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# NGA KOOTI WHENUA

THE DYNAMICS OF A COLONIAL ENCOUNTER

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## ABSTRACT

The Native Land Court was created to establish certain, stable and alienable title to Maori land but it struggled to do so and was regularly re-invented from 1862 to 1928 to deal with crises which undermined its role in meeting the demands of colonial politicians for land. Inside the courtroom, Maori asserted and argued complex claims to land, continuing a long tradition of negotiating relationships between distinct tribal and kinship groups. To deal with these claims and establish a settled title, the Court was forced to navigate a path through particular disputes to individual pieces of land rather than impose its own conceptualisation of customary rights.

This thesis concludes that Maori customary rights to land cannot be generalised as a model of abstract rules. Rather they were a practical application of tribal political and civil rights negotiated in particular circumstances, both geographically and historically. Maori customary rights to land were fundamentally about relationships, how people interacted with each other over access to resources and land. This thesis also concludes that the Court demonstrates in the colonial context, power was never absolutely in the hands of imperial authorities. The process of alienating Maori from their land did not occur easily or quickly – colonisation was a haphazard process which occurred over many decades.

Five discourses on Maori customary rights to land are examined. They are that of historians, the political discourse surrounding the Court from its establishment through to 1928, that of Maori claimants asserting rights to land in the Court and of judges and assessors attempting to resolve disputed claims to land, and the bureaucratic discourse which emerged after 1928. The major sources used are parliamentary debates, official and unofficial published papers, manuscript collections of particular individuals and the Court's minute books. A sampling process has been applied to the minute books to make this material manageable using specific criteria designed to ensure, among other things, geographical and chronological diversity. This thesis marks a first attempt to discuss the Court by taking a systematic approach to its minute books and one which recognises both the volume and complexity of the material available.

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## ABBREVIATIONS

ATL	Alexander Turnbull Library
AJHR	<i>Appendix to the Journals of the House of Representatives</i>
BPP	<i>Irish University Press Series of British Parliamentary Papers. Colonies: New Zealand</i>
NZLR	<i>New Zealand Law Reports</i>
NZPD	<i>New Zealand Parliamentary Debates</i>
NA	Archives New Zealand
PP	<i>Parliamentary Papers on New Zealand, Massey University Library, Albany.</i>

## INTRODUCTION

'In the [Native Land] Courts,' wrote Sir Apirana Ngata in 1940, 'where exultant descendants of conquering ancestors gloated over the humiliation of their foes, old wounds are reopened with far-reaching results.'<sup>1</sup> He went on: 'I know of many large areas sold hurriedly to place the issue beyond doubt and as a final taunt to the enemy. I have listened patiently to a large number of petitions to Parliament, where the gravamen of the complaint was not so much the defeat in Court, but the removal of a dishonour foisted on the memory of revered ancestors by unscrupulous enemy witnesses.' Many decades after the original hearing, 'aggrieved communities' still petitioned Parliament for rehearings. Old disputes and conflicts were not forgotten; they were, as Ngata observed, simply maintained in new environments. This thesis is about competing claims to land and the resolution of disputes where they arose. Both are examined through the complex institutional site of colonial exchange known as the Native Land Court.

The particular focus is on the way in which Maori customary rights to land have been negotiated and defined in and around the Court. Rather than attempting to define a model of these rights, this thesis characterises them as a metaphor for complex patterns of interaction between tribes and kinship groups, and between Maori and Pakeha, over land.<sup>2</sup> These patterns revolve around an ongoing process of negotiating relationships involving land among Maori, not just in the Court but over many generations. The way Maori claimants asserted their rights together with attempts by historians, colonial politicians, and the Court itself to come to terms with customary rights are the primary focus of this thesis.

It seeks to establish two fundamental points. The first arises out of the distinction between Maori customary rights to land as a model or as a metaphor. As a model, those rights are fixed and clearly defined as four abstract take. As a metaphor, those rights are about relationships and the actions of Maori in the Court show these relationships had a long history and rights to land were the product of continuous

<sup>1</sup> Apirana T. Ngata, 'Maori Land Settlement,' in *The Maori People Today*, I.L.G. Sutherland (ed.), Wellington: New Zealand Institute of International Affairs and the New Zealand Council for Educational Research, 1940, pp.133-134.

<sup>2</sup> For an interesting discussion of the significance of the metaphor/model distinction, see Greg Denning, *Islands and Beaches: Discourse on a Silent Land, Marquesas, 1774-1880*, Carlton: Melbourne University Press, 1980, pp.86-94.

negotiation. Rather than being fixed abstractions, these rights were constantly in flux as relationships between tribes and kinship groups evolved and where external events affected those relationships.<sup>3</sup>

The second involves the impact of imperial expansion and colonisation on indigenous peoples. It is argued that politicians, officials and the Court faced a considerable struggle in attempting to establish stable and settled title Maori land for the purposes of alienation and settlement. The Court's struggle specifically shows confusion and contingent understandings. In the colonial context, the capacity of the coloniser to know the indigenous inhabitants for the purposes of control was never entirely clear and power was never absolutely in the hands of imperial authorities. Maori did, however, lose a considerable area of land. What must be recognised is that this did not occur easily or quickly; colonisation was a haphazard and long-term process. Defining power relations in that process in terms of subordination and domination is much too simplistic.

There are five key discourses examined in this thesis. They are those of historians and scholars, of colonial politicians and officials, of Maori claimants inside the Court, of judges and assessors who had to resolve competing claims and of bureaucrats trying to administer Maori land in Maori ownership. For historians, that means the way colonial governments attempted to come to terms with Maori customary rights to land for the purposes of alienation. For politicians, that means the way they tried to come to terms with Maori customary rights to land for the purposes of alienation during the nineteenth and early twentieth-centuries. For Maori it is the variety of ways that rights to land were disputed and argued in the Court, and for the Court it was the different strategies used to resolve those rights to land. After 1928, a bureaucracy grew rapidly and produced its own discourse to administer an extremely complex system of land rights which was a product of the interaction between a Pakeha judicial process and Maori customary rights to land.

<sup>3</sup> Alan Ward has made similar observations in his discussion of custom in the context of post-Treaty of Waitangi investigations into land transactions negotiated prior to 1840 (old land claims): 'Adjacent hapu and iwi were interrelated, and their zones of land use intersected. Within the territory controlled by hapu and hapu clusters, precise rights were known for every cultivation, fishing area or birding tree, but continuous boundaries between hapu and iwi were rare. Land tenure was not something set apart from the rest of community life, governed by its own rules. There were norms and priorities of rights to land, but these were interpreted in the context of living with and belonging to a hapu or a community of closely related hapu. To enter such a group, either through birth, adoption or marriage, and to acknowledge the mana of its chief was to gain access to land rights. To behave badly or to sever relations with the group was to lose land rights. Through discussion, rights were constantly adjusted within the various levels of Maori society, according to commonly agreed priorities of rights.' This account of custom, however, is confined to the immediate post-Treaty period and does not extend to the 1860s when the Court was established. See Alan Ward, *An Unsettled History. Treaty Claims in New Zealand Today*, Wellington: Bridget Williams Books, 1999, pp.74-75.

Part One examines the first discourse, that of historians and scholars. It is argued that current approaches to the Court tend to focus on its role in the process of reducing Maori customary rights to land to Crown-derived property rights and subsequent alienation of that land from Maori ownership. The Court is judged harshly in these accounts for the destructive impact on Maori, both culturally (through the adverse impact on customary rights to land) and economically (as the primary economic resource of Maori was systematically acquired by Crown and private purchases, often in dubious circumstances). The Court is characterised as a frontier where customary rights were quickly and easily converted into a Crown-derived title. Maori customary rights to land were found and determined (often incorrectly, either by mistake or on purpose). The Court's role was clearly defined by politicians (to facilitate the alienation of Maori land) and the structure they created in the form of the Court worked rapidly and efficiently to achieve this end and it did so. The statistics showing land alienation are compelling and clearly indicate the dispossession of Maori from their land.<sup>4</sup> How so much Maori land was alienated is not nearly as simple as such interpretations would suggest.

Some of the existing historiography is based on a particular understanding of the nature and impact of colonisation and contact between European colonisers and indigenous peoples. In developing an alternative approach, Part One of this thesis also briefly addresses the nature of key concepts, such as contact, tradition and authenticity, to provide an analytical framework for subsequently examining the several discourses which revolve around the Court.

Two key texts make quite fundamental contributions to the current approaches to the Court and they are the starting point for discussing these discourses. Both have significantly influenced the way the Court has been understood. The first is the report and evidence of the Royal Commission on Native Land Laws of 1891 chaired by W.L. Rees (known as the Rees-Carroll Commission). The other is the work of Judge Norman Smith. Both texts are critically examined in this thesis. The 1891 commission is located in its political context, particularly in terms of the politics of its major protagonists. This thesis argues assessing the commission in this way fundamentally alters how both the commission and the Court are understood. The interpretation established by the commission is fundamentally questioned prior to examining the political discourse in Part Two.

As for Smith's model of four take, and his attempt to explain how the Court dealt with take when investigating title to land, both are located in their political and legal context. This model was later used as a basis for ridiculing the simplistic way Pakeha judges dealt with extremely complex rights to land and challenging their capacity to comprehend something well-beyond their narrow cultural experience.

<sup>4</sup> These statistics are presented most clearly in graph and table form in Alan Ward, *National Overview*, Volume II, Wellington: Waitangi Tribunal Rangahaua Whanui Series, 1997, pp.x-xvi.

This thesis searches for the model's origins and finds instead a façade of order created by Smith. In Part Three, after first ripping away this façade, it is argued Smith's model was not the practice of the Court, and Part Three examines how the Court went about resolving disputes among Maori over competing claims to land.

Part Two examines the political discourse surrounding the Court from its establishment through to 1928 and the bureaucratic discourse which developed after 1928. Techniques for acquiring Maori land prior to 1860 are also assessed by way of background. Debates among politicians and officials are surveyed as the Pakeha political establishment grappled with the question of Maori customary rights to land. Politicians and officials tried to impose order on those rights, although for them it was rhetorically rather than in practice. The clear definition of these rights was designed, however, to have a practical outcome: the alienation of land to either the Crown or Pakeha purchasers through a veil of legality acceptable to Maori and which would preserve peace and avoid descending into military conflict. This thesis argues that rather than being a relatively simple and straightforward problem which could be solved by establishing appropriate structures (such as the Court), it was a matter of regular struggle and considerable confusion for politicians and officials.

This seventy year period can be best characterised as one of constant experimentation, crisis and further invention. This can be seen in the Protectorate, Grey's Native Land Purchase Ordinance, McLean's evolution of Grey's approach, the establishment of the Native Land Court and the regular re-invention of the Court in the forty years after 1862. Each of these structures responded to problems arising in the earlier mechanisms used to acquire Maori land and often the problems were a result of Maori attempts to use the system in their favour. Rather than a simple case of setting up the structures and then letting them do their work, they required annual finetuning to improve their operation and also regular overhauls as responses to new circumstances were required.

Maori customary rights to land were extremely elusive and the struggle by politicians and officials to impose order on them illustrate this very well. This struggle was about how Maori customary rights to land could most quickly, effectively and certainly be defined in a stable and settled title. Each approach worked for a time – and in the process Maori land was successfully acquired – but after a while the limitations of the approach became apparent, the flow of land declined and a new experiment was necessary. The Court did therefore provide a title for alienation but only in the short term; it had to be regularly re-invented to ensure continuing alienation despite highly unstable titles.

Chapter 7 takes the analysis beyond the colonial period and examines the modern bureaucratic discourse which emerged after 1928. From this time, something about the land was indisputably known. The landscape of voices was recorded in the Court's minute books forever. With the appointment of Sir Apirana Ngata as Native

Minister that year, there was a fundamental policy shift from alienating Maori land to developing the land which was still retained in Maori hands. Land continued to be sold in large quantities but blocks of land which could be farmed profitably had money ploughed into them. Ngata's attempts to have this work undertaken by local Maori landowners and communities ended a stellar political career when questions were raised about the failure to account for the funds and accusations and instances of fraud emerged. He was exonerated in subsequent investigations but the impact on his development schemes was significant. From the mid-1930s, much of this work was undertaken by a centralised and growing bureaucracy in Wellington which operated through several closely monitored and controlled district offices.

A substantial bureaucracy, with the Court at the head of it controlling its operation, was necessary because the system of Maori land ownership was so complex and confusing. A permanent full-time judge was required to exercise administrative powers delegated by statute so that landowners and officials could know what was going on. The Court was re-invented again and retained for the purposes of adjudicating on disputes where they arose, not over Maori customary rights to land but over a system created through contact: a process of interaction between a Pakeha politico-judicial process and Maori customary rights to land over a period of about sixty years. In 1993, the Court was re-invented yet again to operate in a quite different policy environment but one where the effects of this interaction still required an impartial Court to make decisions affecting Maori land.

With the exception of Chapter 7 the focus of the chapters in Part Two is primarily on debates among colonial politicians and officials. Maori had a marginal voice in the creation of the structures but they were certainly the powerhouse in undermining the systems as they operated to assert their tribal interests and in this sense they were a major participant in the process of negotiating how customary rights were dealt with.

Part Three examines two discourses: those of Maori claimants asserting rights to land in the Court, and those of judges and assessors attempting to resolve disputes arising from competing claims to land. Maori had the most significant voice in these discourses and a major impact on the ground in the day to day operations of the Court. It is at this level that it becomes clear that customary rights to land, rather than being a model by which Maori customary rights to land could be determined, was a metaphor reflecting complex relations between Maori over land. This is demonstrated both in the ways Maori argued claims in the Court and the range of strategies used by the Court to resolve disputes over land. The Court was used by Maori claimants to preserve or enhance their tribal interests and, for this reason, there was no one single voice recorded in the minute books but many many voices in each case and tens of thousands in total. No one title investigation produced a single voice; there were many: different witnesses, agents, assessor, judge. There is no shortage of competing

narratives negotiating relationships over land within a complex web of power relations.

In the first two decades, debates over land inside the Court were a product of the inter-tribal conflicts of the 1820 to 1850 period. In most instances it can be argued that what was going on inside the courtroom was an extension of the conflict as victors looked to have their victory officially recognised or as the conquered attempted to have their defeat overturned in litigation. Later, as the generation of rangatira who led these large-scale conquest claims died out, they were not replaced by similarly strong leaders whose mana was derived from their parents' leadership in battle. Claims to land shifted down the Maori social structure to the hapu level where claims were made by different hapu of the same iwi. Conquest remained an element of many claims but they tended to be small-scale and part of much larger claims. The Court was still used strategically and now longer narratives of ancestral occupation and more recent occupation by elders, witnesses and claimants were common. Whakapapa, in particular, was used as an instrument of exclusion; parties often complained about the ancestors others had chosen for the purposes of ensuring other parties could be excluded from any award. These narratives were lengthy, exceptionally detailed and covered massive periods of time.

The Court, as it went about investigating title to Maori land and converting customary rights into Crown-derived title, was a site for the continuing negotiation of long relationships between tribes and kinship groups. The narratives presented by witnesses in support of claims were detailed and very complex; the determination of those rights and resolution of competing claims was equally complex. Maori were central to this process in the way that claims were argued and they played a key role in defining the debates in each individual case. The Court had to find ways to deal with the mass of evidence accumulated during hearings and determine who the Maori owners of a block of land were according to 'native custom.' What is clear is that the Court had no model or system of take which was applied to its decisions. Judges and assessors might draw on earlier decisions of the Court but they did so selectively and there was definitely no attempt to create a body of precedent. Deciding the rights of parties was a complex process and the strategies applied to do so depended on the nature of the individual circumstances. The Court was a site of negotiation; it was certainly not a politico-legal institution of imperial domination. The diverse and numerous narratives contained in the minute books rendered this approach entirely impossible and such a simple characterisation is untenable.

At its most basic, the Court always dealt with Maori customary rights to land and that is the primary focus of this thesis: an examination of five discourses on customary rights to land which revolve around and through the institutional framework of the Native Land Court. The Court was a space where Maori customary rights to land could be discussed and negotiated between different tribal and kinship groups and with Pakeha. Customary rights were the axis of this process of contact.

And as we shall see, although the Court was central to dispossession, it was a highly contingent and ambivalent process; the Court was no frontier ahead of which was an authentic and unified Maori identity and behind which was a world where Maori were marginalised and landless. Maori were extraordinarily active in asserting their tribal interests, appropriating and negotiating the Court's activities in their own interests both against their traditional tribal enemies and Pakeha. In order to understand what was going on inside the courtroom, it is necessary to shift away from considering custom as 'authentic' to considering custom as a metaphor deployed by Maori on a collective basis to protect their own tribal interests.

In this thesis, customary rights are defined as a metaphor for complex patterns of interaction. Historians, politicians, ethnographers and others have traditionally considered those rights in terms of an abstraction, a model which can be known, written about and which does not change. This thesis argues that in considering customary rights a metaphor, rather than attempting to define a model of abstract rights, customary rights reflect a practical application of tribal political and civil rights – social, economic and cultural – negotiated in particular circumstances, both geographically and historically. Maori customary rights to land were fundamentally about relationships. That is, how people interacted with each other over access to resources and land. They were always in flux and always subject to debate. This can be seen both in how Maori claimants acted in the courtroom and how the Court responded to the complexity of claims. Understanding Maori customary rights in this sense reflects the struggle faced by politicians, Court officials and scholars attempting to determine and define those rights; they are much less stable and certain.

The large number of competing narratives which are contained in the Court's minute books, in particular, clearly show that customary rights were a metaphor for relationships rather than an abstract model. Thus, on the one hand there are discourses (historical, political and legal) which conceptualise those rights in terms of a model which can be known and defined. On the other, there are the long and detailed narratives recorded by the Court in its practice on the ground, where those rights are a metaphor which undermined attempts to know and define them. This was manifested in two forms: both in the ways claims were argued by Maori and the ways they were resolved by the judge and assessor. The basic concern of this thesis is Maori customary rights to land and knowing an object which was constantly shifting and redefining itself. In this sense then the thesis is not about what can be known of the past but that which cannot be known.

One final note: the spellings of names of people, tribes and kinship groups used in this thesis are those recorded in contemporary documents and may be inconsistent with current usage. The exception is where there is a generally accepted modern spelling and in these cases this spelling has been used. In relation to spellings derived from contemporary documents, some inaccuracy may arise due to difficulties

reading handwritten manuscripts. Every effort has been made to ensure names are accurately transcribed.

PART ONE:

HISTORIES

## APPROACHING THE NATIVE LAND COURT

Historians and other scholars have in the past tended to approach the Native Land Court as an institution which systematically undermined existing Maori customary rights to land and drove the large scale alienation of Maori land which began after 1865 and continued until the early 1920s. While it is important not to simplify or essentialise existing accounts of the Court, they tend to converge at the same point: an interpretation which focused on the alienation of Maori land. The impact of the Court on Maori landownership is not a matter for dispute. Statistics clearly show the flow of land out of Maori ownership during this period was significant. However, Maori tend to be portrayed as the marginalised victims of a judicial process they could neither control nor understand as colonisers took control of new lands and societies with very limited resistance. There are some alternatives to this interpretation which will be examined in detail below.

On the existing approaches to the Court, there are two key points to make. The first is that the focus of many of those who have written about the Court is on its role as the primary agent in alienating Maori from their customary land. The Court is characterised as a frontier where customary rights were quickly and easily converted into a Crown-derived title. The Court's role was clearly defined by colonial politicians – to facilitate the alienation of Maori land. The structure they created in the form of the Court was designed to find and determine Maori customary rights to land and the Court worked rapidly and efficiently to achieve this end. Other than regular demands to do away with the Court, Maori have an extremely marginal role in its activities. Much of this work accepts Maori customary rights to land were a model for colonial officials and politicians to define and impose on Maori for the purposes of appropriating land.

The second key point is the extent to which this work draws heavily on other historical narratives. In particular, there are important parallels between some of the existing approaches to the Court and the various inquiries into its activities in the nineteenth-century, especially the Rees-Carroll Commission of 1891 and its highly critical assessment of the operation of the Court. Another historical narrative upon which existing work on the Court relies is Norman Smith's account of Maori

customary rights to land published in 1942. This is used, in particular, to suggest the Court's view of Maori customary rights to land was simplistic. Both of these texts, and their social and political contexts, will be examined in detail in subsequent chapters. The relationship between the Rees-Carroll Commission and current understandings are examined in greater detail in Chapter 2 by way of introduction to the political debates surrounding the Court and Maori customary rights to land. The significance of Smith's contribution to existing interpretations is discussed in Chapter 8 as an introduction to discussing the operation of the Court on the ground. Overall, by drawing on the several thousand minute books which contain accounts of the evidence given by Maori witnesses during title investigations, aspects of this historiography will be questioned. The argument developed in this thesis will do so by examining, in particular, the struggle faced by colonial politicians and the Court itself in attempting to establish stable and settled title to Maori land together with the role Maori played in the activities of the Court.

Those who have written about the Court in the past have, with some considerable justification, associated the Court with the alienation of Maori land and the destructive consequences of this process for Maori society. Hugh Kawharu famously described the Court as 'a veritable engine of destruction' of Maori customary rights to land.<sup>1</sup> Judith Binney has labelled the Native Land Act 1865 as 'a piece of legislation that was itself an act of war.'<sup>2</sup> Once the Court had determined the owners of a specific block of land, 'the way was open for local settlers to manipulate them into relinquishing their land.'<sup>3</sup> Among Maori, she argues, the Court became known as the 'Land Taking Court' and this is the title of David Williams' history of the Court.<sup>4</sup> Wherever the Court sat, Maori land was alienated. M.P.K. Sorrenson's research took this view one step further, concluding there was a relationship between the Court's adjudication of land, alienation and Maori depopulation.<sup>5</sup>

Alan Ward's account of the Native Land Court, set out in *A Show of Justice*, is the most extensive and coherent critique of the Court and established the framework for current approaches to the Court.<sup>6</sup> Much of the discussion below examines his

<sup>1</sup> I.H. Kawharu, *Maori Land Tenure. Studies of a Changing Institution*, Oxford: Oxford University Press, 1977, p.15.

