dimensional figure that he has become in modern scholarship. Many of Prendergast's actions that were considered successful by contemporary colonial society are also the actions for which Prendergast is now criticised by modern New Zealand society. A clash has occurred between the standards of the past and the views of the present.

This thesis also proffers the argument that the English legal system was of overwhelming importance in the development of the New Zealand legal system and the administration of colonial justice. The central problem in adapting the English system to the New Zealand environment was the inflexibility of the law in the face of indigenous people's rights. Prendergast was a product of Victorian England and failed to come to terms with Maori society. While he was a competent judge who left a legacy of common law precedent, Prendergast's main success was as an administrator and leader of the colonial legal environment. While the *Wi Parata* decision of 1877 was legally dubious, it is misleading to judge Prendergast's career solely by this one decision.

James Prendergast is a pivotal figure in the study of nineteenth-century New Zealand legal history. He has left a legacy of legal precedent and jurisprudential controversy. This judicial biography provides an account of his successes and failures throughout his long and eventful life.

This thesis is the intellectual property of Grant Hamilton Morris (2001).

Acknowledgements

The completion of this PhD thesis has been supported by a range of individuals, institutions and organisations. Firstly, I would like to thank the librarians of all the research institutions that I have worked in over the past three years. These include: the University of Waikato Library, Hamilton, the Alexander Turnbull Library and National Archives, Wellington, the Hocken Library, Dunedin, the Victorian State Library, Melbourne, and the British Library, the Corporation of London Records Office, the Libraries of the Inns of Court and the Public Record Office, London.

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I would like to give special thanks to my two supervisors, Dr. Douglas Simes and Professor Peter Spiller. Their advice and encouragement throughout this project has been invaluable. The supervision experience has been a positive one throughout the three years of study. I would also like to thank my friend and mentor, Dr. Simon Burrows, for his continual interest in my academic endeavours.

On a more personal note, I would like to thank those closest to me, my family and friends. My important research trip to England was significantly aided by personal and practical support from Bronwen and Kersten Hickman. The success of the vital Wellington archival trips was to a large degree due to the support of my grandmother, Mrs. Merle Morris, who provided accommodation, meals and fascinating historical discussions during the evenings.

Finally, I would like to thank three people who were integral to the completion of my PhD, my partner, Olivia Fraser and my parents, David and Lindsay Morris. Olivia was a friend and confidant throughout the ups and downs of research and writing. My thanks to my parents are not only for this thesis, but for all my academic studies over the past 21 years. This achievement is ultimately due to their tireless support and ongoing counsel. The support and inspiration received from my family and friends has seen this project through to its successful completion.

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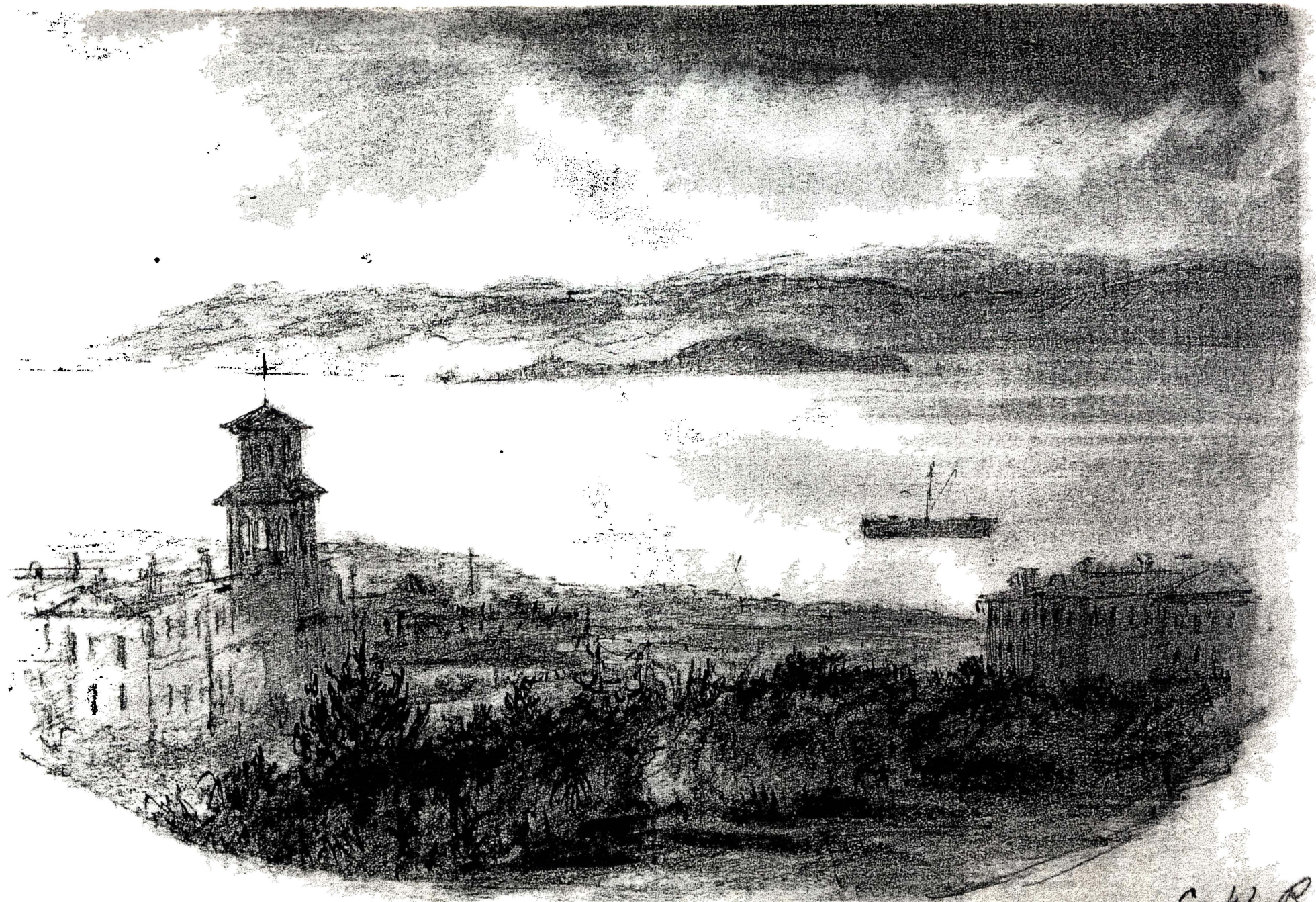
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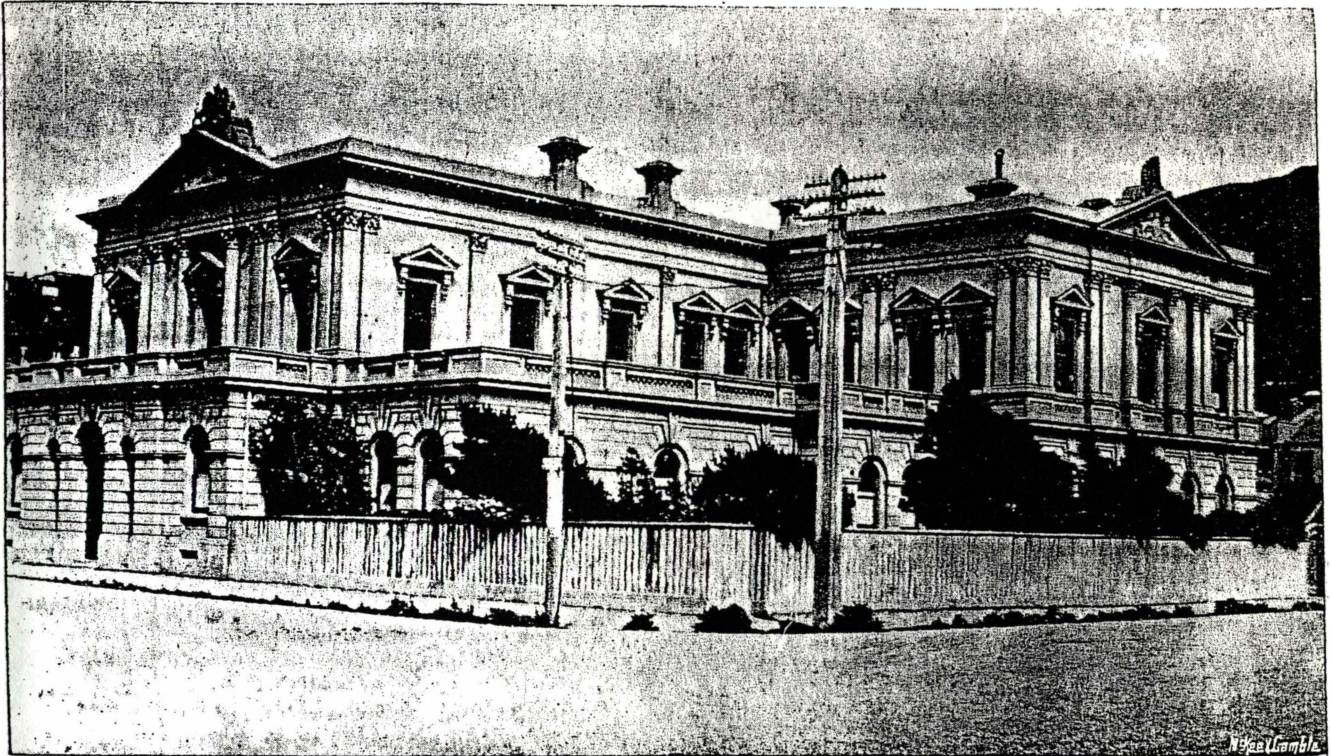
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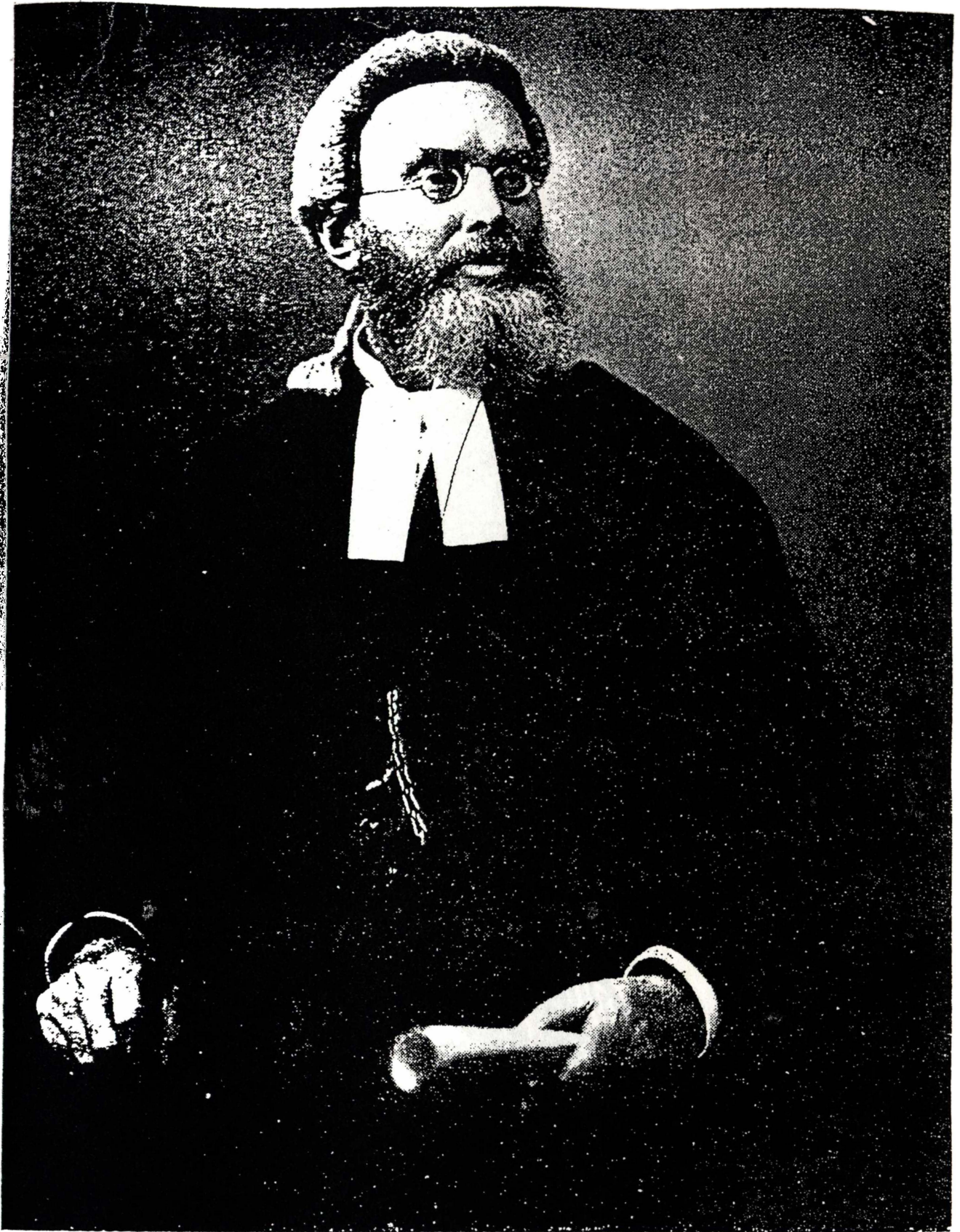


Sir John Pendergast's house - Bolton St. Wellington - Zoo House - Coll. Bunker, about 1879 C.W.R.



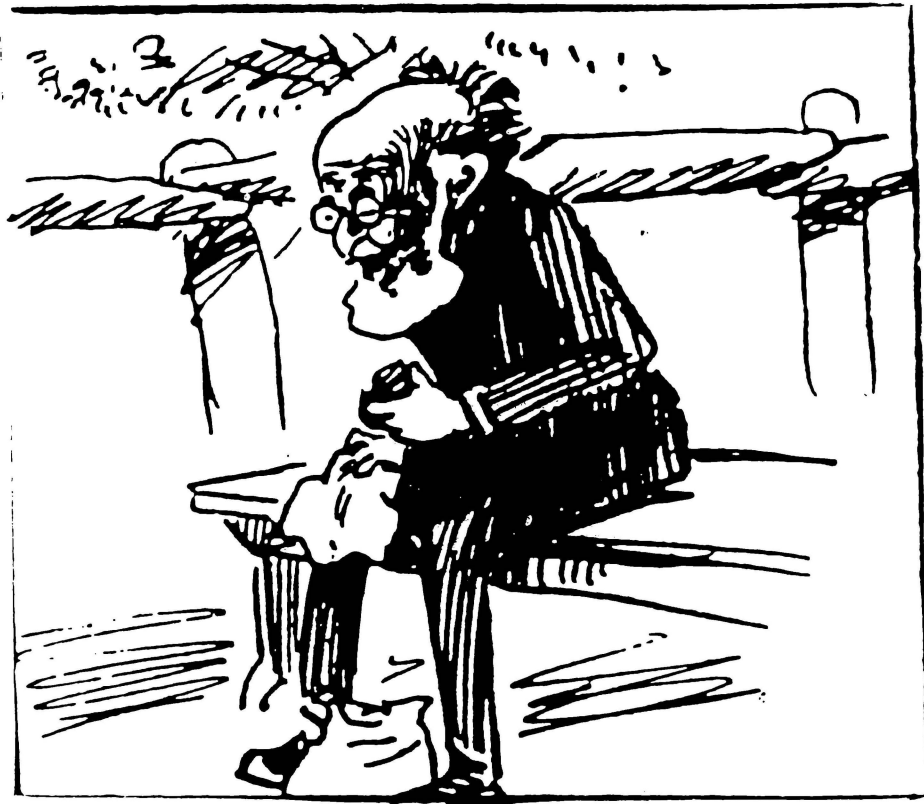
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SIR JAMES OF WELLINGTON





Chapter 1

Introduction

James Prendergast is a well-known name to those who study New Zealand's history. During his life, Prendergast was a respected judge and pillar of the colonial establishment. In recent years, he has been almost vilified for a statement made in 1877 referring to the Treaty of Waitangi as 'a simple nullity.' Despite his influential career and impact on the development of the New Zealand legal system, it is for this statement that many remember James Prendergast today.

There were only four Chief Justices of New Zealand during the nineteenth-century. The Chief Justice acts as the head of the judiciary. The first Chief Justice, William Martin, is well-covered in New Zealand historiography, as is Prendergast's successor, Robert Stout. Following Martin were George Arney and James Prendergast. Arney was a competent but low-profile Chief Justice who served a relatively short term. Prendergast served as Chief Justice for 24 years, making a number of pivotal decisions and adjudicating in many controversial cases. This followed 10 years as Attorney-General during the later stages of the New Zealand Wars. Before becoming Attorney-General, Prendergast was a prosperous barrister in gold-rush Dunedin. With such a strong connection with the development of the New Zealand legal system it is somewhat surprising that Prendergast has never been the subject of a biography. Pen-portraits have provided the outline of his life in G. H. Scholefield's *A Dictionary of Biography* (1940) and *The Dictionary of New Zealand Biography* (1987), but, beyond this brief treatment, Prendergast's life remains largely untouched.

The *Wi Parata* decision, in which Prendergast made his infamous statement, has been discussed by scholars at length, but while treating the case they have virtually ignored the man. Therefore, a biography of Prendergast's life and career was waiting to be written. An impressive number of political biographies appear

in New Zealand historiography, including Raewyn Dalziel's *Julius Vogel*, Judith Bassett's *Sir Harry Atkinson*, Jeanine Graham's *Frederick Weld* and Edmund Bohan's works on *George Grey* and *Edward Stafford*. Yet few academic legal biographies exist.¹ Peter Spiller's *The Chapman Legal Family*, Alex Frame's *Salmond: Southern Jurist* and Waldo Hilary Dunn and Ivor Richardson's *Sir Robert Stout* are the few comprehensive models available to the legal historian. The Chapman family, Stout and Salmond are legal figures widely admired by the present generation. Prendergast's present reputation is largely negative, posing a different challenge to the legal biographer.

Legal history in general has been lightly covered in New Zealand's historical literature. The recent work, *A New Zealand Legal History*, by Peter Spiller, Richard Boast and Jeremy Finn, filled an important gap, but much work remains to be done. Previous to this book, only Robin Cooke's *Portrait of a Profession* (1969) stood as a broad New Zealand legal history. This work, along with the vast majority of early legal history, is more a celebration of the legal profession written by lawyers, than a critical, academic book. Perhaps this relative scarcity of New Zealand legal history is due to the technical nature of the research. The principal tools of the legal historian are the law reports, statutes and Department of Justice archives. A competent knowledge of the law is therefore required to do justice to legal history. Therefore, most New Zealand legal biographies have been produced by academics associated with law schools.

The lawyer and the historian both rely on the key skills of research, analysis and writing. While law requires a certain technical knowledge, the approaches taken in both disciplines share more similarities than differences. Therefore, the legal historian is well-placed to work with archival materials from the nineteenth-century. Legal history in New Zealand is not an over-crowded field of study. New Zealand legal historians are essentially limited to three main areas of study:

¹ This point is supported by Jeremy Finn's survey of New Zealand legal historiography in Jeremy Finn, 'Sir Kenneth Gresson: A Study in Judicial Decision Making', *Canterbury Law Review*, Vol. 6, (1997), pp. 481-98.

Maori legal history, nineteenth-century legal history and twentieth-century or modern legal history. The primary themes running through nineteenth-century New Zealand legal history are the cultural encounter between colonial settlers and Maori and implementation of the English legal system in New Zealand.

Perhaps the reason a biography of Prendergast has not been written in recent years is the infamy now attached to his name. But the study of history demands that all subjects be explored, not only those popular or attractive in any given era. If only the 'safe' subjects were written about, history would become greatly distorted. Also, it is impossible truly to know the nature of a subject, until extensive research has been carried out.

Therefore, the reasons for writing a legal biography of James Prendergast are clear. Firstly, Prendergast was an extremely influential figure in nineteenth-century New Zealand history, and in particular, legal history. Secondly, New Zealand legal history is an area requiring more comprehensive research. Thirdly, a balance is needed in recent New Zealand historiography. Currently 'unpopular' subjects such as James Prendergast need to be addressed to provide a full picture of New Zealand's development. Currently, Prendergast is a two-dimensional figure in New Zealand history. This thesis seeks to provide a third dimension. Lastly, the area of legal history is both fascinating and complex. Research and writing in this field provides a legal historian with a wealth of resources, issues, fact situations, colourful characters and controversial events.

The reasons for the thesis are closely linked to the aims. The primary aim of this thesis is to explore the role and influence of James Prendergast in the administration of New Zealand colonial justice. The thesis also seeks to explore the enduring relationship between the English and the New Zealand legal systems. Another key aim of this thesis is to challenge the reduction of a number of prominent historical figures to mere stereo-types. Prendergast was far more than the archetypal colonial imperialist.

The focus of this thesis is the life and career of James Prendergast. The work could be located in the genre of legal historical biography. As previously mentioned, Prendergast lived an exciting, eventful and controversial life. His English background will form the focus of the first chapter of the thesis. This background is vital in understanding Prendergast's views and later actions and also in examining the close connections between the English legal system and the New Zealand colonial legal system. Chapter Two explores Prendergast's first colonial experience in the colony of Victoria. A comparison will be provided between this experience and Prendergast's later successes in the colony of New Zealand. Chapter Three focusses on Prendergast's beginnings in New Zealand. Starting as a barrister in Dunedin, Prendergast quickly worked his way up the New Zealand legal ladder. An exploration of the high-profile Dunedin bar during the 1860s provides a range of insights into the foundations of New Zealand's legal profession.

Chapter Five focuses on Prendergast's time as Attorney-General. After the Chief Justiceship, it is this role in which Prendergast left his most enduring legacy. Through his legislation, legal opinions and administrative skills, Prendergast dominated the governmental legal environment for 10 years. Studying the development of the legal system during such a formative period will provide insights into the administration of New Zealand colonial justice. The largest and probably most important chapter of this thesis will explore Prendergast's role as Chief Justice from 1875 to 1899. The focus will be primarily on his judicial decisions, but attention will also be paid to his administrative duties as Chief Justice. The length of this chapter also reflects the length of Prendergast's term as Chief Justice, an impressive 24 years of judicial service.

Chapter Seven explores Prendergast's role in the *Wi Parata* decision. While this decision has been discussed at length by other commentators, the historical context of the decision has never been explored in depth. To a degree, this

chapter forms the crux of the thesis, as without the infamy resulting from the *Wi Parata* decision, it is quite possible that Prendergast would remain as unknown as his predecessor, George Arney. Modern New Zealand legal scholarship has become fixated by Prendergast's view on the Treaty of Waitangi. Chapter Eight discusses Prendergast's role as Administrator of New Zealand, and in particular, his controversial involvement in the 1881 invasion of Parihaka. Chapter Nine looks at the final 21 years of Prendergast's long life, his retirement and personal relationships.

A traditional methodological approach has been taken in this thesis. After formulating the reasons, aims and focus of the thesis, I explored the available archival material relating to the life and career of James Prendergast. This material was primarily located in the New Zealand Law Reports, New Zealand Statutes, Department of Justice archives in the National Archives and personal papers in the Alexander Turnbull Library and Hocken Library. Contemporary published sources were also utilised, including law journals, newspapers and official government documents such as the Appendices to Journals of the House of Representatives. Research was carried out in New Zealand, Victoria and England. By researching and visiting the key locations in Prendergast's life, a feeling for his journey was obtained. For Chapter Seven dealing with the *Wi Parata* decision and the section of Chapter Eight exploring the Parihaka invasion, secondary literature has been surveyed at length to provide an appropriate historiographical context.

After finding relevant material, analysis took place. The broad structure of the thesis is chronological, appropriate to a biographical subject. Within each chapter, themes are used as a framework to a greater degree than chronology. The writing of the thesis has been influenced by the wealth of New Zealand historical biographies written over the past fifty years, especially those on legal subjects. Lastly, conclusions are drawn in the final chapter of the thesis, based squarely on the research that has taken place.

The first biography of James Prendergast has been a long time coming. Admired during his lifetime, forgotten after his death and vilified in the present day, Prendergast's reputation has moved from one extreme to the other. His legacy remains, but questions have been raised as to whether this legacy is positive or negative. Different interpretations on the life of Prendergast will continue to emerge. His historical actions are so near the heart of key New Zealand issues such as race relations, land and heritage, that he will always be relevant in New Zealand historiography.

The actions and events of colonial New Zealand form the basis of this thesis. The personalities, problems, conflicts and triumphs provide the themes and issues. James Prendergast was a prominent figure in the story of colonial New Zealand for over a half a century. In 1826, Aotearoa-New Zealand was controlled by Maori with a few, vulnerable European settlements dotted around the countryside. In 1826, London was the centre of the growing British Empire. In 1826, James Prendergast was born in London. Eventually, he would play a large and controversial part in transforming New Zealand from the home of the Maori people to a prosperous colonial outpost of the British Empire. The life of Chief Justice Sir James Prendergast provides essential insights into nineteenth-century New Zealand legal history, and New Zealand history in general.

Chapter 2

Background: Experiences in England / “The creation of a colonial imperialist”: The upbringing, education and experience of Chief Justice Sir James Prendergast in England, 1826-1862

1. Introduction

While Sir James Prendergast is known as a long-serving and controversial New Zealand judge, he was in many ways a product of Victorian England. Prendergast’s privileged English background is the context within which we must judge this judge. The opportunities Prendergast enjoyed in England were largely a result of the successful legal career of his father, Michael Prendergast QC. Prendergast Senior played a pivotal role in directing the life of James. Born in the heart of London in 1826, James found himself literally at the centre of the huge British Empire. Education was a high priority in the Prendergast family, and James attended the elite St. Paul’s School. From St. Paul’s he took the natural step to the University of Cambridge. James was an able student but not entirely sure as to which career he would pursue. After completing his B.A. and spending a year as a school teacher, Prendergast decided to follow his father into the legal profession.

After a brief adventure in Victoria, Australia, James returned to London to begin his career in the law. In the shadow of his high-profile and controversial father, James did not achieve prominence as quickly as hoped. Eventually, an overcrowded legal profession and the death of his father would convince James to leave the centre of the Empire and travel to its farthest reaches. The background of James Prendergast has much in common with other leading New Zealand figures during the late nineteenth century who were born into the English elite, but not able to achieve the prominence they desired in England. The upbringing and schooling Prendergast received is reflected in his legal judgments and political actions while in New Zealand. Created

by Imperial Britain, Prendergast sought to recreate Britain in New Zealand.

2. Early years: Family, St. Paul's

James Prendergast was born on 10 December 1826 in the parish of St. Bartholomew the Great in the City of London.¹ Prendergast's birthplace of Holborn is within the sound of Bow Bells, technically making James a 'cockney'. The Prendergast family had lived in the shadow of St. Bartholomew's for several generations and James' grandfather, Michael, was the local draper. James' father, Michael, is described as "a gentleman who had risen, by his own industry and talent, from a humble origin to a high position at the English bar, without the aid of influential friends or patronage."² Despite his "humble origin", Michael Prendergast QC became a leading legal figure in London while his brother, Joseph, achieved renown as a classical scholar.³ Therefore, while James had a privileged upbringing, his generation of Prendergasts were the first to enjoy this opportunity.

While the Prendergast family may not have enjoyed an illustrious genealogy, James' mother's family were well-known to the English elite. Caroline Prendergast *nee* Dawe was the sister of George Dawe R.A., one of the foremost English portrait artists of his time.⁴ Caroline's father, Phillip Dawe, was also a well-known artist and engraver. Caroline Prendergast gave birth to three sons and one daughter, of whom James was the third child. Born to an ambitious, successful father and cultured mother, the future prospects for young James were bright.

In 1836, at the age of nine, James began his education at St. Paul's School. James' elder brother, Philip, had already spent two years at the school when James arrived.⁵

¹ Baptismal Lists, Guildhall Library, London.

² *The Law Times*, 9 April 1859, pp. 19, 44-5.

³ Frederic Boase, *Modern English Biography, 1851-1900, Vol. II* (London: Frank Cass, 1897, 1965), p. 1626 and Vol. VI, p. 424.

⁴ *The Dictionary of National Biography: From the Earliest Times to 1900*, edited by Sir Leslie Stephen & Sir Sidney Lee (Oxford: Oxford University Press, 1885 onwards), pp. 659-60.

⁵ Rev. Robert Barlow Gardiner (ed.), *The Admission Registers of St. Paul's School, from 1748 to*

In 1836, St. Paul's School, founded by John Colet in 1509, had already educated some of England's most famous sons, including John Milton, Samuel Pepys and John Churchill. The school stood across the street from Christopher Wren's masterpiece and was closely connected with the cathedral. When James began his time at the school, John Sleath was finishing his time as headmaster. Herbert Kynaston replaced Sleath in 1838.⁶ The historian of St. Paul's writes, "there is virtual unanimity that Kynaston was kindly, charming, urbane and almost completely ineffectual....whatever his short-comings, he could inspire scholarship in those of his pupils capable of it."⁷

The school curriculum was dominated by Latin and Greek, preparing many of its scholars for the Universities of Oxford and Cambridge. All 153 boys were taught in one large room with strict discipline and traditional teaching methods.⁸ The school building was cramped and gloomy, described by one old Pauline as presenting "more the appearance of a prison than a school for happy boys."⁹ St. Paul's was closely associated with its rival and fellow day-school, Merchant Taylors' School. James' brother Michael (junior) and his father Michael (senior) both attended Merchant Taylors'.¹⁰

Prendergast was a successful pupil and left St. Paul's in 1845 as a Pauline Exhibitioner, a much sought-after academic honour with financial benefits.¹¹ The traditional nature of St. Paul's curriculum is exemplified by Prendergast's¹² speech at the 1843 Apposition.¹³ The speech was taken from Vitelli's *Renegado*. Whatever its

1876 (London: George Bell, 1884), pp. 289, 293.

⁶ A.H. Mead, *A Miraculous Draught of Fishes: A History of St. Paul's School 1509-1990* (London: St. Paul's School, 1990), p. 138.

⁷ Mead, p. 60.

⁸ Mead, p. 69.

⁹ Rev. R.B. Gardiner and John Lupton (eds.), *Res Paulinae: The Eighth Half-Century of St. Paul's School* (West Kensington: St. Paul's School, 1911), p. 12.

¹⁰ Rev. Charles J. Robinson, *Register of the Scholars admitted into Merchant Taylors' School, From A.D. 1562 to 1874, Volume II* (Lewes: Farncombe & Co., 1883), pp. 182, 256.

¹¹ Gardiner (ed.), p. 404.

¹² Probably James, but could be Philip (no Christian name provided).

¹³ St. Paul's School Archival Records.

limitations, St. Paul's had equipped James well for his next educational step, the University of Cambridge.

3. University Education (Cambridge, including Middle Temple)

It was at the University of Cambridge that James began to demonstrate a somewhat restless nature. Admitted to Caius College on 12 May 1845, Prendergast resided there only one term before migrating to Queens' College on 18 December 1845.¹⁴ His reasons for migration were varied and at first he was unsure as to which new college to enter, "I am going to migrate to Trinity unless they let me have my dinner at 4 o'clock, they have the impudence to say that the Freshmen are (to) dine after the others at 5 o'clock".¹⁵ One reason which may have determined his move to Queens' was the greater availability of fellowships.¹⁶

A collection of letters from James to his father and mother during c1845 provide further insights into the personality of James, aged 18 to 19. James showed frustration with his mother as a correspondent, "It is now 6 o'clock and it is Thursday evening, at 7 o'clock on Thursday last, I sent you a letter I have had no answer what do you mean by it, I shall not write any more now".¹⁷ Caroline Prendergast was in low spirits during the early 1840s, probably due to the death of her daughter, continual absence of her husband and poor health. Caroline died in February 1846, during James' second year at Cambridge.

In his letters, James describes his studies and academic interests. For a man who would make his name dispensing very practical judgments in the colonies, his

¹⁴ John Venn, *Biographical History of Gonville and Caius College, 1349-1897, Volume II* (Cambridge: University Press, 1898), p. 271.

¹⁵ Letter, James Prendergast, Cambridge to Michael Prendergast (Father), London, 17 October 1845, Prendergast Papers, MS-Papers 1791, Alexander Turnbull Library, Wellington.

¹⁶ Letter, James Prendergast, Cambridge to Michael Prendergast (Father), London, 3 December 1845, Prendergast Papers, MS-Papers 1791.

¹⁷ Letter, James Prendergast, Cambridge to Caroline Prendergast, London, 1845, D.O.W. Hall Papers, MS-Papers 986, Hocken Library, Dunedin.

education was extremely academic. Even while at St. Paul's, Prendergast's education focussed on the classic texts, though not all his time was spent studying, "I have begun the Prometheus and have read the whole of the second book of Euclid....I shall walk up to Lords after tea to see the finish of the match between our School and Kings College."¹⁸ During his first year at Cambridge he continued reading Euclid and also attended lectures on Latin and Greek composition.¹⁹ Interestingly, James' main subject of interest was mathematics which may account for his problem-solving, logical approach to the practice of law.²⁰ A schooling in the classics was common amongst many members of New Zealand's elite during the nineteenth century and would have provided Prendergast with intellectual credibility amongst this elite group.

James kept in close touch with his two brothers while at Cambridge, providing him with a support network in his early days of university study. The correspondence between the Prendergast family demonstrates a close-knit unit, while also highlighting the difficulties caused by distance and separation. The young James Prendergast was close to his mother, father and both elder brothers. The loss of his family by the early 1860s would have altered his outlook on life and made him a more independent and solitary man. No letters written by James at Cambridge remain after January 1846, possibly due to the death of his mother soon after that date. The last surviving letter from James to his mother is dated 27 December 1845, "I have now become a loyal member of a royal College [Queen's], I hope your knee is much better by this time....I must finish with a hope that this will find you much better than when I left you."²¹

James graduated with an Ordinary B.A. degree in Mathematics in 1849. While James

¹⁸ Letter, James Prendergast to Michael Prendergast (Father), c1844/5, D.O.W. Hall Papers, MS-Papers 986.

¹⁹ Letter, James Prendergast, Cambridge, to Michael Prendergast (Father), London, 17 October 1845, Prendergast Papers, MS-Papers 1791.

²⁰ Letter from University of Cambridge Library, January 2000.

²¹ Letter, James Prendergast, Cambridge, to Caroline Prendergast, London, 27 December 1845, D.O.W. Hall Papers, MS-Papers 986.

successfully completed his degree at Cambridge, he did not shine as a scholar in the way he had at St. Paul's. With a position of 85th out of 115, James can hardly be said to be a leading Cambridge scholar.²² During this period of English legal history, it was not necessary to obtain an L.L.B. degree before becoming a lawyer. Therefore, James could study mathematics at University and then proceed to the Inns of Court for training as a barrister. All the Prendergasts were 'Cambridge Men'. James' uncle, Joseph, left Queens' with a Doctorate of Divinity and became a leading classical scholar. Michael Senior left Pembroke with a law degree, while Michael Junior completed his legal degree at Trinity Hall. Philip was admitted to Caius, stayed, and completed a B.A. For many well-to-do young men, the ancient universities opened up career opportunities not accessible to others. During his brief time in Victoria, Australia, James would inform his father by letter of 'Cambridge Men' he had met in the distant colonies. Attending Cambridge for four years would provide Prendergast with an influential network of acquaintances for later life.

After completing his degree in 1849, James Prendergast was admitted to the Middle Temple in central London.²³ James' elder brother, Michael, had been admitted to Middle Temple six years earlier but would only be called to the bar in November 1849. James' journey to the bar was even slower. Whether this was due to a reluctance to enter the legal profession or the lack of legal jobs available is not clear. Much had changed in Prendergast's personal life, with the death of his mother in February 1846.²⁴

4. School Teaching in Somerset

After his admission to the Middle Temple in 1849, Prendergast abruptly left the

²² Letter from University of Cambridge Library, January 2000.

²³ Admission, 24 May 1849, Henry F. Macgeagh and H.A.C. Sturgess (eds.), *Register of Admissions to the Honourable Society of the Middle Temple: Vol. II, Years 1782-1909* (London: Butterworths, 1949), p. 512.

²⁴ Administration of Caroline Prendergast's Estate, Prendergast Papers, Misc-MS-Papers 735-A, Hocken Library, Dunedin.

Temple and took the unexpected step of becoming a school teacher. The school was a small private institution run by the Reverend William Routledge and located at Bishop's Hull, a small rural community south-west of Taunton, Somerset. Far from the bustling activity of London, Prendergast began in paid employment. From his own accounts it seems that James was unsure about his decision, "When I first came down [to Bishop's Hull] of course the school was new to me and I did not much like it".²⁵ His father supported him in what was seen by both as a temporary measure:

I assure you all your friends here greatly commend your prudence in taking your present position and your uncle Joseph who knows something of such matters thinks you are very fortunate. I know you will listen to your father....I hope you will not imagine you are not forwarding yourself in the world. You are doing so.²⁶

The experience of teaching in rural Somerset must have allowed Prendergast to see a different way of life from urban London. The students numbered 28 and were aged from seven to sixteen.²⁷ Most were preparing for a career in the army.²⁸ Prendergast lived at the school with Reverend Routledge, his family and a young teacher of French.²⁹ After settling in at the school, Prendergast began to enjoy the experience more, finding time for walking and reading.³⁰ Prendergast's career as a school teacher was brief and in late 1851, he returned to London.

In 1852, Prendergast married Mary Jane Hall, a Cambridgeshire woman.³¹ On 17 June 1852, five days after his marriage, Prendergast set sail for the Victorian goldfields in Australia. James intended Mary to join him after he struck gold. School

²⁵ Letter, James Prendergast, Bishop's Hull, to Michael Prendergast (Father), London, 1850, Prendergast Papers, MS-Papers 1791.

²⁶ Letter, Michael Prendergast (Father), London, to James Prendergast, Bishop's Hull, 26 September 1850, Prendergast Papers, MS-Papers 1791.

²⁷ Census, 1851.

²⁸ Letter, James Prendergast, Bishop's Hull, to Michael Prendergast (Father), London, 1850, Prendergast Papers, MS-Papers 1791.

²⁹ Census, 1851.

³⁰ Letter, James Prendergast, Bishop's Hull, to Michael Prendergast (Father), London, 1850, Prendergast Papers, MS-Papers 1791.

³¹ Marriage Certificate, 12 June 1852, MS-Papers 986, Hocken Library, Dunedin.

teaching had provided James with a valuable experience and an income for a short time, but he was restless for adventure and prestige.

5. Beginnings as a lawyer

It was not until 30 April 1856, when James had recently returned from Victoria, that he was finally called to the Bar and began practice as a lawyer. The bulk of James' training at Middle Temple must have taken place between his brief teaching career and his departure for Victoria in 1852 or on his return from Victoria in 1855, with perhaps some brief training in 1849.

After returning from the Victorian goldfields in 1855,³² Prendergast finished his training at the Middle Temple and was admitted to the English bar in 1856. For six years, Prendergast worked as a special pleader in the London courts before setting off for the colony of New Zealand in 1862. The role of a special pleader was to organise pleas and “develop the point in controversy between parties” resulting in a more efficient judicial process.³³ In practice, the art of special pleading was complex and confusing. One critic from the time described the frustrations of special pleading, “enough to make a horse laugh; a drizzling mass of empirical inventions, circuitous procedure, and unintelligible fiction, calculated for no purpose but to fortify monopoly and wrap justice in deceit and mystery.”³⁴

A few reports remain commenting upon Prendergast's performance as a special pleader. In Sir James' obituary, the *Dominion* recounted a well-known Prendergast anecdote:

Frequently he conducted cases before his father, who was very short-sighted. On one occasion the learned Judge failed to observe that his son

³² See Chapter 3.

³³ A.H. Manchester, *Sources of English Legal History: 1750-1950* (London: Butterworths, 1984), p. 133.

³⁴ Manchester, p. 133.

was engaged in an important case. At tea he declared that a young pleader in the suit in question had done remarkably well for a junior. Great was the surprise when informed that the subject of his eulogy was his own son!³⁵

Despite these favourable comments on Prendergast, the English legal profession was seriously overcrowded during the mid-nineteenth century. Barely a year after Prendergast had begun practising, a Royal Commission was created to investigate the professions, hoping to discover the reasons why many educated middle-class sons were failing to gain adequate professional work.³⁶

Official reports of Prendergast's performance as a special pleader are limited. The name Prendergast appears in the English Reports from the period 1856-1862, but it is unclear whether this is James Prendergast or another.³⁷ A collection of letters from 1862 show James dealing with Philip's declining health and attending to cases, but these sources are limited in their scope.³⁸ The most that can be said about the legal careers of James and Philip Prendergast in London, from 1859 to 1862, is that, at the end of the period, James left London permanently and Philip had a mental breakdown. Neither of the brothers received any recorded public acclaim for their work.

Prendergast lived in and worked from Sergeants' Inn, Fleet Street, in the heart of legal London. During the nineteenth century the title of Sergeant was bestowed upon a barrister who was to be appointed as a Judge.³⁹ The society of Sergeants provided accommodation to London barristers in the society Inn. At the time of Prendergast's career as a London lawyer, his father would have been a Sergeant and was living in

³⁵ 'Obituary', *Dominion*, 28 February 1921, p. 4.

³⁶ Daniel Duman, *The English and Colonial Bars in the Nineteenth Century* (London: Croom Helm, 1983), p. 4.

³⁷ It could be other Prendergasts or Michael Prendergast who retained a small private practice while a judge (Corporation of London Records), or Philip Prendergast from 1859 onwards.

³⁸ Letters, 1862, D.O.W. Hall Papers, MS-Papers 986.

³⁹ Mark Heber, *Legal London: A Pictorial History* (London: Phillimore, 1999), p. 68.

Sergeant's Inn with James.⁴⁰

Prendergast served his legal apprenticeship in the legal offices of Thomas Chitty. Chitty was an associate of Michael Prendergast QC and family connections enabled James to study under this eminent legal figure. Chitty had supported Michael Prendergast's application for Judge of the Sheriff's Court in London.⁴¹ Chitty wrote a glowing testimony for James:

with much pleasure I can forward...testimony to you being in every respect well fitted for the post which you are a candidate for. You were my pupil for some time...you...exhibited every thing expected...[of]...a sound lawyer [and] swift-minded man.⁴²

During the early 1830s, Chitty was a leading special pleader in the Courts of King's Bench, Common Pleas and Exchequer of Pleas. Chitty had a comprehensive knowledge of the forms of proceedings used in these courts.⁴³ The first edition of Chitty's classic work, *Forms of Practical Proceedings in the Courts of King's Bench, Common Pleas and Exchequer of Pleas*, was published in 1834 during a time of reform and change in the English legal system:

The inspiration for the conception, construction, compilation, presentation and publication of this work was doubtless attributable to the extraordinary ferment then prevailing for the reform of civil procedure, engendered very largely by the celebrated speech on Law Reform delivered in the House of Commons in 1828 by Henry Brougham, an ardent and articulate disciple of Jeremy Bentham.⁴⁴

Chitty supplied vital information to common law practitioners in a rapidly changing environment.

⁴⁰ *The Law List*, edited by William Wilks Dalbiac (London: V. & R. Stevens and G.S. Norton, published annually).

⁴¹ Letter, Thomas Chitty to Michael Prendergast, London, 1850s, D.O.W. Hall Papers, MS-Papers 986.

⁴² Letter, Thomas Chitty to James Prendergast, London, 1850s, D.O.W. Hall Papers, MS-Papers 986.

⁴³ Jack I.H. Jacob, *Chitty and Jacob's Queen's Bench Forms*, 21st edition (London: Sweet & Maxwell, 1986), p. vii.

⁴⁴ Jacob, p. vii.

Prendergast began his apprenticeship with Chitty in 1855 or 1856, the time at which Chitty was preparing to publish the seventh edition of his now established work.⁴⁵ Working under a master of English common law would have provided Prendergast with a knowledge base which he could use in administering the New Zealand legal system during the latter half of the nineteenth century.

The influence of Michael Prendergast and Thomas Chitty would have aided James in gathering enough work to continue in practice. With his father's death in 1859, James would have lost his primary mentor and benefactor in the London legal world. But other options were available to young professional men, namely, change in one's career or travel to the colonies.⁴⁶ Thus in 1862, James Prendergast abandoned his legal career in England and set off to try his luck in New Zealand. In only three years Prendergast would rise from a little-known special pleader in the London courts to Attorney-General of New Zealand.

6. The influence of Michael Prendergast QC and the Prendergast family

The rise of James Prendergast as a legal leader was partly due to the influence of his father, Michael Prendergast QC. Michael Prendergast Senior, as mentioned earlier, was from a relatively ordinary background, but through assertiveness and perseverance rose to prominence, first as a barrister and then as a judge. Michael attended Merchant Taylors' School and obtained a prestigious Parkyn Exhibition to progress to Pembroke College at the University of Cambridge.⁴⁷ Studying specifically for an L.L.B. degree, Michael was certain of his desire to lift himself up into the legal profession. After being admitted into Lincoln's Inn in 1816, Michael

⁴⁵ The title was changed to Queen's Bench Forms and the book altered to incorporate the Common Law Procedure Act 1852.

⁴⁶ Judith Bassett & J.G.H. Hannan, 'James Prendergast', in *The Dictionary of New Zealand Biography: Volume One, 1769-1869*, edited by W.H. Oliver and Claudia Orange (Wellington: Allen & Unwin/Department of Internal Affairs, 1990), pp. 354.

⁴⁷ *Colonial Law Journal*, 1865-75, p. 24.

was eventually called to the bar in 1820⁴⁸ and graduated with his L.L.B. in 1821.⁴⁹ From this moment, life moved fast for young Michael Prendergast. He made an advantageous marriage to Caroline Dawe, the daughter of a celebrated artist, in 1821.⁵⁰ Their first son, Michael Junior, was born the following year with a second son, Philip, following in 1824.

Born and bred in the City of London, Michael Prendergast set out to make a name for himself in the capital of the growing British Empire. From 1821 to 1842, Michael appeared as counsel in a number of high-profile cases⁵¹ and succeeded in establishing himself as a leading London advocate. Michael's third son, James, was born in 1826, followed by a daughter, Caroline, in 1829. Tragedy befell the young lawyer, when his daughter died in c1840, aged approximately eleven years.⁵²

In 1848, he transferred to the county of Norwich after the murder of the previous Recorder for that city. During the sensational and high profile trial of the murderer, Michael Prendergast had acted as one of the successful prosecutors.⁵³ In 1850, Michael was appointed Queen's Counsel.⁵⁴ Michael Prendergast served in several other important legal-political positions, but it was his appointment as Judge of the Sheriff's Court in London in 1856, that brought him wide-spread fame, or infamy.

The list of criticisms, both contemporary and recent, concerning Michael Prendergast in the later stages of his career, is very long indeed. Michael's performance as a London judge has been described as "mediocre"⁵⁵ and eccentric.⁵⁶ Matters came to a

⁴⁸ *The Records of the Honorable Society of Lincoln's Inn*, Volume II (London: Lincoln's Inn, 1896), p. 67.

⁴⁹ John Venn, *Alumni Cantabrigienses*, Part II, Volume V (Cambridge: University Press, 1953), p. 185.

⁵⁰ *Colonial Law Journal*, 1865-75, p. 24.

⁵¹ Recorded in the *English Law Reports*.

⁵² Letters, Prendergast Family, c1840, D.O.W. Hall Papers, MS-Papers 986.

⁵³ Charles Mackie, *Norfolk Annals: A Chronological Record of Remarkable Events in the Nineteenth Century*, Volume 1 (Norwich: Office of the Norfolk Chronicle, 1901), p. 474.

⁵⁴ Boase, p. 1625.

⁵⁵ Patrick Polden, *A History of the County Court, 1846-1971* (Cambridge: University Press,

head when, in 1858, Prendergast was accused of incompetency, bias and discourteous conduct towards certain barristers and hauled before the Court of the Common Council.⁵⁷

George Henry Lewis, a London barrister, made a number of serious complaints about Prendergast's ability as a judge. Lewis claimed Prendergast had desired to ask questions of his client, the defendant, before Lewis had actually called the defendant as a witness. When Lewis complained of a breach of proper procedure, Prendergast apparently ignored him. While questioning the defendant, Lewis claimed that Prendergast repeated the defendant's answers incorrectly. After Lewis complained again, Prendergast and Lewis argued in front of the court. After a short but bitter exchange, Lewis was committed by Prendergast for one hour.

While Judge Prendergast was absolved of blame in the 1858 enquiry, his reputation as a lawyer also seems to have been the subject of controversy and debate. Anecdotes tell of Michael Prendergast QC arguing with judges, juries and coroners and assaulting a cab driver in central London while drunk.⁵⁸ James Prendergast would also be the subject of much controversy as a judge, while Michael Junior's career would be ruined by alcoholism. The leading barrister, Ballantine, described Michael Prendergast:

Slovenly as his dress was, his mind was more so: with a greater fund of general knowledge than most people, it seemed mixed so inextricably in his brain that it was next to useless. He rarely had any but the smallest cases from the dirtiest of clients.⁵⁹

A favourite Prendergast anecdote was when the lawyer lost his brief in court. Looking in his pockets, Prendergast produced a piece of toast, before finally locating

1999), p. 322.

⁵⁶ G. Pitt-Lewis, *Commissioner Kerr: An Individuality* (London: T. Fisher Unwin, 1903), p. 76.

⁵⁷ 1858 Inquiry, Corporation of London Records Office.

⁵⁸ Pitt-Lewis, pp. 23, 33.

⁵⁹ Ballantine, p. 30.

“the single greasy sheet that constituted his instructions.”⁶⁰

Like his career as a Judge, Prendergast’s appearance and organisation were condemned, while his integrity was supported by some:

Mr. Prendergast, is in the Crown Court, a Triton among the minnows....He has a peculiar penchant for fact....A well-thumbed bundle of leaves, once perhaps a perfect copy of Archbold’s Criminal Law constitutes the whole of his library in Court....To the honour of Mr. Prendergast it must also be said, that he is equally dauntless in the defence of his clients as for the liberties of his own profession...There are few men at the Criminal Bar of this country, more powerful advocates for the acquittal or fair trial of a prisoner, than Mr. Prendergast.⁶¹

The commentaries on Michael Prendergast occasionally praise his sense of justice⁶² and it seems he was a very eccentric and outspoken, rather than corrupt, judge. Prendergast was a loyal advocate and a fearless opponent, but did not pay homage to rules and procedures.

Despite Michael Prendergast’s apparent shortcomings, he acted as advisor and mentor to his son, James. Letters between father and son show common interests and fatherly guidance. Though Michael had many enemies, he also had powerful friends in the City who could aid James in his early years as a barrister. Michael Prendergast died in 1859, leaving less than 3000 pounds, not an overly impressive amount for a high-profile London judge and lawyer.⁶³ An analysis of the life and character of James Prendergast could lead one to believe he partly modelled himself on his father, but was more diligent and conservative in personality. In 1859, Michael Prendergast died after a short illness. Three years later, James Prendergast left London, the long-time home of the Prendergast family, never to return during his working life.

⁶⁰ Ballantine, p. 30.

⁶¹ *Suffolk Literary Chronicle*, pp. 71-2, c1835, MS-Papers 986, Hocken Library, Dunedin.

⁶² Sergeant Ballantine, *Some Experiences of a Barrister’s Life*, 8th edition (London: Richard Bentley, 1883), p. 30 and Pitt-Lewis, p. 76.

⁶³ Administration of Michael Prendergast’s Estate, 1859, Probate Office, London.

A collection of letters from the late 1830s written by Michael Prendergast to his wife, Caroline, provide insights into Prendergast family life. This decade was perhaps the happiest for the Prendergast family, with four growing children and a fairly stable marriage. While the career of Michael Prendergast did not really flourish until the 1840s, that decade was marred by the death of his daughter and wife. The 1850s saw Michael Prendergast achieve even more professional prominence, but the decade was dominated by the ultimately ill-fated Australian adventure undertaken by his three sons. The end of the 1860s saw only James still active in public and private life.

During the 1830s, Michael was often away from the Prendergast family home in London. Attempting to procure work on the Norfolk circuit, Michael travelled to towns such as Bury St. Edmunds, Ipswich, Norwich, King's Lynn and Cambridge.⁶⁴ While Michael's career was struggling at this point, his keen interest in his family demonstrates the strong family bonds that continued throughout the nineteenth century:

The weather has got milder but I am sure Michael must keep to his room. Philip must rest himself...and his muscular affection will speedily [heal]....I hope James will find the business of school exhausts enough of his animal spirit to prevent any further annoyance to you by their overflow....Pray answer by return of post and tell me how you are.⁶⁵

The Norfolk circuit was competitive and cut-throat:

I have had no business hitherto and as you may suppose am in not very good spirits, my heart too is occasionally troublesome. At Huntingdon, I presume, I was very near having a brief, the waiter told me, at dinner time a gentleman wished to speak to me outside the door, I went but the gentleman had vanished, having, I suppose been...[taken]...by the superior merits of some other barrister, to me this was a grievous disappointment, I however must imitate the conduct of the patient angler who having caught no fish, contented himself with the thought that he

⁶⁴ Letters, Prendergast Family, 1830s, D.O.W. Hall Papers, MS-Papers 986.

⁶⁵ Letter, Michael Prendergast, Bury St. Edmunds, to Caroline Prendergast, London, 1830s, D.O.W. Hall Papers, MS-Papers 986.

has had a glorious nibble.⁶⁶

Michael's fortitude is evident and can later be seen in the personality of his son, James.

By 1839, Michael Prendergast's frustration at the slow progression of his career is evident, "I am not at all pleased with my situation on the circuit, it is neither respectable nor comfortable."⁶⁷ Tragedy struck soon after, with the death of young Caroline Prendergast:

I can assure you I have many disappointments to bear up against besides the never-ending sorrow, which is renewed by almost every event. Again I beg of you to keep up your spirits and to remember that duty demands us to interest ourselves in...life.⁶⁸

Only a few short years after the death of his daughter, Michael lost his wife, reversing the fortunes of the Prendergast family.

With the death of James Prendergast in 1921, the family of Michael Prendergast QC came to an end. James had only one nephew, Michael, who did not marry and predeceased his uncle. While James was brought up in a nuclear family, members of the extended Prendergast family also had some influence during his formative years.

One of James' aunts, married Charles Manning who became close friends with his brother-in-law, Michael Prendergast QC. Charles Manning played an important role in the life of James Prendergast, looking after his affairs in England after 1862. Manning was also a trustee of controversial estate belonging to James' grandfather,

⁶⁶ Letter, Michael Prendergast, Cambridge, to Caroline Prendergast, London, 24 June 1835, D.O.W. Hall Papers, MS-Papers 986.

⁶⁷ Letter, Michael Prendergast, Huntingdon, to Caroline Prendergast, London, 22 March 1839, D.O.W. Hall Papers, MS-Papers 986.

⁶⁸ Letter, Michael Prendergast, Bury St. Edmunds, to Caroline Prendergast, London, 1830s, D.O.W. Hall Papers, MS-Papers 986.

Michael Prendergast. When James decided to send his nephew, Mike, to Oxford during the late 1870s, Manning took care of him. Though not particularly popular with other members of the Prendergast extended family, Manning was the trusted friend of James. Charles' brother, Henry was in charge of a lunatic asylum and cared for Philip Prendergast when he became ill during the 1860s.⁶⁹

Despite having a fairly large extended family, Prendergast left his large fortune to his wife's nephews and nieces. Perhaps James decided these Australasian-based relatives by marriage were closer to him than any first cousins once removed in England. By the end of his life, James had become an 'English New Zealander', detached from his former life in England.

7. Links between the New Zealand and English legal systems during the nineteenth century (including background to English history, 1826-1862)

A variety of aspects of the English legal system were brought to New Zealand by settlers including the structure of the legal system, the English constitutional framework, substantive law, English legal procedure, dress, formalities, training methods and prejudices. Also transported to the colony was an intense focus on property rights and land ownership. James Prendergast was heavily influenced by the English legal system, especially during the period before he travelled to New Zealand in 1862. Practising law on the other side of the world from 1862 onwards, weakened the influence slightly, but in the statutes and legal decisions created by James Prendergast from 1862 to 1899, the English influence is clearly evident.⁷⁰

One of the pivotal reasons for studying the English background of James Prendergast is to analyse links between the New Zealand and English legal systems during the nineteenth century. Colonial New Zealand would draw heavily upon English law, substantive and procedural. To a large extent, men such as Prendergast who

⁶⁹ Letters, Prendergast Family, D.O.W. Hall Papers, MS-Papers 986.

⁷⁰ See Chapters 5 and 6.

constructed the New Zealand colonial legal system, sought to recreate the environment they have left behind in the 'mother country'. Yet the affluent English, Anglican background of James Prendergast was not the only heritage integral in building New Zealand's legal system. New Zealand was settled primarily by English, Scottish and Irish immigrants, each country having its own individual system of law. Christopher William Richmond, Supreme Court Judge, had a similar background to that of Prendergast. Both men were born in London during the 1820s. Both had fathers who were barristers. Both received their legal education at the Middle Temple and then struggled to find work in England.⁷¹

In contrast to Prendergast, Chief Justice Robert Stout was a Presbyterian Scot born into a merchant family on the wind-swept Shetland Islands. He left Scotland for New Zealand as a teenager. Stout spent several years school teaching in Dunedin before commencing his practical training as a lawyer in the New Zealand legal environment.⁷² Prendergast's nemesis, George Elliott Barton, was a Protestant Irishman who began his career in Dublin and then practised in Melbourne after leaving Ireland due to controversial political involvement.⁷³ All these men brought a different view of life and law to the New Zealand environment, but it was the English legal system that was the model for the New Zealand system. Scottish and Irish lawyers were plentiful in the colony but were required to practice 'English' law.

The legal-historical background to James Prendergast's experiences in England provides an important context for the historian. The period from Napoleon's defeat at Waterloo in 1815 to the outbreak of World War I in 1914, was one of relative peace. After defeating the French in the Napoleonic Wars, Britain was effectively the most powerful nation in the world. Although Britain found itself engaged in a number of colonial wars, including the New Zealand Wars and the Boer War, and one

⁷¹ Keith Sinclair, 'Christopher William Richmond', in Oliver (ed.), p. 364.

⁷² Waldo Hilary Dunn and Ivor L.M. Richardson, *Sir Robert Stout: A Biography* (Wellington: A.H. & A.W. Reed, 1961).

⁷³ G.H. Scholefield (ed.), *A Dictionary of New Zealand Biography* (Wellington: Department of Internal Affairs, 1940), p. 46 and Family Information, Alexander Turnbull Library, Wellington.

continental war, the Crimean War, these conflicts did not greatly alter Britain's powerful geo-political position. Imperial Britain had spread across the globe, including its colonies in British North America (Canada), Australia, New Zealand, India and Southern Africa. Queen Victoria ruled at the height of Britain's power from 1837 to 1901.

The main military conflict to affect Britain from 1826 to 1862 was the Crimean War (1854-1855). This war was fought primarily on Russian soil. For some of this time, Prendergast was in Victoria, searching unsuccessfully for his fortune in gold. Therefore, when Prendergast came to New Zealand in 1862 during the height of the New Zealand Wars, he found himself in the midst of war for the first time. Though in Dunedin until 1865, Prendergast played an important role in the later stages of the New Zealand Wars, notably, the campaigns against Te Kooti and Titokowaru during the late 1860s.

Politically, Britain was undergoing great change during 1826 to 1862. The Reform Act 1832, passed by the Whig Government extended the franchise to a far greater number of male voters. Though Prendergast supported the 'Conservatives' such as Atkinson and Hall in New Zealand, it is unclear whether he was a Conservative or a Liberal when voting in Britain. Key politicians in Britain during the mid-nineteenth century included the Duke of Wellington and Robert Peel for the Tory/Conservative Party and Henry Brougham, John Russell, Lord Melbourne and Lord Palmerston for the Whig/Liberal Party. Michael Prendergast QC had limited contact with several key political figures including Henry Brougham.

The period 1826-1862 was dominated by the continuing industrial revolution in Britain. Technology improved dramatically as Britain became 'the workshop of the world', "The new commercial energy was reflected in the Great Exhibition of 1851, which was greeted as the inauguration of a new era of prosperity."⁷⁴ This period of

⁷⁴ Edward Albert, *History of English Literature*, 5th edition (Surrey: Nelson, 1984), p. 367.

economic growth and liberalisation of trade (Corn Laws) also resulted in appalling social conditions for workers in the new industrial cities. Low wages, child labour, poor health and governmental apathy were all important social problems during the mid-nineteenth century. As a Londoner, Prendergast would have seen this suffering, but, having a privileged up-bringing, he would not have experienced it personally. The nineteenth century also saw the abolishment of slavery and the rise of compulsory education.

Intellectual, scientific and philosophical thought underwent a revolution with the ideas of Charles Darwin, Herbert Spencer, Jeremy Bentham, John Stuart Mill and John Austin. These men provided the intellectual framework for the industrial age. Prendergast would have been exposed to the ideas of natural selection, utilitarianism and positivism during his education in England. The Christian Church fought to protect its intellectual authority against an onslaught of scientific rationalism. In the field of artistic literature, Charles Dickens, Alfred Lord Tennyson and Robert Browning were dominant figures, while in historical literature, Thomas Carlyle and Thomas Babington Macaulay were leaders in this field.⁷⁵

The English legal system underwent far-reaching changes during the nineteenth-century. Michael Prendergast QC, in particular, would have been greatly affected by these developments. The practice of law was fiercely competitive⁷⁶ and young lawyers struggled to secure briefs and reputations at the bar. When W. S. Gilbert satirised the English legal system in 1875, his lyrics have more than a little truth in them. For example, a corrupt judge speaks of his early years as an English barrister:

When I, good friends, was called to the bar, I'd an appetite fresh and hearty. But I was, as many young barristers are, An impecunious party.....At Westminster Hall I danced a dance, Like a semi-despondent fury; For I thought I never should hit on a change Of addressing a British Jury – But I soon got tired of third-class journeys, And dinners of bread

⁷⁵ Albert, pp. 366-431.

⁷⁶ As described by Michael Prendergast in his letters to his wife during the 1830s, Prendergast Family, D.O.W. Hall Papers, MS-Papers 986.

and water; So I fell in love with a rich attorney's Elderly, ugly daughter.⁷⁷

This over-supply of lawyers, would provide difficulties for Michael Prendergast during his early years as a barrister and lead to his sons, Michael and James, permanently emigrating to the colonies to secure adequate work.

London was the centre of legal action in the British Empire during the nineteenth century and Michael Prendergast eventually became a prominent figure in that environment. Michael ended his career as a judge of the Central Criminal Court at the Old Bailey, located next to the infamous Newgate Prison. James Prendergast would have acted as a special pleader in the Court of Common Pleas at Westminster. The English legal system in the years before the Judicature Acts of 1873-5 was exceedingly complex. From 1856 to 1862, when James Prendergast was practising in London, the courts included: The Queen's Bench, Chancery (Equity), Probate (Wills), Divorce, Exchequer (Taxes), Admiralty (Maritime) and Common Pleas (Common Law) divisions.⁷⁸ The systems of law and equity were separate and practised in different courts. While the New Zealand legal system was to be more stream-lined than its English counterpart, Prendergast would ensure that New Zealand closely followed English developments in statute and case law. The increasing dominance of statute law (reflecting the positivist views of Bentham and Austin, who saw the State as an appropriate vehicle for law reform) in England, influenced Prendergast during his time as an English barrister. The codification of much English criminal law in 1861, would be followed by Prendergast in New Zealand only six years later.⁷⁹

The leading legal figures in London during the nineteenth-century included Lord Brougham (1778-1868), the Lord Chancellor who instigated widespread legal reform,

⁷⁷ "Trial By Jury" (Musical) 1875, Text by W.S. Gilbert, Music by Sir Arthur Sullivan.

⁷⁸ Morag McDowell and Duncan Webb, *The New Zealand Legal System: Structures, processes and legal theory*, 2nd edition (Wellington: Butterworths, 1998), p. 415.

⁷⁹ Jeremy Finn 'Development of the Law in New Zealand', in Peter Spiller (ed.), *A New Zealand Legal History* (Wellington: Brookers, 1995), p. 103.

Lord Blackburn (1813-1896), the leading common law judge who gave judgment in *Rylands v Fletcher* (1868) and Sir George Jessel (1824-1883) who was the leading judicial authority on equity.⁸⁰ James Prendergast's closest relationship with an influential figure was when he worked under Thomas Chitty at the beginning of his legal career.⁸¹

Intellectually, Prendergast's formative years began with his student years at Cambridge in 1845. From 1849 to 1852, Prendergast continued to read, but lacked the focused study experienced at University. Only on his return to London in 1855, did Prendergast begin his study of the law in earnest. At Cambridge, Prendergast studied mathematics, though his keen mind would have taken an interest in other subjects as well. In placing Prendergast in an intellectual and jurisprudential context, the historian must explore the key philosophical ideas dominating in Britain during the mid-nineteenth century. For the study of James Prendergast, the most important ideas are those of a legal, political nature and those focusing on race and culture.

