Engine of Destruction? An Introduction to the History of the Maori Land Court

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For 130 years, the Maori Land Court has reflected and shaped policies concerning the ownership and disposal of Maori land. This article surveys the primary and secondary sources of information concerning the Court's operations, noting the abundance of material, but the paucity of analysis. It then moves to the Court's legislative base in the Native Land Acts from 1862 and the principles and methodology by which statute was converted to practice and Maori custom to English law. The costs to Maori of this system, especially those related to surveying, are explored. Finally, the developments and changes in the twentieth century, such as those in Te Ture Whenua Maori Act 1993, are considered.

I INTRODUCTION

The Maori Land Court - originally the Native Land Court - has been one of the most significant institutions affecting Maori-Pakeha relations. A venerable institution, it has been in continuous existence since 1865. Although as recently as 1980 a Royal Commission of Inquiry felt able to express the hope that in a few years the court would become unnecessary, the most recent legislation dealing with Maori land (Te Ture Whenua Maori/Maori Land Act 1993) has continued with tradition in according to the Court wide powers over the management of Maori land and has actually extended them in a number of significant respects.[1] The Land Court is clearly destined to be an important part of the country's institutions for some time to come.

Fairly or otherwise, most historians have expressed generally negative views about the court. It has been seen as the means by which, since the early Crown purchases and the confiscations of the 1860s, Maori were divested of the millions of acres of land remaining to them. As well as its role in the alienation process, many have seen the Court as facilitating massive changes to the tenurial system by which Maori held the ever-decreasing amount of land which remained in Maori ownership. Professor Kawharu in his classic study of Maori land tenure has called the Court "a veritable engine of

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1 These include the power to determine Maori representation and the wider use of experts in Maori culture. See below Part VI.

destruction for any tribe's tenure of land, anywhere".[2] It has been regarded as the central instrument in the demoralisation of the Maori people and the key means by which land changed hands peacefully, greatly reducing policing requirements in areas where it operated. What is beyond argument is that for many years the Native Land Court was the most direct manifestation of the British legal system amongst much of the Maori population.[3]

This essay aims to traverse what is known about the Court's history. It will also try to indicate the limitations of what is known, the evidentiary and logistical difficulties which face the researcher, and will sketch what seem to be some fruitful lines for further enquiry.

II HISTORIOGRAPHY OF THE COURT

Despite the willingness of scholars to condemn the Court in fairly harsh tones, the strange reality is that no historian has undertaken a detailed examination of the Court's origins, procedures, or effects. Some detailed studies of the history of race relations in this country include a certain amount of information about the Court, but the fact remains that no monograph specifically on the Court exists.[4] Most of the recent historical writing commenting on the Court has relied very heavily upon the pioneering work from the 1950s of M P K Sorrenson and the wide-ranging survey from the early 1970s of Alan Ward.[5] Even writers who purport to deal directly with the topic in fact go little further.[6]

The amount of legal writing on the Court has been virtually negligible with the little done coming almost exclusively from Judges of the Court. The first and very definitely the most important work was that published by Chief Judge F D Fenton in

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2 *Maori Land Tenure: Studies of a Changing Institution* (Clarendon Press, Oxford, 1977) 15.

3 R S Hill *Policing the Colonial Frontier* (Government Printer, Wellington, 1986) 927.

4 A case study of its operation is B D Gilling "By Whose Custom? The Operation of the Native Land Court in the Chatham Islands" (1993) 23 VUWLR 45.

5 MPK Sorrenson "The Purchase of Maori Lands, 1865-1892" (1955) MA thesis, Auckland University College, and "Land Purchase Methods and Their Effect on Maori Population 1865-1901" (1956) 65 Journal of the Polynesian Society 183; A Ward *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (reprint ed, Auckland University Press/Oxford University Press, Auckland, 1983). K Sinclair's *Kinds of Peace: Maori People after the Wars 1870-1885* (Auckland, Auckland University Press, 1991) studies the Maori people of the late nineteenth century, but manages to do this with barely a direct reference to the Court.

6 Thus, for example, J Binney "The Native Land Court and the Maori Communities 1865-1890" in J Binney, J Bassett and E Olssen *The People and the Land Te Tangata me Te Whenua: An Illustrated History of New Zealand 1820-1920* (Allen & Unwin/Port Nicholson Press, Wellington, 1990) 143, deals mostly with late nineteenth-century Maori society and deals only to a limited extent with the *modus operandi* of the Court and its changing legislative framework.

1879 under the self-explanatory title of *Important Judgments Delivered in the Compensation Court and Native Land Court 1866-1879.*[7] It provided precisely that, publishing four judgments of the Compensation Court and fifteen judgments in the Native Land Court, mostly delivered by Fenton himself, enunciating the key principles which have provided guidance for Court decisions ever since. Since then there have been a brief article by Chief Judge C E MacCormick (despite his article's title dealing largely with the 1931 Native Land Act), a historical survey by Judge E J Haughey and some discussion in Judge Norman Smith's *Maori Land Law,* which was mostly concerned with the 1953 Maori Affairs Act, the legislation current at its time of writing.[8] These all focused on existing practice - even Haughey's work largely skipping over the crucial formative period of the late 1860s and 1870s - and contained scant reflection upon the formation of the Court's ideology or procedures. Even the 1980 Royal Commission investigating the Court's operations revealed little new about the Court's history, relying extensively upon Haughey's work in its cursory historical introduction.[9]

One reason explaining the dearth of legal analysis is the difficulty of obtaining the Court's decisions. To this day the Court's decisions are not reported but are indexed in the registries of the Court using an archaic system of Minute Book references. Even decisions of the Maori Appellate Court are not reported. This astonishing situation may partly be rationalised on the basis that most decisions of the Court are decisions of fact of no interest to anyone but the parties, but this is probably no more true of the Land Court than it is of any other judicial body. Some decisions of the Court involve complex points of law and deal with large blocks of land worth millions of dollars. The practice of never reporting the Court's decisions has the effect of making the Court a closed world where the rules are known only to the judges and a handful of specialist practitioners, and where there is little opportunity for academic commentary on the Court's judgments. As the Court's judgments have never been systematically reported at any time in its history, the task of those who (perhaps misguidedly) wish to truly understand the institution's history becomes laborious and burdensome in the extreme. A whole vast body of principle has to be recreated by means of wading through thousands of pages of often half-illegible handwritten minute books (for which no central repository exists).[10]

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7 (Native Land Court, Auckland, 1879).

8 CE MacCormick "Native Custom as Relating only to the Ownership of Land" [1941] NZLJ 173; EJ Haughey "The Maori Land Court" [1976] NZLJ 203; N Smith *Maori Land Law* (AH & AW Reed, Wellington, 1960). The material in Smith's work is largely a repetition of that in his *Native Custom and Law Affecting Native Land* (Maori Purposes Fund Board, Wellington, 1942). PG McHugh's work frequently contains concise and helpful comments on the Court and its operations, but these generally rely upon many of the other works cited here or are made in passing when dealing more directly with other issues. See, though, *Maori Land Laws of New Zealand* (University of Saskatchewan Native Law Centre, Saskatoon, 1983).

9 [1980] AJHR H3.

10 The large majority of the Court's minutebooks have been microfilmed and photocopied by the National Archives. A complete set of microfilms is held at the Wellington National Archives (WNA), but of the photocopies each Court has a set

One of the central issues in the study of any institution or process is the role of influential individuals within it. The creation and formation of the Native Land Court is no exception; in fact a few men, especially Chief Judge Fenton, have been crucial historically and in relation to this field at least the shallowness of New Zealand historiography is exposed. There is no biography of Fenton, just as there is no extensive or modern biography of virtually anyone important to the history of New Zealand's race relations. Chief Land Purchase Commissioner, Native Secretary, Superintendent of Hawke's Bay Province and Native Minister Sir Donald McLean is another key example with merely a fifty-year old lightweight hagiography having been published about him.[11] There were other significant and interesting participants, such as the lawyer (for both sides) turned politician and Native Minister John Sheehan. Other such characters are similarly neglected by the fashions of New Zealand historiography; the standard biography of Sir George Grey by J Rutherford is now over thirty years old.[12] Comprehensive modern biographies of key Maori individuals such as Wiremu Tamihana Tarapipipi Te Waharoa, Paora Tuhaere or Tareha Te Moananui are totally nonexistent.[13] Sustained and penetrating analyses of the relevant aspects of our political history are also few.[14] We also lack detailed studies of business patterns and personalities and their relationships with both land speculation and politics, an example being the interests and influence of Frederick Whitaker and Thomas Russell (lawyers, financiers, land speculators and powerful politicians) and their Auckland "limited circle" of business leaders.[15] Such studies would help to elucidate the political alliances and

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relating to its region, National Archives in Christchurch has those for the South Island, in Wellington for the lower North Island and in Auckland those for the upper North Island. Victoria University will soon have a collection of the pre-1900 books for those areas not held at Wellington National Archives. These are mostly clerks' minutebooks. The holdings anywhere of judges' minutebooks (regarded by Chief Judge Fenton as the actual official record of the Court) are haphazard in the extreme, having depended on individuals depositing their books with the Court on their own initiative.