<sup>2</sup> Judith Binney, Judith Bassett, Erik Olssen, *The People and the Land, Te Tangata me Te Whenua: an Illustrated History of New Zealand, 1820-1920*, Wellington: Bridget Williams Books, 1993, p.143.

<sup>3</sup> *ibid.*

<sup>4</sup> David V. Williams, *Te Kooti Tango Whenua.* *The Native Land Court 1864-1909*, Wellington: Huia, 1999.

<sup>5</sup> M.P.K. Sorrenson, 'Land Purchase Methods and their Effect on Maori Population 1865-1901,' *Journal of Polynesian Society*, 65 (1956), pp.183-99.

<sup>6</sup> Alan Ward, *A Show of Justice. Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland: Auckland University Press, 1973. As will be acknowledged in more detail in the introduction to Part Two, both Chapters 4 and 5 draw heavily on Ward's seminal work on the politics

account of the Court's activities. An earlier piece of work which makes an important contribution to understanding the significance of the Court is Sorrenson's MA thesis.<sup>7</sup> More recently, Bryan Gilling has examined the historiography of the Court and found it severely wanting.<sup>8</sup> He accurately points out that there is very little research to support some of the statements made about 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.'<sup>9</sup> He adds that few critics of the Court have focused particularly on 'its operations and practice, how it actually went about its business of determining Maori land ownership.'<sup>10</sup> He believes the criticism is justified but it tends to be based on anecdote and specific example rather than a 'systematic analysis ... of the Court's works and of the body of law it built up.' However, although he is highly critical of aspects of the existing historiography, especially the lack of research upon which it is founded, he feeds into several of its elements, especially in relation to the impact of the Court on Maori customary rights. His focus on jurisprudence and precedent is misplaced and that is a question addressed in this thesis. His main point though, that historians and other scholars have condemned the Court on the basis of very thin research, is quite valid.

Current approaches to the Court focus primarily on the period from the creation of the first Native Land Court in 1862 to around the time of the death of Sir Donald McLean in 1876. After this time, the Court is no longer seen as a particularly significant institution in considering relations between Maori and Pakeha. More recent research has focused on the politics of the Court during the large-scale Maori land-purchasing programme of the Liberal government during the 1890s and this has further supported existing interpretations.<sup>11</sup> From around 1876 to the early 1890s, however, there has been little written about the role of the Court other than its role in opening up land in areas such as the King Country and the central North Island from which it had previously been excluded by Maori.<sup>12</sup> Ward, in particular, is concerned

and policy of Maori issues in the nineteenth-century to provide a broader political and policy context in which the debates about and nature of native land legislation must be discussed. It should be noted, however, that his view of the Court is, on several fundamental points, substantially different to that argued in this thesis.

<sup>7</sup> M.F.K. Sorrenson, 'The Purchase of Maori Lands, 1865-1892,' MA Thesis, Auckland University College, 1955.

<sup>8</sup> Bryan D. Gilling, 'Engine of Destruction? An Introduction to the History of the Maori Land Court,' *Victoria University of Wellington Law Review*, 24:2 (1994), pp.115-39.

<sup>9</sup> *ibid.*, p.116.

<sup>10</sup> *ibid.*, p.125.

<sup>11</sup> Tom Brooking, "'Busting Up" the Greatest Estate of All. Liberal Maori Land Policy, 1891-1911,' *New Zealand Journal of History*, 26:2 (October 1992), pp.78-98.

<sup>12</sup> Sorrenson, 'The Purchase of Maori Lands,' pp.110-13 and 121-24.

primarily with the first fourteen years of the Court's existence and he develops three specific themes. They are the juxtaposition of three different statutes, one in 1862, another in 1865 and the third in 1873. Giving coherence to this juxtaposition, and the second theme, is the role of the first chief judge, F.D. Fenton. The third and final theme is the role of the Court in relation to the alienation of Maori land. Although these three characteristics can be identified in Ward's interpretation of the Court they are all intimately related and in discussing his approach, they will be identified but not examined in isolation.

Fenton is the individual who dominates both the creation and operation of the Court. Ward argues Fenton 'was eventually to have a fateful influence on the whole future of Maori land legislation' and that he 'was given virtually a free hand in reorganising the Court and making appointments, and promptly used it.'<sup>13</sup> Fenton was central to the creation of a Court which was designed expressly for the purpose of facilitating the alienation of Maori land.

On the question of the background to the establishment of the Court, Sorrenson argues that that it emerged out of a period of profound conflict between Maori and Pakeha over land and continued the previous policy of acquiring Maori land. Growing inter-tribal tension and opposition among Maori to Crown purchase activities were based on an insistence that individual rights could not be purchased and that there was a right of chiefly veto. Maori defeat in the wars meant that it was not possible for resistance to 'individual dealing' to continue. The Native Land Acts simply 'continued the transition from tribal to individual dealing.'<sup>14</sup> They converted Maori communal rights into individual titles. The creation of the Court and the formation of a new alienation regime which permitted private purchase was supported by all parts of settler society. These changes were designed to simplify the process of direct purchase. Sorrenson concludes these changes were designed to remove delays and reduce complications to allow rapid alienation.

Once legislation creating a Court was in place, Ward focuses on the differences between the Court envisaged by the first Native Lands Act 1862 and that established by the Native Lands Act 1865. He characterises the 1862 legislation establishing an institutional framework in which Maori leaders of a specific district collaborated with the local Resident Magistrate to reach agreement on boundaries of land in their district. Ward argues it was this kind of Court with 'the key role being played by the Maori leaders of the district wherein the land was situated,' that the Weld Ministry wanted to create. However, following his appointment as chief judge 'Fenton abandoned this idea.'<sup>15</sup> He now wanted a Court similar to the Supreme Court

<sup>13</sup> Ward, p.180.

<sup>14</sup> Sorrenson, p.10.

<sup>15</sup> Ward, p.180.

‘whereby a roving Judge could site in any centre, summon witnesses, hear evidence and hand down a judgment with due pomp and formality.’ The structure originally envisaged in the 1862 legislation was rapidly dismembered as Fenton went about creating the sort of institution he wanted.

Fenton fundamentally changed the Court and Ward suggests that the desire to enhance the status of the judges and the Court was partly a product of Fenton’s ‘own ambition and vanity.’<sup>16</sup> There were also concerns that if chiefs interested in a claim were involved in its adjudication, agreement on boundaries would never be reached, and it was believed ‘that the only way to gain quick determination of the issue was for a Pakeha Judge to hand down an authoritative decision.’<sup>17</sup> Gilling adopts a similar view. He argues that the differences between the 1865 legislation and its earlier 1862 incarnation were because ‘settler and Government attitudes had ... hardened and the new Act reflected those changes in its much stronger emphasis on Pakeha judicial procedures and settlement-driven objectives.’<sup>18</sup>

Connected to his focus on the 1862 statute, Ward emphasises the failed rearguard action by ‘humanitarians’ to retain the Court structure laid out in the 1862 Act.<sup>19</sup> The advice of the former Chief Justice, Sir William Martin, was ignored because his view of a land court was very different to that of Fenton’s: he wanted to maintain the approach created by the 1862 statute whereby the court was constituted by a panel of local chiefs. However, the 1865 Act essentially endorsed the Court Fenton had developed since his appointment. The problem was that the process was not straightforward.<sup>20</sup> Ward suggests there were a number of examples where Pakeha officials acting as arbitrators were able to gain agreement from all Maori claimants where rights to land were disputed. Along with a panel of local Maori leaders, a neutral official was able to move debates beyond traditional politics and self-interest. Moreover, he believes local Maori leaders, constituting the ‘court,’ would have ensured on the basis of their knowledge of the district, that false claims and evidence were exposed.

The problem, Ward argues, was that the process was time-consuming and difficult.<sup>21</sup> It required that agreement be reached and this could only be done slowly and without pressure. The purchasers of Maori land did not want to delay. The Court, as established by Fenton with the support of colonial politicians, was to hear evidence and give a decision as quickly as possible. Once adjudicated, the land was

<sup>16</sup> *ibid.*, p.181.

<sup>17</sup> *ibid.*

<sup>18</sup> Gilling, pp.123-4.

<sup>19</sup> Ward, p.185.

<sup>20</sup> *ibid.*, p.181.

<sup>21</sup> *ibid.*, p.182.

expected to be alienated. In consequence, Ward argues, the Court developed by Fenton was designed to facilitate the alienation of Maori land.<sup>22</sup> By juxtaposing the 1862 model of a court with the Court established in 1865, he finds the latter severely wanting in terms of the role of Maori and the demands of settlers for rapid resolution of titles.

Fenton was also central to the early development of the Court, especially in relation to his struggle with Donald McLean over the administration of native affairs. According to Ward, while Fenton wanted to acquire for his Court as much influence as possible over Maori policy, this collided with McLean's desire to expand the work of the Native Department. McLean's attempts to restrict Fenton's interference in native policy and provide Maori with reserves, place restrictions on alienations and ensure transactions were not fraudulent, were simply ignored by Fenton. The chief judge did all he could to defend his Court, 'to the extent of deliberately trying to frustrate legislation.'<sup>23</sup> This intransigence was a matter of fundamental principle: he believed Maori should be responsible for their own property and that this was not the duty of the legislature. Ward argues that Fenton's focus was on the destruction of Maori communal ownership. He opposed the introduction of restrictions on alienations and 'continued to foster the ten-owner system, publicly expounding the view that the principal men of each hapu should be established in property and allowed to live as gentry, while the remainder were compelled to labour for a living.'<sup>24</sup>

Nowhere is the tension between McLean and Fenton over the place of the Court clearer than in their discussions over the Native Land Act 1873 and again Ward juxtaposes McLean's restructured Court of 1873 with Fenton's second Court of 1865. From 1870 to 1873, McLean considered fundamental changes to native land legislation and these reviews are central to Ward's approach.<sup>25</sup> Proposed new legislation designed to regulate the alienation of Maori land was condemned by Fenton who believed they would undermine the authority of the Court and 'reduce it to the role of negotiator, land broker and auction room.'<sup>26</sup> Ward argues that the evidence of Maori witnesses presented during Haultain's review showed many 'favoured settling titles among themselves through a form of traditional runanga and

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.*, p.252.

<sup>24</sup> *ibid.*, p.216.

<sup>25</sup> They included a review of the Court conducted by T.M. Haultain and the Royal Commission chaired by Mr Justice Richmond which investigated 'notorious' Hawkes Bay transactions submitted similar conclusions. McLean also received a number of reports over this period from various officials whom he asked to investigate the activities of the Court and a number of Maori complaints including H.T. Clarke, Sir William Martin and Edward Shortland.

<sup>26</sup> Ward, p.254.

bringing their decision to the Court to secure the requisite confirmation and authoritative support' – that is, the model of the court proposed in the legislation of 1862.<sup>27</sup>

Instead, the final Native Land Act 1873 re-established the Native Land Court and the powers of the judges as before.<sup>28</sup> However, Ward emphasises the most important change associated with the new statute was its impact on the alienation of land. The ten-owner system, applied from 1865 to 1873, was replaced by a memorial of ownership. All the owners of a block were supposed to be included in this memorial. The change made the purchase of land 'laborious, time-consuming and expensive.'<sup>29</sup> A prospective purchaser had to have all those listed in the memorial sign the transfer document. Statutory provisions made the Crown's job a little easier: this was significant at a time when the Vogel schemes involving immigration and public works were contributing to a high demand for Maori land and caused the re-introduction of large scale Crown purchase.<sup>30</sup> In Ward's interpretation, McLean's Court created in 1873 was a moderate improvement in terms of slowing down alienation but its impact was still limited as Fenton did all he could to obstruct its implementation.

The early development of the Court is one of Ward's primary concerns. Fenton is central to the creation of a Court designed to appropriate land from Maori in the fastest and easiest way possible. McLean, in response, struggled to protect Maori interests and prevent the wholesale alienation of their land through the creation of reserves and legislation preventing fraudulent transactions. The Court is central to the rapid alienation of Maori land. Its creation is characterised as the product of intense lobbying by Auckland-based land speculators.<sup>31</sup> This is because once owners were determined and Crown grants issued, the land could be purchased by the Crown or settlers. Crown grants let purchasers 'deal with individual proprietors instead of a relatively amorphous and undifferentiated group of tribal owners.'<sup>32</sup>

The type of Court Fenton established and the place of Pakeha speculators in it, as well as driving alienation, wreaked havoc upon local Maori communities. This is a significant component of the approaches developed by Ward, Sorrenson and others. For example, because the Court usually only sat in central locations, claimants

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*, pp.254-5.

<sup>29</sup> Peter Spiller, Jeremy Finn, and Richard Boast, *A New Zealand Legal History*, Brooker's: Wellington, 1995, p.150.

<sup>30</sup> Sorrenson, 'The Purchase of Maori Lands,' p.67. The Crown could apply to the Native Land Court for a partition order in respect of the shares that it had purchased. Blocks were then split in two, one for the non-sellers and the other for the Crown.

<sup>31</sup> Ward, p.187.

<sup>32</sup> Gilling, p.125.

attending were forced either to rely on the generosity and hospitality of the local tribe or kinship group or run up massive accounts with local shopkeepers. Court sittings were not well advertised and this was another problem. Since the judges could only hear evidence presented in Court claimants might wait some time before their case was heard but they could not leave for fear they would be called. Those who were not present or absented themselves could find their land awarded to a rival claimant group. Ward has found cases where Maori actually living on the land may not have known that it had been adjudicated by the Court. Moreover, they only found out 'when settlers appeared to occupy it, having purchased from those the Court found as owners.'<sup>33</sup> In addition to living expenses associated with attending Court hearings money was also required to pay the costs of the hearing, lawyers, land agents and surveyors. The result was that Maori claimants had to sell land to meet the costs of pushing land through the Court: the operation of the Court itself led to the alienation of land.

Of greater significance, however, was the level of speculation associated with the alienation of Maori land in the period immediately after the creation of the Court. Settlers were able to negotiate directly with Maori landowners and in consequence, Ward argues, Maori were 'exposed to a thirty-year period during which a predatory horde of storekeepers, grog-sellers, surveyors, lawyers, land agents and money-lenders made advances to rival groups of Maori claimants to land, pressed the claim of their faction in the Courts and recouped the costs in land.'<sup>34</sup> For this reason, R.C.J. Stone has described Cambridge as 'the notorious Maori Land Court town.'<sup>35</sup> A major problem was associated with the decision to allocate ten owners to each block. This meant that the needs of the wider hapu were ignored, while purchasers found it easier to acquire all the interests in a block from a small number of owners particularly through the use of credit.<sup>36</sup> On this issue, considerable emphasis has been placed on the findings of the Richmond Commission in the Hawkes Bay which identified these problems in transactions there.

Sorrenson argues that it was European purchasers, not Maori landowners wanting to sell land, who made use of the Court. That is, 'Europeans who started negotiations for land before it had been before the Court, were the main influences behind taking the land before the Court.'<sup>37</sup> Moreover, where there were two or more purchasers competing to purchase land 'they made strenuous efforts to prove the

<sup>33</sup> Ward, p.213.

<sup>34</sup> *ibid.*, p.185-6.

<sup>35</sup> R.C.J. Stone, *Makers of Fortune. A Colonial Business Community and its Fall*, Auckland: Auckland University Press and Oxford University Press, 1973, p.142.

<sup>36</sup> Ward, p.213.

<sup>37</sup> Sorrenson, 'The Purchase of Maori Lands,' p.190.

superiority of the claims of the Maoris they had dealt with.’<sup>38</sup> Lawyers were retained by purchasers to argue cases, nominally on behalf of the Maori claimants. Rehearings as a result of such competition were also common. The Court was an environment controlled by Pakeha where Maori were highly marginal figures whose only role was to claim and convey land.

If the Court’s destructive consequences on Maori landownership and Maori communities were the focus of Ward and Sorrenson in particular, then others have emphasised its role in modifying and simplifying Maori customary rights to land. The Court, in carrying out its functions, was required to take account of Maori customary rights. It is widely accepted that Maori customary rights to land and its resources were diverse and complex. However, the Court, in its role as the ‘Land Taking Court,’ did not appreciate the subtlety of these patterns of rights in its desire to allocate owners as quickly as possible. As Binney argues: ‘This legal framework was not Maori practice, although it purported to be based on it.’<sup>39</sup> It developed a system of precedent for determining ownership of land and rigorously applied strict and inflexible rules to claims to exclude certain groups of owners in favour of others.

Gilling, for example, argues that ‘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.’<sup>40</sup> Many historians and other scholars condemn, in particular, the requirement that judges only consider evidence presented to them in Court as it provided a basis for fraudulent activity.<sup>41</sup> Along with the Papakura rule on succession – where Fenton decided that succession would be according to English rules of descent ‘as can be secured without violently shocking Maori prejudices’ – there was the 1840 rule which was used to reject claims based on conquest after 1840.<sup>42</sup> A further set of rules were developed by which the Court made decisions. These related to the statutory provision that it ‘be guided by Maori “customs and usages”’ and the generally accepted view is that there were four principal take or rights which were used to determine the validity of an individuals claims to land ownership.<sup>43</sup> The Court, however, accorded the greatest importance to evidence of occupation on which a claim was founded.

On the impact of the Court on Maori customary rights to land, Ward makes reference to Fenton’s express intention to break up the system of communal

<sup>38</sup> *ibid.*, p. 191.

<sup>39</sup> Binney, p.144.

<sup>40</sup> Gilling, p.126.

<sup>41</sup> *ibid.*, p.127.

<sup>42</sup> Ward, p.187; Gilling, p.126.

<sup>43</sup> Gilling, p.128.

ownership and create an aristocracy of Maori chiefs; other Maori were to become wage labourers.<sup>44</sup> Gilling supports this view by drawing on the rhetoric of colonial politicians who linked the Court to the 'civilisation' of Maori. This would be achieved by breaking 'down the communal nature of traditional Maori society, thus diluting the coherence of cultural opposition to European mores.'<sup>45</sup> The same politicians considered the individualisation of title essential to encourage Maori to develop their land and sell what they could not use profitably. Even applications to the Court operated to undermine collective interests. While title was supposed to be determined on the basis of customary practices, individuals could take land to the Court; applications were not collective. That is, customary rights could be converted to individual rights without tribal consent.

Nevertheless, at the same time as the Court was undermining Maori customary land tenure and society, Binney argues it operated to foster traditional rivalries. Chiefs could use the Court to assert claims to disputed land and the opportunity to sell or lease the land became proof of a claim. In Binney's view: 'A cockpit had been created in which Maori quarrels and competition could flourish.'<sup>46</sup> The contradiction is significant: the Court had a major destructive impact on Maori customary rights to land and yet when Maori claimants used the Court to continue disputes with long histories, this was just as destructive. Maori agency within the Court was just as problematic as Maori marginalisation.

There is one major body of work which challenges this view of Maori agency in the Court. Ann Parsonson's PhD thesis and two articles drawn from the thesis, unlike much of the other work already discussed, makes extensive use of the evidence given by witnesses at Court hearings in the late nineteenth-century.<sup>47</sup> The principal argument in her study of competitive Maori society attempts:

to show how rights of usage were established, how they were maintained, and how quarrels over claims arose. It distinguishes between age-old methods of affirming claims, and those newly developed during the forty or so years of change which preceded the establishment of the Court. For the Maori had so far adapted their thinking to the requirements of an age of literacy, of litigation, and of a new

<sup>44</sup> Ward, p.254.

<sup>45</sup> Gilling, p.122.

<sup>46</sup> *ibid.*, p.143.

<sup>47</sup> Ann Parsonson, 'He Whenua Te Utu,' PhD Thesis, University of Canterbury, 1978; 'The Expansion of a Competitive Society. A Study in Nineteenth Century Maori Social History,' *New Zealand Journal of History*, 14:1 (April 1980), pp.45-60; and, 'The Pursuit of Mana,' in *The Oxford History of New Zealand*, W.H. Oliver with Bridget Williams (eds), Wellington: Clarendon Press, 1981, pp.140-67. Her much more recent work examines the ways witnesses used oral traditions to argue their claims to land during the Rohe Potae title investigations. See 'Stories for Land: Oral Narratives in the Maori Land Court,' in *Telling Stories. Indigenous History and Memory in Australia and New Zealand*, Bain Attwood and Fiona Magowan (eds), Wellington: Bridget Williams Books, 2001, pp.21-40.

landscape, that they came to construct Court cases in which the old and the new were unobtrusively amalgamated.<sup>48</sup>

Parsonson accepts that the Court did have an underlying political function and that cases were prepared for the purposes of convincing a Pakeha judge of a claim to land. This included the manufacture of evidence. In some cases evidence 'was so contradictory that the judges occasionally came close to despair.'<sup>49</sup>

However, Parsonson argues that such a consideration should not obscure the essential nature of the Court. It 'was run by the Maori litigants themselves, according to their own principles. Though they used the new terminology, and categories, and shifted the emphasis of their presentation accordingly, they brought forward their own sort of evidence, in their own way.'<sup>50</sup> Moreover, she does not accept that the Court fostered disputes. Rather it became the forum in which these disputes – which were long standing – could be debated. And the ways in which they were discussed in the Court were similar to the ways in which they were discussed on the marae. This is a very different view of the Court in which Maori are portrayed as active participants in the process of defining land rights rather than as passive victims of an entirely alien institution.

This thesis adopts much of Parsonson's approach to the Court as its starting point but develops her approach in a quite different way. She is more concerned with using the evidence presented by witnesses for the purposes of examining the continuing impact of custom following initial contact between Maori and Pakeha. That is, she uses the evidence as an historical source to examine a past; the evidence is used in a very different context to explore and explain the particular events referred to by witnesses. In contrast, this thesis focuses primarily on the operation of disputes and debates in terms of the dynamics of the Court. The evidence presented by witnesses is analysed, not so much in terms of its actual content and what it says about the past (although this is extremely important), but in terms of what it reveals about the operation both of the Court and Maori customary rights to land.

Parsonson's work is the only sustained attempt to re-assess the place of the Court in New Zealand history. There is other recent work on the Court but it tends not to challenge this historiography. Angela Ballara's doctoral work on Ngati Kahungunu for example draws extensively on the minute books for the purposes of re-constructing a past; that referred to by witnesses in the evidence they gave in

<sup>48</sup> Parsonson, 'He Whenua Te Utu,' p.60.