In 1859, Charles Darwin(1809-82) published his seminal work, *On the Origins of Species by means of Natural Selection*. While Darwin's ideas were primarily focused on different species, other writers applied his theories to race and political life. Darwin's ideas challenged orthodox religious belief and traditional English society:

Darwin argued for a natural, not divine, origin of species. In the competitive struggle for existence, creatures possessing advantageous mutations would be favoured, eventually evolving into new species....organic descent was achieved by natural selection....An agnostic, Darwin saw no higher moral or religious ends in evolution.⁸²

Herbert Spencer (1820-1903), inspired by Darwin, coined the phrase 'survival of the fittest' when applying evolution to human experience. During the early 1860s he

⁸⁰ Judy Hodgson (ed.), *The English Legal Heritage* (London: Oyez Publishing, 1979), p. 24.

⁸¹ Not to be confused with Joseph Chitty, author of *Chitty on Contracts*.

⁸² Margaret Drabble and Jenny Stringer (eds.), *The Concise Oxford Companion to English Literature* (Oxford: Oxford University Press, 1987), p. 142.

published several important works arguing his theses.⁸³ Prendergast would have been a practising lawyer during the time Darwin and Spencer achieved widespread renown, and would have been exposed to their views. Prendergast's views on race, the ideas of Maori as 'primitive barbarians' who had not reached the stage of having an established legal system,⁸⁴ fit into the paradigms of evolution and natural selection. Little mention of religion is found in any personal material relating to Prendergast and his family.

While the philosophies of Thomas Hobbes (1588-1679) and John Locke (1632-1704) were of the seventeenth century, Prendergast would have been influenced by them, either consciously or sub-consciously. Both scholars argued the view that civil obligations were founded on contract, but Hobbes' view of society was absolutist with an almighty sovereign (Leviathan) while Locke opposed absolutism and advocated greater individual liberty and protection of private property.⁸⁵ Prendergast's opinions as Attorney-General and Chief Justice often referred to the unquestionable authority of the Crown, following a Hobbesian view, but it is unlikely that Prendergast's optimism would have allowed him to agree with Hobbes' view that human life was "solitary, poore, nasty, brutish and short."⁸⁶

The philosophy most evident in Prendergast's jurisprudential approach is that of legal positivism. Leading scholars in this field included Jeremy Bentham (1748-1832) and John Austin (1790-1859). Bentham's *Principles of Morals and Legislation* (1789), and Austin's *The Province of Jurisprudence Determined* (1832) were pivotal influences in nineteenth century legal thought. Bentham's 'utilitarianism' and Austin's 'command theory' can be seen in the judgments of James Prendergast. The concepts of legal objectivity and parliamentary superiority were prevalent in nineteenth century England and would have influenced Prendergast while studying.

⁸³ Drabble and Stringer (eds.), p. 532.

⁸⁴ As seen in *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.

⁸⁵ Drabble and Stringer (eds.), p. 331.

⁸⁶ Drabble and Stringer (eds.), p. 266.

The Whig view of history, which stressed the inevitable progression towards parliamentary government and constitutional improvement, would have also inspired Prendergast's legal and judicial thought. The triumph of the English system of government was celebrated in Macaulay's (1800-59), *History of England* (1849,1855), which was published to wide acclaim during the 1850s, when Prendergast was working in London. Prendergast did not openly discuss philosophy in his personal correspondences, but close analysis of his judgments and legal opinions demonstrate his intellectual approach and legal background.⁸⁷

8. Relationship between Prendergast's experiences in England and his role in nineteenth-century New Zealand history

While the influence of James Prendergast in English society was minor, his influence in New Zealand was very significant. As Attorney-General from 1865 to 1875, Prendergast played a key role in establishing an English-inspired legal system in New Zealand. From 1875 to 1899, Prendergast was Chief Justice, making a number of important decisions. His most notorious and influential decision was in the case, *Wi Parata v The Bishop of Wellington* (1877), in which he stated that the Treaty of Waitangi was "a simple nullity", effectively undermining the legal power of the Treaty for more than a hundred years.

Analysis of Prendergast's life in England sheds light upon his actions in New Zealand. Prendergast had all the educational opportunities necessary to prepare him for his meteoric rise in New Zealand society. Educated at leading English institutions such as St. Paul's School, the University of Cambridge and Middle Temple, Prendergast met and associated with the elite. As a learned man, Prendergast therefore had credibility when working with New Zealand leaders such as Frederick Weld, Edward Fox, Donald McLean, Edward Stafford and many others. Prendergast's knowledge of the English legal system enabled him to attempt to

⁸⁷ See Chapters 5 and 6.

reconstruct that system in a New Zealand context. The lack of interaction with other cultures evident in Prendergast's life was demonstrated by his disregard for Maori affairs while Attorney-General and Chief Justice. To say Prendergast moved from being 'a small fish in a big pond' to 'a big fish in a small pond' is to simplify matters, but there would still be truth in the statement.

The experience of school teaching would have allowed Prendergast to see a non-legal environment but also made him realise that his ambitious nature would not be satisfied by the teaching profession. After his travels in Australia and failure as a gold-miner and adventurer, Prendergast returned to practice law in London. It was only when James left London for Dunedin, that his ambitions were finally realised. The trials and lessons of these early years allowed James to move quickly up the New Zealand legal ladder.

Prendergast came from a close-knit family which experienced tragedy during the 1840s while James was obtaining his education. The loss of his mother and sister would have affected Prendergast's outlook on life. While James had the support of an extended family, with the death of his father in 1859, he decided his familial ties were weak enough to leave England permanently. Prendergast took his intellectual background with him to the colonies and with him came ideas of legal reform, positivism, Whig history and English superiority. Prendergast did not greatly adapt his jurisprudential approach, obtained in London, to suit the new colonial environment of New Zealand.

Prendergast was fortunate to be guided by capable mentors throughout his formative years. His uncles Joseph Prendergast and Henry Dawe, the Reverend William Routledge and the eminent lawyer, Thomas Chitty, all played important roles in the life of James Prendergast. His immediate family was also pivotal during his youth. Prendergast was close to his mother, who struggled with illness and tragedy, and also to his brothers whom he lived, studied and travelled with over a period of thirty years.

But it was his father, Michael, who had the most influence over the young man. The temperamental, controversial lawyer and judge, Michael Prendergast, dominated the youth of his three sons and all attempted to follow in his legal footsteps. Michael (junior) and Philip were unable to emulate their father's success, but James surpassed his father by successfully transferring his talent and ability to the New Zealand environment. By the time James Prendergast arrived in New Zealand his mentors had gone and he was a man in control of his own destiny.

James Prendergast was exposed to the ideas of Empire at an early age. His training at conservative and elite English institutions created a man dedicated to the British Empire and willing to take its ideas and prejudices to new environments. By 1862, Prendergast had an impressive amount of different life experiences but even though he had spent a brief time in Australia, he had never had to deal directly with other races or different cultures. The firm views and beliefs that Prendergast brought to New Zealand were not flexible enough to accommodate the Maori way of life, and as a result, Prendergast is viewed by many modern commentators as a paternalistic oppressor. By the standards of late nineteenth century British society, James Prendergast was a remarkably successful colonist but by the standards of early twenty-first century New Zealand society, he was misguided and prejudiced.

9. Conclusion

The colonial imperialist was educated and trained to command others and be dedicated to serving a higher body, in this case, the British Empire. Many of the beliefs and prejudices of Victorian England can be found in the personality of James Prendergast. Prendergast entered the English elite at a young age and was schooled in the classical traditions at ancient places of learning. Growing up in the heart of Imperial Britain, Prendergast became a strong supporter and advocate of its values. As a young man, Prendergast was ambitious, but not completely sure as to where to channel these ambitions. As a student, Prendergast was diligent and bright but not

exceptional. As a school teacher, he was restless. As a goldminer he was a disaster and as a London lawyer, one of a large crowd. Both inspired and protected by his influential and controversial father, James Prendergast did not really flourish until he left his homeland and family behind him for a new life in New Zealand.

The family of Michael Prendergast, while full of potential during the 1830s, suffered after this time. Michael's career flourished near its end, but under a cloud of controversy and criticism. The London of Michael and James Prendergast was a city of change, over-crowding, social problems and tradition. This was the environment which created James Prendergast and from which he gained his views on law, politics, religion, race and class. His family background, training and intellectual outlook was English but his success was colonial.

While leaving England may have been the making of the man, at thirty-six Prendergast could not change his outlook on the world, which had become firm and inflexible. His actions and decisions as a powerful New Zealand legal figure reflect his up-bringing, education and life in England. Prendergast's controversial nature reflected that of his father while his rigid views on Maori reflected a belief in the superiority of the 'Englishman'. The influence of James Prendergast on New Zealand history shows a man who left his country but never abandoned its values.

Chapter 3

Colonial Beginnings: Experiences in Victoria, Australia, 1852-1855

1. Introduction

The experience of James Prendergast in colonial New Zealand was a resounding personal triumph. His experience in colonial Australia was a different story altogether. The young man left his budding legal career in London for the adventure and risk of the Victorian goldfields in 1852. The adventure quickly turned sour and Prendergast transformed himself from a goldminer into a clerk. This administrative experience would prove useful to Prendergast in New Zealand. While the Australian experience was not an obvious success, it provided Prendergast with the training that would enable him to rise quickly in New Zealand society during the 1860s. Throughout Prendergast's career the influence of the Australian period can be seen. Prendergast had a habit of turning up in colonial lands during traumatic national events. During the early 1850s in Victoria, miner resentment towards bureaucratic authority reached breaking-point at the Eureka Stockade. While Prendergast was in New Zealand during the 1860s, Maori resentment towards British authority also reached breaking-point in the form of the New Zealand Wars.

The Australian adventure engaged not only James Prendergast, but also his brothers, Philip and Michael. Placed in difficult circumstances, the different personalities of the three brothers became evident. Philip arrived in Victoria with James and stayed briefly after James' departure. Michael came in 1853 and stayed on to become a member of the Victorian Parliament. Unfortunately, Michael's colonial experience was to end in tragedy. The Victorian gold-rushes of the 1850s form the historical background for this period of Prendergast's life and provide interesting insights about 'Englishmen abroad'. The conflict between the English gentleman and the harsh

colonial frontier is apparent.

2. Prendergast as colonial adventurer: Gold-mining 1852-1853

On 17 June 1852, James, his brother Philip, his cousin, Thomas Jeffrey and friend, Frederick Cropp, set sail from Portsmouth aboard the “Francis Henty”.¹ The young men were drawn to the colonial frontier by the promises of adventure and wealth. Prendergast had recently married, but left his wife, Mary, in England. The “Francis Henty” carried 135 passengers and was dominated by English adult males.² With only 17 adult females and 15 non-English passengers, this was a homogeneous group of young English men voyaging to seek their fortune on the Victorian goldfields.³

After a relatively speedy 77 day passage from Land’s End to Portland Bay, the young men landed at Portland Bay, Victoria.⁴ They reached Melbourne’s Port Phillip in September 1852.⁵ The voyage had been relatively safe and successful, with only one infant death.⁶ James had found the trip somewhat mundane:

I cannot imagine a more uninteresting voyage than that of England to Australia; even the pursuit of Gold did not seem to enliven us: there was not one on board who seemed to be possessed of the spirit of adventure.⁷

The pride of the Prendergasts was insulted at one point during the voyage, providing insights into the different ‘categories’ of passengers onboard, “They [Ship’s Owners]

¹ Thomas Jeffrey, Letter to his father, 22 September 1852, Prendergast, James, MS-Papers 1791, Alexander Turnbull Library, Wellington and *Immigration to Victoria Inward Passenger Lists and Indexes 1852-1923* (Victoria: Public Record Office, 1993).

² English adult males accounted for 93 of the 135 passengers, or 69%.

³ *Immigration to Victoria Inward Passenger Lists and Indexes 1852-1923* (Victoria: Public Record Office, 1993).

⁴ James Prendergast, Letter to his father, 22 September 1852, Prendergast, James, MS-Papers 1791.

⁵ Scholefield Collection, MS-Papers 0212, Alexander Turnbull Library, Wellington.

⁶ Philip Prendergast, Letter to his father, 21 September 1852, Prendergast, James, MS-Papers 1791.

⁷ James Prendergast, Letter to his father, 22 September 1852, Prendergast, James, MS-Papers 1791.

next attempted to reduce us to the state of Government Emigrants requiring us to sweep & wash the cabins & otherwise to wait upon ourselves but this also they eventually abandoned.”⁸ Despite this indignity, the Prendergasts were comparatively lucky to be aboard the “Henty”. On arriving at Victoria, Phillip spoke of:

one [ship] in quarantine that left England with upwards of four hundred persons but arrived here with less than three hundred the rest having perished by the yellow fever which broke out I suppose in consequence of the overcrowded state of the ship.⁹

The first impression of Victoria that struck the Prendergast brothers was the high price of goods and services.¹⁰ The group camped for a brief time at Liardett’s Point, Port Phillip before travelling to the diggings. The young men had the opportunity of viewing the bustling infant city of Melbourne, “Melbourne is increasing most rapidly; but the buildings, particularly the shops, are anything but handsome....No pavements - little light - oil of course, dangerous to be on the streets after dark = the country much safer than Town.”¹¹ In his letters, Philip estimated the population of Melbourne to be at least 100,000, with the usual (pre-rush) population being 10,000.¹² Like James, Philip was struck by the high rate of crime, especially the danger of highwaymen robbing diggers and:

one in particular who rides single well armed & well mounted to whom they have given the title of Captain his deeds are very astonishing. But we intend to go in spite of them all even of the great Captain himself.¹³

⁸ Philip Prendergast, Letter to his father, 21 September 1852, Prendergast, James, MS-Papers 1791.

⁹ Philip Prendergast, Letter to his father, 21 September 1852, Prendergast, James, MS-Papers 1791.

¹⁰ James Prendergast, Letter to his father, 22 September 1852, Prendergast, James, MS-Papers 1791.

¹¹ James Prendergast, Letter to his father, 22 September 1852, Prendergast, James, MS-Papers 1791.

¹² Philip Prendergast, Letter to his father, 21 September 1852, Prendergast, James, MS-Papers 1791.

¹³ Philip Prendergast, Letter to his father, 21 September 1852, Prendergast, James, MS-Papers 1791.

The extraordinary amount of men flooding into Victoria is apparent in Thomas Jeffrey's letters, "there are thousands of people going to the diggins from all parts of the world, ships are coming in 2 & 3 daily, and altogether things are in a pretty fix".¹⁴ James now found himself in a group of eight, with all the men intending to set off for the Bendigo goldfields: the two Prendergast brothers, James (26) and Phillip (28), Thomas Jeffrey (26), Frederick Cropp (20) and a William Simons (35), his wife, Ann (34) and their two children, Sarah (11) and Maria (10).¹⁵ The Simons family were a recent and interesting addition to the original group of four young men. After poor reports from Bendigo, the group of diggers decided to travel to the rich Ovens diggings instead. Unfortunately, just before the intended departure, Simons left the group to care for his family and Jeffrey deserted after a bitter argument with James, which came to blows.¹⁶

Eventually the Prendergast brothers and Frederick Cropp reached the Eureka Diggings at Ballarat and by January 1853 were working a rich 'hole'.¹⁷ April of 1853 saw the three men still digging at Eureka, though their rich 'hole' had failed to yield the amount of gold expected. James' writings speak of the hardship of the diggings and he advises friends in England not to travel to Victoria in search of fortune.¹⁸ During this period the tenacity and mind-set of James becomes clearer:

Success I am persuaded must eventually be the end sooner or later to the man who will give himself wholly up to the work. What he will chiefly stand in need of is power of Endurance without he can do nothing....Pluck is the one thing needful. Any man from any class who can bear disappointments and hard fare will make a good gold digger.¹⁹

Prendergast's attitude reflected the 'Victorian Frame of Mind', especially in his

¹⁴ Thomas Jeffrey, Letter to his father, 22 September 1852, Prendergast, James, MS-Papers 1791.

¹⁵ Thomas Jeffrey, Letter to his father, 22 September 1852, Prendergast, James, MS-Papers 1791 and *Immigration to Victoria Inward Passenger Lists and Indexes 1852-1923* (Victoria: Public Record Office, 1993).

¹⁶ Philip Prendergast, Letter to his father, 23 January 1853, Prendergast, James, MS-Papers 1791.

¹⁷ Philip Prendergast, Letter to his father, 23 January 1853, Prendergast, James, MS-Papers 1791.

¹⁸ James Prendergast, Letter to his father, 13 April 1853, Prendergast, James, MS-Papers 1791.

¹⁹ James Prendergast, Letter to his father, 13 April 1853, Prendergast, James, MS-Papers 1791.

dedication to hard work and his stubbornly optimistic outlook.²⁰ Unfortunately for James and Phillip, endurance and pluck were not enough to ward off dysentery. Both young men became extremely ill and came close to death. It was at this time, in late 1853, that the eldest Prendergast brother, Michael, arrived in Melbourne. Quickly establishing himself as a barrister in the city, Michael had the funds to bring his younger brothers to Melbourne and care for them:

Philip and James arrived Melbourne in the very extremity of starvation and distress. If it had not been for the lucky accident that brought me out at the right time they must have died the death so many gentlemen have met with out here.²¹

Many years later, in dramatic circumstances, James would return the favour he owed to his brother Michael. The gold-digging experience had been a failure and almost fatal. James and Philip, in debt, now looked to other occupations to make their fortunes in the fledgling Victorian state.

3. Prendergast as colonial administrator: Clerical work in Victoria 1854-1855

On 30 December 1853, James Prendergast was appointed Clerk of Petty Sessions at Elephant Bridge, Western Victoria.²² Working from the local hotel, James had his first real experience with administrative work. In January of 1854, James described his surroundings:

I am at this moment sitting in a room at the Public House at Elephant Bridge a Township 80 or 90 miles from Geelong. I am appointed Clerk of Petty Sessions at a salary of 250 pounds and an allowance of 62 pounds per annum for House-rent. There is no Bench at present; nor are there any constables: nor is there a lock-up.²³

²⁰ Walter E. Houghton, *The Victorian Frame of Mind* (New Haven: Yale University Press, 1957).

²¹ Letter, Michael Prendergast, Letter to his father, January 1854, Prendergast, James, MS-Papers 1791.

²² Robert P. Whitworth, *Bailliere's Victorian Gazer* (Melbourne: F.F. Bailliere, 1865), p. 109.

²³ James Prendergast, Letter to his father, 14 January 1854, Prendergast, James, MS-Papers 1791.

While not entirely happy with his new position, James was optimistic, “In a few years perhaps things will change. Till then I will hope on and work on”.²⁴ Perseverance and patience brought James through the summer of 1854 and in May 1854 he wrote to his father stating that he may return to England soon.²⁵ James managed to make himself useful in the small Elephant Bridge community, and aside from his clerical position acted as administrator for the Public Pound.

James found living at the Public House disagreeable and, with the imminent arrival of his wife, began looking for other positions.²⁶ As Phillip writes, “James is not quite contented with his place of course he cannot he having nobody to speak to no books & nothing to do.”²⁷ James received his wish and was removed from Elephant Bridge to a clerical position at Carisbrook, a new town experiencing a rush of diggers.²⁸ While James was happy with his performance at Carisbrook, others were not, “After all my labour which was very great an objection was made to my writing and that I was slow.”²⁹ Disgusted by his treatment, James blamed an Irish Barrister and contemplated his revenge. After visiting Melbourne in an unsuccessful bid to retain his position, James met his wife who had just arrived aboard the “Blackwell” and began a new job in Maryborough, just west of Carisbrook. James was not the only disgruntled Victorian settler. During these later months of 1854, miner agitation was rising against the authoritarian Victorian governor, Charles Hotham. On 3 December 1854, government troops and police attacked a miner’s stockade at the Eureka Diggings. Approximately thirty diggers and five soldiers were killed.³⁰

Three months after losing his position at Carisbrook, James decided to leave Victoria

²⁴ James Prendergast, Letter to his father, 14 January 1854, Prendergast, James, MS-Papers 1791.

²⁵ James Prendergast, Letter to his father, 24 May 1854, Prendergast, James, MS-Papers 1791.

²⁶ James Prendergast, Letter to his father, 19 July 1854, Prendergast, James, MS-Papers 1791.

²⁷ Philip Prendergast, Letter to his father, 15 February 1854, Prendergast, James, MS-Papers 1791.

²⁸ James Prendergast, Letter to his father, 28 October 1854, Prendergast, James, MS-Papers 1791.

²⁹ James Prendergast, Letter to his father, 28 October 1854, Prendergast, James, MS-Papers 1791.

³⁰ Geoffrey Serle, *The Golden Age* (Charlton, Victoria: Melbourne University Press, 1963), p. 168.

with his wife and return to London.³¹ After little more than two years of colonial life, James returned to his homeland, somewhat bitter but definitely wiser. His brother Philip wrote:

...when he [James] arrives in England [he] will be one of the best men there as he was here the best. He will tell you how he has been treated here by the scoundrelly Irish. If he goes to the bar he will have a great superiority over his rivals from his enlarged knowledge of the world and his own natural ability and his success I think will be certain....In discharging him the Government of the Colony has lost an able and honourable man.³²

Michael also blamed the Irish for James' premature departure, "his removal from the Government service is solely attributable to the malice and jobbery of the detestable Irish Orange set that are the curse of the Colony."³³

Reports of Prendergast's movements between October 1854 and April 1856 are sketchy. In the *New Zealand Dictionary of Biography*, Bassett and Hannan state, "In 1856 another Londoner, the young Julius Vogel, set up shop next to Prendergast's office on the Dunolly field, near Maryborough. Vogel and Prendergast began what was to be a long and mutually beneficial association."³⁴ Dalziel states that, "Vogel set up shop for the first time [in Dunolly] by himself, sandwiched between a general store and the legal offices of J. Prendergast."³⁵ Scholefield states that, "At the request of his father, he [James] and his wife returned to London by the "Anglesea" 1856."³⁶ After detailed research, it would seem that all these statements are incorrect.

³¹ Philip Prendergast, Letter to his father, 27 January 1855, Prendergast, James, MS-Papers 1791.

³² Philip Prendergast, Letter to his father, 27 January 1855, Prendergast, James, MS-Papers 1791.

³³ Michael Prendergast, Letter to his father, 17 May 1855, Prendergast, James, MS-Papers 1791.

³⁴ Judith Bassett & J.G.H. Hannan, 'James Prendergast', in *The Dictionary of New Zealand Biography: Volume One, 1769-1869*, edited by W.H. Oliver and Claudia Orange (Wellington: Allen & Unwin/Department of Internal Affairs, 1990), p. 354.

³⁵ Raewyn Dalziel, *Julius Vogel: Business Politician* (Auckland: Oxford University Press, 1986), p. 24.

³⁶ Scholefield Collection, MS-Papers 0212.

The supposed Prendergast/Vogel connection stems from a mistaken interpretation of a Dunolly sketch map. The map shows Julius Vogel's shop located next to an L. Prendergast (Solicitor).³⁷ One could suspect a spelling error with 'L' substituted for 'J'. In fact, this solicitor was not James Prendergast, but almost certainly Leonard Prendergast who was admitted to the Victorian bar in 1854.³⁸ There are a number of pivotal pieces of evidence to support this claim. Firstly, James was not admitted to the bar until April 1856³⁹ and therefore could not practice as a solicitor before this date. Secondly, Prendergast returned to London in early 1855 making it impossible for him to meet Julius Vogel at Dunolly in 1856, as claimed by Bassett.⁴⁰ This finding has implications for an analysis of Prendergast's later career, as James was closely involved with Vogel in New Zealand. In fact, Vogel assisted Prendergast's rise to legal power in New Zealand. The relationship between the two leading figures cannot be seen in the light of a shared Victorian experience, and it is probable that the two men did not know of each other until they met in Dunedin.

Scholefield's claim that James and his wife returned to London by the "Anglesea" in 1856 is also inaccurate. No primary evidence exists to support James Prendergast being in Victoria during mid to late 1855. In fact, the letters written by the Prendergast brothers during their Victoria experience state that James was on his way back to London at the time of the first "Eureka trials", which took place in early 1855.⁴¹ The date of Philip's letter stating that James had returned to London is January 1855, but many of the dates stated on the letters are inaccurate, so this by itself is not conclusive evidence. If James did leave Victoria in early 1855, his poor wife Mary would have spent only three months in the colony before having to face another three month ship journey back to London.

³⁷ James Flett, *Dunolly: Story of an Old Gold Diggings*, 2nd edition (Melbourne: Hawthorn Press, 1974), map.

³⁸ *Victorian Law List*.

³⁹ Henry F. Macgeagh and H.A.C. Sturgess (eds.), *Register of Admissions to the Honourable Society of the Middle Temple: Vol. II* (London: Butterworths, 1949), p. 512.

⁴⁰ Bassett & Hannan, p. 354.

⁴¹ Philip Prendergast, Letter to his father, 27 January 1855, Prendergast, James, MS-Papers 1791 and Serle, *The Golden Age*.

4. The Prendergast brothers: Family relationships in Victoria

While both James and Michael Prendergast attempted assertively to adapt to the colonial environment, Philip Prendergast found life in Victoria difficult and frustrating. After the ill-fated gold-mining episode at Eureka with James, Philip spent some months in Melbourne recovering his health. From his letters, Philip seems to be a man of many ideas, but with an inability to put the ideas in practice.⁴²

After unsuccessfully securing a long-term position, Philip began to despair for his future in Victoria:

If I fail the failure will not affect me for I am now callous to disappointments. But if successful? I cannot tell how I shall bear that for success is a thing most of us are strangers to out here.⁴³

Much of Philip's bitterness was directed against Irish settlers holding positions of importance:

Englishmen of education are at a discount here. The places under Government filled from top to bottom with wild Irish imported from their bogs expressly for the places & places made expressly for them....Englishmen cannot be kept down long by any and least of all can it be expected the Irish dogs shall have the rule....There is neither law nor order here at least on the Government part. Our Legislative assembly is an assembly of ignorance and cowardice that neither know it's power nor has the courage to hold it. The country is bankrupt and the people are starving and our two papers the most lying journals under the sun.⁴⁴

Michael Prendergast concluded in 1855 that his two younger brothers were both "miserable colonists."⁴⁵ After successive failures, Philip Prendergast left Victoria to

⁴² Philip Prendergast, Letter to his father, 15 February 1854, Prendergast, James, MS-Papers 1791.

⁴³ Philip Prendergast, Letter to his father, 7 January 1855, Prendergast, James, MS-Papers 1791.

⁴⁴ Philip Prendergast, Letter to his father, 7 January 1855, Prendergast, James, MS-Papers 1791.

⁴⁵ Michael Prendergast, Letter to his father, 17 May 1855, Prendergast, James, MS-Papers 1791.

return to London in 1856. Three years later Philip was admitted to the Middle Temple.⁴⁶

Unlike Philip and James, Michael Prendergast flourished in the Victorian colonial environment. With no intention of becoming a gold-miner like his younger brothers, Michael arrived in Melbourne in July of 1853 and was admitted to the Victorian Bar on 20 October 1853.⁴⁷ While at first Michael located his offices in Melbourne, he also travelled to country sessions and circuits. During 1856 to 1858 he based himself at Maryborough.⁴⁸ This knowledge of the Victorian hinterland aided his attempts at being elected as a member for the Victorian Legislative Assembly.

Michael's work brought him into personal contact with some of Victoria's most powerful men including Chief Justice Sir Redmond Barry, Henry Chapman and W. C. Haines. Michael enjoyed colonial society:

I like the Colony very well and the independent way of living. But a voyage of 16 thousand miles and a life more like that of a knight errant than any thing you can imagine...have combined to excite in my mind rather than allay a strong desire of going forth in search of further adventures.⁴⁹

On 28 November 1855, Michael married Jane Smyth whom he had met during his voyage from London to Melbourne.⁵⁰ Jane was a frank and forthright woman who was not shy to express her views, "God ordained very wisely when he people it [Australia] with a tribe of ugly black savages, and I think the English acted very foolishly in coming to inhabit a country that was not made for them."⁵¹ A son,

⁴⁶ Michael Prendergast, Letter to his father, 1856, Prendergast, James, MS-Papers 1791 and *Register of Admissions to the Honourable Society of the Middle Temple: Vol. II*, p. 523.

⁴⁷ Michael Prendergast Biographical File, La Trobe Information Centre, Victorian State Library, Australia.

⁴⁸ Kathleen Thomson & Geoffrey Serle, *A Biographical Register of the Victorian Parliament 1851-1900* (Canberra: ANU, 1972), p. 168.

⁴⁹ Michael Prendergast, Letter to his father, 1856, Prendergast, James, MS-Papers 1791.

⁵⁰ Jane Prendergast, Letter to Michael Prendergast QC, 28 January 1856, Prendergast, James, MS-Papers 1791 and the Victoria Pioneers Index.

⁵¹ Jane Prendergast, Letter to Michael Prendergast QC, 28 January 1856, Prendergast, James, MS-

Michael, was born to Michael and Jane Prendergast soon after marriage. This son would play an important role in James Prendergast's later life.

Michael had his first major opportunity for public prominence during the trials following the Eureka tragedy. As counsel for one of the prisoners, Michael received high praise.⁵² By most accounts, Michael's brief time as a member of the Legislative Assembly was not a resounding success. In 1860, Michael accompanied a fellow member of the Legislative Assembly by the name of George Barton on a political tour of the mining districts. Ironically, eighteen years later in the nearby colony of New Zealand, Barton would attempt to destroy the judicial career of James Prendergast in controversial fashion. Michael Prendergast and Barton were heavily criticised by the *Argus* during their tour:

Listen to the language of the intemperate advocate of temperance, and mark well the unseemly exhibitions of itinerant stump orators; and after that, don't complain if you find English journalists confounding the Legislative Assembly of Victoria with an asylum for the reception of "drunken lawyers" and gibbering idiots.⁵³

Prendergast stood for re-election in Maryborough in 1861 and lost.⁵⁴

After losing his seat in the Victorian Legislative Assembly, Michael left Victoria for the goldrush in southern New Zealand. Michael spent approximately seven years practising law in Dunedin before returning to Victoria in c1868.⁵⁵ Upon his return to Victoria, Michael floundered. In May 1870 the Wedderburn correspondent for the *Inglewood Advertiser* told of Michael's pathetic downfall:

It appears that he [Michael] left Wedderburn late in the evening of Thursday the 12th inst., to walk to Kingower, but in his present weak and imbecile state of mind, he had mistaken the road, and wandered into the

Papers 1791.

⁵² Philip Prendergast, Letter to his father, 27 January 1855, Prendergast, James, MS-Papers 1791.

⁵³ *The Argus*, 17 April 1860, p.4.

⁵⁴ Thomson and Serle, p. 168.

⁵⁵ Thomson and Serle, p. 168.

bush, where he continued to wander about, exposed to the cold and heavy rains, without food or shelter, for five days, when he was accidentally found.⁵⁶

Fortunately, Michael was found by a local farmer before he perished. Brought before magistrates on charges of vagrancy, the broken man was discharged and taken to the Inglewood Hospital for medical treatment.⁵⁷

The reason for the disintegration of Michael's promising career is perhaps supplied in Bodell's account. Not only did Michael lose his career, he eventually also lost his wife and his health.

This Gentleman [Michael] as I approached the House was on the footpath with only Trousers and Shirt on, smashing the front Windows of his house. I could see in a moment what was the Matter. He was heavy drinker, and he was suffering from an attack of delirium tremens....His Wife was about as fine a looking Woman as there was in Victoria but she had to leave him.⁵⁸

5. The impact of the Australian experience on James Prendergast's future career / Placing the 'Australian adventure' in historical context

James Prendergast spent approximately twenty-six months (little over two years) in Victoria. Despite this brief time period, the Australian experience had an obvious effect upon James' future career. When James arrived in Dunedin in 1862 during the Otago goldrush, he could draw on his experiences in Victoria. The administrative skills James acquired at Elephant Bridge and Carisbrook were put to use in a New Zealand context. A more wary approach to people, politics and power was also a result of the Australian episode. In Dunedin, instead of attempting to become a miner himself and make a quick fortune, James set up a legal practice to support the mining community. After two years in Victoria, James was poor and disillusioned. After

⁵⁶ *Inglewood Advertiser*, 24 May 1870, p. 2.

⁵⁷ *Inglewood Advertiser*, 31 May 1870, p. 2.

⁵⁸ James Bodell in Keith Sinclair (ed.), *A Soldier's View of Empire: The Reminiscences of James Bodell 1831-92* (London: Bodley Head, 1982), p. 120.

two years in Dunedin, James was on the verge of becoming Attorney-General of New Zealand.

The different personalities of the three brothers became evident during the trials and tribulations of the Victorian experience. Luckily, the brothers kept in contact with their father in London through letters. These letters have survived and provide the historian with a rich source of primary material. James appears as a conscientious, hard-working young man, though with a quick temper. Michael, the eldest brother, seems to be more inspired and emotional. Compared with James, Michael's personality is more volatile, eventually leading to alcoholism and mental illness. Philip described the essential difference between his two brothers, "Unlike Michael who has a distinct and different genius he [James] will apply himself assiduously to the drudgery of his profession and so will be sure of securing first the confidence of the Attornies and eventually the favour of the Public...You know him to be a good son and I know him to be an excellent brother and a tried friend."⁵⁹

The experience of the Prendergast brothers in Victoria provides the historian with insights into the class structure of the 1850s. Whether onboard the "Francis Henty" or on the goldfields, the Prendergasts are very aware of their role as gentlemen and the treatment to which they are entitled. Cultural encounter is also apparent, for example, in the disparaging attitude of the Prendergast brothers towards the Irish Protestant settlers in Victoria. Jane Prendergast's dismissive comments about indigenous Australians also highlights the ethno-centric view of many European colonists.

Another insight into early Australian life provided by the Prendergast story, is the beginnings of Melbourne city. In the Prendergast letters, the fledgling city is described in detail, with especial reference to rapid population growth, crime and architecture. The Victorian goldfields are detailed as a place both of hardship and

⁵⁹ Philip Prendergast, Letter to his father, 27 January 1855, Prendergast, James, MS-Papers 1791.

opportunity. Qualities such as perseverance and stamina are more important than class and breeding. If gentlemen did not adapt to the colonial frontier they were faced with two choices, return home or perish. The experiences of the three brothers provides a case study which sheds light on more major events such as the Victorian goldrush, Eureka Stockade and development of the Victorian Legislative Assembly. In particular, Michael Prendergast played an important role in all of these historical events.

When comparing James Prendergast's experience in Dunedin with that of Victoria, the question arises: why was Dunedin so successful and Victoria a relative failure? The first answer would be that Victoria was a training ground for Dunedin. The naive young man who landed at Port Philip in 1852 was not the same man who arrived at Port Chalmers ten years later. Another reason was James' decision to undertake only professional work in Dunedin instead of trying his hand once more at goldmining. With the added advantages of a formal law qualification and courtroom experience, James could flourish at the Dunedin Bar.

6. Conclusion

The first colonial adventures of James Prendergast nearly resulted in his early death. The fact that Prendergast returned to Australasia a decade later for a second colonial adventure demonstrated his tenacity and faith in the opportunities offered by the colonial frontier. The Victorian adventure was to be the last time that the three Prendergast brothers would be together. Each brother took away different lessons from Victoria. James used the experience to become a colonial leader. Philip returned to England to practice as a London lawyer and presumably, learned that the colonies were not for him. Michael had high hopes of colonial success. Alcohol combined with a turbulent personality to break the spirit and destroy the career of Michael Prendergast.

While James discovered that he was an indifferent goldminer and adventurer, he also discovered a penchant for administrative work. If Prendergast had persevered in Victoria it is possible that he could have risen to high station. His quietly determined and stoic nature was well suited to the colonial environment. In a world of quick fortunes, heart-breaking tragedy and rough politics, James Prendergast survived with confidence and health intact. Others, such as the Prendergast's friend, Dawson, were not so fortunate.

You may have heard of poor Dawsons sad calamity. Having suffered reverses and vicissitudes of all sorts at the Taron diggings and having failed at the Bar at Sydney he arrived here 18 months ago with nothing but a wig and gown and a few pounds in his pocket. He was just in the right time. It took him a marvellously short time to establish a reputation which up to this time has gone on increasing both as an orator and lawyer.... As soon as he saw his way he wrote for his wife and family to come over and was anxiously expecting an answer. None however arrived till a month ago when he heard they had taken places on board the John Taylor - and shortly after the report of the shipwreck arrived. It was melancholy thing to see the poor fellow walking up to the Flagstaff to get the final confirmation or refutation of the report - at last bit by bit the worst was confirmed. The suspense had worn him out already and the extinction of all hopes has altogether altered him. He has given up the profession and has gone to Ballarat with what object no one knows.⁶⁰

⁶⁰ Michael Prendergast, Letter to his father, 30 April 1854, Prendergast, James, MS-Papers 1791.

Chapter 4

Return to the Colonies: Experiences in Dunedin, New Zealand/The Otago legal profession and James Prendergast, 1862-1867.

1. Introduction

The experience of James Prendergast in Otago was pivotal to his eventual career success and place in history. In approximately three years, Prendergast transformed himself from an unknown immigrant to a leader in the fledgling New Zealand legal profession. Prendergast arrived in Dunedin during a boom time, the Otago goldrush. He immediately established a reputation as a capable and competent lawyer. This reputation and helpful personal contacts led to Prendergast being offered a succession of important official legal positions, namely, Acting Provincial Solicitor for Otago, Crown Solicitor for Otago, Legislative Councillor and Attorney-General of New Zealand.

The success of Prendergast in Dunedin must be seen in the context of broader New Zealand legal history. During the early and mid 1860s, Otago experienced a phenomenal economic boom and became the most flourishing centre in the New Zealand colony. The opportunities for young lawyers were many and varied. This period of New Zealand legal history, centred in Dunedin, could well be titled 'The Golden Age'. Many of the leading names in nineteenth century law and politics furthered their careers in goldrush Dunedin including Julius Vogel, George E. Barton and Robert Stout. Dunedin provided the springboard for the success of James Prendergast and had a huge and lasting impact on his future life.

2. Arrival in Dunedin and beginnings in practice (Nov 1862-)

The Otago gold-rush began with the discovery of a huge deposit at Tuapeka in 1861

by Gabriel Read. Dunedin soon became New Zealand's largest city. James Prendergast arrived with his wife, Mary, at Port Chalmers on 30 November 1862 aboard the 'Chile'. The Otago Daily Times described the voyage:

Throughout the voyage all the passengers were very healthy and the ship as usual, arrived cleanly and in good order. To Captain Turnbull, on arrival, warmly expressed addresses were addressed complimenting him on his skill and attention, and from the shore as the vessel reached the Port, he was saluted from Mr Taylor's battery, the salute being returned by the discharge of two guns on board. The majority of the passengers remain by the vessel until Friday.¹

Prendergast had been persuaded to leave London for Dunedin by his elder brother, Michael. Michael Prendergast had settled in the Otago region in c1861² with his wife and son and was thriving. In a letter to James, Michael argues a case for life in Dunedin:

I hope you will all other advantages being equal if you leave England come here. I am sure you will make more money than you expect - Though of course not so much as at Bombay or Calcutta. I will send you one of my parliamentary speeches and Examiners article thereon....If you come mind to learn the science drawing acts of parliament. I will get you profitable employment at once.³

Michael Prendergast was just one of a number of young immigrant lawyers who were flourishing in the early Otago goldrush. Capital was flowing into the area to finance the economic boom and "professional careers flourished along with merchants' fortunes".⁴

Upon arriving in Dunedin, Prendergast would have discovered a small, rugged town

¹ *Otago Daily Times*, 21 November 1862, p. 4 col. 1.

² Kathleen Thomson & Geoffrey Serle, *A Biographical Register of the Victorian Parliament 1851-1900* (Canberra: ANU, 1972), p. 168.

³ Michael Prendergast, Dunedin, to James Prendergast, c1861, Prendergast, James, MS-Papers 1791, Alexander Turnbull Library, Wellington.

⁴ Judith Bassett & J.G.H. Hannan, 'James Prendergast', in *The Dictionary of New Zealand Biography: Volume One, 1769-1869*, edited by W.H. Oliver and Claudia Orange (Wellington: Allen & Unwin/Department of Internal Affairs, 1990), pp. 354.

though bustling with activity and trade. It would have been a world away from the city of London, but Prendergast had experienced this kind of abrupt change of scene before, namely in Melbourne during the early 1850s. Prendergast was admitted to the Otago Bar soon after his arrival in 1862.⁵ Other leading figures in New Zealand legal history were also admitted to the Otago Bar during 1862 including Christopher William Richmond and Bryan Cecil Haggitt. Also admitted in 1862 were Prendergast's brother Michael and his future partner, Edmund Pell Kenyon.⁶

Prendergast's first client was Julius Vogel,⁷ who would later rise to be one of New Zealand's most influential leaders. The case involving Vogel was high profile and controversial. Gordon Stuart Grant, an eccentric young Scotsman, published a number of anti-Semitic remarks about Vogel and was subsequently arrested on a libel charge.⁸ Dalziel describes the trial:

When his [Grant's] case was eventually heard he was acquitted possibly because the jury thought he had been punished enough, but more likely because of the instructions of the Judge who described the charges as 'paltry' and disapproved of Vogel appearing before the court as a martyr.⁹

While Prendergast received a positive summing up from the Judge, he lost the case. Despite this loss, Prendergast continued as Vogel's legal advisor and it was Vogel's government that eventually appointed Prendergast Chief Justice in 1875.

Ironically, another of Prendergast's most well-known performances as a lawyer involved arguing against Vogel. There was a spate of high profile defamation cases

⁵ Bassett & Hannan, p. 354.

⁶ Iain Gallaway, 'Otago', in *Portrait of a Profession: The Centennial Book of the New Zealand Law Society*, edited by Robin Cooke (Wellington: Reed, 1969), p. 333.

⁷ Raewyn Dalziel, *Julius Vogel: Business Politician* (Auckland: Oxford University Press, 1986), p. 47 and James Macassey (ed.), *Colonial Law Journal, being a selection of reports and cases argued in the Supreme Court of New Zealand 1865-1875 and various articles* (Dunedin: Henry Wise, 1875), p. 25.

⁸ Dalziel, p. 47.

⁹ Dalziel, p. 47.

during the latter half of the nineteenth century in New Zealand and in 1864 the Otago Daily Times was facing a libel charge brought by the New Zealand Banking Corporation. Prendergast represented the plaintiff and was aided by his future nemesis, George E. Barton. Vogel was editor of the Otago Daily Times and implicated in the charge. The jury awarded damages of 500 pounds, much less than was sought by the plaintiff, but still a victory in principal at least for Prendergast's client.¹⁰ Again, this episode does not seem to have harmed the future relationship between Prendergast and Vogel.

Prendergast became a leading figure at the Dunedin Bar. He started up and became a senior partner in the firm of Prendergast, Kenyon and Maddock and during his time in Dunedin commanded a substantial share of Bar practice.¹¹ The firm was located in central Dunedin at the Victoria Chambers on Manse Street.¹² Prendergast's firm became Kenyon and Hosking after his departure in February 1867 and then Hosking and Cook in 1907.¹³

Prendergast had the support of efficient and capable clerks. On 6 February 1864, William Downie Stewart, the future leading New Zealand politician, became the articled clerk of Prendergast.¹⁴ On 7 December 1864, Hanson Turton became Prendergast's clerk.¹⁵ Turton would rise to a high position at the Dunedin Bar. It was common in Dunedin during the 1860s, for articled clerks of leading barristers eventually to become leading barristers themselves in a relatively short space of time. For example, Downie Stewart was articled to Prendergast and Robert Stout was articled to Downie Stewart in Dunedin.¹⁶

¹⁰ Gallaway, p. 331.

¹¹ *Colonial Law Journal*, p. 25.

¹² *Harnetts Dunedin Dictionary* (1864), p. lxvii.

¹³ Gallaway, p. 345 and, Dissolution of Prendergast, Kenyon and Maddock, *Otago Provincial Government Gazette*, 1867, p. 100.

¹⁴ Roll of Articled Clerks at Otago (January 1862 to August 1882), cited in M.J. Cullen, *Lawfully Occupied: The Centennial History of the Otago District Law Society* (Dunedin: Otago District Law Society, 1979), p. 49.

¹⁵ Cullen, p. 49.

¹⁶ Cullen, p. 48.

Various opinions exist as to Prendergast's talent as an advocate. The *Colonial Law Journal* in 1875 described him in the following terms:

As a pleader, his reputation stood very high, and probably no member of the Bar was more consulted on pleadings than he was. In an equal measure had he the preference, by the unanimous voice of the profession, in legal arguments in *Banco*. At *Nisi Prius*, he had probably not the same weight, as his method of handling cases was a little too technical, and too lawyer-like. His examination of witnesses was always singularly careful and judicious; and, when fairly roused, his addresses were pointed and effective, and thoroughly in earnest....he was, as somebody said of Lord Campbell, a safe verdict-getter if he only had a chance. Scorning any attempt at well-rounded periods, or even figures of speech for the mere purpose of display, he would hammer and hammer away, at the most telling points of his case, until success seemed assured. But, whatever may be said concerning his successes with juries, the reports show that in *Banco* and the Court of Appeal, he was practically invincible.¹⁷

Robert Stout remembered Prendergast as, "the best special pleader at a time when special pleading was of great consequence. He was also a great *Banco* lawyer."¹⁸ Common observances on Prendergast's advocacy stress his steadfastness, reliability and his lack of showmanship. While Prendergast may have not been a flamboyant advocate, his talents were obviously observed and appreciated as his meteoric rise up the professional ladder would suggest.

The Macassey Law Reports (1861-72) include a number of cases in which Prendergast was counsel. These cases were heard from December 1862 to February 1867 in the Dunedin Supreme Court before Richmond and Chapman JJ. From his first appearances as a Dunedin lawyer, Prendergast's career was intertwined with that of Christopher William Richmond. In 1875, Richmond and Prendergast would begin adjudicating together on the Wellington Supreme Court Bench. The Macassey Reports are brief and supply little information on Prendergast as an advocate. From

¹⁷ *Colonial Law Journal*, p. 25.

¹⁸ *New Zealand Times*, 4 March 1921.

the limited information available, Prendergast appears as an organised, methodical and persistent advocate. He often appeared in court with other leading lawyers, including George E. Barton and Thomas Gillies. Sometimes, he would appear against these prominent practitioners. Prendergast received more than his share of work at the Dunedin Bar.¹⁹

While Prendergast had obtained an impressive array of official positions, he did not take an active part in Dunedin social life. Robert Stout commented that:

He never took any prominent position in what may be termed the hurly-hurly of our social life. I can remember on one occasion his appearance on a public platform at a meeting which was held to protest against the leasing of the great recreation reserve of Dunedin, the Town Belt, but I am not aware of him appearing in any social or political discussion.²⁰

As his life progressed, Prendergast became more involved in community institutions but was never a socialite or high-profile social figure.

3. Official positions: Acting Provincial Solicitor for the province of Otago (1863-) / Crown Solicitor in Otago (1865-)

Prendergast's success at the Dunedin Bar prompted offers of official station. In a new settler society, able men were needed to take positions of responsibility and power. With a limited pool of talent and experience to draw upon, young men with relatively little experience could rise quickly to high stations. Prendergast was an example of this phenomenon. On 31 August 1863, less than two years after arriving in Otago, Prendergast was created Acting Provincial Solicitor for the Province of Otago.²¹ This administrative position opened up a range of future opportunities for Prendergast.

¹⁹ From Macassey's Reports, 38 cases reported from December 1862 to February 1867.

²⁰ *New Zealand Times*, 4 March 1921.

²¹ Appointment, *Otago Provincial Government Gazette*, 1863, p. 338.

Two years later, Prendergast was appointed Crown Solicitor in Otago by Henry Sewell's government.²² This governmental position gave Prendergast authority to prosecute on behalf of the Attorney-General and was often referred to as the position of Crown Prosecutor. When Prendergast resigned as Acting Provincial Solicitor in 1865, the position went to Bryan Cecil Haggitt.²³ These two positions allowed Prendergast to represent Otago society at a high level and gave him the necessary experience to become Attorney-General of New Zealand. In addition to the post of Crown Solicitor, Prendergast was also appointed Conveyancing Counsel to examine Titles under "The Land Registry Act 1860".²⁴

On 8 or 10 July 1865, Prendergast was called to the Legislative Council of New Zealand.²⁵ From this point onwards, Prendergast's career began to focus on Wellington rather than Dunedin. Despite representing the Otago province in the Legislative Council, Prendergast would relinquish his legal practice in Dunedin and his position of Crown Solicitor only two years after this appointment to the Council. The meteoric rise of Prendergast is summed up in the *Colonial Law Journal* of 1875:

Mr. Prendergast received his first official appointment from Mr. J. H. Harris, Superintendent of Otago, as Acting Provincial Solicitor, on the retirement of Mr. T. B. Gillies from that post. He subsequently received the further appointment of Crown Solicitor or Prosecutor for the Province. In 1865 he was, upon the suggestion of Mr. Sewell, invited to the Legislative Council, with a place in the Weld Administration, as Solicitor-General. He was sworn in as a member of the Upper House; but we believe that ere he took the oath of office as Solicitor-General, Mr. Weld resigned. Mr. Stafford succeeded Mr. Weld, and one of his first overtures was to Mr. Prendergast to become Attorney-General. This offer he accepted, and the appointment was formally announced on the 20th October, 1865.²⁶

²² Appointment, *Otago Provincial Government Gazette*, 1865, p. 190.

²³ Appointment, *Otago Provincial Government Gazette*, 1865, pp. 190, 259.

²⁴ Appointment, *Otago Provincial Government Gazette*, 1866, p. 126.

²⁵ Appointment, *New Zealand Gazette*, 1865, p. 221.

²⁶ *Colonial Law Journal*, p. 25-6. See also, Letter suggesting appointment of Prendergast as Crown Solicitor for Otago, Provincial Official, Dunedin, to Colonial Secretary, Wellington, 10 August 1865, J1 65/2026, National Archives, Wellington and, Letter acknowledging that Prendergast has been made Crown Prosecutor for Otago, Superintendent's Office, Dunedin, to Colonial Secretary, Wellington, 23 August 1865, J1 66/2214, National Archives, Wellington.

4. The Otago Profession (1862-1867)

The Dunedin Bar of the period 1862 to 1867 was a kaleidoscope of talent and potential. The Bar grew alongside Dunedin town:

In 1864 the population of Otago was 49,019 of which 15,790 lived in Dunedin, which was at that time the leading town in New Zealand. In the early 1860s its population had quadrupled with the discovery of payable goldfields and the consequent inrush of immigrants, communications between the coast and the interior had been established, and agriculture had been stimulated by the new local demand for foodstuffs.²⁷

Analysis of the rolls at the time of Prendergast's legal career (and until 1871) in Dunedin reveals the following names: Christopher William Richmond, Bryan Cecil Haggett, George E. Barton, George Cook, Michael Prendergast, Edward Kenyon, Thomas Gillies, Wilson Gray, James Macassey, Robert Stout, William Downie Stewart and Frederick R. Chapman.²⁸

The Law Practitioners Act 1861 had required every Supreme Court Registrar to keep separate rolls for the admission of barristers and solicitors. Judges were to control admission and conduct legal examinations.²⁹ The Act was implemented in January 1862 and thirty-three lawyers were admitted in Otago that year, including Prendergast. By the end of 1866 the list had grown to fifty-three.³⁰ At the end of the decade the Otago Bar was undoubtedly the strongest in New Zealand, as Christopher William Richmond commented:

I have no doubt there is by far the best bar here, altho' individuals in other places are good lawyers. There is not Whitaker's match here as an

²⁷ Waldo Hilary Dunn & Ivor L.M. Richardson, *Sir Robert Stout: A Biography* (Wellington: A.H. & A.W. Reed, 1961), p. 21.

²⁸ Dunn & Richardson, p. 25 and Cullen, p. 23.

²⁹ Cullen, p. 22-3.

³⁰ Cullen, p. 23.

advocate, but on the other hand there are several good men in Gillies, Prendergast, Baron, Wilson Gray, Cook - and a shoal of solicitors of various degrees of efficiency.³¹

The overwhelming majority of the lawyers had come originally from Britain and Ireland. Several had experience in Australia such as the Prendergast brothers and George E. Barton. This relatively small group of men created firms that would dominate Otago law in years to come and many of their number would rise to high office, for example, Prendergast (Chief Justice), Robert Stout (Chief Justice, Premier), Frederick Chapman (Supreme Court Judge), Thomas Gillies (Supreme Court Judge). This was the “golden age” of New Zealand law and this age was centred in Dunedin. Paul Kavanagh³² described the period, “All of us have learnt to regard Dunedin as the nursery of our profession....Here, too, from the earliest days, have practised some of the greatest men who have adorned the Bench and Bar of New Zealand.”³³

In his eulogy to Prendergast, Robert Stout who had practised in Dunedin in the 1870s recalled the wealth of talent of those early days:

He is the last of the great barristers who practised in Otago in the early ‘sixties. Every one of these barristers had a specialty. Mr James Howorth was an English barrister who practised at the Old Bailey in London, and was an able Crown Prosecutor. Mr T. B. Gillies... was an all-round advocate, who had had considerable business experience. Mr James Smith was noted for his power of cross-examination and his summing-up of evidence. Mr G. E. Barton was a brilliant advocate. Mr B. C. Haggitt was an able and careful lawyer. Mr Macassey was the ablest case lawyer in New Zealand.³⁴

The Dunedin Bar, with some exceptions, saw themselves as a homogeneous club which both worked and played closely together. In c1866 a lawyer’s cricket match was organised, featuring many of the key legal figures of the time, “According to

³¹ Cullen, p. 23.

³² Kavanagh was Editor of the *New Zealand Law Journal* from 1931 to 1960.

³³ Gallaway, p. 330.

³⁴ *New Zealand Times*, 4 March 1921.

arrangement, a match was played on the Dunedin Cricket Ground, on Saturday last, between two elevens selected from members of the legal profession and their employees.”³⁵ Prendergast collected three wickets, two of those clean-bowled, but was more disappointing with the bat, scoring a meagre two runs. At the day’s end, “the wickets were drawn, as many of Mr. Turton’s team were leaving the ground, and among others, the well recognised forms of Messrs Prendergast and Macgregor were visible. Taking all things into account, the day was most agreeably spent”.³⁶

While the lawyers mentioned in this chapter were leaders of the Dunedin Bar, all was not well with the Dunedin profession as a whole, “in 1864 there were a number of letters to the newspapers concerning the sham lawyers rampant on the diggings. The public and the profession were anxious the former should not be imposed upon (and the latter competed with)”.³⁷ In 1867, Dunedin lawyer Thomas Parsons attempted to convince Attorney-General Prendergast to form “a properly disciplined bar in New Zealand along the lines of the English Inns of Court.”³⁸ It was not until 1869 that the New Zealand Law Society Act became law and even then it did not immediately create an ordered and accountable legal profession.³⁹ The creation of national and regional law societies would be a central issue facing the profession from the 1860s onwards and an issue with which Prendergast would be closely involved.

Two leading figures at the Dunedin Bar during the 1860s were Michael Prendergast and George E. Barton. Michael, who had originally persuaded James to travel to Dunedin, was “a well-known member of the Bar in Otago”⁴⁰ from c1861-2 to c1868.⁴¹ Michael also preceded James as a member of the Legislative Council representing Otago in the early 1860s.⁴² Michael did not make the impression that

³⁵ ‘A Cricket Match in Dunedin’, in *Colonial Law Journal*, p. 14.

³⁶ ‘A Cricket Match in Dunedin’, in *Colonial Law Journal*, p. 17.

³⁷ Cullen, p. 25.

³⁸ Cullen, p. 27.

³⁹ Cullen, p. 30.

⁴⁰ *Otago Witness*, 25 June 1870, p. 14.

⁴¹ Thomson & Serle, p. 168.

⁴² *Otago Witness*, 25 June 1870, p. 14.

his brother James did in Dunedin, possibly due to his alcoholism and fragile mental state.

The future nemesis of James Prendergast was also working as a lawyer in Dunedin during the 1860s. George E. Barton arrived in Dunedin in c1861⁴³ with his wife and three young children.⁴⁴ Barton began a successful partnership with George Howorth before eventually being elected to the Otago Provincial Council in 1871.⁴⁵ During 1873 to 1876, Barton's whereabouts is uncertain, but an apposite anecdote could untangle this mystery,

disaster suddenly fell upon him, through an action for slander in which he was mulcted to the extent of many thousand pounds for accusing a fellow solicitor of stealing a document that had been left in Court. To his dying day, G.E.B. maintained that he had seen the theft being committed as he came back accidentally to the court room where the various lawyers had left their papers on their tables....When the verdict was given against him, he fled the country after transferring all that he had into the name of a friend, E. Ff Ward.⁴⁶

Barton soon returned to New Zealand, re-appearing in Wellington in 1876. In 1877 he was counsel for Wi Parata in the famous case tried by Prendergast and in 1878 imprisoned by Prendergast for contempt of court. Barton had assisted Prendergast in the 1864 Otago Daily Times libel case and had also been a close political ally of Michael Prendergast in the Victorian parliament during the 1850s. The relationship between Barton and the Prendergast brothers had deteriorated between 1864 to 1877 from comradeship to mutual hatred.

In his time as a lawyer in Dunedin, Prendergast had the opportunity of practising before several of the leading judges in New Zealand legal history. One of these judges, Christopher William Richmond, was to play a pivotal role in Prendergast's

⁴³ Thomson & Serle, p. 10.

⁴⁴ Brief Biography of George E. Barton, p. 1, Alexander Turnbull Library, Wellington.

⁴⁵ Thomson & Serle, p. 10.

⁴⁶ Brief Biography of George E. Barton, p. 2.

later career and in the *Wi Parata* case for which Prendergast is chiefly remembered. Richmond was a high profile politician before resigning his seat in 1862. Deeply implicated in the outbreak of the Taranaki War, Richmond found New Zealand politics, “too strong for the men - at least too strong for me.” Moving to Dunedin from the North Island, Richmond entered into a successful practice with Thomas B. Gillies; both men would eventually become Supreme Court judges. Offered the position of Supreme Court judge in Otago in 1862, Richmond happily accepted and there he remained until 1867.⁴⁷ In 1873, Richmond took a Supreme Court judgeship in Wellington and sat with Prendergast from 1875 until Richmond’s death in 1895. Prendergast appeared many times before his future brother judge in the mid-1860s.

Henry Samuel Chapman joined Richmond on the Dunedin Bench in 1864.⁴⁸ Before his move to Otago, Chapman had already enjoyed an impressive career as a journalist, judge and politician in various locations in the vast British Empire.⁴⁹ Prendergast greatly admired Chapman as a judge, crediting him with “great ability, great perseverance, great patience, and great painstaking.”⁵⁰ This respect was returned by the next generation of Chapmans. Henry Chapman’s son, Frederick, rose to the Supreme Court bench and rated Prendergast highly as a legal mind.⁵¹

Henry Chapman had been in Victoria, Australia from late 1854 through to 1864. Prendergast left Victoria in early 1855, and no records remain to prove that the two men knew each other at this point in their careers. Chapman would almost certainly have known James’ elder brother, Michael Prendergast, as both served in the Victorian Legislative Assembly during the same period. In a letter from Michael to

⁴⁷ Keith Sinclair, ‘Christopher William Richmond’, in *The Dictionary of New Zealand Biography: Volume One, 1769-1869*, edited by W.H. Oliver and Claudia Orange (Wellington: Allen & Unwin/Department of Internal Affairs, 1990), p. 365.

⁴⁸ D.G. Edwards, ‘Henry Samuel Chapman’, in *The Dictionary of New Zealand Biography: Volume One, 1769-1869*, edited by W.H. Oliver and Claudia Orange (Wellington: Allen & Unwin/Department of Internal Affairs, 1990), p. 79.

⁴⁹ Peter Spiller, *The Chapman Legal Family* (Wellington: VUP, 1992).

⁵⁰ Spiller, p. 88.

⁵¹ Spiller, pp. 155, 192.

his father, he states “They [the Victorians] want a leader very badly. Chapman was tried and failed. If you were here you could not make less than 12000 twelve thousand a year. Chapman makes 8 failure though he is.”⁵² In early 1855, “Chapman joined leading members of the Victorian bar in agreeing to appear gratuitously in defence of the [Eureka] prisoners”.⁵³ Michael Prendergast also increased his public profile by taking part in this defence resulting from the Eureka Stockade incident. No other direct references can be found linking Michael Prendergast and Henry Chapman, but undoubtedly the relationship between the Prendergast and Chapman legal families was one than stretched over several decades.

The romance and turmoil of a goldrush society is reflected in the early beginning of the Dunedin Bar. Friendships and feuds dominated the legal arena, and many leading lawyers used Dunedin as a springboard to future success. While the Dunedin Bar dominated the legal scene in New Zealand throughout the 1860s and most of the 1870s, the focus was to move to Wellington. With a move of focus, came a movement of lawyers from Dunedin to Wellington, for example, Prendergast, Richmond and Barton.

5. The impact of the Otago experience on James Prendergast’s future career / Placing the ‘Otago experience’ in historical context

The Otago experience helped to equip Prendergast with the knowledge and skills which would make him leader of the bar and leader of the bench in New Zealand. Prendergast’s experience as barrister at the Dunedin bar improved his advocacy skills and prepared him for his role as Attorney-General. The qualities of persistence, stamina and strong argument can be seen in both Prendergast the barrister and Prendergast the Attorney-General. As Attorney-General, Prendergast was the leader of the legal profession, and the understanding of a lawyer’s life gained in Dunedin

⁵² Michael Prendergast, Victoria, to Michael Prendergast QC, London, 17 May 1855, Prendergast, James, MS-Papers 1791, Alexander Turnbull Library, Wellington.

⁵³ Spiller, p. 60.

was necessary for credibility. Working as a barrister also enabled Prendergast to analyse the role of a judge from the other side of the bench. By observing leading judges such as Chapman and Richmond, Prendergast could develop his own approach to judicial decision-making.

The official positions held by Prendergast while in Otago, Acting Provincial Solicitor and Crown Solicitor, provided administrative experience to a lawyer who would become a leading administrator of law in New Zealand. Working with the Otago Provincial Council and the New Zealand Government from Dunedin was the beginning of Prendergast's long involvement in colonial politics. These official positions also brought Prendergast to the attention of leading politicians in Wellington, for example, Henry Sewell and Edward Stafford. These men would aid Prendergast in his rise to the top of the New Zealand legal profession.

Prendergast made a number of key contacts in Dunedin. Being in Dunedin during the 1860s was extremely advantageous for 'networking'. Prendergast's first client, Julius Vogel, would eventually appoint Prendergast Chief Justice in 1875. Christopher William Richmond, the Otago Supreme Court judge before whom Prendergast practised, would become a close and powerful legal ally of Prendergast in Wellington. But not all contacts proved beneficial in future times. George E. Barton, who worked closely with Prendergast in Dunedin, would attempt to destroy his career when they met again in Wellington.

The Dunedin experience was a far greater success than the Victorian experience for a number of reasons, some obvious. First, Dunedin was the second attempt at colonial life and Prendergast was a shrewd man who learned from past mistakes. The disorganisation and poor management evident in Australia did not occur in Dunedin a decade later. Prendergast knew that deriving income from gold-miners' needs was often more financially beneficial than actually being a goldminer. Secondly, Prendergast was a qualified lawyer when he arrived in Dunedin and found himself in

the midst of a flourishing bar. When in Victoria, Prendergast could not legally practice law and struggled to find suitable administrative work, while his brother Michael who was legal trained conducted a successful practice in Melbourne. Thirdly, the Scottish environment of Dunedin seemed more to Prendergast's liking than the Irish dominated colony of Victoria. Lastly, though some would argue that it has no place in history, Prendergast was very lucky and was in the right place at the right time and met the right people.

Therefore, a combination of skills, experience and contacts allowed Prendergast to progress through the ranks of New Zealand lawyers with exceptional speed. Prendergast was a man who could seize opportunities and settler New Zealand was full of potential for such men. In personality, Prendergast was diligent and capable but did not like to challenge established authority directly. Therefore, he could be relied upon to support those in power, especially those whom he was indebted to for his own positions. Prendergast was not alone in the speed of his career success. Men such as Robert Stout, Frederick Chapman and Francis Bell also quickly rose to prominence in the legal arena.

Prendergast was without doubt a successful barrister in Dunedin. His well-known practice and official recognition attest to this fact. While not a showman or great orator, Prendergast achieved results for his clients and was widely respected. In his official positions, Prendergast was successful enough to be considered for Attorney-General in 1865. There are no references found that comment on Prendergast's domestic life in Dunedin, for example, his relationship with his wife and brother, Michael.

The Otago gold rush was a pivotal event not only in New Zealand legal history, but in New Zealand history generally. A huge influx of dynamic young people entered the colony and many continued to contribute to the building of settler New Zealand long after the goldrush was over. For British and Irish lawyers suffering from an

overcrowded profession back 'home', Dunedin provided a host of opportunities. Invigorated by a flourishing town and inspired by surrounding talent, the men of Dunedin law form an excellent case study of colonial enterprise and energy. There have been other goldrushes in New Zealand history and times of economic boom, but, from a legal perspective, it is hard to find a period to rival Dunedin during the 1860s in terms of concentration of talent and achievement.