11 J Cowan *Sir Donald Maclean: the story of a New Zealand Statesman* (A H & A W Reed, Wellington, 1940).

12 J Rutherford *Sir George Grey* (Cassell, London, 1961).

13 Some, but certainly not all, of these men of both races do have a modern eye cast over them in WH Oliver and C Orange (eds) *Dictionary of New Zealand Biography* (Department of Internal Affairs/Bridget Williams Books, Wellington, 1, 1990, 2, 1993).

14 Refreshing exceptions include RCJ Stone "The Maori Lands Question and the Fall of the Grey Government 1879" (1967) 1 New Zealand Journal of History [NZJH] 51; T Brooking "'Busting Up' the Greatest Estate of All. Liberal Maori Land Policy, 1891-1911" (1992) 26 NZJH 78.

15 Again there is an immensely helpful but isolated exception in RCJ Stone's *Makers of Fortune: A Colonial Business Community and Its Fall* (Auckland University Press/Oxford University Press, Auckland, 1973). Insights can also be gleaned from some of Stone's other work, such as *The Making of Russell McVeagh* (Auckland University Press, Auckland, 1991), the 2-volume biography of John Logan Campbell, *Young Logan Campbell* and *The Father and His Gift* (Auckland University Press/Oxford University Press, Auckland, 1982 and 1987) and "The Thames Valley and Rotorua Railway Company Limited 1882-1889" (1974) 8 NZJH 22-43.

infighting, and the patterns of patronage and clientage, which had a major impact on race relations generally and Native land policy specifically.

Paradoxically, the evidence available for reconstructing the history of the Land Court is at once both too abundant and too sparse, which is perhaps why this task has not previously been essayed. As noted above, the Court itself has many scores of handwritten minutebooks of its proceedings, comprising virtually all of the clerk's minutes, but disturbingly few of the judges' own minutebooks. Files on individual blocks are maintained in the Court's archives, region by region, as they are often still active. There is a large volume of relevant material (reports, statistical returns, petitions etc) printed in the Appendices to the Journals of the House of Representatives (AJHR).[16] The legislative tinkering with Maori land has been extensive and accompanying the many pieces of legislation is the record in the New Zealand Parliamentary Debates of their passage or failure.[17] Frequently, Court sittings were reported in the local newspapers of the time.[18] Government papers relevant to many of the blocks, especially where there was Government purchasing activity, are preserved in National Archives and the personal papers of key participants in the process are often represented in the Alexander Turnbull Library (ATL) or some of the country's other research libraries. Much of this material is in the Maori language; individuals connected with Maori land such as McLean or Fenton spoke and wrote Maori fluently and had many Maori correspondents. The biggest obstacle, though, to research in any aspect of nineteenth-century race relations history was the loss through fire decades ago of most of the Native Affairs records. As the Court still came under the Native Minister at that time, rather than under the Justice Department as at present, there is a huge gap in its records also.

There has been some scholarly debate about the material contained in the Court's minutebooks, mainly concerned with the reliability of the records as a source for interpreting Maori land tenure. Principally, Brent Layton has argued that the evidence given in the Court cannot be regarded as a reliable guide to traditional Maori land

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16 Some of the major sources in the AJHR are *Report on the Working of 'The Native Lands Act, 1865'* [1867] A10-A10d; *Memorandum on the Operation of the Native Lands Court by Sir William Martin* [1871] A2; *Papers Relative to the Working of the Native Land Court Acts* [1871] A2a; *Report of the Hawkes Bay Native Lands Alienation Commission* [1873] G7; *Report of the Commission on the Native Land Laws* [1891] G1-G1a; *Report of the Commission on Native Lands and Native Land Tenure* [1907] G1-G1c and [1908] G1g. See also I Prichard and HT Waetford, "Report of the Committee of Inquiry into Laws affecting Maori Land and Powers of the Maori Land Court" (1965) [hereafter Prichard-Waetford Report].

17 Observations by one who tried to remedy the legislative problem are J Salmond *Preliminary Note, The Native Land Act 1909* (Government Printer, Wellington, 1910).

18 In fact, judges' decisions can sometimes only be documented from the newspapers. An example is Judge FOV Acheson's important March 1933 decision on Lake Tangonge which for some reason is not reported in the relevant minute books - the records give notes of the cross-examination but not the decision. His decision is, however, fortunately reported in the *Northlander* and *New Zealand Herald.*

customs.[19] He calls it "useless" and insists that it "should be disregarded" as there is the possibility that "Eurocentric preconceptions and political motives have biased much of the evidence".[20] But to disregard totally all Native Land Court evidence would seem a bad case of throwing out the baby with the bath-water.[21] The operation of this Court began in some form as early as 1864 and it followed from the Compensation Court which commenced operations a short time previously. When one actually reads through the minutes of the Court's proceedings, a strong impression gained is the stringency of much of the testing of the evidence.

Of course, there was much inadequate investigation by the judiciary, much false evidence by the claimants and jockeying for advantage between rivals. A well-documented example of this problem was the crucial evidence given for the Muaupoko iwi by Keepa Te Rangihiwinui (Major Kemp) in the 1873 hearing to determine title to the Horowhenua Block.[22] He admitted to a later inquiry his perjury without remorse, his reasons having been his friendship with a former ally, the wish to advance his tribe over Ngati Raukawa rivals and the tribe's prior arrangement for all witnesses to tell a unified and predetermined story to that end.[23] The judge who heard in 1886 the application for subdivision of the same block considered himself obliged merely to rubberstamp the divisions proposed by Keepa, leaving open opportunities for great inequities.[24] Again, Judge John Rogan, one of the initial appointments to the Court's bench, commented that in one hearing in Wairoa the claimants "lie with the affrontery [sic] unparalleled even in a Native Land Court".[25] Cases could often be of a mind-numbing complexity which must have baffled all but the most patient of investigators. The Mokoia Island case heard in 1916 involved some 29 claimants or claimant groups to one island in Lake Rotorua; Judge MacCormick described it as "about the most unsatisfactory case in this court's history".[26]

Yet even so the evidence presented was frequently tested rigorously in the Court. Quite apart from the questions of the assertion of mana that Ann Parsonson has

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19 B Layton "Alienation Rights in Traditional Maori Society: A Reconsideration" (1984) 93 Journal of the Polynesian Society 423.

20 Above n 19, 430.

21 Alan Ward has critiqued much of Layton's general argument about Maori land tenure and alienation *per se* in "Alienation Rights in Traditional Maori Society: A Comment" (1986) 95 Journal of the Polynesian Society 259. But he refrains from comment on the actual nature of the evidence, especially that gained from the Native Land Court records.

22 (1873) 1 Otaki MB 245.

23 [1896] AJHR G2, 2.

24 Judge Wilson thought himself restricted to confirming voluntary agreements, so made no enquiries into the details of ownership or questions of trusteeship. He stated bluntly, "The Court was told to mind its own business." Above n 23, 11.