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*

support of their claims to land.<sup>51</sup> That, like Parsonson, is her primary concern, rather than the operation of the Court itself.

Her subsequent book, *Iwi*, is a seminal work which examines change in Maori social organisation in response to European expansion since first contact. It is a subtle and thoughtful re-assessment of the traditional historical and anthropological scholarship which characterised Maori social organisation as static and unchanging. This traditional view emphasises the hierarchical organisation of tribes into waka, iwi, hapu and whanau in which iwi were made up of hapu and each hapu lived within their own clearly defined communally-owned territory. Any change in response to European contact was destructive.<sup>52</sup> In contrast, Ballara argues that 'the Maori political and social system was always dynamic, continuously modified in response to such phenomena as environmental change and population expansion.' Further, she argues that Maori responded to the arrival of Europeans in ways which 'were both pragmatic solutions to problems posed by the changing ecology, and innovative responses inherent in an adaptive culture.'

She draws extensively on the minute books, together with other official documents and manuscript material, again to reconstruct a past rather than consider the operation of the Court. To be fair to Ballara, her stated focus is not the Court but Maori social organisation. Its impact on the evidence she uses is examined to some extent, however, and her interpretation tends to rely on current approaches. She is particularly critical, for example, of the judges tendency to 'adopt a structural framework to simplify their task' and argues 'their expressed prejudices conveyed messages to Maori claimants.'<sup>53</sup> She concludes that Maori witnesses, while not fabricating evidence, 'subtly reinterpreted [their evidence] to the Court's requirements.'<sup>54</sup> In asserting these points, however, Ballara does not provide convincing evidence in support of them or at least show how evidence was re-organised to meet the 'prejudices' of judges. An alternative view, which emphasises the strength of narratives presented by witnesses in evidence and continuity over time, is argued in Part Three of this thesis.

Another recent examination of the Court is David Williams' history. It draws directly on and does not challenge the existing historiography. His work, however, feeds into a newer discourse and that is the Treaty-claims process administered by the

<sup>51</sup> Angela Ballara, 'The Origins of Ngati Kahungunu,' PhD Thesis, Victoria University of Wellington, 1991.

<sup>52</sup> Angela Ballara, *Iwi. The Dynamics of Maori Tribal Organisation from c.1769 to c.1945*, Wellington: Victoria University Press, 1998, p.21.

<sup>53</sup> *ibid.*, pp.88-92.

<sup>54</sup> *ibid.*, p.92. See also Jeffrey Sissons, *Te Waimana. The Spring of Mana. Tuhoe History and the Colonial Encounter*, Dunedin: University of Otago Press, 1991, pp.60-106. Sissons argues dynamics in the process of claiming land in the Court 'systematically distorted' Tuhoe 'traditions.'

Waitangi Tribunal. He draws extensively on accepted understandings and more recent research prepared in support of claims to the Tribunal to argue that the Court and its judges were agents of the Crown and not an independent or impartial judicial institution. He uses history to assert his legal argument but does not produce any new research in support of it. The Tribunal was established for the purposes of determining whether acts or omissions of the Crown breached the principles of the Treaty of Waitangi. In doing so, it must characterise Maori as victims of colonisation and Williams' work, based on the existing historiography, feeds into this discourse of New Zealand history.

The Waitangi Tribunal's own research programme, which produced a number of reports known collectively as the 'Rangahaua Whanui Series,' also deals with the Court. However, as with Williams' book, the particular focus of these reports is narrow, concerned as they are specifically with the activities of the Crown. Although some draw on the minute books of the Court in their research, in order to explain the particular experience of individual blocks of land, they draw on the existing historiography and do not challenge it in any significant way. For this reason, and because the questions addressed in this thesis are much larger than just the Crown's role, many of these reports are of limited relevance here.

In summary, current approaches to the Court tend to emphasise the destructive consequences of its operation – in its impact on local Maori communities, on custom and in the alienation of land. They focus on the fourteen years following the establishment of the Court, particularly Fenton's role in creating and managing the Court during this time. The model of the Court established in 1865 is compared unfavourably with that proposed in the statute of 1862. The new Court was designed by Fenton to facilitate the rapid alienation of Maori land through individualised title which undermined the very communal nature of Maori social organisation – a continuation of the very pattern which had led to war at Waitara. Speculation in Maori land was the product of the Court as Pakeha took advantage of inexperienced landowners or engaged in fraudulent practices to obtain the land. Speculators controlled what happened in the Court and Maori claimants were their puppets.

These problems were exacerbated by the high costs of attending Court and having title to land investigated. Such costs were destructive for Maori communities who bore the full cost and often had to sell land in consequence. McLean's attempts to limit the damage with new legislation in 1873 were futile because Fenton did all he could to frustrate them. As for the continuing impact of the Court on Maori customary rights to land, its rule-bound approach to custom was built on a rigid system of precedent fundamentally at odds with the flexible and layered nature of those rights. The Court's approach was a direct assault on custom and this is linked to the expressed statements of Fenton and colonial politicians in favour of undermining Maori communal social organisation.

One of the possible reasons for such an interpretation is the availability of official published papers, especially the Royal Commission on Native Land Laws of 1891 and the massive appendices of evidence given by witnesses which were printed in their entirety, and only glances fleetingly at the Court's minute books, if at all. The same point can be illustrated with reference to the emphasis placed on the establishment and early development of the Court during the nineteenth-century. Some work relies heavily on a number of reports from investigations and correspondence between officials published in the annual volumes of *Appendix to the Journals of the House of Representatives* during this time. Most were set up to review the Court and prepare the Native Land Act 1873 and after this statute was enacted, the Court is of marginal interest to historians. Likewise, consideration of the impact of the Court on Maori customary rights reflects the work of Norman Smith and his four take. Both Rees and Smith are fundamental to understanding the current approaches to the Court and both have had a significant impact on interpretations of its operation. Past understandings of the Court have vitally affected how the Court has been understood.

There is no doubt that the Court had a significant and detrimental impact on Maori land ownership and this had profound future implications in terms of the capacity of tribal groups to participate in the colonial economy. This does not mean, however, that the process was straight forward, rapid, or simple to execute. To explain the alienation of Maori land, it is necessary to distinguish between the Court's investigation of title and its award of title. The Court was an institution where customary relationships over land could continue to be negotiated. This process of negotiation did not necessarily cease with the decision of the Court because discussion over lists of names and debate over whakapapa and use or occupation rights was a means by which those whose claims were rejected by the Court could still be recognised.

However, once a legally binding certificate listing the absolute owners was issued by the Court, the ground was laid for a very different future: the process of negotiating relationships, while it could continue through rehearings, appeals, petition and partition hearings, was fundamentally changed. The Court could now only hear those whose names were included in the title; those who had previously asserted an interest in the land through a relationship of whatever kind and had traditionally participated in negotiating relationships over the land, but whose names were not on the title, were excluded.

On questions relating to the continuing management of the land, such as sale, these groups of people could in some instances still attempt to influence decisions through the continuing control of existing customary relationships. But because the title privileged the individual's rights, to the exclusion of the collective interest, they were not legally enforceable and individual owners could and did take independent action. It was the structure and operation of the title created by the Court which had

the most adverse impact on the landholdings of the Maori rather than the Court itself. Equally important was the relentless and persistent policy of acquiring Maori land after 1865 which continued for over a century until the mid-1970s. The widespread acquisition of Maori land was not rapid and completed in one or two decades after the Court was created; it was a much longer-term process.

The continuing impact of custom should not be understated: it would be absurd to suggest that as soon as people received individual awards they immediately acted as individuals. Such relationships which are evident in the Court hearings could not be undermined so easily. Even today Maori landowners often act in customary ways in the land which they have been able to retain. The same debates over rights continue when for example establishing trusts or appointing trustees to manage lands. Nevertheless, when the title was issued the relationship was frozen in time. Only those included and those who succeeded to their interests could, from that point on, be recognised as having an interest in the land. The flux and fluidity of Maori customary rights to land was swept away: shifts in relationships and rights were no longer recognised when the Court issued a title.

While the adverse impact of colonisation on Maori land ownership must be acknowledged, some of the current interpretations of the Court are somewhat simplistic and, to some extent, feed into an 'imperial' approach to New Zealand history. Traditional 'imperial' history was about European expansion: European exploration, discovery and imperial politics, including rivalry over colonies. Imperial history assumed European superiority and considered colonial control an outcome of annexation. As for indigenous peoples, they were stereotyped, backward and uncivilised primitives. Victims of European civilisation and expansion, indigenous peoples were historical actors only in their contact with missionaries and other agents of Christianity.

Certainly this 'imperial' approach does not accurately reflect how Maori have been incorporated into New Zealand history since around 1960. The role of Maori in the process of colonisation has been the subject of pioneering research and scholarship by, among others, Ward, Sorrenson and Binney. The shift has been significant. However, it has not been universal and in relation to the Court specifically, the analysis still portrays Maori as victims. The Court itself was the frontier in New Zealand history: once the troops were withdrawn and a hesitant peace established, it was sent in to establish the owners of defined blocks of land which could then be alienated. The Court was an institution intimately linked to military violence and dispossession; it rapidly ploughed through Maori customary rights to land and Maori landownership in a systematic and efficient way. The economic base on which Maori communities survived was acquired from them through the Court and this led to serious social, economic and cultural dislocation. Maori themselves were powerless and were generally coerced into the process despite considerable

opposition. They were victims of the Court and had no capacity to engage actively with or respond to its aggressive and destructive activities.

This thesis will take a different approach. To characterise the Court as an efficient institution is to ignore how contingent and complex the process of negotiating the conversion of communal customary rights to Crown-derived individual rights actually was. It is too simplistic to suggest that the process of coming to terms with Maori customary rights was easily achieved, effective and total. Moreover, portraying Maori as victims of the Court, who were powerless in the face of its oppressive and destructive activities, ignores the extent to which they tried to use the system to protect and preserve their tribal interests.

An important element of the approach of this thesis relates to the very nature of what is 'culture.' It is argued that an approach to 'culture' which is characterised by an either/or dichotomy based on 'authenticity' is not a productive way of thinking about what was happening when people interacted in a colonial context. This thesis will focus on the production of culture: what happened when people interacted in the Court. The Court is no longer the frontier in New Zealand history but a place where negotiation and communication occurred.

Moreover, the relationship between Maori and Pakeha cannot be characterised simply in terms of domination and subjugation. The Court was fundamental in creating a cultural space for Pakeha out of a physical space because its primary concern was Maori land: the land had to be authoritatively known so it could be acquired. However this was not simply a matter of Pakeha domination of Maori. Rather it was part of this process of negotiation between Maori and Pakeha and its success was always ambivalent and contingent. Certainly a Pakeha judge, clerk and perhaps lawyers were present, but the Court was essentially a location where Maori interacted with each other and a Pakeha judicial process. It was also, more importantly, a place where Maori interacted with each other to debate rights to land and resources. In this sense, the Court was not so much a means by which Maori were subjugated by the colonial state as it was a forum where very old debates between distinct tribal or kinship groups could continue. The Court, therefore, was an institution established to lay out boundaries on the land and a space where negotiation and discussion between Maori and Maori as well as between Maori and Pakeha could occur.

By using an alternative approach, one which focuses on Maori participation and agency inside the courtroom and conceptualises authenticity, contact and the frontier in these terms, this thesis challenges some of the fundamental elements of the existing interpretations of the Court. In particular, it questions the authority of the Rees-Carroll Commission by locating the commission in the political environment of the 1880s and 1890s, and challenges the significance attached to Smith's model of Maori customary rights to land by examining the context in which Smith produced his

texts. This thesis assesses the attempts by colonial politicians to establish a regime for defining Maori customary rights to land in a stable and settled title for the purposes of alienation. It argues they were never entirely successful and always struggled to locate a lasting solution; that the late nineteenth and early twentieth-centuries were a period of constant experimentation and re-invention in response to crises. It explores the way Maori used the Court to assert their claims to land to preserve and protect the interests of their tribe or kinship group. It examines the confusion of judges and assessors as they attempted to resolve disputed claims and establish a title to Maori land. Finally, it discusses the continuing difficulties caused by interaction between the title created by the Court and Maori custom over decades as a bureaucracy attempted to administer the land remaining in Maori ownership after 1928.

**PART TWO:**

**POLITICS**

## INTRODUCTION

In Part Two, it is argued colonial politicians and officials struggled to find a way of dealing with the complexity of Maori customary rights to land through the nineteenth and early twentieth-centuries. The first manifestation of this struggle was the increasing difficulties associated with acquiring Maori land under Crown pre-emption in the 1840s and 1850s. Where problems arose, a new system was introduced and used until its own limitations precluded the large-scale alienation of Maori land. With the creation of the Native Land Court in 1862 and its widespread application from 1865, a new system was established in response to problems associated with Grey's pre-emption purchases. This did not, however, end the struggle of dealing with Maori customary rights to land. Throughout the nineteenth-century and well into the twentieth-century, the Court was regularly re-invented in response to problems and the policy priorities of different governments. This struggle is also reflected in the volume and complexity of native land legislation through the period.

Debates in the nineteenth-century regarding native land legislation show an overwhelming consensus of opinion among politicians on all sides of the political spectrum to use the Court to establish clear title to Maori land for the purposes of negotiating its acquisition. Politicians and officials tried to impose order on Maori customary rights and searched for a way to define those rights quickly, effectively and certainly in a stable and settled title. The Court did provide such a title for alienation but only in the short term – each approach worked for a time and in the process Maori land was successfully acquired. But as problems emerged and the flow of land declined, it had to be regularly re-invented to ensure continuing alienation.

Later principal statutes and amendments to them were designed to deal with problems which precluded the acquisition and settlement of Maori land and reflected the broader policy aims of the government in power. Thus, the Native Land Act 1873 was structured in a way which saw the Crown negotiating and purchasing Maori land for settlement as part of the immigration and public works programmes of Julius Vogel. The election of the Hall government in late 1879 and appointment of John Bryce as Native Minister brought another shift in policy and new native land legislation which saw the government playing a more limited role in Maori land purchase. The Crown balance sheets were at that time severely undermined by the high level of debt accrued through the Vogel schemes and Bryce limited himself to a very low cost Court and policing (with a degree of stringency) private purchase activities.

John Ballance, appointed Native Minister in the Stout-Vogel government in 1884, in contrast wanted the Crown to administer the process of acquiring Maori land and opening it for settlement. The problem that had emerged was not so much that private purchasers could not acquire Maori land but that speculators were unwilling or unable to divide the land for settlement, either because they were holding on to the land for capital gains or because of the cost. Anticipating the rhetoric of the Liberal government of which it was a predecessor, the Stout-Vogel government wanted to get men onto small farms, and having speculators acquiring and then holding on to large blocks of Maori land prevented the effective implementation of this policy.

The Atkinson government returned in 1887 with Edwin Mitchelson as Native Minister who brought the emphasis back to private purchasers, primarily because the government still had no money with which to buy land. In fact the new government made acquiring undivided interests in Maori land much easier under the Native Land Act Amendment Act 1888. The election of the Liberal government in 1891 coincided with a period of major economic expansion and this allowed a return to substantial Crown purchase activity and so in 1894 almost all private purchase was prohibited. Like Ballance in the mid-1880s, Seddon's Liberal government in the mid-1890s shut down private purchase because speculators were holding on to land they wanted for small farms.

In all these instances, the shift in policy was designed specifically to deal with the problems which arose from acquiring Maori land and making it available for settlement. There was increasing concern in the early twentieth-century that Maori were very close to losing all their land. The Liberal government, and in particular the Native Minister, James Carroll, were worried about this possibility because Maori could become a burden on the State – the very outcome the Liberals wanted to avoid through their small farms policy. This concern, however, did not have any effect on policy because before anything could be done the policy changed as Massey's Reform government, with William Herries as Native Minister, was elected. Maintaining only limited procedural protections, Herries was more than happy for Maori to continue to sell what little land was left. This shift was embodied in the Native Land Laws Amendment Act 1913. Once again, there was a new government with new legislation and a new direction for the Native Land Court and the system of purchasing Maori land.

The period of the Reform government was also one of transition for the Court. The Court shifted from dealing with Maori customary rights to land primarily through original title investigations to dealing with customary rights through the administration of land still in Maori ownership. This transition was almost completed by 1928 when Apirana Ngata was appointed Native Minister. The alienation of Maori land continued until the mid-1970s but there was also a concerted effort to develop Maori land to make it productive and return a profit to owners. However, the title created by the Court became highly problematic: fragmented into unprofitable

farming units through partition and choked by huge number of owners as generation after generation succeeded to the interests of their elders. The interaction between the title system and custom over many decades caused major problems in attempting to make land productive which required strict bureaucratic control. This was found impossible and title was anything but stable and settled. Where land was retained in Maori ownership, the problems were just as intractable. Just as nineteenth-century politicians and officials struggled to find a structure for effectively dealing with Maori customary rights to land in a way which defined those rights clearly, so too did officials and politicians in the twentieth-century. The policy context was quite different – twentieth-century officials and politicians were increasingly trying to administer Maori land in Maori ownership – but the struggle was very much the same.

There was until 1920 at least, as noted above, an assumption that Maori would not retain the majority of their land. Some land might be set aside for occupation and cultivation but by 1913, even this view was dismissed. Instead, Maori land would be acquired, whether privately or by the Crown, and that land would be divided and settled by small farmers. How that land would be acquired, and how Maori should be dealt with in the process, was never decisively determined, and this in part underpinned nineteenth-century colonial politics. Proposals for acquiring Maori land were always tentative and experimental.

This trend continued after 1862 with the regular re-invention of the Court throughout the rest of the nineteenth-century and the constant flow of amending legislation. As well as reflecting shifting policy priorities, the regular re-invention of the Court was also a response to Maori participation in the process. This is because it became more difficult, over time, to establish a firm and certain title which was not subject to constant rehearing and appeal. Another key consideration was that the number of owners included in titles, especially for large blocks, grew considerably towards the end of the nineteenth-century making the mechanics of negotiation that much more time-consuming and difficult.

Both created crises as early as 1880 when unstable titles and the growing numbers of people included in titles began seriously choking off the large-scale alienation of Maori land. Thereafter, a period of considerable experimentation in dealing with Maori land developed as, at about six year intervals, new structures were created in an attempt to deal with the problem. None lasted long as none could provide the solution wanted. It is argued that colonial politicians and officials struggled to find the mechanism for rendering Maori customary rights to land fixed and certain. Part Two examines their experiments, focusing primarily on the Court and the re-invention of the Court as their experiments failed.

The following chapter discusses the Royal Commission on Native Land Legislation and questions the generally accepted starting point for considering debates among politicians and officials about Maori customary rights to land and how those

rights could be transferred either to the Crown or Pakeha purchasers. The subsequent chapters are arranged chronologically. Chapter 3 gives background to the establishment of the Court and examines these debates from the 1830s through to the early 1860s. It focuses on the way officials responded to crises which prevented the transfer of land from Maori to the Crown or Pakeha as they emerged. The next three chapters examine the establishment of the Court in 1862 and the several subsequent re-inventions of the Court to the mid-1920s. The focus is the political debates which surged around these re-inventions as politicians and officials responded to crises which, again, prevented the transfer of land from Maori to the Crown. Most of these crises involved the difficulties the Court faced in establishing settled and stable title for the purposes of purchasing Maori land. Determining Maori customary rights to land was not nearly as simple as nineteenth-century politicians expected and later historians have suggested. The last chapter in Part Two, Chapter 7, examines the debates among twentieth-century politicians and officials who struggled to come to terms with customary rights through a bureaucratic system of title administration.

It is important to note that although Ward, particularly his *A Show of Justice*, is often referred to in Chapters 4 and 5 (which examine the Court from establishment through to the election of the Liberal government), his view of the Court is, on several fundamental points, substantially different to that argued in this thesis. Ward takes a much more evolutionary approach to the Court in which change was designed either to improve its operation or the consequence of a residual humanitarianism which believed Maori needed to be protected in their dealings with Pakeha until they achieved a higher level of civilisation. He also emphasises the destructive consequences of the Court in terms of custom. As already discussed, this thesis takes a different view of change in relation to the Court preferring an approach which is much more revolutionary, one where the Court was constantly and regularly re-invented in response to both internal and external crises in a particular political context and driven by different policy priorities.

So, on the question of native land legislation and the Court, the argument developed in this thesis is quite different in a number of ways from that argued by Ward. Nevertheless, his seminal work is essential to providing a broader political and policy context in which the debates about and nature of native land legislation must be discussed. In *A Show of Justice*, Ward is concerned with much more than just native land legislation and the Court whereas the focus in this thesis is entirely on that one type of legislation and the Court it established. While this thesis develops a different view of the legislation and the Court, therefore, it relies heavily on Ward's analysis to locate and understand the wider political context.

## WILLIAM LEE REES

## AND A NINETEENTH-CENTURY SHOW-TRIAL

It is necessary first, rather than starting with the Court's establishment in 1862, to begin in the early 1890s. This chapter focuses on the Royal Commission on Native Land Legislation and explores the political context in which the commission was established and sat, the significance of the evidence presented by witnesses, the reports themselves and the parallels between these reports and the historiography of the Court. It is argued that by the early 1890s, the Court system was in crisis and the commission was the Liberal government's response to that crisis. It was, however, a complete failure: two commissioners, William Rees and James Carroll, took the opportunity to put the Native Land Court on trial. This trial was the theatre of high politics. Rees had suffered ignominy at the hands of the Court as a result of his activities with the East Coast trusts. Carroll used the commission to blame the Court for undermining the great rangatira of earlier decades. Even witnesses who appeared before the commission took the opportunity to provide an assessment of the Court which was designed to flatter themselves and portray their honesty and hard work in an institution which was fundamentally flawed.