In the wider context of colonial legal history, the Dunedin goldrush can be compared to the Victorian goldrush of the 1850s. Apart from the fact that a number of lawyers participated in both experiences, there are a number of other similarities. Both goldrushes led to a rapid influx of lawyers who proceeded to engage in a dynamic legal environment. In both experiences, strong friendships were formed and bitter feuds erupted in a short space of time. Partnerships and practices were rapidly established and some just as rapidly collapsed. In both Dunedin and Melbourne, most present day firms and the legal profession as a whole rest upon the foundations created in a goldrush era.

6. Conclusion

Gold and family brought James Prendergast to Otago and New Zealand. The death of his father in 1859 left Prendergast with few binding ties to England and only three years later he had left London for Dunedin. In a town of young, ambitious men, Prendergast quickly became a leader at the Dunedin Bar. With strong advocacy and a talent for making influential friends, Prendergast was noticed by powerful people. After only one year in Dunedin, Prendergast took up the position of Acting Provincial Solicitor and then Crown Solicitor in 1865. In 1865, the New Zealand capital moved from Auckland from Wellington and the New Zealand government became increasingly centralised. As Wellington grew, Dunedin became less and less the centre of the New Zealand legal profession. Therefore, though Dunedin had provided Prendergast with a springboard for success, his time there was short and it was to

Wellington that he moved to further his career.

The Dunedin Bar provides the historian with an insight into the beginnings of the New Zealand legal profession. Exploring the early careers of leading legal figures helps the biographer to appreciate their later success in context. Prendergast made a number of long-lasting and influential contacts in Dunedin, including Richmond, Chapman and Vogel. The success of Prendergast and eventual failure of his brother Michael who also practised in goldrush Dunedin was primarily due to personality differences. James was solid, reliable and knew when to follow orders. Michael was unpredictable, short-tempered and an alcoholic. The homogeneous club of white, male Dunedin lawyers could be extremely helpful to a young lawyer's career but if one was not accepted by this club the results could be detrimental. That said, when the Barton-Prendergast feud erupted in 1878, the Dunedin bar petitioned for an inquiry, supporting Barton, rather than Prendergast.⁵⁴

Dunedin was vital to the success of James Prendergast in New Zealand. While it did not prepare him for the Maori-Pakeha problems of the North Island, the Otago experience equipped him with vital skills, experience and contacts. In the minds of some, Prendergast always remained a Dunedin barrister, groomed in the nursery of the New Zealand legal profession.

⁵⁴ *New Zealand Mail*, 29 June 1878, p. 9.

Chapter 5

The role of the Attorney-General and the development of New Zealand law, 1865-1875

1. Introduction

The career of James Prendergast is primarily remembered for his contribution in two public roles, Attorney-General (1865-75) and Chief Justice (1875-99). Prendergast was appointed Attorney-General of New Zealand only three years after arriving in the colony and held that position for ten years. The nature of the position was different from that of the present day. These differences directly affected the influence and actions of Prendergast while Attorney-General. In fact, the nature of the position changed several times while Prendergast was in office and a detailed exploration of these changes is necessary. For the first two years of Prendergast's career as Attorney-General he was also a member of the Legislative Council. Prendergast's speeches and political movements during these two years provide insights into his political views and key historical issues that were occurring during the late 1860s and early 1870s. As Attorney-General, Prendergast became involved in the later stages of the New Zealand Wars, and, in particular, the campaigns of Te Kooti and Titokowaru. Prendergast was also a pivotal figure in the controversial political debate pitting provincialists against centralists. One of the roles of Attorney-General was to appear on behalf of the Government in the New Zealand courts and Prendergast played a leading role in several major trials including the trial of Hamiora Pere for high treason.

The New Zealand Law Society was created in 1869 and Prendergast became its first President. The formation and regulation of the practice of law in New Zealand is an important theme during the period 1865-75, with ground-breaking legislation being introduced such as the Law Practitioners' Amendment Act 1866. Perhaps

Prendergast's greatest contribution to New Zealand legal history while Attorney-General was the drafting and administration of a large body of legislation. The period 1865-75 was a fruitful time for new legislation, often directly reflecting developments in the English legal system. Prendergast's statutes were a key contribution to the New Zealand legal system, especially his codification of criminal law. Another role of the Attorney-General was to provide legal opinions to the Government. Prendergast's opinions were influential and provide insights into his emerging views on race, politics and law. For example, Prendergast's hard-line approach to Maori affairs is clearly demonstrated during this era.

New Zealand politics during the time Prendergast was Attorney-General was dominated by three men, Edward Stafford, William Fox and Julius Vogel. Prendergast's relationships with these leading political figures affected his future career and influence in New Zealand society. The personal life of James Prendergast while Attorney-General was dynamic and changing. Prendergast moved from Dunedin to Wellington, built a house, bought land in the Manawatu and made a new circle of elite friends. He also witnessed the decline of his two brothers, Michael and Philip. Prendergast used the position of Attorney-General as a stepping stone for the Chief Justiceship, but this ten year period marked the division between Prendergast as a relatively unknown lawyer seeking success and an important pillar of the New Zealand settler establishment.

2. The nature of the position of Attorney-General

With regard to many aspects of Prendergast's life and career, the secondary material available is contradictory and confusing. Terms such as 'Solicitor-General' and 'Attorney-General' become interchangeable, with little description provided as to what these roles entailed. At the beginning of 1865, Prendergast was practising as a lawyer in Dunedin and also filled the role of Crown Solicitor for Otago. On 8 July 1865, Prendergast became a member of the Legislative Council 'representing'

Otago.¹ Members for the Legislative Council were appointed by the Governor and Prendergast's appointment states that, "he shall [hold] his seat therein for the term of his life subject to the provisions of the said Act contained for vacating the same." Prendergast was appointed by George Grey, who was empowered to "summon to the said Legislative Council from time to time such person or persons as he the said Sir George Grey shall deem to be prudent and discreet men."² Grey's opinion of Prendergast was not so positive ten years later when Prendergast aided the passing of the Abolition of the Provinces Act 1875.

Prendergast's work as Crown Solicitor for Otago had brought him to the attention of politicians in Wellington, and Henry Sewell, the Attorney-General in Frederick Weld's 1865 ministry, arranged for Prendergast's appointment as Solicitor-General and Legislative Councillor. Henry Sewell was known for his fierce attacks on opponents in Parliament and he later referred to a ministry of which Prendergast was a key part, as a group of "respectable dummies."³ When Weld's Ministry fell soon after Prendergast's appointment, Sewell attempted to retain personal power by undermining Prendergast's position: "this discontented man who so craved power, offered his help by informing Stafford that Prendergast was not intending to continue in office as Solicitor General after the session, 'and of course, by inference, who more fit than himself.'"⁴ Prendergast did not have the slightest intention of stepping down from his new position of influence and Sewell was not seriously considered as a minister in the government of his rival, Edward Stafford.

In the New Zealand Parliamentary Debates, Prendergast is recorded as holding the post of Attorney-General from 20 October 1865.⁵ The Weld Ministry ended on 16

¹ Appointment, *New Zealand Gazette*, 8 July 1865, p. 221 and James Prendergast Papers, MS-Papers 730-B, Hocken Library, Dunedin.

² Appointment, James Prendergast Papers, MS-Papers 730-B.

³ Raewyn Dalziel, *Julius Vogel: Business Politician* (Auckland: Oxford University Press, 1986), p. 66.

⁴ Edmund Bohan, *Edward Stafford: New Zealand's First Statesman* (Christchurch: Hazard Press, 1994), p. 211.

⁵ *New Zealand Parliamentary Debates* (NZPD), 1865, p. ixx.

October 1865, meaning that Prendergast took his post during Stafford's time as premier. Before 16 October, the Attorney-Generalship was held by Prendergast's benefactor, Sewell. The Stafford Ministry of 1865 has been described in unflattering terms. "The Ministry he patched up was a strange one: Colonel A. H. Russell from Napier and James Prendergast, the Otago lawyer, both Legislative Councillors, Colonel Haultain from Auckland and James Paterson from Otago."⁶ One of the members of Stafford's Ministry was John Hall, who would work closely with Prendergast in 1881 during the Parihaka invasion. Being a part of the New Zealand Parliament at that time also exposed Prendergast to other influential figures in his future career, including John Bryce, Donald McLean, Julius Vogel (whom Prendergast knew from Dunedin) and Frederick Whitaker.⁷

No Solicitor-General for Weld's Ministry appears in the official records, and this may be explained by a contemporary report.

In 1865 he [Prendergast] was, upon the suggestion of Mr. Sewell, invited to the Legislative Council, with a place in the Weld Administration, as Solicitor-General. He was sworn in as a member of the Upper House; but we believe that ere he took the oath of office as Solicitor-General, Mr. Weld resigned. Mr. Stafford succeeded Mr. Weld, and one of his first overtures was to Mr. Prendergast to become Attorney-General. This offer he accepted, and the appointment was formally announced on the 20th October, 1865.⁸

Yet in a parliamentary debate on 25 August 1865, Prendergast is referred to as the Solicitor-General.⁹ Therefore, it is unclear as to whether Prendergast ever actually served as Solicitor-General, though it is certain that he replaced Sewell as Attorney-General three months after joining the Legislative Council.

Prendergast served as political Attorney-General for only two years. In 1866 the

⁶ Dalziel, p. 66.

⁷ *NZPD*, 1865-6.

⁸ *Colonial Law Journal 1865-1875*, pp. 25-6.

⁹ *NZPD*, 25 August 1865, p. 354 (Julius Vogel).

Attorney-Generals Act was passed making the post non-political (outside parliament) and vested with life tenure. This Act came into effect in March 1867, resulting in Prendergast leaving his seat in the Legislative Council and giving up his Dunedin practice and position as Crown Solicitor of Otago. Prendergast's brief career as a 'politician' was at an end, but his influence in Wellington's power elite would continue to grow. In offering Prendergast the permanent position in 1866, Stafford suggested an annual salary of 1200 pounds and assistance with removal costs from Dunedin to Wellington. Stafford was intent on a fast process: "I have to request that you will come to Wellington as soon as possible."¹⁰ Stafford also offered Prendergast the first "vacancy occurring in the office of Judge of the Supreme Court in the Colony."¹¹ Prendergast was unsure about Stafford's ability to bind future governments, and, sure enough, in 1870 William Fox qualified Stafford's earlier statement:

The late Government [Stafford's] seems to have exceeded its power in attempting to bind a future Government....But...the present Government will be prepared to offer to you the first puisne judgeship which may fall vacant during your tenancy of the non-political office of Attorney-General, and their own tenure of office as a Ministry. In case of the Chief Justiceship falling vacant, the Government would hold itself free from all previous pledges.¹²

The Chief Justiceship was one of the several judicial positions to fall vacant in 1875. By this stage, Vogel had replaced Fox and offered Prendergast the coveted position of head of the judiciary.

Prendergast was not impressed with the frenetic and ever-changing nature of the Attorney-Generalship. On 3 October 1866, during the passage of the Attorney-General's Bill, Prendergast wrote a detailed opinion on the matter to the Colonial

¹⁰ Correspondence relative to the appointment of the present Attorney-General, *Appendices to the Journals of the House of Representatives* (AJHR), 1870, D-32.

¹¹ Correspondence relative to the appointment of the present Attorney-General, *AJHR*, 1870, D-32.

¹² Correspondence relative to the appointment of the present Attorney-General, *AJHR*, 1870, D-32.

Secretary. Prendergast argued that the Bill should remain in its present shape, “with an amendment excluding the officer only from the House of Representatives, and also, I am disposed to think from practising as a Solicitor, except in Crown business. I think the chief permanent officer should be termed Attorney General.”¹³ Prendergast also argued for the creation of a new political position, one suitable for non-practising lawyers, such as Sewell or Fox: “These persons would more properly hold an office to be termed ‘Minister of Justice’”.¹⁴

Prendergast’s seat in the Legislative Council, which would be taken away by the Act, was very dear to the ambitious lawyer. “I do not think it necessary to exclude the officer from the Legislative Council. In all Acts of the Imperial Parliament applying to permanent officers the officers are excluded only from the House of Commons.”¹⁵ The successful Dunedin practice held by Prendergast would also be lost under the new Act, with Prendergast reluctant to experience a drop in income:

the officer should be excluded from practising as a Solicitor except for the Crown, but not as a Barrister....as the salary allotted is insufficient to remunerate such a person as ought to fill the office, he ought to conduct the Crown Prosecutions in Wellington and be paid in addition for that.¹⁶

Prendergast argued for a more secure and lucrative political office, but most of his suggestions were not accepted.

Prendergast’s position as Attorney-General was akin to the present role of Solicitor-General, and, with Hart, the Assistant Law Officer, they effectively comprised the ‘Crown Law Office’. The office was called by the rather confusing title, ‘the Judicial Branch of the Colonial Secretary’s Office’, but changed to the ‘Department of

¹³ Letter, James Prendergast to Colonial Secretary, 3 October 1866, AG 67/3311, National Archives, Wellington.

¹⁴ Letter, James Prendergast to Colonial Secretary, 3 October 1866, AG 67/3311, National Archives, Wellington.

¹⁵ Letter, James Prendergast to Colonial Secretary, 3 October 1866, AG 67/3311, National Archives, Wellington.

¹⁶ Letter, James Prendergast to Colonial Secretary, 3 October 1866, AG 67/3311, National Archives, Wellington.

Justice' in 1872 under the control of a new Minister of Justice. By this time the lack of legal expertise in Parliament which led to the need for a permanent Attorney-General was not so apparent. Calls were made for the disestablishment of the non-political post of Attorney-General. The problem was resolved when Prendergast moved to the Bench in 1875. One year later the Attorney-General Act 1876 was passed, again making the position political as it is to this day.¹⁷

3. Prendergast as Legislative Councillor

While Prendergast was appointed to the Legislative Council in July 1865, it seems that he did not become part of a ministry until appointed Attorney-General in Stafford's Ministry during August. New Zealand politics from the time of responsible government in 1856, to the Liberal's victory in 1891, was fluid, ever-changing and based more on personality and local interests than party loyalty.¹⁸ The 'first' Premier of New Zealand was Sewell, whose office lasted only a few weeks, during 1856. From 1856 to 1861, the Premier was Edward Stafford, who must rank as New Zealand's most powerful Parliamentary politician from 1856 to the early 1870s, at which point Vogel began to dominate Parliament.¹⁹ Beyond Parliament was the important figure of Governor George Grey, who eventually entered Parliament as a member in the 1870s. The New Zealand Wars which raged throughout the early 1860s saw a succession of brief Ministries led by William Fox, Alfred Domett, Frederick Whitaker and Frederick Weld. It was Weld's Ministry of 24 November 1864 to 16 October 1865²⁰ that provided Prendergast with his political opening.

When Weld's Ministry collapsed on 16 October 1865, Edward Stafford, with

¹⁷ Information in Justice Department Records Finding Aid, National Archives, Wellington.

¹⁸ Raewyn Dalziel, 'The Politics of Settlement', in *The Oxford History of New Zealand*, edited by Geoffrey W. Rice, 2nd edition (Auckland: Oxford University Press, 1992), pp. 87-111.

¹⁹ See Bohan.

²⁰ W. David McIntyre and W. J. Gardner (eds.), *Speeches and Documents on New Zealand History* (Oxford: Clarendon Press, 1971), p. 468.

experience and influence, was the obvious choice for Premier. Stafford's Ministry of relatively unknown politicians lasted until 28 June 1879, an impressive length by the standards of mid to late nineteenth-century New Zealand politics. Prendergast owed his newly-founded position of power to Henry Sewell and Edward Stafford, but he eventually angered both men. Sewell, as mentioned earlier, hoped to serve as Stafford's Attorney-General in place of Prendergast. By enabling Prendergast's rise of power, Sewell effectively created a rival who would replace him, though it could be argued that Stafford would never had desired Sewell in his Ministry in any case. Prendergast's relationship with Stafford was harmonious until Stafford lost power in 1869. Stafford was pleased with his choice as Attorney-General, "who, although new, 'has won golden opinions from all who have come in contact with him', and his legal opinions were received with a respect and influence which Sewell never could acquire."²¹ But in 1869, Stafford attempted to obtain the house currently occupied by the Governor. Stafford had leased the house as Colonial Secretary but was now demanding it as a private citizen.

He [Fox] would get the Attorney General [Prendergast] to scrutinize the lease and other papers. The comedy lasted a fortnight. Attorney General Prendergast ruled that Stafford had signed the lease as Colonial Secretary and had no rights as a private citizen to claim Clifford's house from the Governor....Stafford finally refused to accept the Attorney General's ruling....He was patently in the wrong.²²

The matter was laid before both Houses of the General Assembly in a battle of wills between Fox and Stafford.²³ As non-political Attorney-General, Prendergast was in the difficult position of having to be totally neutral. His opinion was brief and blunt, Stafford was totally in the wrong.²⁴ While in situations such as the invasion of Parihaka in 1881, Prendergast provided strong support for dubious political action,

²¹ Bohan, p. 212.

²² Bohan, pp. 291-2.

²³ Papers relative to Occupation of Ministerial Residences, *AJHR*, 1869, D-26.

²⁴ Papers relative to Occupation of Ministerial Residences, *AJHR*, 1869, D-26, p. 9.

the Stafford incident demonstrates political integrity with Prendergast willing to risk offending a powerful leader who was attempting to abuse his power.

New Zealand politics during the late nineteenth-century did not feature obvious political parties or labels such as ‘conservative’ and ‘liberal’. During 1865-69, when Prendergast served in the Stafford Ministry, a key debate was ‘centralism’ versus ‘provincialism’. The capital city had been transferred from Auckland to Wellington in 1865 and moves were afoot to dismantle the provincial system set up by Grey’s 1852 Constitution. Wellington, as the most central New Zealand city, was the perfect site for a central government. Stafford was an outspoken centrist, and Prendergast’s speeches in the Legislative Council reveal him to be a supporter of strong central government. During the early days of Prendergast’s Attorney-Generalship, New Zealand was recovering from the wars between Maori and Pakeha based in the Taranaki and Waikato regions. While armed resistance continued from groups such as the Hauhau, Te Kooti and Titokowaru, the open warfare period was at an end by 1865 and Maori were suffering under the weight of drastic land confiscations.

During the latter half of Prendergast’s term as Attorney-General, the borrowing schemes of Julius Vogel dominated the political scene. Vast amounts of overseas money was borrowed to finance the immigration and large-scale building of a national infrastructure. The early 1870s was a boom time for New Zealand settler society and during this period Prendergast finally cemented his position of power by ‘rising’ from Attorney-General to Chief Justice. Prendergast’s beginnings in Wellington though, were relatively reserved and restrained.

Prendergast’s service as a Legislative Councillor lasted from July 1865 to October 1866. Prendergast was considered by several commentators a poor public speaker²⁵ and did not distinguish himself as a political orator. But his speeches in the Council were succinct and lucid, and generally treated with respect by his peers. Most

²⁵ For example, William Gisborne, *New Zealand Rulers and Statesmen, From 1840 to 1897*, revised and enlarged edition (London: Sampson Low, 1897).

nineteenth-century New Zealand politicians were effectively 'part-timers' with other occupations and independent incomes. This meant the Parliament could only sit for part of the year as the rest of the time was needed to attend to private business interests. The Parliamentary term began in late June and ended in early October, a period of little more than three months. During the 1865 term Prendergast delivered nine recorded speeches, and, during the 1866 term, 15 recorded speeches.²⁶ Most of Prendergast's speeches were legal comments on legislation under consideration. This legislation ranged from land issues to Parliamentary dissolution to codification of the criminal law. By analysing the New Zealand Parliamentary Debates of 1865-66, the nature of Prendergast's political involvement can be gauged.

The first recorded parliamentary speech made by the Honourable James Prendergast, Otago, was on 1 August 1865, approximately one month after entering the Council. James Crowe Richmond, Colonial Secretary and younger brother of Richmond J opened the debate which concerned Maori representation in Parliament. After outlining the Weld Ministry's achievements up to August 1865, Richmond introduced the issue of Maori representation, arguing that his Ministry fully supported it:

the present movement was a corollary to the Native Lands Act. The two were essentially the abandonment of the system of protectorate, or dry-nursing. The Colonial and Home Governments confessed alike that they had failed. They were throwing the Maori on the world to take his lot with other subjects, and they must remove all disabilities....there was certainly a sense of wrong existing in their minds which we should remove. Now was the time, when we were getting the upper hand of them, to do it, and thus show them that we had none but friendly intentions towards them.²⁷

James Menzies, from Southland, took a less approving view of Maori enfranchisement:

²⁶ *NZPD*, 1865-6.

²⁷ *NZPD*, 1 August 1865, pp. 206-7 (J.C. Richmond).

he saw very grave objections to the passing of any clause which would provide any different qualification for Maori electors or members from that of the European population. He apprehended that it was absolutely necessary for us to maintain a power over the Maoris. They had but a very imperfect acquaintance with our laws, and paid but an extremely imperfect obedience to them.²⁸

Another South Islander, Henry Tancred, believed Maori would be more effectively represented by their own political structure:

He wished to give the Natives a voice, but was opposed to so far amalgamating the two races as to allow them a seat in Parliament. Everybody must recognize that the Maoris and the Europeans were two distinct races, and therefore he thought that the only system would be to organize the former as a separate body, and not have half the House composed of Natives and the other half of Europeans.²⁹

Prendergast stated simply:

there could be no doubt that, in the minds of all our friends at Home, the Natives have an inborn right, as British subjects, to the privileges of this country....the Natives, who were the largest landholders in the colony, and he considered it was unjust that they should exist under such disabilities.³⁰

Prendergast argued that Maori should have parliamentary representation, a view which appears at odds with his general disparaging attitude towards the Maori. His argument that Maori were British subjects corresponds with Article Three of the Treaty of Waitangi.

As a representative of Otago, Prendergast was closely connected with the gold-rush of the 1860s. On 7 August 1865, James Crowe Richmond moved the second reading of the Goldfields Acts Amendment Bill. During the discussion in the Legislative

²⁸ *NZPD*, 1 August 1865, pp. 206-7 (J. Menzies).

²⁹ *NZPD*, 1 August 1865, p. 207 (H. Tancred).

³⁰ *NZPD*, 1 August 1865, p. 208 (James Prendergast).

Council, Prendergast supplied legal advice.³¹ His three years of experience as an Otago lawyer had provided Prendergast with a comprehensive knowledge of mining law. The main focus of the debate was land use and ownership, a major issue during nineteenth-century New Zealand history. The following debate focused upon the Leases and Sales of Settled Estates Bill. Prendergast was responsible for this Bill as Attorney-General and had based it completely on an English model:

The Bill he was now asking them to read a second time was a transcript of a Bill introduced in the House of Lords by Lord Cranworth....The Council might rely on it that the Bill was as perfect as legal skill could make it....Bill read a second time, and passed through all its remaining stages without amendment.³²

The successful passing of this Bill demonstrated Prendergast's heavy reliance upon English statute law and the faith shown in him by the Council. Prendergast later demonstrated this reliance on English law in his judgments as Chief Justice from 1875 to 1899.

Prendergast had only been in New Zealand for three years before rising to the position of Attorney-General. This meant that he had more recent experience with English legal developments than many other politician-lawyers such as Henry Sewell or William Fox, who had been in New Zealand since the earlier days of settlement. When introducing the Printing and Publishing Regulation Bill on 22 August 1865, Prendergast again referred to English legislative precedents, "stating that a number of provisions with respect to publishing existed in England, but it was doubtful whether the law was in force in the colony."³³

An interesting debate took place in the Legislative Council on 10 October 1865, only six days before the collapse of the Weld Ministry. John Hall of Canterbury, who in later times would work with Prendergast to destroy Parihaka, introduced a motion to

³¹ *NZPD*, 7 August 1865, p. 255 (James Prendergast).

³² *NZPD*, 7 August 1865, p. 255 (James Prendergast).

³³ *NZPD*, 22 August 1865, p. 333 (James Prendergast).

increase the customs revenue of Canterbury, without the same provision for any of the other provinces.³⁴ Several of the Councillors, including Prendergast, spoke against Hall's motion, arguing that its provincial bias would undermine 'equality' between the different provinces. The provincial debate was still very much at the centre of New Zealand political discussion in 1865 and 'pork-barrel' politics were common. Prendergast often sided with the majority view in the Council, which did no harm to his support network and future career opportunities. If he did disagree with an influential figure, such as John Hall, he always used moderate and non-confrontational language.

On 25 and 26 October 1865, the Legislative Council faced the issue of parliamentary dissolution. On 16 October, Weld's Ministry had fallen. It was replaced by a Ministry led by Stafford. Weld's supporters were outraged and prepared to make Stafford's position as difficult as possible. A rumour circulated that Stafford had secretly met with Governor Grey and obtained a promise that Parliament would be dissolved even if the Parliament refused supplies to Stafford. Stafford desired a dissolution to allow him to seek an election to secure his position. The Legislative Council, led by Tancred, moved the adoption of an address to the Governor seeking clarification on the controversy.³⁵ Prendergast was unsure about the course of action proposed by the Council. The evidence was insufficient and lacked credibility:

he had already expressed his opinion that this taking notice of an unknown document was a highly improper course to take....His Excellency himself was perfectly aware whether or not he had made this promise to Mr. Stafford. If this statement affected any place it affected the other branch of the Legislature.³⁶

In this case, Prendergast spoke out unsuccessfully against the majority of the Council and supported Stafford in his actions. Stafford had only ten days earlier 'promoted' Prendergast to the position of Attorney-General. Prendergast's reasoning was that the

³⁴ *NZPD*, 10 October 1865, p. 667 (John Hall).

³⁵ *NZPD*, 26 October 1865, p. 720 (Henry Tancred).

³⁶ *NZPD*, 26 October 1865, p. 721 (James Prendergast).

Council's actions are effectively *ultra vires*. This dismissal of an issue on the basis of lack of jurisdiction would also be used in *Wi Parata*, when Prendergast claimed that the Courts had no ability to question dealings of the Crown.

Unlike Stafford, Frederick Weld was widely considered a man of honour and integrity and his fall from power caused great consternation in Parliament. Although Prendergast was a member of his Ministry, he owed his position to Sewell's influence. Stafford was treated with suspicion by many of his parliamentary colleagues and was often the subject of controversy. The Weldites were convinced that Stafford:

had done a deal with Grey. The two Machiavellis had outwitted the virtuous men....The Legislative Council, restrained in tone but committed in its corporate hostility to Stafford, asked Grey, firmly but politely, for a reconciliation between Stafford's denial that he had asked for a dissolution and Pharazyn's statement. Grey replied that it was up to the Government to make whatever statement it thought fit.³⁷

In 1865, the Government Ministry consisted of seven portfolios: Premier, Colonial Secretary, Colonial Treasurer, Attorney-General, Postmaster-General, Minister for Colonial Defence and Minister for Native Affairs. In Stafford's Ministry, Prendergast took the position of Attorney-General, while Theodore Haultain received Colonial Defence and Andrew Russell, Native Affairs. Stafford took the other four portfolios, an impressive achievement for one man. Prendergast was a new and little-known political quantity, in a Ministry dominated completely by Edward Stafford. In the fast-moving world of nineteenth-century New Zealand politics, Ministers were rapidly appointed, rapidly replaced, and often appointed again soon after. By late August 1866, the Stafford Ministry was almost completely changed, but Prendergast remained. A new appointment, James Crowe Richmond as Commissioner of Customs, further strengthened Prendergast's connection with the Richmond-Atkinson families and the conservative elements in New Zealand politics. As Chief Justice,

³⁷ Bohan, pp. 207, 213.

Prendergast would be a close and loyal ally of Richmond's elder brother, Christopher William.

The 1866 session of parliament (first session of the fourth Parliament) began on 30 June 1866 and ended on 8 October 1866. This was to be Prendergast's second and last year as a colonial politician. On 4 July, Prendergast was appointed to the Select Committee for Standing Orders, along with leading Councillors such as Alfred Domett.³⁸ Prendergast's central role in the Council during his two years of service was to introduce and give advice upon new legislation. For example, during the first month of the 1866 session, Prendergast introduced the Legislative Council Limitation Bill and amended the Offences Against the Person Bill.³⁹ The Bill to limit the number of Councillors could have been proposed to retain the select and elite nature of the Upper House. Prendergast's key contribution to New Zealand statute law was his introduction, improvement and codification of criminal law. The Offences Against the Person Act 1867 was one example of a range of criminal statutes introduced while Prendergast was 'political' Attorney-General. Others included the Accessories Act 1867, Affirmation in Lieu of Oaths in Criminal Proceedings Act 1866, Coinage Offences Act 1867, Criminal Law Procedure Act 1866, Forgery Act 1867, Indictable Offences Trials Act 1866, Indictable Offences Repeal Act 1867, Introduction of Convicts Prevention Act 1867, Larceny Act 1867, Malicious Injury to Property Act 1867, Neglected and Criminal Children Act 1867 and the Vagrancy Act 1866.⁴⁰

Prendergast also looked out for the interests of the legal profession, both advocates and adjudicators, while Attorney-General. In a Council debate on 15 August 1866, Prendergast disagreed with John Acland's motion to have Private Bills first brought before the Supreme Court and then to the Legislature. Colonel Whitmore asked the Attorney-General for advice and Prendergast stated that he:

³⁸ *NZPD*, 4 July 1866, p. 753 (James Prendergast).

³⁹ *NZPD*, 19 July 1866, p. 786 (James Prendergast).

⁴⁰ All found in *Statutes of New Zealand (Statutes)*.

was not in favour of this course. The Council should consider the matter thoroughly before they referred to the Judges a work which had generally been performed by the Legislature....there was no power in the Council to insist upon an answer from the Judges, but he could not conceive that any of the Judges would refuse to give their opinion when asked.⁴¹

On 28 August 1866, the New Zealand Wars again dominated debate in the Legislative Council. An Indemnity Bill, drawn up by Prendergast was about to have its second reading. The long title of the Act, when passed, read, “An Act for indemnifying persons acting in the suppression of the Native Insurrection.”⁴² Walter Mantell, an outspoken supporter of Maori, attempted to prevent the second reading, arguing that the Bill was poorly written and that Parliament should not protect leading military leaders such as Major-General Chute and Colonel Whitmore from answering for their actions during the Wanganui expedition. Mantell cited a list of accusations against the British army:

friendly Natives being pillaged of their horses, which were afterwards sold at Taranaki; the forcing of a number of friendly Natives to act as guides, and marching them in front of the column without arms and without rations, to attack their own friends....a spear which was taken from the body of a chief, and which a soldier - to use the language of the letter accompanying the gift - ‘had pierced through fifteen dead Maori bodies, to be certain that life was quite extinct.’⁴³

The ex-military officers residing in the Legislative Council leapt to the defence of the British Army, including Major Coote, Colonel Whitmore, Colonel Peacocke and Colonel Russell. Whitmore argued that the abuse of ‘friendly Natives’ was unavoidable:

It was difficult to distinguish a friendly from a hostile Native: his (Colonel Whitmore’s) experience had taught him that most Natives were enemies when possible, and many friends when they dared not be

⁴¹ *NZPD*, 15 August 1866, p. 883 (James Prendergast).

⁴² *Statutes*, 1866.

⁴³ *NZPD*, 28 August 1866, p. 901 (Walter Mantell).

enemies. At any rate, it was so in India and the Cape of Good Hope.⁴⁴

Prendergast also defended his legislation but refused to comment on the “Native part of the Hon. Mr. Mantell’s argument, but at what he thought he had wished to be considered the funny part.”⁴⁵ Many of Prendergast’s speeches in the Legislative Council displayed an avoidance of controversy and support of the majority. Prendergast continued and taunted Mantell, challenging him to write a better piece of legislation if he could. Mantell was unsuccessful in his bid to prevent the Bill from passing.

Two days later Mantell sought revenge for Prendergast’s dismissive treatment of his views. After Prendergast moved to introduce the Innkeeper’s Liability Bill based on a recent Imperial Act, Mantell criticised Prendergast’s speech, the only voice raised against it.⁴⁶ Mantell continued to upset the Council with his calls for justice regarding Maori. On 18 September 1866, Prendergast sided with the conservative majority in Council to question Mantell’s inquiry into the legitimacy of certain Crown Grants.⁴⁷ Prendergast, along with other Councillors such as Alfred Domett and Colonel Whitmore, repeatedly found himself in opposition to Mantell.⁴⁸ Prendergast was not always successful in his challenges to Mantell. On 5 October 1866, Mantell successfully moved to decline entertaining any more Bills for that session, other than those introduced by the Colonial Government. Prendergast protested vehemently, but Mantell “thought that the objection of the Hon. the Attorney-General had no weight with it”.⁴⁹ The Council agreed.

Certain legal issues which dominated discussion in nineteenth century New Zealand have remained contentious issues to this day. An apposite example is the payment of

⁴⁴ *NZPD*, 28 August 1866, p. 901 (Colonel Whitmore).

⁴⁵ *NZPD*, 28 August 1866, p. 902 (James Prendergast).

⁴⁶ *NZPD*, 30 August 1866, p. 909 (James Prendergast).

⁴⁷ *NZPD*, 18 September 1866, p. 974 (James Prendergast).

⁴⁸ *NZPD*, 18 September 1866, p. 974, Marine Board Debate (James Prendergast).

⁴⁹ *NZPD*, 5 October 1866, p. 1043 (James Prendergast).

jurors. In 1865, common jurymen (as opposed to special jurors) received no compensation for their services and, as Colonel Peacocke explained:

He had been induced to bring the matter forward from personal observation of the hardships which poor men and their families were subjected to through being compelled to attend the Supreme Court at the sacrifice of their time, which was their daily bread.⁵⁰

Peacocke cited Victoria as a colonial example where this issue had been addressed. Robert Stokes countered the Victorian example with a more binding precedent, that of English law:

Certainly common jurymen were not paid in England; and, as the New Zealand Legislature took the laws of that country for their model, they should be cautious, particularly when they were told on every hand that peculiar economy was required. It appeared to him that citizens owed to their country a duty which they were bound to discharge.⁵¹

The opportunity cost for common jurors was much higher in 1865 than the present day, for employers would not continue paying wages. Prendergast showed interest in the plight of the common jurymen: “For his own part, he did not see why special jurors should be paid a guinea a day while common jurymen received nothing.”⁵²

One of Prendergast’s most important pieces of legislation was the Law Practitioners Amendment Act. The Act, passed on 8 October 1866, ensured that:

No person who has or shall have been convicted in any part of the British dominions of forgery or perjury or subornation of perjury shall be enrolled or admitted to practice or shall practice as a Barrister or Solicitor in New Zealand.⁵³

The regulation of the legal profession was vital to protect the public and the integrity

⁵⁰ *NZPD*, 7 September 1866, p. 930 (Colonel Peacocke).

⁵¹ *NZPD*, 7 September 1866, p. 931 (Robert Stokes).

⁵² *NZPD*, 7 September 1865, p. 931 (James Prendergast).

⁵³ Law Practitioners Amendment Act 1866 s3, *Statutes*.

of the profession. In a Council debate on 7 September 1866, Prendergast successfully argued that the words “or any felony” should be left out of Section 3 of the Act. By rejecting a wider net, Prendergast was able to regulate the profession while reducing parliamentary control over admission of lawyers in New Zealand.

Prendergast’s approach in the Legislative Council was pragmatic, formal and logical. His arguments, like his judgments, reflected a commitment to justice and law rather than to mercy and emotion. In the debate over the Crown Lands Sales Extortion Prevention Bill, Prendergast took a typically hard-line attitude: “he thought the person paying the money ought to be equally liable with the extortioner. The object of the Legislature was not in this matter to protect individuals, but to prevent frauds on the revenue.”⁵⁴ Prendergast showed little patience with colleagues who did not devote themselves entirely to their public duties. On 20 September 1866, Prendergast successfully argued against a leave of absence for George Lee on the basis that there were already fifteen members of the thirty-five strong Council absent.⁵⁵

One of the most controversial political issues of the mid-1860s was the location of the nation’s capital. In 1864, it was decided that Wellington should be the seat of government. The Wellington members of the Legislative Council spoke in support of retaining their home as the permanent capital. Prendergast, who would soon shift his geographic allegiance from Dunedin to Wellington, supported them. Dr. Menzies stated the case for Wellington:

He could not see, geographically speaking, that any advantage could arise if the next session of the Assembly were held in any other part of the colony. Wellington, being central, possessed many advantages over any of the other cities, and its communication with other places was more regular and frequent.⁵⁶

Colonel Peacocke of Auckland disagreed with Menzies, demonstrating the Auckland-

⁵⁴ *NZPD*, 18 September 1866, p. 974-5 (James Prendergast).

⁵⁵ *NZPD*, 20 September 1866, p. 984 (James Prendergast).

⁵⁶ *NZPD*, 3 October 1866, p. 1029 (Dr. Menzies).

Wellington rivalry which has permeated New Zealand's history over the last one hundred and fifty years. Peacocke's argument was rebutted by Mantell, another Wellingtonian. Prendergast stated that the matter was one for the Governor alone but "proceeded to speak of the expense and inconvenience that would be felt by a removal of the Legislature."⁵⁷ Wellington's political dominance was becoming difficult to challenge and the Council supported the Wellingtonians (six out of 35). This debate demonstrated the continuing tension over movement towards centralisation, supported by Prendergast and his premier, Stafford. Prendergast's role in the Legislative Council ended with the 1866 session, but his influence in Wellington continued.

4. Prendergast as Attorney-General I (opinions and advice to the Government)

(4a. Maori issues)

The Waikato War between Imperial Britain and Kingite Maori ended in 1864. The conflict then transformed from one of open warfare to guerilla warfare. The period from 1864 to 1869 saw a number of Maori campaigns launched against settler dominance and land confiscations. The most well-known campaigns were those of Te Kooti (1868-1872) on the East Coast of the North Island and Titokowaru (1868-69) on the West Coast of the North Island.⁵⁸ As Attorney-General, Prendergast became embroiled in the conflict as the settler government asked for his opinion on legal matters. Prendergast's often ruthless opinions earned him a reputation as an unforgiving enemy of Maori in arms against the government.

This reputation has survived for over one hundred and thirty years and was encapsulated in the historical novel, *Season of the Jew* by Maurice Shadbolt written in 1986. Shadbolt's book focused on the campaign of Te Kooti and in particular the role of Hamiora Pere, forced to fight for Te Kooti after being captured. Pere was

⁵⁷ *NZPD*, 3 October 1866, p. 1030 (James Prendergast).

⁵⁸ See James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland: Penguin, 1986).

later captured again, this time by colonial troops. As an example to the other 'rebel' Maoris, Pere was charged with high treason and hanged after a bizarre trial. Prendergast, as Attorney-General, prosecuted on behalf of the Crown. In the novel, Pere's defence lawyer describes Prendergast in less than flattering terms, "His [Fox's] Attorney-General, a devious monster named Prendergast, is taking the case. Prendergast will make the trial his next step up the ladder to the post of Chief Justice. He knows what Fox needs."⁵⁹ Johnson J presided over the trial, with a description which could have suited Prendergast as well:

A Mr Justice Johnston, with a jowly face under long wig, oversaw proceedings. Retired from obscure English assizes, he was not one to miss his chance in the colonies, nor make light of his task in a trial of promising dimension.⁶⁰

During the trial of *R v Pere*, Prendergast emerges as a cold, formal but not especially malicious figure, "his youthful face suggested disdain for the business of hand, and his voice professional impatience."⁶¹ Prendergast was 43 years old at the time of the trial. Prendergast, the Machiavellian lawyer, is apparent in Shadbolt's description: "It seemed Prendergast was not one to rely on the letter of the law to win a conviction....never at a loss in milking the last drop of prejudice."⁶² Prendergast was of course successful in his prosecution but was given a reprieve by Shadbolt in the final stages of the trial, as Johnston took the mantle of 'villain', "Prendergast, with compassion apparent for the first time, permitted Fairweather to leave the witness stand....Prendergast, as if fatigued by truths too familiar, made a passionless summary of the crown case."⁶³

The trial of Hamiora Pere was a reality, but fact differs from fiction. Though Shadbolt returned Hamiora Pere to New Zealand's historiography, a large amount of

⁵⁹ Maurice Shadbolt, *Season of the Jew* (Kent: Hodder and Stoughton, 1986), p. 441.

⁶⁰ Shadbolt, p. 447.

⁶¹ Shadbolt, p. 448.

⁶² Shadbolt, p. 459.

⁶³ Shadbolt, p. 464.

archival material stills exists relating to the case.⁶⁴ A brief article from 1972 described the fate of Pere. The author describes Te Kooti as, “the fervent enemy of the white man, plotted and attacked with fanatical zeal.”⁶⁵ Judith Binney’s revisionary work on Te Kooti portrays the leader in a more positive light. Like Shadbolt, the author believes Pere was unjustly executed as he was unaware of the crime that he had committed, and had committed it under duress.

Pere was captured after Te Kooti’s disastrous defeat at Ngatapa in 1868. Prendergast’s former colleague in the Legislative Council, Colonel Whitmore, was responsible for the Te Kooti campaign. The trial began in September 1869, with Prendergast well-established in Wellington as Attorney-General. With over 80 other Maori, Pere was tried under the Disturbed Districts Act 1869. During the trial, Prendergast paraded a line of witnesses testifying to Pere’s involvement with Te Kooti, including Whitmore himself:

The Attorney-General, for the prosecution, had little to add. He claimed that the prisoner was proved to be a member of Te Kooti’s Hau-haus, that he had taken part in fighting against the soldiers of the Queen and that the charge was duly proved against him.⁶⁶

Pere was hanged at the Wellington gaol on 16 November 1869.⁶⁷ Four other prisoners were condemned to death for the same crime. One committed suicide in gaol and two had their sentences reduced to life imprisonment.⁶⁸

Capturing the Maori leader, Titokowaru, was a more difficult matter. Reflecting the desperation of the colonial establishment, Governor Bowen controversially placed a price on the head of the Maori leader, to be paid on his capture, dead or alive. The

⁶⁴ Hamiora Pere File, Justice Department Records, NA J1 73/586, National Archives, Wellington.

⁶⁵ ‘A Casualty of Conflict’, in *New Zealand’s Heritage*, edited by Ray Knox (Sydney: Paul Hamlyn, 1972), p. 991-3. Consult pp. 2934-6 to find author.

⁶⁶ *New Zealand’s Heritage*, p. 993.

⁶⁷ *Wellington Independent*, 18 November 1869.

⁶⁸ *Wellington Independent*, 18 November 1869.

price was 1000 pounds. Titokowaru responded by placing a price on the head of the Governor: Two shillings and sixpence.⁶⁹ The placing of a reward on the capture, dead or alive, of Titokowaru was legally dubious. Prendergast was asked for his opinion and stated that, “The justification of the proceedings was based on the universal and supreme law of necessity and preservation of the state.”⁷⁰

This opinion was vague and contentious, though Prendergast did find English precedent to defend his views. Prendergast argued that:

The law of England on the subject is as follows:- ‘If a person having actually committed a felony will not suffer himself to be arrested...so that he cannot possibly be apprehended alive by those who pursue him...he may be lawfully slain.’⁷¹

Prendergast added that it is the duty of every man to prevent the escape of a felon and, if the felon is killed while fleeing, this will be justifiable homicide. He also added that the Government’s motives were righteous and denied that they “were inciting on any of the people subject to its rule to an indulgence in an appetite for blood or needless cruelty.”⁷² The humanitarian concerns of the Colonial Office in London were not shared by the ruling colonial elite in New Zealand facing the prospect of continuing warfare. Prendergast would later meet a pacific Titokowaru during the trials following the invasion of Parihaka in the 1880s.

Prendergast strongly supported ‘total war’ on the Maori fighters, using whatever means necessary to ensure their defeat. When asked about the legality of certain actions during the West Coast campaign, Prendergast explained that the rules of war

⁶⁹ 1868, Belich, p. 240.

⁷⁰ Opinion of the Attorney-General on legal questions raised in Earl Granville’s Despatch, *AJHR*, 1870, A-23 and Prendergast’s opinion, Justice Department Records, NA J1 70/2307, National Archives, Wellington.

⁷¹ Opinion of the Attorney-General on legal questions raised in Earl Granville’s Despatch, *AJHR*, 1870, A-23 and Prendergast’s opinion, Justice Department Records, NA J1 70/2307, National Archives, Wellington.

⁷² Opinion of the Attorney-General on legal questions raised in Earl Granville’s Despatch, *AJHR*, 1870, A-23.

between civilised nations did not apply to war with the Maori. Prendergast's inability to recognise Maori society as 'civilised' is consistent with his decision in *Wi Parata*. Prendergast's view that imprisoned Maori were British subjects in rebellion against their Queen, rather than members of foreign state, is somewhat inconsistent with *Wi Parata*.⁷³ In the *Wi Parata* decision Prendergast argued that transactions between Maori and the Crown were Acts of State, yet in 1869 he argued that war between Maori and the Crown was a 'rebellion'.⁷⁴

The opinion given by Prendergast on 30 June 1869 regarding the 'legal status of Maori now in arms' is the most extreme statement on Maori affairs ever offered by Prendergast. His language is unforgiving and confrontational. Prendergast ignores Maori claims for land retention and rangatiratanga, stating:

The Maoris now in arms have put forward no grievance for which they seek redress. Their object, so far as it can be collected from their acts, is murder, cannibalism, and rapine. They form themselves into bands, and roam the country seeking prey...the revolt has been carried out in defiance of all the laws of nature, and there can be no doubt that all who have taken part in it have forfeited all claim for mercy.⁷⁵

Prendergast demonstrated a complete inability to appreciate Maori grievances.

In his concluding paragraph, Prendergast justifies his hard-line stance and provides a clear statement of the practical political philosophy that would guide him throughout his career: "The object of the Government is self-preservation. The peaceful citizens must be protected at all costs." Utilising his knowledge of legal texts, Prendergast quotes *Vattel* (book iii, ch. viii):

When we are at war with a savage nation, who observe no rules, and

⁷³ Opinion of the Attorney-General as to the legal status of the Maori now in arms, *AJHR*, 1869, A-14.

⁷⁴ Paul McHugh, 'The aboriginal rights of New Zealand Maori at common law' (Ph.D. thesis, University of Cambridge, 1987), p. 270. The common law rule is that no act of state can be made against the Crown's own subjects.

⁷⁵ Opinion of the Attorney-General on the legal status of Maori now in arms, *AJHR*, 1869, A-14.

never give quarter, we may punish them in the persons of any of their people whom we take (these belonging to the number of the guilty), and endeavour, by this rigorous proceeding, to force them to respect the laws of humanity.⁷⁶

Prendergast's first real contact with Maori culture was as Attorney-General during the bitter military campaigns of the late 1860s. Atrocities were committed by both sides and both Government and Maori used desperate measures in their attempts to achieve victory. This destructive cultural contact determined Prendergast's attitudes to Maori for the rest of his life and must be considered when analysing such landmark cases such as *Wi Parata* (1877). Prendergast's first opportunity of meeting Maori was at the other end of a bayonet. For Prendergast, as for many other political leaders of the 1860s, the spectres of the Te Kooti, Titokowaru, Te Ua Haumene and Kereopa would haunt them forever.

In 1872, Prendergast delivered another blow to Maori society. As Attorney-General he ruled that "title to the lands below high-water mark rested with the Crown".⁷⁷ This decision affected Maori rights to fish and contravened Article Two of the Treaty of Waitangi. Within seven years of moving from Dunedin, Prendergast had established a reputation as an enemy of the Maori. In 1896, Dom Felice Vaggioli, using a quote from Rusden, described in his extreme way Prendergast's reputation amongst Maori supporters:

He [Prendergast] was a bitter enemy of the Maori. 'His contemptuous scorn for the treaty of Waitangi and for the rights of Maori, who were British subjects, was clearly demonstrated by him when Government compensation for Maori heads was discussed.' He had the gall to write that the Maori had no right to be treated humanely. And this man was the colony's chief judge! Justice had fallen into such disreputable hands!⁷⁸

⁷⁶ Opinion of the Attorney-General on the legal status of Maori now in arms, *AJHR*, 1869, A-14.

⁷⁷ Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin, 1987), p. 188.

⁷⁸ Dom Felice Vaggioli, *History of New Zealand and Its Inhabitants*, translated by John Crockett (Dunedin: University of Otago Press, 2000, First published 1896), p. 272.

(4b: Leader of the legal profession)

A central role for the Attorney-General was as leader of the legal profession. With the introduction of the New Zealand Law Society Act 1869, the profession moved towards effective regulation. Prendergast, as Attorney-General, was the obvious choice for President. Other members of the first Council included Bryan Cecil Haggitt of Dunedin and William Travers of Wellington.⁷⁹ The first Council was appointed by Governor Bowen. The Act was based on the English Law Society Charter of 1845, but was not welcomed by Auckland practitioners who claimed that they had not been adequately consulted. The passing of the Bill was principally due to the efforts of the Wellington and Christchurch professions.⁸⁰ During Prendergast's five year term as President, the Council achieved little except monitoring issues of discipline. While the New Zealand legal profession was still small, numbering only 225 in 1876,⁸¹ a strong Law Society was necessary. This did not occur until Francis Bell became President in 1901. In fact, between 1875 and 1897, records do not mention any President.⁸² Prendergast's attention during the period 1870 to 1875 was focused on his role as Attorney-General, leaving him little time to attend to strengthening a Law Society.

(4c: Advisor to the Government: Opinions on political issues)

As Attorney-General from 1865 to 1875, Prendergast fulfilled a variety of roles: legal expert in the Legislative Council for two years, legal adviser to the government, legal advocate for the Government in the higher courts, President of the Law Society and chief drafter of legislation. As legal adviser, Prendergast's opinion was often sought on matters of national importance. When Julius Vogel and Frederick Whitaker attempted to launch a government-sponsored trading company, Prendergast protested that, "[he] did not like Whitaker's 'heads of agreement' and wanted the Government

⁷⁹ Robin Cooke (ed.), *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (Wellington: Reed, 1969), p. 146.

⁸⁰ Cooke (ed.), p. 146.

⁸¹ *The New Zealand Jurist* 1876.

⁸² Spiller (ed.), *A New Zealand Legal History*, p. 244.

to wait until a company was formed before it became involved.”⁸³

Prendergast’s close involvement with Government legal matters began before he became Attorney-General. Early in 1865, Prendergast played a key role in the high-profile case of William Jarvey. Jarvey was accused of murdering his pregnant wife in Dunedin. Poison had been used to kill Catherine Jarvey and the case captured the imagination of colonial New Zealand. The analysis of Catherine’s dead body was conducted by Dr John Macadam in Melbourne. Prendergast conducted the prosecution for the Crown at the trial on 15 March, along with James Howorth and his brother, Henry. Spectators had to be turned away at the door. Chapman J presided over the court. Dr Macadam had travelled from Melbourne to be at the trial and testified that Catherine Jarvey had indeed been poisoned. After 40 hours the jury still could not reach a decision so a second trial was arranged for June and eventually began on 11 September before Richmond J. Unfortunately, Dr Macadam, who had controversially not had his expenses paid by the Crown, died on his way to the second trial. Prendergast, as Crown Solicitor, Solicitor-General and Legislative Councillor again conducted the prosecution, this time with his partner, Kenyon.⁸⁴ Prendergast was successful and Jarvey was the first man hanged in Otago.⁸⁵

With Prendergast’s re-appointment as Attorney-General in 1867, his role of providing opinions to the Government increased. As Attorney-General from 1867 to 1875, successive governments consulted Prendergast on issues ranging from conduct during the New Zealand Wars to guano-collecting on the Bounty Islands. Matters of confusion between the New Zealand Government and Imperial Britain were often passed to Prendergast for his opinion. During 1867 clashes appeared between Imperial legislation and the New Zealand Land Registry Act 1860.⁸⁶ The legal

⁸³ Dalziel, *Julius Vogel: Business Politician*, p. 193.

⁸⁴ *Otago Daily Times*, 12 September 1865.

⁸⁵ Sherwood Young, *Guilty on the Gallows: Famous Capital Crimes of New Zealand* (Wellington: Grantham House, 1998) and Justice Department Records, NA J1 66/530, National Archives, Wellington.

⁸⁶ Opinion of the Attorney-General on Imperial Legislation, *AJHR*, 1867, A-1A, p. 84.

obstacles were preventing the introduction of the 1860 Act and Prendergast studiously analysed the situation, eventually recommending that the Imperial Parliament legislate to remove conflicting law.

Another issue facing Stafford's Government in 1867 was the administration of Vice-Admiralty Courts for the colony. Prendergast argued strongly for the reform of this jurisdiction to make it more efficient and practical. The reasoning of the Attorney-General was clear:

I think that the step that should be taken is to bring to the attention of the Secretary of the Colonies the Resolution of the House, and the necessity there is for the establishment of a Vice-Admiralty Court in various parts of the Colony, arising from the great distances of the several ports from each other, and the unfrequent communication between the various parts of the Colony.⁸⁷

Prendergast's opinion highlighted the limited communication networks that existed in New Zealand during the 1860s. During the 1870s, the Vogel Government would invest heavily in creating a communications and transportation infrastructure. Due to the structure of the New Zealand court system during the 1860s, Prendergast suggested that the simplest remedy was to make each Supreme Court Judge (Auckland, Wellington, Nelson, Christchurch and Dunedin) also a Judge of the Vice-Admiralty Court for his province. Before 1867, only Chief Justice Arney presiding in Auckland was a Vice-Admiralty Judge. As New Zealand was a maritime colony with poor connections between major cities, one judge sitting in the north of the North Island could not effectively serve the rest of the colony on matters of maritime law. Prendergast was supported by the Judges of the Supreme Court.

Land was at the centre of many, if not most, of the political controversies during 1865 to 1875. Different power groups in New Zealand contested available lands, the Crown, Maori, the Provinces, individual developers and overseas interests. A Select

⁸⁷ Opinion of the Attorney-General on the Vice-Admiralty Courts, *AJHR*, 1867, A-1A, p. 80.

Committee investigating disputed land reserves in Dunedin called on Attorney-General Prendergast for advice. The issues included the validity of Crown Grants, the separation of powers between central government and the provinces, and Maori land rights.⁸⁸ Prendergast's legal legacy is primarily in the area of land ownership, around which issues of sovereignty and individual rights revolve.

Constitutional issues also occupied the time and attention of Attorney-General Prendergast. Only two years after Prendergast had been appointed to the Legislative Council, he was asked to provide his opinion on a number of controversial appointments.⁸⁹ The powers and jurisdiction of the Governor formed another constitutional issue which arose during the late 1860s. Prendergast continued his series of decisions supporting the New Zealand establishment in its struggle with 'rebel' Maori. On the question of indemnity for officials who committed crimes in the course of suppressing rebellion, Prendergast sought to protect his fellow political leaders:

I am of opinion that if the Colonial Legislature, by Act, authorizes the Governor or any officer or other person to adopt any measures for suppression of rebellion or other disturbances, no Court of Law in Great Britain could adjudge any act done under such authority to be a crime. The Legislature of New Zealand may also, after unauthorized and illegal acts have been done in suppression of rebellion, by Act, indemnify or pardon the person so acting on account of and for such acts, and I am of opinion that such an Act, if not disallowed by the Queen, would be pleadable in all Courts in England, and be a discharge there as well as here.⁹⁰

While Prendergast was loyal to the British Crown and the legal system from which he had come, he offered strong protection to New Zealand leaders and attempted to justify their actions.

⁸⁸ Opinion of the Attorney-General on the Dunedin Dispute Land Reserves, *AJHR*, 1868, F-4, p. 14-15.

⁸⁹ Opinion of the Attorney-General on the Appointment of Members of the Legislative Council, *AJHR*, 1868, D-6.

⁹⁰ Opinion of the Attorney-General on Indemnity, *AJHR*, 1870, A-1, p. 11.

The period from 1865 to 1875 was a pivotal ten years in the development of the New Zealand legal system. With the advent of responsible government in 1856, New Zealand politicians sought to create a new society through legislation. After emerging victorious from the New Zealand Wars, the colonial government began the creation of a 'Better Britain'⁹¹ in earnest. Prendergast was at the forefront of this movement. A large amount of legislation was passed during his Attorney-Generalship and older legislation was rationalised and sometimes discarded. In 1871, Prendergast analysed a host of ordinances made by the Provincial Governments and found many of their sections *ultra vires*.⁹² Only four years later, Prendergast would play an instrumental role in the dismantling of the provincial system of government.

During 1871, Prendergast delivered an opinion concerning a libel case taken by the Fox Government against George B. Barton, lawyer and editor of the *Otago Daily Times*. George B. Barton was known as 'long Barton' as opposed to Prendergast's nemesis, George E. Barton, who was referred to as 'little Barton'.⁹³ The Bartons, though not related, shared similar causes and both were outspoken public figures. In this case:

Barton alleged that there had been manipulation by the Government of the telegraph service, which resulted in messages intended for the *Otago Daily Times* being withheld and supplied first to other sources which were more pro-Government in outlook. There were protracted hearings and, with politics involved, tense feelings developed. Later the argument on behalf of the New Zealand Government, in justification of the conduct of its Ministers, was dealt with in a memorandum from the then Attorney-General, Sir James Prendergast.⁹⁴

In the memorandum, Prendergast explained how he had advised the Governor to pardon a Charles Muston whose evidence proved Barton to be the author of the

⁹¹ James Belich, *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century* (Auckland: Penguin, 1996).

⁹² Opinion of the Attorney-General on the Validity of Provincial Ordinances, *AJHR*, 1871, A-7.

⁹³ Iain Gallaway, 'Otago' in Cooke (ed.), p. 332.

⁹⁴ Gallaway, p. 332.

defamatory words.

Questions arose during the trial as to whether the Governor had the ability to grant a pardon before a conviction was obtained, with Prendergast again providing an opinion which pleased the Government:

There can be no doubt that it is necessary that the Governor of a Colony, such as any situated at so great a distance from England as is New Zealand, should have the power to promise free pardons, and to fulfil his promise; and that any limitation upon this power, such as it is contended is contained in the Commission, would be found to create grave difficulties in the administration of the Government and of justice.⁹⁵

In 1871, the prosecution abandoned the case, handing a victory to Barton. As editor of the *New Zealand Jurist* during the 1870s, Barton was an opponent of several of Prendergast's more controversial actions.

Prendergast was involved in the development of the New Zealand University system from its earliest beginnings. From 1884 to 1903, Prendergast served on the New Zealand University Senate.⁹⁶ In November 1871, Prendergast supplied an opinion supporting the right of Otago University to confer degrees under the Otago University Ordinance 1869.⁹⁷ Tension between provincial ordinances and central government legislation continued through Prendergast's term as Attorney-General. In his opinion on Otago University degrees, Prendergast sought a balance between the two competing powers: "I think that the Ordinance is not *ultra vires*, and that degrees may be conferred under it, but such degrees will be recognized and give rank and precedence only within the Province."

⁹⁵ Opinion of the Attorney-General on the *R v Barton* affair, 3 April 1871, *AJHR*, 1871, A-1, p. 92.

⁹⁶ Guy H. Scholefield and E. Schwabe (eds.), *Who's Who in New Zealand and the Western Pacific, 1908* (Wellington: Gordon & Gotch, 1908), p. 139.

⁹⁷ Opinion of the Attorney-General on the Power of the University of Otago to Confer Degrees, *AJHR*, 1872, G-45.

Not all of Prendergast's legal opinions were officially published. Much personal correspondence passed between Prendergast and the Premier and Governor regarding important matters of state. For example, on 19 August 1868, Governor Bowen reported to Prendergast that his views on the re-swearing of the Executive on the arrival of a new Governor had been supported by Law Officers in London. Bowen invited Prendergast to meet with him personally to discuss the issue further.⁹⁸ On 15 June 1869, Prendergast reluctantly provided a non-professional legal opinion for Walter Buller.⁹⁹

During his first two years as Attorney-General, Prendergast was placed in the difficult position of being the Attorney-General based in Wellington and also acting as Crown Prosecutor and Senior Partner of a law firm in Dunedin. Prendergast's correspondence during 1865-66 demonstrates the logistical difficulties and conflicts of interest he faced.¹⁰⁰ During 1866, Prendergast was involved in the trial of the infamous Burgess Gang. The gang had committed a series of grisly murders including the infamous Maungatapu murders of 1866. The first trial resulted in the execution of Burgess, Kelly and Levy, while the second trial acquitted Wilson of wrong-doing and unsuccessfully attempted to lay the charge of murder on Sullivan. As the key Crown witness, Sullivan (one of the gang members), needed protection before, during and after the second trial, and much of Prendergast's correspondence is from Dunedin regarding a case being heard in Nelson and Wellington.¹⁰¹

In November 1866, Prendergast authorised the removal of Sullivan from Nelson gaol to Hokitika for the second trial. The decision was difficult to enforce as Sullivan was possibly the most hated man in the colony at this point. Sullivan's movements were to be kept secret but, "Despite this, word leaked out, and when the steamer carrying the "informer" was seen off Hokitika in December, a large crowd was awaiting

⁹⁸ Appointment, James Prendergast Papers, MS-Papers 730.

⁹⁹ Legal Opinion by James Prendergast for Walter Lawry Buller, 15 June 1869, Buller Papers, Micro-MS-Coll-0048, Alexander Turnbull Library, Wellington.

¹⁰⁰ Justice Department Records.

¹⁰¹ Letter from James Prendergast, Dunedin, Justice Department Records, J1 66/2678.

developments. All available police marched to the wharf, surrounded by a mob calling for Sullivan to be lynched. When the passengers began disembarking, there was no sign of him amongst the waiting police. He had been brought ashore in a whaleboat while the vessel was still outside the bar and was already in the Revell Street Gaol.”¹⁰²

The final province to be created before the end of the provincial system in 1875 was that of Westland. It became an independent county on 1 January 1868 and a Province on 1 December 1873.¹⁰³ As a developing province, a court system was needed to administer justice. Prendergast was involved in the appointing of a District Court judge in Westland during 1870 and the establishment of rules and regulations for the Court.¹⁰⁴ The telegraph provided an effective form of communication between Wellington and Hokitika during this period.

Even before Prendergast’s elevation to Attorney-General on 20 October 1865, his legal expertise was being utilised by the Government. During the passing of the Leases and Sales of Settled Estates Bill in 1865 by the Weld Government, Prendergast gave his advice on proposed amendments and additional clauses.¹⁰⁵ Sewell had engineered Prendergast’s appointment to bolster the amount of legal expertise in Parliament. While leaders such as Fox and Sewell were legally trained, they did not have the practical expertise of men such as Prendergast and Whitaker. Prendergast’s legal comments demonstrate an impressive command of colonial law, especially for a man who had been practising in the colonies for only three years.

As Attorney-General, Prendergast was ably assisted by a small, but industrious, staff. When Prendergast first became Attorney-General he presided over the Judicial Branch of the Colonial Secretary’s Office. A.G. Fountain was the permanent head of

¹⁰² Young, p. 47.

¹⁰³ McIntyre and Gardner (eds.), p. 74.

¹⁰⁴ Justice Department Records.

¹⁰⁵ Advice from Prendergast, Justice Department Records, AG 65/1521.

the Judicial Branch but was referred to as the Assistant Law Officer. The Judicial Branch transformed into the Department of Justice in 1872.¹⁰⁶ Fountain was an able and efficient administrator and of great assistance to Prendergast during his time as Attorney-General. Another key figure on Prendergast's staff was William Pharazyn, who would later become a leading Wellington lawyer.¹⁰⁷ Pharazyn was also referred to as Assistant Law Officer.

The final years of Prendergast's time as Attorney-General were dominated by the bitter and protracted dispute over the abolition of the provinces. Throughout the period 1865 to 1875, tension had been evident between provincialists led by Grey and Fox and centralists led by Stafford. In 1872, Colonial Treasurer Julius Vogel requested an opinion from Prendergast over responsibility for toll collection at the Wanganui Bridge. Prendergast's opinion reflects an attempt to address the concerns of both province and central government:

the Colonial Treasurer [Vogel] cannot now insist upon receiving the tolls or appointing collectors. Nevertheless, the Colonial Government cannot, by anything that has taken place, be deemed to have assented to the Province denuding itself of those revenues which are derivable from the tolls.¹⁰⁸

The argument over the Provinces, originally established by George Grey under the Constitution Act 1852, reached a climax during 1874-5. In the high-profile Court of Appeal case, *Attorney-General v Bunny*, the Wellington Provincial Council represented by William Travers faced Attorney-General Prendergast representing the Vogel Government. The Bridges, Roads, and other Works Appropriation Act 1874, passed by the Wellington Provincial Council was disallowed by the Governor. The Bench of the Court of Appeal hearing the case consisted of Arney CJ, Johnston J, Gresson J and Richmond J. A year later, with the retirement of Arney, these judges

¹⁰⁶ Information in Justice Department Records Finding Aid, National Archives, Wellington.

¹⁰⁷ J. Millen, *The Story of Bell Gully Buddle Weir, 1840-1990* (Wellington: Bell Gully, 1990), p. 53.