25 J Rogan to D McLean, 6 November 1875. MS Papers 32/543. ATL.

26 (1916) 3 Mokoia Island MB 85. This case was so complex that it generated a sequence of minute books all for itself. A typescript is held by the Auckland Institute and Museum Library, MS 193.

raised,[27] the very fact that much money and even the land where one lived was at stake raised the intensity of scrutiny of the evidence by other parties. Cross examination by both the Court and by counter claimants was permitted and parties were often represented by counsel, frequently distinguished and very expensive. Thus, for example, in the original hearings in the relatively obscure Chatham Islands, witnesses were cross examined by the Judge, the Assessor and the rival claimants.[28] At the other extreme, in the protracted Horowhenua hearings into valuable and eagerly-sought lands, thousands of pounds were expended on lawyers' services and aspects of the case went through not only Land Court hearings, but also the Native Appellate Court, a Royal Commission and the Supreme Court (several times).[29] There is, too, the point to be made that the issue of the reliability of the Court's materials does not arise in quite the same way when it is the history of the Court itself - rather than the structure of Maori customary land tenure or the traditional history relating to areas - to be investigated. From the record one can usually see, for example, whether a detailed investigation involving a range of parties had been conducted or whether matters had been disposed of summarily, whether full or scanty records were kept, who the Judges and Assessors were, and so on. Many statements of policy and principle, revealing how conclusions were arrived at, appear in the decisions. I believe, therefore, that provided due caution is exercised and the normal criteria for validation of historical and legal evidence are applied, that the minutes of the Court can be mined as a rich source of information about both Maori traditional society and culture, as well as for matters concerning the specific blocks of land under investigation.[30]

III ESTABLISHING LEGISLATION: THE NATIVE LAND ACTS 1862 AND 1865

Huge areas of New Zealand had already passed out of Maori hands by the time the Court was fully established in 1865, including virtually the whole of the South Island. The machinery by which this earlier alienation had been accomplished was through Crown purchase by deed, examples being the succession of deeds by which Ngai Tahu alienated nearly all of their lands to the Crown in the years 1844-1865,[31] or the purchase of hundreds of thousands of acres of Hawke's Bay land at Waipukurau, Ahuriri and Mohaka by Donald McLean for the Government in 1851.[32]

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27 A Parsonson "The Pursuit of Mana" in W H Oliver with B R Williams (eds) *The Oxford History of New Zealand* (Clarendon Press/Oxford University Press, Oxford and Wellington, 1981) 140, now heavily revised as "The Challenge to Mana Maori" in G W Rice (ed) *The Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1992) 167.

28 (1870) 1 Chatham MB 1-70.

29 [1896] AJHR G1; [1897] Sess II G2, G2a, G2b.

30 See, for example, HA Ballara "The Origins of Ngati Kahungunu" (1991) PhD thesis, Victoria University of Wellington.

31 See (1991) 3/4 WTR (Ngai Tahu Report) *passim.*

32 Most of these purchases are recorded in HH Turton *Maori Deeds of Land Purchases in the North Island of New Zealand* [1873], the originals being held by DOSLI, usually in Wellington.

Pressure continued to mount in Pakeha society for Government to divorce itself from the land purchase business and to allow direct private purchase, supposedly to facilitate settlement. Maori, too, could see possibilities for improvement in the purchase prices they received for lands. There had been numerous examples of the Government buying at low prices, offering the prospect of added value to adjacent lands with the arrival of European settlers as additional inducement, and then selling the land soon after for many times the purchase price.[33] The Government also found itself in the invidious position of being both arbiter and defendant in the many complaints which were generated by purchases during this era. Perhaps the last straw was the debacle of the Waitara Purchase when the dispute over who owned the land the Government was attempting to purchase led to the outbreak of the Taranaki War in 1860.

The declared policy of the Government in the late 1850s and early 1860s - reflecting the general attitude which led to the Native Land Court's establishment - was, in the words of former Native Minister C W Richmond, that "they must first civilize the Natives if they wished to extend colonization in this colony".[34] The Court would expedite that "civilising" process by breaking down the communal nature of traditional Maori society, thus diluting the coherence of cultural opposition to European mores. In the same debate in which Richmond spoke, Native Minister Frederick Weld offered the opinion that individualisation of title to Maori lands would be the greatest possible step to take towards settling the "Native Question". This was, he argued, because without individual title Maori had no motivation for the improvement of their land, and "unless they could have property and be afforded the means of progression by means of that property, all their efforts would fail [ie those of Maori to make 'progress']."[35]

The Native Land Court was created by the Native Land Act 1862, the genesis of an institution which has been governed by and dependent entirely for its scope of operation upon statute. The Preamble to the 1862 Act gave four reasons why the legislation was necessary. The first was to honour the guarantee in the Treaty of Waitangi which recognised the rights of Maori to "the full exclusive and undisturbed possession of their lands and estates which they collectively or individually held so long as it should be their desire to retain the same".[36] The second was also derived from the Treaty,

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33 For example, the 3,000-acre area which became the centre of Auckland City was bought from local Maori in 1840 for cash and goods worth £34 and promises of future prosperity. Within nine months a mere 44 acres had been resold for £24,275, the profit being put towards the amenities associated with establishing Auckland as the country's then capital city. In 1850 the Crown bought another 700 acres in suburban Auckland for a much more substantial £5,000, but still one third of it was sold immediately for £32,000 and the whole block eventually realised £100,000. See (1987) 1 WTR (Orakei Report) 21.

34 NZPD 1861: 311. In 1858, Richmond's Native Territorial Rights Act, which would have overthrown Crown pre-emption, was passed by the New Zealand Legislature, but disallowed by the Secretary of State for the Colonies. The issue remained alive, though, with a Select Committee chaired by FD Bell considering the options through 1860-1861.

35 Above n 34.

36 Native Lands Act 1862.

specifically to preserve the provision for the Crown's exclusive right of pre-emption over such lands as Maori wished to alienate. The third reason made clear a different sort of objective, the joint advancement of European settlement and Maori welfare, as it would greatly promote the peaceful settlement of the Colony and the advancement and civilization of the Natives if their rights to land were ascertained defined and declared and if the ownership of such lands when so ascertained defined and declared were assimilated as nearly as possible to the ownership of land according to British law.

The fourth principle was that the Crown might be prepared to waive in favour of the Maori some of its rights to pre-emption, to establish courts and to ascertain and define Maori rights to land.

The third of these principles was the key Crown aim for this legislation. On the one hand, there was a great need at that time (1862) for peace in race relations, with the initial conflict in Taranaki fresh to the memory and with the situation in the Waikato region deteriorating. Settlement, or at least the arrival of settlers, was proceeding apace, leading to unremitting pressure for the opening up to them. On the other hand, there was a genuine humanitarian concern on the part of many for the welfare of the Maori race. In the context of the times, many thought, with Richmond and Weld, that the best that could be done for another race was to attempt to raise them to European standards, to assimilate them to British models. In this case, these two aims coincided in the conforming of Maori land ownership customs to the way in which individual Britons held formal title for parcels of land. Changing the Maori communal ownership pattern would break down a crucial pillar of their society, while from the awarding of individual titles Maori would be encouraged to sell to settlers for money, or at least to work land productively for personal reward and colonial prosperity.

The Court did operate briefly in Northland under this Act, John Rogan, Land Purchase Officer at Kaipara, using a panel of Maori Assessors to work through the relative merits of the Maori claims over a block for which payment had already been made by a settler.[37] The 1862 Act had intended some such methodology, by which a panel of local chiefs would themselves adjudicate on claims and award title under the supervision of the local Resident Magistrate. Rogan, W B White and George Clarke were made Judges and a group of Maori Assessors were named in December 1864. Over the next few months, more Judges and Assessors were appointed. But for reasons yet obscure there was no serious attempt to make it fully operational during the three years after the Act's passage. Probably, it was simply put to one side as the Government focused upon the problems of fighting first the Waikato War, then the second war in Taranaki, and the intricacies of confiscating land from "rebel" Maori.

The Native Land Court was really formed and activated by the 1865 Native Lands Act. Fighting by late 1865 had become more confined geographically and there were greater prospects that land could be bought and that a Court could operate to determine title. However, settler and Government attitudes had also hardened and the new Act reflected those changes in its much stronger emphasis on Pakeha judicial procedures and

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37 Ward, above n 5, 180.

settlement-driven objectives. Rogan, Resident Magistrate in Kaipara, was retained as a Judge, but the dominant figure was the Chief Judge, Francis Dart Fenton.