It might appear strange to open a discussion of political debates and legislation regarding the Native Land Court and Maori land in the nineteenth-century with a commission which sat in 1891. However, the commission and its report have provided the interpretive framework in which some approaches to the Court were developed. The point of this discussion is instead to identify the politics of the commission and tear away the façade which dominates discussion of the operation of the Court in the nineteenth-century. It was an important part of the debates over native land legislation but the interpretation of the Court it produced reflected a particular political context and the diverse priorities of a large number of individuals who had participated in the Court process over several decades. The commission is not the last word on these issues and it is discussed at this point because the rest of

Part Two and Part Three are concerned with producing a very different interpretation of debates regarding Maori customary rights to land and the Court.

In May 1891, the Court of Appeal handed down its explosive decision in *In re The Mangaohane Block*.<sup>1</sup> The application was sent straight to the Court of Appeal by the Supreme Court. The cream of the colonial legal profession turned out to argue the case with Sir Robert Stout, Charles Skerrett, C.B. Morison, Martin Chapman, F.H.D. Bell, P.S. McLean and M.W. Richmond appearing for the parties. In their decision Chief Justice Prendergast, Mr Justice Williams and Mr Justice Conolly found that the chief judge of the Native Land Court, who had since 1880 held sole discretion for considering applications for rehearings, had acted without jurisdiction when he refused an application for rehearing without hearing submissions from the applicants. The Court of Appeal concluded therefore that the applications were not properly dismissed and in consequence the Native Land Court had no jurisdiction to issue certificates of title on the basis of its original orders. The certificates were, certiorari, 'quashed,' and with them titles to all blocks dealt with in a similar way were suddenly destabilised. The recently appointed Liberal government faced a massive crisis and its response was to appoint a commission to investigate.

In September 1892, the Liberal government's Native Minister, A.J. Cadman, rose in the House of Representatives to introduce the Native Land (Validation of Titles) Bill. The proposed legislation was, he told members present, designed to deal with the 'most numerous' problems 'which have arisen through technicalities – technicalities which prevent the purchases from being completed.'<sup>2</sup> Where both Maori sellers and European purchasers were 'quite satisfied with the arrangements made,' the proposed Validation Court would provide an authoritative tribunal which could create a valid and stable title. Cadman added that the bill was not designed to assist those who had engaged in fraudulent activity and then expected their political influence to assist in completing the transaction.

William Rees, the speaker who followed Cadman, was also a member of the Liberal Party. He was, however, appalled at the proposals contained in the bill. In his prolonged speech he focused on the causes of the problems it was supposed to address. He asserted that '[b]etween 1865 and 1891 about seventy principal Acts were passed dealing with Native lands, many of them contradictory, and all of them impossible to read with each other – all of them creating additional difficulties in dealing with these lands.'<sup>3</sup> He was also highly critical of the Native Land Court, particularly in light of the recent decision by the Court of Appeal. In 1880, legislation

<sup>1</sup> (1891) 9 *NZLR*, pp.731-758.

<sup>2</sup> *NZPD*, 78 (1892), pp.503-4.

<sup>3</sup> *ibid.*, p.509.

had taken the power to grant rehearings of Court decisions from the Governor-in-Council and passed it to the Native Land Court:

That right existed up to the year 1880, and then the right of application for a rehearing was given to the Native Land Court, and was exercised for eight years by that Court; and, will the House believe it, on every occasion on which that right was exercised the Native Land Court made a mistake! For eight years the Court refused to hear private applications for rehearing, the Court of Appeal having decided that every one of these should have been made public, and that the primary dismissal of them was valueless. So that, of the six million acres of land which passed through the Native Land Court during that time, in nearly every one of the cases connected with that land applications for rehearing were made, and such applications were refused, by which the title to those lands is now absolutely destroyed by the decision of the Court of Appeal.<sup>4</sup>

Rees pulled no punches in his condemnation of the Native Land Court: 'that is the Court which from 1865 up to the present time has been misinterpreting the law in every case that has come before it.'<sup>5</sup> He was incredulous that the legislation proposed sending such complex and technical cases to a Court which was both 'utterly incompetent' and 'so overburdened with work that it cannot possibly get through it.'<sup>6</sup> Rees demanded the establishment of a commission to resolve the mess and make recommendations that would allow Maori to be able to deal with their land on a tribal basis.

The member for Western Maori, Hoani Taipua, also complained of the problems with the present system. He told the House during the debate that he knew 'of cases where blocks of land have been brought before the Court ever so many times, when judgment after judgment has been appealed against and set aside, and fresh proceedings taken: in fact, there seems to be no end to it.'<sup>7</sup> In contrast to the proposals contained in Cadman's bill, he supported the creation of 'Native committees' to determine tribal boundaries and administer the land and have their decisions confirmed by the Native Land Court. Such an approach would be much more flexible and provide immediate responses to disputes: the Court was simply 'too cumbrous.'

What the Native Land (Validation of Titles) Act 1892, which established the Validation Court, was designed to address were problems which had been emerging as early as 1880. Titles containing the names of all interested persons had become choked and as the Court was unable to keep up with the appointment of successors (despite attempts to speed up the procedure with the appointment of commissioners to

<sup>4</sup> *NZPD*, 78 (1892), p.509.

<sup>5</sup> *ibid.*

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*, p.516.

assist the judges) or, when successors were appointed, the title became even more difficult to clearly establish, the acquisition of land by private purchasers was almost entirely prevented. The system itself, established in 1873, had become so problematic that the sale of Maori land, the intention of all governments since 1862, was simply too difficult and complex to effect cheaply and easily. These were the problems referred to by all the speakers in the debate on the legislation. The Validation Court was set up to cut through the many many layers of legal technicalities which prevented the creation of stable titles to Maori land.

The Liberal government had the previous year attempted to deal with the crisis by appointing a royal commission of inquiry but it was an unmitigated disaster. The two surviving commissioners, both Liberal politicians, had produced a report which damned the Native Land Court rather than suggesting solutions to the government's main concerns. The three member Royal Commission on Native Land Legislation was appointed by the Earl of Onslow to investigate the native land laws of the colony in February 1891.<sup>8</sup> The commission was to be chaired by William Rees and he was joined by James Carroll and Thomas Mackay as commissioners.

Before examining the commission, some further background on the commissioners is necessary. Rees was possibly the most controversial of the commissioners. He was a Liberal politician, although he was associated with Grey rather than Ballance and Seddon. He refused the offer of the position of attorney-general in Grey's government in 1876, in 1878 took over the Napier law firm of John Sheehan, Grey's Native Minister, and later wrote a book on Grey's life. During the 1880s he lived mostly at Gisborne where he formed a very close alliance with Wi Pere of Aitanga-a-Mahaki and was a driving force behind the East Coast trusts.<sup>9</sup> According to Brooking, Rees 'lived in considerable comfort, but was not as obviously wealthy as some of his political opponents.'<sup>10</sup> His critics nevertheless challenged the extent to which he had gained financially from the East Coast trusts, although Brooking suggests their validity is questionable. By the late 1880s, the Supreme Court had refused to recognise the legality of the trusts and Rees' ambitious schemes failed completely as investors lost considerable sums of money and large areas of Maori land were left in limbo. Rees was intimately linked to Liberal politicians during the 1880s but remained outside Parliament until 1890 when he was elected for the City of Auckland seat. His political career ended in controversy when in 1893 he

<sup>8</sup> 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws,' *AJHR*, Sess. II, 1891, G-1, p.iii.

<sup>9</sup> Alan Ward, 'The History of the East Coast Maori Trust,' MA Thesis, Victoria University of Wellington, 1958.

<sup>10</sup> Tom Brooking, 'Rees, William Lee,' in *The Dictionary of New Zealand Biography, 1870-1900*, Claudia Orange (ed.), vol. 2, Wellington: Bridget Williams Books/Department of Internal Affairs, 1993, pp.409-11.

accused Cadman, the Native Minister, of using his position for personal gain.<sup>11</sup> Both men resigned their seats and contested Rees' City of Auckland electorate; Cadman won and Rees retired from public life and returned to Gisborne.

James Carroll was also a Liberal member of the House of Representatives. He was a well known Ngati Kahungunu leader who had long been associated with the Court, first as a clerk and interpreter and later as an agent.<sup>12</sup> He would go on to an illustrious political career and, as Native Minister from 1899 to 1912, would have the opportunity to implement many of the recommendations contained in the commission's report. He would also find them as unworkable as the existing structures. The last commissioner, Thomas Mackay, was a former engineer who had worked in the land purchase branch of the Public Works Department.<sup>13</sup> He later held the positions of government agent on the West Coast, trust commissioner and trustee of the West Coast settlement reserves.

Five general questions were posed in the commission. The first related to the operation of existing legislative provisions governing the alienation of Maori land. The second involved the existing constitution of the Native Land Court, its operation and how it could be improved in the future. The third was probably the most important in terms of understanding why the commission was established:

What class or classes of cases have arisen which exhibit the defects in the present system of alienating or disposing of interests in Native land, or in which non-compliance with existing laws has created or complicated defective titles where such land have been equitably acquired or dealt with after the titles thereto have been investigated by the Native Land Court, and where such complication or defect still exists, what-remedy, if any, should be adopted in respect thereof.<sup>14</sup>

The commission was specifically excluded from investigating or commenting on particular cases unless all parties agreed and there were no Court proceedings pending. The last two questions asked for advice on how Maori land could be alienated in the future and invited the commission to investigate any other significant issues it thought necessary. Two months were given for the submission of a report.

The crisis surrounding native land legislation and titles to Maori land came to a head in the early 1890s and the 1891 commission was a direct response to that crisis. Historians have in the past, however, interpreted the commission in a very different way. They have drawn extensively both on the evidence given by witnesses

<sup>11</sup> *ibid.*, p.410. See also 'Rees, William Lee,' in *A Dictionary of New Zealand Biography*, G.H. Scholefield (ed.), vol. 2, Wellington: Department of Internal Affairs, 1940, pp.212-13.

<sup>12</sup> Alan Ward, 'Carroll, James,' in *The Dictionary of New Zealand Biography, 1870-1900*, Orange (ed.), vol. 2, pp.78-81.

<sup>13</sup> 'Mackay, Thomas,' in *A Dictionary of New Zealand Biography*, Scholefield (ed.), vol. 2, p.22.

<sup>14</sup> 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws,' p.iii.

associated with the Court and on the interpretation of the Court contained in the report.<sup>15</sup> The report, at least that of Rees and Carroll, is one of the main sources for those who have written about the Court and it presents an interpretation of the Court's development to 1890 which parallels very closely some of the current approaches. One of the major problems with drawing on the evidence presented to the commission and the Rees-Carroll report is that historians have accepted the interpretation with very little critical appraisal and failed to examine closely the context in which the inquiry was conducted. That is, although the commission has had a fundamental role in defining how the Court has been understood, historians have paid very little attention to the context of its operation. It is certainly the case in relation to this particular commission that its interpretation of the Court was influenced decisively by more recent events.

Three examples, focusing on Rees, Carroll and the evidence given by Fenton will be used to illustrate this point. In the first instance, Rees, together with Wi Pere, was the driving force behind attempts to bring East Coast Maori land into production.<sup>16</sup> The scheme was large scale and expensive and eventually lost the Maori landowners a lot of land and money. The mess took many decades and several investigations to finally clean up. One of the most significant problems Rees and Pere faced was not necessarily the type of title created by the Court but more particularly the numbers of owners these titles contained and the implications this had for gaining unanimous agreement for a particular course of action. His report, which stridently criticised the Court and 'individualism,' indicates that Rees used his royal commission for the purposes of embarrassing, even shaming the Court, to transfer blame away from himself in consequence of his own failure in the East Coast trusts.

James Carroll's position on the commission is also significant. Despite what has disparagingly been written of his Pakeha ancestry, he was raised by Ngati Kahungunu in the strong traditions of chiefly rangatiratanga. He himself demonstrated great leadership, forging a path hitherto untravelled by Maori politicians by reaching some of the highest positions in the Pakeha political world. One of his most important contributions to the report of the royal commission was an attempt to re-assert a romantic, even nostalgic, era of the previous sixty years: that of the great rangatira.

<sup>15</sup> See, for example, the interpretation of the Native Land Court in Alan Ward, *A Show of Justice. Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland: Auckland University Press, 1973, Peter Spiller, Jeremy Finn, and Richard Boast, *A New Zealand Legal History*, Brooker's: Wellington, 1995, and David V. Williams, 'Te Kooti Tango Whenua.' *The Native Land Court 1864-1909*, Wellington: Huia, 1999. For a more critical view, see Michael Belgrave, *Auckland: Counting the Hectares. Quantifying Maori Land Loss in the Auckland District, 1865-1908*, Wellington: Waitangi Tribunal, 1997, p.31.

<sup>16</sup> See Ward, 'The History of the East Coast Maori Trust.'

Two generations earlier, these men had established strong power bases in the highly dislocated circumstances of the inter-tribal conflicts of the 1820-1850 period. They were warriors who led from the front and derived their mana from their military skill, especially their capacity to protect their people from harm. Their mana was passed onto the subsequent generation who fought for or against the Crown. However, the power base of these men was under threat. Not so much from colonisation but from their growing inability to prove their leadership and assert their authority in conflict. Ironically, rather than diminishing their authority, the Native Land Court maintained it – both through giving them absolute title (for a short period) but more especially providing a forum where the conflicts of their elders could be continued. The tools were rhetoric and history; the battles as fierce as those fought with muskets in earlier decades.

From around 1880, however, this generation of rangatira began to die out. It would take almost twenty years for this trend to come to end and the last was probably Kepa Te Rangihwinui of Muaupoko who died shortly after finally securing the Manawatu-Kukutauaki lands for his people. From 1880, nevertheless, it is clear that the great rangatira who had led their people in the Court were disappearing. Instead, claims to land moved down the social structure to smaller kinship groups. They were often closely related but disputed titles to land with vigour. It was this trend which Carroll had seen working in the Court, first as clerk and interpreter and later as an agent. The great rangatira who could command the absolute loyalty of his or her people was rapidly disappearing and there were few people to replace them. This was not necessarily destructive or a product entirely of the process of colonisation; it was a shift down the social structure where leadership was exerted over smaller kinship groups. But it was a change Carroll lamented and this needs to be acknowledged when analysing his report.

The evidence of witnesses given to the commission also needs to be contextualised and the example examined here is the evidence given by Fenton. Historians have placed considerable emphasis on what Fenton had to say, especially since there is precious little material written by Fenton about the Court's practice which either has been preserved or is easy to access.<sup>17</sup> And there is nothing which is so candid or critical of the Court. But of course by then he no longer considered the Court to be his creation, even if he was the first chief judge. This is most clearly seen when considering the Fenton family land transactions in south Kaipara. They have been examined in detail by Richard Nightingale and reveal the problems which had arisen by 1890.<sup>18</sup> As the Maori population grew, increasing numbers of owners were

<sup>17</sup> Fenton's evidence is recorded in the 'Minutes of Evidence' appended to the commission's report, pp. 45-53 and pp.54-55.

<sup>18</sup> Richard Beresford Nightingale, 'Lines in the Sand, Nga Maenga o To One. The Native Land Court in the Southern Kaipara, Kaipara Ki Te Tonga and Tamaki Makaurau, Auckland: A Reflexive Reconsideration,' MPhil Thesis, Massey University, 1999, pp.110-21 and pp.137-69.

included in titles, especially children, and as owners died their interests were succeeded to by even more Maori landowners. Titles were becoming choked by the numbers of owners and this made alienation to Pakeha even harder as the consent of all owners or their successors was required before transfer of a block could be executed.

This was the problem which met the Fenton family as they tried to acquire several blocks of land in south Kaipara. Fenton himself was trying very hard to purchase a small block of coastal land where he had built a home for his retirement. However, the Court system had prevented him from doing so because a stable title could not be finalised. Nightingale draws on the correspondence between Fenton and the Native Office and the frustration is obvious. Fenton himself wrote at one point that he had an informal relationship with the local kaumatua over his house on the land.<sup>19</sup> The irony is palpable. Here is the man who was going to create a common law of Maori customary rights to land so that questions of Maori land could be dealt with according to legal principles. Instead, twenty-five years after the Court was established, he was forced to enter into informal arrangements because the Court titles system prevented him from executing a transfer of the land. It was hardly surprising that Fenton was so disparaging of the Court when he gave evidence to the commission or that he rejected any suggestion that he was in any way responsible for its development after 1873. He was also by this time ten years retired from the Court and a very elderly man. His frustration is evident in the closely printed text.

This discussion of Fenton's evidence is only one of several possibilities. It has been chosen for more detailed discussion because of the importance of Fenton in current approaches to the Court and because historians have generally placed considerable emphasis on his evidence to the commission. However, many other witnesses gave evidence and that evidence too might be interpreted in a different light were their individual circumstances explored in more detail. Another example is James Mackay's evidence of his ordered and methodical approach to purchasing land when he was the Crown's land purchase agent at Thames.<sup>20</sup> His correspondence with superiors during the 1870s suggests a much more fragmented and confusing situation at the time he was on the ground negotiating with local Maori.

Attempts to contextualise this evidence are extremely limited and much of it has been accepted by historians at face value. This should probably not be surprising. The evidence is printed and easily accessible in the *Appendix to the Journals of the House of Representatives*. It is furthermore very extensive and detailed and from diverse Maori and Pakeha participants in the Court process. The commission also

<sup>19</sup> *ibid.*, pp.114-15.

<sup>20</sup> Mackay's evidence is recorded in the 'Minutes of Evidence' appended to the commission's report, pp. 38-45. Compare with Grant Young and Michael Belgrave, 'The Operation of the Native Land Court in Hauraki,' *The Marutuahu Treaty Claims Research Reports Volume Two*, June 2002, pp.40-70.

provided a succinct overview of the operation of the Court along with a readymade critique. The only other way historians could have gained any idea about what went on inside the Court was through the minute books. However, these have only recently become easily accessible through two separate projects: one which copied the minute books and the other which indexed them.<sup>21</sup> Until then, the minute books themselves were held at Court offices and the three thousand or so volumes would present to any historian an intimidating source.

So the Rees-Carroll commission was the most accessible and most coherent means for getting an idea of what went on inside the Court and it has come to dominate how the Court has been understood by historians. Rees and Carroll portrayed the Court as a monolithic institution which was subject to very little or no change during the late nineteenth-century. Historians have adopted this view and accounts characterise the Court established in 1865 as the Court which operated in 1891.<sup>22</sup>

This thesis argues a very different view. It suggests that rather than a monolithic and immutable institution, the Court was constantly re-invented in response to a number of crises. Annual legislation was required to tinker with the structure and operation of the Court but regular and significant overhauls (known colloquially as consolidations) of the legislation was required every fifteen years or so. Politicians were forced to respond to crises and the situations they and the Court created. Hence, as early as 1880, problems emerged with large numbers of owners starting to choke titles especially as successions to original owners became more common. Difficulties also arose in attempting to establish stable and settled title; claims were fought vigorously in the Court and rehearings, appeals and petitions allowed the disputes to continue for many years.

The commissioners presented their report to the governor in May 1891. In the interim, the commission sat all over the North Island, heard evidence from many witnesses and held a number of meetings with different Maori tribes. The commission sat for 48 hearing days in many different centres including Gisborne, Auckland, Cambridge, Kawakawa, Waimate North, Te Ahuahu, Whangarei, Otorohanga, New Plymouth, Parihaka (where they met with Te Whiti), Opunake, Wanganui, Palmerston North, Napier, Waipawa, Dannevirke, Greytown, Otaki and Wellington. During these sittings, forty-nine Pakeha and Maori witnesses gave evidence. Many were lawyers or agents along with Maori leaders, two retired judges

<sup>21</sup> See the Introduction to Part Three below for more detailed comment on these projects and their significance.

<sup>22</sup> See, for example, Ward, *A Show of Justice*, Spiller, Finn, and Boast, *A New Zealand Legal History*, Williams, 'Te Kooti Tango Whenua,' and Bryan D. Gilling, 'Engine of Destruction? An Introduction to the History of the Maori Land Court,' *Victoria University of Wellington Law Review*, 24:2 (1994), pp.115-39.

and several officials from the Native Department. In addition the commission held eleven meetings with Maori throughout the North Island. Thomas Mackay attended most of the sittings and heard the bulk of the evidence but he died in early June leaving his final report incomplete. Alexander Mackay suggested he might prepare the report for final publication and this was approved by the Native Minister.<sup>23</sup>

The report of the commission cannot be described as unanimous. Rees and Carroll agreed on some issues but disagreed over the major question of Crown pre-emption. Rees supported a return to Crown pre-emption while Carroll strenuously opposed it. Carroll's major concern was that the Crown would gain a monopoly on the acquisition of Maori land and he referred to a number of occasions in the past when Maori landowners had received a very poor deal.

Thomas Mackay had more fundamental concerns and wrote an entirely separate report to that of the two Liberal politicians. His major objection to the majority report was that it contained discussion of issues which were beyond the terms of their commission and he believed the report should be 'strictly confined' to the questions stated by the Governor. His report opened with a lengthy narrative of Maori land transactions prior to the establishment of the Court in 1865, much of which was drawn from Alexander Mackay's 'Compendium of Official Documents relative to Native Affairs,' and the rest was taken up with a 'synopsis of legislation' affecting Maori land from 1862 to 1890. This synopsis set out the legislation which had been repealed and that which was still in force, the different forms of title created by statute (he found twelve) and the variety of ways Crown pre-emption had been dealt with in legislation. His focus on legislation was detailed and comprehensive and responded to the commission's instruction for advice on cleaning up native land legislation; this was a question left almost entirely unanswered in the Rees-Carroll report. The other significant part of Mackay's report were his recommendations for new legislation and these will be examined in more detail below.

In their joint report, Rees and Carroll provided a long historical overview and summary of the evidence presented to the commission to address the background, present situation and problems with native land legislation, the alienation of Maori land and the Native Land Court. The bulk of their report, however, was constituted by an historical narrative which revolved around the alienation of Maori land. In the first instance, they romanticised in glowing terms the practice of acquiring land under Crown pre-emption (as established by Grey) prior to the establishment of the Court. During this time, private individuals or the Crown purchased Maori land 'in a manner at once simple and public.'<sup>24</sup> Open and careful negotiation and payment before the whole tribe ensured fair purchases. With considerable certainty, Rees and Carroll

<sup>23</sup> Mackay to Lewis, 20 June 1891; Lewis to Mackay, 22 June 1891, 'Unfinished Report by the Late Mr Thomas Mackay relating to Native-Land Laws,' *AJHR*, Sess. II, 1891, G-1A, p.1.