¹⁰⁸ Opinion of the Attorney-General on the Wanganui Bridge Tolls, *AJHR*, 1872, G-19.

would be under the leadership of Prendergast. William Fitzherbert, the ultra-provincialist, and his Treasurer, Henry Bunny, challenged the ability of the Government to intervene in provincial law-making.¹⁰⁹ Prendergast was successful and a year later the Provinces were abolished under the Abolition of Provinces Act 1875. Ironically, the 1875 Act was passed by Vogel's Government. Vogel had originally been a die-hard defender of the provincial system.

Prendergast supported Vogel's move to abolish the Provincial system. Prendergast, in one of his final acts as Attorney-General based his opinion on an Act of the Imperial Parliament (31 and 32 Vict, or 1868/9) which had the long title, "An Act to declare the Powers of the General Assembly to abolish any Province, or to withdraw from any such Province any part of the Territory thereof."¹¹⁰ With the backing of Imperial Britain and the Vogel Government, the Provinces were swept aside despite a desperate effort by George Grey to rally support for their continued existence. In this matter of grave political importance, Prendergast looked towards English legal experts to support his finding:

though I see no room for doubt or question, I think that it would be well that the Secretary of State should be asked to take the opinion of the Law Officers in England; and if any doubt whatever is entertained by them, that a Bill should at once be passed for removing the doubt.¹¹¹

This ultimate reliance on English support survives today in the New Zealand legal system with the final appeal to the Privy Council.

Prendergast's views on the Provinces debate aroused the anger of George Grey. While Chief Justice in August 1875, Prendergast defended himself against charges from Grey that he had later expressed a differing opinion about the power to abolish

¹⁰⁹ *Attorney-General v Bunny*, *AJHR*, 1874, A-4.

¹¹⁰ Opinion of the Attorney-General on the Power of the General Assembly to abolish Provinces, *AJHR*, 1875, A-8.

¹¹¹ Opinion of the Attorney-General on the Power of the General Assembly to abolish Provinces, *AJHR*, 1875, A-8.

the provinces. Speaking in Parliament, Grey claimed that Prendergast had later given a differing opinion supposedly supporting the provinces, but Prendergast flatly denied this in a letter dated 2 August 1875. Prendergast's relationship with the 'Liberal' leaders, Grey and Stout, was often strained. With such an influential position, Prendergast was always bound to cause offence to some parties. The role of Attorney-General required opinions on extremely controversial issues and the drafting of pivotal legislation. Much of the key legislation passed by Prendergast during the period 1865-1875 would be interpreted by him as Chief Justice, centring an extraordinary amount of legal power in one man. While often soft-spoken and retiring, Prendergast's power was real and his influence growing all the time.

As Attorney-General, Prendergast also represented the Government in the Supreme Court and Court of Appeal (though primarily in the Court of Appeal). Prendergast was involved in a number of important cases from 1865 to 1875. Many of these cases were reported in the Court of Appeal Reports, edited by Johnston J. After advocacy experience in London and Dunedin, Prendergast was a seasoned lawyer and proved an effective barrister in the Wellington Supreme Court. In his court appearances as Attorney-General, Prendergast worked with leading lawyers such as William Travers and argued against high-profile advocates such as Robert Stout and Frederick Chapman. The Court of Appeal Bench at this time, included Johnston and Richmond JJ, both of whom would later serve under Prendergast as Chief Justice. As Attorney-General, Prendergast shared his time between demanding legal trials and drafting important legislation and legal opinions.

5. Prendergast as Attorney-General II (drafting legislation)

One of Prendergast's most important legal legacies is the body of legislation introduced from 1865 to 1875. Prendergast played an integral role in the formulation of many of the 926 Acts brought in during this ten year period. To gain an understanding of Prendergast's role in developing statute law, key statutes must be

analysed. From this analysis, the legal historian can view Prendergast's style, substance and reliance on other jurisdictions. While every statute was important enough to be passed by the New Zealand government, the Offences against the Person Act 1867 is of more general and lasting importance than, for example, the Wairarapa Racecourse Exchange Act 1867. It must also be pointed out that Prendergast was aided in the formulation of legislation by fellow politicians, his staff in the Judicial Branch of the Colonial Office and other leading figures. Legislation from the 1860s and 1870s has similarities and differences to the legislation of the present day. Much of the legislation is brief and written in semi-archaic English, for example, "Subject and in addition to the conditions hereinbefore contained every such lease shall contain such covenants stipulations and conditions as the Court shall decree expedient with reference to the special circumstances of the demise."¹¹² There is also a heavy reliance on English legislation and sometimes wholesale adoption of specific English statutes.

The legislation from 1865 to 1875 covers a range of areas, though there is a clear emphasis on land law and introducing a criminal code. Both these areas were of particular interest to Prendergast. Certain statutes deal with issues that are non-existent or of little relevance to present day society, for example, the Railway Offences Act 1865. Some statutes are still very relevant, for example, the Debtors and Creditors Act 1865. No Acts from the period 1865 to 1875 are presently in force, but many have been used as the basis for more recent pieces of legislation.

Commentators on Prendergast's statutes focus on his criminal legislation and dense prose. Prendergast's contemporary, William Gisborne, described the statutes as, "shocking examples of the old style of Acts of Parliament in the time of the Georges, when 'words, words, words', paraphrase and parenthesis created a block worse than any caused by carts, cabs, and 'buses in these days in the City.'¹¹³ In his dictionary entry, Scholefield cites Prendergast's impressive achievements in "consolidating the

¹¹² Leases and Sales of Settled Estates Act 1865, s3.

¹¹³ Gisborne, p. 221.

criminal law of the Colony, and succeeded in getting passed by Parliament no less than 94 acts with this object.”¹¹⁴ Prendergast had no practical experience in legal drafting when he became Attorney-General in 1865, but he did have recent experience of English legal developments. As Attorney-General, Prendergast relied heavily on Imperial legislation. Prendergast had a moderate amount of success in modifying English law to fit the New Zealand environment. In certain areas, such as law relating to Maori, Prendergast failed to modify ‘foreign’ law to take into account the presence of Maori society.

The growing importance of legislation has been a theme throughout New Zealand legal history. Following the shift in focus of English law, from case law to statute, New Zealand has become one of the most heavily legislated nations in the world. The speed and flexibility of statute law was of great assistance in the task of quickly creating a settler society in New Zealand. Case law takes many years to develop and New Zealand judges tended to rely heavily on English common law until relatively recent times. In creating the unique New Zealand legal system, the statute has been the most effective tool and, therefore, New Zealand Governments have always wielded a large amount of power.

When analysing the importance of statutes from well over a century ago, the historian tends to focus on statutes which have continued to have influence in hindsight. For example, during Prendergast’s time as Attorney-General, landmarks statutes were passed such as the Maori Representation Act 1867 (which created the 4 Maori seats), the Land Transfer Act 1870 (which introduced the Torrens System of land registration), the New Zealand Law Society Act (which created the organisation), and the Offences Against the Person Act 1867 (which helped form the basis of the Crimes Act 1961). Unlike the present day, legal expertise was a relatively rare commodity in mid-nineteenth century colonial New Zealand. Prendergast, though aided by competent colleagues, demonstrated strong legal leadership in his legislative actions.

¹¹⁴ G.H. Scholefield (ed.), *A Dictionary of New Zealand Biography* (Wellington: Department of Internal Affairs, 1940), p. 184.

The success of his legislation increased his reputation and was a factor in his appointment as Chief Justice in 1875.

While serving in the Legislative Council, Prendergast initiated and introduced 30 public bills. Prominent amongst these Bills were the Sale and Lease of Settled Estates Bill, the Criminal Law Procedure Bill, the Justice of the Peace Bill, the Offences against the Person Bill and the Lunatics Bill. This was an impressive achievement but these efforts formed only a minority of the 176 public bills introduced during 1865 and 1866.¹¹⁵ It is unclear whether Prendergast drafted the 146 public bills which he did not introduce.¹¹⁶ Officially, the Attorney-General was responsible for the drafting of legislation:

the work of drafting legislation was first carried out by the Attorney-General and his officers. In 1873 a Crown Law Office was set up, and four years later the first Law Draftsman was appointed as a member of this Office.”¹¹⁷

After being made non-political Attorney-General in March 1867, Prendergast would have been able to devote more time to the drafting process. It is highly probable that, while Prendergast may not have individually composed every statute from 1865 to 1867, he would have had an integral role in the formation of the legislation. Therefore, the body of legislation passed between 1865 to 1875 will be referred to as ‘Prendergast’s statutes’.

Prendergast’s involvement in creating statute law began in 1865. In the Journal of the Legislative Council 1865, Prendergast is credited with initiating the following public bills: Sale and Lease of Settled Estates, Bank Shareholders Liability (lapsed), District Courts Act Amendment, Sale of Poisons Regulation (lapsed),

¹¹⁵ *Journals of the Legislative Council*.

¹¹⁶ From 1865 as ‘solicitor-general’ Prendergast would have aided Sewell. From 20 October 1865 as Attorney-General, Prendergast would have been responsible for drafting legislation but would also have been spending a large amount of his time in the Legislative Council.

¹¹⁷ J.B. Ringer, *An Introduction to New Zealand Government* (Christchurch: Hazard Press, 1991), p. 180.

Commencement of Acts, Otago Provincial Public Offices Site, Printing and Publishing Regulation (lapsed), Fisheries Protection (lapsed), Legislative Council Quorum, Grants and Leases Validation (lapsed).¹¹⁸ Important Acts passed in 1865 included the Debtors and Creditors Act, Law Practitioners Amendment Act, Native Lands Act (which set up the Native Land Court and discussed Crown Grants) and the New Zealand Settlements Amendment and Continuance Act. An Act which had a direct impact on Prendergast was the Wellington Supreme Court House Site Act 1865. Under this Act, the Government acquired land from the Presbyterian Church to use as a site for the new Court in which Prendergast would act as an advocate and adjudicator.

During 1866, Prendergast was political Attorney-General and had an active role in drafting and introducing legislative into Parliament. The following public bills were initiated by Prendergast; Partnership Law Amendment, Resident Magistrates (lapsed), District Courts Jurisdiction Extension, Criminal Law Procedure, Appeals from Justice (lapsed), Justices of the Peace, Offences against the Person, Summary Procedure on Bills Amendment Act, Supreme Court Practice and Procedure Amendment, Sale of Poisons, Aliens, Law Practitioners Amendment Act, Innkeepers Liability, Justices of the Peace Acts Repeal, Intestate Estates Amendment Act, Affirmation in lieu of Oaths in Criminal Proceedings, Lunatics, Justices Protection, New Zealand Post Office Amendment Act (No. 2), Wellington Hospital Reserve (lapsed).¹¹⁹ In his first full year as Attorney-General, Prendergast made his presence felt with a raft of legislation. Legislation of particular importance included the Law Practitioners Amendment Act 1866, Criminal Law Procedure Act, Justices of the Peace Act and Offences against the Person Act. One of Prendergast's main tasks was to regulate the criminal law of New Zealand. Criminal law in the colony before the Criminal Code Act 1893 has been described as:

both substantive and procedural, was often obscure and needlessly

¹¹⁸ *Journals of the Legislative Council*, 1865.

¹¹⁹ *Journals of the Legislative Council*, 1866.

complex. The New Zealand Parliament paid little attention to the criminal law for many years, and what little was done was normally only by way of adoption of changes made in England....in 1867 a number of statutes were passed to adopt the English reforms of 1861.¹²⁰

This statement is accurate when applied to the period before 1866, but unfair if applied to the period following Prendergast's appointment as Attorney-General. Prendergast introduced a range of relatively accessible criminal statutes from 1866 onwards including the Criminal Law Procedure Act 1866 which amended "the law of evidence and practice on Criminal Trials and for facilitating the despatch of business before Grand Juries."¹²¹ This statute regulated evidential procedure in criminal trials including summing-up and examination of witnesses. The Justices of the Peace Act outlined the jurisdiction of Justices in a detailed fashion. Justices of the Peace were given an impressive degree of power to hear cases of assault, larceny and indictable offences. With a Court system limited in judges and funding, Justices played an integral role in the legal system of the nineteenth-century. The Offences against the Person Act focussed upon the unlawful administration of poison but also touched upon attempted murder. Several of the most high-profile criminal trials during Prendergast's career, including the Jarvey trial, featured unlawful use of poison.

The most productive year for Prendergast as a legal draftsman was 1867. During this year, Prendergast was relieved of his duties as a politician and could concentrate more fully on his role as a draftsman. In 1861, criminal law reform had taken in place in England. Six years later, Prendergast introduced these reforms to New Zealand.¹²² The most important criminal statutes were the Accessories Act, Coinage Offences Act, Forgery Act, Indictable Offences Repeal Act, Larceny Act, Malicious Injury to Property Act and Offences against the Person Act. Another major statute introduced during 1867 was the Bankruptcy Act. The year 1867 has been used as an

¹²⁰ Jeremy Finn, 'Development of the Law in New Zealand' in Spiller (ed.), *A New Zealand Legal History*, p. 103.

¹²¹ Long Title, Criminal Law Procedure Act 1866.

¹²² Finn, p. 103.

example of the New Zealand's heavy reliance on English law:

In 1867 amidst statutes which drew on Australian precedents [Neglected and Criminal Children Act and Introduction of Convicts Prevention Act] there were nine statutes which reproduced English enactments, seven transcribing recent English reforms of the criminal law, and the Old Metal and Marine Stores Dealers Act 1867 and the Bankruptcy Act 1867. That may have been an exceptional year, but only in that it showed in exaggerated form a common pattern.¹²³

The important criminal law statutes of 1867 begin by stating, "whereas it is expedient to consolidate and amend the Statute Law relating to...". The Larceny Act 1867 is representative of the criminal statutes in its description of the crime, outline of punishments and detailed referencing to different situations of larceny. Some sections remain apposite today, for example, Section 54 which deals with "Entering a dwelling house in the night with intent to commit any felony", while some are indicative of the time, "Killing hares or rabbits in a warren in the night-time".(Section 17) The Forgery Act 1867 provides examples of the continuing influence of British society on colonial New Zealand. Section 6 outlines the crime of "Forging an East India bond" while Section 16 describes the penalties for "Engraving or having any plate &c. for making notes of Bank of England or Ireland or other banks or having such plate &c. or uttering or having paper upon which a blank bank note &c. shall be printed".

The Offences against the Person Act 1867 was more comprehensive than its 1866 predecessor, covering homicide, attempted murder, assault, rape, child-stealing, bigamy, attempts to procure abortion and unnatural offences (sodomy, bestiality). While Prendergast's statutes were described as 'legal labyrinths',¹²⁴ Section 1 of the Act is very clear, "Whosoever shall be convicted of murder shall suffer death as a felon". The morality of the Victorian era is evident in most of the sections, particularly, Section 58, "Whosoever shall be convicted of the abominable crime of

¹²³ Finn, p. 110.

¹²⁴ Gisborne, p. 221.

buggery....shall be liable at the discretion of the Court to be kept in penal servitude for life or for any term not less than ten years.” Victorian standards were also applied in the Divorce and Matrimonial Causes Act 1877 in which a husband could seek a divorce if his wife had committed adultery, but a wife must prove adultery coupled with an aggravating circumstances such as bigamy to obtain a dissolution.(ss17-18) A husband could also claim damages from an adulterer in the similar way one could seek damages for property damage, but wife could not.(ss31-34)

Several important non-criminal statutes were also passed in 1867. The voluminous Bankruptcy Act was a vital piece of legislation in a growing colony which experienced boom and bust periods in rapid succession. The Armed Constabulary Act 1867 marked the beginnings of a state-run police force, taking responsibility for law enforcement away from the provinces. The attempts of the State to regulate Maori society increased during 1867 with the Native Schools Act which provided funds for Maori Schools, the Confiscated Lands Act which created the power to set aside reserves for Maori and the Maori Representation Act which created the four Maori seats in Parliament.

The year 1868 did not include the amount of landmark legislation that had appeared in 1867, but a number of important statutes were devised by Prendergast and his staff. Legislation provides the historian with an excellent impression of the important political and social issues of any given time. The Immigrant Act 1868 marked the beginning of mass immigration to New Zealand. Under the Act, Provincial Councils were authorised to make permanent appropriations for promoting immigration. The policies of Julius Vogel during the early 1870s would see a flood of immigrants enter New Zealand to aid in the building of the colony’s infrastructure. Not surprisingly, Prendergast’s speciality was legislation directly relating to the administration of law. During 1868, the Juries Act, Treason-Felony Act and Supreme Court Practice and Procedure Amendment Act were passed.

The continuing conflict between Maori and Paheka in 1869 led to the introduction of the Disturbed Districts Act. It would be difficult to imagine a clearer example of emotive legislation than this:

Whereas certain aboriginal Natives subjects of Her Majesty within the Colony of New Zealand have for a long time been and are now in open rebellion and engaged in levying war against the Queen many of whom have been guilty of outrages and atrocities such as murder rape torturing of prisoners and cannibalism. And whereas in the course of such rebellion large tracts of settled country have been devastated whole families have been massacred in cold blood and much property has been destroyed whereby the Colony has become impoverished its people disheartened and its resources exhausted in the attempt to suppress rebellion. And whereas it is expedient to amend and adapt the ordinary course of law for the purpose of promptly bringing to punishment persons engaged in such rebellion.

The patience of New Zealand's ruling elite had run out and, in order to finish the conflict, the rule of law was compromised. The Act was only imposed for a short period, but its sweeping disregard for basic justice reflected the bitter state of New Zealand race relations during the 1860s. Section 20 virtually gave the colonial forces discretion to act in any way necessary: "No act matter or thing done in any such proclaimed district as aforesaid in pursuance or execution of any power or authority hereby conferred shall be questioned in any Court having jurisdiction civil or criminal except as herein mentioned."

An impressive range of statutes were produced in 1870, including the landmark Land Transfer Act. This Act introduced the Torrens system of registration of title to land. This system had been originally introduced in South Australia in 1858 by Robert Richard Torrens and had proved a marked improvement on earlier systems.¹²⁵ The Torrens system continues to be used (in a modified form) today and is the basis of New Zealand's land law. Prendergast's expertise in criminal and land law were to prove invaluable during his career as Attorney-General and Chief Justice. Another

¹²⁵ Peter Spiller, *Butterworths New Zealand Law Dictionary* (Wellington: Butterworths, 1995), p. 298.

major piece of legislation introduced in 1870 was the Immigration and Public Works Act 1870. This comprehensive statute enabled the construction of roads, railways, waterworks and encouraged wide-scale immigration. The statute attempted to define the differing powers of central government and the provinces. The Immigration and Public Works Loan Act authorised Vogel and his allies to raise millions of pounds to finance public works schemes.

In the area of criminal law, 1870 introduced the Punishment of High Treason Act. In a humanitarian move, the penalty for High Treason was made less barbaric. The original punishment of being hung, drawn and quartered was modified. No longer would the felon be:

drawn on a hurdle to the place of execution and be there hanged by the neck until such person should be dead and that afterwards the head should be severed from the body of such person and the body divided into four quarters should be disposed of as His Majesty and his successors should think fit.

Instead, the guilty party would “be taken to the place of execution and be there hanged by the neck until such person be dead.(s3)

The grand schemes of Julius Vogel continued to dominate legislation during the early 1870s, for example, with more statutes in 1871 and 1872(Immigration and Public Works Amendment Act 1871/Immigration and Public Works Act 1872). Prendergast continued to introduce criminal legislation such as the brief Criminal Law Amendment Act 1872 and the Assaults of Constables Act 1873, but the pace of legislative reform had slowed from the heady days of the late 1860s. An example of key social legislation introduced during Prendergast’s term as Attorney-General is the Employment of Females Act 1873. The Act regulated the female workplace, restricting working hours to eight a day, providing set holidays and ensuring proper workplace ventilation. Inspectors were appointed under the Act to enforce its provisions.

Prendergast took a keen interest in the development of the New Zealand University system. The New Zealand University Act 1874, repealed the earlier 1870 Act and regulated the administration of Universities. The powerful University Senate was regulated under the Act, a panel of leaders which would include Prendergast only ten years later. The last pivotal piece of legislation introduced by Prendergast was the Abolition of the Provinces Act 1875. The political divisions this Act caused have been discussed earlier, but the statute itself clearly shows how complete the centralist's victory was. Grey's cherished 1852 Constitution was significantly altered by Section 3 of the Act, "The second section of the Constitution Act is hereby repealed, and the Provinces of Auckland, Hawke's Bay, Taranaki, Wellington, Nelson, Marlborough, Westland, Canterbury, and Otago shall be and are hereby abolished." Thus ended the career of Prendergast the legislator. Prendergast immediately began his career as the nation's leading adjudicator.

6. The personal affairs of Prendergast while Attorney-General

With the establishment of a permanent, non-political Attorney-Generalship in 1867, Prendergast left Dunedin and focused all his attentions on Wellington. During the period 1865 to 1867, he had been torn between his practice in Otago and his Government position in Wellington. With limited transport available, this situation was difficult and untenable in the long-term. While Dunedin remained the focus of the New Zealand legal profession during the 1860s and early 1870s, moving to Wellington introduced Prendergast to the most powerful politicians in the colony. Not only did he mix with Wellington's political elite, but all the politicians who journeyed from their home provinces to meet in the capital city during the parliamentary session. Letters from the period include a dinner invitation from Donald McLean to James and Mary Prendergast in August 1868.¹²⁶ Prendergast mixed with McLean, both professionally and socially, providing an example of his

¹²⁶ Donald McLean to James Prendergast, August 1868, McLean Papers, MS-Papers 0032, Alexander Turnbull Library, Wellington.

powerful new connections.

Prendergast bought land on Bolton Street and began to build his house, using his comfortable salary and probably savings from five years of successful practice in Dunedin. The impressive house with a panoramic view of the Wellington harbour took some time to build and much interest was displayed in its construction. Prendergast's Uncle Thomas Jeffery mentions the building in a letter from 1869, "Your house when built will I hope be all that you and Mrs Prendergast can desire."¹²⁷ Prendergast would remain in the Bolton Street address until his death in 1921.

Prendergast's main concern from 1865 to 1875 was his flourishing professional career. Outside involvements were limited, though family matters did demand his attention. The career and life of James' brother, Michael, disintegrated during the 1860s, placing James in the difficult position of having to support his brother and his brother's son. In a letter dated 17 February 1866, from Thomas Jeffery, mention is made of Michael's problems, "I hope that what Michael has suffered will be one means of inducing him to alter his conduct for the future and that he will not disgrace himself and the Attorney General."¹²⁸ Philip's continued mental illness also weighed on the mind of Prendergast during his time as Attorney-General. During the late 1860s, the extended Prendergast family in London was in crisis over family money and looked to James for assistance, "We all agree in what you say about carefully avoiding any family feud and above all law proceedings. We all wish very much that you were in England."¹²⁹

Letters from Manning to Prendergast during the early 1870s indicate Prendergast's

¹²⁷ Letter, Thomas Jeffery to James Prendergast, 22 November 1869, D.O.W. Hall, MS-Papers 986, Hocken Library, Dunedin.

¹²⁸ Letter, Thomas Jeffery to James Prendergast, 17 February 1866, D.O.W. Hall, MS-Papers 986.

¹²⁹ Letter, Charles Manning to James Prendergast, 17 January 1867, D.O.W. Hall, MS-Papers 986.

ultimate aim of a position on the Bench.¹³⁰ Manning attempted to use Prendergast's new-found power and influence to further his own stifled career, "I thought perhaps that you as Attorney General might be able to give a hand to a relative and create a necessity for a suitable post for him. Others in high office do, why shouldn't you?"¹³¹ Nepotism was a factor in Victorian politics and law, with Prendergast later providing work for his nephews, Michael, Henry Hall and Charles Prendergast Knight. Manning's letters to Prendergast often provide insights into the relationship between the New Zealand and British legal systems, for example:

I heard your promotion in a letter from home last week and write a line to congratulate you. The only thing against it is that it will probably interfere with your coming over. Perhaps you can imitate the example of the Law Officers in this Country [Ireland] who the moment they are raised to the Bench take their Law Libraries and go to reside miles away in the Country. They sit in Court of course occasionally but as a rule if you want to find an Irish Common Law Judge you must look for him at the Athendum Club Pall Mall or...at his Country seat in Ireland.¹³²

Manning's rather cynical view of Irish Judges would be almost the opposite of Prendergast's experience as Chief Justice of New Zealand from 1875 to 1899.

7. Conclusion: An analysis of Prendergast's career as Attorney-General: Successes vs Failures

James Prendergast achieved success as Attorney-General. This success enabled Prendergast to take the position of Chief Justice in 1875. Through legal talent, good connections and sheer hard work, Prendergast rose to the pinnacle of the New Zealand legal profession. The non-political nature of the Attorney-Generalship from 1867 to 1875 suited Prendergast's strengths as a legal administrator. While his performance as a Legislative Councillor (1865-7) was sound, his main achievement

¹³⁰ Letter, Charles Manning to James Prendergast, 1 May 1872, D.O.W. Hall, MS-Papers 986.

¹³¹ Letter, Charles Manning to James Prendergast, 7 January 1874, D.O.W. Hall, MS-Papers 986.

¹³² Letter, Charles Manning to James Prendergast, 24 December 1874, D.O.W. Hall, MS-Papers 986.

in this role was providing helpful legal advice, rather than political leadership. Prendergast knew the importance of good connections, but did not owe his rise to power to any one man. Sewell, Stafford and Vogel all supported Prendergast at key moments in his career. Essentially, it was Prendergast's skills and support of the governing elite that guaranteed his success. While Prendergast did speak out on unpopular issues, for example, Stafford's accommodation in 1869, his support was often with the powerful majority. With the exception of Maori issues, Prendergast was a patient and reasoned Councillor and Attorney-General.

The period 1865 to 1875 were pivotal years in New Zealand's history. Prendergast's views on leading issues can be gauged by his actions as Attorney-General. Prendergast was a centralist, supporting the concentration of power in Wellington. He was also outspoken in his views on the New Zealand Wars. As with his judicial career, Prendergast's main failing as an Attorney-General was his inability to appreciate Maori culture and his emotive, almost political, approach to giving legal opinions regarding Maori rights.

Prendergast was always aware of his role as leader of the legal profession and sought to safeguard the rights of lawyers and judges. While his leadership of the New Zealand Law Society was largely token, his statutes and legal advice aided the development of the profession. In his opinions to the Government, Prendergast showed expertise on a range of issues, though his legal opinions on the New Zealand Wars were not triumphs of justice or legal thought. The frustrations of fighting Te Kooti and Titokowaru led Prendergast and the Stafford Government to ignore basic legal rights and privileges. The later stages of the New Zealand Wars would permanently fix Prendergast's opinion on Maori society and influence his decisions as Chief Justice.

The amount of work Prendergast achieved over his ten years as Attorney-General was impressive. Prendergast's output included two years as an active Legislative

Councillor, an integral role in the creation of hundreds of statutes and a host of legal opinions. Prendergast's workload was reduced somewhat by his strong reliance on English precedent, especially in the drafting of legislation. Under enormous pressure to reform New Zealand law in readiness for large-scale national development, Prendergast sometimes adopted English law without effectively modifying it to the New Zealand colonial environment. Despite this limitation, Prendergast's statutes included real achievements in the codification of criminal law and the introduction of a new system of land registration. Prendergast's statutes were efficiently drafted and introduced, though often lacked clarity. The Victorian frame of mind is evident throughout his body of legislation. The statutes range from the long-lasting and efficient Land Transfer Act 1870 to the emotive and unjust Disturbed Districts Act 1869.

As Attorney-General, Prendergast had finally found an arena in which his talents could flourish. As a top legal administrator, Prendergast's diligence and patience were well rewarded. By 1875, he had cemented his place amongst the New Zealand elite. While his brothers had both met with disaster and disappointment, James Prendergast had become a sterling example of colonial success. The stage was now set for his most important historical role, as Chief Justice of New Zealand.

Chapter 6

The role of Chief Justice and the decisions of James Prendergast, 1875-1899

1. Introduction

While James Prendergast made a lasting impact as a lawyer and Attorney-General, it was his career as Chief Justice which provides his primary historical legacy. Prendergast's 24 years as Chief Justice (April 1875 to May 1899) stands as the second longest Chief Justiceship after Robert Stout's tenure of 27 years. As Chief Justice, Prendergast became the head of the New Zealand judiciary. An analysis of Prendergast's role as Chief Justice requires knowledge of his fellow judges, in particular, Prendergast CJ's fellow Wellington Supreme Court judge, Richmond J. The nature of the Chief Justiceship from 1875 to 1899 has many similarities to the present day, but also some key differences. As the Supreme Court judges also acted as Court of Appeal judges during the late nineteenth-century, Prendergast CJ played an integral role as head of the Court of Appeal.

A judicial biography requires a close analysis of the body of judgments delivered by the individual under scrutiny. Prendergast CJ delivered approximately 600 judgments which were recorded in Law Reports. These reported cases provide the legal historian with insights into his judicial ability, jurisprudential background and intellectual framework. The New Zealand Law Reports and their predecessors provide descriptions of key legal decisions. Prendergast CJ often sat with Richmond J on the Supreme Court Bench in Wellington and on the Court of Appeal Bench without actually delivering the judgment. Therefore, what remains for analysis is only an incomplete portion of Prendergast CJ's decisions.

It is important to note that decisions which were considered pivotal during the late nineteenth-century do not necessarily leave a legal legacy. By analysing more recent law reports, Prendergast CJ's judgments which have been utilised during

the twentieth century can be discovered. This is his true legal legacy. Prendergast CJ's key areas of judicial expertise and prominence included land law, criminal law and law relating to Maori. Prendergast CJ's decisions regarding Maori land have become his most obvious legal legacy. Also of historical interest are Prendergast CJ's judgments in high-profile 'celebrity' cases such as the Minnie Dean trial and the controversial case concerning the appointment of Edwards J.

Controversy was apparent throughout Prendergast's career as Chief Justice. His term began with a long-running and bitter feud with George E. Barton. During his first few years as Chief Justice, the Barton affair threatened to undermine Prendergast's authority as a judge. Prendergast CJ's reputation as a fair adjudicator resulted in his voyage to Raratonga in 1897 to manage the constitutional crisis that had developed there. Prendergast CJ also served as chairman of the landmark Royal Commission on Law Procedure during the early 1880s.

While a judge's primary concern is practical decision-making, Prendergast CJ's judgments reveal a man heavily affected by the jurisprudence of his era. The theories of legal philosophers such as John Austin are evident in Prendergast CJ's decisions. On a more general level, the influential arguments of Henry Spencer and other creators of the 'Victorian Frame of Mind' affected Prendergast CJ. Another important factor in Prendergast CJ's later career was his family life. The ill-health of his wife drained his energies during the 1890s and her death in 1899 effectively ended Prendergast's working career.

It is only recently that Prendergast has become a well-known Chief Justice. Before 1975, he had received little historical recognition and would have been placed alongside low-profile Chief Justices such as George Arney, rather than high-profile ones such as William Martin and Robert Stout. Prendergast CJ's decisions on Maori land became increasingly topical as the twentieth-century drew to a close, and his name is arguably as recognisable to readers of history as

William Martin or Michael Myers. Unlike Martin CJ, Prendergast CJ's recognition has been largely negative, and commentators have largely ignored his judicial work outside law relating to Maori. Prendergast CJ has become a two-dimensional judge. A third dimension is needed, if Prendergast CJ is to be properly understood and critically analysed.

2. The nature of the position of Chief Justice

As Chief Justice, Prendergast was the most important legal figure in New Zealand. As head of the Supreme Court and the Court of Appeal, the Chief Justice wielded an impressive amount of power in the colony's legal system. Despite being the most powerful figure, several of the judges working under his leadership arguably had greater public profiles. Alexander Johnston, a Scottish lawyer trained in London, became a Supreme Court puisne judge in 1858 and continued until his death in 1888. During the period 1875 to 1888, Johnston J was second-ranking judge after Prendergast CJ and served as acting Chief Justice in both 1867 and 1884.¹ Johnston J sat in Wellington until Prendergast's elevation to Chief Justice in 1875. During 1865 to 1875, Prendergast appeared before him as Attorney-General on a number of occasions. To make way for the new Chief Justice, Johnston J moved to Christchurch. Scholefield describes Johnston J as "A man of great culture and high attainments, he had a dry humour, was socially popular and interested in social movements, and was a lover of music in all forms, and of art."²

Relations between Prendergast CJ and Johnston J seemed cordial, though Johnston J was unimpressed with his removal to Christchurch in 1875:

the sum mentioned in your letter [is] quite inadequate to compensate me for the loss and charges I shall be put to by my removal....It is important that I should know the final decision of the Government on

¹ G.H. Scholefield (ed.), *A Dictionary of New Zealand Biography* (Wellington: Department of Internal Affairs, 1940), p. 439.

² Scholefield (ed.), p. 439.

the subject as soon as possible; inasmuch as I shall have but a brief period for making the necessary preparations for breaking up my home, disposing of my property, and making fresh arrangements for my family.³

Prendergast CJ's nephew, Henry Hall, blatantly criticised Johnston J in a private letter to his uncle on 28 May 1884, "The general opinion is that Johnston acting C.J. has been most unbearable in his bearing on the Bench this Court of Appeal".⁴ It is unlikely that Hall, who had great respect for his uncle, would criticise Johnston J in this fashion, if Johnston J was a close associate of Prendergast CJ.

Prendergast CJ's strongest ally on the Supreme Court Bench was Christopher William Richmond. Their role in the *Wi Parata* decision is discussed in Chapter 7. The primary reason for the closeness of their relationship was that both sat in Wellington. In such a situation, mutual admiration will build a strong friendship, but mutual dislike would be disastrous. As mentioned in Chapter 2, Richmond J's background was very similar to Prendergast CJ's and the two men formed a supportive working partnership which lasted for two decades. Richmond J began his judicial career in 1862, after a brief legal partnership with Thomas Gillies, who would also become a Supreme Court judge. Initially, Richmond J served in Dunedin and Prendergast conducted a number of cases before him during the period 1862 to 1867.⁵ Richmond J moved to Wellington in 1873 and remained there until his death in 1895. Richmond J's death was a blow for Prendergast CJ⁶ but as Richmond J had suffered from ill-health for many years, it was not unexpected.

³ Johnston J to the Colonial Secretary, 14 November 1874, *AJHR*, 1875, H-28, p. 2.

⁴ Henry Hall, Wellington, to James Prendergast, Britain, 28 May 1884, D.O.W. Hall Papers, MS-Papers 986, Hocken Library, Wellington.

⁵ Keith Sinclair, 'Christopher William Richmond', in *The Dictionary of New Zealand Biography: Volume One, 1769-1869*, edited by W.H. Oliver and Claudia Orange (Wellington: Allen & Unwin/Department of Internal Affairs, 1990), pp. 365 and the *Macassey Law Reports*.

⁶ Diary, Charles Prendergast Knight, 1895, Prendergast Papers, MS-Papers 1791, Alexander Turnbull Library, Wellington.

Three new Supreme Court judges were appointed in the judicial re-shuffle of 1875, Prendergast, Joshua Williams and Thomas Gillies.⁷ Gillies, originally from Scotland, was the first New Zealand judge to have qualified for admission to the Bar by New Zealand examination.⁸ Like Richmond, Gillies arrived in New Zealand during the early 1850s and had firmly established himself by the time he became a judge. Prendergast arrived approximately ten years later than Gillies and Richmond, but was favoured over both Gillies and Williams for Chief Justice when the three men were appointed in 1875. Gillies was a practising lawyer in Dunedin during the 1860s and would have known Prendergast during that time. While serving as Attorney-General in 1862, Gillies was embroiled in the New Zealand Wars and struggled to pursue his political career in Wellington while conducting a practice in Dunedin. These experiences and problems were shared by Prendergast. Like Johnston J and Richmond J, Gillies J never had the opportunity to enjoy retirement. After serving fourteen years on the Auckland Bench, Gillies J died in 1889. He was considered an able judge with a liberal bent. During the controversial trials of Parihaka's leaders, Gillies J was uncomfortable with the treatment of the Maori leaders. While Prendergast CJ, Johnston and Richmond JJ all shared hard-line views on Maori affairs, Gillies J could be considered more racially tolerant.

The year 1875 was a watershed one for New Zealand judicial history. A new generation of judges replaced three retiring judges who had been involved in setting up the New Zealand legal system during its formative years (1840s-1860s). Three of the five Supreme Court judges retired in 1875, Arney CJ (Auckland), Gresson J (Christchurch) and Chapman J (Dunedin). Prendergast CJ took Arney's position of Chief Justice while Gillies J received Arney CJ's seat on the Auckland bench. Johnston J was shifted to Christchurch to replace Gresson J and make way for Prendergast CJ, while Williams J became the new judge for Dunedin.⁹

⁷ Judicial Appointments, *AJHR*, 1875, H-28.

⁸ Hugh Rennie, 'Thomas Bannatyne Gillies', in Oliver and Orange (eds.), p. 149.

⁹ Judicial Appointments, *AJHR*, 1875, H-28.

Joshua Strange Williams was possibly the most popular and widely respected New Zealand judge during the nineteenth-century. While William Martin and Henry Chapman may have been his intellectual equals, Williams J was venerated by the New Zealand legal profession, especially in his later years. Williams arrived in New Zealand in 1861 and spent most of his practising years in Christchurch, before being elevated to the bench in 1875. The *New Zealand Mail* claimed that Prendergast was responsible for Williams' rise, "Mr Justice Williams was raised to the bench and assigned to that district. The new judge had previously been Registrar-General of Lands, and he was discovered, as the saying goes, by the Chief Justice when the latter was Attorney-General."¹⁰ As with Johnston J and Gillies J, Williams J would have come into contact with Prendergast CJ primarily during Court of Appeal sittings in Wellington.

It seems Prendergast CJ and Williams J had a healthy working relationship. Some members of the profession felt that Williams J should have succeeded Prendergast CJ in 1899, as Williams J was the senior puisne judge.¹¹ The lawyer and politician, Robert Stout was chosen over Williams J, in the same way Attorney-General Prendergast was chosen over senior puisne judges in 1875. At the unveiling of Prendergast CJ's portrait in October 1899, Williams J spoke highly of his former leader:

I have had the honour and happiness of having been associated with Sir James Prendergast for all but a quarter of a century. During the whole of that time he worked with the utmost harmony and friendship, not only with myself but with every other Judge with whom he was associated. It is, indeed, difficult to imagine a more loyal or unselfish colleague....I can only say that it affords me infinite pleasure to be able to look upon the counterfeit presentment of my old colleague, and, I hope I may say, my old friend.¹²

¹⁰ *New Zealand Mail*, 1 June 1899, p. 41.

¹¹ Judith Bassett, 'Joshua Strange Williams', in Oliver and Orange (eds.), p. 580.

¹² *New Zealand Mail*, 12 October 1899, p. 36.

While Johnston, Richmond, Gillies and Williams JJ were the longest serving judges during Prendergast's chief justiceship, three others also adjudicated under Prendergast leadership, Conolly, Denniston and Edwards JJ. Edward Conolly replaced Gillies J in Auckland in 1889, though he also travelled on circuit to New Plymouth and Gisborne.¹³ Appointed in his late 60s, Conolly J was four years older than Prendergast but came to the bench 14 years later. John Denniston replaced Johnston J in Christchurch in 1889. Denniston had been a young man in Dunedin during the 1860s and was eventually admitted to the Bar in 1874.¹⁴ Therefore Denniston, Richmond, Gillies and Edwards JJ were all in Dunedin during the period 1862-1865, the time during which Prendergast established himself as a legal figure in New Zealand.

The most controversial judge to serve with Prendergast CJ was Worley Bassett Edwards. In 1890, Edwards J was appointed as the sixth member of the Supreme Court Bench. Provision was only available for five members, and thus began the long-running saga to prevent Edwards taking his position on the Bench. The case *Buckley v Edwards* and the Edwards J affair will be discussed later in this chapter. Prendergast CJ had opposed Edwards' appointment, but with Richmond J's death in 1895, Prendergast found himself sharing the Wellington bench with Edwards J in 1896. Ironically, Edwards J's nemesis, Patrick Buckley, initially replaced Richmond but died after only one year on the bench, to be replaced by Edwards J. Edwards J was the first judge to have his complete education in New Zealand. While an intelligent man, Edwards J was, "Naturally arrogant and vindictive, his behaviour may also have owed something to a feeling that fate had sentenced him to life in a coarse-grained colony." Edwards J also harboured great bitterness over his initial rejection as a judge during the early 1890s.¹⁵ One would imagine that

¹³ Judith Bassett, 'Edward Conolly', in *The Dictionary of New Zealand Biography: Volume Two, 1870-1900*, edited by Claudia Orange (Wellington: Bridget Williams Books/Department of Internal Affairs, 1993), p. 97.

¹⁴ Scholefield (ed.), p. 201.

¹⁵ Bernard Brown, 'Worley Bassett Edwards', in *The Dictionary of New Zealand Biography: Volume Three, 1901-1920*, edited by Claudia Orange (Auckland: Auckland University Press, 1996), p. 146.

sharing a bench with Edwards J would not be a pleasant experience, and only three years after Edwards J joined Prendergast CJ in Wellington, Prendergast CJ retired. There appears to be no obvious connection between the two events, as Prendergast CJ's retirement closely followed his wife's death.

Prendergast's success as Chief Justice of New Zealand must be placed in the context of New Zealand judicial history since 1841. William Martin was appointed first Chief Justice of New Zealand in 1841. From 1841 to 2001, there have been only twelve Chief Justices. From 1841 to 1926, there were only four. Martin CJ had a well-earned reputation as a liberal and a humanitarian. He also "closely identified himself with the missionary and evangelical aspirations of the Anglican church in the south Pacific".¹⁶ Martin CJ was a strong advocate for Maori and the Treaty of Waitangi. George Arney replaced Martin CJ in 1857 and served as Chief Justice until 1875. Prendergast's predecessor was quietly successful, working to establish the New Zealand legal system, and in particular, helping to fuse the common law and equity. In one of his few outspoken moments, Arney CJ called for social justice for Maori during the Taranaki War of 1860.¹⁷

When Prendergast CJ retired in 1899, he was the longest serving Chief Justice in New Zealand's brief settler history. This achievement was bested by Robert Stout, who acted as Chief Justice from 1899 to 1926. As mentioned in other chapters, Stout came into contact with Prendergast at various times during his long career in law and politics. While Stout CJ was a successful judicial administrator, he was ultimately less successful as a judge than one would have expected from one of the colony's leading legal figures. Stout CJ's judgments, "were seldom the product of prolonged deliberation, often being written in haste and lacking literary quality. One in three cases taken on appeal from his decisions

¹⁶ G.P. Barton, 'William Martin', in Oliver and Orange (eds.), p. 277.

¹⁷ Scholefield (ed.), p. 19.

was successful.”¹⁸ Unlike Prendergast, Stout was a liberal, both in politics and in his interpretation of the law. Therefore, of the first four Chief Justices, Prendergast CJ appears the most conservative.

Prendergast was appointed Chief Justice by the Vogel Government on 1 April 1875. Vogel’s Ministry had come to power in April 1873 and fell from power in July 1875. In a letter to the Colonial Secretary dated 20 February 1875, George Arney announced his retirement, “I think I understood you on recent occasions to say that arrangements were already in contemplation of the Government for the appointment of my successor.”¹⁹ Prendergast had been promised, by Fox’s Ministry, the next vacant seat on the bench of the Supreme Court. Fox’s Ministry fell in 1873 to be replaced by Vogel. Fox had refused to guarantee the Chief Justiceship to Prendergast if it should fall vacant and also refused to bind any other Ministry in any way.²⁰

Julius Vogel had been one of Prendergast’s first clients in Dunedin and was aware of Prendergast’s credentials. Prendergast had demonstrated a desire to join the Supreme Court Bench since his arrival in Wellington and was a clear choice for one of the three vacant positions in 1875. Vogel was not obligated to give Prendergast the Chief Justiceship, but, of the other eventual appointees, Williams lacked Prendergast’s experience and Gillies was an outspoken opponent of Vogel’s policies.²¹ Tradition held that puisne judges should not be elevated to the Chief Justiceship, restricting the chances of Richmond J and Johnston J. Prendergast was therefore the clear choice. Daniel Pollen, Colonial Secretary, informed Prendergast of his elevation officially on 1 April 1875:

I have the honour to inform you that His Excellency the Governor in Council has been pleased to appoint you to be Chief Justice of the

¹⁸ David Hamer, ‘Robert Stout’, in Orange (ed.), *The Dictionary of New Zealand Biography*, Volume II, p. 486.

¹⁹ Judicial Appointments, *AJHR*, 1875, H-28, p. 5.

²⁰ See Chapter 5.

²¹ Rennie, p. 149.

Supreme Court of New Zealand, and to assign to you the Judicial District of Wellington....Your salary will be at a rate of 1,700pounds a year.²²

Prendergast CJ appointed his nephew, Henry Hall, as his marshal and secretary. While Hall proved an able administrator, this appointment was indicative of nineteenth-century nepotism.

The appointment of a Chief Justice has a sizeable component of chance involved. When a Chief Justice resigns, the best possible candidate at that time must be appointed. Many of the most suitable people may already have taken puisne judgeships, lack the necessary experience or refuse to leave lucrative practices. While he was leader of the profession from 1875 to 1899, Prendergast CJ's ability as a judge was inferior to others such as Williams and Richmond JJ.

As Chief Justice, Prendergast CJ was based in the capital city of Wellington, but the Wellington District included Hokitika, Wanganui, Napier and Gisborne, requiring a great deal of travel and time away from home. Though Richmond J shared the Wellington District with Prendergast CJ, of the two men, Prendergast CJ was more robust and was often away on circuit. Therefore, Prendergast CJ played an important role in the legal history of the centres of Wellington, Wanganui, Napier and Gisborne.

As well as the judicial duties of a Supreme Court judge, the Chief Justice must fulfill the role of leader of the Bench and chief judicial administrator. This is a weighty task involving

the allocation of duties to the members of the judiciary; it includes dealing with the government of the day as spokesman for the judiciary; it covers acting as administrator of the government in the

²² Letter, Colonial Secretary to James Prendergast, 1 April 1875, Judicial Appointments, *AJHR*, 1875, H-28, p. 7.

absence of the Governor-General; above all it means being regarded by people generally as the embodiment of the law.”²³

Prendergast CJ’s speciality was the administration of the law and he proved himself an effective Chief Justice in this respect. By acting as Attorney-General and Chief Justice, Prendergast served at different times as both leader of the legal profession and the judiciary. His successor, Robert Stout, would also fulfill both these roles, though in a more high-profile fashion.

Through the period 1875 to 1899, Prendergast CJ issued judgments while dealing with the day to day administration of the New Zealand legal system. An analysis of the Department of Justice Indexes during this period reveals the variety of issues that Prendergast CJ faced. These issues included the formulation of rules for various Courts, opinions on controversial prison sentences, setting of bar examinations, assignment of judicial districts, appointment of secretaries, purchases of new technologies including telephones and typewriters and decisions regarding expenses.²⁴

Prendergast CJ was a strict manager of finances and was wary of expensive new developments:

When the judges of the Supreme Court were consulted in 1885 as to the employment of shorthand writers in that court, Sir James Prendergast gave it as his opinion that note-taking by stenographers could not in this colony supersede the taking of notes by judges and counsel respectively, but would be an assistance to the bench and Bar. “The whole question”, he added, “is one of expense”.²⁵

²³ Waldo Hilary Dunn and Ivor L.M. Richardson, *Sir Robert Stout: A Biography* (Wellington: A.H. & A.W. Reed, 1961), p. 162.

²⁴ Departmental Indexes, 1875-99, Justice Department Records, National Archives, Wellington.

²⁵ *New Zealand Mail*, 1 June 1899, p. 41.

3. Prendergast as Chief Justice I: Survey of decisions/judging

SECTION A: CASE ANALYSIS/JUDGING

As Chief Justice, James Prendergast delivered numerous legal judgments. The most important judgments were those which have remained as useful precedents up to the present day. This is the judicial legacy of Prendergast CJ. The controversial *Wi Parata* case is one such example, though its authority was diminished during the 1980s. Several other Prendergast judgments, such as *Merrie v McKay* and *Doyle v Edwards*, have been referred to three times in reported cases over the last four decades. While Prendergast CJ is not considered a great jurist compared to figures such as Joshua Williams, John Salmond and Robin Cooke, his decisions form an important part of New Zealand's legal history.

Several commentators have referred to Prendergast CJ's ability as a judicial decision-maker, not always favourably. William Gisborne, a contemporary of Prendergast and fellow Royal Commissioner in 1881 described the Chief Justice's approach to the law "Sir James was slow, but he was sure and safe. He was careful, cautious, and he always looked before he leaped."²⁶ On his death, Charles Skerrett stated that:

Although he may not have possessed the brilliance of some of his colleagues, yet for sound law, for shrewd judgment of human nature and character, for painstaking unravelling of difficult problems of law or fact he was the compeer of any of his colleagues.²⁷

Francis Bell provided a complimentary account of Prendergast's judicial qualities, as he:

²⁶ William Gisborne, *New Zealand Rulers and Statesmen, From 1840 to 1897*, revised and enlarged edition (London: Sampson Low, 1897), 221.

²⁷ *New Zealand Times*, 4 March 1921.

remembered his always seeming to regard the argument of counsel as being offered for his assistance and he always offered what help he could. When he tried a case alone he gave an early indication of the difficulties before him; but where there was a jury it was almost a complaint against him that his attitude throughout the case and in summing up was colourless, and the jury was left to try the case.²⁸

A social commentator in 1907 described Prendergast, “As a judge, like Lord Eldon, he doubted to the last minute, but his “reserved judgments” were hard to upset in the Appeal Courts.”²⁹ The same newspaper also stated that “reversals of his judgments were practically nil”.³⁰ These comments are not accurate, as Prendergast CJ had a sizeable amount of his Supreme Court decisions over-turned on appeal. Comparisons can be made to Chief Justice Stout, who had one in three of his decisions taken on appeal overturned.³¹ In a report from 1899, criticisms of Prendergast CJ were mentioned including his lack of assistance to juries, indulgence to barristers and yielding of precedence to his brethren.³²

Later summations of his performance as Chief Justice have also been both positive and negative:

There have been better Chief Justices than Sir James Prendergast....Scorning any attempt at well-rounded periods, or even figures of speech for display, he went straight to the point, frequently to the degree of bluntness. His vigorous personality was reflected in many uncompromising judgments and opinions which, whether right or wrong, were always interesting. It was said of him that on the principle that thirsty men want beer, not explanations, he was concerned primarily with reaching a decision, and only secondarily with the mechanics of elaborating it. But at the same time he was slow, safe, careful, and cautious, despite surprising slips and misunderstandings.³³

²⁸ *New Zealand Times*, 4 March 1921.

²⁹ *New Zealand Freelance*, 13 April 1907.

³⁰ *New Zealand Freelance*, 2 March 1921, p. 32.

³¹ Hamer, p. 486.

³² *New Zealand Mail*, 1 June 1899, p. 41.

³³ A.H. McLintock (ed.), *An Encyclopedia of New Zealand: Vol. 1* (Wellington: R.E. Owen, 1966), p. 862.

Similar comments were made in *Portrait of a Profession*:

His personal qualities of caution, thoroughness, and care enabled him to fulfill all his forensic duties...in a sage and forthright manner...and also with industry, but perhaps without noticeable distinction. His qualities are typified by his reputation as a particularly sound real-property lawyer. So by a fortuitous confluence of events the New Zealand judicial system, after its initial inception and period of initial growth, had as its head a man whose personal characteristics enabled him to impart the stability and confidence required during a period of consolidation.³⁴

Therefore, opinion on Prendergast CJ as a judge was mixed, with praise for his reliability, diligence and leadership, and criticism for his lack of brilliance and bluntness of approach. There are obvious differences of opinion amongst commentators and the only way to obtain an accurate view of Prendergast CJ's judgments is to analyse them. As Robert Stout said about Prendergast, "I do not need to speak of his fame as a judge. The reports show his ability and his work."³⁵

Many of Prendergast CJ's judgments have been referred to in recent New Zealand legal history. These judgments can be utilised to support a number of observations regarding Prendergast CJ's judicial approach. The decisions delivered by Prendergast alone in the Supreme Court allow the historian to see clearly his legal reasoning at work. When Prendergast CJ delivered judgments with Richmond J or on the Court of Appeal, one must be aware that Prendergast CJ was not acting alone and, while the decision may be his, he could be heavily influenced by his brother judges.

During the course of his judicial career, Prendergast CJ made hundreds of decisions that have been recorded in various law reports. Some of these decisions have created important precedents still utilised today and some attracted much public interest when they were decided in the late nineteenth-century. The bulk of

³⁴ J.F. Jeffries, 'Sir James Prendergast', in Robin Cooke (ed.), *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (Wellington: Reed, 1969), p. 44.

³⁵ *New Zealand Times*, 4 March 1921.

Prendergast CJ's reported judgments were neither influential precedent nor controversial. Many of these decisions were simply the application of legislation to a specific fact situation or the clarification of an important common law precedent. Amongst these cases are particular decisions which serve to highlight interesting aspects about Prendergast CJ as a judge. The scope of this thesis does not allow for a discussion of each decision by Prendergast CJ, nor would such a comprehensive survey be particularly useful. In analysing Prendergast CJ's approach as a judge, a select number of apposite cases can be used as historical evidence. Most of the cases chosen have had some influence in New Zealand legal history, while several serve primarily to demonstrate aspects of Prendergast CJ's adjudication style.

In reading Prendergast CJ's judgments, they are not as poorly written as Gisborne would have us believe. While Prendergast CJ was not an inspired writer, judicial reports are written to elucidate on points of fact and law, not to be read for their literary quality. One difference that the modern lawyer notices when reading the judgments of the nineteenth-century is their brevity. Few of Prendergast CJ's judgments took more than four to five pages, as compared to the lengthy and involved judgments often delivered in modern courts. When analysing Prendergast CJ's judgments which continue to be used as legal precedents, special attention will be given to those used most often. These are Prendergast CJ's most successful judgments and they continue to have resonance in today's legal environment.

The judgments of Prendergast CJ can be found in a variety of historical sources. Law reporting in New Zealand between 1875 and 1899 was a developing area. For the first eight years of Prendergast's Chief Justiceship (1875-1882), there was no standard series of law reports in which to find his decisions. The *New Zealand Jurist Reports* (Old Series Vol II and New Series Vols I-IV) provide a number of decisions made by the Chief Justice. Complementing these early reports are Johnston J's *Court of Appeal Reports* (Vols I-II) and *Ollivier, Bell and*

Fitzgerald's Reports (1878-1880). In 1881 and 1882, no official law reports existed, though cases from these years can be found in the New Zealand Law Reports.³⁶ Therefore, for this period, it is difficult to gain a comprehensive picture of Prendergast CJ's decisions. The New Zealand Law Reports were first produced in 1883, a landmark year for New Zealand legal history. These reports continue to the present day and provide a goldmine of information for the legal historian.

Case analysis section:

1. Ability as a judge:

1A. Comprehensive treatment of legal issues

As a judge, Prendergast CJ displayed an impressive ability to treat legal issues in a comprehensive fashion. Prendergast CJ was not consistent in this regard, and at times provided brief, vague judgments on important areas of law. An example of Prendergast CJ's comprehensive treatment of legal issues is *R v Potter* (1887) 6 NZLR 92. This decision was later referred to in the 1993 Court of Appeal decision, *R v Te Kira* [1993] 3 NZLR 257. The *Potter* decision related to the obtaining of evidence by a police officer. Prendergast CJ held that, "Although it is the duty of a constable when arresting a prisoner, not to ask questions, yet, if he does so without using any threat or promise the answers in reply are evidence."³⁷ Prendergast CJ had delivered his original decision in the Christchurch Supreme Court and also delivered the judgment of the Court of Appeal on 29 November 1887. The Court of Appeal decision unanimously upheld Prendergast CJ's earlier judgment. In this case, Prendergast CJ supported controversial actions by the police, but expressed his discomfort at doing so:

³⁶ Survey from Spiller (ed.), *A New Zealand Legal History*, p. 255-6.

³⁷ *R v Potter* at 92.

As to the other point raised, that of improper questioning, no doubt there were questions asked. If it were necessary to express an opinion I should express disapproval of what was done; it was too much like trying to convict the prisoner out of his own mouth. But there is not sufficient authority for saying that if questions are put by an arresting constable, the answers given by the prisoner are not evidence.³⁸

In *Te Kira*, Richardson J, noted the complexity of Prendergast CJ's decision:

Indeed over 100 years ago this Court in *R v Potter* (1887) 6 NZLR 92, 96 held that it was the duty of the arresting constable not to ask questions....But, in delivering the judgment of this Court in *Potter*, Prendergast CJ went on to note that if no threat or promise was used the evidence of answers to police questions could not be rejected. That ambivalence is also reflected in the Judges' Rules 1912."³⁹

Richardson J therefore, correctly views Prendergast CJ's decision as a complex and pivotal statement on the law regarding arrest.

In the case of *Nankivell v O'Donovan* (1893) 13 NZLR 60, Prendergast CJ also provided a comprehensive approach to adjudication. In *Nankivell*, Prendergast CJ was faced with a breach of the Licensing Act 1881. The case was on appeal from the Resident Magistrates Court in Wellington. Appearing for the appellant was Charles Skerrett, the future Chief Justice. Skerrett was unsuccessful in his attempt to overturn the decision of the magistrate with Prendergast CJ affirming the conviction. The facts of the case involved a publican who was charged with illegally selling beer on a Sunday to a customer who was not a *bone fide* traveller or lodger. In his judgment, Prendergast made an important ruling on admission of evidence:

In substance, the question is whether the sufficiency of the evidence adduced in support of an issue is a question of law. Certainly it is not: it is a question of law whether any evidence has been adduced upon which a Magistrate's finding could be based, but it is not a question of

³⁸ *R v Potter* at 96.

³⁹ *R v Te Kira* at 267.

law that, such evidence as adduced being all one way, and tending to prove a fact, the Magistrate was bound to accept it as sufficient.⁴⁰

In *Nankivell*, Prendergast CJ wrestled with the intricacies of evidential procedure. Prendergast CJ's reasoning was referred to and discussed by Fisher J in *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76, 88.

Prendergast CJ was most impressive in the area of land law, especially law relating to the Land Transfer System. Prendergast CJ's expertise in land law extended beyond the Land Transfer Act and encompassed areas such as Maori land law and mining law. As a Dunedin barrister during the 1860s, Prendergast had ample opportunity to work in the area of mining law. In a case of *McKenzie v Couston* (1898) 17 NZLR 228, the Court of Appeal dismissed an appeal from a decision of acting-Supreme Court judge, Pennefather J. In his judgment, Prendergast CJ stated that a perpetual lease should not be included in the definition of Crown Land under the Mining Act 1891. Though both counsel had "elaborately examined the course of legislation in the various Goldfields Acts, Mining Acts, and Land Acts",⁴¹ Prendergast CJ ignored most of this discussion to focus on the central issue in question.

Prendergast CJ was an efficient judge who was able to distill the key legal issue from the range of issues presented to him by counsel. At times his efficiency is almost brutal, but with only five Supreme Court judges in a colony of nearly one million people,⁴² a need for efficiency is understandable. In *McKenzie*, Prendergast opened his judgment by stating, "We think, notwithstanding the very full examination of the Land Acts and Mining Acts which has been made by the learned counsel on both sides, that we can dispose of this case satisfactorily

⁴⁰ *Nankivell* at 61.

⁴¹ *McKenzie* at 238.

⁴² Geoffrey W. Rice (ed.), *The Oxford History of New Zealand*, 2nd ed. (Auckland: Oxford University Press, 1992), p. 601.

without any elaborate purview of legislation.”⁴³ Prendergast CJ’s decision was used by Moller J in *Echolands Farms Ltd v Powell* [1976] 1 NZLR 750.

Several of Prendergast CJ’s decisions were comprehensive enough to withstand scrutiny under appeal and remain as binding precedent to the present day. Business in colonial New Zealand was enterprising and risky. The commercial cases dealing with large corporations which dominate modern law reports were not as prevalent during Prendergast CJ’s term as Chief Justice. But as business requires legal support, Prendergast CJ heard many commercial cases, including the Supreme Court case of *The Picturesque Atlas Publishing Company (Limited) v Harbottle* (1891) 10 NZLR 348. Prendergast CJ’s decision in the Supreme Court was appealed, but upheld in a Court of Appeal consisting of Denniston, Williams and Conolly JJ. In this case, the vendor had been extremely tardy in the delivery to the purchaser of *The Picturesque Atlas of Australasia* in forty-two parts. Instead of delivering in installments, the vendor eventually delivered the entire Atlas on one specific date. The purchaser refused to complete the contract, and was supported by Prendergast CJ who stated that:

I also think that it appears sufficiently clear from the contract that the subject-matter about which the parties were agreeing was a book to be delivered in parts and at intervals, and not to be delivered at once and as a complete book. It is to be assumed that the delivery in parts and at intervals was essential, and that the plaintiff is seeking to compel the buyer to accept an essentially different⁴⁴ thing from that bargained for.⁴⁴

This was the portion of the judgment appealed and upheld by the Court of Appeal and also used as an authority in Eichelbaum J’s exhaustive judgment in *Innes v Ewing* [1989] 1 NZLR 598, 625. Prendergast CJ also held that the Foreign Companies Act 1884 did not render it illegal for a foreign company to carry out business in New Zealand without an attorney present in the colony.⁴⁵

⁴³ *McKenzie* at 238.

⁴⁴ *Picturesque Atlas Publishing Company* at 352.

⁴⁵ *Picturesque Atlas Publishing Company* at 350.

Prendergast CJ's comprehensive knowledge of New Zealand legislation was appreciated by his brother judges. In this way, Prendergast CJ demonstrated sound judicial leadership. In *Reid v Official Assignee of McCallum* (1886) 5 NZLR 68, 82, Johnston J stated, "I entirely concur with His Honor the Chief Justice both in the conclusion at which he has arrived, and also as regards the valuable practical exposition which he has given of the enactments affecting the case."

But Prendergast CJ's initial decisions were usually sound, largely as a result of his cautious and attentive approach to decision-making. It must be remembered that a sizeable amount of the decisions that were appealed from the Wellington Supreme Court were made by both Prendergast CJ and Richmond J. In *Young v Hill, Ford and Newton* (1883) 2 NZLR 62, the Court of Appeal upheld a Prendergast CJ decision, with Richmond J stating:

His Honor the Chief Justice, who heard this case, also came to the same conclusion. After a very attentive perusal of the evidence, and the careful addresses of counsel, we are all of opinion that the conclusions of the jury and His Honor the Chief Justice are justified by the evidence.⁴⁶

Respect from fellow judges is also evident in *Hadfield v Armstrong* (1894) 12 NZLR 476, in which Denniston J refers at length to Prendergast CJ's decision in *Re Roche* (1888) 7 NZLR 206. As a judge, Prendergast CJ had the ability to effectively canvass relevant legal precedent and deliver comprehensive and efficient judgments, though this did not always lead him to the same conclusions as his brother judges.

The case of *Re Cairns; Ex parte New Zealand Land Mortgage Company (Limited)* (1888) 7 NZLR 42, related to a bankruptcy action. The Court of Appeal, led by Prendergast CJ's judgment held that, "The secured creditor of a bankrupt who

⁴⁶ *Young* at 86.

realises his security after the bankruptcy, is not entitled to prove under the bankruptcy for the difference between the price he sold at, and the total amount of his debt.”⁴⁷ The relevant legislation was the Bankruptcy Act 1883, which was used by Prendergast CJ in his judgment. Prendergast CJ’s judgment was used as precedent in *Re H. (A Bankrupt)* [1968] NZLR 231, which was an appeal from the 1967 Supreme Court decision in which Prendergast CJ’s *ratio* in *Re McGregor* was utilised. McCarthy J held that *Cairns* was “a judgment which has stood and has controlled our practice for almost 80 years and from which we should not depart.”⁴⁸ Prendergast CJ’s decisions in the area of bankruptcy law have continued to stand as precedent throughout the twentieth century. Ratios such as that of *Re Cairns*, demonstrate Prendergast CJ’s enduring legacy in New Zealand common law.

1B. Interpreting his own legislation/using past experience

One of Prendergast CJ’s defining qualities as a judge was his ability to utilise past experience to aid in deciding cases. Prendergast CJ was in a particularly strong position to interpret key New Zealand statutes, as he had been responsible for drafting many of them as Attorney-General. One of Prendergast CJ’s lasting contributions as a judge, were his landmark rulings in the area of real property. Land is a central theme running through New Zealand’s history. It is a central concern of both the Maori and Pakeha peoples and was a principle cause of the New Zealand Wars. Therefore, any *ratio* decisions in the area of land law were to have a great effect on New Zealand society. As Attorney-General, Prendergast had been partly responsible introducing the South Australian Land Transfer System into the New Zealand legal system. As Chief Justice, Prendergast was partly responsible for interpreting his own statute.

⁴⁷ *Re Cairns* at 42.

⁴⁸ *Re H.* at 241.