Initially, little happened in this Court, its members being almost identical with, and occupied in, the Compensation Court. The Compensation Court was a body created by the New Zealand Settlements Act 1863 to deal with claims for compensation by "loyal" Maori who had had their lands in Taranaki, Waikato, the Bay of Plenty and East Coast regions confiscated under that same Act as punishment for "rebellion".[38] In determining with any precision who were the Maori owners of particular pieces of land, the Compensation Court had to develop methods and principles *de novo* and these principles would later be carried over to the Native Land Court.[39]

The 1865 Native Land Act had lost the relatively high-minded motivations of the 1862 Act. It was driven overtly by expediency, as the Court was to have four interlocking, practically-oriented purposes. Gone was the previously-declared need to honour the Treaty of Waitangi, to be replaced by aims seeking solely to expedite the conforming of Maori custom to English law and thus the easier acquisition by settlers of Maori land. The first new purpose was "to amend and consolidate the laws relating to lands in the Colony which are still subject to Maori proprietary customs". This was necessitated by the rapid multiplication, even at that time, of legislation relating to dealings with land belonging to Maori since the Treaty of Waitangi had guaranteed their continued possession and use of it.

Second, it was now deemed desirable to "provide for the ascertainment of the persons who according to such [Maori proprietary] customs are the owners". Such a process was the essential precursor to any move to anglicise Maori land ownership and to permit direct European purchasing - the proper owners under Maori custom had to be determined. Partly, this was to ensure fairness to those who did have rights; partly, it was to forestall further outbreaks of warfare occasioned by slipshod purchasing from those with inferior rights - the spectre of Waitara still haunted legislators.

Once this ascertainment of ownership was achieved, the third purpose envisioned for the Native Land Court was "to encourage the extinction of such proprietary rights and to provide for the conversion of such modes of ownership into titles derived from the Crown". Thus, the Court having determined those traditional owners, the

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38 Details of these confiscations, the amounts returned to Maori ownership and those "purchased" by one means or another, are recorded in *Report of the Royal Commission into Confiscated Native Lands and Other Grievances* (Sim Commission) [1928] AJHR G7. See also Ward, above n 5, 200-224; Rutherford, above n 12, 491-538.

39 Again, no extensive study of the Compensation Court exists. For Taranaki, see J Ford "The Decisions and Awards of the Compensation Court in Taranaki 1866-1874" (1991) Waitangi Tribunal WAI143 Doc E6; H Bauchop "The Aftermath of Confiscation - Crown Allocation of Land to Iwi: Taranaki 1865-80. A Case Study in Confusion" (1993) Waitangi Tribunal WAI143 Doc I18 56-136; A Harris *Crown Acquisition of Confiscated and Maori Land in Taranaki 1872-1881* (1993) WTRS 1993/1.

extinguishment of those rights and the conversion of them to a type of title which could be recognised and dealt with by the British-style legal system (ie a conversion to titles held by individuals from the Crown by virtue of a Crown grant) would achieve two ends. The first would be that ownership of land would derive from the Crown alone (an assertion of the Crown's ultimate sovereignty). Then, it would permit land to be purchased more readily by either the Government or private settlers who could deal with individual proprietors instead of a relatively amorphous and undifferentiated group of tribal owners.

The Court's fourth purpose was "to provide for the regulation of the descent of such lands...."[40] This allowed for ownership, once having been determined, to be clearly retained and recorded for ease of subsequent dealings.

The changes between the two preambles may indicate an exhaustion of colonial patience after five years of warfare and the belief that the Maori, having been subdued militarily, needed (or could demand) less favourable consideration than previously. The derivation of titles from the Crown, as opposed to Maori traditions and customs, was an important principle as, despite the Treaty of Waitangi's high-sounding pronouncement of English sovereignty, previously the Crown had in practice exercised none over Maori customary lands.

The ideology ultimately behind the Court, as expressed in these legislative aims for it, changed little throughout the nineteenth century. In 1891, T W Lewis, the long-serving Under-secretary of the Native Department, could still state,[41]

> ... the whole object of appointing a Court for the ascertainment of Native title was to enable alienation for settlement. Unless this object is attained the Court serves no good purpose, and the Natives would be better without it, as, in my opinion, fairer Native occupation would be had under the Maoris' own customs and usages without any intervention whatever from outside.

IV MODUS OPERANDI

The sternest criticism levelled by both contemporaries and historians at the Native Land Court has been at its operations and practice, how it actually went about its business of determining Maori land ownerhip. Yet we have noted above how little systematic analysis there has been of the Court's work and of the body of law it built up. The criticisms, while undoubtedly largely justified, have been made mostly at the level of anecdote and individual example.

As the Court was operating in a novel situation, Chief Judge Fenton aimed to create a body of case-law for its own guidance, rather than adhere strictly to such English case-law as it could manage to relate its work to. The Court's judges should return to first principles, in this case what he conceived of as "the original principles of equity", and

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40 Native Lands Act 1865.

41 [1891] AJHR Sess II G1, 145.

this must happen "until you have established a common law. The Native Land Court must respect its own precedents, or you will never build up a system of common law."[42] This dream was never really fulfilled, as seldom did the judges communicate or attempt to systematise their judgments. In what is otherwise a frequently inaccurate article, lawyer L A Taylor as late as 1930 quite rightly bemoaned the never-ceasing flow of legislation tinkering with Maori land, which made it nigh on impossible for the lay person to be fully cognisant of the exact state of the law, but which was made necessary precisely because of the lack of any publication of the Native Land Court's judgments. He argued,[43]

> ... but no system of yearly amendments of a code can make up for the loss of interpretative judgments on principles and policies. A further result of the lack of interpretative judgments, save where disputes get into the Supreme Court, is that the judges are neither bound nor assisted by precedent. The complaint of the Chancellor's foot is as available in the Native Land Court as ever it was in the Equity Courts of England.

Yet, underlying this apparent problem, in the Court's proceedings it did create for itself a new body of rules and operating principles, even if they, and its decisions, were not widely publicised through official channels and remained more or less arcane mysteries accessible only to initiates. One of the key principles honed by its members' experience in the Compensation Court was the rule that the Court would consider only the state of things obtaining in 1840, at the time of the Treaty of Waitangi and the assumption of nominal control by the British Crown. This principle seems first to have been enunciated in detail in mid-1866 in the Compensation Court's judgment on the Oakura Block where it was said,[44]

> We do not think that it can reasonably be maintained that the British Government came to this Colony to improve Maori titles or to reinstate persons in possessions from which they had been expelled before 1840, or which they had voluntarily abandoned previously to that time. Having found it absolutely necessary to fix some point in time at which the titles as far as this Court is concerned must be regarded as settled, we have decided that that point in time must be the establishment of the British Government in 1840.... Of course the rule cannot be so strictly applied in the Native Land Court... but even in that Court the rule is adhered to except in rare instances.

In this case, the 1840 Rule was employed to exclude any of the hundreds of absentee claimants to Taranaki lands who could not show constructive possession since 1840, many of the tribes from the region having been forced south during the raids from the north in the 1820s and 1830s. These peoples had dispersed themselves to the Kapiti

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42 Above n 41, 55.

43 LA Taylor "Native Land Laws" [1930] NZLJ 293.

44 [1866] AJHR A13, 4. See also Fenton, above n 7, 10. The originals of the Taranaki Compensation Court minutes and judgments, mostly held by the Department of Survey and Land Information, New Plymouth, are reproduced in the Waitangi Tribunal's *Raupatu Document Bank, passim.*

Coast, Wellington, Nelson and the Chathams. Those who fled, if they had not returned in the interim, were excluded by the Compensation Court from rights to compensation once the Government proclaimed as confiscated 1,275,000 acres in the mid-1860s.[45]

The principle appears first to have been employed, though not elaborated upon, in the Native Land Court - as opposed to the Compensation Court - by Judge T H Smith in Hawke's Bay three months prior to this Oakura decision. Local chiefs Tareha and Karaitiana Takamoana claimed the Heretaunga Block not only through ancestry, but also through force of arms, having ejected their rival, Te Hapuku, in 1857. The Court minutes contain the cryptic note, "The Court [sic] that no claim to land founded upon conquest since the Treaty of Waitangi would not [sic] be admitted".[46] In a later case, the Native Land Court adjudicated on reserves made in Nelson in 1839 by the New Zealand Company on the basis of Taranaki tribes having conquered there prior to 1840.[47]

This rule, though, was applied only to changes in ownership effected through violence and other changes through gift and succession continued to be recognised. The 1840 Rule can therefore be seen as primarily an instrument for establishing Britannic law and order. Its very artificiality appears to have led to inequitable decisions, as, for example, in the case of the Moriori in the Chathams discussed below, and for other groups who were prevented from full recognition or reassertion of their traditional rights because of the fossilisation of the situation obtaining in the late 1830s alone, made even more aberrant by the effects within Maori society of the advent of the musket.