<sup>24</sup> 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws,' p.vi.

announced that 'No such sales were ever disputed.' They concluded: 'Land-purchases of a very extended character took place in this open and public manner prior to 1865.... Only a few of these purchases were ever questioned, and then only on the ground of disputed Native ownership.'

The two commissioners, like much of the current historiography, were highly critical of the Court. They condemned the 'strange course of procedure' which involved vesting the land in ten or fewer owners. Whether those awarded land in this form were trustees who had a fiduciary duty to their tribes or absolute owners without any trust obligations was never tested in the Courts and in any case was a product of misinterpreting the statute. Furthermore, Rees and Carroll, like Ward in particular, saw the legislation of 1873 as a response to these problems.<sup>25</sup> They argued that the ten-owner system had led to fraud and the appropriation of funds received by tribal leaders becoming acceptable. Significantly, the problems associated with acquiring Maori land were also blamed on the 1873 legislation: 'having established the principle of individual title where no such title by nature existed, [it] has been the foundation and source of all the difficulties which have since arisen, not merely in the transfer of land from Natives to Europeans, but in the settlement of the North Island of New Zealand.'<sup>26</sup>

The report went on to describe in eloquent terms the 'evil effects' of the system of private and individual dealing. A short extract will suffice:

The old public and tribal method of purchase was finally discarded for private and individual dealings. Secrecy, which is ever a bane of fraud, was observed. All the power of the natural leaders of the Maori people was undermined. A slave or a child was in reality placed on an equality with the noblest rangatira (chief) or the boldest warrior of the tribe.<sup>27</sup>

The mass of legislation relating to native land passed after 1873 was damned in two sentences. With the exception of Ballance's Native Land Administration Act 1886, all this legislation had 'striven to establish, contrary to Native custom, a system of individual titles to tribal lands.'

The only other piece of legislation singled out for special mention was the Native Land Court Act 1888. Rees and Carroll condemned the statute in no uncertain

<sup>25</sup> In his prolonged speech on the Native Land (Validation of Titles) Bill in 1892, Rees went further stating that 'all the First Part – the precautionary Part – of the Act [of 1873] was entirely disregarded, and only the latter portions of the Act were brought into effect. No districts were made, no Commissioners were appointed, no Committees set up, no Domesday Book was commenced, in which it was proposed to put all tribal boundaries – nothing of that sort was done at all.... The whole precautionary measures were thrown to the winds, and the Native Land Court went on again under the Act of 1873 as it had proceeded under the Act of 1866.' *NZPD*, 78, 29 September 1892, p.506.

<sup>26</sup> 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws,' p.viii.

<sup>27</sup> *ibid.*, p.x.

terms, describing it as a 'climax of absurdity' in native land legislation and suggested that it was 'almost more easy to believe that Parliament was playing a gigantic practical joke.'<sup>28</sup> This legislation gave the Court power to partition land according to each owner's relative interest; to do so it had to determine the size of this relative interest. Rees and Carroll believed, after laying out some of the maths of the task, that it was simply impossible: there were too many individual owners for it to be successfully completed. They argued that all those who appeared before them wanted a return to a tribal corporate model for dealing with Maori lands. Like Ward, Rees and Carroll clearly favoured Grey's runanga system.<sup>29</sup>

There were problems with the Court itself too: cases took longer to hear, fees and charges were excessive, adjournments and postponements more common and applications for rehearings were more frequent than in the past. False claims were commonly engineered to exclude the real owners. It no longer visited land or met in Maori settlements. Its decisions were never final and constantly subjected to challenge especially by new legislation. A growing number of Maori agents were representing claimants in the Court and had taken 'almost complete control' of proceedings, received very large fees and some were 'alleged to be unscrupulous and cunning.'<sup>30</sup> Constant tinkering by Parliament had rendered the administration of Maori land a complete mess. According to the commissioners, '[s]o complete has the confusion in both law and practice become that lawyers of high standing and extensive practice have testified on oath that if the Legislature had desired to create a state of confusion and anarchy in Native-land titles it could not have hoped to be more successful than it has been.'<sup>31</sup> Rees and Carroll were nothing if not unambiguous in their view of the past.

And so to the future. Both reports, that of Rees and Carroll and that of Mackay, provided recommendations which would re-organise in quite dramatic ways the administration of native land and the structure of the Court. The most important recommendations in terms of future legislative developments were surprisingly unanimous. Rees and Carroll supported a commission to investigate existing disputes over transactions and where necessary to validate incomplete titles. They agreed that a Native Land Titles Court should be established to investigate past disputes. Mackay took a similar approach suggesting a special court be established 'to settle absolutely the titles in all incomplete and outstanding purchases and leases, and to validate, by an order of the Court, any transaction proved to have been entered into in good faith between the parties thereto.'<sup>32</sup> This court would have the power to establish validate

<sup>28</sup> *ibid.*, p.xvii.

<sup>29</sup> See Ward, *A Show of Justice*, pp.125-46.

<sup>30</sup> *ibid.*, p.xviii.

<sup>31</sup> *ibid.*, p.xi.

<sup>32</sup> 'Unfinished Report by the Late Mr Thomas Mackay relating to Native-Land Laws,' p.20.

titles by order and decide all questions in dispute between vendors and purchasers. It was these recommendations which were embodied in the Native Land (Validation of Titles) Act 1892 which established the Validation Court; in fact, the recommendations of the commission were not, as some have asserted, ignored.

As for the investigation of ownership of customary land, there was again some level of agreement in the two reports. Rees and Carroll proposed a fairly complex system of committees and courts through which disputes could pass where they arose. In the first instance, titles would be investigated by a committee of all claimants chaired by an administrative officer. It could then pass to a district board. It would be both a judicial and administrative body having the final say on questions of law and administering subsequent leases of Maori land.

Mackay recommended the creation of a Native Land Administration Board made up of several commissioners. The board was to advise Maori on taking their land through the Court. Leaders of the tribe claiming the land would apply to the board and a district commissioner would hold a meeting at their meeting house to elect a tribal committee made up of the leaders of each hapu. Once the committee was elected, the district commissioner would appoint a surveyor to help define the external boundaries. Detailed boundaries and plans would be produced and the map used to fix hapu boundaries. When all boundaries were determined, maps and an application would be sent to the board which would forward them to the chief judge of the Native Land Court. A court would then be held in the district to finalise the title and once a Crown grant was issued, the board would advise Maori on the management and disposal of their lands.

Far from ignoring these recommendations, Carroll, when Native Minister, attempted to establish structures of this type in the Maori Land Administration Act 1900. On finding them very unwieldy and just as problematic as the Court itself, he rationalised them heavily in 1909. This shift is examined in detail in Chapter 6.

Thomas Mackay made a further very significant suggestion. He recommended the new legislation embody 'a code of Native usages and customs regarding the tribal ownership of land, giving the different significations that may be in vogue in the several Native districts.'<sup>33</sup> This was possibly the most important observation in the reports. The failure to impose order on Maori customary rights to land had severely undermined the system and led to the crisis to which the commission was a response. Customary rights were argued by Maori claimants to land in the Court at great length and it had been impossible to render these disputes into a concisely defined code. The whole system was on the verge of falling apart for this reason. The Court certainly influenced Maori customary rights to land but it could not clearly define them; there was simply too much diversity for this to be

<sup>33</sup> *ibid.*

achieved. Knowledge, rather than ensuring imperial domination, had only led to colonial confusion.

It is this confusion and the struggle to find an effective mechanism for dealing with Maori customary rights to land which is the focus of Part Two of this thesis. Rees and Carroll and their interpretation has been adopted uncritically in some of the current approaches used to analyse the Court's activities. This chapter has argued, in contrast, that the commission was the product of a major crisis and the highly critical view of the Court it produced reflected a particular political context and the diverse priorities of a large number of individuals who had participated in the Court process over several decades. It is not a starting point for examining continuing debates over how to clearly and quickly define Maori customary rights to land: it was a part of these debates but it is far from the last word. The commission provides a clear critique of the Court; the situation, however, was much more complex and unsettled.

## GREY, MCLEAN AND CROWN PRE-EMPTION

This chapter examines the first twenty-years of defining Maori customary rights to land and purchasing Maori land from the Treaty of Waitangi to the Waitara war as background to the establishment of the Native Land Court. It argues that the question of how to define Maori customary rights and acquire Maori land was never stable and certain and the subject of constant debate and experimentation throughout this period. Approaches to these rights and the methods for acquiring Maori land were experimental and contingent. They responded to circumstances on the ground, particularly in relation to Maori debates and disputes over land, and also to debates and disputes among officials and politicians both in London and New Zealand. Practice was always concerned with the most effective and cheapest way of acquiring Maori land but, it is argued, colonial officials found defining rights to land highly problematic and experimented with various techniques and methods to extinguish Maori title throughout this period.

The complex interaction of a number of different interests governed the methods used to acquire Maori land in the first few years of Crown colony government in New Zealand. From 1846, the autocratic George Grey took full control of land purchase activities and drove several large-scale purchases which involved lengthy and complex negotiations which could occur and recur over many years. With the arrival of Grey's successor as governor, Thomas Gore Browne, this approach was maintained but as negotiations became increasingly difficult and as Maori opposition to land sales increased, it became more and more difficult to acquire Maori land. The limitations of Grey's approach were evident as early as his departure from the colony in late 1853, but his protégé McLean continued to apply it throughout the 1850s until it failed completely and led to war at Waitara.

These circumstances were further exacerbated by the extraordinarily strained relationship between Browne and responsible ministers during the late 1850s. This was a consequence of the constitutional structure established to administer native affairs. From 1856, attempts were made to establish a new system for acquiring Maori land but they always failed, either because ministers tried to appropriate authority the governor considered properly belonged to him or because the governor

refused to involve ministers in the administration of native affairs. Browne preferred instead to rely on the advice of those who were independent of the colonial government. As the relationship between Browne and his responsible ministers became increasingly sceptic in the late 1850s and as native policy became more and more fragmented, the governor and his officials were left filling the void on an ad hoc basis – regularly experimenting with different approaches to Maori customary rights to land and in the process of purchasing Maori land. By the time the Native Land Court was finally established in 1865, the political and policy context had changed significantly. Nevertheless, the experience of the previous twenty-five years provides an important perspective for understanding the development of the Court and native land legislation through the rest of the nineteenth-century.

In the first instance, a significant theme which ran through many of the debates among imperial officials in Britain and colonial officials in New Zealand when discussing how to deal with Maori customary rights to land, and later colonial politicians debating native land legislation, needs to be identified. Emmerich De Vattel was an eighteenth-century Swiss jurist who published in 1760 a three volume treatise entitled *The Law of Nations; Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns*.<sup>1</sup> His work did not determine what happened on the ground but it did influence perceptions of Maori customary rights to land. His ideas were mentioned by colonial politicians during parliamentary debates as late as 1880.

Vattel's central argument was that sovereign states could only be recognised if a group of people based their ownership of land on dominion.<sup>2</sup> Dominion evolved over time from a situation where land was owned in common by all people. As the population grew it became more difficult to sustain the people in this way because the land could not be effectively cultivated. Increasingly it became necessary for individuals to locate themselves on part of the land and apply their labour to it for the purposes of providing for their subsistence. In doing so the rights of property and dominion were introduced and the common right of all the people was restricted. The people retained some relationship though by forming a political unit which became the basis for the nation.

In relation to imperial expansion, Vattel argued that indigenous economies based on hunting and gathering had a much more limited claim to nationhood.<sup>3</sup> In particular, they had no rights to land which they did not cultivate when another nation was able and willing to do so. Consequently, civilised agricultural societies such as

<sup>1</sup> Emmerich De Vattel, *The Law of Nations; Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns*, 2 vols, London: J. Newbery et al, 1759-60.

<sup>2</sup> Michael Belgrave, 'Maori Customary Law: from Extinction to Enduring Recognition,' unpublished paper for the Law Commission, 1996, pp.12-15.

<sup>3</sup> *ibid.*

those in Europe had a right to take possession of that uncultivated land. Such land could simply be taken; negotiation and purchase were unnecessary in Vattel's view.

If this was the theory, the practice in New Zealand was very different. The recognition of Maori customary rights to land in the period from 1840 to 1846 was driven entirely by a pragmatic response to circumstances which required expedient solutions to operate in practice. As Belgrave argues, there was an important political context in which early policy developed, and this context was 'bitter disputes between the Colonial Office and the New Zealand Company, between settlers and Maori, and between Sydney speculators in Maori land and Governor Gipps of New South Wales.'<sup>4</sup>

At the time of the cession of New Zealand, Gipps did attempt to argue the Vattellian point of view.<sup>5</sup> He characterised Maori as a savage society without property laws and therefore not sovereign. The problem for Gipps was a Treaty which recognised Maori customary rights to land and he simply could not maintain this view. The Treaty of Waitangi was a necessary expedient, a product of recognition of the Declaration of Independence of 1835, the military strength of Maori and the political influence of missionaries and other humanitarians. Strangely enough, however, procuring an agreement with Maori was also supported by the New Zealand Company and Sydney-based speculators in Maori land. Their support was not based on the humanitarianism of the CMS and Aboriginal Protection Society but on economic self-interest and the desire of those who had purchased land from Maori prior to 1840 to have their claims recognised and validated by the Crown.

Gipps was nevertheless forced to ignore the Treaty pledge because of land speculation in New Zealand, particularly among Sydney-based land speculators. One of those speculators, W.C. Wentworth, argued Maori were a sovereign people whose sales of land prior to the Treaty had to be respected by the Crown. But even if the Treaty recognised Maori customary rights to land, it had to be denied by Gipps and the Colonial Office who asserted sovereignty on the basis of discovery for the purposes of ensuring the Crown held a monopoly over the land. In doing so, they denied the rights of all those speculators who held deeds purporting to show they purchased land from Maori.<sup>6</sup>

As for the New Zealand Company's claims to have purchased Maori land, after initially asserting Maori did hold title to all the land, the Company reversed its position in November 1840. It supported Gipps' decision to ignore the Treaty

<sup>4</sup> *ibid.*, p.20.

<sup>5</sup> *ibid.*, pp.15-16.

<sup>6</sup> Gipps' solution to the problem of claims to land based on purchases prior to annexation was to appoint a commission to investigate all transactions. Despite intense opposition from the Sydney-based land speculators, three commissioners were appointed in August 1840 and despatched to New Zealand.

claiming, based on Vattel, that Maori did not own the land.<sup>7</sup> This about face was the result of an agreement reached with the Secretary of State for the Colonial Office, Lord John Russell. The Company and Russell agreed that the Crown would provide a grant of four acres for every pound expended by the Company in pursuing the systematic colonisation of New Zealand. Until then, the Company had argued Maori did have property rights, because its claim to twenty million acres was based on sales from Maori.<sup>8</sup> Once the Company had reached an agreement with the Crown over its claim to land, Maori land rights were irrelevant.

Company officials in New Zealand estimated this would total about 600,000 acres.<sup>9</sup> However, their claims had to be assessed by the commission like all other purchases. William Spain was appointed by Russell as Land Claims Commissioner in January 1841 and he arrived in New Zealand later that year. Spain had to determine, in the first instance, whether the land had been legitimately purchased. This was highly problematic not least because Maori themselves disagreed as to their rights and their authority to sell the land. Spain, accompanied by George Clarke Jr, arrived in Wellington in late April 1842 to begin investigating the Company's claims.<sup>10</sup> The Company had assumed it would be granted the land it claimed as a matter of course but found the Colonial Office less than impressed at its intransigence and complaints regarding Spain's investigation. As the hearings continued the considerable opposition from Maori led Spain to conclude early that several groups had not agreed to sell their settlements, cultivations and burial sites and that only a small portion of the land claimed would be awarded. However, he was also of the view that it would be impossible not to award the land to the Company as a number of the settlements were well-advanced.

The Spain Commission was not a recognition of Maori customary rights to land. It was rather part of a policy which denied those rights; the Crown held dominion over the land which was not occupied or cultivated and could grant it to whomever it pleased.<sup>11</sup> Spain quickly discovered this was not the case, however, and was forced through circumstance to rapidly adapt to the situation on the ground. Maori opposition to the sales meant that their customary rights had to be recognised. Finding resolutions to the issues raised by Maori claimants in dispute was also more

<sup>7</sup> Michael Belgrave, 'Pre-emption, the Treaty of Waitangi and the politics of Crown purchase,' *New Zealand Journal of History*, 31:1 (April 1997), p.29.

<sup>8</sup> The New Zealand Company also supported this view as to have recognised Wentworth's claims, which included much of the South Island, would have undermined its own attempts to establish a monopoly over Maori land.

<sup>9</sup> Rosemarie V. Tonk, 'The First New Zealand Land Commissions, 1840-1845,' MA Thesis, University of Canterbury, May 1986, p.122.

<sup>10</sup> *ibid.*, p.130.

<sup>11</sup> Belgrave, 'Pre-emption, the Treaty of Waitangi and the politics of Crown purchase,' p.29.

time-consuming and much more difficult than anticipated, taking years rather than weeks to decide.<sup>12</sup> This pattern continued through the rest of the nineteenth-century: policy was one thing but practice was made up as officials were confronted with particular circumstances.

Spain's commission was concerned with purchases made prior to 1840. After 1840, Crown pre-emption was asserted and the negotiations for the acquisition of any Maori land was managed by the Protectorate of Aborigines. The Protectorate was based on the 1837 Report of the House of Lords Select Committee and established by Hobson to purchase land from Maori. The Protectors were responsible to the Governor and the personnel were drawn almost exclusively from missionaries and their families.<sup>13</sup> By the time George Clarke, the Chief Protector, was sacked by Grey in December 1846 he had purchased 60,300 acres in and around Auckland.<sup>14</sup> Clarke tried to ensure that all those Maori with an interest consented to the proposed sale, that they all received a share of the purchase price and that the boundaries were well-defined. His approach to purchasing land was direct but time consuming.

And it was much too slow for settlers and the Colonial Office. In London, directors of the New Zealand Company again reversed their position and began questioning whether Maori had customary rights to waste lands citing Vattel. In 1844 after considerable lobbying from the Company, a select committee accepted this view and far from the realities of governing New Zealand took a much more limited view of Maori customary rights to land.<sup>15</sup> Lord Stanley, the Colonial Secretary, was very sceptical. He rejected the committee's view, arguing 'that the exact nature of Maori title would have to be determined on the ground and with reference not to abstract rules but to custom.'<sup>16</sup> In 1846, however, the chairman of the 1844 committee had become Colonial Secretary and Earl Grey issued instructions to the new governor, George Grey, not to recognise any further title to waste land beyond that which already been acknowledged. The problems of purchasing land from Maori in the first six years of the colony had undermined confidence that Maori customary rights to

<sup>12</sup> The commissioners concluded their work in 1845 but much remained unfinished, see Tonk, p.300. Officials in London were under the impression that the New Zealand Company's claims could be sorted out in a few weeks and without the commissioner having to leave Auckland. Cleaning up the New Zealand Company's claims was in contrast very difficult and not completed until 1856 when the Land Claims Settlement Act 1856 appointed a commissioner, Francis Dillon Bell, see Tonk, pp.312-13. It finally brought to an end a festering problem which had taken nearly twenty years to solve.

<sup>13</sup> George Clarke, a senior CMS catechist, was appointed Chief Protector and a number of sub-protectors, clerks and interpreters were subsequently appointed, and they were drawn predominantly from missionary families. Peter D. Gibbons, 'The Protectorate of Aborigines, 1840-1846,' MA Thesis, Victoria University of Wellington, 1963, p. 15.

<sup>14</sup> *ibid.*, p. 36.

<sup>15</sup> Belgrave, 'Pre-emption, the Treaty of Waitangi and the politics of Crown purchase,' p.30.

<sup>16</sup> *ibid.*

land would be quickly and inexpensively extinguished. Earl Grey's instructions were a response to these problems: land could not easily be acquired by negotiation so it would simply become part of the demesne estate of the Crown.

George Grey's appointment in 1846 was a watershed in the continuing dilemma of Maori customary rights to land. During the early years of his first governorship, Grey was in a very strong position. He had the support of the Colonial Office after successfully dealing with the conflicts which had arisen over land purchases, outstanding claims from the New Zealand Company and claims to Maori land based on FitzRoy's pre-emption waiver.<sup>17</sup> Grey's reputation was based primarily on his apparent capacity to deal with and defuse problems associated with governing Maori.<sup>18</sup> He could also acquire land from Maori. During the eight years of his first governorship, he directed or negotiated the purchase of nearly 30 million acres of Maori land in the South Island and about three million acres in the North Island.<sup>19</sup>

Grey condemned repeatedly and without mercy FitzRoy and his pre-emption waivers. He also sacked the Protector of Aborigines, George Clarke, questioned his integrity, and charged him with incompetence. Clarke's Protectorate Department was closed down in March 1846.<sup>20</sup> Few of the allegations had any substance. However, Clarke presided over a process for purchasing Maori land which was slow and cumbersome and based on the recognition of Maori rights to all territory.<sup>21</sup> Grey was equally dismissive of the missionaries and the New Zealand Company was not immune to his attacks either.

Grey reviewed and challenged some of the purchases of the New Zealand Company, the Church Missionary Society and land acquired through FitzRoy's pre-emption waiver scheme to end such dubious transactions and re-assert Crown pre-emption. He took some of them to the Supreme Court for consideration. High profile cases, such as *R. v. Symonds* and *R. v. Clarke*, were part of this campaign. The former dealt with a claim based on a pre-emption certificate and the latter was part of Grey's open war with the Church Missionary Society in which he alleged missionaries had used their influence to acquire grants to land illegally.<sup>22</sup> His attacks on FitzRoy and Clarke left him with almost complete control over land purchase policy and also undermined the best organised opposition in the colony – the CMS – and ensured his own activities were not examined closely.

<sup>17</sup> James Rutherford, *Sir George Grey, KCB, 1812-1898. A Study in Colonial Government*, 2nd ed., London: Cassell, 1961, p.124.