In two modern High Court cases regarding the Land Transfer System and Maori land, Prendergast CJ's legacy has been apparent. In 1976, Beattie J heard the case of *Chan v Lower Hutt City Corporation* [1976] 2 NZLR 75, while in 1987, McGechan J heard, *Housing Corporation of New Zealand v Maori Trustee* [1988] 2 NZLR 662. Both cases mentioned the 1888 Supreme Court decision, *Paraone v Matthews* (1888) 6 NZLR 744. In this case, Prendergast CJ attempted to reconcile the Native Land Acts of 1867 and 1873 with the Land Transfer Act 1885, the descendant of Prendergast CJ's original statute. Prendergast CJ heard the case in Gisborne, but reserved it for argument in Wellington. The three defendants, Matthews, Russell and Murdoch believed they had obtained the land of the plaintiffs with the assistance of the District Land Registrar and their solicitors. Prendergast CJ ruled that the Registrar had been wrong to attempt to transfer the land to the defendants as this transfer conflicted with the Native Land Act 1873. The Native Land Act stated that a conveyance cannot be made before subdivision, which is what the defendants attempted to do. As Prendergast CJ clearly stated, "The conveyance is not a transfer within the meaning of the Land Transfer Act."⁴⁹ The Maori owners of the lands won this case due to Prendergast CJ's decision.

In the 1976 *Chan* case, only a fleeting reference is made to Prendergast CJ's decision, but in the 1987 *Housing Corporation* case, *Paraone* received more detailed attention. McGechan J referred to Prendergast CJ's decision as being an important interpretation of the 1885 Act, "a case in which a purchaser presented a void transfer, signed correct, and obtained registration. This in itself, with no element of fraud, was regarded as the carrying out of a "wrongful" act."⁵⁰ McGechan J attempted to place the 1885 Act in context, referring to the uncertain nature of land ownership and the need for a rigid system of land registration. Parihaka is used as an example to highlight this uncertainty. Prendergast CJ had

⁴⁹ *Paraone* at 750.

⁵⁰ *Housing Corporation of New Zealand* at 680.

been involved in creating the tension over land which the Land Transfer Act sought to successfully manage.

Prendergast CJ dealt with a similar case in 1892, *Re Stewart & Co., Ex parte Piripi Te Maari (No.2)* (1892) 11 NZLR 745. The Land Transfer Act 1885 was analysed alongside the Native Land Act 1873, to decide whether an unregistered transferee could successfully remove a caveat on a summary application. The applicant, Piripi te Maari, was unsuccessful in removing the caveat and was described by Prendergast CJ as “a mere tool of Paraone and the Native lessors.”⁵¹ After refusing to remove the caveat, Prendergast CJ stated (semble) that “Oral contracts by Natives relating to land may still be enforceable, if there has been part-performance, notwithstanding the provisions of section 83 of the “The Native Land Act, 1873””.⁵² Prendergast CJ’s decision was used to aid Perry J in the 1971 case, *Scott v Broadlands Finance Limited* [1972] NZLR 268.

In 1890, Prendergast CJ was called upon once more to clarify the Land Transfer System in *Re Mrs. Jackson's Claim* (1890) 10 NZLR 148. Jackson’s representative did not conduct a thorough search of the register, failing to make inquiry into whether any instrument had been received for registration but not yet entered upon the register. Such an instrument had been received and not registered, but Jackson only discovered this after parting with her purchasing money. Prendergast CJ took a hard-line approach and showed no mercy for what he considered an omission on the part of Jackson and her representative.⁵³ The complexities of the Land Transfer System were for those working with it to discover for themselves. In *Bradley v Attorney-General* [1978] 1 NZLR 36, O’Regan J referred to Prendergast CJ’s decision and expressed dissatisfaction at the modern day workings of the Land Transfer System:

⁵¹ *Re Stewart & Co.* at 748.

⁵² *Re Stewart & Co.* at 745. The Court of Appeal differed on *semble* in *Piripiri te Maari v Stewart* (1893) 11 NZLR 205.

⁵³ *Re Mrs Jackson's Claim* at 152-3.

The decision [*Jackson's*] has stood for more than three-quarters of a century and been accepted by the courts, the textbook authors and the profession over those long years....“the necessities of the office” have of recent time assumed proportions beyond the possible contemplation of the Chief Justice and, indeed, such as might well have Torrens himself turn in his grave with despair at the cavalier attitudes of those entrusted with the administration of his enlightened system.⁵⁴

As the principal designer of New Zealand’s Land Transfer System, Prendergast CJ was in a commanding position to interpret the system when it came before the New Zealand courts.

Prendergast CJ’s decision in *Merrie v McKay* (1897) 16 NZLR 124, has been referred to in three recent New Zealand cases. Only *Wi Parata* (1877) and *Doyle v Edwards* (1898) can claim similar importance in modern times. All three cases deal with land law. *Merrie v McKay* is a relatively brief judgment dealing with fraud under the Land Transfer Act 1885. Prendergast CJ ruled on the issue of whether fraud may be committed after registration has taken place. In an oft quoted passage, Prendergast CJ stated:

If the defendant acquired the title intending to carry out the agreement with the plaintiff, there was no fraud then; the fraud is in now repudiating the agreement, and in endeavouring to make use of the position he has obtained to deprive the plaintiff of his rights, under the agreement. If the defendant acquired his registered title with a view to depriving the plaintiff of those rights, then the fraud was in acquiring the registered title. Whichever view is accepted, he must be held to hold the land subject to the plaintiff’s rights under the agreement, and must perform the contract entered into by the plaintiff’s vendor.⁵⁵

A host of later decisions have followed Prendergast CJ’s *ratio* including Salmond J’s decision in *Wellington City Corporation v Public Trustee* [1921] NZLR 423, the Court of Appeal decision in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101; NZPCC 267, Cooke J in *Harris v Fitzmaurice* [1956] NZLR

⁵⁴ *Bradley* at 50.

⁵⁵ *Merrie* at 127-128.

975, Woodhouse J in *McCrae v Wheeler* [1969] NZLR 333, Turner P's dissenting judgment in *Sutton v O'Kane* [1973] 2 NZLR 304 (CA) and McMullin J in *Bunt v Hallinan* [1985] 1 NZLR 450 (CA). Analysis of these cases clearly proves that Prendergast CJ's legacy has been prominent in the New Zealand legal system throughout the twentieth century. In his rulings on the Land Transfer System, Prendergast CJ demonstrated a depth of experience and a resourceful approach to decision-making.

Prendergast had the rather unique opportunity as Chief Justice of interpreting his own legislation, drafted while Attorney-General. He demonstrated a willingness to explore different approaches to statutory interpretation. In *Wilson v Brightling* (1885) 4 NZLR 4, 8, Prendergast CJ provided a liberal interpretation of his Land Transfer Act 1870:

The clause, no doubt, if read literally, does involve some little difficulty, or at least a great incongruity....What the Legislature probably intended was that the clause should be read as if the words "as lessee" at the end of the section had not been introduced....the clause does not read very clearly.

As a Supreme Court Judge, Prendergast CJ adjudicated in a variety of different legal areas. In 1891, Prendergast CJ gave judgment in the case of *Re Campbell's Application* (1891) 10 NZLR 197. This case focused on the Patents, Designs, and Trade-marks Act 1889. While Attorney-General, Prendergast had also fulfilled the role of Patent Officer and was therefore well-versed in patent law. Colonial New Zealand demanded new and ingenious devices for solving practical problems in the areas of farming, fishing and mining. In *Re Campbell's*, an application for a patent by Campbell, an Otago Miner had been challenged by another inventor who charged Campbell with infringing his patent. Prendergast CJ decided that the patent ought to be granted, supporting the decision of the Registrar. In his judgment, Prendergast CJ displayed an impressive knowledge of basic engineering, proving that his knowledge extended beyond the law:

The object of both schemes is to add to the force of hydraulic pressure acting on loose material mixed with water in an uptake pipe by combining air with the water and material....[but]...The opponent in this case does not satisfy me that in this case there is not in Campbell's machine a different mechanical contrivance from that of Robertson's, though the principle applied is the same."⁵⁶

Prendergast CJ's judgment also explored the nature of the Registrar's function. This section of judgment was of great use to Davison CJ in *Beecham Group Ltd v Bristol-Myers Company (No 2)* [1979] 2 NZLR 629, 633. Prendergast CJ's experience as Patent Officer provided the background experience to successfully create a lasting, binding precedent.

One of Prendergast CJ's most enduring legacies are his judgments concerning the nature of Crown Grants. The *Wi Parata* case is the most famous example. Another important decision was *Rangimoeke v Strachan* (1895) 14 NZLR 477. This decision, made eighteen years after *Wi Parata*, held that Crown Grants must be treated with greater reverence than other land ownership methods, and gave judgment to Rangimoeke. Prendergast CJ's support of a Crown Grant under challenge was reminiscent of the *Wi Parata* decision, though this time the judgment favoured the Maori plaintiff.⁵⁷ Prendergast CJ was able to use his experience in the area of Crown Grants to aid his adjudication in *Rangimoeke*. In making his decisions, Prendergast CJ was ready to draw back into his past for knowledge and inspiration.

1C. Ability to successfully deal with high-profile cases

Another successful trait of Prendergast CJ's adjudication was his ability to deal successfully with controversial, high-profile cases. *The Wellington City Election Petition* (1897) 15 NZLR 454, is a case which was high-profile when delivered and remains an important legal precedent today. The case was tried before

⁵⁶ *Re Campbell's Application* at 202-3.

⁵⁷ *Rangimoeke* at 481.

Prendergast CJ and Conolly J in the Election Court, Wellington during February 1897. It deals with the petition of Arthur Richmond Atkinson, nephew of Sir Harry Atkinson.⁵⁸ Atkinson challenged the election of his rival George Fisher as the Member of Parliament for the City of Wellington seat. Atkinson had been narrowly defeated and demanded a recount. Atkinson employed Martin Chapman as his lawyer, while Skerrett represented the respondent.

Atkinson argued against the validity of the election on a number of grounds. Firstly, he argued that the votes were incorrectly counted. Prendergast CJ allowed a recount to proceed, citing some of the problems with election procedures, “Incompetent persons may be appointed to the positions of Deputy Returning Officers. Everything is hurried through on the night of the polling-day for the purpose of satisfying the eagerness of the public.”⁵⁹ The recount confirmed the original result. Atkinson also charged that his opposition had sought to influence the election by providing entertainment on a day other than the polling-day, providing taxi cabs to promote the election of Liberal candidates and allowing offensive crowds to dissuade conservative voters from casting their ballot. All these charges were rejected by Prendergast CJ, who held that even if true, they were not grounds for avoiding the election. Atkinson’s petition was dismissed with costs and Prendergast CJ, despite personal sympathies with conservative politicians, confirmed the victory of the Seddon’s Liberal party in the City of Wellington electorate.

In his decision, Prendergast CJ made a number of interesting comments about late 1890s New Zealand society. The 1896 Liberal election victory was the second election in which women could vote. Atkinson had accused ‘The Women’s Social and Political League’ of providing afternoon tea the day before the election to sway voters towards Liberal candidates. While Prendergast CJ agreed that this action was intended to sway voters, he could not connect these actions with

⁵⁸ Prendergast’s secretary in 1882 Justice Department Records, J1 82/727, though the reference is not entirely clear.

⁵⁹ *Wellington City Election* at 458.

Fisher.⁶⁰ Atkinson also complained that certain conservative women voters were prevented from voting by offensive behaviour at the polling booths. While Prendergast CJ was brought up as a patriarchal English gentleman, he was not convinced of the frailty of women, stating, “I have no doubt that if these ladies really wanted to vote, they could have done so; if not there, elsewhere.”⁶¹ *The Wellington City Election* case clearly shows the development of the two-party New Zealand electoral system, a different system to the one Prendergast had worked with during most of his career. Prendergast CJ’s decision analysed several areas of election law and was referred to in Cooke J’s judgment in *Re Wellington Central Election Petition, Shand v Comber* [1973] 2 NZLR 470, 475 and *Re Te-Au-O-Tonga Election Petition* [1979] 1 NZLR S26, heard in the High Court of the Cook Islands.

Though Prendergast CJ was a close associate of Arthur Atkinson’s uncle, Sir Harry Atkinson, this did not prevent Prendergast CJ from ruling against his nephew in this important case. In studying legal history, it is tempting to look for *real-politik* and Machiavellian influences in the decisions of judges, especially in controversial cases such as *The Wellington City Election* and *Wi Parata*. In a series of high-profile cases, Prendergast CJ demonstrated an ability to rise above partisan alliances and make decisions based on specific fact situations.

During his twenty-four years on the Bench, Prendergast CJ heard a number of celebrated cases. This thesis has analysed the seminal *Wi Parata* decision and the controversial case of *The Attorney-General v Mr Justice Edwards*. Other high-profile decisions delivered by Prendergast CJ included *R v Woodgate* (1876), *R v Veitch* (1883) and *R v Dean* (1895). These three cases concerned charges of murder. This selection of cases provides insights into Prendergast CJ’s handling of controversial decisions.

⁶⁰ *Wellington City Election* at 462.

⁶¹ *Wellington City Election* at 465.

In only his second year as a Supreme Court Judge, Prendergast CJ tried the murder case of *R v Woodgate*. William Woodgate lived with his niece, Susan, in a remote area of the Marlborough Sounds. Susan had become pregnant with her uncle's child and immediately after it was born, Woodgate murdered the child. No body was found. The case hinged on whether or not the child had been born alive or dead and whether the evidence of Susan Woodgate without proper corroboration was enough to win a conviction. Prendergast CJ allowed the evidence to proceed to the jury on the charge of wilful murder, though he wisely reserved the question of evidence for the Court of Appeal.⁶² Woodgate was found guilty and the case was taken to the Court of Appeal in January 1877 to be heard by Johnston J and Prendergast CJ. Prendergast CJ was sitting in judgment on his own case, a rather odd situation that occurred in the Court of Appeal from time to time.⁶³ Johnston supported Prendergast CJ's decision and William Woodgate was hanged, Prendergast CJ's first judicial death sentence. In his criminal judgments, as in his opinions as Attorney-General, Prendergast CJ showed little tolerance for criminals. His judicial conclusions in high-profile murder trials were not heavily influenced by media coverage or public debate.

In 1883, Prendergast CJ was faced with the unusual case of *R v Veitch*. Phoebe Veitch had been charged with murdering her four-year-old child by drowning it in the Wanganui River.⁶⁴ The Crown Prosecutor called Veitch's seven-year-old son as a witness, but Prendergast CJ "questioned the boy as to his comprehension of an oath, but the answers not being altogether satisfactory, His Honor ruled that he was too young to be examined."⁶⁵ Veitch claimed in her defence that the father of the child was responsible for the drowning. The police were unable to find the supposed father, a problem referred to by Prendergast CJ during his two hours of summing-up. The jury concluded that Veitch was guilty but recommended mercy.

⁶² *R v Woodgate* (1876) SC, Unreported Judgment, Justice Department Records, NA J1 77/731.

⁶³ See *R v Hall* (1886-7) NZLR, Williams J had his decision overturned but was on the Court of Appeal Bench.

⁶⁴ *Wanganui Chronicle*, 1 May 1883.

⁶⁵ *Wanganui Chronicle*, 1 May 1883.

At this point it was brought to the court's attention that the prisoner was probably pregnant. Prendergast CJ ruled that in order to confirm the pregnancy, a jury of matrons must be called. This unusual step demonstrated the Victorian morality present in late nineteenth-century New Zealand. It was not considered appropriate for men to judge a female matter of such a personal nature. In line with his moral conservatism, Prendergast CJ immediately ordered a jury of matrons to be formed.

The criteria for a 'matron' was to be a lady "of whom any town has the right to be proud."⁶⁶ The matrons examined Veitch with the aid of a doctor and concluded that she was pregnant. Prendergast CJ stayed the sentence of death and forwarded the original jury's recommendation of mercy to the Government. Veitch escaped execution. Prendergast CJ was criticised for his handling of the case in the *Wanganui Herald*:

Juries of Matrons, we think, ought to have become an institution that *was*. There is no necessity to bring respectable modest women from their home to perform such irksome and unpleasant duties. Two professional men could give the information required.⁶⁷

During the same criminal sittings, Prendergast CJ was also criticised for his ignorance in respect of Maori juries. The *Herald* finished its tirade against the Court by providing its own rationale for the actions of Pheobe Veitch, stating that she:

was fertile soil for criminal results...For it was a kind of insanity, led up to by a life of abandoned profligacy, that a mother, otherwise kind to her child, should deliberately drown it in order to get rid of it.⁶⁸

As with many of the cases tried before Prendergast CJ, *R v Veitch* has much resonance in New Zealand society today. While, certain elements of the media disagreed with Prendergast CJ's approach in *R v Veitch*, Prendergast CJ again

⁶⁶ *Wanganui Chronicle*, 2 May 1883.

⁶⁷ *Wanganui Herald*, 7 May 1883.

⁶⁸ *Wanganui Herald*, 7 May 1883.

showed a determined ability to remain constant to his view of the case, rather than be swayed by outside influences.

Perhaps the most high-profile murder case in nineteenth-century New Zealand history was *R v Dean*. Minnie Dean is possibly New Zealand's most famous murderer. Dean is the only woman to be hanged in New Zealand history. As with many other memorable New Zealand events in the second half of the nineteenth-century, Prendergast CJ was involved in this murder case. Dean has recently received relatively favourable treatment by academics,⁶⁹ but during her trial in 1895, she was a hated figure. Dean was accused of "the murder of an infant received by her upon a pretence of adoption, in consideration of a small sum paid to her for its support. Death was alleged to have been caused by the administration of laudanum."⁷⁰ The bodies of two infants and the skeleton of another were found buried in her garden. Dean had been sentenced to death by Williams J in Invercargill in June 1895. Questions had arisen during the trial regarding the admission of contentious evidence, including evidence relating to the act of poisoning, the unidentified skeleton and four undiscovered infants that Dean had also received. Dean's lawyer, Alf Hanlon, could not be present at the Appeal hearing.⁷¹ The Court of Appeal delivered a strong judgment in favour of Williams J's decision, with Prendergast CJ refusing to allow leave to appeal.

In his reasoning Prendergast CJ stated that:

the admission of evidence was not contrary to any principle, and is in accordance with what has been decided in reported cases to be permissible. The decision in *Makin's case* is so exactly in point, and, being a judgment of the Privy Council, is of such high authority, that I think it unnecessary to refer to others.⁷²

⁶⁹ For example, Lynley Hood.

⁷⁰ *R v Dean* (1895) 14 NZLR (CA), p.272

⁷¹ Hood, p. 189.

⁷² *R v Dean* at 283.

The decision was unanimous (Williams, Denniston, Conolly, Richmond JJ). Richmond J was unable to prepare a judgment due to poor health, so Prendergast CJ spoke on his behalf. The Court of Appeal hearing took place on Saturday 27 and Monday 29 July 1895. Richmond J died on 3 August. Richmond had been a legal colleague of Prendergast's for 33 years, including 20 as a judge. Only Michael Prendergast QC had comparable personal and professional influence upon James Prendergast for a similar length of time.

As Chief Justice, Prendergast was faced with several cases involving high-profile political figures. Cases relating to the following political figures appeared before Prendergast; William Larnach (*Smith v MacKenzie* (1880-1) 1 NZLR 1 CA), Edwards J (*The Attorney-General v Mr Justice Edwards* 1891), Francis Bell (*Bell v Finn* 1896) and Arthur Richmond Atkinson (*The Wellington City Election Petition* 1897). In *Re The Puhatikotiko No. 1 Block* (1893) 12 NZLR 131, Prendergast CJ even had to deal with a case delivered by his old nemesis, George E. Barton, now a Judge of the Native Land Court. To his credit, Prendergast CJ generally displayed impartiality during all these trials. As Attorney-General, Chief Justice and Administrator, Prendergast worked with these political figures in the administration of government, providing a difficult personal challenge when they appeared before him in court. Despite being faced with controversial situations, Prendergast CJ received consistent support from the political establishment and his brother judges.

Not all controversial case reports were covered in the New Zealand Law Reports, but instead were sometimes mentioned in contemporary newspapers. For example, in 1897, the Thames Advertiser discussed a Prendergast CJ decision relating to compensation to miners after the Brunner mine disaster.⁷³ Newspaper reports were seldom neutral, and in this particular case, the Thames Advertiser clearly sided with the Miner's Union. Denniston J provided a decision which

⁷³ *Thames Advertiser*, 7 August 1897, p. 2.

effectively reduced the amount of compensation due to the miners, but this was contradicted by a later Prendergast CJ decision:

The question seems to have hung over until another action came before the Chief Justice a week or two ago, and Sir James Prendergast, so far as we understand the Press Association wire, took a diametrically opposite view, for he seems to have said in effect that the plaintiff having benefited by the [public] fund was no grounds for mitigation of the amount claimed as damages. The point is most important, and will have to go before the Court of Appeal.⁷⁴

Though Prendergast CJ had conservative leanings, in a controversial case such as this, his decision supporting the miners reflects an unbiased and impartial approach to adjudication.

1D. Dissenting judgments on the Court of Appeal Bench

In analysing judicial decision-making, it is important for the legal historian to take special note of dissenting judgments. In these judgments, the adjudicator is forced to clearly outline their ideas and philosophy to justify taking a different position to the other Appeal Court judges. In his twenty-four year career as Chief Justice, Prendergast CJ rarely delivered dissenting judgments on the Court of Appeal. This could have been due to a number of reasons. Through strong leadership Prendergast CJ could have convinced his brother Judges to follow his judicial lead or the Appeal Court judges may have often been of a similar outlook. While Prendergast CJ was a strong administrative leader, critics charged that he often yielded precedence to his brother judges in the Appeal Court.⁷⁵ Finally, the rarity of Prendergast CJ's dissenting judgments could be due to his innate conservatism and unwillingness to allow dissension to undermine the clarity and security of the law. Prendergast CJ was committed to delivering justice and if the need arose would speak out with a dissenting voice, but if any opportunity could be found to

⁷⁴ *Thames Advertiser*, 7 August 1897, p. 2.

⁷⁵ *New Zealand Mail*, 1 June 1899, p. 41.

reconcile his view with the other Appeal Court judges, Prendergast CJ would take that opportunity.

Prendergast CJ's judicial decisions were not always in line with his brother judges. In the Court of Appeal decision, *Fanzelow v Kerr* (1896) 14 NZLR 660, Prendergast CJ dissented from the majority judgment of Williams, Denniston and Conolly JJ. The case was one of malicious prosecution and Prendergast believed this charge against the defendant was adequately supported by evidence. In stating his judgment, Prendergast CJ did not hide his doubts and his unease at taking a dissenting viewpoint:

I take a different view, though I am bound to admit that the question is a doubtful one, not only because it appears to myself upon the case to be a doubtful one, but also because the other members of the Court take a different view of it from that which I take.⁷⁶

Split decisions in the Court of Appeal can cause problems for modern courts, as demonstrated in Richardson J's judgment in *Commercial Union Assurance Co of NZ Ltd v Lamont* [1989] 3 NZLR 187, 194-5 (CA). In this case, Richardson J compared the majority judgments in *Fanzelow* with Prendergast CJ's minority judgment. In taking a different viewpoint from the other Court of Appeal judges, Prendergast CJ demonstrated an independent streak and a willingness to support his own judgment even if it could lead to dissension.

Prendergast CJ's most famous dissenting judgment was in the high-profile case, *The Attorney-General v Mr Justice Edwards* (1891) 9 NZLR 321. The facts of this case will be dealt with later in this chapter, but the decision delivered by Prendergast CJ reveals a judge ready to take a courageous stand, even in the glare of the public spotlight. While essentially a conservative, in certain circumstances, Prendergast could be outspoken and controversial. Prendergast CJ's decision was

⁷⁶ *Fanzelow* at 664.

exhaustive and thorough. In his conclusion, Prendergast clearly stated his case against appointing Edwards as a Supreme Court judge,

As I think there was no authority in law to make the appointment, the judgment of this Court ought to be for cancelling the letters patent; but, the opinion of the majority of the Court being otherwise, the judgment will, of course, be for the defendant.⁷⁷

Conolly J also provided a dissenting judgment in the case and Prendergast CJ's decision was eventually vindicated by the Privy Council. While rare, Prendergast CJ's dissenting judgments provide vital insights into his approach to decision-making.

2. Conservatism:

2A. Reliance on English precedent

James Prendergast was a conservative Chief Justice. In his reliance on English precedent and cautious, suspicious approach to change, Prendergast CJ displayed a reverence for tradition and past experience. Though land and criminal law were the two most notable areas of Prendergast CJ's legal legacy, he also delivered important judgments in other areas. These areas included solicitor and client relations, torts, bankruptcy, patents, commercial, family, liquor licensing and election law. In the year of the *Wi Parata* decision, the Court of Appeal heard the case of *Barton v Allan* (1878) 3 NZ Jur NS 46. In this case, the solicitor Barton effectively sought to charge his client on two separate occasions for one whole piece of work. Prendergast CJ delivered the judgment of the Court supporting the Supreme Court decision of Williams J. As Attorney-General, Prendergast had paid particular attention to the ethical actions of solicitors and in this case the client claimed victory. Prendergast's *ratio* was quoted at length by Eichelbaum J in the 1985 case of *Parsons v Young Swan Morison McKay* [1986] 2 NZLR 204:

⁷⁷ *Attorney-General v Edwards* at 359.

it must be assumed that the employment by the defendant of the plaintiff was that ordinarily existing between solicitor and client...It must be assumed therefore that the work was done under an entire contract; therefore the plaintiff could not maintain an action for any part of the work done until the whole contract was performed, and all work done under the contract formed one indivisible cause of action.⁷⁸

Prendergast CJ's decision was strongly supported with relevant English case law. In the early years of his Chief Justiceship, Prendergast was able to depend upon English precedent to support his decisions.

The importance of English legal precedent also featured in the case of *Tarry v The Taranaki County Council* (1894) 12 NZLR 467. In this case, the Magistrate Court's decision in favour of the Council was upheld in the Court of Appeal. The decision was a divisive one, with Richmond J and Prendergast CJ agreeing with the overall judgment, but taking issue with the criticism of an important precedent by Williams and Denniston JJ. The *Tarry* case provides the historian with insights into the nature of New Zealand's infrastructure during the late nineteenth-century. Tarry sustained injuries to himself and his coach through the neglect of the Taranaki Council in not repairing a hole in a road. The Court of Appeal decided that the Council could not be held liable for mere non-feasance.⁷⁹ Denniston and Williams JJ attempted to reconcile decisions of the Privy Council and House of Lords but were unable to do so, leading them to criticise the Privy Council judgment in *The Borough of Bathurst v Macpherson* 4 App. Cas. 256.

Richmond J's judgment also canvassed the relevant case law, but stated that the cases could be reconciled. Richmond J continued to argue:

If, however, there is any real conflict between the decision of the Privy Council in the *Bathurst* case and the decision of the House of Lords in *Cowley v The Newmarket Local Board*, and of the Privy

⁷⁸ *Barton* at 48.

⁷⁹ *Tarry* at 467.

Council again in the *Pictou* case, I do not think it is for us to intervene.⁸⁰

Prendergast CJ followed Richmond J's argument, conservatively stating, "I entertain the same hesitancy as Mr Justice Richmond in criticizing the judgment in the *Bathurst* case. We are taking a new departure, and it behoves us to move somewhat carefully."⁸¹ Richmond J and Prendergast CJ were unwilling to criticise the higher English courts. When the New Zealand Court of Appeal angrily confronted the Privy Council in 1903, the conservative influence of Richmond J and Prendergast CJ was gone from the Bench, but Williams and Denniston JJ were present. In the case of *Hocking v Attorney-General* [1963] NZLR 513, North J shared the doubts of Williams and Denniston JJ, demonstrating a less reluctant approach to criticising English decisions.⁸²

As Attorney-General, Prendergast relied heavily on English statute law in formulating his legislation. As Chief Justice, Prendergast again turned to English precedent when supporting his judgments. In the case, *Bell v Finn* (1896) 14 NZLR 447, Prendergast CJ interpreted the Liberal Government's new legislation, the Arbitration Act 1890, in a dispute over counsel's fees. Prendergast CJ opened his judgment by stating:

The case of *Longman v East*, on which the application was principally based, turned wholly on the Judicature Act. Since then the English Arbitration Act has introduced a substantial difference; and our Act is a close copy of the English Arbitration Act. Under the Judicature Act the whole cause could not be referred, but only particular facts; and that makes all the difference.⁸³

Part of the problem in the *Bell* case, was the dual nature of many New Zealand lawyers, who acted as both barristers and solicitors. In *Bell*, "The statement of defence disputed the right of the firm of solicitors who were also counsel to sue

⁸⁰ *Tarry* at 474.

⁸¹ *Tarry* at 475.

⁸² *Hocking* at 534.

⁸³ *Bell* at 453.

for counsel's fees payable to members of their own firm."⁸⁴ The New Zealand legal system attempted to simplify the English tradition of keeping barristers and solicitors separate. In doing so, new problems arose, as in the *Bell* case, and also, *Robinson and Morgan-Coakle v Behan* [1964] NZLR 650, in which the *Bell* case is applied to modern legal practice.

As Chief Justice, Prendergast relied heavily on English common law, but this was true of many of his contemporaries.⁸⁵ In *Wotherspon v Dobson* [1893] 11 NZLR 283, 287, Prendergast CJ noted, "we ought generally in such a case [concerning damages] to follow the English practice, because it is probable that good sense will be found in it." Reference was also made to the law existing in the Australian colonies, especially Victoria and South Australia. Prendergast CJ had personal experience in the Victorian colony and had relied upon the Torrens system of land registration invented in South Australia. Occasionally, Prendergast CJ referred to American law, for example, in the *Wi Parata* decision. Prendergast CJ's legal speciality was in the area of pleading, but this area of the law was removed on the instructions of the 1881 Royal Commission on Common Law Procedure. In cases from 1875 to 1881, Prendergast CJ's comprehensive knowledge of special pleading is evident. Trained in the English legal system, Prendergast utilised this background when adjudicating as Chief Justice.

2B. Support of the establishment

Despite striving for an objective approach to adjudication, certain Prendergast decision can be seen as supporting the settler establishment and colonial elite. The case of *Sargood v The Corporation of the City of Dunedin* (1888) 6 NZLR 489, was heard by the Court of Appeal in 1888, following a decision by Williams J. Serious flooding had occurred on the property of Sargood, and the Corporation was blamed for negligence in failing to prevent the accident. Delivering the

⁸⁴ *Robinson and Morgan-Coakle v Behan* [1964] NZLR 650, 661-2.

⁸⁵ Peter Spiller, *The Chapman Legal Family* (Wellington: VUP, 1992), p. 98.

judgment of the Court, Prendergast CJ held that Sargood's omissions in not fixing certain valves was contributory negligence and undermined their action.⁸⁶ Robert Stout and John Denniston represented Sargood, but were unsuccessful in this case. The successful Corporation was represented by Cecil Haggitt and Frederick Chapman. In 1888, Dunedin could still boast an elite selection of barristers. Prendergast CJ described the nature of contributory negligence in this case:

Whose duty then was it to make provision against the inevitable result to the plaintiffs of such a state of things? It was the plaintiffs themselves, who, for their own convenience and benefit, laid down the pipes connecting the cellar with the sewer...and it appears to us that it was the duty of the plaintiffs to take such precautions as would protect them from the necessary consequences of the sewer being filled to its greatest capacity.⁸⁷

While Prendergast CJ was by all accounts an impartial judge, it must be noted that many of his decisions were in favour of established and powerful institutions such as the Crown, local government and high-ranking professionals. He was not a judge for the underdog. *Sargood* has been referred to in recent times for Prendergast CJ's warning against admitting fresh evidence, "unless it is evidence having a strong and distinct bearing on the case."⁸⁸ For example in the case, *Sulco Limited v E. S. Redit and Company Limited* [1959] NZLR 45.

Prendergast CJ also played a role in the celebrated poisoning case, *R v Hall* during 1886 and 1887. Thomas Hall had been convicted of attempting to poison his wife in 1886 and the following year was found guilty in the Supreme Court of murdering his father-in-law by poisoning. The verdict of murder was quashed by the Court of Appeal headed by Prendergast CJ.⁸⁹ The evidence used to convict Hall in the Supreme Court was the unsuccessful attempt of his wife's life. The Court of Appeal ruled that this was insufficient evidence. Hall was the nephew of

⁸⁶ *Sargood* at 489.

⁸⁷ *Sargood* at 511.

⁸⁸ *Sargood* at 512.

⁸⁹ McLintock (ed.), p. 449, NB. Johnston J delivered the judgment.

Sir John Hall, the prominent and popular Premier, who had been closely involved with Prendergast CJ during the invasion of Parihaka in 1881. The Court of Appeal judgment caused an angry outburst from the public and press, who accused the Court of ruling in favour of Hall because of his family connections.⁹⁰ The Court of Appeal was vigorously criticised for its decision by the New South Wales Court of Appeal when it later heard the similar case, *R v Makin*. It has been argued that a different set of rules was applied by Prendergast CJ and the Court of Appeal to Thomas Hall than in the 1895 case of Minnie Dean.⁹¹

2C. Literal approach to statutory interpretation

New Zealand law has been dominated by legislation, therefore making judicial statutory interpretation of great importance. Prendergast CJ was often faced with the task of interpreting recent New Zealand legislation. Though Prendergast CJ was a conservative judge, he did allow for liberal interpretation of statutes at times, referring to the ‘spirit’ of the legislation. But usually Prendergast took a conservative, literal approach as in *Re A Lease, Whakarare to Williams* (1894) 12 NZLR 494, 495, “The safe construction of any legislative Act is to take the literal words of the Act, unless you can see a clear meaning to the contrary appearing from the provisions of the Act itself”. Sometimes, Prendergast CJ also discussed recent New Zealand case-law, though this body of law was still in its early stages. Relying on New Zealand common law became somewhat easier during the later stages of Prendergast’s Chief Justiceship, with the continued success of the New Zealand Law Reports.

As Chief Justice, Prendergast was called upon to interpret legislation relating to local government matters. Two important decisions in this area included *Nelson City Corporation v Nelson College* (1896) 14 NZLR 507 and *Jenkins v The Mayor, Councillors, and Citizens of the City of Wellington* (1896) 15 NZLR 118.

⁹⁰ Lynley Hood, *Minnie Dean: Her life and crimes* (Auckland: Penguin, 1994), p. 188.

⁹¹ Hood, p. 189.

While the *Nelson City Corporation* case dealing with rateable property and water supply was briefly referred to in the 1966 decision, *Auckland City v Auckland Metropolitan Fire Board* [1967] NZLR 615, 622, it is Prendergast CJ's decision in *Jenkins* which has left a more noticeable legacy. In *Jenkins*, a claim had been made for compensation when a public drain was construction under private land. Prendergast CJ applied a narrow approach to statutory interpretation:

I think that the proper reading of this section is to connect the word "suffering" with the preceding word "person", and not with the word "land"; though in the present case, as the damage alleged to have been suffered is to land, it is not necessary to do more than decide that, at any rate all cases of damage by reason of land being "injuriously affected" would be within the provision.⁹²

Edwards J, in an *obiter* decision, disagreed with Prendergast CJ's approach, but did not receive the support of his brother judges.

While Prendergast CJ preferred a literal approach to statutory interpretation, he demonstrated a certain amount of flexibility. In the Supreme Court case of *Arihi Te Nahu v Locke* (1887) 5 NZLR 408, Prendergast CJ made an interesting judgment regarding costs and taxation between solicitor and client. The case dealing with land law was tried in Napier by Prendergast CJ, but the Chief Justice did not properly settle the question of costs. Later in Gisborne the plaintiffs managed to elicit extremely high solicitor's costs out of the estate in question. Prendergast CJ set aside this unfair situation and in his judgment essentially looked to what was fair in that specific fact situation:

It is to be hoped, however, that when the decree comes to be settled, it may be found possible to fix by consent or otherwise, a gross sum for the costs, for this is more in accordance with the spirit, if not the requirements of the Judicature Act and the scale thereby fixed.⁹³

⁹² *Jenkins* at 125, Municipal Corporations Act 1886, s227, "Every person having any estate or interest in any land or buildings so taken, or suffering any damage by the exercise of powers hereby given, shall be entitled to full compensation".

⁹³ *Arihi* at 415.

In this decision, Prendergast CJ proved that he could move beyond the black letter of the law and look to the general purpose of a statute.

3. Pragmatism/Caution:

Prendergast CJ's approach to adjudication included a mixture of pragmatism, efficiency and caution. In delivering his judgments, Prendergast CJ sometimes used cautious language indicating doubt on his part. For example, in the case *R v Vowles* (1885) 3 NZLR 111, concerning embezzlement by a Government officer, Prendergast CJ concluded that:

I think that the facts might have been more precise....This fund is *in a sense* public money, and in a sense also trust money, but it is only in a sense....*I think* the regulations may be good....I therefore *think* we may look upon him as a person employed in the public service under Her Majesty, and that the conviction therefore *ought to be* affirmed.[italics added]⁹⁴

In *Piripi Te Maari v Stewart* (1892) 11 NZLR 205, Prendergast CJ's caution and uncertainty aided in having his decision over-turned in the Court of Appeal. In giving judgment, Richmond J stated:

In the judgment appealed from, His Honour the Chief Justice said he was very doubtful as to the interpretation of the statute which he adopted. We should have taken time to consider our judgment if the Chief Justice had expressed anything like a positive opinion contrary to that which we have arrived at.⁹⁵

While often careful and cautious, Prendergast also assertively maintained discipline in his court. In *Hawera County Council v Standard Insurance Company* (1889) 7 NZLR 268, 270, Prendergast stated, "I think it is important that parties should not be able to play fast and loose in any Court." As a Chief Justice, Prendergast brought discipline to the Bench.

⁹⁴ *R v Vowles* at 112.

⁹⁵ *Piripi Te Maari* at 209.

4. Weaknesses as a judge:

4A. Brief treatment of important legal issues

While Prendergast CJ was widely respected by his peers, there were notable deficiencies in his approach to adjudication. The Supreme Court case of *Doyle v Edwards* (1898) 16 NZLR 572, has also been referred to numerous times in recent legal decisions. Prendergast CJ's decision affirmed the ability of Crown Land to be free from restrictive by-laws. In a very brief judgment, Prendergast CJ once more upheld the power of Crown Land. The judgment does not seek to explore relevant authorities but is basically Prendergast CJ's opinion on the Municipal Corporations Act 1886. Though it could seem that Prendergast CJ was negligent in providing so brief a decision on an important matter of law, it must be remembered judgments were noticeably shorter in the nineteenth-century and Prendergast CJ was clearly certain of his decision. The Chief Justice stated:

I think it is plain what construction must be given to the words of section 3 of "The Municipal Corporations Act, 1886." It is plain there is a property in the land and building vested in the Crown. It is true, that there is a property in the lessee; but, inasmuch as serious liabilities would be imposed on the Crown if its land, though under lease, were subject to all building by-laws, and to the various provisions of the Municipal Corporations Act relating to nuisances, &c., I think section 3 does exempt land belonging to and vested in the Crown, although a leasehold interest is created, and that it cannot be said that this builder was liable to get a permit. To hold so would be to affect the land.⁹⁶

The Court of Appeal in 1964 followed Prendergast CJ's decision, but only after expressing dissatisfaction with its formulation. In *Lower Hutt City v Attorney-General* [1965] NZLR 65, Turner J described his opinion of Prendergast CJ's judgment:

⁹⁶ *Doyle* at 573-4.

Prendergast C.J. did not take time to consider his judgment, which occupies only twenty lines in the report. The judgment contains no reasoning supporting its conclusion, nor does it cite any authority....[but]....*Doyle v Edwards* is by virtue of its age a compelling authority.⁹⁷

Wilson J in *Victory Park Board v Christchurch City* [1965] NZLR 741, avoided Turner J's predicament by simply distinguishing *Doyle* and *Lower Hutt City*.⁹⁸ In more recent times, Cooke J applied the *Doyle ratio* in *Wellington City Council v Victoria University of Wellington* [1975] 2 NZLR 301, while Prichard J found the decision unhelpful in *Retaruke Timber Co Ltd v Rodney County Council* [1984] 2 NZLR 129. Like *Wi Parata*, the *Doyle* decision has been utilised by some judges and ignored by others. Prendergast CJ's brief and insufficient reasoning has created problems for later judges.

Prendergast CJ was a tireless worker and a model of judicial endurance. His ability to carry out both the decision-making and administrative functions of Chief Justice for twenty-four years is a testimony to this fact. Prendergast CJ's efficiency occasionally appeared excessive as in *Light v Milton* (1883) 2 NZLR 214, "It is not necessary to consider our judgment. I think we may decide the question by looking at the Act generally." Prendergast CJ's decisions actually improved as his judicial career progressed. Most of his landmark judgments were made in the final years of his career. Almost a third of Prendergast CJ's judgments reported in the New Zealand Law Reports appear in the final four years of his career.

In *Olsen v Bailey* (1888) 6 NZLR 713, Prendergast CJ adjudicated in the area of trespass by cattle. The case was heard in Gisborne in 1888, when Prendergast CJ was aged 62 years. Arduous journeys, such as from Wellington to Gisborne, were an integral part of a Supreme Court judge's work, and must be taken into account when analysing their contributions. Prendergast CJ was especially dedicated to

⁹⁷ *Lower Hutt City* at 77-8.

⁹⁸ *Victory Park Board* at 746.

circuit work. In *Olsen*, Prendergast gave judgment to the defendant despite his sheep trespassing on Olsen's land. Olsen was held to be to blame for the poor upkeep of his fence.⁹⁹ The decision was another basic application of legislation to a specific fact situation and no case law is mentioned in Prendergast CJ's brief decision. A lack of attention to relevant common law precedent is apparent in a number of Prendergast CJ's important judgments.

In the long-running saga of *Russell v The Minister of Lands* (1898) 17 NZLR 241 and 780, the second reported case (No.2 – May 1899) which was presented before a Full Supreme Court is an apposite example of a complex real property case. The case was appealed from a decision by Edwards J in the Compensation Court and upheld by Prendergast CJ, Denniston, Conolly and Edwards JJ in the Supreme Court. The case dealt with the acquisition of land by the Crown for public purposes and relevant compensation. The case had also been heard by Prendergast CJ in the Supreme Court in October 1898. In the final 1899 decision, Prendergast CJ delivered the leading judgment confirming the ability of the Compensation Court to award extra compensation, "No doubt the compensation for compulsorily taking ought to be included in the amount to be awarded for compensation."¹⁰⁰ When the *Russell* case was mentioned in *Coomber v Birkenhead Borough Council* [1980] 2 NZLR 681, Speight J and R J MacLachland Esq by-passed Prendergast CJ's judgment as it "was upheld with brief reasons and the *ratio* can be best followed from the observations of Edwards J in the Compensation Court."¹⁰¹ Thus, *Russell* is another example of modern judicial criticism of Prendergast CJ's brief treatment of legal issues in his decisions.

⁹⁹ *Olsen* at 715.

¹⁰⁰ *Russell (No.2)* at 788.

¹⁰¹ *Coomber* at 685.

4B. Vague judgments

Prendergast CJ was a master of brief judgments. In the Court of Appeal decision, *Blaymires v Ewing* (1890) 9 NZLR 567, Prendergast CJ delivered one of his most vague decisions. The case was on appeal from a decision by Richmond J in the Supreme Court, arguing that Richmond J had acted on an incorrect principle when awarding costs. Prendergast CJ defended Richmond J's decision stating, "The spirit of our rules is to give the Judge a discretion as to costs....If there is anything at all in the nature of a hard-and-fast rule, it is that a successful party is to have his costs."¹⁰² Prendergast CJ did not provide any legal evidence to support his reasoning.

Prendergast CJ's decision in *Re Rickman, Ex parte The Bank of New Zealand* (1890) 8 NZLR 381 is another example of vague adjudication. In the case, *Rural Banking and Finance Corporation of New Zealand Ltd v Official Assignee* [1991] 2 NZLR 351, Fisher J dismissed Prendergast CJ's decision as it "contained no reasons other than the bald comment with respect to mortgaged land that 'it cannot, to my mind, be said that this is land subject to onerous covenants.'"¹⁰³ The *Re Rickman* case concerned that power of the Official Assignee under the Bankruptcy Act 1883 in regard to mortgages on land. Prendergast CJ referred to the relevant practice in England, but then stated that this was irrelevant to the present New Zealand case. Prendergast CJ relied heavily on English law and often seemed frustrated that he could not use it more readily in New Zealand courts.

Another weakness apparent in Prendergast CJ's judgments relates to his writing style. In *Low v Hutchinson* (1893) 13 NZLR 55, Prendergast CJ adjudicated on the Licensing Act 1881. In this case, there had been a temporary transfer of a

¹⁰² *Blaymires* at 570.

¹⁰³ *Rural Banking and Finance Corporation of New Zealand Ltd* at 355.

publican's license. During the temporary transfer, the original licensee was convicted of an offence committed before the transfer was granted. Prendergast CJ held that the conviction could not be recorded upon the license as it was currently vested in the temporary transferee. In the judgment, Prendergast CJ's *ratio* contains an apposite example of his complex syntax:

It is in my opinion quite clear that, when, in consequence of a change of tenancy of the premises in respect of which a publican's license is granted, the licensee procures a temporary transfer of his license to be made to the new tenant and indorsed on the license, such temporary transfer is, pending the application for an ordinary transfer at the then ensuing quarterly licensing meeting, for all purposes a transfer of the license.¹⁰⁴

This judgment was discussed at length in the decision of Richmond J in *Johns v Westland District Licensing Committee* [1961] NZLR 35. While the *Low* ratio has been influential, it is not an accessible precedent due to its awkward, dense construction.

4C. Weak judgments/over-turned

The relatively high number of decisions made by Prendergast CJ in the Supreme Court and later over-turned in the Court of Appeal suggests a number of unconvincing judgments on the part of the Chief Justice. Despite Prendergast CJ's command of bankruptcy law, in 1896, three years before his retirement, his Supreme Court decision, *Re Reimer, Ex parte The Official Assignee* (1896) 15 NZLR 198, was overturned by the Court of Appeal. The Court of Appeal consisted of Denniston, Conolly and Edwards JJ. Richmond J had died the previous year, leaving Prendergast CJ without his most loyal legal supporter. Prendergast CJ's judgment in the Supreme Court is confusing and contradictory. The case dealt with a debtor who had sold his business to his creditor with a term of the sale being that the creditor should be entitled to set off the indebtedness

¹⁰⁴ *Low* at 58.

against the price payable for the business. In the case of *Re Proudfoot, A Bankrupt, Ex parte Ballins Breweries (New Zealand) Limited* [1961] NZLR 268, Prendergast CJ's decision caused problems for the Court of Appeal. In his judgment, Cleary J stated that:

Sir James Prendergast C.J. made somewhat inconsistent findings. He found that the substantial object of the transaction on the part of the creditor was to acquire the hotelkeeper's business....He also found, however, that so far as the arrangement for set-off was concerned, it was stipulated for by the creditor with the object of getting a preference and the bankrupt's agreement thereto constituted a preference, and he ordered the creditor to make a refund to the Official Assignee. In the Court of Appeal, this order was set aside.¹⁰⁵

In the preceding Supreme Court decision of Hutchinson J ([1960] NZLR 577), the judge spent a sizeable portion of his decision coping with Prendergast CJ's awkward reasoning. The maxim, 'bad law makes hard cases', has some resonance in Prendergast CJ's *Reimer* decision.

4D. Difficulties in dealing with Maori issues

It has been argued in this thesis that Prendergast CJ's judicial legacy is primarily in the areas of land law, criminal law and the law relating to Maori. Earlier in this section, Prendergast CJ's influence on land and criminal law was mentioned, and in Chapter 7, Prendergast CJ's impact on Maori land and the Treaty of Waitangi is analysed in depth. But within Prendergast CJ's corpus of cases are a number of decisions relating to Maori but not directly concerned with land or sovereignty. For example, in the Supreme Court case of *Rira Peti v Ngaraihi Te Paku* (1888) 7 NZLR 235, Prendergast CJ discussed the law relating to Maori and matrimony. The decision in *Rira Peti* bears all the trademarks of a Prendergast CJ judgment. The judgment is relatively brief, deals with a moderate range of common law and statute, is influenced by English precedent and shows little regard for non-English perspectives. The ratio of *Rira Peti* was that "Marriage between persons of the

¹⁰⁵ *Re Proudfoot* at 284.

native race is governed by the common law of England...and must, therefore, be solemnized before a minister of some Christian denomination.”¹⁰⁶ Prendergast CJ refused to accept the validity of Maori ‘usages’. This decision has been recently described as “ludicrous”, due to Prendergast CJ’s proposition that tribal marriages had been subject to the common law since 1840.¹⁰⁷

The case of *Broughton v Donnelly*, relating to a Maori will, was mentioned in one of Prendergast CJ’s obituaries. The Dominion stated that Prendergast CJ’s decision in this high-profile case, “was not upheld by the Appeal Court, but the Privy Council took the same view as he had.”¹⁰⁸ As in the Edwards J affair, Prendergast CJ’s judgment had been vindicated by the highest court in the New Zealand legal system. In *Broughton*, Prendergast CJ held that the will in question was valid and that Maori witnesses must be accorded differing treatment to European witnesses:

It is impossible for native witnesses to give reliable evidence when a question depends upon the time when an alleged fact occurred, or upon the lapse of time....it is not possible to apply the same tests of their credibility as in the case of other witnesses.¹⁰⁹

The Court of Appeal, in a judgment delivered by Richmond J, disagreed with Prendergast CJ’s approach. Prendergast’s decisions in the area of Maori affairs strongly reflect racial attitudes of the era and seem paternalistic from a modern perspective.

5. Decisions reflecting the colonial environment:

The cases heard by Prendergast CJ from 1875 to 1899 reflected the colonial environment from which they arose. New Zealand during the late nineteenth-

¹⁰⁶ *Rira Peti* at 235.

¹⁰⁷ Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: OUP, 1991), p. 95.

¹⁰⁸ ‘Obituary’, *Dominion*, 28 February 1921, p. 4.

¹⁰⁹ *Broughton v Donnelly* (1888) 7 NZLR 288 (CA) 295.

century was a rapidly growing, agricultural community focussed on land. In this community, actions in tort often related to farming practice. While a case such as *Webber v Finnimore* (1880) 1 OB&F (SC) 150, dealing with the shooting of a dog for chasing sheep, may seem of minor importance today, in 1880 it was of major importance. Livestock and land were the keys to prosperity and sheep and cattle must be protected at all costs. The Injuries of Dogs Act, passed in 1865 when Prendergast CJ first entered the Legislative Council, governed this area of the law. In *Webber*, Prendergast CJ stated that the right to destroy a dog found in the Act was only “at the time when the dog was at large among sheep” and did not extend to hours afterwards. With a 17-line application of the statute to the facts, Prendergast CJ set a precedent which would still be used 78 years later in the case of *Payze v Everitt* [1959] NZLR 423, 425. The plaintiff, Webber, had appealed from the decision of a Resident Magistrate, and Prendergast CJ allowed the appeal. Prendergast CJ seemed far more ready to overturn appeals from the Magistrates Courts, when compared with appeals from the Supreme Court.

The fledgling New Zealand economy during the late nineteenth-century was often unstable and moved in cycles of boom and bust. A severe depression during the 1880s saw many would-be businessmen face bankruptcy and financial ruin. With a salary fixed by statute, James Prendergast flourished financially throughout the depression, but many of those who appeared in court before him were not so fortunate. In the case of *Re McGregor; Ex parte McGregor* (1888) 7 NZLR 241, Prendergast CJ was faced with a legal question relating to the Bankruptcy Act 1885. In this case, Prendergast CJ ruled against the creditor, stating, “Creditors who, knowing that a dividend has been declared, and is about to be paid, delay claiming by sending in their proof, do so at the risk of losing payment of the dividend.”¹¹⁰ The case was heard at Wanganui, the scene of several important decisions by Prendergast CJ. During Prendergast’s time as Chief Justice, Wanganui played a more prominent role in New Zealand affairs than it does today. As Judge in Wellington, Hokitika, Wanganui, Napier and Gisborne,

¹¹⁰ *Re McGregor* at 243.

Prendergast CJ was the legal ‘ruler’ of the northern South Island and southern North Island. During the 1830s, Te Rauparaha had ruled this area through force, Prendergast now ruled it through the law.

One of the staples of New Zealand colonial life was alcohol. In a social culture dominated by males, beer and spirits were consumed in large quantities. The licensing of alcohol was a complex legal issue, especially due to the fact that the liquor industry was a powerful voice in political life. Several prominent nineteenth-century politicians took very public stands on the alcohol issue. Richard Seddon, who was a publican before becoming premier, was a strong supporter of the alcohol industry, while Premier William Fox, was a vocal supporter of complete prohibition. No mention is made in Prendergast’s personal archival material regarding alcohol. It is likely that Prendergast supported moderation in this area, as in most others areas of life, though the alcoholism of his father and two brothers may have influenced his views. Prendergast CJ made several influential judgments in the area of liquor licensing. Though they provide some insights into Prendergast’s views on the topic, the legal historian must be wary of assuming judicial decisions in some way reflect personal viewpoints. While no judge is totally objective and free from personal bias, the role of the judge is to apply the law to the facts, not to make personal value judgments about the issues involved. Prendergast CJ took his role as a judge very seriously and respected the impartiality of the position.

Three years later in *Jull v Treanor* (1896) 14 NZLR 513, Prendergast CJ found himself faced with another case dealing with the Licensing Act 1881, with arguments provided by Skerrett and Gully, the same lawyers who appeared in *Nankivell*. This *déjà vu* case was on appeal from the Magistrate’s Court, where a licensee was convicted of selling liquor during closing hours, vicariously through the actions of a staff member. Prendergast CJ quashed the conviction as the staff member was not authorised to sell liquor. While stating his reasons, Prendergast CJ argued that, “The penalty is on the person who sells. No doubt the licensee is

liable if he himself sells, or if any person sells who is his agent in the sale.”¹¹¹ This *ratio* was used by North P and Turner J in *Gifford v Police* [1965] NZLR 484, 488, 495. In the *Jull* judgment, Prendergast CJ did not hesitate from openly criticising the decision of the Woodville Magistrate describing it as “an erroneous view of the law”.¹¹² Prendergast CJ was understandably more reluctant to use this language when dealing with case on appeal from the Supreme Court.

Prendergast CJ’s decisions reflected the colonial environment in which they were created. The legal historian must attempt to view judicial decisions on subjects such as farming, bankruptcy and liquor in the context in which they were made. An analysis of Prendergast CJ’s decision sheds light on the nature of late-nineteenth-century New Zealand society.

6. Summary:

From this summary of Prendergast CJ’s legacy in case law, it becomes clear that his most important decisions, with the exception of *Wi Parata*, were made in the final years of his Chief Justiceship. Of Prendergast’s 37 cases referred to in reported cases since 1959, 15 were in the final four years of his judicial career.(41% of cases in 17% of career) This could well be a reflection of maturity as a judge, or perhaps the greater precedential strength of more recent decisions. Two of Prendergast CJ’s most important decisions, *Merrie v McKay* (1898) and *Doyle v Edwards* (1898), were delivered in his penultimate year as a judge. While his least convincing landmark decision, *Wi Parata*, was made only two years into his judicial career. Interestingly, the group of decisions made in Prendergast CJ’s final years, were without the influence of Richmond J who died in 1895.

A common, though approximate, indication of a judge’s success is the number of cases upheld in a higher court. A number of Prendergast CJ’s decisions in the

¹¹¹ *Jull* at 516.

¹¹² *Jull* at 517.

Wellington Supreme Court were appealed to the Court of Appeal, and a few appealed beyond to the Privy Council. The clear majority of appeals against Prendergast CJ were unsuccessful. But approximately 30 percent of appeals reported in the New Zealand Law Reports, resulted in the Court of Appeal overturning Prendergast CJ's judgment, a similar figure to Robert Stout's 33 percent. It is possible that these reversals were reported due to their controversial nature, but regardless of this, Prendergast CJ had approximately thirteen decisions overruled in the New Zealand Law Reports. While this is not an alarming number, it casts doubt upon the claim that Prendergast CJ's decisions were almost full-proof.¹¹³

Prendergast CJ often took an active approach to adjudication. During the arguments of counsel, Prendergast CJ was always ready to interrupt if necessary to provide his views on a statute, case or line of reasoning. As Supreme Court Judge in Wellington, Prendergast CJ was fortunate to have the services of a highly competent bar, including advocates such as Martin and Frederick Chapman, Francis Bell, Hugh Gully, William Travers, Charles Izard, Charles Skerritt and Robert Stout. As a lawyer in Dunedin, Prendergast had been part of the strongest bar in New Zealand and as a judge in Wellington, he adjudicated before what had arguably become the strongest bar in New Zealand.

The Court of Appeal Bench from 1875-1899, was made up of a variety of different personalities and perspectives. Prendergast CJ and Richmond J were conservative judges and close associates. Williams, Johnston, Denniston and Conolly JJ tended to avoid activist judgments, though could be outspoken on occasions. Gillies and Edwards JJ were the most likely members of the Court to support judicial activism and deliver controversial judgments. While there was natural disagreement in the Court of Appeal, in the Wellington Supreme Court, Prendergast CJ and Richmond J almost always supported each others judgments. Disagreement in the one Supreme Court with two judges would have undermined

¹¹³ *New Zealand Freelance*, 2 March 1921, p. 32.

that court, when all other Supreme Courts were delivering unanimous judgments by a sole judge. A split decision in the Supreme Court would also require a case to proceed to the Court of Appeal to be heard again.

From 1875 to 1895, Richmond J and Prendergast CJ shared the bench of the Supreme Court in Wellington. The volume of cases in the Wellington Supreme Court steadily increased as this period progressed culminating in Prendergast's busiest year, 1895. In this year, Richmond J died, leaving Prendergast CJ as the sole Supreme Court judge in Wellington. The number of judgments delivered by Prendergast CJ in the Court of Appeal and Supreme Court and reported in the *New Zealand Law Reports* averages approximately 27 per year. In 1895, the number of cases is 51.¹¹⁴ Prendergast CJ was effectively hearing one case a week for an entire year, a heavy burden even for a judge of Prendergast CJ's experience.

Prendergast CJ's decisions attest to strengths and weaknesses in his adjudicative approach. Prendergast CJ was able to marshal past experiences and legal training to deliver many comprehensive and influential decisions. The professional approach taken by the Chief Justice allowed him to securely deal with high-profile cases and interpret his own legislation. Prendergast CJ showed a strong reliance on English precedent and preferred a literal approach to statutory interpretation. As Chief Justice, Prendergast had limitations, including a tendency to deliver brief, vague decisions. In the area of Maori affairs, Prendergast CJ was especially challenged. Prendergast CJ was a solid judicial decision-maker, but not an inspired one.

SECTION B: JURISPRUDENTIAL INFLUENCES IN DECISIONS

The issues facing Prendergast were essentially practical in nature, but the approach taken by the Chief Justice was influenced by his intellectual and

¹¹⁴ *New Zealand Law Reports*, Volume 14.

theoretical background. Prendergast CJ was not a legal philosopher, but was so well-versed in the law that he would consciously and sub-consciously deal with the great jurisprudential issues of the era. Prendergast CJ's judgments do not include many references to sources of a jurisprudential nature. Even legal textbooks received little mention in his decisions as Chief Justice. Most decisions rely on statute and case law, though some are essentially common sense applied to a specific fact situation. Prendergast was an intelligent man with a degree from one of the world's leading universities, but his reading was mainly confined to the law. In looking for the intellectual context of Prendergast CJ's decisions, it must be remembered that Prendergast CJ was a practical judge, rather than an intellectual one. Unlike Henry Chapman, Joshua Williams and John Salmond, Prendergast CJ did not canvass all available relevant literary material in reaching his legal conclusions.

While Prendergast CJ's decisions did not usually utilise jurisprudential texts to any great extent, there are exceptions. In *R v Bern* (1895), Prendergast CJ made reference to Chitty's *Criminal Law*. In *Rangimoeke v Strachan* (1895), Prendergast CJ considered the real property text, *Sugden on Powers*, 8th edition. In one of his earliest landmark decision, *Barton v Allen* (1877), Prendergast CJ referred to *Bigelow on Estoppel* and *Taylor on Evidence*. In the *Wi Parata* decision, also made in 1877, Prendergast CJ also canvassed a large range of legal sources, possibly reflecting the desire of a new judge for intellectual credibility. While Prendergast CJ's references to texts were limited, it must be remembered that it is primarily the duty of counsel to provide the court with legal evidence. The judge utilises this evidence in the course of reaching a judgment.

The legacy of Prendergast CJ's decisions are their practical effects on New Zealand society, for example, the effect of *Wi Parata* on the retention of Maori land. With the exception of Treaty law, Prendergast CJ did not greatly shape New Zealand's jurisprudence. The jurisprudence existing in New Zealand during the late nineteenth-century was primarily imported from England. It must also be

noted that Prendergast CJ was a busy judge, and brief judgments dealing solely with the facts and law in question made for a more efficient court. The number of judgments made by Prendergast CJ during his time on the bench is impressive, though the quality of decision-making varies. Prendergast CJ's decisions appear in both the Court of Appeal reports and those of the Supreme Court. Due to time constraints, Prendergast CJ often assigned Richmond J to hear Wellington Supreme Court matters alone.

Prendergast CJ's jurisprudential outlook can be further explored by analysing his role in the formulation of the 'Examinations for Barristers and Solicitors' in 1875.¹¹⁵ As Chief Justice, Prendergast was nominally responsible for setting the examination papers for prospective barristers. It is unclear to what degree Prendergast CJ was personally responsible for the formulation of the examinations, but they bear his name. Prendergast CJ's examinations are clearly modelled on his experiences in England. Candidates were expected to study subjects for the general knowledge examination including; Latin (Cicero, Livy, Virgil's *Aeneid*), Greek (Homer's *Iliad*, Sophocles' *Antigone*, Herodotus), Law (Property, Common Law, Torts, Crimes, Equity, Pleading, Evidence and 'A knowledge of the leading decisions in the Court of Appeal in New Zealand').¹¹⁶ While these subjects as based on an English model, the inclusion of the study of New Zealand Court of Appeal decisions suggests a gradual movement towards a New Zealand legal identity.

Candidates were also expected to study international law (*jus gentium*) including Broom, Blackstone and Hallam's commentaries on Constitutional Law. Also included in the curriculum was the study of Euclid and Algebra. Euclid was Prendergast's speciality subject at Cambridge University. History was another important subject examined. Conventional texts were set such as Alison's *History of Europe* and Hallam's *Constitutional History*. No mention was made of New

¹¹⁵ *Colonial Law Journal*, 1865-75, p. 34.

¹¹⁶ *Colonial Law Journal*, 1865-75, p. 34-5.

Zealand history or society. For those barristers wary of Greek, this requirement could be replaced with the more ‘modern’ languages of French and German. Lastly, prospective barristers were expected to be competent in English, both etymology and composition. Candidates sat both a written and an oral examination, the oral examination being conducted by a Judge of the Supreme Court.¹¹⁷

The examination for solicitors was based on the barrister’s examination but less demanding. The solicitor’s examination included works such as Joshua Williams on the law of real property and personal property, possibly the most relevant book set in both examinations.¹¹⁸ The examinations clearly demonstrate the European, and in particular English, focus of legal study in nineteenth-century New Zealand. While an attempt was made to test knowledge beyond the law, Maori culture was ignored, while the law relating to women was briefly touched upon under the heading of ‘Rights and Liabilities of Married Women’.

While the Chief Justice’s examination papers cannot be taken to completely reflect Prendergast’s viewpoints, they provide insights into his conservative, English-based intellectual framework. Discussion on the creation of this framework can be found in Chapters 2 and 7. The most obvious influence on Prendergast CJ’s jurisprudence are the positivist ideas of John Austin. Austin’s command concept of law, separation of law and morality and theories on sovereignty are reflected in the career and decisions of Prendergast CJ.¹¹⁹ Prendergast CJ was a product of Victorian England. In his work, *The Victorian Frame of Mind 1830-1870*, Walter E. Houghton describes the fundamental beliefs of the Victorians.¹²⁰ Houghton argues that the Victorians shared a range of values

¹¹⁷ H.R. Richmond described Prendergast’s approach as examiner as “severe and technical”. In Guy H. Scholefield (ed.), *The Richmond-Atkinson Papers: Volume II* (Wellington: R.E. Owen, 1960), p. 432.

¹¹⁸ *Colonial Law Journal*, 1865-75, p. 34-6.

¹¹⁹ See John Austin, *The province of jurisprudence determined*, edited by Wilfrid E. Rumble (Cambridge: University Press, 1995, First published 1832).

¹²⁰ See Walter E. Houghton, *The Victorian Frame of Mind* (New Haven: Yale University Press, 1957).

and beliefs in common, for example, a reverence for science and business, a fear of revolution, a rigid puritanical belief system, a strong work ethic and a hypocritical moral outlook. Of course, all these were challenged during the Victorian era, but many of these Victorian traits can be found in Prendergast's personality, which was essentially conservative. Prendergast was a tireless worker, a supporter of business interests and had the ability to act with integrity while also being responsible for seemingly crafty actions. Though Prendergast spent only 25 years of his life in Victorian England, 39 years were spent in Victorian New Zealand. Prendergast was a Victorian gentleman, with a passion for the more practical pursuits of law, farming and business.