A second significant rule laid down by Fenton was that only evidence actually presented in Court could be admitted; the Court would not assume an inquisitorial role and search for its own evidence. Thus, for example, a surveyor who had produced the plan of the block before the Court had to be present when the block was actually being considered, costing the claimants heavily.[48] Technically, a judge could not even take his personal knowledge into account. This rule also led to many possible owners being excluded from titles of blocks if they were not present at the precise moment when the Court considered their claims. The difficulty was frequently compounded by inadequate notice of sittings being given when claimants had to come from a distance or a remote location, made all the worse when for a long time Court sittings were held only in a few central (European) locations such as Cambridge, Hastings and Gisborne.[49] The opposite problem was the practice which endured for years of announcing all of the

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45 The major published description of this process this is the *Report of the West Coast Commission* [1880] AJHR G2.

46 (1866) 1 Napier MB 48. This was apparently what Chief Judge Fenton later referred to at Orakei as "the great Hawke's Bay case". Fenton, above n 7, 86.

47 (1897) 3 Nelson MB 1-9.

48 [1867] NZ Gazette 137.

49 For example, part of the reason for allowing the rehearing of the Owhaoko-Kaimanawa Blocks was that the claimants who actually lived on the land in question (east of present Waiouru) had been given only two days' notice to attend a Court sitting in Hastings. [1886] AJHR G9 and I8.

cases to be heard at a sitting to begin on a certain date. Any particular claim might not be heard for weeks afterwards, yet Maori had to loiter in the vicinity of the Court at great personal inconvenience and cost for fear of not being heard in person:[50]

> Large numbers of them are thus bound to attend the Courts, herding together in all weathers under tents or temporary breakwinds, living on food to which they are not accustomed, tempted to drink, demoralised and ruined by spending weeks in idleness and excitement in a European town. No language can too strongly express the mischief done to the natives in this way.

Other principles by which the Court reached its determinations were derived from the statutory instruction to be guided by Maori "customs and usages". These were distilled down to four central take, or rights, which determined the validity of one's ownership and by which the Court is still guided.[51] The first was discovery by an ancestor. The second was take tupuna, proven descent from an ancestor whose right was recognised, which generally also subsumed the first take. The assertion of this right through recitation of whakapapa has led to the Court's minutebooks being a rich source of information on Maori genealogy, much of which would otherwise now be lost. A third right was take tuku, right by gift, where land was freely and openly given and received with the full public knowledge of all interested parties. The fourth right recognised was take raupatu, right by conquest.[52]

Fenton again came to define the Native Land Court's impression of the take raupatu in its sibling, the Compensation Court:[53]

> The conclusion at which we have arrived after our experience in the Compensation Court, and as members also of the Native Land Court, is, that before the establishment of the British Government in 1840, the great rule which governed Maori rights to land, was force, - ie that a tribe or association of persons held possession of a certain tract of country until expelled from it by superior power, and that on such expulsion, the invaders settled upon the evacuated territory, it remained theirs until they in turn had to yield it to others.

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50 EGB Moss *Native Lands and Their Incidents* (Wilson & Horton, Auckland, 1888) 2. The additional costs in disease, drunkenness, neglect of food production and other social ills are discussed in Sorrenson "Land Purchase Methods", above n 5.

51 An extended discussion, with examples, can be found in Smith *Maori Land Law*, above n 8, 81.

52 This raises the question of the adequacy and accuracy of the systematisation of one culture's customary law within the legal system of another. As most documentary sources are European and Maori oral sources have been subjected to an ever-increasing period of influence by the Court principles, it is now very difficult to determine exactly how widespread or clearcut these concepts actually were in traditional Maori society - which returns in part to the Layton-Ward debate noted above n 19-21. The problem of the distortion of customary law when squeezed into a British mould is portrayed in another jurisdiction in P France *The Charter of the Land: Custom and Colonization in Fiji* (Melbourne, Oxford University Press, 1969).

53 [1866] AJHR A13, 3.

To be valid, the conquest had to have taken place prior to 1840, after which time, it was assumed, British control had made inter-tribal conflict illegal.[54] A major application of the principle was in the exclusion by the Compensation Court of many Te Ati Awa who had fled the Taranaki region.[55] Another clear-cut example of the recognition of a right gained through conquest was in the decisions made in the Chatham Islands. Ngati Tama and Ngati Mutunga refugees had arrived from Taranaki in 1835-36 and killed and enslaved the indigenous Moriori, some still remaining in occupation when the Court sat there in 1870. Despite Moriori assertions that in their culture to have resisted violently would have been wrong and would in their eyes have lost their mana whenua, Judge Rogan, following Court practice, awarded almost everything to the Maori, with a handful of tiny reserves allowed to Moriori virtually *ex gratia*.[56] Yet a further example is Judge Mackay's 1892 decision on the beneficial interests in the Nelson Tenths, where Rangitane and Ngati Kuia found that their interests in these lands were wholly disallowed on the basis that they had been defeated in the early nineteenth century by invasions of Ngati Toa and allied tribes.[57]

The other point to make about these customary rights is that for any of them to be valid, they all had to be sustained by continuous occupation or use of the land or resources; the principle of ahi kaa, to "keep one's fires burning", was crucial.[58] Chief Judge Seth-Smith, in his judgment on the Omahu Block, made the point that for the Court actual occupation took precedence over and assisted the assessment of other traditional evidence such as genealogies.[59]

> The persons now in possession are prima facie the owners.... Possession commenced before 1840, and continued without interruption to the present time, raises a presumption of so strong a character that it will require the clearest evidence to rebut it.... It seems to me... that one unequivocal act of ownership, and *a fortiori*, a series of such acts, is of far more importance in determining on which side the balance of testimony lies, than any amount of traditionary lore that may be brought forward for the purpose of leading the Court to a different conclusion.

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54 Thus, Chief Judge Fenton made it clear in the Orakei judgment of December 1869 that "the Court... would recognise no titles to land acquired by intertribal violence since 1840.... It would be a very dangerous doctrine for this Court to sanction that a title to native lands can be created by occupation since the establishment of English sovereignty, and professedly of English law, for we should then be declaring that those tribes who had not broken the law by using force in expelling squatters on their lands, must be deprived 'pro tanto' of their rights." Fenton, above n 7, 86, 94.

55 Above n 40.

56 (1870) 1 Chatham Islands MB 56. Moriori protestations were made in evidence, much being reproduced in M King *Moriori* (Viking Press, Auckland, 1989) 123.

57 For Judge Mackay's final orders of 14 March 1893, see (1893) 14 Nelson MB 153.

58 An extensive example of the application of this principle was in the deliberations over who amongst the Muaupoko tribe should be admitted into the Horowhenua Block. [1896] AJHR G2 259.

59 Chief Judge Seth-Smith (1891) 2 CJMB 71. Quoted in Smith *Maori Land Law,* above n 8, 90.

Yet another principle upon which the Court based the vast bulk of its early determinations, the so-called "Ten-Owner Principle", illustrates clearly how the apparently narrowly-focused legal decisions had vast ramifications upon the society in which they were practised. Once the Court was in operation, Chief Judge Fenton, too, had proved to be a convinced advocate for the benefits of individualisation of Maori land title. He saw from the beginning, with complete equanimity, that the Court's operations would ultimately result in the emergence of two classes in Maori society, "one composed of well-to-do farmers, and the other of intemperate landlords". The establishment of a class of Maori gentry was to him a good thing. He seemed not to realise, or at least to be completely unconcerned, that those "intemperate landlords" would soon become impoverished and landless through that very intemperance. Although he was aware of the "intemperance and waste" already well under way in Hawke's Bay with the introduction of the Court there, he regarded it as regrettable but of no concern of the judicial or legislative authorities. He merely said[60]

> ... in my judgment, it is not part of our duty to stop eminently good processes because certain bad and unpreventable results may collaterally flow from them, nor can it be averred that it is the duty of the Legislature to make people careful of their property by Act of Parliament, so long as their profligacy injures no one but themselves.