<sup>18</sup> *ibid.*, p.204.

<sup>19</sup> *ibid.*, p.163.

<sup>20</sup> *ibid.*, p.145.

<sup>21</sup> Belgrave, 'Pre-emption, the Treaty of Waitangi and the politics of Crown purchase,' pp.34-5.

<sup>22</sup> See Grant Phillipson, "'The Thirteenth Apostle': Bishop Selwyn and the Transplantation of Anglicanism to New Zealand, 1841-1868,' PhD Thesis, Otago, 1992, pp.303-309.

The instructions issued by Earl Grey regarding the limited nature of Maori title to land was the product from pressure of the London-based directors of the New Zealand Company. The Secretary of State also wanted to establish a new constitution and revive colonisation by removing any impediments to the rapid acquisition of land. In New Zealand, George Grey found this impossible to implement. However, Earl Grey's instructions, although clear, were heavily qualified and it was this ambiguity which gave the governor considerable discretion. In this context, Earl Grey retreated from his original instructions and accepted Grey's approach without qualification.<sup>23</sup>

Earl Grey's approach was comprehensively rejected by the Supreme Court in *R. v. Symonds*, but it was not the legal formalities which were significant. Again it was a question of what was possible: Maori remained militarily stronger and the most numerous. Grey's response was to acquire land by purchase, often in very large blocks, but negotiating with several key tribes and then settling the tribes on small reserves. Customary interests in the land were acquired but they were never clearly defined.<sup>24</sup> The more principled approach of the Protectorate was rejected. Rights to land were based on the ability to assert them or the ability to deliver them to the Crown.

This position, which was accepted by Earl Grey, entirely rejected the suggestion that unoccupied and uncultivated Maori land could be acquired by proclamation. In doing so, George Grey was able to use the Treaty and its pre-emption clause to beat the New Zealand Company into submission. Successful Crown purchases undermined the Company's influence at the Colonial Office and its attempts to have the recognition of Maori customary rights withdrawn. Grey's success in the South Island encouraged him to try elsewhere and this became the approach to land purchase until the Waitara dispute.

The cracks were, however, beginning to appear as early as 1853 when the process of acquiring land in the more populous North Island became much more difficult. Conflict between tribes over sales became common especially as resistance to selling grew. At the same time, speculation and sheep-farming sent demand for Maori land skyward. Increasingly, Grey and his lieutenant, Donald McLean, showed

<sup>23</sup> Rutherford, p.171.

<sup>24</sup> During Grey's first governorship, he and McLean worked very closely together. Grey took a keen interest in land purchasing and was always involved in negotiations. McLean acted as his agent who was sent to discuss offers and possible sales to the Crown with Maori landowners. A collaborative approach was developed by Grey and McLean. Grey was the senior and more important figure who held the power and controlled land purchasing; McLean was his agent and worked for him without question. In 1853, McLean recommended to Grey that a Native Land Purchase Department be established. Grey was about to leave the colony and McLean was becoming increasingly concerned that a new governor might not maintain what had been a very successful collaborative approach to purchasing Maori land. Grey set up the Department and appointed McLean Chief Land Purchase Commissioner and then left for South Africa.

little regard for Maori interests as negotiations were conducted in secret, and it was only a matter of time before Maori became concerned. As Rutherford concludes, 'Grey was fortunate to get out before the reaction commenced.'<sup>25</sup> His capacity to purchase land was nevertheless judged very successful – after the fiasco of the commission and the plodding method of the Protectorate.

Grey departed the colony at the end of 1853. The new governor, Thomas Gore Browne did not arrive at Auckland and take office until early September 1855.<sup>26</sup> In the intervening two years there was considerable change. Very little occurred in native policy or land acquisition. McLean continued to negotiate the sale of large blocks of land on a tribal basis although there was increasing shift toward secrecy and negotiations with only a few tribal leaders. The most significant change in native policy and the recognition of Maori customary rights to land during this interregnum was not to be found in the policy or practice of native land purchase but rather in the constitutional structures by which the colony was governed. The 1852 constitution devolved self-government upon settler representatives and guided by an interim administrator, Colonel R.H. Wynyard, effect was given to the new constitution.

The first General Assembly met at Auckland in May 1854 and immediately demanded responsible government. This was conceded by the Colonial Office with the exception of native affairs, control of which remained with the British government and the Colonial Office through its agent, the governor. A government was not formed at that first sitting, however, and no sitting was held during 1855 so that the first responsible government was not appointed until April 1856 – after the arrival of Browne. Of greater significance to the political situation in the colony though were the provincial governments. They were the primary political institutions of the colony because of the geographical isolation of the settlements.<sup>27</sup>

With the formation of the first responsible government in 1856, Browne announced that native policy and administration was a matter of imperial interest and, as in 1854, would be reserved to the governor. This was approved by the Colonial Office on the basis that while the imperial government provided troops to defend the

<sup>25</sup> Rutherford, p.186.

<sup>26</sup> *New Zealand Government Gazette*, III, 20, 6 September 1855, p.1.

<sup>27</sup> W.P. Morrell, *The Provincial System in New Zealand, 1852-76*, 2nd ed., Christchurch: Whitcombe and Tombs, 1964, pp.91-101. The power of the provinces in the General Assembly was great enough to take control of the purchase of Maori lands, the land revenue and immigration. Responsibility for all these areas were given to the various Provincial Councils and Superintendents. They were also to receive part of the customs revenue and any unused revenue not appropriated for general purposes. Two further matters were resolved at the same time. The first related to the South Island and the payment of debts held by the New Zealand Company. The other involved primarily the North Island and the money needed to purchase Maori land. The provinces agreed that a loan would be negotiated to meet both needs, the South Island taking responsibility for the payment of the New Zealand Company claims and the North Island liability for the cost of purchasing Maori land.

colony it should retain some control over native policy. The colonial government in consequence had no responsibility for finance or for native policy. This agreement over the administration of native affairs was reached after considerable discussion and dispute between the Governor and his ministers during 1856. Browne's relationship with his ministers was so bad that the agreement over the administration of native affairs was far from settled and it would remain a cause of major instability throughout the remaining four years of his tenure as governor.

Negotiations over the agreement of 1856 were protracted and difficult. First Browne had to convince the Secretary of State, Henry Labouchere, that the chances of conflict were still very high. Labouchere had suggested British troops might be withdrawn from the colony and the enforcement of law undertaken by a colonial militia or police force. Browne, however, identified 'the very controversial problem of land rights which had led to feuds' as the primary reason for retaining imperial troops.<sup>28</sup> Based on advice he had received from McLean and Halse, the Governor argued native affairs had to be carefully managed to ensure local Maori feuds did not escalate into widespread disputes that could threaten property and the security of some of the new settlements. He added that the Maori population still out-numbered the settler population by a massive proportion. He also recognised a continuing reality: 'As the Maoris are a brave and warlike race, it is evident that the existence of the Europeans, even with such military assistance as can be afforded, must depend on their forbearance and good will, rather than on any wholesome dread of our power.'<sup>29</sup> For these reasons, he believed it essential for the peace and security of the colony, that the imperial troops remain.

It was no longer, however, just the Colonial Office Browne had to convince. Colonial politicians and responsible ministers were also most interested in the organisation of native policy; control of native policy after all was primarily about the acquisition of land, the most important economic resource in the colony. Writing to responsible ministers, the same day as requesting that imperial troops remain in New Zealand, he advised that he would be guided by his ministers on all matters for which the General Assembly was responsible. However, he would retain control of native affairs on the basis that he was responsible for peace and order in the colony and went on to lay out a complicated structure for administering native policy.<sup>30</sup> The governor would appoint a Native Minister and a Native Secretary. The minister would be responsible to the settler legislature and the secretary to the governor. All matters regarding native affairs would be forwarded to the Native Secretary who would read the papers and annotate them. They would then be sent to the Native Minister for his views before being sent to the Governor for a decision. This decision was then given

<sup>28</sup> Browne to Labouchere, 15 April 1856, *PP*, 1853-61, p.194.

<sup>29</sup> *ibid.*, p.195.

<sup>30</sup> Browne to Labouchere, 30 April 1856, *PP*, 1853-61, pp.208-9.

effect by the Native Secretary using finance provided by the Native Minister through the legislature. It was intended that the Governor would have a veto on native matters but in practice this was impossible because he had no control over finance.

These proposals were accepted by responsible ministers and it appeared the question was settled in April 1856. However, ministers continued to pressure the governor to pass the administration of native affairs to them and their activities undermined any of Browne's attempts to implement a coherent policy. In June, the Fox ministry, which had accepted Browne's proposals for the administration of native affairs in April, was replaced by a new ministry led by Edward Stafford. In August a major crisis blew up when ministers raised the question of how native affairs should be administered again. The new controversy arose over the recently enacted Native Reserves Act. Browne had approved the legislation and not reserved it for imperial assent. In doing so it is not clear that he understood the impact of one key provision which appeared to limit his authority in native policy. A provision inserted into the bill after its introduction required the governor to exercise the powers conferred on the advice and with the consent of the Executive Council. It effectively limited the Governor's authority over native affairs and was a direct assault on the agreement reached in April.

At the same time, ministers attempted to assert greater control over native affairs in a more direct way. The Stafford ministry wanted the Native Office and the Land Purchase Department brought under their control and subject to the supervision of the governor who could act independently where he considered this was necessary.<sup>31</sup> Browne rejected the proposals arguing that any changes would have to be approved by the Secretary of State.<sup>32</sup> However, he did agree to an adjustment. He decided that the Chief Land Purchase Commissioner should also be appointed Native Secretary and his position would be subject to review by the governor only. The office would also be placed on the civil list.<sup>33</sup> The system only became more complex and it was increasingly difficult for Browne to develop and implement a coherent native policy. Moreover, the acceptance of these changes by responsible ministers was very reluctant and heavily qualified:

The present arrangements being necessarily of a temporary character only, the question as to what should be the permanent relations between the Governor of New Zealand and his responsible ministers still remains to be considered, and his Excellency's advisers at once admit that it is their duty to state their views on this subject frankly, for the consideration of Her Majesty's Imperial Government.<sup>34</sup>

<sup>31</sup> Minute on Native Affairs, 22 August 1856, *PP*, 1853-61, pp.361-2.

<sup>32</sup> Minute, 28 August 1856, *PP*, 1853-61, p.363.

<sup>33</sup> *ibid.*

<sup>34</sup> Minute No. 2 on Native Affairs, 2 September 1856, *PP*, 1853-61, p.363.

They accepted that the governor's proposals were the best to deal with the present circumstances but anticipated gaining greater authority over native affairs in the future. Concerns regarding the threat of conflict remained high.<sup>35</sup>

The amalgamation of the Native Office and the Land Purchase Department were, ostensibly for reasons of economy, but in reality it was a product of conflict between McLean, the Chief Native Land Purchase Commissioner, and Fenton, the Native Secretary.<sup>36</sup> McLean was appointed Native Secretary and Fenton was exiled to the Waikato as Resident Magistrate. The two had disagreed and Browne deferred to McLean as the senior officer.<sup>37</sup> The changes in August highlighted the absurdities of a divided power structure governing native affairs. Neither did they resolve Browne's funding problem. The politics were equally important, especially for the future, as McLean and Browne were able to consolidate their control over native affairs, and Fenton became increasingly associated with colonial ministers.

This became very clear during 1858 when ministers attempted again to take control of native affairs from the governor. The conflict was embodied in the Native Territorial Rights Bill. Introduced to the General Assembly by the Colonial Treasurer, C.W. Richmond, in June 1858 it was one of five pieces of native land legislation considered by the Assembly that year. Together they formed a comprehensive policy programme for the newly appointed ministry. Three were approved by Browne who had no objection to them. The other two bills were more controversial and were reserved for the Queen's assent, technically because Browne believed they breached the terms under which the imperial government had agreed to secure the New Zealand loan.

<sup>35</sup> It was approved by the Colonial Office where Labouchere believed it 'a satisfactory conclusion in itself, and it is one of which Her Majesty's Government, on whom it is thrown, the cost of Military protection of the Colony against the hazard of hostility from these very Natives, has full right to require strict enforcement.' Labouchere to Browne, 16 December 1857, *AJHR*, 1858, E-5, p.7.

<sup>36</sup> Alan Ward, *A Show of Justice. Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland: Auckland University Press, 1973, pp.93-94.

<sup>37</sup> Paterson argues McLean opposed testing Fenton's proposals for 'civil institutions' in the Waikato favouring instead the Bay of Islands. The decision to send Fenton on his first circuit in 1857 was made while McLean was away from Auckland and after meeting Te Wherowhero at Mangare, he became convinced his view was correct. Moreover, Edlin suggests McLean was incensed that Fenton continued to correspond with Richmond despite specific instructions from the governor that all correspondence was to be forwarded to McLean. Fenton upset many while in the Waikato where he tried to promote the individualisation of land and his second circuit in 1858, dispatched with severely circumscribed instructions, was cancelled shortly after he left Auckland. Fenton and McLean also disagreed over how to deal with the kingitanga: Fenton refused to meet Potatau whereas McLean did not want to exclude him. See Richard Edlin, 'Aspects of "that Great and Glorious Imprudence:" C.W. Richmond and Native Affairs in New Zealand, 1853-1861,' MA Thesis, Otago, 1977, pp.59-64 and 85-88; and, Alison Paterson, 'The Maori Problem 1852-1863,' MA Thesis, Otago, 1973, pp.48-57.

The crisis of 1858 blew up primarily over the Native Territorial Rights Bill.<sup>38</sup> It proposed a revolution in Maori land purchase activities which had been laid down by Grey over ten years earlier. The bill had two functions. First, it provided a process for determining and recording tribal titles to land. Ownership would be determined by specially appointed officers and transferred to English title. The other related function was creating the power to grant individual Maori blocks of land allocated to them by their tribes. The bill's effect in practice was clear. It provided the 'means for the extrication of native title from its present entanglement, for reducing it to fixed rules, and for subjecting it to the jurisdiction of regular tribunals.'<sup>39</sup> It was hoped that in doing so, further conflicts between Maori would be avoided and that the land purchase activities of the Crown would recommence with fewer difficulties. On the question of the sale of such land, ministers remained particularly vague: there was no clear statement in favour of private negotiations. Richmond expressed a 'preference' for settlers to purchase land from the government rather than from Maori landowners.<sup>40</sup> This 'preference' was nevertheless heavily qualified:

So long as the loan for the extinction of native title holds out, and it is possible to obtain the cession of tribal rights over considerable tracts of country through the operations of the Land Purchase Department, it appears preferable that the European settlers should purchase of Government, rather than of natives holding Crown grants.<sup>41</sup>

In the view of ministers, any system of Maori land purchase had to deliver both land and a land fund (from the difference between the purchase and sale of land) which could be used for public works and other developments.

However, not only was the bill a direct assault on the administration of native affairs agreed in August 1856, it challenged the assumption which had been unquestioned for twelve years. In proposing this new system, the ghost of Vattel returned as ministers argued that the existing system was based on a fiction in that it acknowledged Maori ownership of all land. For the system to work effectively and generate a fund for development, land had to be purchased at very low prices and resold at a much higher price. They took a much narrower view of Maori title and attempted to re-assert a Vattellian point of view regarding customary rights over unoccupied and uncultivated lands and based this on the pre-emption clause of the Treaty of Waitangi. Richmond, for example, characterised the view of Maori rights on which land purchase policy had been based as a 'fallacy' in that it assumed it was a right when it was 'really a gratuitous concession by the Government.'

<sup>38</sup> Browne's objection to another piece of legislation which was reserved for the Queen's assent, the Bay of Islands Settlement Bill, were mostly technical rather than fundamental.

<sup>39</sup> 'Memorandum by Responsible Advisors on Native Affairs,' 29 September 1858, *PP*, 1853-61, p.24.

<sup>40</sup> *ibid.*, p. 25.

<sup>41</sup> *ibid.*

As well as attempting to radically shift Maori land purchase policy, ministers were trying to amend the administration of native affairs as agreed in 1856. Like the Native Reserves Act 1856, the operation of the native land legislation of 1858 required the consent of the Governor-in-Council. That is, the governor could only exercise powers under the Native Territorial Rights Act 1858 on the advice and with the consent of responsible ministers.

Browne objected to the Vattellian approach and attempts to impose limits on his authority in native policy and recommended the legislation not be approved by the Colonial Office. He added that both would threaten the peace of the colony and that it would therefore require greater expense in the form of naval and military forces to maintain peace, a cost of significant concern to the imperial government.<sup>42</sup> He also continued to conceive of land purchase operations in large scale terms where Maori ceded massive blocks of land. He believed the bill would only undermine these activities while allowing for the acquisition of comparatively small amounts of land.

The dispute over the legislation of 1858, and in particular the Native Territorial Rights Bill, between Browne and his responsible ministers escalated into full-scale political war when the legislation was reserved for the Queen's assent and forwarded to the Colonial Office.<sup>43</sup> The papers accompanying the bill show ministers and the governor engaged in tit-for-tat correspondence involving whether ministers threatened to resign if the legislation was not accepted by the Legislative Council, the importance placed on the acceptance of native policy as a whole by ministers, the governor's support or otherwise for the policy, and who was present and when during the debate. The dispute degenerated into a retaliatory farce in which colonial ministers and the governor both complained bitterly to the Secretary of State about who would have control of native affairs. The correspondence between Browne and his ministers got to such a point that Sir George Arney, the Chief Justice, who was dragged into the fray by both sides, was moved to remark in exasperation 'that the differences between "the despatch" [Browne's] and the "memorandum" [of ministers] are rather in form than in substance.'<sup>44</sup> This was a conflict over power in which the substance of the dispute was immaterial.

The Colonial Office accepted Browne's advice and the bill was disallowed.<sup>45</sup> While fully supporting the concept of responsible government where it related to internal and domestic affairs, Lord Carnarvon maintained the view that responsibility for native affairs had to remain with the governor. While the imperial government remained responsible for preserving peace and the cost of troops, 'Her Majesty's

<sup>42</sup> Browne to Lytton, 15 October 1858, *PP*, 1853-61, p.62.

<sup>43</sup> Browne to Lytton, 15 October 1858, *PP*, 1853-61, p.60.

<sup>44</sup> Arney to Browne, 10 December 1858, *PP*, 1853-61, p.74.

<sup>45</sup> Carnarvon to Browne, 18 May 1859, *PP*, 1853-61, p.171.

Government cannot consent to yield a point which, in their opinion, is so intimately connected with the security of the colony, the justice due to native claims, and the issues of peace or war itself.<sup>46</sup>

Beyond the antagonistic nature of the discussions, the issues raised by Browne and his ministers were those which dogged his tenure as governor and which George Grey would also find impossible to resolve on his return to New Zealand. That was the best and cheapest way of purchasing Maori land while maintaining peace and at the same time appeasing settler demands for more land and attempts by colonial politicians to take control of native affairs.

The crisis over the Native Territorial Rights Bill is also significant for the role of Fenton. Debates in the House of Representatives show that Fenton was closely involved in assisting ministers to develop their native policy in 1858. Richmond told the House that he 'could not have felt satisfied without making a public acknowledgment of the assistance rendered by that gentleman.'<sup>47</sup> In acknowledging the ministry was responsible for the legislation, Richmond added that 'the gentleman to whom he referred [Fenton] had been most active in calling the attention of the Government to the evils which these measures were addressed to remedy, and to the urgent necessity for action in the matter.'<sup>48</sup> Indeed, in 1864 John Gorst, writing of his time in the Waikato in the early 1860s, described Fenton as 'a protégé of Mr Richmond, from who he received all his instructions.'<sup>49</sup> While McLean continued to work closely with Browne in this fractious environment, Fenton was becoming increasingly associated with the men who would soon appoint him first chief judge of the Native Land Court.

During 1859, there was considerably less political pressure on Browne as the General Assembly did not sit that year and there was no flurry of legislation as there had been the previous year. In this context, Browne attempted to take the initiative in developing a coherent policy to deal with the question of purchasing land from Maori. A plan was submitted to the new Secretary of State at the Colonial Office, the Duke of Newcastle. The Governor's assessment was that 'on the subject of waste lands belonging to the aboriginal natives, ... the time has arrived when it appears to me that some change must be adopted in the mode of acquiring them.'<sup>50</sup>

This plan was based on advice from a wide range of officials including Martin, Swainson, Sewell (who had prepared a bill embodying the proposals) and Smith and

<sup>46</sup> *ibid.*, p.173.

<sup>47</sup> *ibid.*

<sup>48</sup> *ibid.*

<sup>49</sup> J.E. Gorst, *The Maori King*, Keith Sinclair (ed.), Hamilton and Auckland: Paul's Book Arcade, 1959, p.74.

<sup>50</sup> Browne to Newcastle, 20 September 1859, *PP*, 1853-61, p.77.

partly drew on the report of a Board of Inquiry appointed in 1856 to advise Browne on native policy and native title. The evidence presented to the Board and the report produced indicates there were many officials who had enough experience to recognise the complexity of Maori customary rights to land based on many different claims. There was general agreement that Maori held rights over all the territory and that individual rights were usufructuary and derived from the more important communal right.<sup>51</sup> The Board recommended a much more rigorous approach to purchasing Maori land. Land purchase commissioners would have to thoroughly investigate all claims to a block of land offered for purchase and give the opportunity for others to lodge claims. The purchase money would have to be paid in full and not in instalments and a survey of the land undertaken at the time of payment to set aside reserves. Browne forwarded the report to the Colonial Office where it was promptly and efficiently acknowledged, filed and forgotten. He attempted to direct further attention to it by submitting it a second time in 1859 with his proposals for the administration of native affairs but then the conduct of war overwhelmed him. At the Colonial Office, the whole business was simply too difficult to bother with.

On the ground in New Zealand, however, the problem of how to acquire Maori land was becoming increasingly difficult to ignore. Browne was unambiguous on one major issue. He noted that while land in the South Island had been purchased for small nominal prices, there were large areas of land remaining which could not be acquired at those rates. At the same time, Maori had seen land purchased for small sums resold for much higher prices.<sup>52</sup> He was equally certain though that Maori held much land they could not use 'and unless means are devised for reconciling the interests of the one with the other, collision, attended with calamity to one race, and annihilation to the other is inevitable.'<sup>53</sup> This might come about as settler numbers grew and Pakeha simply defied both the Maori landowners and the government and occupied the land.