SECTION C: PRENDERGAST AS JUDICIAL ADMINISTRATOR

While Prendergast CJ was not inclined towards jurisprudence, he was an able administrator of the justice system. As well as hearing cases in the Wellington Supreme Court and the Court of Appeal, Prendergast CJ also devoted himself to the administration of colonial justice. Many of the administrative and bureaucratic decisions made by Prendergast as Chief Justice are somewhat mundane, but some provide fascinating insights into the development of the New Zealand legal system. Prendergast came to the job of Chief Justice with a large amount of experience in legal administration. Not only had he acted as Attorney-General for ten years, he had also held the posts of Provincial Solicitor and Crown Solicitor in Dunedin and clerical appointments in Victoria, Australia. Prendergast CJ was a well-organised and efficient administrator and provided strong leadership in this area.

As Chief Justice, Prendergast was involved in the management of the New Zealand judiciary, including Supreme Court Judges, Resident Magistrates and Justices of the Peace. Prendergast was required to administer the oaths of office to new judges and oversee their work. Appointments such as Registrars of the

Court were also under Prendergast CJ's administrative jurisdiction.¹²¹ Prendergast CJ's views were often passed onto the Governor to receive rubber-stamping. The Chief Justice was aided his work by a personal secretary. Prendergast CJ allowed nepotism to influence several of his choices. His first secretary was Henry Hall, his nephew. Hall was followed in 1882 by an Atkinson, with Michael Prendergast acting as temporary secretary in the interim.¹²² In November 1884, A. C. Hadfield was appointed Chief Justice's secretary. Finally in 1889, Charles Prendergast Knight, another nephew, took the role of aiding Prendergast CJ.¹²³

As an administrator, Prendergast CJ was also faced with mundane issues relevant to any large organisation or institution. For example, in June 1877, Prendergast dealt with the question of whether it was necessary for judges to obtain receipts when travelling on Government Railways. Other similar issues included furniture orders, accommodation matters and the installation of new communication technology such as the typewriter and telephone.¹²⁴ Thus was the nature of the Chief Justiceship, one day dealing with office equipment, the next death sentences.

Administrative issues could also be quite fascinating and have long-lasting implications. For example, Prendergast CJ was involved in the organisation of a new Court House in 1877. These conditions in the original Court House had become unsuitable for the large amount of legal business being conducted. In July 1877, the Grand Jurors of Wellington made a formal complaint to Prendergast CJ, stating, "the very insufficient and miserable nature of the accommodation provided for the Courts of Justice in this City and the urgent necessity which exists for an improvement therein."¹²⁵ Moves were already afoot

¹²¹ Departmental Indexes, 2 January 1877, Justice Department Records, J1 77/52.

¹²² Department Indexes, Justice Department Records. NB. Hall continued to supported Prendergast in administration throughout his term as Chief Justice.

¹²³ Department Indexes, Justice Department Records.

¹²⁴ Prendergast wanted a telephone connection from work to home in 1892.

¹²⁵ Grand Jurors, Wellington, to Prendergast CJ, July 1877, Justice Department Records, J1 77/2914.

to build the new Court House and Henry Hall had organised a meeting between Prendergast CJ and Richmond J and the Colonial Architect's Office.¹²⁶ Wellington was growing rapidly as a city, since becoming the capital in 1865.

The contentious issue of Grand Juries was addressed by Prendergast in his first year as Chief Justice. In his first appearance as Judge in Marlborough, the Grand Jury at Picton provided him with the following petition:

it is their humble opinion that the time has now arrived when Grand Juries could very well be abolished, and the duties performed by such Juries, could with great relief, to those liable to serve on such juries, and also with great advantage to the administration of Justice, be transferred to an Officer, legally qualified, to be appointed by the Government for that purpose.¹²⁷

Prendergast CJ conveyed the presentment to the Colonial Secretary for consideration. With the New Zealand legal system undergoing rapid change, new issues were constantly arising. Most issues were related to the implementation of the English legal system in a new and challenging environment.

Prendergast CJ was involved in the day-to-day workings of the legal system. Issues relating to specific prisoners were brought before the Chief Justice, for example, petitions for the remission of sentences. In 21 June 1875, Prendergast CJ supplied an opinion on Prisoner Tsong Tsi to the Colonial Secretary. Prendergast wrote that "the prisoner was convicted in due course of law, and that I am aware of no reason for the remission or commendation of the sentence passed upon him."¹²⁸ Prendergast CJ gave a similar opinion in the matter of Prisoner Buchanan on 28 June 1877.¹²⁹ Evidential issues were also brought before Prendergast CJ. In *R v Woodgate*, Prendergast CJ was not only judge but reported

¹²⁶ Henry Hall to Colonial Architect's Office, 1877, Justice Department Records, J1 77/2914.

¹²⁷ Grand Jurors, Picton, to Prendergast CJ, July 1875, Justice Department Records, J1 75/1860.

¹²⁸ Prendergast CJ to Colonial Secretary, 21 June 1875, Justice Department Records, J1 77/1649.

¹²⁹ Prendergast CJ to Colonial Secretary, 28 June 1877, Justice Department Records, J1 77/2493.

on the evidence in the case in his capacity as administrator as well.¹³⁰ The duties of a Chief Justice were many and varied.

4. Prendergast as Chief Justice II (Controversial affairs – three cases studies; Barton, Edwards J, Moss)

During the period 1875 to 1899, Prendergast CJ heard a myriad of cases. Of the cases heard, few were reported. Of the cases reported, few were high-profile or controversial. Despite this, part of Prendergast CJ's legal legacy is his role in controversial legal actions. Prendergast CJ's first appearance as a judge was at Dunedin in April 1875. Thirteen years after beginning practise in Dunedin, Prendergast returned to his former home as Chief Justice of New Zealand. Prendergast CJ dismissed an official welcome and pressed on with the business at hand:

A large number of the members of the Bar were present in court when his Honour took his seat on the bench. It had been their intention to present him with an address, but he previously expressed a wish that this should not be done.¹³¹

Prendergast CJ's debut was a success, working late into the night to complete cases. Despite this, Prendergast CJ did not escape criticism, "A light sentence for infanticide led to considerable condemnatory comment of a vigorous kind, but generally, so it is recorded, the new Chief Justice 'created a very favourable impression.'"¹³²

SECTION A: THE BARTON AFFAIR

After a relatively successful beginning, in 1877 Prendergast CJ found himself embroiled in a vicious controversy involving George E. Barton. As outlined in

¹³⁰ Justice Department Records, J1 77/601.

¹³¹ *New Zealand Mail*, 1 June 1899, p. 41.

¹³² *New Zealand Mail*, 1 June 1899, p. 41.

earlier chapters, Barton had chanced upon Prendergast and his brothers on a number of different occasions. After leaving legal practise in Dublin for the Victorian goldfields during the 1850s, Barton was a political associate of Michael Prendergast. Barton also worked with James Prendergast in Dunedin during the early 1860s. As mentioned in Chapter 4, Barton left New Zealand under a cloud of controversy during the mid 1870s, only to return to practise in Wellington a few years later. During 1877 and 1878, the relationship between Prendergast CJ and Barton exploded into one of the most high-profile legal conflicts in nineteenth-century New Zealand society. It is ironic that the Barton-Prendergast dispute received more coverage in the public arena than did the *Wi Parata* decision. The effect of the feud upon the *Wi Parata* decision is discussed in Chapter 7. It is possible that the feud was related to Barton's exclusion from the Supreme Court appointments in 1875.

The Barton affair provides the historian with insights into Prendergast CJ's early career as a judge. Under a high degree of pressure, Prendergast CJ's reaction was to remain steadfastly stubborn and resolutely maintain the authority and power of his office. Two years after beginning his judgeship and only a few months before his *Wi Parata* decision, Prendergast CJ heard the case, *Cole v McKirdy* (1877) SC with Richmond J. Barton appeared before the two Wellington Supreme Court judges in this case and was unhappy with their conduct. It is this case in particular that Barton used to support his charges of judicial misconduct. The charges were levelled against both Prendergast CJ and Richmond J.

The matter flared up in August 1877, when Barton brought a petition to the House of Representatives. Mr. Sheehan introduced the petition on Barton's behalf and gave notice on his intention to move for a committee to inquire into the allegations. In his defence, Prendergast CJ stated the grounds on which an inquiry should take place, arguing that the matter must be:

not only of such misconduct as would if established justify their removal, but be also so specific as to be capable of answer. The

complaints made in the petition fail in both respects: there is but one matter of complaint which is stated with any particularity namely, my alleged conduct on the occasion of hearing a summons in Chambers in a case in which one Cole was plaintiff and one McKirdy defendant.¹³³

Prendergast CJ dismissed the need for an inquiry:

Assuming that I was wrong in all the particulars alleged with regard to that matter I fail to see that such errors afford any sufficient reason for inquiry by His Excellency's Advisors or either House of the General Assembly into my decision or conduct in that case.¹³⁴

The matter simmered until 28 January 1878 when Prendergast CJ and Richmond J heard the case of *Gillon v MacDonald* in the Supreme Court at Wellington. Barton appeared on behalf of Gillon, the plaintiff. Gillon desired an injunction to prevent MacDonald and others interfering with Gillon in the sale of the plant and goodwill of the *Evening Argus* newspaper.¹³⁵ During the trial, Barton took offence at the direction of proceedings and threatened to walk out of the court. Prendergast CJ asked Barton to sit down and Barton refused. Barton then left the courtroom. The case was adjourned. Two days later on 30 January 1878 in the Supreme Court case of *Spence v Pearson*, Barton once again appeared before Prendergast CJ and Richmond J. In his argument, Barton implied that the judges were biased towards him and his client. Prendergast CJ took offence, stating:

Will you sit down, Mr. Barton, you are entirely forgetting yourself. I ask you to explain what you mean by the language you have just used....Do you mean to impute to myself and brother Judge that we are not actuated by those principles which are required for the impartial administration of justice.¹³⁶

¹³³ Prendergast's reply to Barton's claims, 27 August 1877, Justice Department Records, J1 77/3361, National Archives, Wellington.

¹³⁴ Prendergast's reply to Barton's claims, 27 August 1877, Justice Department Records, J1 77/3361.

¹³⁵ *New Zealand Mail*, 2 February 1878, p. 20.

¹³⁶ *New Zealand Mail*, 2 February 1878, p. 20.

Barton replied, "What I have said I have said." Barton asked to be able to consult with his principals in Dunedin, Sievwright and Robert Stout. He then presented a monologue describing the unfair treatment he had received at the hands of Prendergast CJ and Richmond J. After discussions with Richmond J, Prendergast CJ proclaimed that Barton was in contempt of Court and fined him 50 pounds.

The Court then moved to continue debate in the matter of *Gillon v MacDonald*. Barton immediately caused offence, by accusing the defendant's lawyers, Ollivier and Travers of rascality. After further arguments between Bar and Bench, Prendergast CJ ruled in favour of MacDonald. During the judgment, Barton continued to interrupt. At this point, the normally composed, Prendergast CJ lost his temper for perhaps the only time in documented records. The Chief Justice twice ordered Barton to "keep your seat and hold your tongue". After another interjection by Barton and a threat to leave the court, Prendergast CJ asserted his supreme authority over the Court:

Will you be good enough to remain. Well, now, Mr Barton, I have many times requested you to keep your seat and not to interrupt the proceedings of the Court....unless you see fit to apologize to this Court and express regret for such transgressions, you will be adjudged guilty of contempt of this Court.¹³⁷

Barton met Prendergast CJ's challenge with stubborn resolution, "This matter must go to the end, it is perfectly clear. I know what the Court means, and I hope it knows what I mean." Prendergast CJ's reply was to again judge Barton guilty of contempt of Court, but instead of a further fine, Barton was sentenced to one month imprisonment.

While in prison, Barton won the election for Wellington City seat in the House of Representatives. William Travers had held the seat, but did not run for re-election. In a surprise result, Barton convinced enough voters of the righteousness of his controversial actions to win the important political seat. In his campaign,

¹³⁷ *New Zealand Mail*, 2 February 1878, p. 20.

Barton was supported by his client, Gillon and his son, L'Estrange Barton.¹³⁸ Barton supported George Grey's 'liberal party' placing him politically in opposition to Prendergast CJ, who leaned towards 'conservatives' such as Atkinson.

The *Gillon v MacDonald* saga continued throughout 1878. Richmond J heard the case of *In re George Elliot Barton* on 29 March 1878 and ruled that Prendergast CJ had the power to commit a barrister instantly to prison for contempt of Court.¹³⁹ The case came before the Supreme Court again on 25 June 1878, with Barton arguing that the case should not have been struck off the list. This hearing was another protracted and personal debate between Barton and the Wellington judges.¹⁴⁰ Barton received support for his cause from the Dunedin and Christchurch Bars and a meeting of Wellington citizens. In written statements these groups supported the possibility of an inquiry, placing Prendergast CJ and Richmond J in an embarrassing position. It is telling, that no resolutions were passed by the Auckland or Wellington Bars. Prendergast, though originally a Dunedin barrister, had focused his energies on Wellington for over a decade since moving permanently to the capital city in 1867. The Government claimed that it was for Barton to personally call for a parliamentary inquiry, while Barton argued that it was the responsibility of the Grey Ministry. Grey and Ballance attempted to wash their hands of the situation by refusing to openly vindicate their judges or allow Barton a full-scale inquiry.¹⁴¹ Prendergast CJ would have hoped for stronger support from the Executive branch of Government. Only three years into his Chief Justiceship, Prendergast had become a figure of controversy and angered a large section of the New Zealand Bar.

Richmond J attempted to defend Prendergast CJ and himself in a letter to the Colonial Secretary dated 3 October 1878. The Barton affair had been exacerbated

¹³⁸ *New Zealand Mail*, 23 February 1878, p. 18.

¹³⁹ *New Zealand Jurist*, May 1878, p. 67.

¹⁴⁰ *New Zealand Mail*, 29 June 1878, p. 8.

¹⁴¹ *New Zealand Mail*, 29 June 1878, pp. 9-10.

by lurid details in the press and Prendergast CJ and Richmond J were on the defensive:

I need scarcely add that it is quite a misapprehension to suppose that the Chief Justice refused to refer to his notes of the first trial. I do not know that there is any ground for this mistake in the Jurist report, which, so far as it is based on the report of the New Zealand Times, is fair enough....Some reporter must have misunderstood the [Chief Justice's] observation. Such mistakes are continually occurring.¹⁴²

In the final months of 1878, the Grey Government (including Stout, Ballance and Whitmore) finally tired of Barton's continued attacks on Prendergast CJ and Richmond J. In a letter dated 29 October 1878, Colonial Secretary Whitmore, an ally of Prendergast CJ from his days in the Legislative Council, wrote to Barton, "After carefully considering the report of your speech, the Government are of opinion that no inquiry should be made into any charges against Judges or other persons unless the charges are particularized and specified."¹⁴³ Barton replied with an exhaustive lists of charges detailing all the cases and instances upon which Barton claimed he had been treated unfairly. The cases began with *R v Pune* in 1876 and also included *Hall v Borough of Wanganui* (March 1877), *Cole v McKirdy* (August 1877), *Clayton v Isaacs* (24 January 1878), *Gillon v MacDonald* (January 1878), *Spence v Pearse* (January 1878) and *Peters v Joseph* (May 1878).

The Government was not impressed and dismissed the charges.¹⁴⁴ Barton wrote one more scathing letter, chiefly attacking Richmond J on a personal level and stating his support from Robert Stout, George Grey and James Macandrew. After accusing the judges of outright corruption and other evils, Barton stated that he would not force an inquiry. As Whitmore stated in a letter to Barton dated 20 December 1878, "correspondence upon the subject has reached its natural

¹⁴² Letter, Christopher Richmond to Colonial Secretary, 3 October 1878, *AJHR*, 1878 and *New Zealand Mail*, 12 October 1878, pp. 12-13.

¹⁴³ Colonial Secretary Whitmore to George E. Barton, 29 October 1878, *AJHR*, 1879, A-4, p. 1.

¹⁴⁴ Colonial Secretary Whitmore to George E. Barton, 12 December 1878, *AJHR*, 1879, A-4, pp. 6-9.

conclusion.”¹⁴⁵ The controversy was over, but damage had been inflicted upon the judicial career of James Prendergast.

In the *New Zealand Jurist* (February 1878), the editor, George B. Barton, an ally of George E. Barton’, attacked Prendergast CJ. While he did not speak for the New Zealand legal profession, his journal was circulated throughout the colony:

Whatever there may be to regret in Mr. Barton’s demeanor in this case, it must be admitted that there is still more to be regretted in the action of the Bench. When the Rule *nisi* was directed to issue by the Chief Justice in October, 1876, it was painfully clear that the learned Judge had allowed his temper to get the better of his discretion....But if irritability of temper and want of judgment were displayed on that occasion, they were displayed in a still greater degree on the present....And no one who will read the report [*Gillon v MacDonald*] can fail to be struck with the utter want of proportion between the offence and the punishment; nor can anyone fail to see that such a mistake is fatal to the reputation of a Judge.¹⁴⁶

In the March edition of *Jurist*, Barton pedantically criticised Prendergast CJ for occasionally delivering judgment in the first person and addressing Barton by the title ‘Sir’.¹⁴⁷ Prendergast CJ’s judicial career experienced a difficult beginning.

SECTION B: THE EDWARDS J AFFAIR

It was thirteen years later when Prendergast CJ once again became a key player in a nation-wide legal controversy. Worley Bassett Edwards has been described as “undoubtedly the most controversial man to have sat on the Bench of the Supreme Court of New Zealand.”¹⁴⁸ While Edwards J was the most controversial during his lifetime, Prendergast CJ would have a claim to be the most controversial from a modern perspective. The Edwards J affair began in 1889 when he was appointed as the sixth judge on the Supreme Court Bench. Problems arose when the

¹⁴⁵ Colonial Secretary Whitmore to George E. Barton, 20 December 1878, *AJHR*, 1879, A-4, p. 34.

¹⁴⁶ *New Zealand Jurist*, February 1878.

¹⁴⁷ *New Zealand Jurist*, March 1878.

¹⁴⁸ Brown, p. 146.

Ballance Government came to power in 1891. The Attorney-General, Patrick Buckley, claimed that as there was no fiscal or constitutional provision for a sixth judge, Edwards J's appointment was null and void.¹⁴⁹ The fight to dislodge Edwards J from the Bench continued for several years and drew all the Supreme Court Judges into the fray.

From the beginning, Prendergast CJ was unhappy with the sixth appointment. His views remained consistent throughout the controversy and were eventually vindicated by the Privy Council. The judicial leadership shown by Prendergast CJ during the drawn-out proceedings was level-headed and impressive. When comparing the Edwards J affair with the Barton affair, the biographer can see the maturing of Prendergast from a proud and hard-line Chief Justice into a calmer and wiser authority figure.

When the Ballance Government challenged Edwards J in 1891, he was unwilling to relinquish his newly found judicial position. In fact, he fought a long and bitter rearguard action to maintain the judgeship. A frank and difficult man with an impressive grasp of the law, Edwards J provided the Government with a strong opponent. During the appointment of Edwards J in 1889 and 1890 Prendergast CJ voiced his doubts as to whether the Government could appoint a fourth puisne judge. After discovering that several other Supreme Court Judges had been appointed before vacancies had appeared, Prendergast CJ withdrew his opposition. The Premier at the time was Harry Atkinson, or 'Sir Harry' to Prendergast.¹⁵⁰ Prendergast CJ admitted his doubts to Atkinson and to his brother judges.

A key issue worrying Prendergast CJ was whether he would be compromised as a judge by administering the oath as Chief Justice. Prendergast CJ remembered

¹⁴⁹ Brown, p. 146.

¹⁵⁰ Edwards J Papers, *AJHR*, 1891, H-13, p. 3.

well the Parihaka aftermath and was wary of being publicly compromised again. In a letter to Denniston J, Prendergast CJ revealed his tense state of mind:

What appears to me a serious question has arisen....I have suggested that I, at any rate, ought not to be asked to administer the oaths till after Parliament has met; but I may be pressed to administer the oath at once.¹⁵¹

Richmond J offered his support to Prendergast CJ in a telegram dated 12 March 1890, "If the Chief Justice continues to entertain doubt as to the legality of the appointment, he should certainly not be asked to swear in Mr. Edwards."¹⁵² The other Supreme Court Judges, Denniston, Williams and Conolly JJ also offered helpful advice and support.

But the Government was not to be hampered by judicial doubt. In a letter to Atkinson, Frederick Whitaker stated that, "If the Chief Justice has scruples about the administering of the oath, the only alternative I see is the substitution of some one else to do so."¹⁵³ After reconciling himself to Edwards J appointment, Prendergast CJ requested his services as soon as possible to relieve the heavy burden of cases hampering the Supreme Court.¹⁵⁴ Prendergast CJ was a judge of integrity, but he was above all a pragmatist.

With the election of the first Liberal Government in January 1891, Edwards J found himself under attack. Ballance and his Attorney-General Buckley attempted to prevent Edwards J from adjudicating. Prendergast CJ found himself in the unenviable position of having to appease the Executive Branch of Government and support his brother judge. Throughout his career as Chief Justice, Prendergast had been associated with the conservative section of New Zealand politics, including the Richmond-Atkinson clan and John Bryce. It is

¹⁵¹ Letter, Prendergast CJ to Denniston J, *AJHR*, 1891, H-13, p. 4.

¹⁵² Telegram, Richmond J to Prendergast CJ, 12 March 1890, *AJHR*, 1891, H-13, p. 5.

¹⁵³ Letter, Frederick Whitaker to Harry Atkinson, *AJHR*, 1891, H-13, p. 5.

¹⁵⁴ Edwards J Papers, *AJHR*, 1891, H-13, p. 7.

unlikely that Prendergast was pleased with the election of the Ballance Liberal Government. It is also unlikely that Prendergast CJ gladly accepted continuing governmental interference with the judicial branch of government. In a brief exchange of letters between Prendergast CJ and Ballance in February 1891, there was a dispute over whether Edwards J could be appointed Deputy Judge of the Vice-Admiralty Court, with Prendergast CJ supporting Edwards J.¹⁵⁵ A meeting was arranged between Buckley and Prendergast CJ to discuss the Edwards J issue. In this meeting, Prendergast CJ referred Buckley to the earlier correspondence in which he doubted the ability of Edwards J to take his position as the sixth Supreme Court judge.¹⁵⁶

When asked to prevent Edwards J sitting at the Napier sitting, Prendergast CJ stepped back from the conflict:

As Mr. Edwards has not informed me that he does not intend to sit at Napier, I can only repeat what I stated in my former letter to you, that I do not see what steps I can take in the matter of the sittings appointed to be held at Napier.¹⁵⁷

Prendergast CJ once again organised the Judges of the Supreme Court to provide opinions for the Government, but Prendergast CJ's opinion was noticeably absent:

For myself, though I still entertain the doubts I have always felt on the subject, I have not been able at this time to find sufficient leisure to write on the subject, but propose to do so as soon as possible.¹⁵⁸

Prendergast CJ displayed a cautious approach to controversy, perhaps remembering the Barton affair and the dangers of impulsive words and actions.

¹⁵⁵ Letters, Prendergast CJ and John Ballance, February 1891, *AJHR*, 1891, H-13, p. 14.

¹⁵⁶ Edwards J Papers, *AJHR*, 1891, H-13, p. 18.

¹⁵⁷ Letter, Prendergast CJ to John Ballance, 28 February 1891, *AJHR*, 1891, H-13, p. 25.

¹⁵⁸ Letter, Prendergast CJ to John Ballance, 10 April 1891, *AJHR*, 1891, H-13, p. 30.

The uncompromising attitudes shown by the Government and Edwards J forced the matter into the Court of Appeal. The case of *The Attorney-General v Mr Justice Edwards* (1891) 9 NZLR 321, was heard in May 1891. Robert Stout represented the Government while Martin Chapman and Theophilus Cooper represented Edwards J. The decision was split, with the majority of Richmond, Williams and Denniston JJ ruling for Edwards J, and Prendergast CJ and Conolly J dissenting. The matter had already harmed the prestige of the Court, showing it to be either in conflict or under the power of central government. The Court of Appeal decision further undermined the Court as the split decision failed to deliver a conclusive answer. Prendergast CJ's judgment was lengthy and involved, highlighting the importance of a strong and independent judiciary supported by legislation supplying salaries and job security.

While Prendergast CJ's verdict was not supported by the majority, the Privy Council vindicated his views several months later. Prendergast CJ maintained his opinions throughout the controversy, but also acted practically when necessary and attempted to carry out his duty to the Government and his fellow Judges. Despite his defeat in the Court of Appeal, Prendergast CJ immediately began organising work for Edwards J in the following weeks.¹⁵⁹ As the Government pressed onwards to the Privy Council, Edwards J received support from the New Zealand Bar, worried about the impact of the dispute on the prestige and authority of the Supreme Court.¹⁶⁰ Edwards J was legally appointed to the Supreme Court Bench in 1896. It is unclear whether he harboured any resentment against Prendergast CJ for adjudicating against him in the 1891 case.

SECTION C: THE MOSS AFFAIR

Prendergast CJ's reputation as an adjudicator were called upon in a somewhat different capacity in 1897. Trouble had erupted in the Cook Islands between its

¹⁵⁹ Telegram, Prendergast CJ to Edwards J, 14 June 1891, *AJHR*, 1891, H-13a, p. 2.

¹⁶⁰ Edwards J Papers, *AJHR*, 1892, H-28, p. 3.

inhabitants and the British Resident, Frederick Moss.¹⁶¹ Moss had been a high-profile figure in New Zealand politics during the late nineteenth-century and had been appointed to the post in Rarotonga as a man of high standing. Moss was not popular amongst the inhabitants of the Cook Islands, in particular, the European settlers. Prendergast left New Zealand in December 1897 aboard the H.M.S. “Torch”, aged 71 years. The fact that Prendergast could successfully undertake a strenuous voyage and mission such as this at an advanced age is testimony to his impressive health and longevity. Prendergast’s personal secretary and nephew, Charles Prendergast Knight, travelled with him to aid in the conducting of the inquiry. Prendergast was not empowered by Governor Ranfurly to compel the attendance of witnesses or to take sworn evidence.¹⁶² Rarotonga was in 1897 a New Zealand protectorate¹⁶³ and Ranfurly felt obliged to intervene in its troubled domestic affairs.

In true Prendergast fashion, the report provided to Ranfurly was comprehensive and dense. Prendergast’s instructions were to conduct a fact-finding inquiry into the state of the Cook Islands constitution and society in general. Prendergast’s experience in dealing with the rights of indigenous peoples made him especially suitable from Ranfurly’s perspective. Twenty years after *Wi Parata*, Prendergast took his hard-line approach to race relations beyond New Zealand shores. On his arrival Prendergast was treated with due ceremony and his inquiry was welcomed by many who were relieved to find that matters had been taken out of the hands of Moss.¹⁶⁴ The charges against Moss were not criminal:

It will be seen that in no case is a charge of corrupt, fraudulent, or dishonest conduct made; the most that can be inferred is a charge of erroneous policy, mistake, want of judgment, overbearing conduct, and wilful disregard of the opinions of others.¹⁶⁵

¹⁶¹ Moss served as a Member of the House of Representatives and also on the Otago Provincial Council from 1863-66, Barrie MacDonald, ‘Frederick Joseph Moss’, in Orange (ed.), p. 338.

¹⁶² Moss Papers, *AJHR*, 1898, A-1, No. 21, p. 10.

¹⁶³ Rarotonga had been a protectorate since 1890, the same year Moss appointed.

¹⁶⁴ Moss Papers, *AJHR*, 1898, A-3, p. 15.

¹⁶⁵ Report, Prendergast CJ to Governor Ranfurly, 24 January 1898, *AJHR*, 1898, A-3, p. 16.

While Prendergast found that Moss had overstepped his jurisdiction in certain matters, he found most of the charges made against the British Resident frivolous and unsupported by evidence.

Mentions of ‘savages’ and ‘barbarians’ are noticeably absent from Prendergast’s report. From Prendergast’s perspective, the Cook Islanders must have reached a higher state of civilisation than the Maori in 1877 or Prendergast’s views on indigenous people were becoming more tolerant.¹⁶⁶ Ultimately, Prendergast supported Moss and dismissed the charges against him. Prendergast blamed much of the disruption on Moss’ European enemies and credited Moss with attempting to aid the indigenous Cook Islanders. But it was clear to Prendergast that Moss’ position was no longer tenable and Moss was recalled.¹⁶⁷ Prendergast concluded his report with a prediction for the future, “it is only a question of time, and that ere long it will be found inevitable to give up the Protectorate, or modify the position of the British Resident, or to annex these islands to the British Crown.”¹⁶⁸ In 1901, New Zealand’s boundaries were extended to include and annex the Cook Islands while in 1965 the Cook Islands became a self-governing state in association with New Zealand.¹⁶⁹

5. Chairing the Royal Commission of 1881

While Chief Justice, Prendergast was involved in the Royal Commission which altered the nature of common law procedure in New Zealand. As Chairman of the Commission, Prendergast CJ presided over a pivotal event in New Zealand’s legal history. The recommendations of the Commission heavily influenced the practice of law and the administration of law in New Zealand. While source material

¹⁶⁶ Though Prendergast does use the term ‘partially-civilised people’ (p. 24) and believes the effectiveness of native judges is limited (p. 25).

¹⁶⁷ Barrie MacDonald, ‘Frederick Moss’, in Orange (ed.), p. 338.

¹⁶⁸ Report, Prendergast CJ to Governor Ranfurly, 24 January 1898, *AJHR*, 1898, A-3, p. 24.

¹⁶⁹ J.B. Ringer, *An Introduction to New Zealand Government* (Christchurch: Hazard Press, 1991), p. 317.

detailing the findings of the Commission is comprehensive, material detailing Prendergast CJ's specific role in the investigation is limited.

The Commission of Inquiry was established by Governor Hercules Robinson on 7 July 1880.¹⁷⁰ The Commission featured the elite of the New Zealand legal system in 1880, including the five Supreme Court Judges (Prendergast CJ, Gillies, Richmond, Johnston and Williams JJ), the Solicitor-General Walter Reid, the Attorney-General Frederick Whitaker and leading barristers such as Edward Conolly and Robert Stout. Others on the Commission included two District Court Judges, a Resident Magistrate and three Justices of the Peace, including William Gisborne. Martin Chapman, whose father Henry had been pivotal in earlier legal changes, was appointed secretary. The nineteen members provided one of the most impressive gatherings of legal minds in New Zealand during the nineteenth-century. The Commission had specifically been charged with:

inquiring into the constitution, practice, and procedure of the several Courts of judicature in our said colony, that is to say, - (1.) The Supreme Court, including the Court of Appeal; (2.) The District Courts; (3.) Resident Magistrates' Courts; (4.) Courts of Petty Sessions of the Peace; (5.) Courts held before Justices of the Peace.¹⁷¹

The chief achievement of the Commission was to adapt common law procedure to better suit the New Zealand colonial environment. Public criticism of court delays and expense had led to the Commission and after the Commission's deliberations, Parliament passed the Supreme Court Act 1882, the Court of Appeal Act 1882 and the Law Amendment Act 1882.¹⁷² Meetings were held in the main centres of New Zealand in 1880 to gather suggestions from the wider legal profession. The Commission's first formal meeting was on 23 November 1880. After seven sittings, a number of important resolutions were made.¹⁷³ Many suggestions were

¹⁷⁰ Letters Patent, *AJHR*, 1880, A-10.

¹⁷¹ Royal Commission of Inquiry into the nature of common law procedure in New Zealand, *AJHR*, A-10.

¹⁷² Peter Spiller (ed.), *A New Zealand Legal History* (Wellington: Brookers, 1995), p. 194.

¹⁷³ Royal Commission, *AJHR*, 1881, A-6, p. 5.

made to the Commission by District Law Societies and leading lawyers including William Travers, F. M. Ollivier and Robert Stout (who was also on the Commission). Some of these suggestions were adopted, many were not, for example, the suggestion of A.E.T. Devore, “That the sittings of the Court of Appeal should be held consecutively in the various centres of population – ie, Dunedin, Christchurch, Wellington, and Auckland”.

It is not the purpose of this section to provide a detailed account of the Commission’s findings. Prendergast CJ was only one member of nineteen, and though Chairman was not necessarily the leading intellectual figure on the Commission. Documentary records suggest this honour was Robert Stout’s. Prendergast CJ did provide strong leadership and a patient and professional attitude in his role as Chairman. As Chairman, he presided over pivotal and long-lasting changes to the New Zealand legal system, most of which were clearly improvements. The main achievements of the Commission were to abolish the District Courts in their present state, abolish special pleading and special forms of action (Prendergast’s speciality) and simplify legal procedure. Where Law and Equity conflicted, Equity would prevail and all proceedings in the Supreme Court were to be made uniform. The system of awarding costs in cases was reformed and simplified. Many of the changes reflected changes that had recently occurred in English law.

Ultimately, the Commissioners, with the exception of Gillies J, predicted that their changes would generally reduce expense to suitors and improve the efficiency of the court system. In a memorandum with Johnston and Richmond JJ, Prendergast CJ added a note of caution:

there are new methods proposed to be introduced in some of which we are not confident. Seeing, however, that the recommendations were adopted by the great majority of the Commissioners after ample discussion, we are not prepared to refuse to recommend that a trial should be given to the new proposals.¹⁷⁴

¹⁷⁴ Royal Commission, *AJHR*, 1882, A-3, p. 4.

Prendergast CJ was a conservative reformer, and while he played his part on the Commission, changes such as the abolition of special pleading, must have seemed to draw the curtain on the old era of legal practice of which he had been a part.

6. The personal affairs of Prendergast while Chief Justice

James Prendergast's personal life between 1875 and 1899 was relatively settled. With his brothers both in psychiatric institutions abroad, Prendergast had little contact with his personal past. The major events in his personal life are covered in Chapter 9, but certain events affecting his role as Chief Justice must be mentioned in this chapter. Firstly, the on-going support of his wife, Mary, was a key factor in Prendergast's longevity and success as a judge. Quietly supportive, Mary Prendergast was the most important person in the later life of James Prendergast. Despite his commitment to his wife, Prendergast was first and foremost a man dedicated to his career in the law.

Several nephews of James Prendergast played a role in his career as Chief Justice. Henry Hall, the son of Mary's brother, became Prendergast's secretary on his appointment as Chief Justice in 1875. Hall was an able secretary and his letters to Prendergast during the mid-1880s provide the historian with insights into their relationship. In 1888, Charles Prendergast Knight, the son of Mary's sister, also fulfilled the role of secretary to the Chief Justice.¹⁷⁵ Knight enjoyed social life and was probably less diligent than Hall, but Prendergast was fond of them both. Knight's diaries during the 1890s contain interesting anecdotes about his uncle and the cases that occupied the time of the Chief Justice.

James made two visits to England while Chief Justice, in 1884 and 1893. These opportunities allowed him to reacquaint himself with his English relatives, but

¹⁷⁵ Charles Prendergast Knight replaced A.C. Hadfield, Prendergast Papers, Te Papa Archives, Wellington.

Prendergast was always ready to return to his adopted home of New Zealand. Some of these English relatives went to great lengths to keep in regular correspondence with Prendergast, often to obtain financial assistance. Prendergast seems to have borne these requests with a patient sense of familial duty.

Prendergast enjoyed a vigorous and fast-paced lifestyle. During his time as Chief Justice, Prendergast travelled extensively, especially throughout the southern North Island. His endurance, especially during the late 1890s, when he was in his 70s, was a testimony to an active and healthy lifestyle. Prendergast was a survivor, physically, professionally and emotionally. A tireless worker, Prendergast was happiest when dealing with the law. It was said of Prendergast that he found a law report more entertaining than any other form of literature.¹⁷⁶

The Chief Justice had a sense of humour, albeit a very dry one:

Even stolid Chief Justice Sir James Prendergast can't resist the temptation to indulge in the usual weak judicial joke. A bank manager at Napier, who wanted to escape jury service, told the Bench that the doctor advised him not to sit in draughts. And His Honor's little quip was this: - 'It is certainly not pleasant to sit in a draught, but I have no objection to bank drafts.'¹⁷⁷

During the final decade of his long public career, Prendergast had become a Wellington fixture. The diaries of Charles Prendergast Knight refer to Prendergast's day to day activities, such as strolls along the Wellington harbour with Knight, attending official functions, picnics, tennis parties, opera concerts, games of draughts and reading.¹⁷⁸ In the later stages of his career, Prendergast was closely associated with many of the prominent figures in New Zealand colonial history, including Richmond J, Alfred Domett, Harry Atkinson and successive Governors.

¹⁷⁶ *New Zealand Freelance*, 13 March 1907.

¹⁷⁷ *Thames Observer*, 4 July 1896, p. 18.

¹⁷⁸ Diaries, Charles Prendergast Knight, 1890s, Prendergast Papers, MS-Papers 1791, Alexander Turnbull Library, Wellington.

In 1884, Prendergast took extended leave with his wife, but was kept up-to-date with New Zealand developments through his secretary, Hall. The letters written by Hall provide insights into Prendergast's political and moral views. In a letter dated 1 March 1884, Hall states that all Prendergast's mortgagors were keeping up with payments, except the Anglican Church. Hall wrote, "It would give me much pleasure to make them pay this, in order to make the Church practise what it preaches – payment of debts: but your instructions were not to press the matter."¹⁷⁹ Despite this leniency, Prendergast's finances continued to flourish during the severe economic depression of the 1880s. In his letters, Hall describes the difficulties many lawyers were facing finding work.

Hall also describes the political situation, openly stating his support of the 'conservatives'. While this does not prove Prendergast's political leanings, it is unlikely Hall would speak so candidly against his uncle's views, "Atkinson in obtaining an unconditional dissolution certainly seems to have outwitted the Rads."¹⁸⁰ During Prendergast's absence a rumour had arisen that the Chief Justice was to resign due to ill health and would not return to New Zealand. Hall quickly quashed the rumour and wrote to Prendergast that "Stout is quite ready to assume that your health will not permit of your retaining the Chief Justiceship long, and I fancy he got the above rumour published."¹⁸¹ On his return voyage to New Zealand in late 1884, Prendergast stopped at Melbourne to visit his brother Michael in a private retreat.¹⁸² Prendergast was partly responsible for financing Michael's treatment.

On his return, Prendergast set to work consolidating his position as Chief Justice. While Prendergast may have been a conservative in politics, he was also a judge,

¹⁷⁹ Henry Hall, Wellington, to James Prendergast, Britain, 1 March 1884, D.O.W. Hall Papers, MS-Papers 986.

¹⁸⁰ 'Rads' being political 'radicals' such as George Grey; Henry Hall, Wellington, to James Prendergast, Britain, 20 June 1884, D.O.W. Hall Papers, MS-Papers 986.

¹⁸¹ Henry Hall, Wellington, to James Prendergast, Britain, 18 November 1884, D.O.W. Hall Papers, MS-Papers 986.

¹⁸² Henry Hall, Wellington, to James Prendergast, Britain, 24 November 1884, D.O.W. Hall Papers, MS-Papers 986.

and therefore, attempted to remain politically neutral. While his relationship with Stout, Grey and other liberals may have been less than cordial, the historian must be careful not to read too much into brief comments. By all accounts, Prendergast had effective working relationships with most members of the New Zealand legal and political elite.

7. Conclusion: An analysis of Prendergast's career as Chief Justice: Successes vs Failures

Despite a number of challenging situations and professional setbacks, James Prendergast was a successful Chief Justice. His ability as leader of the Bench and chief judicial administrator outshone his ability as a judge, though many of his judgments retain their influence in the modern legal system. Prendergast CJ delivered approximately 600 judgments in a variety of legal areas. To remember him for one decision, namely that of *Wi Parata* (1877), is to distort the judicial impact of Prendergast CJ. In the context of Prendergast CJ's corpus of cases, *Wi Parata* is clearly one of his weaker decisions, delivered at the beginning of his career. Prendergast CJ was *prima inter pares* on the Supreme Court Bench of New Zealand. Surrounded by intelligent and competent judges, 'Prendergast's Bench' was one of the strongest in New Zealand legal history. As a judge, Prendergast CJ worked in the shadow of some of his more illustrious peers, namely, Johnston, Williams and Richmond JJ. While he was able to work successfully with all his judicial colleagues, Prendergast CJ's relationships with his brothers judges ranged from a close friendship with Richmond J to a very formal relationship with Edwards J.

In his appointment as Chief Justice, Prendergast benefited from good timing, a high-profile in the Wellington legal environment and strong political connections. For 24 years after his appointment in 1875, Prendergast CJ was the judicial 'ruler' of the bottom half of the North Island and the northern region of the South Island. The length of Prendergast CJ's career is testimony to his endurance and fortitude.

Commentators have described the defining qualities of Prendergast CJ's adjudication as being caution and safety. These qualities are evident in the published Law Reports, but Prendergast CJ's approach to adjudication was far more complex. Prendergast CJ's judicial style included both impressive strengths and worrying weaknesses. While he had the ability to deliver comprehensive judgments on key legal issues, Prendergast CJ could also deliver brief, vague judgments based on little legal precedent. Prendergast CJ's strengths were in land law and criminal law and he tended to adjudicate most effectively in these areas. Prendergast CJ was also experienced enough to handle controversial cases which poise and impartiality. Despite assertive decisions such as *Wi Parata*, Prendergast CJ was essentially a passive judge who preferred to interpret law rather than make it.

Prendergast adopted a literal interpretation of legislation in line with standard nineteenth-century judicial thought. While at times he looked to the 'spirit' of a statute, Prendergast was a conservative judge who believed his job was to apply the law as it was written. For ten years as Attorney-General, Prendergast had drafted legislation. As Chief Justice, Prendergast had the opportunity of interpreting that legislation. This domination in the legislative and judicial branches of government is impressive but somewhat unnerving. It could be argued that Prendergast faced a conflict of interests, though Robert Stout found himself in a similar position on becoming Chief Justice in 1899. Prendergast CJ wisely drew upon his legal and political background to inform him when decision-making. As a lawyer, Attorney-General and Patent Officer, Prendergast CJ was well suited to make decisions in the New Zealand legal environment.

Prendergast CJ combined efficiency with caution in his adjudication. In a busy court system, Prendergast CJ could move cases through with speed but he was also careful in his setting of precedents, avoiding maverick, assertive decisions if possible. Prendergast CJ was adept at interpreting important statutes relating to real property, and in particular, the Land Transfer System. Three decisions made

by Prendergast in the area of land law remain highly influential in the modern courts, *Wi Parata* (1877), *Merrie v McKay* (1897) and *Doyle v Edwards* (1898).

The cases heard by Prendergast CJ between 1875 and 1899 reflected the developing colonial environment from which they came. Issues relating to farming, finance and liquor were often placed before Prendergast CJ. In his rulings on these 'colonial' issues, Prendergast CJ relied heavily on English precedent. This was partly due to his English heritage and sympathies, but also due to the relatively undeveloped state of New Zealand common law. As his judicial career progressed, Prendergast CJ used more New Zealand precedent in his decisions, but he always remained an 'English' judge working in a colonial environment.

Prendergast CJ's judgments improved as his career progressed. From poorly argued cases such as *Wi Parata* (1877) to succinct and intelligent decisions such as *Merrie v McKay* (1897), Prendergast CJ developed his judicial abilities throughout his time on the Bench. Prendergast CJ took great pains to appear impartial, and while many of his decisions supported powerful institutions such as the Crown, this is more a reflection on the conservative nature of the judicial profession, rather than any partiality on Prendergast CJ's part. His leaning towards conservative decisions was also a result of personality and reliance on the English legal heritage in which he had been schooled.

As an administrator of the legal system, Prendergast CJ was able, efficient and influential. With the assistance of excellent secretaries such as Henry Hall, Prendergast CJ was able to manage a heavy caseload and oversee the day to day running of the judiciary. As an essentially practical man, Prendergast CJ's abilities were more suited to administration than jurisprudence. In his decisions, the philosophy of the law plays a minor role. Though Prendergast CJ referred to various textbooks in his judgments, his approach was clinical rather than intellectual.

Many of Prendergast CJ's decisions can be found in the reports of the Court of Appeal. This Court was comprised of a variety of personalities who disagreed at times, but usually provided interesting judgments. Prendergast CJ found a number of his Supreme Court decisions overturned by the Court of Appeal, though the majority of judgments were supported. On the Supreme Court Bench, Prendergast CJ and Richmond J rarely disagreed and provided mutual support in the busiest court in New Zealand. When Richmond J died in 1895, the legal traffic in the Wellington Supreme Court threatened to overwhelm Prendergast CJ. But with his capacity for sustained hard work, Prendergast CJ was able to endure the caseload until Richmond J's replacement was appointed.

Along with highly competent judicial peers, Prendergast CJ enjoyed the benefits of the able Wellington bar. With notable exceptions such as George E. Barton, the Wellington bar afforded Prendergast CJ respect and deference. Prominent legal figures such as Robert Stout, Martin Chapman and Francis Bell regularly appeared before Prendergast CJ. The 'Barton' problem was not the only controversy to face Prendergast as Chief Justice. Prendergast CJ was also embroiled in the debate over Edward J's judgeship and Frederick Moss' problems in the Cook Islands. The wise handling of the cases of Edwards J and Moss, reflect the lessons learned during the Barton debacle. During his time as Chief Justice, Prendergast also served as Chairman of the Royal Commission on common law procedure in New Zealand. As in other areas of his Chief Justiceship, Prendergast's main achievement was to provide strong and stable leadership.

As Chief Justice, Prendergast had little time for a personal life. He remained a man dedicated to his career and the law. For twenty-four years, Prendergast CJ was at the pinnacle of the New Zealand legal system. By 1899, he had become a New Zealand institution and had influenced a several generations of prominent legal figures. Christopher Richmond, Joshua Williams, Robert Stout, the

Chapman brothers, Charles Skerrett and Michael Myers were only a few of these figures influenced by Prendergast from 1875 to 1899. In 1899, Prendergast CJ was at the height of his judicial prowess, having recently delivered some of his most influential judgments. In March 1899, Mary Prendergast died. Two months later, Chief Justice Sir James Prendergast resigned his office and became another Wellington citizen.

Chapter 7

James Prendergast and the Treaty of Waitangi, judicial attitudes to the Treaty during the latter half of the nineteenth century / *Wi Parata* case and its legacy

1. Introduction

During the last decades of the twentieth century, New Zealand as a nation has increasingly focused on Maori and Pakeha relations. At the forefront of debate has been the Treaty of Waitangi, an agreement between Maori and the British Crown, signed in 1840. This debate has taken many forms: political argument, academic analysis and legal reasoning. The Treaty debate has also transformed a late nineteenth century New Zealand Supreme Court case into the most notorious judicial decision in New Zealand history. In 1877 Chief Justice James Prendergast declared in the case, *Wi Parata v The Bishop of Wellington*¹ that the Treaty of Waitangi was ‘a simple nullity’. This decision heavily influenced New Zealand law until being challenged during the mid-1980s. The *Wi Parata* decision created legal boundaries between Maori and Pakeha that lasted over a hundred years and still permeate contemporary New Zealand society.

While Prendergast’s career included many important achievements, it is his decision in the *Wi Parata* case for which he is best remembered. Although the *Wi Parata* decision has been discussed at length by various legal commentators, Prendergast’s role in the decision has not yet been viewed in historical context. The legal boundaries that are Prendergast’s legacy have been explored, but the influence of Prendergast in creating these boundaries remains to be ascertained. Research into the context of Prendergast’s decision aids in providing what has been, up till now, a two-dimensional historical event, with an important third dimension. To understand and appreciate the complexities of the pivotal decision,

¹ (1877) 3 NZ Jur (NS) SC 72.

it is vital to know the relevant background facts to both Prendergast the man and the case itself. A close textual analysis of the decision reveals that there is much that this narrow focus has obscured.

A brief outline of the decision's influence will be provided to assess its historical legacy, and modern academic opinion will be explored. Finally, this chapter will provide a tentative assessment of the role of Prendergast in this controversial decision and his role in creating legal boundaries between Maori and Pakeha.

2. Background to the case

A highlighting of certain events in James Prendergast's background is important in helping to view the *Wi Parata* decision in context. Prendergast was born in London at the time it was the heart of the global British empire, in direct contrast to the 'frontier' society where Prendergast would eventually achieve prestige and power. James Prendergast had all the educational opportunities a young middle-class Englishman needed to pursue a successful career. In his early twenties, Prendergast already demonstrated an ambitious and resourceful personality.²

The first experience Prendergast had with colonial frontier society was his bold and adventurous decision to join the gold rushes in Victoria, Australia during the early 1850s. A fortune made from gold-mining proved elusive and he began to appreciate the awesome challenges facing colonists in a new and alien land.³ Prendergast returned to London three years later to be called to the English Bar. Prendergast embarked upon his second adventure to the frontiers of the British Empire and arrived in Dunedin in 1862 to begin work as a New Zealand lawyer.⁴

² James Prendergast, University of Cambridge, personal letters to father Michael Prendergast QC, 1846-1850, MS-1791, Alexander Turnbull Library, Wellington.

³ James Prendergast, Victoria, Australia, personal letters to Michael Prendergast QC, London, 1852-1855, MS-1791, Alexander Turnbull Library, Wellington.

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

After only three years as a successful Otago barrister, Prendergast was appointed Attorney-General. Prendergast became well-known for his hardline approach in dealing with the Maori 'disturbances' during the late 1860s.⁵ This period in New Zealand history saw armed conflict between Imperial Britain and colonial settlers on one side and Maori fighting to retain land and sovereignty on the other. The boundaries established between Maori and Pakeha during the New Zealand Wars would be clearly evident in New Zealand society for the rest of Prendergast's career. The views on race relations formed by Prendergast during his time as Attorney-General would influence his decisions as Chief Justice.

In 1875 Prendergast was made New Zealand's third Chief Justice, a spectacular rise for the ambitious colonist.⁶ By this stage in his career, James Prendergast had become a key figure in the New Zealand settler establishment with a firm commitment to creating a stable and prosperous frontier society free from dissension. As Chief Justice Prendergast demonstrated a pragmatic and often conservative approach to judicial decision-making. After two years of his twenty-four year career as Chief Justice, Prendergast and his Wellington judicial colleague, Christopher William Richmond, heard the case of *Wi Parata v The Bishop of Wellington* in 1877.

The facts of the case stretched back almost three decades to a period of increasing European dominance in New Zealand. In 1848 the Ngati Toa tribe in the south-west of the North Island reached an agreement with the Anglican Bishop of New Zealand to place a parcel of land aside for educational purposes. This land was held under native or aboriginal title. In 1850 Governor George Grey issued a Crown Grant to the Bishop without the consent of Ngati Toa.⁷ During the

⁵ Judith Bassett and J.G.H. Hannan, 'James Prendergast' in *Dictionary of New Zealand Biography: Volume 1, 1769-1869*, edited by W.H. Oliver and Claudia Orange (Wellington: Allen & Unwin/Department of Internal Affairs, 1990), p. 355.

⁶ 'The New Chief Justice', *Colonial Law Journal* (1865-1875), pp. 24-6.

⁷ George Grey, Governor of New Zealand, Crown Grant of Porirua land to George Augustus Selwyn, Bishop of New Zealand, 28 December 1850, MS-Papers-5449-2 *Wi Parata versus the Bishop of Wellington, and others* - Papers [1898-1905] found under Church of the Province of New Zealand. Wellington Diocese: Further records (89-008), Alexander Turnbull Library,

intervening twenty-seven years, no school had been established and Maori numbers in the area had substantially diminished. Wi Parata, a Maori member of Parliament and a Ngati Toa chief, decided to take the case to the Supreme Court in an attempt to recover the entrusted land for his tribe.⁸ Parata had become prominent in the support of Maori land cases and was aware of the importance that would be attached to this particular case. Questions over land ownership were pivotal in creating boundaries between Maori and Pakeha, and the Wi Parata example demonstrates the preoccupation with land ownership and land boundaries in a frontier colonial society.

The events leading up to the 1877 decision were not unique and therefore served as a test case for similar situations in the colony. A Royal Commission in 1869 had shown that many similar trusts around the colony had also failed to achieve their purpose. As Frederika Hackshaw argues, “The political implications of that claim are self-evident: a favourable decision for the plaintiff would open the floodgates to native demands for the return of every similarly situated trust property.”⁹ The case demonstrated that the issue of land ownership had the potential to unravel the delicate fabric of Pakeha society. Parata petitioned the Court for the return of the land to its original Maori owners on the basis that the grant had been issued without the tribe’s consent and the expected school had not been built.¹⁰ The judges who were assigned the task of hearing Wi Parata’s case were adjudicating on a controversial issue, namely, the struggle for control of land between Maori and Pakeha.

Prendergast’s present historical reputation rests on his decision in *Wi Parata v The Bishop of Wellington*. Only a few legal commentators, when discussing the case,

Wellington.

⁸ *Wi Parata* at 72.

⁹ Frederika Hackshaw, ‘Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi’ in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, edited by I.H. Kawharu (Auckland: Oxford University Press, 1989), p. 110.

¹⁰ *Wi Parata* at 72-3.

have emphasised that the decision was a cooperative effort made by two judges.¹¹ Both James Prendergast and Christopher William Richmond were responsible for Supreme Court decisions in the Wellington judicial region. Richmond, like Prendergast, was an English lawyer from a privileged background.¹² Arriving in the frontier colony in 1853, Richmond and the extended Richmond-Atkinson clan secured a leading position in colonial politics. The blame for the controversial and bloody Taranaki War (1860-61) has been partly attributed to Richmond by some commentators.¹³ The Taranaki War left a legacy of misunderstanding and distrust between Maori and Pakeha. Richmond was no stranger to difficult decisions regarding Maori land rights. During his time as Minister of Native Affairs (1858-60), Richmond demonstrated a hard-line, unsympathetic attitude towards Maori.¹⁴ Richmond began his judicial career in 1861 and was an original member of the New Zealand Court of Appeal when it was first convened in 1863. When viewing the *Wi Parata* decision in context it is necessary to appreciate the supporting role of Richmond in formulating the Court's decision. To hold Prendergast totally responsible for the legal boundaries created in the case would be both unjust and inaccurate.

The judicial careers of Prendergast and Richmond are closely intertwined. Both judges served on the Court of Appeal bench and in the Wellington division of the Supreme Court. For twenty years the two men adjudicated together in the

¹¹ See David Williams, 'Te Tiriti o Waitangi - Unique Relationship Between Crown and Tangata Whenua?' in Kawharu (ed.), p. 87; E. J. Haughey, 'A vindication of Sir James Prendergast', *New Zealand Law Journal* (July 1990), p. 230.

¹² Judith Bassett, *Sir Harry Atkinson, 1831-1892* (Auckland: Auckland University Press, 1975), pp. 2-5.

¹³ Principally early New Zealand historians such as Saunders, Rusden and Miller, but also contemporaries such as William Martin and Octavius Hadfield. Richmond's critics are answered and his conduct defended in, William Downie Stewart, *Mr. Justice Richmond and the Taranaki War of 1860: A great judge vindicated* (Wellington: Whitcombe & Tombs, 1945), especially pp. 7-9.

¹⁴ Keith Sinclair outlines Richmond's views in Oliver and Orange (eds.), *Dictionary of New Zealand Biography: Vol. 1*, p. 364, "Richmond wanted to destroy what he called the 'beastly communism' of Maori society by introducing private property in land....Richmond knew almost nothing about Maori culture or land tenure. He simply believed that it was necessary to 'civilise' the Maori, that is, to lead them to adapt British habits and practices." While Native Minister, Richmond attempted to overthrow Crown pre-emption, thus challenging Article Two of the Treaty.

Wellington area. The *Wi Parata* decision was formulated near the beginning of Prendergast's twenty-four year tenure as Chief Justice and at the beginning of his professional relationship with Richmond. While both judges were responsible for the decision, Prendergast officially delivered it in court. It is difficult to know just how much influence Richmond had in aiding Prendergast, as the two men were fine-tuning their working relationship. While Richmond had fourteen years more judicial experience than Prendergast, the Chief Justice was an assertive individual, aware of his position and role.

It is possible that Prendergast's decision in *Wi Parata* was part of an attempt to assert his authority as the head of the New Zealand judiciary. The decision comes early in Prendergast's judicial career and the relative inexperience of the Chief Justice must be taken into consideration when evaluating the quality of the legal reasoning. In fact, Prendergast's competency as Chief Justice was about to be placed in serious question, only a few months after the *Wi Parata* decision was delivered. The man responsible for formulating the most serious allegations that Prendergast had ever faced, happened to be one of the advocates in the *Wi Parata* case, George E. Barton.

It is necessary to highlight the influence of this key legal player in the *Wi Parata* drama. The barrister for the plaintiff, *Wi Parata*, was an Irish lawyer named George E. Barton. Barton was a colourful character, often finding himself at the centre of controversy.¹⁵ Like Prendergast and Richmond, Barton was no stranger to frontier colonial society. Barton was involved in law and politics in both Australia and New Zealand having practiced in Melbourne and Dunedin. Barton was also familiar with James Prendergast and his brother Michael. During 1877, Barton was prominent in a number of important Supreme Court cases tried in Wellington. A clash of personalities had seen a bitter feud develop between Barton and the two judges, Prendergast and Richmond. Indeed, only two months

¹⁵ Iain Gallaway, 'Otago' in *Portrait of a Profession: The Centennial Book of the New Zealand Law Society*, edited by Robin Cooke (Wellington: Reed, 1969), p. 332.

before the decision in *Wi Parata* was handed down, Barton had submitted a formal petition to Parliament to force the resignation of Prendergast and Richmond for alleged bias against Barton and his clients as well as citing the judges to be guilty of judicial incompetence.¹⁶ In January of 1878 Barton would make colonial legal history for being found in contempt of court by Prendergast and imprisoned for one month.¹⁷ The experience of Chief Justice Prendergast and Richmond with Maori affairs and their bitter relationship with Barton must be considered a factor when analysing the nuances of the *Wi Parata* decision.¹⁸

The *Wi Parata* decision featured a kaleidoscope of prominent New Zealand public figures. In addition to Prendergast, Richmond and Barton, the case also involved Wiremu Parata, William Travers and Charles Izard. Wi Parata, the plaintiff, was a Ngati Toa leader and spokesman who had also served in Parliament during the 1870s. A vocal supporter of Maori issues, “He expressed the view that the law-makers were making decisions affecting Maori without understanding them.”¹⁹ On his departure from Parliament, Parata championed Maori land cases, most famously, the 1877 landmark case regarding Ngati Toa land in Porirua. In the *Wi Parata* case, Parata was representing the Ngati Toa tribe, “Quoere, whether a Maori chief can sue on behalf of his tribe....Prayer:--1. That the lands may be declared to be part of the native lands lawfully reserved for the use and benefit of the Ngatittoa tribe”,²⁰ in the same way the Attorney General in the case represented the Crown.

Walter Christie claims that Parata:

¹⁶ Report on Petition 172 - G. E. Barton complaining of improper and partial conduct on part of certain judges of SC and asking for inquiry and relief, *Appendices to the Journals of the House of Representatives* (AJHR), 1877, I-2 p. 7.

¹⁷ In the case *Gillon v MacDonald* (1878) discussed in, *New Zealand Jurist*, February 1878, p. 28.

¹⁸ Barton later served as a judge of the Native Land Court and in 1892 a judge of the validation court. While working in the area of Maori land, Barton could not be seen as especially sympathetic to Maori concerns.

¹⁹ Hohepa Solomon, ‘Wiremu Te Kakakura Parata’, in *The Dictionary of New Zealand Biography, Volume II 1870-1900*, edited by Claudia Orange (Wellington: Bridget Williams/Department of Internal Affairs, 1993), p. 375.

²⁰ *Wi Parata* at 72-73.

owner of other areas of land that he privately farmed, wanted the church to give the Porirua land to him, claiming he had better title than any other. He cited past fraud by kinsmen, the use of forged signatures, complications over who had paid what to whom, legitimacy of related titles and so on, but the church, through its Bishop of Wellington, refused Parata the land. The matter was taken to a select committee of parliament, then by petition from Parata and eighteen others to court.²¹

This claim is not referenced and seems to be a misunderstanding of Parata's role as a Maori chief. Parata's commitment to Maori justice was further demonstrated by his support of Te Whiti at Parihaka. Parata was present at Parihaka in 1881 when the Taranaki village was invaded following Prendergast's proclamation.²² Parata was not simply a self-interested property developer but rather a Maori leader committed to achieving justice through the court system and Parliament. It is this path that brought Parata into contact with Prendergast.

The legal advocates involved in the *Wi Parata* decision were all leading figures at the Wellington bar, including George Barton from the firm, Barton and Fitzherbert (plaintiff), William Travers from the firm Travers, Ollivier and Co. (defendant, Bishop of Wellington) and Charles Izard (defendant, Attorney-General). Barton has been discussed earlier and was by far the most volatile of the lawyers present. William Travers was an Irish lawyer who had come to New Zealand in 1849 and experienced a disjointed career in Parliament. During the years 1877 to 1878, during which the *Wi Parata* decision was made, Travers was the member of the House of Representatives for Wellington City.²³ Therefore, Travers was a member of the Government attempting to acquire more Maori land while acting as a advocate in a decision which enabled the acquisition of Maori land.

²¹ Walter Christie, *New Zealand Education and Treatyism* (Auckland: Wyvern Press, 1999), p. 28.

²² Solomon, p. 375.

²³ Winsome Shepherd, 'William Thomas Locke Travers', in Oliver and Orange (eds.), p. 547.

In 1870, Prendergast and Travers worked together on the first New Zealand Law Society Council.²⁴ When James Prendergast was formally congratulated for his time as Administrator during and after the tenure of Governor Gordon, a group of private citizens were there to pay respects, including Travers. While it is unclear whether Prendergast and Travers were friends, a degree of respect existed in their relationship which was clearly absent in the case of George Barton and Prendergast. Travers also had the respect of the wider legal profession and during the controversy following the Privy Council's *Wallis* decision in 1903 was described as "the doyen of the local Bar."²⁵

Charles Izard was another established Wellington practitioner and represented the Attorney-General in *Wi Parata*. An English lawyer with a specialist knowledge of equity, Izard had been a leading figure at the Wellington bar since its earliest days, when he appeared before Prendergast in the 1877 case. Izard was also partly responsible for the creation of today's mega-firm, Bell Gully, which he helped create alongside Sir Francis Dillon Bell.²⁶ Izard was a political conservative and supporter of Harry Atkinson.²⁷

The offending Crown Grant which effectively provided the basis for the *Wi Parata* case, and the following Privy Council cases, *Nireaha Tamaki v Baker* (1901) and *Wallis v Solicitor-General* (1903), was given by Governor George Grey to Bishop George Augustus Selwyn. Grey's relationship with the Maori ranged from meticulously recording their oral history to invading their tribal lands during the Waikato War. Selwyn, a key missionary figure in New Zealand history, was committed to the welfare and conversion of Maori but found himself torn between Government and Maori during the New Zealand Wars.²⁸ Selwyn was the Bishop of Wellington in 1850, while in 1877 it was the high-profile and

²⁴ Cooke (ed.), p. 146.

²⁵ Cooke (ed.), p. 140.

²⁶ G.H. Scholefield (ed.), *A Dictionary of New Zealand Biography* (Wellington: Department of Internal Affairs, 1940), p. 431.

²⁷ Scholefield (ed.), p. 431.

²⁸ Warren E. Limbrick, 'George Augustus Selwyn', in Oliver (ed.), p. 388.

widely-respected Octavius Hadfield. While Hadfield was an outspoken supporter of Maori in the Porirua-Otaki region, the Anglican church found itself directly in conflict with Ngati Toa in the *Wi Parata* case.

Analysis of the main players in the *Wi Parata* affair aids in viewing the case in context. The antagonistic behaviour of Barton throughout 1877 towards Prendergast and Richmond and the intense frustration that the new Chief Justice experienced in response, is not evident in a reading of the official law reports. The dry manner in which many decisions were written and recorded during Prendergast's era masks the personalities and rivalries of those involved in creating the decision. While the legal system strives for objectivity, the system is comprised of individuals, with individual personalities and backgrounds. These factors may affect a legal decision to varying extents, but even if their influence is limited they provide context for what appears in the law reports. But the individuals prominent in the *Wi Parata* decision were also representatives of larger groups in colonial New Zealand society. Prendergast and Richmond represented the legal system of New Zealand, Parata and Barton represented the Ngati Toa tribe, Travers spoke on behalf of the Anglican Church while Izard was the advocate for the New Zealand Government. These large and powerful forces in New Zealand colonial society met in the Wellington Supreme Court in 1877.