This rather disingenuous disavowal of responsibility for his own actions overlooks the very real and irreparable harm already being done to many Maori communities at this time. Many tribes were being divested of their lands, thousands of acres at a time, with effectively no voice in the process and no compensation for their loss. This came about through Fenton's own policy of putting only ten names upon the certificate of title, regardless of the size of the group entitled to the block. The 1865 Act had made that provision for blocks under 5,000 acres only, probably intending subdivision to take place until the block was sufficiently small that only ten people did own it - ignoring the fact that communal land could never be so divided. But Fenton wilfully insisted on the Court acting likewise for all blocks, of whatever size, many being of tens of thousands of acres. This, of course, assisted in the emergence of the wealthier propertied class of Maori he sought. These ten were then in law absolute owners, no trust relationship was expressed or implied in the documents, however Maori perceived them, and the few could - and did - dispose of the lands at a great rate, often completely regardless of the remainder of the tribe.[61] They were assisted in this divestment by Pakeha traders, storekeepers and land speculators working in collusion to entrap the vulnerable few in debt and then threaten Supreme Court action unless land changed hands as payment.[62]

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60 [1867] AJHR A10, 4.

61 The trust relationship was not recognised or enforced until the passage of the Native Equitable Owners Act 1886.

62 There is no question about the extent of calculated exploitation by Pakeha speculators involved in this problem. It was revealed from earliest Land Court times, in addition to popular observation, by a number of official inquiries. See, eg [1871] AJHR A2 and A2a, and 1873, G7, *passim*.

The tribal owners not named on the certificate were simply dispossessed of their land by this process, with no recompense except when the ten owners were sufficiently high minded (or debt-free) to share sale proceeds. Even when some distribution of purchase monies took place, as Fenton was well aware there was precious little forthcoming to an individual to substitute for the permanent loss of the right to inhabit and live off the land. When the politicians tried in the Native Land Act 1867 to require by legislation the inclusion of more owners' names (although on the back of the certificate), Fenton continued just as before, blithely claiming still to have a discretion, or simply failing for some years to inform claimants of the change.[63] Mere recording in this way failed to confer any legal standing upon the other registered owners anyway - they were still not the named holders of the title. Despite the more stringent statutory requirements, led by Fenton the Court's judges also consistently failed to make adequate reserves, increasingly leaving many low-status Maori with neither land nor the proceeds from sales.

In 1873, a new Native Land Act required all tribal owners to be recorded and a memorial of ownership, containing all those found to have an interest, replaced the certificate of title awarded by the Court. This did slow the alienation process as so many signatures now had to be acquired for a purchase, but later led to further problems, such as the fragmentation of land ownership, compounded as the descendants of each of the many grantees multiplied.[64] Then again, shares could be committed in advance by the owners' acceptance of takoha or tamana, a payment which effectively bound the recipient to sell to the giver.[65] As a result, the partition order soon became a favoured device of both Government and private purchasers. Having amassed a sufficiently large number of individual shares, the prospective purchaser would then apply to the Court to partition out their total interest. This placed non-sellers in a difficult position; they were often left with small, fragmented and uneconomic segments, which they could choose to retain, or they could capitulate and sell, too.[66]

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63 He claimed this discretion on the grounds that the overriding individualising and "civilising" principles of the main 1865 Act would be compromised by reintroducing numerous "communal" owners. He also thought this would be a form of "disguised equity" recorded only in the Court's records and not on the Crown Grant with which public dealings were made. MA 13/2a. WNA. A subsequent Commission of Inquiry observed the lack of notification. [1871] AJHR A2a. Although this was Fenton's own preference, other cases show that most of the judges did record the additional names eg the Horowhenua Block in 1873 when Keepa Te Rangihiwinui was placed on the certificate as sole owner but another 106 were registered on the back of the certificate.

64 From a Maori perspective, this was not altogether a bad thing, the added inconvenience being at least partly balanced by the increased difficulty of alienation. E Durie "The Law and the Land" in J Phillips (ed) *Te Whenua, Te Iwi* (Allen & Unwin/Port Nicholson Press/Stout Research Centre, Wellington, 1987) 79.

65 See, for example, the use of this technique in Taranaki. Harris, above n 39, 52.

66 These tamana have been condemned recently as "an established pressure tactic, an unfair practice designed to purchase land as quickly and cheaply as possible, and incompatible with the Crown's fiduciary duty under the Treaty. Tamana was a sprat to catch the mackerel." (1993) 6 WTR (Pouakani Report) 60.

A further complication arose with the power conferred in the Native Land Court Act 1880 at s 56 for the Court to give effect to any voluntary agreements reached by the parties outside the Court. This could have been regarded positively as allowing the reduction of the duration and costs of hearings and encouraging intra-Maori concord. In practice, it frequently occurred that a small group of self-aggrandising claimants could swear that an agreement had been reached, the Court would call for objectors, and, if none appeared, the "agreement" would be ratified, giving "facilities to the worst natives to rob others in this treacherous way". There was often no way for other potential claimants to be aware of what was occurring, hence the need for all to be present at all times. One European lawyer noted a large and valuable but unnamed block which had been awarded to 400 Maori in 1882, but in the following year was passed over to only four through just such a fraudulent "voluntary agreement".[67] He therefore recommended that the Native Land Court be reconstituted as a Commission, which could actively seek its own full evidence, rather than relying solely upon what was presented to it.

V THE COST OF DUE PROCESS

From its inception, the Native Land Court process itself imposed a heavy financial burden upon Maori. There was, of course, the monetary, social and spiritual cost of the alienation of their land, but even to have a case heard before the Court gobbled up large amounts of money. There were fees imposed by the Court simply to defray the cost of the institution's operation, then there were further fees to be paid for the various stages of acquisition of Crown grants and land transfer. But by far the most onerous cost was that of having the land surveyed, which is deserving of more detailed comment.[68]

From the beginning, Chief Judge Fenton, supported by legislation, insisted that no case would be heard before the Court unless an adequate plan were produced, a seemingly reasonable procedure to determine exactly the block boundaries.[69] As a supposed

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67 Moss, above n 50, 2. He observed further that "In that case not a whisper could have reached the Judge, who can and does decide only on the evidence before him. A Court is a Court and cannot undertake to protect absentees." In another case, concerning a 6,000-acre block in the Rotorua-Patetere region, Moss (above n 50, 6) alleged that the title was given to one person only through a "voluntary agreement" amongst a small group and that immediately upon receiving the title she went to Tauranga, where no-one could hear by accident and interfere, and sold the block to the Government, sharing the proceeds amongst her co-conspirators only. Since the Government was the purchaser, no rehearing was permitted and even the small and reluctantly-awarded compensation of £45 to the tribe was embezzled by the two Maori to whom it was paid.

68 [1871] AJHR A2a, 5-6 canvassed many of the following points. The inaugural Inspector of Surveys, Theophilus Heale, issued detailed rules and guidelines for surveyors, while Fenton also published the Court's own requirements. Above n 48, 137, 139-140.

69 The initial claims in Rotorua in 1865 were all dismissed due to lack of surveys. None was heard until the 1880s. The 1865 Native Land Act had required at s 25 that the

insurance of quality, this had to be prepared by a qualified surveyor, duly licensed under the Native Land Acts, who was also obliged to attend the Court hearings.[70] After the Native Land Court Act of 1880 at s 39, the surveyors were employed by the Government, rather than being private free-lancers.