Browne's solution to the problem was the establishment of a special council of native affairs which would be chaired by the governor and which would advise him on matters relating to Maori. He believed the council should have seven members, two of whom would be recommended by the colonial government. The governor would recommend the other five, three of whom would be paid. The council should be permanent and individuals members removable only by the Secretary of State. This council would be responsible for the conduct of native policy including land purchases.

<sup>51</sup> Belgrave, 'Maori Customary Law: from Extinguishment to Enduring Recognition,' p.30.

<sup>52</sup> Browne to Newcastle, 20 September 1859, *PP*, 1853-61, p.78.

<sup>53</sup> *ibid.*, p.82.

As for land purchases, Browne wanted to clearly set out and formalise the creation of reserves for Maori when land was purchased. In doing so, he hoped to deal with the problem of granting land to Maori: 'One power, namely, that of securing absolutely to the aboriginal natives the possession of so much of their property as is necessary for their present and future support, and to prevent their becoming pauperised, must be entrusted to some authority in this country.'<sup>54</sup> Browne also suggested a scheme for allowing private purchase by individual Pakeha. It would only apply to certain districts where Crown grants to individual Maori would be made. Where a purchaser indicated Maori landowners were willing to sell their interests, the governor would attempt to extinguish native title to the land through a fixed process. That would involve a public auction with a minimum price to be set by the governor which could not be less than five shillings per acre plus the cost of the survey.

Responsible ministers were asked to comment on these proposals. Not surprisingly they were not particularly keen on the suggestion that native policy should be vested in an independent board concluding that it 'appears improbable that such a system could work in harmony with the representative institutions of the Colony.'<sup>55</sup> They, in response, drafted three bills for the consideration of the governor. Browne had one fundamental objection to all this legislation: many of the powers conferred on the governor could only be exercised on the advice and with the consent of responsible ministers. Once again ministers were attempting to assert control over native affairs.<sup>56</sup>

Conflict between Browne and ministers was, by 1859, intense. Another conflict would shortly overshadow the problem of administering native affairs and acquiring Maori land, but prior to that ministers and the General Assembly in New Zealand waged all-out war on Browne's proposals. Browne nevertheless submitted his plan and then what happened? War. With conflict at Waitara, the question of responsibility for native affairs became marginal to dealing with chiefly rights in Taranaki.

From 1855 to 1859 there existed a vacuum in native policy especially in relation to the purchase of Maori land for settlement. In this vacuum, McLean had a great deal of scope.<sup>57</sup> Browne relied heavily on the advice of McLean and a small group of officials and McLean gained a much freer hand in native and land purchase policy than he had previously been permitted during Grey's tenure as governor. He closely monitored the work of his officials and resisted any external interference in

<sup>54</sup> *ibid.*

<sup>55</sup> Richmond to Browne, 19 August 1859, *PP*, 1853-61, p.106.

<sup>56</sup> Remarks by the Governor, undated, *PP*, 1853-61, p.109.

<sup>57</sup> Ward, p.108.

matters relating to native affairs – this had led to the departure of Fenton. McLean became increasingly autocratic and embroiled in conflict with ministers over their attempts to become involved in native policy.<sup>58</sup> After 1856 and the arrival of responsible government, McLean's independence was threatened because funding for his department was appropriated by the General Assembly. McLean also had problems on another front. From 1853 growing concern among Maori at the extent to which land had been alienated led to increasing resistance to further land sales. Feuds also developed among Maori over land rights as a result of the activities of land purchase commissioners and several broke into open conflict.

McLean was subject to two competing pressures. To avoid conflict between Maori and Pakeha and exclude colonial politicians from native affairs he had to provide enough land for settlers. To do so he engaged in highly dubious practices and was forced to push through very questionable purchases. He engaged in secret purchasing, favoured sellers, and prevented Maori appealing to the governor. In doing so he was unable to prevent conflict. Not so much between Maori and Pakeha but between Maori and Maori: increasingly disputes between sellers and non-sellers threatened to erupt into open conflict. According to Fargher, after 1853 the 'old method of tribal meetings where discussion and consent took place in the presence of all the natives concerned, was abandoned for the most part, and in its place was substituted purchase from those individuals, chiefs or groups, who appeared to have the strongest claims.'<sup>59</sup> A product of this new approach was greater opposition to purchases from those whose claims had been ignored during negotiations. Many of the payments for Hawke's Bay purchases arranged in this period were made at Auckland or Wellington rather than on the land itself and the deeds were signed by comparatively few people.

It was this context which provided the background to the Waitara dispute of 1860. The first Taranaki war began in March 1860 and continued through several phases until a ceasefire was arranged twelve months later. Although questions of sovereignty and power were bound up in this conflict, it also arose out of problems which had always existed in the approach to purchasing land developed and applied by Grey and later by McLean. Waitara was not the first conflict to have emerged as a consequence of land purchasing activity. However, prior to 1860 such conflict had taken the form of feuds between Maori over rights to land and had been successfully managed away by McLean who was willing to acknowledge any rights so long as conflict was avoided and the Crown acquired land.

The question, therefore, was how a feud between two Taranaki chiefs turned into a conflict with the governor. The immediate cause of the war was a result of

<sup>58</sup> R.W.S. Fargher, 'Donald McLean. Chief Land Purchase Agent and Native Secretary,' MA Thesis, Auckland University College, 1947, p.61.

<sup>59</sup> *ibid.*, p.82.

Browne's decision to force the survey of the Waitara block. Essentially, Waitara was like any feud between Maori chiefs – in this case Wiremu Kingi and Teira – over land and McLean had successfully defused many of these before. In this instance he was not able to, although it was McLean who was sent to Taranaki by Browne to negotiate a truce when it became clear a decisive battle was not to be won. It was a truce based on the investigation of the Waitara purchase.

The war in Taranaki represented the collapse of the Maori land purchase system established by Grey in 1846. Many of the contradictions and problems inherent in that system contributed to the outbreak of war in 1860. However, while it has been a particular focus of historians' attention, in Canterbury, a young man was attempting to come to grips with Maori landownership in a very different way. In December 1859, Walter Buller was sent to Canterbury by the Governor as a special commissioner. The son of a Wesleyan missionary and barely twenty-one years old, he was told to visit the Maori settlements and report on their living conditions and needs.

The reserves there had been created as part of H.T. Kemp's negotiations in 1848. The Kaiapoi Reserve had an area of 2,640 acres and it was specifically reserved from the sale. By 1859 disputes among the owners made it very difficult to use the land productively. Firewood had been cleared by individuals for their own profit rather than that of the Maori community, some of the land was being leased to Europeans, and some of the land had been sold without the consent of all the owners. Disputes over the very valuable timber on the land – valuable as a result of a shortage of good wood for construction – were also intense.<sup>60</sup> Following his visit, Buller advised that Maori at Kaiapoi were unhappy with the ownership of the reserve especially in relation to claims to the timber on the block. In his report he 'urged the partition and individualization of the land and the issue of Crown Grants to the Natives, in severalty, as the only effectual remedy for the evils complained of.'<sup>61</sup>

Before examining the subdivision and allocation of the Kaiapoi Reserve, it is necessary to examine discussions among officials on the question of issuing Crown grants to Maori. An investigation into the number of Crown grants in July 1861 showed that 44 Crown grants had been issued to Maori, the first in 1852 and the last in 1859, generally for urban sections and moderately sized blocks of land.<sup>62</sup> All had been issued to individuals only. The only other way these lands could be administered was under the Native Reserves Act 1856 and this legislation had proved particularly ineffective. By the late 1850s therefore it would appear that much of the land which had been reserved to Maori was in fact Crown land on which they were

<sup>60</sup> Ward, p.112.

<sup>61</sup> 'Report on the Partition and Individualization of the Kaiapoi Reserve,' *AJHR*, 1862, E-5, p.3.

<sup>62</sup> 'Return of all Crown grants issued, or in course of preparation, to Native subjects of Her Majesty,' 3 July 1861, *AJHR*, 1861, E-6.

squatting. This did not really matter of course. While settlement remained thin, surveying these boundaries so that they were clearly defined and granting firm title to the land was not really necessary. It only became an issue as land became more closely settled and Maori were confined to their reserves.

The question of how Maori land was to be managed was still very unclear. The Native Reserves Act provided one possible model. Individualisation was another. Ward argues that the Kaiapoi Reserve at Tuahiwi became a testing ground for individualisation.<sup>63</sup> To describe it as a policy at this point, however, would be giving too much coherence to a very uncertain and ambiguous way of dealing with specific problems there. Neither Browne nor McLean were particularly clear on how it would work. Both remained committed to large scale purchasing by the Crown. Ward argues that colonial politicians saw the individualisation of Maori land as an opportunity for purchasing land directly from Maori. However, as we have seen, colonial politicians had little capacity to influence land purchase policy in any way and Browne, in his proposals of 1859, was moving away from attempting to deal with Maori landownership on an individual basis. The proposals of 1858 – where even ministers were vague on their support of direct purchase from individual Maori – were rejected entirely. Issuing Crown grants to Maori was nevertheless seen by Browne as a way of providing them with clear and indisputable title to their lands. It was not necessarily a means for acquiring land from Maori.

There was certainly a consensus on the merits of individualisation. All were agreed that the communal ownership of land by Maori had to be replaced by individual rights. How it could best be achieved though was, in the late 1850s, far from clear. The Governor had, for several years, complained that he did not have the power to make grants to individual Maori of land which they owned and which had not been ceded to the Crown. In April 1857 he had requested the imperial parliament amend the constitution vesting this power in him so that he could convert 'the title of the natives as tribes or communities into titles to be held by individuals under Crown grants, especially in reference to lands which it is desirable that they should retain for their own use and occupation.'<sup>64</sup> This view was supported by Stafford, the Colonial Secretary, but it was seen as a way not of effecting alienation but of securing to Maori land which they retained for occupation and cultivation. Browne complained again of this problem in the political disputes of 1858 and also in submitting his proposals for administering native affairs in 1859.

So Buller went to Canterbury with a very clear idea about what had to be done but very little idea about how it could be done. Title to the reserve had to be individualised but how that might be effected was still far from clear. During his

<sup>63</sup> Alan Ward, 'A Report on the Historical Evidence: the Ngai Tahu Claim,' 1989, p.343.

<sup>64</sup> 'Memorandum by Responsible Advisers,' April 1857, *PP*, 1853-61, p.76.

second trip, Buller organised a runanga to undertake the partition and award of the land.<sup>65</sup> With his guidance the runanga set down rules as a basis for awarding the land and then partitioned the reserve and allotted sections to each hapu. Where there were intractable disagreements, especially over the valuable bush sections, he decided against issuing Crown grants to individuals. Instead they were awarded to several landowners in common. So he was not able to individualise title to land over which there were major disputes. However, the Governor, rather pre-occupied with events in the North Island, was in no rush to prepare the Crown grants. In September 1866, the Commissioner of Native Reserves for Canterbury, Henry Tancred, reported that Crown grants had still not been issued for the reserves.<sup>66</sup>

Like most of his Pakeha contemporaries, Buller linked individual land ownership with civilisation and material progress. He also saw it as a way of improving inter-tribal relations. Noting there had been disputes over land for many generations, he believed that:

So long as these debatable grounds remain so, there is a continual danger of land feuds being renewed. Any overt act of ownership exercised upon such land by either of the contending parties would be construed into a challenge, the tribal jealousy would be aroused, and the worst consequences might ensue.<sup>67</sup>

The Kaiapoi approach was not used elsewhere and certainly not adopted by the Native Land Acts where, rather than vesting small blocks of land in individuals, large blocks were vested in groups of owners who held shares in the land in common. The failure, however, to issue grants for many years after an agreement was reached did become the norm. Kaiapoi was significant because it was an early attempt to deal with the question of administering land retained by Maori.

All Pakeha observers agreed, in a vaguely Vattellian way, that Maori needed to have sufficient land to occupy and cultivate and that this land should be secured to them in the form of Crown grants and that the surplus land they did not use could be sold without detriment to their needs. Browne in particular based his proposals of 1859 on providing Maori with defined and secure blocks of land. This was in the hope they would be willing to sell other land, confident they would retain some land in any circumstances and would not be rendered landless – the key issue he attributed to founding of the king movement. Nevertheless, how individualisation might be achieved was still unclear and it would not become clear until another conflict had been fought and won. The theatre of war was not the Waikato but Government House in Auckland.

<sup>65</sup> 'Report on the Partition and Individualization of the Kaiapoi Reserve,' pp.4-5.

<sup>66</sup> Ward, 'A Report on the Historical Evidence: the Ngai Tahu Claim,' p.347.

<sup>67</sup> 'Report on the Partition and Individualization of the Kaiapoi Reserve,' p.11.

The continuing battles between the governor and responsible ministers for control of native affairs and their significance in the establishment of the Native Land Court in a period of conflict and uncertainty is examined in the next chapter. This chapter has shown that the question of how to define Maori customary rights and acquire Maori land was never stable and certain and the subject of constant debate and experimentation from the time the Treaty of Waitangi was signed to the Waitara war. Decisions made in London regarding the recognition of Maori customary rights to land were subject to modification in New Zealand in response to circumstances on the ground. This chapter has also demonstrated the extent to which battles within the political elite were, in the second half of the 1850s, the major cause of a highly unstable and murky approach to administering native affairs and the process of acquiring Maori land. In such a volatile environment, the Native Land Court – another experiment which had been waiting in the wings for several years – was finally established. The Court, however, did not bring stability and certainty to Maori customary rights to land: these patterns continued in the decades after 1860.

## ESTABLISHING THE NATIVE LAND COURT AND EARLY REFORM

In the late 1850s, conflicts within the colonial political elite in Auckland precluded the development and systematic application of any coherent policy to deal with Maori customary rights to land and the acquisition of Maori land. A court to deal with Maori land was proposed on a number of occasions but never established because of those conflicts. At the same time, it was clear that there were growing difficulties associated with acquiring Maori land under Crown pre-emption in the 1840s and 1850s. This chapter argues that during the early years, the Native Land Court itself was invented and re-invented on three occasions – in 1862, 1865 and 1873. Each piece of legislation and the kind of Court it created reflected the specific political context in which it was enacted. The first two Native Lands Acts were a product of the civil wars of the early 1860s and of conflicts between the governor and colonial ministers. Each was fundamentally different and those differences reflected shifts in power relations, particularly between the governor and colonial ministers.

The 1862 statute was vague in terms of the Court it created but most importantly conveyed all authority to the governor as colonial politicians tried to avoid responsibility for the cost of any war. The 1865 legislation established a very formal court designed fundamentally to operate in a free market in Maori land. In 1873, a new Native Land Act established a very different court, which was structured to reflect the Crown's role in negotiating and purchasing Maori land for settlement as part of the immigration and public works programmes of Julius Vogel. During this period, there was an overwhelming consensus of opinion among politicians on all sides of the political spectrum that Maori land had to be acquired. This chapter concludes that political priorities and the continuing threat of further armed conflict drove the re-invention of the Court, as colonial politicians struggled to find a way of effectively dealing with Maori customary rights to land.

The 1860s was a period of considerable unrest in the colony of New Zealand. There was not only the threat and reality of conflict but also simmering tension between Grey and colonial politicians. In the first half of the decade there was a new government each year. In the second half political stability emerged as the Stafford Ministry governed with only minor interruption from October 1865 to June 1869. There were a number of reasons for this instability, not least the war but also the differences of opinion between Grey and his responsible ministers as to how government policy, particularly native affairs, was to be conducted. It was in this context that both the 1862 and 1865 Native Lands Acts were debated and enacted by the General Assembly. These two pieces of legislation and the circumstances of their enactment are the focus of this chapter.

With conflict at Waitara, the Colonial Office dispatched Browne with little ceremony and returned George Grey to New Zealand in September 1861. He was instructed to establish peace, introduce 'civil institutions' into Maori society and re-organise the administration of native affairs. The situation Grey found himself in was very different to that of his earlier tenure as governor: he was now required to exercise power in a very different way; he had to act on the advice of his responsible ministers.

On reaching Auckland, he found colonial politics in disarray. The Stafford Ministry had been defeated in July by a slim margin of one vote. William Fox had been able to form a new government but only with difficulty. The first Taranaki war against Wiremu Kingi and the kingitanga over the Waitara purchase had been fought and the result was very ambiguous. Fox opposed Browne's policy of force and preferred instead the introduction of civil institutions among Maori communities, as had been recommended by Fenton in 1857, and argued in favour of peace negotiations and concession.

Difficulties quickly emerged over the conduct of native affairs as Grey was expected by his ministers to take responsibility for this area of policy. The fighting over Waitara had scared colonial politicians: not so much from a military point of view but rather fear of having to meet the cost of any conflict. Responsible ministers nevertheless insisted that, while still refusing any responsibility over native affairs, they provide advice to Grey and he was still required to have the money to fund any policy appropriated by the General Assembly. Grey himself was keen for ministers to take over the administration of native affairs but also ensure he could intervene as he wished: 'to give them the responsibility to do what he wanted.'<sup>1</sup> Fox demanded either the abolition of the Native Department or to have it brought under ministerial control. Colonial politicians were highly critical of the Department as a source of independent advice for the governor and blamed it for the conflict over Waitara. However, no

<sup>1</sup> Keith Sinclair, *The Origins of the Maori Wars*, 2nd ed., Wellington: New Zealand University Press, 1961, p.238.

overall responsibility for the native affairs was sought at all: ministers wanted to ensure the financial liability of the colony was limited and so the governor had to retain responsibility for decisions while ministers provided advice and carried out administrative functions.

Out of this mess, in October and November 1861, a native policy was finally thrashed out by Grey, Fox and Henry Sewell (the Attorney-General) assisted by Fenton (then an Assistant-Law Officer). Grey did not support any further military operations and instead worked with Fox and Sewell to introduce civil self-governing institutions into Maori communities to foster better relations between Maori and settlers. Runanga, chaired by Resident Magistrates and Civil Commissioners, were established to make and enforce local regulations. Ward describes these 'new institutions' as 'comprehensive machinery' designed to give Maori 'a substantial measure of legislative, judicial and administrative authority in their own districts.'<sup>2</sup> McLean, marginalised in the government, was particularly scathing of the proposals and retired to Hawkes Bay.

One of the civil institutions proposed in this scheme was a court to settle titles of Maori land. After the debacle of 1858, Browne had suggested to ministers as early as March 1861 they consider legislation to establish a court 'in which disputed claims to land (over which the Native title has not been extinguished) whether between Maoris themselves or between the Government and Maoris.'<sup>3</sup> Both Stafford and his Native Minister, F.A. Weld, supported the proposals.<sup>4</sup> Weld wanted to take a very cautious approach, favouring a court which would hear appeals from decisions of the Land Purchase Commissioners and settle any disputes where parties voluntarily agreed to submit to its jurisdiction. He did not think anything beyond that was a good idea until the court's decisions could be enforced. It is significant that he proposed a court constituted by a commissioner and two Maori assessors: the approach taken in the Native Lands Act 1865.

This all came to nothing before the Stafford ministry was ejected from government but the proposal was adopted in the agreement reached between Grey and the Fox ministry. The following year, in early July 1862, Fox introduced the first Native Lands Bill into the House of Representatives. He was the only member to speak and his speech focused entirely on the relationship between the Governor and his responsible ministers over legislation which would 'regulate the disposal of Native lands.'<sup>5</sup> The bill was introduced at a time when that relationship in the administration

<sup>2</sup> Alan Ward, *A Show of Justice. Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland: Auckland University Press, 1973, p.126. For a detailed analysis of their operation, see Chapter 9, 'The "New Institutions,"' pp.125-64.

<sup>3</sup> 'Memorandum by His Excellency the Governor,' 12 March 1861, *AJHR*, 1862, E-11.

<sup>4</sup> 'Memorandum by Mr Stafford,' undated, 'Memorandum by Mr Weld,' 24 April 1861, *ibid*.

<sup>5</sup> *NZPD*, (1862), p.421.

of native affairs was undergoing close scrutiny. Indeed, the House had interrupted an extremely long debate on the question of ministerial responsibility for native affairs to consider the bill.

Fox assured the House that the policy had been developed by the Governor and that his ministers fully supported the approach and were taking action to have the policy implemented. He asserted that ministers and not the Governor should be responsible for native affairs as the problem which they had to solve was not the administration of Maori as such, but rather 'the regulation of the relations between the Natives and Europeans.'<sup>6</sup> He saw the bill as a way of ensuring ministers were not responsible for native affairs and that the Native Department did not have an entirely free rein: 'either you must submit to the Responsible Government innumerable questions which affect the Natives, or you must hand over to an irresponsible Native Department innumerable questions which affect the Europeans.'<sup>7</sup>

The following month the Fox Ministry was removed and replaced by a new government led by Alfred Domett. The new Domett Ministry had to be constructed out of very reluctant colonial politicians. War and peace were on their minds and Domett and his colleagues were much less concerned with peace. Despite Grey's substantial role in putting the government together he found it much harder to work with his new ministers and because of their very different political allegiances they found it difficult to work with each other.

Like Fox, Domett refused to accept any responsibility for native affairs. In a ministerial statement, read to the House on 12 August, he stated this was a responsibility neither he nor his ministers would accept 'because clearly it was not their duty to be answerable for the means of extricating the colony from the difficulties it had got into under a government of the Natives carried on from Home by a representative of the Crown.'<sup>8</sup> Ministers could provide advice on matters relating to Maori to Grey if requested and the government would administer the Native Department and carry out the governor's policy, but any decisions relating to policy would be taken by the governor himself. Ministers accepted no responsibility for the policy itself. This approach was supported by the House of Representatives: it declared that the crisis in native affairs was a product of the conduct of native policy by the British government through the governor and it was up to the British government to resolve the crisis. Fortunately, it also meant that the government would not pay beyond what had already been appropriated for native affairs.

Domett announced that the government would introduce a second native lands bill for the purposes of regulating the sale of land by Maori similar to that of the

<sup>6</sup> *ibid.*, p.424.