3. The judgment: a case study in the establishment of legal boundaries in a frontier society

The judgment in *Wi Parata v The Bishop of Wellington* was far from just a simple one-line quotation. The judgment of Sir James was complex and discussed a variety of related issues. The ruling stated that unless native customary title was supported by a Crown Grant it could not be accepted or enforced by the Courts. The imposition of British legal theories upon Maori land-ownership would result in the loss of much Maori land and give the impression that 'English law' was a tool to aid in dispossession. The Crown Grant made to the Bishop was unable to

be annulled by the Court and the existence of this grant implied that the Crown had used its sovereign powers to extinguish any existing native title. When the Crown acquired the North Island of New Zealand by occupation and the South Island by discovery, it also acquired the exclusive right of extinguishing aboriginal title. The Maori group, Ngai Tahu, who were living in the South Island at the time of European arrival became a casualty of a broad and sweeping system of extinguishment. The Crown's right to extinguish aboriginal title was accompanied by a treaty-like duty to protect Maori against infringement of their right of occupancy. Land transactions with Maori were a matter for the Crown only, and the Court had no jurisdiction to diminish the Crown powers.²⁹

Instead of only discussing the nature of Crown Grants and native title, Prendergast ventured further beyond the scope of the mere facts of the case to pass judgment on the Treaty of Waitangi. Prendergast used the *Wi Parata* decision as an effective vehicle for enshrining eurocentric, imperialist views into law. To justify his opinion that New Zealand was acquired by occupation and discovery, vital to his reasoning, the Chief Justice had somehow to dispose of the Treaty. The method Prendergast used became the most notorious example of legal reasoning in New Zealand history. The Chief Justice stated that:

So far indeed as that instrument [The Treaty] purported to cede the sovereignty - a matter which we are not here directly concerned - it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist.³⁰

In Prendergast's view, New Zealand was peopled only by 'primitive barbarians' and 'savages' who had no sovereignty to cede nor existing body of customary law. This primitive race were to be quickly subdued as the New Zealand 'frontier' was tamed. The use of emotive words such as 'savages' demonstrates the cultural boundaries between many colonists and indigenous peoples. After giving a landmark judgment on the most controversial aspect of New Zealand

²⁹ *Wi Parata* at 78-9.

³⁰ *Wi Parata* at 78.

history, Prendergast returned to the specific facts in question. Prendergast applied the doctrine of *cy pres*³¹ and decided that the land would not revert to the surviving donors in any case, but to the Crown.³²

While Prendergast adjudicated upon several issues relating to Maori land, the *Wi Parata* decision is remembered for three words, 'a simple nullity'. If these three words were preceded by 'The Treaty of Waitangi is...', all three articles of the Treaty, according to Prendergast, would be null and void. But Prendergast's judgment did not state this. Instead it related 'nullity' to the ceding of sovereignty. Both the Maori and English versions of the Treaty discuss more than sovereignty. Other issues include possession of Maori land, forests, fisheries and other taonga³³, the Crown's preemptive right of purchase and the imparting of the rights and privileges of British subjects to Maori.³⁴ A similar line of argument has been presented before by E.J. Haughey and forces one to examine the exact language in the judgment in more detail.³⁵ While there seems little doubt that the Chief Justice was seeking to sidestep the Treaty, he did not necessarily condemn it entirely.³⁶ In his judgment, Prendergast made an attempt to widely canvass existing law, both statute and common. The effect of the judgment was to minimize the role of the Treaty and emphasise that the Treaty in itself had no binding force. Therefore, though Prendergast can be justly accused of building legal boundaries between Maori and Pakeha, these boundaries were not as impenetrable nor as foreboding as some commentators have suggested.

As a Legislative Councillor in 1865 during a debate on Maori representation in

³¹ Funds would be applied as near as possible to application specified by donor. Peter Spiller, *Butterworths New Zealand Law Dictionary*, 4th edition (Wellington: Butterworths, 1995), p. 80.

³² *Wi Parata* at 72, 83.

³³ Loosely translated as 'treasures'.

³⁴ From the Texts of the Treaty of Waitangi (Text in English, Maori and Translation of Maori text by Kawharu) in Kawharu (ed.), pp. 316-21. See discussion of Prendergast in the Legislative Council, in particular, his reference to Maori as British subjects, Chapter 5.

³⁵ Haughey, p. 230.

³⁶ If Prendergast had attempted to nullify the entire Treaty he would have undermined the entire Crown pre-emption system (outlined in Article Two of the Treaty).

Parliament, Prendergast made an intriguing speech regarding the rights of Maori in New Zealand society:

there could be no doubt that, in the minds of all our friends at Home, the Natives have an inborn right, as British subjects, to the privileges of this country....the Natives, who were the largest landholders in the colony, and he considered it was unjust that they should exist under such disabilities.³⁷

Prendergast argued that Maori should have parliamentary representation, a view which appears at odds with his general disparaging attitude towards the Maori. Yet, in *Wi Parata*, Prendergast stated that Britain, by settling New Zealand assumed the duty:

as supreme protector of aborigines, of securing them against any infringement of their right of occupancy; -3 Kent, Com., *ubi supra*. The obligation thus coupled with the right of pre-emption, although not to be regarded as properly a treaty obligation, is yet in the nature of a treaty obligation.³⁸

This dutiful and paternalistic approach is a mark of British imperialism and control but could begin to undermine the view that Prendergast was blatantly 'anti-Maori'.³⁹

In the course of his *Wi Parata* judgment, Prendergast referred to previous landmark cases dealing with aboriginal title and the Treaty of Waitangi. Prendergast provided a confused reference to the 1847 New Zealand Supreme Court case of the *Queen v Symonds*.⁴⁰ He stated that 'Our view of this subject [indigenous peoples' rights] is in accordance with previous decisions of this Court.'⁴¹ The Chief Justice then discussed the *Symonds* case as an apposite

³⁷ NZPD, 1 August 1865, p. 208 (James Prendergast).

³⁸ *Wi Parata* at 78-9.

³⁹ Ranginui Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (Auckland: Penguin Books, 1990), p. 158.

⁴⁰ (1847) NZPCC 387 per Chapman.

⁴¹ *Wi Parata* at 78.

example, implying concurrence with its findings. Later in his judgment, Prendergast took issue with specific arguments made by Chapman J in deciding the *Symonds* case.⁴² While Prendergast agreed with Chapman J's argument that the Treaty had affirmed rights already vested in the Crown, he took issue with Chapman J's claim that:

the American courts would allow a grant of land to be impeached by a native Indian, on the basis that the Indian title had not been extinguished. The [Prendergast's] court said that this was not a legitimate inference from the *Commentaries of Kent*.⁴³

Prendergast found both helpful and unhelpful statements in Chapman J's landmark decision.

This raises the possibility that Prendergast manipulated relevant precedent to reach a judgment favourable to contemporary colonial land policy. Analysis of Chief Justice Prendergast's judgment in *Wi Parata* could lead to a number of conclusions. Prendergast may have purposely engineered a line of legal reasoning to aid in the alienation of Maori land, or given a sincere but mistaken judgment in an effort to clarify a complex area of law. Alternatively, Prendergast may have provided an accurate decision in accordance with convincing precedent demonstrating wise and logical legal reasoning. Between the polarities of an ethnocentric conspiracy and a triumph of justice is where the answer lies. But whether intentional or not, Prendergast's decision had tragic consequences for Maori society for over one hundred years.

When analysing the *Wi Parata* case it is necessary to separate the various issues raised by Prendergast and explore each in turn and then how the issues relate to one another. First, the ratio of the decision deals with the nature of native or aboriginal customary title and its relationship to a Crown Grant. When discussing

⁴² *Wi Parata* at 80.

⁴³ Peter Spiller, 'Chapman J. and the *Symonds* Case', *Canterbury Law Review*, Vol. 4 (1990) 257, 264.

a Crown Grant, the ability of the Courts to question an Act of State is analysed. Secondary, the obiter dicta of the case deals with the Treaty of Waitangi and whether that document was an act of cession or a 'simple nullity.' Thirdly, Prendergast's decision must be seen in the context of contemporary international law, was it representative or not?

Prendergast has not made it easy for legal academics analysing the case. His language is verbose and convoluted, for example the sentence, "Such a qualification nullifies the proposition to which it is annexed."⁴⁴ The Chief Justice discussed a number of cases, which have become high-profile in today's indigenous people's rights debate, including, *Johnson v McIntosh*, *Cherokee Nation v The State of Georgia* and *Queen v Symonds*. Also discussed are important statutes such as the Land Claims Ordinance 1841, the English Law Act 1858 and the Native Rights Act 1865.

The legal historian must look beyond secondary commentaries on primary sources to the actual documents themselves. On the issue of aboriginal or native customary title and its relationship to a Crown Grant (ratio), Prendergast stated, "the right of extinguishing native title being exclusively in the Crown....further, we are of opinion that the Court has no jurisdiction to avoid a Crown grant."⁴⁵ Therefore, Prendergast uses the term native title, but argues that the Crown has complete authority to extinguish this title by issuing a Crown Grant and the Court can do nothing to prevent this. Crown sovereignty is supreme and "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."⁴⁶ Transactions with the Maori "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."⁴⁷ Though he refers to native title,

⁴⁴ *Wi Parata* at 77.

⁴⁵ *Wi Parata* at 76-7.

⁴⁶ *Wi Parata* at 78.

⁴⁷ *Wi Parata* at 79.

Prendergast is not convinced that it is a legitimate concept, “there existed amongst the natives no regular system of territorial rights nor any definite ideas of property in land.”⁴⁸

On the issue of the nature of the Treaty of Waitangi (obiter), Prendergast argues that the Treaty was not one of cession, “No body politic existed capable of making cession of sovereignty.”⁴⁹ Cession of sovereignty can only be made by a body that has sovereignty and Prendergast decided that ‘savages’ did not have this vital power. Therefore the Treaty, as a legal instrument ceding sovereignty, was a nullity.

On the question of procedure, Prendergast decided that “a Crown grant cannot be avoided for a matter not appearing upon the face of the grant.”⁵⁰ The doctrine of *cy pres* was to be applied, meaning that the funds would be applied as near as possible to application specified by the donor, that is, the building of a school. This decision would cause ongoing legal actions in the Courts. Also, Prendergast decided that the Crown was the legal donor of the land, not the Ngati Toa, and if necessary the land would revert to the Crown.

Therefore, the land originally belonging to the Ngati Toa, and then given to the Bishop of Wellington by a Crown Grant, remained with the Bishop. The Crown Grant was valid and native title could not undermine this fact and the Court could not question a Crown Grant. Wi Parata’s case failed due to a host of legal reasons offered by Prendergast and Richmond. Prendergast’s reasoning, though elucidated at length in the judgment, has been described by the leading legal academic, McHugh, as completely incorrect, “There were no portions of the judgment in which important errors of detail or interpretation did not occur.”⁵¹

⁴⁸ *Wi Parata* at 77.

⁴⁹ *Wi Parata* at 78.

⁵⁰ *Wi Parata* at 82.

⁵¹ Paul McHugh, ‘The aboriginal rights of the New Zealand Maori at common law’ (Ph. D. thesis, University of Cambridge, 1987), p. 271.

However, the decision has also been described by Auckland practitioner, Guy Chapman, as having, “stood the test of time. In its clarity of exposition, and basic soundness of judgment, it is fitting testimony to the quality of that most learned Chief Justice’s judicial work.”⁵² With trained experts completely in disagreement over the judgment, it remains the most controversial legal decision in New Zealand history.

It is not the aim of the thesis to investigate in-depth the national and international law relating to native or aboriginal customary title. This work has been extensively completed by Paul McHugh and Frederika Hackshaw. Their arguments are comprehensive and carefully researched and have received support from the Privy Council in the early 1900s and the New Zealand High Court in the 1980s. The arguments against the existence of aboriginal title are brief and limited. That said, there appears to be two schools of thought on the matter, one led by the Privy Council and McHugh and one led by Prendergast and certain English writers of the later nineteenth century, and supported by the New Zealand legal establishment up until the 1980s. In judicial decision-making it is possible to have a range of different precedents to follow, allowing a judge great flexibility. Prendergast used this flexibility in the law to decide *Wi Parata*. As to which school of thought will ultimately triumph, the law is in a constant state of flux, and therefore, the answer to that question is unclear.

In following the concept of Crown sovereignty, Prendergast was following a long line of established jurisprudential thinking, from Hobbes to Austin. In this respect, Prendergast was a judge of his time. It has only been recently that jurisprudential schools of thought, such as the Critical Legal Studies school, have challenged the dominance of positivist thinking in the Western legal environment. If Prendergast had ignored the ultimate power of a Crown Grant, he would have been taking a liberal course in direct collision with New Zealand settler law and

⁵² Guy Chapman, ‘The Treaty of Waitangi – fertile ground for judicial (and academic) myth-making’, *NZLJ* (July 1991), p. 231.

society. Prendergast was not the man to do this.

In his view of the Treaty, Prendergast comments were extreme but were also obiter dicta, and therefore not technically a precedent. While always a key concern for Maori, the Treaty has only recently been recognised by wider New Zealand society as a vital constitutional document. For all the attacks made on the *Wi Parata* view, the Treaty of Waitangi is not in itself legally enforceable, although its principles have been incorporated into New Zealand law by statute. Prendergast's language regarding Maori society was unforgiving, but his desire to avoid allowing the Treaty to have a true part in the New Zealand legal system remains to this day. If one agrees with modern 'orthodox' thought that the Treaty was one of cession, then Prendergast's view that it was 'a simple nullity' is not correct, but in terms of its legal power, the Treaty remains limited. The Treaty does not, in the positivistic sense, have intrinsic legality. The legal recognition of the principles of the Treaty is a far different matter from the legal recognition of the Treaty itself.

4. The influence of the decision: maintaining the legal boundaries

When describing the *Wi Parata* decision as the most notorious in New Zealand's history, it is with reference to the legal legacy of the case rather than just specific ethnocentric statements. Prendergast's 1877 decision in the Supreme Court created a precedent that resulted in the alienation of large amounts of Maori land. Effectively, any Maori land not bolstered by a Crown Grant could not be claimed as native title. Throughout the twentieth century, examples can be provided demonstrating the legacy of the *Wi Parata* decision. In 1909, Prendergast's reasoning was incorporated into statute form with the passing of the Native Land Act 1909 s84 and later the Maori Affairs Act 1953.⁵³ Prendergast's judgment was relied upon to defeat Maori claims in several important twentieth century cases,

⁵³ Haughey, p. 231.

for example, *Re the Bed of the Wanganui River* [1962]⁵⁴ and *Re Ninety-Mile Beach* [1963].⁵⁵ The legal boundaries established by Prendergast were maintained and strengthened by many lawmakers who followed him.

The triumph of the *Wi Parata* line of reasoning was not without legal dispute, as demonstrated by the controversial Privy Council decisions in *Nireaha Tamaki v Baker* (1900-01)⁵⁶ and *Wallis v Solicitor-General* (1902-03).⁵⁷ Analysis of these Privy Council decisions helps to place the reasoning of the New Zealand judiciary in a Commonwealth context. The Privy Council stated that it was ‘rather late in the day’ to argue before a New Zealand Court that there was no customary Maori law which the courts could recognise, as had happened in *Wi Parata*.⁵⁸ While the Privy Council harshly criticised the actions of the New Zealand Supreme Court in a general manner, the Council stated that *Wi Parata* had been correctly decided on its own facts. Lord Davey of the Privy Council stated:

In the case of *Wi Parata v The Bishop of Wellington*...the decision was that the Court has no jurisdiction by *scire facias* or other proceeding to annul a Crown grant for matter not appearing on the face of it, and it was held that the issue of a Crown grant implies a declaration by the Crown that the Native title has been extinguished. If so, it is 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. But the dicta in the case go beyond what was necessary for the decision. Their Lordships have already commented on the limited construction and effect attributed to s. 3 of the Native Rights Act, 1865, by the Chief Justice in that case. As applied to the case then before the Court however, their Lordships see no reason to doubt the correctness of the conclusion arrived at by the learned Judges.”⁵⁹

It was not until the mid-1980s that Prendergast’s decision would be challenged directly. It could be argued that by this time the damage had been done.

⁵⁴ [1962] NZLR 600.

⁵⁵ [1963] NZLR 461.

⁵⁶ (1900-01) NZPCC 371.

⁵⁷ (1902-03) NZPCC 730.

⁵⁸ *Nireaha Tamaki* at 382.

⁵⁹ *Nireaha Tamaki* at 383-4.

Damage was done not only to Maori society but also to the relationship between the Judicial Committee of the Privy Council and the New Zealand Court of Appeal. The *Wi Parata* case formed the basis of the *Wallis v Solicitor-General* case, in which the Privy Council severely criticised the conduct of the Court of Appeal. In an adjourned sitting of the Court of Appeal in Wellington on 25 April 1903, the Bench and the Bar of New Zealand defended themselves against the attack from London. On a day that would in future times represent New Zealand's 'coming of age', the New Zealand legal fraternity asserted their independence and *raison d'etre*.

Chief Justice Stout led the protest by defending the decisions of Prendergast, the Supreme Court and the Court of Appeal, "I feel the aspersions under the circumstances in which they have been made are a greater reflection on the Privy Council than on the Appeal Court of New Zealand."⁶⁰ Stout had not been part of the controversial Court of Appeal decisions as Stout CJ and Edwards J had made the earlier Supreme Court decision which was successfully appealed. In fact, Stout was congratulated by the Privy Council for his decision.

Williams J was more obviously indignant than Stout, being one of the Court of Appeal judges responsible for the decision in question:

If the Court had displayed subserviency or want of independence of the Executive it would have been loudly condemned by a unanimous public opinion. Not suggestion of the kind has ever been made here. It has been reserved for four strangers sitting 14,000 miles away to make it....Whether, however, they [decisions] should be reviewed by the Judicial Committee, as at present constituted is a question worthy of consideration. That Court, by its imputations in the present case, by the ignorance it has shown in this and other cases of our history, of our legislation, and of our practice, and by its long-delayed judgments, has displayed every characteristic of an alien tribunal.⁶¹

⁶⁰ Protest of Bench and Bar re *Wallis v Solicitor-General*, Appendix (1903) NZPCC 730, 744.

⁶¹ Protest of Bench and Bar re *Wallis*, 756.

Williams' emotive challenge to the Privy Council could well have delayed his knighthood and elevation to the Council. Williams defended the decisions of his former leader, Prendergast.

After a further indignant speech by Edwards J, Prendergast's associate, Travers, rose and stated that while he had not consulted his fellow lawyers, the Bar was in complete support of the Bench. As Travers spoke, the lawyers surrounding him rose to their feet and remained standing in a show of solidarity.⁶² Though attacked by the powerful Privy Council, the legal establishment of New Zealand closed ranks to protect their own and to protect the decision of James Prendergast. Even Prendergast's rivals, Stout and Edwards, spoke openly in support of colonial independence and judicial loyalty.

In the case, *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655, Stout followed Prendergast's decision in *Wi Parata*. There was widespread support for Prendergast's views from the New Zealand judiciary for over a hundred years. Even New Zealand's greatest jurist, Sir John Salmond, supported the *Wi Parata* doctrine when he created s84 of the Native Land Act 1909. The *Wi Parata* decision's legacy was diminished somewhat by the *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 decision, which recognised the Treaty as one of cession and not a simple nullity. But the decision supported Prendergast's claim that the Treaty could have no legal effect unless incorporated into statute. The judicial support for *Wi Parata* fell away during the mid-1980s, a time of radical governmental change and judicial activism.

In 1986 Williamson recognised Maori customary fishing rights in *Te Weehi v Regional Fisheries Officer* [1986].⁶³ This decision, according to some commentators, successfully challenged Prendergast's decision in *Wi Parata*.⁶⁴

⁶² Travers was killed the following day in a railway accident.

⁶³ [1986] 1 NZLR 680.

⁶⁴ Paul McHugh, 'From Sovereignty Talk to Settlement Time' in *Indigenous Peoples' Rights in Australia, Canada, & New Zealand*, edited by Paul Havemann (Auckland: Oxford University

Paul McHugh heralded Williamson's decision as the end of Prendergast's legacy, "The common law doctrine of aboriginal title has returned to New Zealand at the cost to the personal reputation of the primary adjudicator against it, Chief Justice Prendergast".⁶⁵ Thus began a period of judicial activism which would see the legal boundaries established by Prendergast challenged by modern day jurists.

While the *Te Weehi* case challenged Prendergast's views on aboriginal title, the landmark case, *NZ Maori Council v Attorney-General* [1987],⁶⁶ addressed another controversial issue raised by *Wi Parata*, the validity of the Treaty of Waitangi. This case concerned the effects of section 9 of the State-Owned Enterprises Act 1986 which declared that Government actions must accord with the principles of the Treaty. In interpreting what these principles were the President of the Court of Appeal, Cooke P, stated that "those principles require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith."⁶⁷ The *Wi Parata* decision in relation to the Treaty was briefly discussed and criticised in the *NZ Maori Council* case. Bisson J stated that, "With the advent of legislation invoking recognition of the principles of the Treaty no longer is it to be regarded as a "simple nullity" (as in *Wi Parata v Bishop of Wellington*)".⁶⁸ Although the Court of Appeal has stressed that the Treaty does not have legal force except where incorporated by statute, the negative attitude to Prendergast's decision taken by modern legal leaders stands in contrast to the support Prendergast's decision received at the time it was made.

Six years after the *Te Weehi* decision had given recognition to the doctrine of aboriginal title, the High Court of Australia heard the landmark case, *Mabo v Queensland (No.2)* (1992).⁶⁹ In this case, aboriginal title was discussed and recognised and the doctrine of *terra nullius*, the concept that Australia was not

Press, 1999), p. 458.

⁶⁵ Paul McHugh, 'Constitutional Theory and Maori Claims', in Kawharu (ed.), p. 51.

⁶⁶ [1987] 1 NZLR 641.

⁶⁷ *New Zealand Maori Council* at 667 (Cooke P).

⁶⁸ *New Zealand Maori Council* at 715 (Bisson J).

⁶⁹ (1992) 66 Australian Law Journal Reports 408.

inhabited when discovered by Europeans, was cast aside. The idea of *terra nullius* is similar to Prendergast's statement in *Wi Parata*, that the South Island of New Zealand was acquired by 'discovery'.

The *Wi Parata* decision has been analysed and discussed at length in the reports of the Waitangi Tribunal. In the Rangiteaorere Land Claim, the Tribunal examined 'The Validity of the Crown Grant', an issue closely related to the *Wi Parata* ratio. Prendergast's view that a Crown Grant is an act of state was suggested as one possible authority to support the Crown's actions in the Rangiteaorere situation. The Tribunal Report states, "While tribunal cannot overrule the *Wi Parata* decision, we can comment on whether it is applicable to the Crown Grant before us."⁷⁰ The tribunal attempts to distinguish *Wi Parata* and argues that it is not applicable in the present situation. Prendergast's obiter on the Treaty of Waitangi is also challenged:

This tribunal is not restricted to issues of legality and under our statute we are obliged to take a more expansive view of the Treaty of Waitangi than Mr Justice Prendergast. We have to measure whether a particular proceeding of the Crown, in relation to any claim before us, is in conformity with the principles of the Treaty.⁷¹

In the Orakei Claim report, the approach of Prendergast and Richmond is compared with that of Chapman J, "In *Wi Parata* the Court no longer spoke of "aboriginal natives" or "Maori New Zealanders" as Chapman J had done thirty years before, but of "savages" and "primitive barbarians."⁷² The report claims that the Privy Council contradicted the *Wi Parata* view in *Nireaha Tamaki* and *Wallis* but "Thereafter, and although the decisions of the Privy Council were meant to be binding, the New Zealand Courts pursued the *Wi Parata* view."⁷³ While the Privy Council did criticise the *Wi Parata* decision, they also stated in

⁷⁰ Waitangi Tribunal, *Report of the Waitangi Tribunal on the Rangiteaorere Land Claim* (Wellington, 1990), Section 3.5.8.

⁷¹ *Rangiteaorere Land Claim*, Section 3.6.1.

⁷² Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington, 1987), Section 4.6.

⁷³ *Orakei Claim*, Section 4.6.

Nireaha, “As applied to the case then before the Court however, their Lordships see no reason to doubt the correctness of the conclusion arrived at [in *Wi Parata*] by the learned Judges.”⁷⁴

In the Kaituna River Claim, the Tribunal report relies heavily on the work of Paul McHugh and his argument that Prendergast’s decision “was wrong being based on a concept of international law and not on the established principles of colonial law.”⁷⁵ The Tribunal gives much weight to McHugh’s arguments. The Ngai Tahu Sea Fisheries Report also refers to *Wi Parata* and discusses at length the conflict between the New Zealand Court of Appeal and the Privy Council during the early years of the twentieth century.⁷⁶

Overall, the Waitangi Tribunal has taken an unfavourable view of the Prendergast decision, in line with the new ‘orthodox’ view prevalent in Treaty jurisprudence.⁷⁷ As mentioned in the Rangiteaorere Land Claim, the Tribunal reports cannot over-turn legal precedent nor are their recommendations binding on the New Zealand Government.⁷⁸ Nevertheless, the opinion of the Tribunal and its researchers has much influence and the Tribunal reports have further served to undermine Prendergast’s judicial reputation. The literature on the Treaty of Waitangi that has appeared over the past twenty-five years is vast and diverse. Numerous commentators, legal, academic, political and otherwise, had provided their viewpoints. In attempting to navigate this complex and often confusing mass of information, this author submits that an appropriate primary focus are the legal decisions and jurisprudential theory surrounding the Treaty of Waitangi.

The role of the Treaty of Waitangi in New Zealand society is possibly the most

⁷⁴ *Nireaha Tamaki* at 384.

⁷⁵ Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wellington, 1984), Section 5.6.10.

⁷⁶ Waitangi Tribunal, *Report of the Waitangi Tribunal on the Ngai Tahu Sea Fisheries Claim* (Wellington, 1992), Section 5.14.

⁷⁷ Found in the work of academics such as McHugh, Brookfield and Williams.

⁷⁸ Treaty of Waitangi Acts 1975 and 1985.

important and controversial issue facing modern New Zealanders. The question posed is; how does the nation begin to disestablish the legal, political and cultural boundaries between Maori and Pakeha established and strengthened over the past one hundred and sixty years since the signing of the Treaty? In Treaty jurisprudence, recent commentators have found it necessary to analyse the *Wi Parata* decision, either briefly⁷⁹ or in-depth.⁸⁰ The result of this analysis has been a largely negative view of Prendergast's decision. Therefore, the *Wi Parata* decision is arguably the most notorious in New Zealand's history, though this notoriety is a recent development. The lack of recognition given to the Treaty before 1975 is the principal reason for the relatively recent revisionist attention given to Prendergast's judgment by academics.

5. Academic opinion on the decision and the role of Prendergast: Was Prendergast alone in the building of legal boundaries?

Recent academic opinion on Prendergast's decision in the *Wi Parata* case has been divided. This division has not been balanced, with most commentators condemning the decision as incorrect at best and manipulative ethnocentrism at worst. In the continuing discussion over the nature of legal boundaries between Maori and Pakeha, Prendergast's legacy is often addressed. The critics of Prendergast's decision are vocal and numerous. In his ground-breaking research into the common law concept of aboriginal title, Paul McHugh has dismissed *Wi Parata* as an example of misguided judicial activism. Far from following established law, Prendergast propagated the view of a small, unrepresentative group of English writers.⁸¹ By disregarding the doctrine of aboriginal title, the Chief Justice steered New Zealand law off course for over a century. McHugh's research is of a jurisprudential nature and does not include comprehensive

⁷⁹ Claudia Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books, 1987), pp. 186-7.

⁸⁰ For example, Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991).

⁸¹ McHugh, *The Maori Magna Carta*, pp. 113-4.

discussion about Prendergast himself.

Frederika Hackshaw, who, like McHugh, completed a doctorate concerning aboriginal title, has also argued that Prendergast's decision did not reflect established law.⁸² The arguments of these academics influenced Williamson in his *Te Weehi* decision, highlighting the importance of Prendergast in New Zealand Treaty jurisprudence. Williamson needed to confront the legacy of James Prendergast and the academic debate surrounding his decisions, before he could present his ground-breaking judgment. This provides an example of academia and the judiciary combining in an attempt to break down legal boundaries from the past.

Another legal academic, David V. Williams, also comments negatively on Prendergast's role in the *Wi Parata* decision. Williams has described Prendergast's approach to Maori attempts to enforce the terms of the Treaty as 'racial chauvinism'.⁸³ Unlike McHugh, Williams finds similarities between Prendergast's viewpoint and that of other Commonwealth colonial judges. Sir James was not alone in his refusal to recognise indigenous rights.⁸⁴ Legal boundaries were built by judges in other Commonwealth countries, including Australia and especially, South Africa.

A revisionist approach to *Wi Parata* is also seen in the works of F. M. Brookfield and Richard Boast. Brookfield takes a practical view of the Treaty stating the realities of Prendergast's legacy:

I am a revisionist myself. But in any case, if the Treaty of Waitangi was a valid treaty in the international law of Western states, it is no longer in force as such: either the treaty itself or the ultimately successful assertions of imperial power that followed it extinguished the international personality of the chiefs.⁸⁵

⁸² Hackshaw, p. 113.

⁸³ Williams, p. 72.

⁸⁴ Williams, pp. 86-7.

⁸⁵ F.M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*

In his analysis of the *Wi Parata* decision, Boast refutes several of Prendergast's claims:

Prendergast CJ famously denied that Maori had any 'settled system of law'. This remark is not only untrue but is inconsistent with contemporary statutory directions to the Native Land Court in the Native Lands Acts that determinations of Maori title to land were to be made according to "Maori custom".⁸⁶

While the views of McHugh, Hackshaw, Williams, Brookfield and Boast have attained some degree of orthodoxy in recent years, several commentators have argued the validity of Prendergast's now notorious decision. The most convincing argument vindicating Prendergast was presented by E.J. Haughey, a former Maori Land Court Judge. Haughey emphasised the fact that Prendergast had only ruled in relation to Article One of the Treaty while seemingly confirming Article Two, which guaranteed Maori ordinary proprietary ownership.⁸⁷ Haughey argued that the concept of territorial ownership found in Article One (upon which Prendergast ruled) was significantly different to the concept of proprietary ownership found in Article Two. While Haughey stated that the Chief Justice was acting in accordance with well-established international law, his discussion is brief and lacks the complexity and depth of McHugh, Williams and Hackshaw. Like the other commentators, Haughey does not delve deeply enough into the historical context of the *Wi Parata* decision and the role of James Prendergast.

The most controversial use of Prendergast's judicial legacy has been by Stuart C. Scott. Scott's 'The Travesty of Waitangi', released in 1993, captured headlines, became a best seller and gained a reputation for being an anti-Treaty handbook. Scott used Prendergast's judgment to support his claim that the Treaty of Waitangi is not a valid document and should be ignored. Little legal argument is

(Auckland: Auckland University Press, 1999), p. 99.

⁸⁶ R.P. Boast, 'The Law and the Maori', in *A New Zealand Legal History*, edited by Peter Spiller (Wellington: Brookers, 1995), p. 127.

⁸⁷ Haughey, p. 230.

used by Scott, and Prendergast's usefulness is primarily in his 'simple nullity' quotation.⁸⁸ Scott's arguments are one-sided and poorly supported by primary evidence. While many commentators have accused Prendergast of building up legal boundaries, Scott defends the Chief Justice. The positive reaction to Scott's book by a sizable portion of the New Zealand Pakeha population possibly resulted in the rebuilding of boundaries which had begun to be dismantled.

Scott's work is not convincing when compared with the other writers mentioned, but the popularity of 'The Travesty of Waitangi' highlights the support for Prendergast's viewpoint in large sectors of the New Zealand community. The work of the Waitangi Tribunal in investigating Maori land claims relating to the Treaty of Waitangi has been extremely controversial and demonstrates the very real boundaries still existing in New Zealand between Maori and Pakeha. The protests and disruptions surrounding Waitangi Day are further evidence of distinct differences in opinion over the nature of the Treaty. The issues surrounding the Treaty that Prendergast was faced with in 1877 are as important today as they were when *Wi Parata* was decided.

Prendergast is used by both sides in the debate over the validity of the Treaty of Waitangi. Pro-treaty writers condemn Prendergast as a racist imperialist, but usually in a few brief sentences. Anti-treaty writers see in Prendergast a credible champion for their views. While Scott is the most widely-known example, the ultra-conservative end of the Treaty jurisprudence spectrum also includes writers such as Walter Christie, Guy Chapman and David Round. The arguments of Scott, Christie, Chapman and Round all focus on the *Wi Parata* decision.

Walter Christie places a picture of Prendergast on the dust cover of his book, *New Zealand Education and Treatyism* (1999), the only time Prendergast has appeared on the cover of a book. After presenting a brief and selective factual background,

⁸⁸ Stuart C. Scott, *The Travesty of Waitangi: Towards Anarchy* (Christchurch: Caxton Press, 1995), p. 25.

Christie states that Prendergast's decision was completely correct:

In short, modern treatyism teaches that Prendergast and Richmond were wrong, when their fellows at the time and over the following years saw them as certainly right, as did every contemporary government. A variety of ways including ridicule, have been used in modern times to discredit the Prendergast-Richmond 'simple nullity' dictum, yet it remains, as it must always remain, a tough if not impossible nut to crack.⁸⁹

Like Scott, Christie does not argue his case in depth, but rather uses *Wi Parata* as a quotation to support their overall argument relating to the Treaty's influence in present-day New Zealand. While a strong supporter of Prendergast, Chapman finishes his *Wi Parata* argument with a similar conclusion to some writers on the other end of the Treaty spectrum, "*Wi Parata v Bishop of Wellington* was a test case in its own time, addressing the matter of extinguishing aboriginal title in order to put in place a modern, contemporary system of land registration under state administration."⁹⁰

David Round's view on the *Wi Parata* decision is in direct conflict to Paul McHugh's, "The Treaty is a nullity in international law. This was so held in *Wi Parata v Bishop of Wellington*, and there is no reason to suppose that that case was not an accurate statement of international law as it was understood and practised last century."⁹¹ But it was Guy Chapman's 1991 article in the *New Zealand Law Journal* that sparked an obvious pro-Treaty, anti-Treaty debate. Chapman supports Prendergast's 'simple nullity' decision, "That statement has stood the test of time. In its clarity of exposition, and basic soundness of judgment."⁹² The article by Chapman was rebutted by McHugh, Pita Rikys and Joe Williams later in 1991.⁹³

⁸⁹ Christie, p. 28.

⁹⁰ Christie, pp. 33-4.

⁹¹ David Round, *Truth or Treaty: Commonsense questions about the Treaty of Waitangi* (Christchurch: Canterbury University Press, 1998), p. 110.

⁹² Chapman, p. 231.

⁹³ *NZLJ* (October 1991).

Radical scholarship on the Treaty of Waitangi has not been kind to Prendergast. His views on the Treaty and aboriginal title are seen as blatant support of the settler establishment. Writers such as Jonathan Lamb argue that Prendergast is just one oppressor in a long line, “there has been a Machiavellian theme, neatly summarised by Prendergast, which has justified the seizure of land by any finesse, deceit or force as requisite to a sound economy and stable polity. Its effect has been to privilege a land-owning elite that has consistently disguised its self-interest as bluff pragmatism and common sense.”⁹⁴ Scholars such as Ranganui Walker and Jane Kelsey refer negatively to Prendergast but not directly in relation to his *Wi Parata* decision. In an increasingly polarised debate, Prendergast is cast by pro-Treaty writers as a villain, while Chief Justice William Martin, for example, is cast as a hero. There are obvious historical problems with this polarised view as this thesis reveals, the situation is more grey, than black and white.

If one was to create a spectrum of thought on Prendergast’s *Wi Parata* decision with liberal thought opposing the decision and conservative thought supporting it, the writers mentioned in this chapter could be placed according to their arguments. The ultra-liberal, anti-Prendergast end of the spectrum would include writers such as Ranganui Walker and Jane Kelsey. The moderately liberal position could also be described as orthodox⁹⁵ and would include writers such as McHugh, Hackshaw, Williams and Brookfield. The moderately conservative position would include Haughey, while the ultra-conservative position would include Scott, Christie, Chapman and Round.

The term ‘orthodox’ in relation to the *Wi Parata* decision is a controversial one. Havemann describes the views of Paul McHugh, who dismisses Prendergast’s

⁹⁴ Jonathan Lamb, ‘The idea of utopia in the European settlement of New Zealand’ in *Quicksands: Foundational Histories in Australia & Aotearoa New Zealand*, edited by Klaus Neumann, Nicholas Thomas and Hilary Ericksen (Sydney: UNSW Press, 1999), p. 80.

⁹⁵ Paul Havemann, “‘The Pakeha Constitutional Revolution?’ Five Perspectives on Maori Rights and Pakeha Duties’, *Waikato Law Review* v.1 (1993), pp. 53-77.

decision as incorrect, as orthodox.⁹⁶ McDowell and Webb in *The New Zealand Legal System* describe Prendergast's decision as orthodox:

The orthodox view is that the Treaty is not one of cession, because the Maori did not possess any treaty-making capacity; that is, Maoridom was not a "state" recognisable in international law. This rule of international law was based on the assumption that native tribes did not possess any form of civil government capable of ceding sovereignty. This was recognised in New Zealand Courts in *Wi Parata v Bishop of Wellington*.⁹⁷

As the debate continues it is difficult to attach the word 'orthodox' to the arguments of either side. Prendergast's view of the Treaty as a nullity was orthodox until *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*⁹⁸ stated that the Treaty could be enforceable in a Court but must have statutory recognition first. McDowell and Webb describe *Hoani* as the orthodox legal position, "the Treaty has been regarded by the Privy Council as a treaty of cession, and this, rather than Prendergast CJ's view, is probably the orthodoxy at the present time".⁹⁹ The Treaty of Waitangi has not yet been given statutory recognition, though the principles of the Treaty have, so while scholarly thinking may support the legal legitimacy of the Treaty, legislation still does not.

The range of views on the *Wi Parata* decision mirrors the range of views found in wider Treaty jurisprudence. Several authors have attempted to provide summaries on the positions found in the Treaty debate. Examples include Paul Havemann in 'The "Pakeha Constitutional Revolution" Five Perspectives on Maori Rights and Pakeha Duties',¹⁰⁰ K. Upston-Hooper in 'Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi'¹⁰¹ and David Williams in '*Te Kooti*

⁹⁶ Havemann, p. 71 and Brookfield, p. 99.

⁹⁷ Morag McDowell and Duncan Webb, *The New Zealand Legal System: Structures, processes and legal theory*, 2nd edition (Wellington: Butterworths, 1998), p. 200.

⁹⁸ [1941] NZLR 590.

⁹⁹ McDowell and Webb, p. 204.

¹⁰⁰ *Waikato Law Review* v.1 (1993), pp. 53-77.

¹⁰¹ K. Upston-Hooper, 'Slaying the Leviathan: Critical Jurisprudence and The Treaty of Waitangi', *VUWLR*, 28 (1998), pp. 683-717.

tango whenua: *The Native Land Court 1864-1909*.¹⁰² It is not the purpose of this chapter to repeat this work, but to relate it to Chief Justice James Prendergast and the *Wi Parata* decision.

The uniqueness of Prendergast's decision in a global context is a controversial issue in New Zealand legal historiography. Williams provides a number of examples from other Commonwealth nations, in particular, African countries such as Uganda and Swaziland, in an attempt to place the *Wi Parata* decision in global context.¹⁰³ The conclusion reached is that Prendergast was not "a judicial pariah who wantonly disregarded the 'true' colonial law".¹⁰⁴ Williams argues that Prendergast was also not alone in the British Empire in reaching decisions favourable to colonial governments.¹⁰⁵ It is important that Prendergast be seen in a Commonwealth context, as New Zealand was only one of many British frontier colonies during the nineteenth century. As already noted, Richmond aided in the formulation the *Wi Parata* judgment, immediately dismissing the notion of a 'one-man stand' by Prendergast. Both Richmond and Prendergast shared euro-centric views on indigenous people's rights.

In his role as Chief Justice, James Prendergast was the acknowledged leader of the New Zealand judiciary. Prendergast's views on Maori land differed from those of New Zealand's first Supreme Court judges, Chief Justice William Martin and Henry Chapman. The dismissal of the validity of aboriginal title in *Wi Parata* diverged from the more tolerant views of Martin and Chapman. But it does not follow that Prendergast was a poor representative of judicial attitudes during the later half of the nineteenth century. Both Chapman and Martin were criticised during their careers at the bench for favourable decisions towards Maori and may provide better examples of uncommon judicial attitudes than Prendergast.¹⁰⁶

¹⁰² (Wellington: Huia Publishers, 1999).

¹⁰³ Williams, pp. 66-75.

¹⁰⁴ Williams, p. 86.

¹⁰⁵ Williams, pp. 86-87.

¹⁰⁶ Martin was criticised from some quarters for his support of the Maori cause and emphasis on the importance of the Treaty, as discussed by G. P. Barton in Oliver and Orange (eds.), p. 279.

Prendergast's *Wi Parata* judgment stood virtually unchallenged by New Zealand judges until 1986. In comparison, Chapman's decision in *Symonds* lasted only thirty years before being superseded by Prendergast's judgment in 1877, demonstrating institutional and societal support for the *Wi Parata* decision. The legal boundaries established by the *Wi Parata* decision helped enable the rise and dominance of European New Zealanders over Maori.

In his *Wi Parata* decision, Prendergast described Maori as 'primitive barbarians' and 'savages'. The inability to appreciate cultural difference due to ethnocentric biases was a common trait among those in positions of power in New Zealand during the late nineteenth century. Even leaders such as George Grey, steeped in knowledge of Maori society, took a paternalistic attitude towards Maori people.¹⁰⁷ The few powerful, later nineteenth-century figures who fought for Maori rights, including William Martin and Governor Arthur Gordon,¹⁰⁸ were often unpopular amongst other colonists. Gordon's outspoken support of Maori welfare helped to sour relations between himself and the settler government. Placed in historical context, Prendergast's views on Maori culture were not unique and show him to be a man of his times. These views did not prevent Prendergast from being widely admired by his peers and colleagues, in fact, quite the opposite.

Prendergast was praised by leading contemporary figures for his judicial integrity and dedicated leadership of the bench.¹⁰⁹ Prendergast's loyalty to the British Empire and the New Zealand colonial government made him a highly respected and celebrated figure during the late nineteenth century. In contrast, Prendergast has recently featured in New Zealand historiography being criticised for his *Wi*

¹⁰⁷See for example, Edmund Bohan, *To be a hero: Sir George Grey: 1812-1898* (Auckland: HarperCollins, 1998).

¹⁰⁸Gordon and Prendergast clashed over Prendergast's assenting to the invasion of Parihaka in 1881. Prendergast was Acting-Governor in Gordon's absence. See Chapter 8. James Prendergast, Chief Justice, to W. Jervois, Governor, 27 January 1883, G 17/9 5 Governor's papers and 4 September 1883 G17/9-21 Governor's papers, National Archives, Wellington.

¹⁰⁹'Obituary', *Dominion*, 28 February 1921, p. 4; 'Obituary', *Evening Post*, 28 February 1921, p. 6; 'The retiring chief justice', *New Zealand Mail*, 1 June 1899, p. 41. 'Presentation to Sir James Prendergast', *New Zealand Mail*, 27 January 1883, p. 189.

Parata judgment and his support of the infamous Parihaka invasion.¹¹⁰ When these events occurred, Prendergast received the opposite reaction from many of his European peers. The legal boundaries which now seem so obvious in hindsight were an integral part of building a white settler nation to those who lived a hundred years ago. Prendergast has been judged differently by different generations. The Chief Justice has been transformed from a hero to a villain. Prendergast lacked the humanitarianism of Martin and outspoken reputation of Gordon, but his present role as ruthless imperialist is undeserved.

7. Conclusion

In analysing the role of Prendergast in the *Wi Parata* legacy, the historian must be wary of judging the past by the values of the present. Prendergast may have been guilty of devastating ethnocentrism, *actus reus* (in action), but continuing research suggests that he was less guilty *mens rea* (in mind). The subjugation of the Maori race and the destruction of their culture was not the aim of James Prendergast. Instead, Prendergast hoped to lay the foundations for a thriving frontier colonial society, where Maori could play a limited but supporting role. The successful laying of foundations required the successful building of legal boundaries between the two races. To a modern audience, this seems blatantly paternalistic, but it is far from genocidal.

Viewing the *Wi Parata* case in context provides a vital third-dimension to this important historical event. Analysis of the motives and backgrounds of key players and the legal legacy of the decision transform the decision from a brief quotation to a historical incident, representative of its time and place in New Zealand's legal, political and cultural development. While Prendergast's views of aboriginal title, Crown sovereignty and the legal status of the Treaty have been challenged over recent decades, the Treaty of Waitangi remains essentially an

¹¹⁰Orange, p. 202 and Walker, *Struggle without end: Ka Whawhai Tonu Matou* (Auckland: Penguin Books, 1990), p. 158.

important constitutional document outside of the New Zealand law. The debate over its validity has become fierce and divisive, both in circles of power and wider New Zealand society. Instead of a legal ratio and accompanying dicta, the case has become a political weapon to be used at will by different factions in the Treaty debate. James Prendergast, the historical figure, has been lost in the chaotic war of words.

To dismiss the *Wi Parata* decision as completely incompetent and false, is to dismiss one hundred years of historical support for Prendergast's viewpoint. If legally dubious, the decision was a reflection of political thought and settler desires. There is enough legal truth in the decision for it to retain substantial support from different sectors of the debate, but its power has been effectively reduced by decisions in the modern New Zealand courts.

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

Prendergast failed to rise above the prejudices of his society and quite possibly misunderstood the legal precedent surrounding indigenous people's land. The *Wi*

Parata decision was not a triumph of justice and left a devastating legacy of Maori land alienation and economic breakdown. The legal boundaries created during Prendergast's Chief Justiceship have clearly influenced race relations throughout the late nineteenth and twentieth centuries. But Prendergast's decision was followed by many judges and incorporated into statute by many politicians who shared similar views to Prendergast.

Chief Justice Sir James Prendergast does not deserve his role as the arch-villain of New Zealand legal history. Instead, Prendergast was a small player in a powerful social and cultural phenomenon beyond the influence of any one person. The implementation of the British legal system in a troubled land. For this system to operate successfully, legal boundaries had to be erected between those who sought to dominate and those who would resist.

Chapter 8

James Prendergast as Administrator, 1875-1899, including the invasion of Parihaka, 1881.

1. Introduction

While Chief Justice, Prendergast also took the role of Administrator of New Zealand or Deputy-Governor in the absence of a permanent Governor. The Dormant Commission which governed this transfer of power was complex and unique, giving rise to a number of controversial issues. During his times as Administrator, Prendergast was, by the nature of the position, closely linked to both Governors and politicians. Prendergast's relationships with these pivotal figures provides the historian with an insight into the political history of New Zealand during the late nineteenth century. While Prendergast worked closely with leaders such as Governor Jervois and John Bryce, he found himself in confrontation with key figures such as Governor Gordon and the Maori leader, Te Whiti. Prendergast's time in Government House also had a social and ceremonial aspect to it, which provides insights into Prendergast's personality.

During Prendergast's time as Governor in late 1881, he played an instrumental and controversial role in the invasion of the Maori settlement of Parihaka. Aside from Prendergast's decision in *Wi Parata*, this is the historical action for which he is most remembered. The role of Prendergast in the Parihaka controversy needs to be re-examined and subjected to in-depth analysis. A close look at Prendergast's achievements while Administrator of New Zealand can aid the historian in assessing the extent of Prendergast's success while in this position. Like many other aspects of his career, Prendergast's role as Administrator received much praise during his life, but has recently received much criticism. This period of Prendergast's career is pivotal in exploring his views on race relations, and whether these views had altered

from his time as Attorney-General.

2. The Dormant Commission

As Chief Justice, Prendergast held the Dormant Commission “empowering him to act as Governor in case of death or absence of Governor.”¹ This commission, while granting Prendergast power, was in addition to his duties as Chief Justice. The strain placed on the Chief Justice while Administrator was a cause of concern. While Prendergast was praised for his ability to juggle two official posts, “besides performing his own judicial duties, efficiently manages, when occasion requires to fill up these Gubernatorial gaps,” doubts were raised about the nature of the Dormant Commission:

there is much to be said against a system which is frequently, or for a long period of time, imposing on a Chief Justice of a Colony the additional duties of administering its Government. It would be preferable that the Chief Justice should temporarily relinquish his judicial office while he was Administrator. Or, better still, that no ordinary intervals between two Governorships should take place, leaving only provision to be made for those created extraordinarily by death or unavoidable causes.”²

The suggestion of temporarily relinquishing judicial office while Administrator would have been a case of creating a problem while solving a problem. A ‘Deputy’ Chief Justice would have had to be appointed, acting as leader of the bench. This may have created rivalry between the Supreme Court judges as to who was second in importance to the Chief Justice.

While the presumption was that the Chief Justice would assume the role of Administrator, controversy occurred in 1907 when Governor Plunket appointed

¹ Guy H. Scholefield and E. Schwabe (eds.), *Who's Who in New Zealand and the Western Pacific, 1908* (Wellington: Gordon & Gotch, 1908), p. 139.

² Gisborne, William, *New Zealand Rulers and Statesmen, From 1840 to 1897*, revised and enlarged edition (London: Sampson Low, 1897), p. 220.

Prendergast to act as Deputy-Governor while Plunket was visiting several Pacific islands. Here a confusing distinction between Administrator and Deputy-Governor was again raised. The Colonial Under-Secretary, H. Pollen was of the opinion that the Letter Patents required an Administrator (in New Zealand, the Chief Justice) to be appointed “in the event of the death, incapacity, or removal of the Governor, or his departure from the colony - when, that is to say, he is leaving permanently.”³ Pollen argued that if the Governor had merely left for a short period and would return:

In such a case the Letters Patent provide that the Governor may appoint some person...to be his deputy during his temporary absence....there is no reason, so far as constitutional procedure is concerned, why any person other than the Administrator should not be appointed Deputy-Governor. There is no novelty about it.”⁴

Pollen cited an example when Prendergast was appointed Deputy-Governor in 1900, while Robert Stout was Chief Justice and Administrator. In this case, Governor Ranfurly was temporarily absent attending an official function in Australia.⁵ Therefore, the office Administrator and that of Deputy-Governor were indeed different, with the Dormant Commission relating to the role of Administrator.

Governor Ranfurly in the letter dated 7 July 1899 to Joseph Chamberlain, Secretary of State for the Colonies, raised the issue of the Dormant Commission. Ranfurly, a supporter of Prendergast, hoped to create the position of Deputy Governor in New Zealand and appoint Prendergast. As with the Plunket incident of 1907, the evidence suggests that both Ranfurly and Plunket held Prendergast in high regard, considering him for Deputy-Governor despite Robert Stout being the obvious first choice. In his letter to Chamberlain, Ranfurly states:

The Dormant Commission will now place His Honour Sir Robert Stout K.C.M.G. as Administrator during the absence of a Governor, as there is no Deputy Governor in the Colony, under other circumstances I should

³ *New Zealand Mail*, 6 February 1907, p. 1.

⁴ *New Zealand Mail*, 6 February 1907, p. 1.

⁵ *New Zealand Mail*, 6 February 1907, p. 1.

have recommended Sir James's appointment as Deputy Governor, but I understand that Sir Robert Stout has been led to expect that the Dormant Commission would still remain in force, he is further in every way suited to act as Administrator.⁶

The most historically relevant debate over the roles of Administrator and Deputy Governor occurred during the Governorship of Arthur Gordon. In a series of letters to Prendergast during the middle of 1881, Gordon expressed confusion over the two roles:

I am not as yet, quite certain whether, for the first month of my absence, my locum tenens should be "Deputy" or "Administrator". I myself think the latter; for, although I may return within the month allowed by the Royal Instructions, it is more probable that I shall not do so.⁷

After seeking advice from the ministers of the Hall Government, Gordon concluded in a later letter, "The ministers have determined that you are to be Administrator and not Deputy, and they are, I think, quite right, though the decision will cost me in all probability a good deal of money".⁸

3. Summary of the six Administrator periods

Prendergast served as Administrator for the Colony of New Zealand on seven different occasions. The majority of these occasions were the periods of time between the departure of one Governor and the arrival of the next Governor. When the Marquis of Normanby retired as Governor on 21 February 1879 Prendergast acted as Administrator until the arrival of Sir Hercules George Robert Robinson in March of that year. Normandy's term had included a number of constitutional clashes with

⁶ Letter, Governor Ranfurly, Wellington, to Joseph Chamberlain, Secretary of State for the Colonies, London, 7 July 1899, Hocken Library.

⁷ Letter, Governor Gordon to James Prendergast, 23 June 1881, James Prendergast Papers, MS-Papers 730, Hocken Library, Dunedin.

⁸ Letter, Governor Gordon to James Prendergast, 8 September 1881, James Prendergast Papers, MS-Papers 730.

his Ministers⁹ and Robinson was welcomed by many New Zealand political leaders as a positive change. Robinson's term was to be very brief, falling short of two years. When Robinson left New Zealand on 9 September 1880, Prendergast took office until 29 November 1880 when Sir Arthur Hamilton Gordon arrived. Gordon had an even more acrimonious relationship with his Ministers than Normanby had experienced and Gordon "was probably more out of step with his government here than any governor before or since."¹⁰ The most controversial period as Administrator was during Gordon's absence in Fiji from 13 September to 20 October 1881. This was the only time Prendergast would act as Administrator during the term of a Governor. Whether Prendergast should have been appointed Administrator or Deputy Governor was an issue Gordon explored with various political experts.

When Gordon left New Zealand in controversial fashion in June 1882, Prendergast again took the role of Administrator until Gordon's replacement, Lieutenant-General Sir William Francis Drummond Jervois, took up his post in Wellington during January 1883. Jervois had a successful and lengthy term as Governor which ended on 22 March 1889. Prendergast became Administrator until the Earl of Onslow became the next Governor in May 1889. Like Normanby and Gordon before him, Onslow found himself embroiled in constitutional controversy, in particular, with John Ballance.¹¹ Between 25 February and 6 June 1892, Prendergast took over from the departing Onslow and waited for his replacement, the Earl of Glasgow. Prendergast's final time as Administrator came in February 1897 with the departure of Glasgow, who had relinquished the Governorship "on the grounds that the remuneration left him unable to uphold the dignity of the office".¹² Glasgow was replaced by the Earl of Ranfurly in August 1897. Ranfurly also had major difficulties with the low level

⁹ McLauchlan, Gordon (ed.), *Bateman New Zealand Encyclopedia*, 2nd edition (Auckland: Bateman, 1987), p. 393.

¹⁰ McLauchlan, Gordon (ed.), *Bateman New Zealand Encyclopedia*, 2nd edition (Auckland: Bateman, 1987), p. 227.

¹¹ McLauchlan, Gordon (ed.), *Bateman New Zealand Encyclopedia*, 2nd edition (Auckland: Bateman, 1987), p. 400.

¹² McLauchlan, Gordon (ed.), *Bateman New Zealand Encyclopedia*, 2nd edition (Auckland: Bateman, 1987), p. 221.

of remuneration.¹³

Historical sources, mainly primary, reveal the nature of Prendergast's relationships with these different Governors. As Administrator and Chief Justice, Prendergast often came into contact with the Governor, both professionally and socially. Prendergast had a cordial relationship with Jervois, Onslow, Glasgow and Ranfurly but had a serious break with Gordon. Insufficient evidence remains to comment on Prendergast's relationship with Normanby and Robinson. The first Administrator period which has sufficient evidence to analyse is during the Governorship of Gordon in 1881. This eventful period will be dealt with in relation to Prendergast's role in the invasion of Parihaka.

The period between the Governorships of Gordon and Jervois was interesting from a historical point of view, as it was the interregnum between possibly the most unpopular Governor in New Zealand history and one of the most popular. Many colonists were glad to see Gordon depart and were thankful to Prendergast for his support of the Hall Government which had often clashed with Gordon. In a ceremony in January 1883, members of the Wellington City Council, leading citizens and a selection of Cabinet ministers gathered to thank Prendergast for his half-year contribution as Administrator. Notable among the Cabinet ministers were Frederick Whitaker and John Bryce, conservative politicians with reputations for being 'anti-Maori.' Among the citizens present was W.T.L. Travers, who represented the Bishop of Wellington in the 1877 landmark case, *Wi Parata v The Bishop of Wellington*.¹⁴

The prepared address was read:

We, the Mayor, Councillors, and Citizens of Wellington, desire, on the occasion of your resigning the reins of Government into the hands of his Excellency Sir William Jervois to convey to your Excellency our deep sense of appreciation of the manner in which you have fulfilled the high

¹³ McLauchlan, Gordon (ed.), *Bateman New Zealand Encyclopedia*, 2nd edition (Auckland: Bateman, 1987), p. 441. Dates from, Bryce Fraser (ed.), *The New Zealand Book of Events* (Auckland: Reed Methuen, 1986), pp. 244-5.

¹⁴ (1877) 3 NZ Jur (NS) SC 72.

and important duties of Administrator of the Government. The expressions of the people at all public assemblies, held during your term of office, prove clearly that you are held in the respect and esteem of all classes of the community, not only in your official capacity, but as the dispenser of a warm-hearted and genial hospitality.¹⁵

Prendergast's nephew by marriage, Charles Prendergast Knight, kept a detailed diary of his life during the 1890s. As 'secretary' to Prendergast, Knight made many references relating to his Uncle's career and social life. On 15 February 1892, nine days before Lord Onslow's departure as Governor, Knight met Onslow at Government House for instructions, "I was ushered into the presence chamber and Lord Onslow took me into the Secretary's room and showed me the way that dispatches were filed." Later that day Knight returned to Government House to attend Lady Onslow's final levee.¹⁶

As Administrator, Prendergast was present at official farewells and greetings, "Uncle [Prendergast] and I went down to the Railway station to see Governor and the Countess of Onslow off a large crowd was present. I stood and looked on musing at the title-loving crowd that gaped around."¹⁷ The Administrator was expected to fulfill a variety of roles, both political and social, including meeting with the Executive Council and hosting social functions. On 13 May 1892, Prendergast was the guest of honour at a Royal Command performance evening¹⁸ while on 24 May 1892, he hosted a levee at Government House and a ball in honour of the 73rd birthday of Queen Victoria.¹⁹ Notable power-brokers present at the levee included Richmond J, the Premier John Ballance, Richard Seddon, William Pember Reeves, Jock McKenzie and Harry Atkinson.

¹⁵ *New Zealand Times*, 19 January 1883, pp. 2-3.

¹⁶ Diary of Charles Prendergast Knight, 15 February 1892, p. 53, James Prendergast Papers, MS-Papers 1791, Alexander Turnbull Library, Wellington.

¹⁷ Diary of Charles Prendergast Knight, 17 February 1892, p. 55, James Prendergast Papers, MS-Papers 1791.

¹⁸ Diary of Charles Prendergast Knight, 13 May 1892, p. 102, James Prendergast Papers, MS-Papers 1791.

¹⁹ Diary of Charles Prendergast Knight, 24 May 1892, p. 103-4, James Prendergast Papers, MS-Papers 1791.

The Government House ball, held on a Wellington autumn evening, was described by a newspaper commentator in idyllic terms:

It was lovely night, calm, cloudless, and starlit, while the nipping air outside gave an added zest to dancing....The guests as they arrived were received by Sir James and Lady Prendergast....Soon after 9 o'clock the ball was opened by Sir James Prendergast, who danced with Mrs Buckley; the other couples in the set being the Hon W. P. Reeves and Lady Hector, the Hon R. Seddon and Mrs Godfrey Knight, Sir James Hector and Miss Hilda Williams.²⁰

Whether the government was liberal or conservative, James Prendergast was secure in his place amongst the power elite of late nineteenth century New Zealand society.

Prendergast's relationship with most of the Governors from 1875 onwards was cordial and one of mutual respect. For example, on 19 July 1892, Lady Glasgow rang to tell the Prendergast's that she would pay a visit, eventually staying "over the conventional 10 minutes."²¹ On 8 August 1892, Prendergast was walking from Bolton Street to Brooklyn, when he met Governor Glasgow and engaged in a friendly chat.²² On Prendergast's retirement as Chief Justice in 1899, Lord Ranfurly wrote to the British Secretary of State for the Colonies suggesting that Prendergast be awarded the K.C.M.G.:

I think if any recognition is made of his services that the permission to bear the title of Honourable will be considered by him, under the circumstances, as hardly adequate for his long public career....I venture to suggest for your consideration the advisability of making Sir James Prendergast K.C.M.G., in addition to the title of Honourable.²³

²⁰ Newspaper report in Diary of Charles Prendergast Knight, 24 May 1892, p. 104, James Prendergast Papers, MS-Papers 1791.

²¹ Diary of Charles Prendergast Knight, 19 July 1892, p. 118, James Prendergast Papers, MS-Papers 1791.

²² Diary of Charles Prendergast Knight, 8 August 1893, p. 8, James Prendergast Papers, MS-Papers 1791.

²³ Letter, Governor Ranfurly, Wellington, to Joseph Chamberlain, Secretary of State for the Colonies, London, 7 July 1899, Hocken Library, see footnote 61.

The happy relationship Prendergast enjoyed with popular Governor's such as Glasgow and Ranfurly was not present with Arthur Gordon. In fact, when leaving for Fiji in 1881, after being Governor for over nine months, Gordon seems not to have even met his 'Deputy' Prendergast, "I am sorry not to have had the pleasure of meeting you before leaving for Fiji, but I do not know that I had anything to say which cannot be said equally well on paper."²⁴ This formal relationship would deteriorate into mutual dislike on Gordon's return from Fiji.

4. Prendergast and the invasion of Parihaka

With the obvious exception of the *Wi Parata* decision, Prendergast's most well-known historical role was as Administrator of the Colony of New Zealand during the invasion of Parihaka in 1881. Prendergast's actions as Administrator during the period 13 September to 20 October 1881²⁵ were highly controversial, in stark contrast to his other periods as Administrator. Much has been written about the Parihaka invasion and accounts differ to varying degrees. The Dictionary of New Zealand Biography summarised the situation as follows:

The prophet Te Whiti-o-Rongomai's thriving Maori settlement at Parihaka in Taranaki lay on land officially confiscated in the 1860s. When the Grey government began opening up the area for European settlement in 1878 Te Whiti resisted, rightly claiming that Maori land reserves, promised in 1865, had not been set aside. The West Coast Royal Commission in 1880 confirmed that the government's failure to define these reserves constituted a genuine grievance.²⁶

Maori, under the leadership of Te Whiti and Tohu, protested by erecting fences and ploughing land already sold to Europeans, leading to the imprisonment of 216 Maori

²⁴ Letter, Governor Gordon to James Prendergast, 8 September 1881, James Prendergast Papers, MS-Papers 730.

²⁵ Fraser (ed.), pp. 24-5.

²⁶ W.P.N. Tyler, 'Arthur Hamilton Gordon' in *The Dictionary of New Zealand Biography, Volume II 1870-1900* (Wellington: Department of Internal Affairs/Bridget Williams, 1993), p. 173.

protesters by September 1880.²⁷

The Parihaka community was a model town with strong leadership and a successful agricultural economy. Tensions between Parihaka and the settler government continued to rise throughout 1881 and reached a climax in the latter half of that year. Governor Gordon openly supported Te Whiti's case and the relationship between the Governor and his Ministers was strained and unhappy. The government's desire to take assertive action against Te Whiti was effectively being restrained by Gordon. Aside from his constitutional powers as Governor, Gordon was also in a position to make negative reports to London and could potentially damage the reputation of the New Zealand government in Britain. In an unforced error and perhaps naive misjudgment, Gordon left New Zealand to visit Fiji during September and October 1881, leaving Prendergast as Administrator. With Gordon powerless to harness government action, the way was now clear to move on Parihaka.

Specific dates and details are pivotal in assessing Prendergast's involvement in the Parihaka invasion. In a letter dated 23 June 1881 Gordon informed Prendergast of his decision to travel to Fiji, "I intend to go to Fiji, for the sittings of the Lands Appeals Court, and, possibly, to visit some other parts of the Western Pacific. During my absence, the administration of the Government will, of course, devolve upon you."²⁸ Gordon was unsure as to the length of time he would be absent from New Zealand, "although I may return within the month allowed the Royal Instructions, it is more probable that I shall not do so."²⁹ Gordon intended to keep in touch with New Zealand developments through his trusted private secretary, Mr Murray. In another letter to Prendergast dated 8 September 1881, Gordon stated his wish, "that you will continue to employ my private Secretary, Mr Murray, who is fully *au courant* of the business of my office and who in Mr G's absence acts as Clerk of the Executive

²⁷ Tyler, p. 173.

²⁸ Letter, Governor Gordon to James Prendergast, 23 June 1881, James Prendergast Papers, MS-Papers 730.

²⁹ Letter, Governor Gordon to James Prendergast, 23 June 1881, James Prendergast Papers, MS-Papers 730.