The costs of this survey were to be met entirely by the Maori claiming the block. The irony was, of course, that since the land was the only capital possessed by most Maori, their only negotiable asset, large segments of it had to be sold simply to pay for having it surveyed. This was not so bad in places like Hawke's Bay where the going was easy and the land valuable, so that Maori could raise money relatively readily or intending purchasers would deduct the payment from the purchase price. However, in less prosperous or accessible areas an inordinate acreage of land had to be disposed of to cover these charges.[71] The costs were so high because in those pre-aerial mapping days a physical line four feet wide had to be cut and chained through the dense forests that covered the North Island and over the steep mountain sides away from the coastal plains.[72]

There are many examples of these costs in the Court's records. To take but one small and virtually random sample from the accessible Hawke's Bay in 1868: a surveyor was awarded £2/2/- for attendance at a hearing which can have lasted only a few minutes, in addition to the Court's own standard fees of £1 each for investigation, certificate of title and Crown Grant. Later on the same day, he was awarded another £1/1/- for attendance on another block of only 18 acres - meaning a total of £4/1/- in Court and survey charges for even that small and uncontroversial block. For the 700-acre Eparaima West Block he charged £28 for the survey and 10/- for one day's attendance and identical amounts for the same-sized Eparaima East Block.[73] On the same day, he also charged £10 survey + 10/- attendance on a 98-acre block, £51 + 10/- for 3,960 acres and £18/2/6 + 10/- for 500 acres. All of these charges had to be paid by the Maori owners before they received the certificate of title.

Surveyors found reimbursement of their legitimate fees could be delayed for months or years if land remained unsold and they became entrapped themselves, having to sell their claims to money lenders at a great discount. When unsure of rapid payment, they raised their initial prices correspondingly. Eager, therefore, to recoup their costs, and often under financial pressure themselves, surveyors put pressure on Maori owners to sell land. The 1865 Native Land Act at section 68 allowed the Court to grant liens over land for survey costs and for the Court to give the Crown Grant to the surveyor until "his lawful charges" were paid and this power was continued in subsequent Acts. In

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Court should neither come to a decision nor make an order without the survey having first been completed satisfactorily.

70 Above n 48.

71 See again (1993) 6 WTR, esp. ch 12 "Survey Charges". For example, from the 113,000-acre Pouakani Block, south of Mangakino, in 1887 20,000 acres were cut to pay for survey charges and sundry "other costs".

72 Above n 48.

73 (1868) 2 Napier MB 2, 9, 33.

1867 the Execution of Judgments against Real Estate Act exposed debtors to Supreme Court action and to having their land seized and sold, usually fetching far below its real value. Although not intended for use against Maori, this Act meant that, as land passed through the Native Land Court and title was individualised, those individual owners could have their portion of the tribal land alienated for personal debts - another ill effect of those few nominated being regarded as absolute owners rather than merely tribal trustees.[74] In the Native Land Act 1873 at section 73 it was also provided that the Court could order a portion of the land to the Crown both for advances already made and in payment of any fees due, including survey costs.

The inequities of these provisions were common knowledge as early as 1871, when Colonel T M Haultain reported to Parliament on the working of the Court.[75] The Supreme Court actions and the high surveying charges already meant that Maori were paying at least double what Europeans would have, much higher than working through the Native Land Court alone. "But," Haultain observed, "[the Maori] does not know the law, and the surveyor prefers the Supreme Court if he can get there." Haultain cited the case of Ngakapa Whanaunga, who had had a survey conducted in expectation of a deal with a European purchaser. The sale was not concluded, he gave a promissory note which he could not meet, so he was sued in the Supreme Court for survey charges of £560, related costs raising the total to £1,000. He raised £400 on mortgage and gave as security for the balance a commercially valuable town allotment from which he was receiving £87 3s per annum rent. This land was auctioned by Supreme Court writ for only £35, leaving a large debt still outstanding. Haultain reflected, "No wonder the Natives are dissatisfied with English law."[76]

Even when this expensive surveying was carried out, there was no guarantee of its quality. The office of Inspector of Surveys was established in 1867 largely because the Court found so many plans were little more than vague sketches. The first Inspector, Theophilus Heale, found it necessary immediately to publish instructions which included warnings that inadequate surveys would have to be reworked and that the offending surveyor risked losing his licence.[77] Despite this inspection, inaccuracies continued to be perpetrated which still have ramifications today. A striking example of this problem is in the Pouakani region, a large block south-west of the Waikato River, centred on Mangakino and extending to Pureora. Although at least 20,000 acres were taken by the Crown for survey fees and titles were awarded in the Native Land Court on the basis of partial surveys conducted in the 1880s and 1890s, many segments of this region have not been fully surveyed to this day. Those inaccuracies mean that the Maori owners still lack a registrable title recognised by New Zealand law.[78]

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74 This was also the measure which permitted Pakeha storekeepers and others to use personal indebtedness as a lever to separate the ten owners from their lands. The purchase of the Heretaunga Block (Hastings) in the late 1860s was a notorious example. [1873] AJHR G7, *passim.*

75 Above n 68.

76 Above n 68, 5.

77 Above n 48, 139-140.

78 The problem is dealt with at length in (1993) 6 WTR 1993, *passim.*

VI TWENTIETH-CENTURY DEVELOPMENTS

Through its life, the Maori (Native) Land Court has acquired a number of different but related types of work. It has also been exported to Pacific Island territories within New Zealand's jurisdiction.[79] The main purpose of the Court at its inception was the determination of title in such a way as to permit the conversion of Maori communal title to a European-style individual title which could be more readily absorbed into the English legal system - and more easily acquired by land-hungry settlers. But it has also always had the responsibility of determining rights of succession to those newly-granted titles and over more recent times, with the disappearance of customary land, this has become perhaps its major role. The seminal judgment appears to have been that given by Fenton in the Compensation Court on the Papakura Block. He interpreted section 30 of the Native Land Act 1865 so as "to cause as rapid an introduction amongst the Maoris, not only of English tenures, but of the English rules of descent, as can be secured without violently shocking Maori prejudices".[80] This implied equality of division amongst all heirs, whereas Maori customary allocation would have been on the basis of various kinds of status, or on the actual habitation on and use of the land in question. It has resulted in the rapid multiplication of owners on any given title to the extent that titles to most Maori land within a generation or two were so fragmented as to be beyond economic viability. Further fragmenting Maori titles, once a large block was defined individuals (or large-scale purchasers, especially the Government) often wanted their interests partitioned out, perhaps so that they could be sold, perhaps to reserve some land from the sale of the larger block. Some attempts were made to reverse the trend, notably Sir James Carroll's incorporation scheme embodied in the Maori Land Administration Amendment Act 1903, and Sir Apirana Ngata's programmes from 1929 to consolidate individual interests, building on the provisions of the Native Land Act 1909.[81] None, though, has enjoyed widespread and enduring effectiveness. The present state of Maori land titles is not a consequence of Maori customary ownership, but of the superimposition of a form of English law upon it.

The Land Court has also had an established relationship with two other Courts. In 1894, the Native (now Maori) Appellate Court, comprised of any three or more Native Land Court Judges, was created to hear appeals from the Native Land Court. Previously the only means of reviewing a decision of the Court was to hold a rehearing, a process which required the approval of the Chief Judge, sometimes given so reluctantly that it

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79 Its transplantation and adaptation in the Cook Islands from 1897 is surveyed in RG Crocombe *Land Tenure in the Cook Islands* (Oxford University Press, Melbourne, 1964) 97-142.

80 [1867] NZ Gazette 189.

81 See PG McHugh *The Fragmentation of Maori Land* (1980); JR Holmes "Fragmentation of Maori Land" (1967) 1 Auck ULR 1-19; Prichard-Waetford Report at 19. See also JK Hunn "Report of Department of Maori Affairs" [1961] AJHR G10, who commented at 52 "Everybody's land is nobody's land."

had to be forced by parliamentary action.[82] From the Appellate Court there was no direct right of appeal to either the Supreme Court or Court of Appeal, but the Appellate Court could state a case to the High Court on a question of law. It was possible, though, to appeal directly to the Privy Council.[83] The original 1865 Act made the Native/Maori Land Court competent to receive questions from the Supreme Court regarding Maori customs and usages. Its decisions on such topics were held to be binding on the Supreme Court just as if they were decisions from a jury in the Supreme Court itself.

The Maori Land Court has also acquired its own unique character. Although a Court of Record, it is entirely a creature of, and dependent upon, statute. It also has taken on a role as "a Maori people's Court", in which testimony need not be sworn, and which may consider any type of information which may assist its deliberations, whether otherwise strictly legally admissible or not. Usually, Maori appear before it in person without assistance of counsel.[84]

After the founding Acts, perhaps the most important legislation affecting the Court was the 1909 Native Land Act. Solicitor-General Sir John Salmond took the opportunity to thoroughly revise and consolidate the 69 statutes then impinging on Maori land issues and, in theory at least, to shift the Court's emphasis towards the retention and more effective utilisation of Maori land.[85] Since then, several judgments have reinforced its more protective role.[86] The Maori Affairs Act of 1953 was the longest-lasting consolidating Act, but that was not seen as final and more alterations were made in 1967 and 1974. The most visible alteration in the Court's work following the 1953 Act was its role in administering "Section 438" trusts. Modelled on the trusts created by s 8 of the Native Purposes Act 1943, these constituted legal entities for the administration of Maori land, usually for a single block, generally for the benefit of Maori or any specified groups or class of Maori. The Court was tasked with determining the trustees and this and related administration have occupied much of the Court's time of recent years.[87]

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82 Thus, for example, the Owhaoko and Kaimanawa-Oruamatua Reinvestigation of Title Act 1886 and attendant reports and Select Committee hearings. Above n 49.

83 *In re Matua's Will* [1908] AC 448. This still appears to be the law. Following *In re Henare Rakiihia Tau* - discussed in (1991) 4 WTR 1122-1145 - Ngati Toa claimants took their case to the Privy Council in 1990. The 1993 Act contains no provisions which expressly alter the status quo, s 50 indicating the continuance of the Maori Appellate Court as previously, except insofar as the new Act reformed procedures.

84 Haughey, above n 8, 208.

85 Above n 17.

86 Following from, eg *Paterika Hura* v *Native Minister* [1940] NZLR 259; *In re Mangatu Nos 1, 3 and 4 Blocks* [1954] NZLR 624. Hunn, above n 81, observed at 76 that the Court acted as a "protective mantle" over Maori in their land transactions - but continued at 77 by questioning the contemporary need for such protection and advocated a review of the Court's functions and procedures (and even the curtailing of its jurisdiction) as "progressive and timely".

87 In the 1993 Act they have become known as "ahu whenua" trusts.

Otherwise, the 1953 Act did not greatly alter the role of the Maori Land Court in the general scheme of things, however in the 1960s and 1970s there was a legislative diminution of the Court's longstanding control over adoption and probate matters. Even by the beginning of the 1980s the legislative maze seemed hardly to have been reduced or rationalised. The 1980 Royal Commission observed that[88]

> ... a history of the Court is a history of land legislation since European settlement even though its jurisdiction has been extended from time to time to include social as well as land matters....
>
> Since 1865 there have been almost annual amendments to the Acts affecting the jurisdiction and constitution of the Court. In 1888 eight amending Acts were passed, and in 1889, nine. The 1953 Maori Affairs Act has been amended each year by a Maori Purposes Act or a Maori Affairs Amendment Act. This has produced a body of legislation which is a morass for the legal profession and leads to very great difficulties for the Maori people in dealing with their land.

Small wonder that historians have hesitated to rush in where lawyers fear to tread!

As noted above, from the late nineteenth century, the main work of the Court has changed. The big blocks had all passed out of Maori hands. Since that time the chief work has been the partition of and determination of succession within the remaining Maori lands. In 1993 Te Ture Whenua Maori [Maori Land Law] Act, the first major piece of legislation affecting Maori land in forty years, has confirmed the place of the Maori Land Court and given it new responsibilities - against the wishes of the 1980 Commission which expressed the hope that it could soon be done away with altogether.[89] This legislation strengthened the recent ethos of the retention rather than the alienation of Maori land.[90] To that end, a total ban has been placed on the alienation of such Maori customary land as still exists (section 145) and the process for alienation of Maori freehold land has been made more stringent. Further, the new Act has actually expanded the Court's role. The Minister of Maori Affairs, the Chief Executive of Te Puni Kokiri or the Chief Judge can refer to the Court any matter about which they wish an inquiry to be made (section 29). The old position of Assessor has effectively been upgraded in several new provisions. Sections 28 and 31 allow the appointment at the Chief Judge's discretion of one or two additional members with expertise relevant to a particular inquiry. Sections 32-3 provide that in cases where there is dispute about Maori custom or rights of Maori representation the Chief Judge is required to appoint two or more lay members expert in tikanga Maori, additional to the Judge, who are full members of the Court. In such cases the majority vote is the decision of the Court, regardless of the Judge's vote; on other matters the Judge must be included in the majority or has the casting vote (section 36). New kinds of family and tribal trusts have been created as legal entities entitled to administer Maori land (sections

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88 [1980] AJHR H3, 7, 14.

89 The Court's modern role under the 1993 Act is discussed at length in J McGuire "The Status and Functions of the Maori Land Court" (1993) 8 Otago LR 125.

90 Thus, s 17 includes as a primary objective of the Court its promotion and assistance of Maori in the retention of their lands.

212-217). The Court, too, has now been set up as the body which shall determine Maori representation on all kinds of public bodies (section 30). This task has a sharp edge to it in the context of, for example, the recent and often acrimonious debate over who should be the Maori representatives on the Maori Fisheries Commission overseeing the allocation and management of fishing resources. The Maori Land Court will in future be an arbiter in such disputes.[91]

In 1975, the Treaty of Waitangi Act created another tribunal to investigate and review Maori claims of grievance against the Crown. In 1985 the Treaty of Waitangi Amendment Act extended that review back to 1840, thus baring to historical and legal scrutiny the operations of the Native/Maori Land Court, amongst other institutions.[92] The Court and the Tribunal do not have identical roles, personnel or objects, so the one cannot replace the other as many have suggested. The Tribunal's role is far more wideranging than concentrating solely on land or determining current ownership of Maori land amongst Maori.[93] But to the extent that it has become the major forum for Maori to express their dissatisfactions over issues connected with their lands, past and present, the Tribunal's work can be in conflict with the decisions of the Court and to amalgamate their functions would result in the Court's successor investigating its own earlier dealings, a fertile breeding ground for distrust and suspicion.

The Native/Maori Land Court has thus played an enduring and central role in the shaping of the country as it now is, having been and remaining one of the central institutions in New Zealand's race relations. The Court's underlying legislative bases, and most of its former judges, have followed in the wake of general Pakeha attitudes, supporting unquestioningly the desirability of ultimately absorbing Maori land into the common estate. More broadly, it has exercised directly social functions alluded to above, especially the impact upon Maori people of the separation from their ancestral land. Most obviously through key members such as Chief Judge Fenton, the Court has not only reflected but helped to forge elements of race relations policy. Even its seemingly petty procedural rules have had major, often negative, implications for Maori people and their retention of land ownership.

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91 See further AL Mikaere "Maori Issues" [1993] NZ Recent Law 312; PG McHugh "A New Role for the Maori Courts in the Resolution of Waitangi Claims?" (1993) NZLJ 229.

92 P Temm *The Waitangi Tribunal* (Random Century, Auckland, 1990); WH Oliver *Claims to the Waitangi Tribunal* (Waitangi Tribunal Division/Daphne Brasell Associates, Wellington, 1991).

93 ET Durie and GS Orr "The Role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence" (1990) 14 NZULR 62; MPK Sorrenson "Giving Better Effect to the Treaty" (1990) 24 NZJH 135; MPK Sorrenson "Towards a Radical Reinterpretation of New Zealand History" in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 158; A Ward "Commentary. The Treaty and the Purchase of Maori Land" (1988) 22 NZJH 169; A Ward "History and Historians before the Waitangi Tribunal" (1990) 24 NZJH 150.

Positively, though, the Court's very existence has always represented a European acceptance that Maori as the country's indigenous inhabitants have always had rights over land and that those rights should be respected and dealt with seriously and by due process. This contrasts dramatically with the Australian application of the *terra nullius* doctrine.[94] Although that process has often gone seriously awry, the very existence of that legislative framework and its institutional focus in the Maori Land Court (and more recently in the Waitangi Tribunal) now provides a means in the present of attempting to remedy the defects from the past.

94 Although see now *Mabo* v *Queensland* (1992) 66 ALJR 408.