Council.”³⁰ On the day of his departure, 13 September, Gordon penned a final preparatory note to Prendergast:

I believe it is usual for the Governor after the session to make a sort of review of it to the Secretary of State. If you have no objection I should prefer to do this myself after my return and it will I think come perhaps more fitly from the permanent Governor than from an acting one.³¹

While leaving New Zealand for Fiji during a time of tension proved disastrous for Gordon’s attempt to protect Parihaka, he attempted to retain some control while absent. By asking Prendergast to retain Murray, Gordon could keep up-to-date with all developments in New Zealand and by retaining his duty to provide a report to London, Gordon could continue to influence the reputation of the New Zealand government abroad. While there is no specific evidence to suggest that Gordon did not trust Prendergast, Gordon attempted to ensure that Prendergast would not have complete freedom of action while the Governor was absent. On September 16, Prendergast sent a brief note to Gordon appraising him of the situation in New Zealand. In a letter from Gordon in Fiji to Prendergast in Wellington dated 7 October 1881, Gordon expressed dismay at the Parihaka situation:

The news brought by the “Southern Cross” is so alarming, and so at variance with what I was led to expect when leaving New Zealand, that I have made up my mind to return immediately. We shall probably reach Wellington about the same time that the “Southern Cross” reaches Auckland; but in case we may meet with any unexpected hindrance, and her mails reach you first, I write a line to announce my return to you. I trust I may be in time to anticipate any hasty or inevitable proceedings in a warlike direction.³²

The ship “Southern Cross” did not reach New Zealand before Gordon returned, so Prendergast was unaware of its contents when the Parihaka proclamation was made

³⁰ Letter, Governor Gordon to James Prendergast, 8 September 1881, James Prendergast Papers, MS-Papers 730.

³¹ Letter, Governor Gordon to James Prendergast, 13 September 1881, James Prendergast Papers, MS-Papers 730.

³² Letter, Governor Gordon, Fiji, to James Prendergast, Wellington, 7 October 1881, James Prendergast Papers, MS-Papers 730.

on 19 October.³³ Gordon arrived in Wellington on the evening of 19 October.

While Gordon was in Fiji, the New Zealand government began to take decisive action against Te Whiti and Parihaka. Only hours before Gordon's return to Wellington late on the evening of 19 October, John Bryce, the most avid supporter of an invasion of Parihaka, was reinstated as Native Minister and a proclamation was prepared by Prendergast and his ministers³⁴ giving Te Whiti an ultimatum:

Te Whiti and his adherents must now accept the proposals of the Government, or all that they might now have under these proposals will be beyond their reach. In the Parihaka Block, 25,000 acres on the Mountain side of the road are, as recommended by the Commissioners, offered as an ample provision for the Parihaka people, beside other reserves on the seaward side of the road. About the latter, the Government has said that it was willing to consider the wishes the Native might lay before it. The Government now states plainly that these offers will, after fourteen days, be withdrawn, unless, within that time, Te Whiti and his adherents signify their acceptance of them, and their willingness to submit to the law of the Queen and to bring their claims before the Commission. If they do so, the recommendations of the Commissioners, and the promises made, will be liberally interpreted and fulfilled.³⁵

If the government's offer was not accepted, Prendergast promised that drastic action would follow:

The Queen and the law must be supreme at Parihaka as well as elsewhere. Te Whiti and his people are now called upon to accept the proposals made to them, which would give large and ample reserves to the people. If they do not do this, they alone will be responsible for the passing away from them for ever of the lands which are still proffered by the Government, and for the great evil which must fall on them.³⁶

³³ Letter, Governor Gordon, Wellington, to James Prendergast, 24 October 1881, James Prendergast Papers, MS-Papers 730.

³⁴ Drawn up primarily by Hall and Whitaker. See Hazel Riseborough, *Days of Darkness: Taranaki 1878-1884* (Wellington: Allen & Unwin, 1989), p. 155-6.

³⁵ Proclamation by James Prendergast, Administrator of the Government, *New Zealand Gazette Extraordinary*, 19 October 1881, Volume II, p. 1300. Also signed by William Rolleston, Native Minister.

³⁶ *New Zealand Gazette Extraordinary*, 19 October 1881, p. 1300.

The proclamation was given under the hand of Prendergast as Administrator of the Government.

The question facing historians of Parihaka is whether or not Gordon's ministers took advantage of his absence to take aggressive action against Te Whiti or whether they were just responding to an apparent 'hardening' in Te Whiti's attitude.³⁷ Did Prendergast take an assertive role in the issuing of the proclamation or was he just acquiescing to his Minister's demands? Gordon had been alerted by Murray of the changing situation in New Zealand and as mentioned earlier, rushed back to New Zealand. Gordon was furious at the proclamation and at Prendergast, questioning "the legality of the proclamation, which he regarded as 'injudicious', 'disputable' and 'inequitable', but gained no support from the Colonial Office."³⁸ At an Executive Council meeting called soon after Gordon's return, Prendergast was called for a private interview with the Governor. Prendergast emerged "ashen and fuming".³⁹ A rather distant relationship between the Governor and his Administrator had transformed into mutual dislike and resentment. Gordon's rage was in vain. Te Whiti did not answer the proclamation and, on 5 November 1881, 1,589 troops marched on Parihaka, led by Bryce. Te Whiti and other leaders were arrested and the village was largely destroyed.⁴⁰ Bryce and his men had been met with passive resistance, after Te Whiti instructed his followers not to use violence.

During the invasion and occupation of Parihaka during early November 1881, many of the pivotal figures in Prendergast's Wellington career were present. Several Maori leaders who had crossed paths with Prendergast on other occasions were present at Parihaka. On 9 November, Bryce arrested Titokowaru,⁴¹ who had been the subject of

³⁷ Tyler, p. 173.

³⁸ Tyler, p. 173.

³⁹ Riseborough, p. 157.

⁴⁰ Tyler, p. 173.

⁴¹ Scott, Dick, *Ask that Mountain: The Story of Parihaka* (Auckland: Reed/Southern Cross, 1975), p. 123.

Prendergast's consternation during the late 1860s while serving as Attorney-General. Titokowaru had acted as one of the leaders of the Parihaka community after retiring from warfare. Also on 9 November, Wi Parata, the Maori MP and plaintiff in the landmark legal decision, left Parihaka with several of his supporters.⁴² Bryce had ordered Parihaka to be evacuated after the 5 November invasion.

Prendergast also had a number of friends, even a relative, present at the invasion. Bryce was closely associated with Prendergast during the early 1880s and Michael Prendergast, James' nephew was a part of the invasion force. In a letter to his Uncle, dated 9 November 1881 and sent from the Armed Constabulary Camp at Manaia, Michael describes the events at Parihaka:

Today we started at a quarter to five this morning with Bryce, Rolleston and Major Atkinson and went to all the Maori Pahs in the neighbourhood and took all the arms and ammunition that could be found, there are very few natives about here, they are all at Parihaka....There are about sixty men in the troop, they are very decent fellows, most of them are farmers who live near Wanganui, one of Bryce's sons, the eldest one I think, is amongst them....Bryce went back to Parihaka this afternoon as I believe some of the natives are getting troublesome up there.⁴³

Michael does not allude to any personal involvement in the actual invasion on 5 November.

The events of 9 November are described in a somewhat different fashion by historian Dick Scott in *Ask That Mountain*:

At dawn...raids for arms began over a wide area of Taranaki. Major Atkinson and Bryce personally led raids on the Waimate Plains. First to burst in on Taikatu, a former stronghold of Titokowaru, the Colonial Treasurer [Atkinson] found it occupied by a few old women....The total haul from west and south Taranaki was 339 guns, only two-thirds of them in working order....The raiding, accompanied by the customary

⁴² Scott, p. 123.

⁴³ Letters from Michael Prendergast Junior, Manaia, to James Prendergast, Wellington, 9 November 1881, D.O.W. Hall, MS-Papers 986/17, Hocken Library, Dunedin.

destruction and looting, was extended to north Taranaki.⁴⁴

Prendergast, as Administrator, had aided in beginning a chain of events that would leave Parihaka in ruins and create distrust and bitterness amongst many Maori for generations to come.

In the aftermath of the Parihaka invasion, Gordon launched a series of attacks on the men he felt were responsible. In 1883, Gordon having returned to England, the 'Blue Book' containing Gordon's public and private despatches while Governor of New Zealand was presented to the British parliament. Along with his own damning comments about the New Zealand government, Gordon had also included a range of clippings from the liberal New Zealand newspaper, the *Lyttelton Times*.⁴⁵ Prendergast was accused by Gordon of being aware of the Governor's imminent return from Fiji in October 1881. In a letter to the new Governor, Jervois, dated 27 January 1883, Prendergast defended his actions as Administrator. Prendergast focussed on a despatch sent by Gordon to the Secretary of State dated 22 October 1881.⁴⁶ Gordon argues that immediately after he departed for Fiji on 13 September 1881, the government prepared to step up the pressure on Parihaka.⁴⁷ On 4 October, Gordon learned of these developments through Murray, his private secretary, and by reading New Zealand newspapers.

Gordon believed he had not been kept properly informed by his ministers and administrator. In a separate memorandum, Frederic Whitaker argued that "it would have been irregular and improper for them [the ministry] to communicate with Sir Arthur Gordon as Governor during his absence and the existence of an Administrator."⁴⁸ Prendergast believed that Mr Murray, having access to all relevant

⁴⁴ Scott, p. 123.

⁴⁵ Riseborough, p. 197.

⁴⁶ Memorandum, James Prendergast to Governor Jervois, 27 January 1883, p. 1, Governor's Papers, National Archives, Wellington.

⁴⁷ Memorandum, James Prendergast to Governor Jervois, 27 January 1883, p. 2, Governor's Papers.

⁴⁸ Memorandum, James Prendergast to Governor Jervois, 27 January 1883, p. 3, Governor's

governmental information, would keep Gordon informed, which he did.⁴⁹ Prendergast states that “It has always been and still is my opinion that a Governor absent under such circumstances as Sir Arthur Gordon was ought to be kept generally informed of any matter of extraordinary importance occurring in his absence.”⁵⁰ Again, Prendergast’s argument is that it was understood by all parties that Mr Murray would keep Gordon informed. Prendergast also argues, consistent with Gordon’s earlier letters to Prendergast, that the duration of Gordon’s absence was uncertain.⁵¹

The steamer “Southern Cross” carried communications from Auckland to Fiji monthly. Prendergast wrote to Gordon on 16 September and the letter left Wellington for Auckland on 23 September. A few days later, the “Southern Cross” carried both Prendergast’s letter and Murray’s communications to Fiji, arriving 4 October. Prendergast did not keep a copy of his letter but remembered it being brief as he stated that Murray would provide a more detailed account of happenings in New Zealand.⁵² Prendergast argues that he could not send any further communications to Gordon before the middle of October when the next steamer left New Zealand. By that time, Gordon would have left Fiji.⁵³ Therefore, on the question of whether Prendergast kept Gordon informed of developments in Taranaki, the answer must be that it was understood by Prendergast that Murray would do so. Murray, acting as private secretary to the Administrator, did keep Gordon informed to the best of his ability. The “Southern Cross” steamer voyage in late September was effectively the only opportunity of communicating with Gordon and both Murray and Prendergast sent information on that steamer. Riseborough argues that Prendergast could have

Papers.

⁴⁹ Memorandum, James Prendergast to Governor Jervois, 27 January 1883, p. 4, Governor’s Papers.

⁵⁰ Memorandum, James Prendergast to Governor Jervois, 27 January 1883, p. 5, Governor’s Papers.

⁵¹ Memorandum, James Prendergast to Governor Jervois, 27 January 1883, p. 6, Governor’s Papers.

⁵² Memorandum, James Prendergast to Governor Jervois, 27 January 1883, p. 7, Governor’s Papers.

⁵³ Memorandum, James Prendergast to Governor Jervois, 27 January 1883, p. 8, Governor’s Papers.

penned a further letter to Gordon between 16 and 23 September as tension increased between Te Whiti and the government. Again, Murray successfully kept Gordon informed of all developments on the West Coast.

Therefore, assuming that Gordon was fully informed of important developments in New Zealand, why did Prendergast issue the drastic proclamation on 19 October, without waiting for any communication from Gordon on the Parihaka issue? Did Prendergast and the Ministry know of Gordon's imminent arrival in Wellington and hastily move before Gordon could intervene? If so, this would probably rank as Prendergast's most dubious and underhand action in his long career as a public official. The options open to Prendergast were either to make the proclamation or refuse and wait for communications from Gordon. If Prendergast had refused to make the proclamation, he would have alienated many of his powerful friends and political allies. It is also possible that if Gordon was Governor at the time, he would have had little choice but to make the proclamation as well, for the power of the Governor was in reality primarily dependent on the support of his ministers.

Gordon, in a memorandum to his Ministers written on the day following his arrival from Fiji, stated that "his own return within twenty-four hours [of the Proclamation] was known to be at least probable, if not well nigh certain."⁵⁴ Prendergast argues that though Murray communicated to him on 19 October, Gordon could well have decided to return to New Zealand after hearing about the escalation in tensions on the West Coast but:

Mr Murray's utterances did not convey to my mind that he had received any communication from Sir Arthur Gordon or that he knew anything more about Sir Arthur Gordon's probable movements than I or the general public knew. Mr. Murray was present at the time when the Proclamation was signed and said not one word to me about the matter of Sir Arthur Gordon's return.⁵⁵

⁵⁴ Memorandum, James Prendergast to Governor Jervois, 27 January 1883, p. 9, Governor's Papers.

⁵⁵ Memorandum, James Prendergast to Governor Jervois, 27 January 1883, pp. 11-12, Governor's Papers.

Gordon had managed to place a message on a ship bound for Sydney, which could then be telegraphed to New Zealand. This message reached New Zealand on 15 or 16 October and stated that Gordon's return to New Zealand was imminent. Prendergast argues that Murray did not pass this information onto him, "for some reason which I am not able to discover, the fact of such communication having been received was intentionally suppressed, and not made known to me."⁵⁶ Prendergast was apparently furious at Gordon and had:

expressed to him my astonishment at his entertaining such a belief of my conduct, and at his communicating his intended return to others and not to me, and that I had shown to him very warm indignation that he, by refraining to inform me of his intended return had placed me in a position inevitably to be suspected of availing myself of his absence to complete an important act of State.⁵⁷

In Riseborough's scathing criticism of the New Zealand government's action during late 1881 it is stated that, although ministers had not been officially told, and denied knowing at all, that Gordon's arrival was imminent:

There is little doubt that they knew what they had not been officially told, and their actions between 17 and 19 October confirm what they tried to deny....The ministers' memories a year or two later were as convenient as their consciences at the time.⁵⁸

Prendergast's role in the Parihaka invasion has been examined by a number of historians and most importantly, by Gordon himself after the incident. Some historians have damned Prendergast as a conspirator and a racist. The Catholic priest, Dom Felice Vaggioli in 1896 described Prendergast's role:

Judge Prendergast, a bitter enemy of the Maori, was acting as acting-

⁵⁶ Memorandum, James Prendergast to Governor Jervois, 27 January 1883, p. 14, Governor's Papers.

⁵⁷ Memorandum, James Prendergast to Governor Jervois, 27 January 1883, p. 18, Governor's Papers.

⁵⁸ Riseborough, pp. 154, 159.

governor. The government used him to carry out an unwarranted attack on Parihaka....For his part in the illegal action, Prendergast was knighted by the British government on 30 October.⁵⁹

Vaggioli, along with several other historians,⁶⁰ incorrectly links Prendergast's knighthood with the Parihaka invasion. It was a matter of course for Chief Justices of the colonies to be knighted and in a letter dated 23 May 1881, months before the Parihaka invasion, Gordon wrote to Prendergast, "the Queen has been pleased to give directions for conferring on you the honour of knighthood. I beg to offer you my best congratulations."⁶¹

More recently, the Waitangi Tribunal Report on the Taranaki - Kaupapa Tuatahi Claim(1996), criticised Prendergast:

The then chief justice, whose descriptions of Maori as 'savages' and 'barbarians' informs his disposition, became administrator of the Government in the Governor's absence....The proclamation of the chief justice, as administrator of the Government, berated the people [of Parihaka] for making themselves poor by their useless expenditure on feasts; for neglecting the cultivation of their own land (though one could not tell whether they legally owned one acre); for listening to the sound of Te Whiti's voice, which had unsettled their minds; for assuming a 'threatening attitude'; and the like.⁶²

Hazel Riseborough describes Prendergast as 'the pliant chief justice'⁶³ and criticises Prendergast's failure to keep Gordon properly informed of the developments in New Zealand during his absence.⁶⁴ In describing Prendergast's role in the issuing of the proclamation, Dick Scott, calls Prendergast "a ruthless Attorney-General of the war

⁵⁹ Dom Felice Vaggioli, *History of New Zealand and Its Inhabitants*, translated by John Crockett (Dunedin: University of Otago Press, 2000, First published 1896), p. 290.

⁶⁰ Riseborough, p. 157.

⁶¹ Letter, Governor Gordon to James Prendergast, 23 May 1881, James Prendergast Papers, MS-Papers 730 and Kimberley Papers, 4 May 1881, Alexander Turnbull Library, Wellington.

⁶² Waitangi Tribunal, *Report of the Waitangi Tribunal on the Taranaki-Kaupapa Tuatahi* (Wellington, 1996), pp.5-6.

⁶³ Riseborough, p. 130.

⁶⁴ Riseborough, p. 145.

days”,⁶⁵ while Ranganui Walker says the Executive Council was called together “while the anti-Maori Justice James Prendergast was still Acting Governor.”⁶⁶

One contemporary figure who openly criticised the actions of the Executive Council was Robert Stout, associated with Prendergast throughout his career. Stout wrote to the liberal newspaper, the Lyttelton Times:

I suppose, amidst the general rejoicings at the prospects of a Maori war, it is useless for anyone to raise his voice against the present native policy. I do so more as a protest than with any hope that any one colonist can ever aid in preventing the murder of the Maoris, on which it seems we as a colony are bent.⁶⁷

In this instance, Stout is in direct opposition to Prendergast, in his views on native policy. While no evidence exists to suggest a feud between Prendergast and Stout, analysis of primary material reveals a very formal, almost distant, relationship. The conservative views of Prendergast would have been difficult to reconcile with the liberal outlook of Stout, both on matters of cultural encounter and on matters of law.

Not all accounts of Prendergast’s role during October 1881 are negative though. W. J. Hunter in 1959 defended Prendergast’s actions:

in 1881, it fell to his lot to sanction in the Executive Council military operations against the Maoris in Taranaki who, under the leadership of Te Whiti, a ‘prophet’ of a kind not unknown to the native race, were defying surveyors of land acting under instructions from the Government. Prendergast has been criticised for so doing but without justification. Ministers and people feared that the actions of the Maoris were the prelude to another outbreak of Hau Hauism and its deplorable attacks on settlers and that it must be put down with a strong hand.⁶⁸

⁶⁵ Scott, p. 100.

⁶⁶ Ranganui Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (Auckland: Penguin Books, 1990), p. 158.

⁶⁷ Scott, p. 101.

⁶⁸ W.J. Hunter (1959), p. 125, MS-Papers 1777-02, Alexander Turnbull Library, Wellington.

In Prendergast's obituary in the *Dominion* (1921), Te Whiti is ascribed the blame for the events of 1881:

Sir James held the office of Deputy-Governor at the time when it was feared Te Whiti's action would occasion war, and, on the advice of his Ministers, he authorised the military authorities to march on Parehaka [sic] and arrest the troublesome chief.⁶⁹

One of the reasons why Gordon did not attempt to reverse Prendergast's proclamation is that he knew the majority of the colony supported the actions of the government in seeking to attack Parihaka. As with so many other aspects of Prendergast's career, his actions were supported by many of his contemporaries and historians writing in the first half of the twentieth century, while being damned by historians writing since the 1960s and 1970s.

Prendergast's role in the Parihaka invasion cannot be adequately dealt with in a few sentences. The Hall government in 1881, and in particular John Bryce, wanted to solve the Parihaka question as soon as possible. With Gordon's departure for Fiji, the Government could use Prendergast as Administrator to aid it in this task. The description of Prendergast as 'pliable' in this situation has some accuracy. Gordon definitely took a gamble by leaving New Zealand for an extended period of time and appointing an Administrator in his place during a time a tension on the West Coast. During Prendergast's twenty-four year career as Chief Justice, this would be the only instance when Prendergast would serve as Administrator during the term of a Governor. The role of the Governor in New Zealand politics in 1881 was far different to that during the period 1840-1870. To a large extent, the Governor was expected to follow the advice of his ministers. Gordon was not doing this and therefore was resented by the Hall Ministry.

It seems highly likely that the Hall Government took Gordon's absence as an opportunity to put pressure on Te Whiti and Parihaka. Gordon may have been

⁶⁹ 'Obituary', *Dominion*, 28 February 1921, p. 4.

unable to stop events even if present in New Zealand, but, with his departure, the path to invasion was made smoother. The events of September and October 1881 wrecked the relationship between Gordon and Prendergast. Distrust and anger best describe their connection after October 1881. Gordon's claim that Prendergast, among others, failed to keep him advised of developments during his absence is unfair. As argued earlier, Murray had been ascribed the role of informant during the Administration period. Gordon's claim that Prendergast knew of Gordon's imminent arrival on the afternoon before the signing of the Proclamation is again difficult to prove.

But Prendergast did know that Gordon could well have been arriving in New Zealand in a matter of days or weeks and agreed to help formulate a drastic proclamation which he knew would be against the views of the Governor. Prendergast did not wait for communication from Gordon before he made the proclamation. As in *Wi Parata*, Prendergast took the path of supporting the colonial settler majority. Most of the settler community were behind the Hall Government in its views of native affairs and Prendergast can be seen as part of the ruling establishment transforming those views into action. Recent scholarship on the Parihaka invasion has strongly argued that it was unfair and probably illegal. Therefore, those associated with the period are ascribed blame depending on their level of support of the invasion. Gordon opposed the invasion, Rolleston was uncomfortable about it, Prendergast helped to issue the proclamation allowing it and Bryce led it. But to see the incident as a backroom conspiracy between Bryce, Hall, Whitaker and Prendergast is not necessarily accurate. After Parihaka, the *Lyttleton Times* mused:

The low cunning, characteristic of the whole proceeding, leads us to suppose that its conception must have originated in the mind of the Attorney-General [Whitaker]. His idea of statesmanship is political thimble-ry. What we are surprised at is, that Sir James Prendergast, if he knew the likelihood of the immediate return of the Governor, should have lent himself to such a discreditable piece of finesse behind the Governor's back.⁷⁰

⁷⁰ Memorandum, James Prendergast to Governor Jervois, 27 January 1883, p. 17, Governor's Papers.

5. Conclusion: An analysis of Prendergast's Governorship: Successes vs Failures

With the exception of September and October 1881, Prendergast's role as Administrator of the Colony of New Zealand was successful. He was well liked by large sectors of the public and aware of his duties, "the unanimous comment of all is that he again performed these duties to everybody's entire satisfaction."⁷¹ With the obvious exception of Gordon, Prendergast had a positive working relationship with the New Zealand Governors. To a large extent, Prendergast's relationship with the Governors reflects their popularity with the wider settler community. Prendergast's adversary Gordon was an unpopular Governor, while his successor Jervois was very popular. When considering the work already undertaken by Prendergast as Chief Justice, acting as Administrator as well demonstrates an ability for a heavy workload and commitment to the colony. It could also show a liking for powerful positions and status.

Prendergast became a fixture as Administrator and some, including Governor Ranfurly, would have desired Prendergast to continue in this role after his retirement as Chief Justice. Being Administrator allowed Prendergast to keep in touch with the powerful political figures of the time. While Chief Justices are of course high ranking leaders, an 'Acting Governor' arguably has a closer relationship to the ruling Ministry. This led to Prendergast being able to cement this place not only in the legal elite, but also amongst the political elite. While not an especially social figure, Prendergast successfully hosted the various parties and gatherings expected by an Acting Governor. The support of his wife, Mary, and nephew and secretary, Charles Prendergast Knight, was vital in this area of Governorship.

The black mark on Prendergast's career as Administrator is Parihaka. The fact that this incident occurred during the only time Prendergast was administering the colony in the temporary absence of the Governor, highlights the difficult role he faced in

⁷¹ J.F. Jeffries, 'Sir James Prendergast', in *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (Wellington: Reed, 1969), p. 44.

having to account for his actions to the returning Governor rather than a new one. Prendergast's role as Chief Justice of New Zealand was more than just one quotation, and his role as Administrator was more than just one proclamation. That said, Prendergast's actions during September and October 1881 were at best weak, and, at worst, negligent.

As with his time as Chief Justice, Prendergast demonstrated a hard-line and conservative attitude towards relations with Maori. While he successfully reflected the views of the settler community, Prendergast seemed apathetic to the views of the Maori community. The invasion of Parihaka was not led by Prendergast, but he definitely did not use his power as Administrator to prevent it.

Historians are divided in their views of Prendergast as an Administrator. Recent historians have been highly critical of his actions during 1881 and have not analysed other aspects of his career as Administrator. Many contemporaries were supportive of Prendergast in his role as figurehead of a growing settler society. In many ways, Prendergast's outlook and personality were very much in keeping with New Zealand settler society, making him a popular official. This division between the views of past and present is also apparent when analysing the other roles James Prendergast played in helping to build colonial New Zealand society.

Chapter 9

Later life 1899-1921, and family matters

1. Introduction

James Prendergast died in 1921, aged 94. Therefore, Prendergast's life spans almost a century of history. James Prendergast was a product of the Victorian era. Only 31 of these 94 years were spent under a different monarch and these were the years of childhood and old age. Living during the height of the British Empire, Prendergast was extremely loyal to Empire, Colony and the political, legal and racial views accompanying those institutions. After Prendergast's retirement from the position of Chief Justice in 1899, he continued to live a prosperous and useful life in Wellington. Legally, his most important achievement was representing New Zealand at the 1901 London Conference discussing the Privy Council. He also served as adjudicator in an unhappy controversy at Wanganui Collegiate in 1903. From 1902 to 1907, Prendergast acted as a director of the Bank of New Zealand and was also involved in other directorships. Throughout his judicial career and retirement, Prendergast showed some interest in fine art, reading and tennis but his primary concern outside his career and family was his farming interest in the Manawatu. While most of Prendergast's farming exploits occurred before his retirement, they will be discussed in this chapter. An analysis of Prendergast's later life is important in understanding the man beyond the bench and also in understanding how Prendergast became so wealthy.

James Prendergast had no children, but he was committed to his wife and extended family. In describing the life of an eminent political or legal leader it is often easy to ignore the impact or influence of close family and friends. While the focus of this thesis is on the legal career of James Prendergast, special mention must be made of the roles played by his wife, brothers and nephews, especially in his later life. While these figures have received some attention in previous chapters, an assessment of

their influence is necessary. Prendergast continued to play an important role in New Zealand society after his retirement in 1899, but to a large extent he became a man left over from another century. Popular with the public during the early twentieth century, Prendergast was seen by some as a relic from a bygone age. After playing a pivotal role in the development of colonial New Zealand, Prendergast would have seen the nation come of age during the First World War. But by that stage, Prendergast “was perhaps not much more than a name to the present generation of legal practitioners in the dominion.”¹

2. Retirement: the final 22 years

Mary Prendergast died on 5 March 1899 of endocarditis² after struggling with illness for many years. James Prendergast resigned as Chief Justice of New Zealand on 25 May, less than three months later. Robert Stout, who had long desired Prendergast’s position, became the colony’s fourth Chief Justice. But Prendergast’s role in legal affairs was not at an end. The years of experience he had gained as a lawyer, Attorney-General and Chief Justice were highly prized in New Zealand society.

The Judicial Committee of the Privy Council stands at the apex of the New Zealand legal system but has long been a source of controversy. The Council which sits in London has been seen by some commentators as out of touch, inaccessible and irrelevant. Others have supported its objectivity, experienced adjudicators and attention to Maori affairs. In 1901, New Zealand was asked to attend a Conference considering the question of strengthening the representation of the self-governing colonies on the Privy Council. Joseph Chamberlain, Secretary of State for the Colonies, wrote to Governor Ranfurly: “New Zealand has interests divergent to some extent from those of Australia. His Majesty’s Government will be prepared, if it is desired by your Government to receive a separate representative from New Zealand.”³ The matter was considered by Premier Seddon and his cabinet, and

¹ *Otago Daily Times*, 1 March 1899, p. 4.

² A heart disease, Death Certificate, Mary Prendergast, 1921.

³ Joseph Chamberlain, Secretary of State for the Colonies, London, to Governor Ranfurly,

Prendergast was asked to represent the colony. “Sir James has responded that he will be quite willing to place his services at the disposal of the colony.”⁴

The Conference agenda focused on the question of whether the colonies should be represented on the Judicial Committee. Prendergast asked for opinions from the New Zealand legal community and received a handsome number,⁵ “However, the opinion of the majority of the representatives in London, which Prendergast apparently shared, was that ‘for the present the existing system had better continue’”.⁶ Prendergast’s failure to effect any changes in London may have disappointed some in New Zealand, especially the current Chief Justice Stout, who was a strong critic of including the Privy Council in the New Zealand legal structure.⁷

The question of the Privy Council became a major New Zealand issue only two years after the conference. In the Privy Council decision of *Wallis v Solicitor-General* (1903)⁸, New Zealand’s Court of Appeal was harshly criticised, evoking an indignant defence from New Zealand legal leaders. The Privy Council ruled against the New Zealand Government stating:

The proposition advanced on behalf of the Crown is certainly not flattering to the dignity or the independence of the highest Court in New Zealand or even to the intelligence of the Parliament....In the opinion of their Lordships the respondent [Government] has been wrong in every step from first to last.⁹

If the conference had been held after this decision, Prendergast’s conservative views on the Privy Council would probably have been unpopular with the New Zealand legal community. A hundred years later, the issue of the Privy Council continues to

Wellington, 15 February 1901, MS-730-B, Hocken Library, Dunedin.

⁴ *New Zealand Times*, 7 March 1901, p. 33.

⁵ Sir James Prendergast Papers, MS-Papers 730, Hocken Library, Dunedin.

⁶ Robin Cooke (ed.), *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (Wellington: Reed, 1969), p. 153.

⁷ Cooke (ed.), p. 153.

⁸ (1902-03) NZPCC 23.

⁹ *Wallis* at 35.

be debated in legal circles in New Zealand.

In London, Prendergast met with some of the leading figures in colonial law.¹⁰ This would be Prendergast's last visit to the 'mother country'. He had left London in 1862 as a struggling advocate and returned 39 years later as one of the most respected legal figures in the British Empire. But England had long ceased to be home for Prendergast, and he soon returned to New Zealand to enjoy his 'retirement'.

Prendergast's standing as a figure of integrity was again utilised in 1903. The headmaster at the prestigious boy's school, Wanganui Collegiate, had been accused by a student of sexual abuse. Prendergast was asked to enquire into the affair and, after several days of investigation, exonerated the headmaster, Walter Empson, from any wrongdoing and placed the blame on the teenage boy for making false accusations.¹¹ Much trust was placed in Prendergast's hands as the trustees of the school:

most wisely determined to seek the assistance of the Honourable Sir James Prendergast, lately Chief Justice of this colony, of whose ripe experience and strict impartiality it is as unnecessary, as it would be impertinent, for me to speak....the decision was to be left to Sir James and to him alone.¹²

The father of the boy making the accusation was not so impressed by Prendergast's experience:

If, as a perusal of the [Prendergast] decision shows, my boy's story was chiefly disbelieved because it related to something of a nature never before heard of by the judges, then I respectfully affirm it is not so much my lad's veracity as their knowledge, that is at fault.¹³

¹⁰ *Illustrated London News*, 20 July 1901, p. 83.

¹¹ Empson Enquiry – Summary by Bishop of Wellington Wallis (September 1903), Riddiford Family, MS-Papers 5714-045, Alexander Turnbull Library, Wellington.

¹² Empson Enquiry Decision – Sir James Prendergast, July 1903, Riddiford Family, MS-Papers 5714-045.

¹³ Empson Enquiry – Letter from John M.L. Davies, accuser's father, 1 September 1903, Riddiford Family, MS-Papers 5714-045.

The father was also disturbed at Empson's lack of involvement in the enquiry proceedings due to ill health. No stranger to controversy, Prendergast had once again found himself in the midst of an argument which has resonance in more modern times. Prendergast also found himself sided with the establishment, a common occurrence throughout his career.

Land issues continued to dominate New Zealand politics at the beginning of the twentieth century. The debate over ownership of Porirua land, which had led to 1877 *Wi Parata* case, refused to disappear. A Royal Commission was established in 1905 to report on the Porirua, Otaki, and other School Trusts. Prendergast was one of four commissioners appointed.¹⁴ There were continuing questions over who rightfully owned the land on which an Anglican school was to be built in 1848: the Anglican Church, local Maori or the Crown. The Anglican church was unhappy with the Commission's proposal to found a school at Otaki with a non-denominational character.

Less controversial was Prendergast's role as a Director of the Bank of New Zealand from 1902 to 1907. Prendergast seems to have played a fairly passive role on the Board of Directors, compared with other directors such as Harold Beauchamp, the father of Katherine Mansfield. The bank's summary of Prendergast's contribution was, "During the five years that Sir James Prendergast was connected with the Directorate he rendered good service to the Bank."¹⁵ From 1884 to 1903, Prendergast served as a member of the New Zealand University Senate.¹⁶ Prendergast was also a director of the Wellington Trust, Loan and Investment Company and the Colonial Mutual Life Insurance Company until his death.¹⁷

¹⁴ Letter of the Lord Primate (Church of England), 4 September 1905, *Wi Parata v Bishop of Wellington*, MS-Papers 5449, Alexander Turnbull Library, Wellington.

¹⁵ *Bank of New Zealand: Reports of Proceedings at the Ordinary, Half Year and Special General Meeting of Proprietors from August 1900 to June 1920* (Wellington: Whitcombe & Tombs, 1920), p. 120.

¹⁶ Guy H. Scholefield and E. Schwabe (eds.), *Who's Who in New Zealand and the Western Pacific, 1908* (Wellington: Gordon & Gotch, 1908), p. 139.

¹⁷ 'Obituary', *The Dominion*, 28 February 1921, p. 4.

While banking, investment and insurance were key business interests for Prendergast, farming was perhaps the most important. After serving six years as Attorney-General, Prendergast had acquired enough money to purchase land in Manawatu. In 1871, Prendergast acquired 5000 acres of land in both Fitzherbert and Bunnythorpe.¹⁸ This land was known as the 'Tiritea Estate', and the main campus of Massey University now occupies part of Prendergast's former property. Controversy surrounded the purchase of the Manawatu area from Maori. Prendergast:

had played an important part in the long litigation over the sale of the Manawatu area, with the Maori tribes disputing the ownership of the land....the case [for Manawatu ownership] was reopened a year later, this time in Wellington; Sir James Prendergast, then Attorney-General, appeared for the Crown. This Court came to conclusions diametrically opposed to those reached by the judges at Otaki.¹⁹

Therefore Prendergast, who as a judge would be partly responsible for the alienation of large amounts of Maori land, financially benefited in his personal life from his public actions.

Prendergast's land was developed and then sold in January 1900, twenty-nine years later, at a significant profit.²⁰ Prendergast also aided in the administration of farming in the Manawatu, "In his role as a landowner, he played a prominent part in the establishment of the Manawatu and West Coast Agricultural and Pastoral Association, of which he was the first president."²¹ During the 1880s, Michael Prendergast, James' nephew, acted as manager of the farm before he became ill. Based at Fitzherbert, Michael regularly provided up-dates for his uncle on farming developments. The letters sent by Michael to his uncle speak of clearing bush,

¹⁸ Scholefield Notes, Scholefield, Guy Hardy, MS-Papers 0212, Alexander Turnbull Library, Wellington.

¹⁹ Dorothea Joblin, *Behold the Plains: The Story of the Old Houses of Massey* (Auckland: Longman Paul, 1970), p. 46.

²⁰ *New Zealand Mail*, 8 February 1900, p. 17.

²¹ Ronald Jones, 'James Prendergast', in *An Encyclopedia of New Zealand: Vol. 1*, edited by A.H. McLintock (Wellington: R.E. Owen, 1966), p. 862.

planting seed, grazing stock and battling fires and floods.²² Relations between uncle and nephew were not always happy and Michael struggled to please a demanding Prendergast who was often critical of Michael's financial management, "I fully realise that you have done as much for me as any one could have done for his son, and I will endeavour to merit your confidence."²³

Prendergast's other main property investment was his house on Bolton Street. Contemporary pictures show the house perched above the central city with a commanding view of the Wellington harbour. Prendergast acquired the property in 1868.²⁴ The house and land were eventually sold in 1922 and subdivided in 1923 after Prendergast died in 1921.²⁵ There is no evidence to suggest Prendergast ever resided anywhere other than Bolton Street from 1868 onwards, though he took numerous business trips to different locations. Built in the early days of Wellington's development as a city, the large Bolton Street property became a valuable piece of land during the 53 years Prendergast lived there. Prendergast's property investments were wise, timely and helped to make him a very wealthy man.

3. Family matters (since 1862)

In 1862, James Prendergast, aged 35, left London and travelled to Dunedin. Prendergast's mother had died on 15 February 1846²⁶ and his father died in 1859. Caroline Prendergast, James' younger sister, had died aged approximately 11 in c1840. James' elder brother, Michael, was already in Dunedin practising as a lawyer. The only member of the Prendergast family remaining in Britain was Philip, James' other brother.

²² Letters from Michael Prendergast Junior, Fitzherbert, to James Prendergast, Wellington, 1880s, D.O.W. Hall, MS-Papers 986/17, Hocken Library, Dunedin.

²³ Letter from Michael Prendergast Junior, Fitzherbert, to James Prendergast, Wellington, 30 July 1881, D.O.W. Hall, MS-Papers 986/17.

²⁴ D.O.W. Hall, MS-Papers 986.

²⁵ Margaret H. Alington, *Unquiet Earth: A History of the Bolton Street Cemetery* (Wellington: Wellington City Council/Ministry of Works, 1978), p. 111.

²⁶ Material relating to Caroline Prendergast's Estate, D.O.W. Hall, MS-Papers 986.

In 1849, James had married Mary Hall, the daughter of John Hall and Sarah Hall *nee* Kean. John Hall's occupation was listed as a gentleman and the Hall family were Anglican.²⁷ Therefore, Mary was from a 'respectable' Church of England background like her husband. They were also both born in 1826. Little direct evidence remains about Mary Prendergast to provide the historian with insights into her personality, but indirect evidence suggests a patient, loyal and supportive woman. Soon after their marriage, James spent time away from his wife, first as a teacher in Somerset and then as an 'adventurer' in Victoria. Mary eventually joined her husband in Victoria only to return with him to London several months later. Mary provided James with unwavering support during the trying times before his career flourished in Dunedin.

Mary Prendergast was a popular figure amongst friends and family. In the collection of private and professional letters received by James Prendergast while in Wellington, the vast majority send warm greetings to Mary and inquire after her health.²⁸ Whether Mary enjoyed the pomp and ceremony of being 'Lady Prendergast' is unclear, but she played a major role in hosting the social functions held by James, especially when Administrator of the Colony.²⁹ While Mary seems to have enjoyed the social aspects of elite Wellington society, she also experienced loneliness as a result of James' long periods on circuit.³⁰ To alleviate this, Mary entertained friends and family at the Prendergast mansion.

Mary Prendergast died on 5 March 1899, aged 73.³¹ The closeness of the Prendergast marriage in later years is probably apparent in James' almost immediate resignation as Chief Justice after her death. Mary had been suffering poor health for some time and died of endocarditis. No evidence exists revealing why the Prendergast's did not have any children. The way in which Mary and James

²⁷ Death Certificate, Mary Prendergast, 1899.

²⁸ Letters to James Prendergast, 1865-1899, D.O.W. Hall, MS-Papers 986.

²⁹ Diary of Charles Prendergast Knight, early 1890s, Prendergast, James, MS-Papers 1791, Alexander Turnbull Library, Wellington.

³⁰ Letters, 1865-1899, D.O.W. Hall, MS-Papers 986.

³¹ *New Zealand Mail*, 9 March 1899, p. 20.

'adopted' their nephews, Michael Prendergast and Charles Prendergast Knight (son of Mary's sibling), demonstrates interest of a parental nature. James Prendergast was close to Mary's extended family and, at his death, twenty-two years after his wife, he left the vast majority of his wealth to the Hall family.³²

While the marriage of James and Mary Prendergast was successful, James' nuclear family continued to experience tragedy and hard times. James' brothers, Michael and Philip, had both received first-rate English educations at leading public schools, Cambridge University and Middle Temple. Both had shown ambition and talent in their early careers in London and Victoria, as mentioned in earlier chapters. Yet, as described in an earlier chapter, Michael had become an alcoholic while in Victoria and his wife had left him. During his time in Dunedin during the 1860s, Michael's health and reputation deteriorated and eventually James had to take over the upbringing of Michael's son, Michael junior.³³ Michael senior, left Dunedin in c1868 and returned to Australia. After a near death experience in 1870 while delirious, Michael seems to have spent the rest of his life in a 'retreat' for the mentally unstable. At one point, Michael was diagnosed as suffering from dipsomania. Michael's wife, Jane, died in 1864,³⁴ effectively leaving Michael junior an orphan and under the care of James and Mary Prendergast.

Philip Prendergast also met with tragedy. After returning to London in late 1856 after a largely unsuccessful time in Victoria, Philip qualified as a barrister but shortly after became mentally ill. The cause of the illness was apparently a result of the fever caught on the Victorian goldfield or 'intemperance'. As knowledge of mental health was minimal during the nineteenth century it is hard to know what were the exact causes of the Prendergast's illnesses. Soon after James left London in 1862, Philip's

³² Probate, James Prendergast, 1921.

³³ Letters, 1865-1899, D.O.W. Hall, MS-Papers 986.

³⁴ Jane Prendergast died 1864 aged c31 at Meat.(could be short for Meatian Which is near Swan Hill and Lalbert Vic.) Certificate no. 6766, Father - Lawrence Smyth, Mother - Ellen Maria Ryan.

health collapsed and only a few years later he had lost all rationality.³⁵ Proceeds from the Prendergast family trust and from James personally supported Philip in his cousin, Henry Manning's, lunatic asylum.³⁶ Philip remained in an asylum until his death.³⁷ Philip had never married. When James visited England with his wife in 1884, he visited Philip in the asylum. The brother whom James had once been so close to, did not recognise him. James stopped in Melbourne on his return journey to visit Michael, but no comment on the visit can be found in James' correspondence.³⁸ Michael had once saved James' life by bringing him from the goldfields to Melbourne, it is unclear whether James supported Michael financially after he became ill.

By the late 1860s, of the six members of the Prendergast family, three were dead and two were suffering from serious mental illness. James Prendergast, while being born into a relatively affluent family was no stranger to tragedy. The hard-line, sometimes ruthless, approach Prendergast demonstrated as Attorney-General from 1865 to 1875 must be seen in the context of family disaster. While Prendergast had no children, he set out to give his brother's son, Michael, the best opportunities money could buy. Michael was sent to England during the 1870s to become a gentleman and obtain a degree at Oxford University.³⁹ The colonial boy did not take well to English life and soon returned to New Zealand to pursue life as a farmer. Placed in charge of Prendergast's Manawatu properties, Michael seemed to flourish as a settler. Like his father before him, tragedy struck in the form of mental illness. By the late 1880s, Michael was unable to continue as his uncle's farm manager and retired from society.

While James Prendergast was a career man, his family was very important to him during his time in New Zealand. It was often observed that Prendergast had experienced a meteoric rise up the New Zealand 'legal ladder', but it must be

³⁵ Letters, D.O.W. Hall, MS-Papers 986.

³⁶ Letters, D.O.W. Hall, MS-Papers 986.

³⁷ Date of death unknown for Philip, Michael senior and Michael junior.

³⁸ Letters, D.O.W. Hall, MS-Papers 986.

³⁹ Letters, D.O.W. Hall, MS-Papers 986.

remembered that during this period he had the total support of his dedicated wife, Mary. Though Mary suffered long periods of isolation while her husband attended to business, she remained loyal to him and his career until her death in 1899. In leaving south-east England for colonial New Zealand with her husband, Mary Prendergast showed courage and fortitude. Of the four Prendergast men, Michael Prendergast QC and his three sons, James was easily the most successful and emotionally stable. This was, to a large extent, due to a moderate, disciplined personality and a happy marriage. The death of Mary in 1899 resigned Prendergast to a solitary retirement without the chance to enjoy his final days with his wife.

Both Prendergast's brothers suffered from severe mental illness. From the late 1820s through to the early 1860s, the brothers had been close. The disintegration of this fraternal bond would certainly have affected James Prendergast's emotional state. His continued success in New Zealand colonial society while his brother's lives deteriorated demonstrates that he responded to tragedy by working harder and concentrating on his career. Whether he felt any guilt at his inability to prevent his brother's suffering is unclear. But unlike colonial leaders such as Harry Atkinson and Christopher William Richmond, Prendergast operated in New Zealand without the support of a large, supportive family network. The illness of Philip and Michael provides the historian with insights into the state of mental health in the late nineteenth century. The causes of mental illness were still largely unknown and often the best society could do was house patients in lunatic asylums until they died.

While James Prendergast sometimes demonstrated an unforgiving and ruthless streak while Attorney General and Chief Justice, his commitment to his family showed a more generous side to his personality. The 'adoption' of Michael Prendergast, though it would eventually end in tragedy, was an impressive example of family loyalty. James also provided financial aid to other relatives during his time in New Zealand.⁴⁰ Looking after his nephew, Michael, was often frustrating and

⁴⁰ Letters, D.O.W. Hall, MS-Papers 986.

troublesome for Prendergast.⁴¹ Committed to his official posts, Prendergast struggled to find ample time to support Michael in his endeavours. The other nephews close to Prendergast, Henry Hall and Charles Prendergast Knight, were a great asset to the Chief Justice. They aided James both professionally and personally, and were rewarded in Prendergast's will.

Prendergast finally died in 1921 of cerebral apoplexy.⁴² After a service at St Paul's Cathedral, Prendergast was buried at Karori Cemetery.⁴³ A range of dignitaries were present at the funeral including the Prime Minister Massey, the Attorney General Francis Bell, Judges Stout and Chapman, Harold Beauchamp and Michael Myers. Members of Prendergast's extended family were also present.

During his time in New Zealand, James Prendergast had become a wealthy man. When he died the value of his estate was 132,605 pounds.⁴⁴ Prendergast spread his wealth amongst his wife's nephews and nieces, though he also provided a legacy for his house staff and his brother Michael's sister-in-law. Henry Hall and Charles Prendergast Knight were the main beneficiaries receiving 20,000 pounds each. The list of beneficiaries does not include Prendergast's two brothers and nephew Michael, indicating that they must have died sometime before 1921. Prendergast also gifted his collection of pictures by George Dawe (excepting family portraits) and George Morland to the New Zealand Academy of Fine Arts.⁴⁵

4. Conclusion

The life of James Prendergast spanned almost a century of change and development. Prendergast became a Wellington institution in later years. By all accounts,

⁴¹ Letters, D.O.W. Hall, MS-Papers 986.

⁴² Death Certificate, James Prendergast, 1921.

⁴³ *New Zealand Times*, 3 March 1921.

⁴⁴ Probate, James Prendergast, 1921, approximately NZ\$6,600,000 in 2001, adjusted using Consumer Price Index, 1990 New Zealand Yearbook.

⁴⁵ Codicil to the Will of James Prendergast, New Zealand Academy of Fine Arts, MS-Papers 1372, Alexander Turnbull Library, Wellington.

Prendergast kept his mental faculties until his death aged 94. As the twentieth-century progressed, Prendergast became almost a curiosity from a bygone colonial age. During the period 1899 to 1907, Prendergast continued to play an active role in colonial society. Whether representing New Zealand in London or conducting enquiries into scandals and land disputes, Prendergast remained an important figure. Prendergast remained a conservative, supporting the status quo as demonstrated by his views on the Privy Council and the continuing Porirua Trust dispute. Prendergast was totally committed to the development of the New Zealand colony but still remained loyal to British institutions and concepts. Immediately after his retirement from the bench, Prendergast sold his large and prosperous farm in the Manawatu. He continued to serve on various boards of directors, but his impact on New Zealand history largely finished when he retired as Chief Justice in 1899. Like other colonial power brokers, such as Frederick Whitaker and Harry Atkinson, Prendergast's action in public life benefited his private fortunes. The alienation of Maori land in the Manawatu, aided by Prendergast's legal actions, contributed to his impressive wealth.

Prendergast had a long and successful marriage to his wife, Mary. For over fifty years, Mary Prendergast supported her husband in his career. The family of Michael and Caroline Prendergast, described in detail in chapter two, suffered a remarkable decline in fortunes. At one point in the late 1850s, the family included a high-profile English judge, a Victorian Member of Parliament and two London barristers. Less than ten years later, only James Prendergast remained in the public sphere.

The Prendergast family decline would have been painful for James, but he succeeded in spite of it and attempted to aid members of his family in a variety of ways. Prendergast had no children, but his nephew, Michael, became his ward. At the dawn of the twentieth century, Michael had followed the sad path of his father and Mary Prendergast had died. James Prendergast remained, fulfilling his words written while a gold digger in Victoria during the 1850s:

Success I am persuaded must eventually be the end sooner or later to the man who will give himself wholly up to the work. What he will chiefly

stand in need of is power of Endurance without he can do nothing....Pluck is the one thing needful. Any man from any class who can bear disappointments and hard fare will make [it].⁴⁶

When Prendergast died he was the oldest member of any New Zealand Executive, the oldest ex-Chief Justice within the Empire, and probably also the oldest Knight Bachelor.⁴⁷

Prendergast, the ultimate survivor, had seen New Zealand progress from a colony divided by cultural conflict to a thriving agricultural settlement to a Dominion with a national identity forged through foreign war. In his final years, Prendergast was a solitary figure content to ruminate alone about the events of the past. Prendergast was spotted at a Wellington picnic in 1908 by a social reporter:

Nearby the chute, where black swans and pale young ladies disported themselves, in the shade of the old spreading tree, Mr. Justice Prendergast flung himself down at mid-day to cool himself. He looked happy and patriarchal....He had the right tree and a good seat, and he soon had his hat off and was tucking into some fruit. The bag was on the ground between his feet. He is fond of fruit as anyone might see, and he had his picnic on his own, with little sea views and ocean breezes in between the bites.⁴⁸

⁴⁶ James Prendergast, Letter to his father, 13 April 1853, Prendergast, James, MS-Papers 1791.

⁴⁷ 'Obituary', *The Dominion*, 28 February 1921, p. 4.

⁴⁸ *New Zealand Freelance*, 22 February 1908, p. 4.

Chapter 10

Conclusion

James Prendergast played an integral and influential role in the development of the New Zealand legal system. As Attorney-General, Prendergast dominated the creation of legislation for 10 years. As Chief Justice, Prendergast dominated the judicial branch of government for 24 years. Therefore, for the final 34 years of the nineteenth-century, New Zealand's legal development was closely linked to the career of Prendergast. No study of late-nineteenth-century legal history could be complete without substantial reference to the achievements of Prendergast. While not all his contributions were positive, they were contributions nevertheless, and they continue to influence New Zealand in the present day.

The over-riding purpose of this thesis is to argue that James Prendergast was more than just a two-dimensional historical figure, more than just the one-line quotation, “[The Treaty] is a simple nullity”. On a general level, this thesis has investigated the problems of judging the past by the standards of the present. The gaping dichotomy between the treatment of Prendergast by his contemporaries and his treatment by modern commentators is obvious. A hero in one century has become a villain in the next. It is not the purpose of this thesis to construct an apology for James Prendergast. The actions and views of Prendergast can be discovered, revealed and interpreted through detailed and informed research. While all secondary historical writing is influenced by perspective, the historian can do his or her utmost to present both sides of an historic story and draw conclusions from the evidence available.

Another key theme in this thesis is the overwhelming importance of the English legal heritage on the development of the New Zealand legal system. To a large degree, the English legal system was up-lifted and planted in New Zealand with little modification. This ready-made system was the product of centuries of

English trial and error but was not necessarily suited to the New Zealand environment. A conflict between the rules and laws of Britain and those of the Maori people was virtually inevitable. Cultural encounter between Maori and Pakeha is a pivotal theme running through New Zealand history and dominates modern scholarship. Therefore, a figure such as Prendergast is currently remembered for his views and actions in the area of race relations. Thrust into the arena of the New Zealand Wars without little previous experience of other cultures, Prendergast's defensive attitudes and total devotion to the British Empire created a ready example of the colonial imperialist. But history is not about stereo-types, it is about real people and a biography of a powerful figure such as Prendergast must seek to view the man in context.

A number of important conclusions have been stated in the course of this thesis. Prendergast was a product of Victorian England and the British Empire. His formative years and early career was centred in London, the heart of Imperial Britain. A loyal son of the Empire, Prendergast sought to re-create British life and British values in his adopted home of New Zealand. Born into an affluent family, Prendergast was provided with opportunities closed to the mass of English people. Despite the best education and an ambitious and intelligent disposition, Prendergast struggled for success in his early career. Frustrated by the intense competition in England, Prendergast viewed the colonies as the obvious alternative. As with many of New Zealand's leading legal and political figures during the nineteenth-century, Prendergast set sail for the colony after a less than prosperous experience in Britain. Despite his inability to break into the London legal elite, the experience gained by Prendergast as a special pleader in the English legal system would prove invaluable for his later roles as Attorney-General and Chief Justice. By the time Prendergast left England with his wife, Mary, the Prendergast family had collapsed. The tragedy of the Prendergast family did not deter Prendergast and probably strengthened his resolve to succeed. Prendergast was 36 years old when he arrived in New Zealand, young enough to make a new start, but too old easily to alter ingrained attitudes. Prendergast's life

and career must be seen in the context of the 'Victorian Frame of Mind.' Traits such as hard work, optimism, devotion to duty and commitment to British superiority are clearly evident in Prendergast's personality. Many of these traits were shared by other leading New Zealand colonists such as Henry Chapman and Christopher Richmond.

In a career as publicly successful as that of James Prendergast, it is easy to brush over apparent failures. Prendergast's three year adventure in Victoria was *prima facie* a failure. But Prendergast had the ability to transform failure into a valuable learning experience. From his time in Victoria, Prendergast learned harsh truths about colonial life and did not make the same mistakes again in Dunedin. It is during the Victorian experience that Prendergast's defining attribute becomes clear, namely, his endurance.

One of Prendergast's most remarkable achievements was rising from an unknown Otago immigrant in 1862 to Attorney-General of New Zealand only three years later. By a combination of luck, timing, talent and hard work, Prendergast became the legal equivalent of an 'overnight success'. Prendergast wisely chose gold-rush Dunedin as his starting-point in New Zealand. Money abounded and, instead of taking the risky path of gold-digging as in Victoria, Prendergast took the wiser and more secure path of supporting the gold industry as a lawyer. Prendergast was an able lawyer, especially in the areas of special pleading and *in banco* suits. Capable men of Prendergast's experience were in short supply in 1860s New Zealand, and it was not long before Prendergast's talent was recognised by the New Zealand government. With his appointment as Attorney-General in 1865, Prendergast's focus moved to Wellington. It would be difficult to construct a comprehensive civic history of Wellington in the late nineteenth-century without a mention of James Prendergast. He dominated the legal arena in Wellington for 35 years and lived in the city for 56 years.

It was as Attorney-General that Prendergast made his first enduring mark on New Zealand's history. Appointed to this pivotal position in the midst of New Zealand's only civil war, Prendergast found himself at the centre of a devastating cultural conflict. From his first days in New Zealand, Prendergast had associated with power-brokers and he quickly moved to the centre of the New Zealand political elite as Attorney-General. While his role as a Legislative Counsellor was limited, Prendergast excelled as a non-political Attorney-General primarily focussed on drafting new legislation. The huge body of legislation drafted from 1865 to 1875 is an enduring legacy of James Prendergast. While these statutes have long since been repealed, they have formed the basis of much of New Zealand's present legislation, especially in the areas of land law and criminal law. Statutes such as the Land Transfer Act 1870 and the Abolition of the Provinces Act 1875 are of lasting historical importance. In no other area of his New Zealand career is the influence of the English legal system more evident than in Prendergast's statutes. The triumphs and failures of this body of legislation are primarily a result of successful and unsuccessful importation of English statutes.

As the government's legal advisor, Prendergast earned a reputation as an enemy of the Maori, though his harsh decisions were aimed specifically at Maori leaders in arms against the Crown. Prendergast demonstrated no mercy in his dealings with Titokowaru and Te Kooti, and received the overwhelming support of the settler community. The reputations of these Maori leaders have prospered over the last twenty years, while Prendergast's reputation has been on a downward spiral. The situation existing in 1860s colonial New Zealand has been turned on its head. Prendergast did not cope well with Maori issues, but his decisions must be seen in the context of a nation at war.

While Attorney-General, Prendergast became a strong supporter of central government, an institution of which he had become an integral part. While Prendergast was not a flamboyant public figure, Theodore Roosevelt's famous maxim 'Speak softly and carry a big stick' would have applied to his outlook and

personality. Prendergast's success as Attorney-General aided him in his next step up the legal ladder and in 1875 he was appointed New Zealand's third Chief Justice.

It is for his lengthy period as Chief Justice that Prendergast is remembered today. In particular, he is noted for one decision, that of *Wi Parata*. An entire career is thus condensed into one quotation. Until approximately 25 years ago, Prendergast CJ's peers such as Christopher Richmond, Joshua Williams and Alexander Johnston enjoyed a greater historical profile than their nominal leader. With the recent public attention given to the Treaty of Waitangi, Prendergast CJ has largely eclipsed these judges in New Zealand historiography. During his Chief Justiceship, Prendergast relied heavily on the support offered by his brother judges, and, in particular, the professional companionship of Richmond J. Prendergast CJ was a cautious judge and took some time to feel secure on the Supreme Court Bench, especially after the Barton affair early in his judicial career. But through endurance and sheer determination, Prendergast CJ became a widely respected and powerful judge. By the 1890s, with the exception of Williams J, Prendergast CJ was *the* outstanding legal figure in the colony of New Zealand.

Prendergast CJ was an excellent administrator and excelled as leader of the judiciary. The administration of colonial justice was in capable hands during the period 1875 to 1899. As a jurist, Prendergast CJ was pragmatic and able, but demonstrated a number of weaknesses. Prendergast CJ could deliver comprehensive judgments on issues where he had a command of the subject matter, such as real property, the Land Transfer System and aspects of criminal law. He was also capable of delivering brief, unsubstantial judgments based on sparse legal precedent. Prendergast CJ was a conservative jurist, who despite some assertive and controversial decisions, preferred to apply the existing statute and common law to the fact situation at hand. In keeping with this conservatism, Prendergast CJ preferred a literal approach to statutory interpretation, providing

security to his decisions. Many of the statutes Prendergast CJ was called on to interpret, were in fact drafted while he was Attorney-General. There was little need to take an assertive approach to interpreting statutes, when the adjudicator was also the author.

Prendergast CJ was able to deal with controversial case situation with tact and professionalism. While in *Wi Parata*, Prendergast CJ could be seen to be using the law to support established power groups, the general rule in his decisions is one of impartiality. As a judge, Prendergast CJ mixed efficiency with caution. Some of his best judgments created concise and perceptive precedents which are still used in the modern New Zealand legal system. While many of Prendergast CJ's decisions reflect the New Zealand colonial environment, the Chief Justice relied heavily on English precedent to support his legal decisions. Prendergast was a solid, but not inspired, Chief Justice who provided effective leadership on the Supreme Court Bench for over three decades.

A sizable number of Prendergast CJ's decisions were on matters affecting Maori, and the judgments show a man attempting to grapple with a different cultural outlook. Prendergast CJ matured as a judge, making many of his best decisions in the twilight years of his judicial career. Analysis of his later judgments and his report on problems in the Cook Islands reveals a slightly more tolerant attitude towards indigenous people than during the earlier part of his career. When searching for strong jurisprudential influences on Prendergast CJ's decisions, the legal historian must be content with assumptions. Prendergast CJ's approach was that of Austin positivism, in common with the vast majority of other judges in the British Empire. Prendergast CJ was a conservative, wary of change and new directions.

Throughout his career, Prendergast faced controversy and challenging situations. Whether on the Victorian goldfields or the Wellington Supreme Court Bench, Prendergast met conflict head on. Generally, Prendergast showed integrity in

these situations, for example, in the awkward affair of Edwards J's void appointment to the Supreme Court Bench. Occasionally, as in the Barton affair, Prendergast lost his composure and made a destructive error of judgment. Many of the well-known figures from late nineteenth-century New Zealand society touched the career of James Prendergast, including criminals such as Minnie Deans and the Sullivan Gang, politicians such as George Grey and Robert Stout, lawyers such as William Travers and Alfred Hanlon, and Maori leaders such as Te Kooti, Te Whiti and Titokowaru. In this kaleidoscope of famous names, Prendergast appears a somewhat retiring figure, prominent but uncomfortable in the limelight. He was a powerful force behind the scenes. Many of the famous legal names of later generations would owe some of their success to Prendergast's influence, including Michael Myers, William Downie Stewart and Martin Chapman.

For all the many achievements and disappointments in the career of James Prendergast, only three words continue to be associated with his name, 'a simple nullity'. This thesis has argued that greater attention must be paid to Prendergast's other contributions to nineteenth-century New Zealand society. Supported by his peers, damned by many of the present generation of scholars, perhaps Prendergast will be viewed differently again by future New Zealanders? There is little doubt that Prendergast considered judicial impartiality of the utmost importance. It is highly unlikely that the *Wi Parata* decision was a cynically and deliberately 'rigged' judgment by Prendergast CJ and Richmond J to disenfranchise the Maori people. But, as Paul McHugh has successfully argued, the decision was flawed and its legacy has been one of land loss and cultural devastation. This thesis has attempted to put this landmark decision in its historical context. Factoring in the influence of Richmond J, Barton and the tenuous hold on law and order 'enjoyed' by the colonial government, the *Wi Parata* decision takes on a different appearance. The *Wi Parata* decision has split the scholarly community, with the majority of commentators challenging its credibility. The irony of the case is that it was unnecessary for Prendergast to

adjudicate upon the Treaty in that specific fact situation. In 1877, Prendergast created what has become the most famous *obiter dictum* (not directly related to the issue in question) in New Zealand legal history.

Unfortunately for Prendergast's present reputation, he was involved not only in diminishing the founding document of New Zealand but also in destroying the village of Parihaka, a model of Maori success and independence. While Prendergast has received some of the blame for the destruction of Parihaka, it is John Bryce who has become the obvious villain in this key incident. As with the *Wi Parata* decision in the context of Prendergast's Chief Justiceship, the Parihaka invasion was one isolated incident in the many brief terms during which Prendergast served as Administrator of New Zealand. Prendergast carried on public feuds with two men during his career, George E. Barton and Governor Arthur Gordon. Both Barton and Gordon were unpopular with the settler government and both were extremely outspoken. Prendergast ably survived both feuds and enjoyed more consistent success than either man, though history has been kinder to Barton and Gordon than it has to Prendergast.

Upon leaving England in 1862, Prendergast experienced a relatively settled personal life. Aided by his supportive wife, Prendergast superficially separated his personal and private lives, but the reality was a man totally dedicated to his work. Prendergast had no children, devoting his time to the law instead. Prendergast was an example of the Victorian gentleman, patriarchal, moral but also hypocritical. Upon retirement, Prendergast continued to be involved in public life, in particular farming pursuits and various directorships. While he could easily have returned to London to see out his later years at the heart of the Empire, Prendergast chose to stay in New Zealand. By 1899, Prendergast had become totally dedicated to the development of the New Zealand colony. His energy and focus was on New Zealand. New Zealand was his home, his career and where he had achieved success and fortune. Therefore, in condemning James Prendergast, the scholarly community condemns one of modern New Zealand's

founding fathers. It cannot be disputed that this founding father had feet of clay and in his dealings with Maori caused much lasting damage. But Prendergast remains a founding father for all that.

When Prendergast arrived in New Zealand in 1862, the Colony of New Zealand was in the throes of war, economic boom and rapid growth. When Prendergast died in 1921, the Dominion of New Zealand was experiencing peace and relative prosperity after the destructive, but nation-forming, experience of World War One. During his final 14 years of life, Prendergast withdrew from the public glare he had been in for so long. When he died, a number of important official figures gathered at his funeral. While prominent men such as William Massey were present out of official duty, others were there to pay their personal respects to one of the defining figures in New Zealand's legal history. Francis Bell, Robert Stout, Frederick Chapman and Michael Myers had all been influenced by the life and career of James Prendergast. They in turn would continue to develop and administer justice in New Zealand.

There is no more apt nor fitting tribute to Prendergast than that of his old associate and rival, Robert Stout. On Prendergast's death, Stout accurately predicted his legacy. Stout had often disagreed with the actions and decisions of Prendergast, so the ambiguity of Stout's statement is fitting,

I believe he will not be forgotten by our law students and our future race. He is enshrined in the history of our judiciary and his name will be recalled as our students study our case law and our legal history.¹

¹ *New Zealand Times*, 4 March 1921.

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Immigration and Public Works Act 1870
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Injuries to Dogs Act 1865
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Portrait of Michael Prendergast, c1840s by Thomas Wright (Hall Private Collection, Lower Hutt)