<sup>7</sup> *ibid.*

<sup>8</sup> *ibid.*, p.533.

previous government. He argued that the greatest problem which had to be dealt with in relation to Maori was the distrust which had arisen over government land purchase activities. The new bill proposed the complete removal of pre-emption. It also acknowledged 'absolutely the proprietary rights and title of the Natives to the lands they held by Native custom.'<sup>9</sup> Domett intended to give Maori the right to determine title themselves and this was to be done in the form of a court with a European judge presiding. The Court would issue certificates of titles which would be equivalent to Crown grants. These certificates would allow landowners to sell land to anyone they chose. The only limit on this provision would be a power of the government to make reserves. The bill was part of the Governor's native policy and Domett pointed out with great care that consequently ministers had no responsibility for it at all.

It was these two questions – pre-emption and ministerial responsibility – which dominated the lengthy debate over the second Native Lands Bill. The Native Minister, Francis Dillon Bell, told the House that the bill's fundamental principle was that 'all land over which the Native title is not extinguished is the absolute property of the persons entitled to it by Native custom, and that, after their ownership has been ascertained and registered, the proprietors may deal with it in like manner as Her Majesty's subjects of European race may deal with land held by them under grant from the Crown.'<sup>10</sup> As Bell recognised, this was a revolutionary change from the approach of the previous twenty years. It removed Crown pre-emption and allowed Maori to deal with their lands without restrictions. The proposed legislation, Bell argued, would ensure harmonious relations in the North Island by removing 'the secret causes of jealousy and distrust which have been at work in the Native mind, and which are the acknowledged sources of the Maori king movement.'<sup>11</sup> It was designed for the purposes of pacifying Maori.

It would do so by allowing Maori to gain a fair price for their land. Bell claimed that the conflicts which had arisen were a result of 'always trying to give them the least price they would accept for their land, in order that we might ourselves get the greatest profit we could by its sale.'<sup>12</sup> He considered the time had come when the full price had to be paid for land. Walter Mantell supported the legislation for this reason. Mantell came from the South Island and the bill was supported by South Island members who saw it as a way of maintaining peace and also dealing with what they considered the injustice of past land purchase policies. A former land purchase officer, he told the House that he 'became resolved to have nothing more to do with such transactions' because they were so 'iniquitous.'<sup>13</sup> The government had

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid.*, p.609.

<sup>11</sup> *ibid.*, p.611.

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*, p.620.

attempted to purchase land as fast as possible at the lowest possible price in order to extract the maximum profit.

If the bill had the support of South Island politicians, there was nevertheless significant dissent especially regarding the abolition of pre-emption. It came in two forms: one was from provincial interests (which were very strong and had brought down the Stafford government earlier in the year), and the other concerned that the colonial government could be forced to take responsibility for native affairs. A substantial majority of the Auckland members supported the legislation but it was vigorously opposed by the Wellington members and a minority from Auckland.

Of major concern was the possibility that after refusing to take responsibility for native affairs, the legislation would impose on the colonial government this responsibility, and it was a matter in which they wanted to avoid any involvement.<sup>14</sup> Isacc Featherston, Superintendent of the Wellington Province, noted that less 'than a week ago the House had repudiated all responsibility for Native policy, and yet today were prepared to pass a law which would plunge the House in greater difficulties with regard to the Home Government and the Natives than any they had yet met with.'<sup>15</sup> It was quickly recognised that the policy contained in the bill was a direct reversal of the approach adopted in 1846 when Grey had been highly critical of FitzRoy's direct purchase method. Critics keenly observed the contradiction in a political environment where colonial ministers had refused to take any responsibility for native affairs.

It was the proposal to end pre-emption which incensed provincial interests. Members from the Auckland and Wellington provinces were particularly concerned about the loss of revenue the proposed legislation would cause. The provinces had used the revenue generated from land purchase activities to negotiate loans to provide access to and improve land.<sup>16</sup> Featherston and the Superintendent of the Auckland Province, John Williamson, were outraged. They believed the bill breached the financial arrangements made in 1856 between the North and South Island provinces.<sup>17</sup> Both believed handing the acquisition of Maori land over to speculators would severely limit the development of the colony. Featherston told the House the move to direct purchasing 'would have the effect of destroying the systematic colonization of

<sup>14</sup> *ibid.*, p.629.

<sup>15</sup> *ibid.*, p.646.

<sup>16</sup> *ibid.*, p.629.

<sup>17</sup> *ibid.*, p.644. It was arranged that the costs of the debts held by the New Zealand Company and extinguishing the native title remaining in each province would be met by a loan. The South Island provinces took the Company debt and the North Island took the cost of extinguishing native title. It was on this basis that the loan of £500,000 was distributed among the six provinces. When it was agreed that each province would retain its own land revenue, Featherston argued, it was also agreed that the Crown's right of pre-emption would be retained.

this Island, and the territorial revenue of the provinces.’<sup>18</sup> Despite their opposition the provincial interests, who had formerly held the power to control revenues and bring down governments, were defeated by a coalition of Auckland land speculators who wanted to acquire Maori land by direct purchase and South Island politicians who wanted to preserve peace. Both the Auckland land speculators and the South Island politicians were to be severely disappointed by George Grey.

The question of Grey’s view of the bill was one which many members were concerned to clarify. Government ministers were ambivalent in their response. Sewell understood the governor had given a qualified assent to the proposal in that ‘he takes it as the best thing he can get, not as what he desires.’<sup>19</sup> The minister in the Legislative Council, Henry Tancred, informed members that although Grey’s policy was not that of the proposed legislation, ‘having become convinced that the Assembly will not adopt them in the form put forward by him, he thinks the recognition of Natives’ title to their land a matter of such importance that he is willing to accept the Bill as it now stands, and he is of opinion that it can be administered in such a way as to be productive of beneficial results.’<sup>20</sup> To avoid any suggestion that ministers were responsible for native affairs, the legislation gave authority for giving effect to its provisions to the governor. He gained total discretion and was not required to consult with his ministers. The governor was also to determine where the Act would operate and even how the Court would be constituted. Grey never got around to using the legislation to any great extent when events in 1863 got a little beyond his control and he was forced to go into open battle: not just with the kingitanga but with his own responsible ministers.<sup>21</sup>

The major point of conflict between Grey and his ministers during 1863 was the situation regarding the Waitara block. The governor wanted to abandon the block but his ministers favoured the use of force to overcome Maori opposition to the sale. Once conflict in the Waikato became increasingly likely they abandoned their demand in the face of Grey’s intransigence. War with the kingitanga, for which Grey was preparing, was preferred because it was the focal point for Maori independence. The

<sup>18</sup> *ibid.*, p.648.

<sup>19</sup> *ibid.*, p.687.

<sup>20</sup> *ibid.*, p.684.

<sup>21</sup> According to Don Loveridge, the Court only sat under the Native Lands Act 1862 in the Kaipara North and South districts. The Native Land Court first sat at Te Awaroa in June 1864 and a number of sittings were held over the subsequent twelve months. The Court issued fifteen certificates for 4,300 acres of land. Loveridge argues that the ‘Kaipara experiment’ was pragmatic. It was ‘for the most part, a “loyal” and peaceful district,’ where the Crown ‘had a strong and influential presence,’ and local Maori leaders ‘had sold a good deal of land to the Crown.’ Donald M.Loveridge, ‘The Origins of the Native Lands Acts and the Native Land Court in New Zealand,’ Wellington: Crown Law Office, October 2000, p.206. The Court only operated in a district specifically chosen because the tribes there lived in relative harmony with each other, the Crown and settlers.

usual problem of responsibility for native affairs continued during the year: in fact, the absurdity of the way in which native policy was developed and implemented was exacerbated by the Waikato war. While Grey put a great deal of effort into forcing ministers to take responsibility for native affairs (as they had demanded since at least 1856) they attempted to evade any responsibility. The situation was made even more difficult in that ministers were responsible for the Native Office, limiting the ways in which Grey was able to respond to the crisis.

With conflict in the Waikato increasingly likely, Domett took great care to ensure that when war came colonial politicians would not be blamed. Eventually this proved impossible and in October as Grey's Waikato campaign attacked the independent authority of the kingitanga, Domett resigned. His ministry, riven with internal dissension over peace and war, fell apart. In an attempt to shift colonial politics towards peace, Grey tried to appoint a government led by Fox. It backfired disastrously. A small ministry of five including Fox was elected but it was dominated by Whitaker and Russell. The new government was controlled by Auckland politicians who supported war with Maori.

Whitaker immediately demanded full control of native affairs and meant to exercise that control. Grey quickly found himself marginalised. Whitaker's policy was to use imperial forces to subdue Maori and confiscate as much land as possible. The revenue generated by the sale of the confiscated land would pay for the war and ensure colonial ministers could severely restrict Grey's capacity to develop native policy independently. The Colonial Office was not in any position to dictate terms either. The Secretary of State, the Duke of Newcastle, was most diplomatic so that colonial politicians would find no excuse for refusing to meet its share of the costs of war. As the Waikato conflict continued, tension between Grey and his ministers rose significantly, particularly over how the confiscation of Maori land should be dealt with and how peace might successfully be established. By 1864 Grey had found that he was unable to govern the colony without the co-operation of the colonial government. He had, however, not yet lost the war he was fighting with those on the opposite side of Waterloo Quadrant. He could stop government but he could only act through his ministers. His only real and substantial influence was that he commanded the imperial troops in New Zealand.<sup>22</sup>

Whitaker was forced to resign in November 1864 over limits placed on the confiscation of Maori land by Grey and the consequent financial collapse of the

<sup>22</sup> The imperial troops remained under Grey's control, as pockets of armed resistance continued to require a military response. He was concerned that should the troops leave the colony's internal security would be severely compromised. It was his decision to delay as long as possible the return of troops despite instructions to do so, which led to his dismissal by the Colonial Office in 1866. See James Rutherford, *Sir George Grey, KCB, 1812-1898. A Study in Colonial Government*, 2nd ed., London: Cassell, 1961, p.556.

colonial government. Whitaker intended that the sale of the confiscated land pay for the cost of the war but with Grey's refusal to take as much land as Whitaker considered necessary the whole scheme was undermined. Grey asked Weld to form a ministry; Weld developed a policy of 'self-reliance' which included the removal of imperial troops. Once the colony had provided for its own defence it could then take full control of native affairs. The scheme required finance and it was during Weld's ministry that Grey finally approved the confiscations – Maori land would pay for military independence and defeat the Governor; in signing the proclamations, Grey admitted his own defeat in the battle of Waterloo Quadrant.

Mantell, Weld's first Native Minister, resigned in July 1865 as a result of a dispute over the valuable Princes Street reserve in Dunedin.<sup>23</sup> He was replaced by another South Islander, J.E. FitzGerald of Canterbury. FitzGerald had opposed the invasion of the Waikato and supported political and legal equality for Maori. His appointment caused some concern for North Island land speculators. He and the Weld government only remained in office for a further three months but during that time they pushed through a new Native Lands Bill.<sup>24</sup> With Grey having found his Waterloo, the political situation in 1865 was very different to that of 1862. Government ministers were now firmly in control of native affairs and, with the exception of defence, without interference by the Governor or the Colonial Office.

War was still very much a consideration in the Native Minister's thinking. If the land purchase activities of the Crown were seen as the cause of war in 1862, this was not the case by 1865.<sup>25</sup> FitzGerald argued that the principal object of the conflict, the assertion of the Crown's authority and the establishment of the Queen's law over Maori, had not been obtained. He accepted this was the case in districts where settlers outnumbered Maori but added 'I have yet to learn that the Natives are at all more willing to submit to the Queen's authority and to the law than they were when we first plunged into this terrible struggle.'<sup>26</sup> He spoke with some 'diffidence' because the

<sup>23</sup> The Otago Provincial Council had been pressuring the General Government to hand the reserve over to it and Mantell had resisted this pressure having made the reserve in 1853 as a landing place and market for Maori. He resigned when the government caved to the pressure. See Ward, p.183.

<sup>24</sup> The Native Lands Bill was one of three pieces of legislation introduced by the Weld ministry in August 1865. The others were the Outlying Districts Police Bill and the Native Rights Bill. All three collectively embodied the policy of the government. The Outlying District Police Bill provided for the confiscation of land of tribes which assisted those guilty of criminal offences. The 'Hauhau superstition' was one direct target of this measure. Tribes hiding criminals had to give them up or they would lose their lands and a police force established in the district to preserve the peace. Money raised from the sale of the land would be used to fund the police force and maintain law and order. The Native Rights Bill enacted in statute the article included in the Treaty of Waitangi which provided that Maori gained the rights and privileges of British subjects.

<sup>25</sup> Unlike the previous act, the Native Lands Purchase Ordinance 1846 was repealed.

<sup>26</sup> *NZPD*, (1865), p.322.

future appeared so uncertain and described the present situation in the colony as 'disastrous.' Colonial politicians were still very nervous in the immediate aftermath of the Waikato war and they were not at all convinced that they had emerged victorious. For this reason, the new Native Lands Bill had to ensure the maintenance of peace and FitzGerald considered the bill a compromise approach designed to ensure that war was to be avoided but land purchasing made possible.

The new Native Lands Bill was subjected to very little scrutiny in the House or the Legislative Council. FitzGerald described it as an amendment to the 1862 statute and told the House it had been developed with the assistance of F.D. Fenton, the chief judge of the Native Land Court. The legislation prepared by FitzGerald and Fenton was not an amendment to the 1862 Act in the technical legal sense in that it did not modify the earlier Act; it was repealed in its entirety. FitzGerald's claim that the bill was an amendment does, however, have some substance. The 1862 Act was extremely vague on the structure and powers of the Court: it gave the governor almost unfettered power in establishing a court to adjudicate on the ownership of Maori land. The 1865 Act gave ministers administrative responsibility for a court but set up a tribunal which was (in theory at least) governed by independent judicial officers. Furthermore, it was much more detailed and prescriptive in terms of the structure and powers (adopting Weld's recommendation in 1861 that a court be constituted by a European judge and two Maori assessors). The 1862 Act was so vague in all these areas that the type of court set up in 1865 was not precluded in the least; it was only Domett's ministerial statement which set out the type of Court proposed by politicians: it was not, however, prescribed in legislation and was only one of the possibilities the governor might apply when using the powers conferred by the Act. In this sense then the 1865 bill was an amendment to the 1862 Act.

One of the biggest problems which FitzGerald acknowledged was the failure to develop a coherent native policy during the first half of the 1860s. He complained that in 1861, 1862, 1863 and 1864 governments prepared detailed policies but were unable to effectively implement them or have them scrutinised by the House as ministries soon left office. He deplored this situation because it was impossible for any elected person to be responsible for the conduct of native affairs and as a result 'Government ... must degenerate into nothing more than a series of successive experiments.'<sup>27</sup> Ironically, FitzGerald described with considerable accuracy the trend in native land legislation for the following decades and even when stable government was established, the administration of Maori land would remain 'a series of successive experiments.'

In October 1865, Weld was pushed from office in a financial crisis and replaced by a ministry cobbled together by Stafford. Stafford was less concerned to

<sup>27</sup> *ibid*, p.321.

see the imperial troops depart the colony and was happy to leave this decision to Grey. Grey continued to direct military operations against Maori resistance but native affairs was entirely in the hands of his ministers. FitzGerald was replaced by A.H. Russell. According to Ward, Russell 'brought a stiff-necked insensitive attitude to the administration of Maori affairs.'<sup>28</sup> He took a ruthless approach to dismantling the Native Department. Once the new land court structure was established the Land Purchase Department was shut down and negotiations by the Crown to purchase Maori land ended. The runanga were abolished and several civil commissioners ejected.

His approach caused chaos and led to protests from Nga Puhī and Te Arawa. Russell was forced to resign as the possibility that two 'loyal' tribes in the North Island were unhappy caused considerable concern among the settler population. J.C. Richmond took over the work although he was not appointed Native Minister. He continued to scale back the functions of the Native Department although was much more concerned to ensure Maori landownership was protected.<sup>29</sup> He was supported in his endeavours by Donald McLean, who had very recently re-entered public life as the member of the House of Representatives for Napier, and William Rolleston, Under Secretary of the Native Office. Despite these attempts to preserve at least some form of Maori landownership, the acquisition and availability of Maori land for the purposes of Pakeha settlement was still central. The focus, however, had shifted away from Crown acquisition towards private purchase and in this context the Native Department became redundant and its abolition eagerly anticipated by colonial politicians. In their view, with the exception of a few centres of resistance, Maori were no longer a military threat.

Donald McLean did not agree. The legislation and policy of the early post-war period had been established in a period of comparative peacefulness.<sup>30</sup> However, tension and resistance continued, particularly surrounding the confiscations on the

<sup>28</sup> Ward, p.195.

<sup>29</sup> A number of statutes enacted during his tenure as Native Minister reflect this view. The Native Lands Act Amendment Act 1866 required the Native Land Court to consider the present and future needs of Maori claimants and recommend restrictions preventing alienation if necessary. It also required that reserves could only be alienated by lease for a period of twenty-one years with the consent of the Governor-in-Council. The Native Land Act 1867 went further requiring that all the owners in a block of land had to be entered on the Court records, even if only ten were entered on the Certificate of Title. The same year an Inspector of Surveys was appointed to give some coherence to the survey of Maori land as confusion and ambiguity had caused a number of boundary disputes. Richmond also introduced the Maori Real Estate Management Act 1867 which vested the interests of minors in trustees. The trustees were not permitted to alienate the land except by lease for twenty-one years and the consent of the Governor-in-Council was necessary.

<sup>30</sup> Ward, p.224.

east and west coasts, and it was in the context of negotiating peace that McLean returned to office in June 1869.

The greatest problems for McLean to deal with were caused by the blundering attempts to enforce the post-war confiscations and the divisive operation of the Compensation Court. By the late 1860s, colonial politicians feared a return to large-scale conflict. Despite this fear, they were caught in a massive contradiction. London had remained in control of native affairs during the 1850s and early 1860s because colonial politicians did not want to pay the bill for any conflict with Maori. When finally they did agree to take responsibility for native affairs, it was on the basis that any war had to be paid for using funds realised from the sale of land confiscated from Maori who 'rebelled' against the Crown. Land was after all the most valuable economic resource in the colony. The New Zealand Settlements Act 1863 established the framework for the confiscation of Maori land from those deemed to be in rebellion against the Crown. A defined area of Maori land could be taken by proclamation. It could be taken from Maori in rebellion and for those Maori who remained loyal but lost land, a court was provided to determine whether individuals were 'rebel' or 'loyal,' and if the latter who was eligible for compensation, either by land or money.

Land was confiscated in the Waikato, at Taranaki, on the East Coast and at Tauranga. The problem was, the proposals did not work: the mess caused by these confiscations took decades to clean up. The Waikato confiscation was dealt with most expeditiously. Only one sitting of the Compensation Court was held, evidence heard and negotiations between the Crown representatives and Maori claimants undertaken. The resulting agreement was confirmed by the Court and an order issued. The sitting was over in a few weeks although many years were then spent trying to finalise grants for the land returned to the Maori claimants. Taranaki did not go quite so well. A Compensation Court was established to deal with the confiscated land there but it was only after the West Coast Commission was established – fifteen to twenty years later – that those eligible for compensation received their grants. Early in the Court hearings Crown representatives were called in by the Court to negotiate a solution with Maori claimants. Rather than the Court handing down a decision awarding land to loyal Maori, the government negotiated agreements for the purposes of compensating those who had lost their lands through confiscation. The Court itself did not hold any hearings to determine what land should be returned to Maori.

After the experience at Taranaki, the system had to be fiddled with. In the first instance, the principal statute was amended three times, primarily to validate actions taken by the Crown and the Court. Then new ways of dealing with the confiscations had to be found. The East Coast and the Bay of Plenty were sites of experimentation as to how confiscations could be effected. Some of the East Coast land was the subject of negotiation between Maori claimants and a special

commissioner which were then confirmed by a Compensation Court.<sup>31</sup> The Native Land Court was given jurisdiction over confiscated land in the Hawke's Bay province.<sup>32</sup> It was designed to ensure only the land belonging to those who had been in rebellion was taken and the land belonging to loyal Maori was awarded to them. The Court's work remained incomplete, however, and a special commission was established by statute to hear claims to land there ceded to the Crown by Maori; a similar structure was put in place to deal with the Tauranga confiscations.<sup>33</sup>

In all of these cases, the process for determining compensation was extremely difficult to carry out and required regular tampering and re-invention, especially as the fear of a return to war grew in the late 1860s. Many of the grants of land were not finalised well into the 1880s and many required further large scale inquiry before a settlement could be reached. For Maori these remained a continuing source of grievance and a focus around which conflict could flare. Many of those personnel involved in the Compensation Courts and various commissions were also judges of the Native Land Court. Chief Judge F.D. Fenton of the Native Land Court was also Senior Judge of the Compensation Court. H.A.H. Monro, John Rogan, F.E. Maning and T.H. Smith were judges of both Courts. From 1866 until the early 1870s, and in some instances even later, the work of the Native Land Court was severely restricted because the judges were busy presiding over Compensation Courts and other commissions. This limited the operation of the Native Land Court in its first six years or so and the Court was really only beginning to hear claims to customary land in the early 1870s on a full-time basis.

*misleading  
understatement*

The problems of the confiscations faced McLean as soon as he was appointed in 1869. He would remain in control of native policy for the subsequent seven years. During his early years in office Te Kooti and Titokowaru had to be dealt with and McLean's approach was based on diplomacy through an active and expanded Native Department. Vacant positions were filled to improve government communication with and knowledge of the situation of Maori tribes. Furthermore, he persuaded the government not to take land from tribes who had participated in armed conflicts

<sup>31</sup> To ensure these actions were lawful, a number of validating statutes were enacted. These included the New Zealand Settlements Amendment and Continuance Act 1865, New Zealand Settlements Acts Amendment Act 1866, the Confiscated Lands Act 1867, the Richmond Sales Act 1870 and the Whakatane Grants Validation Act 1878.

<sup>32</sup> Under the East Coast Land Titles Investigation Act 1866. This legislation and subsequent amendments are discussed in Sian Daly, *Poverty Bay*, Wellington: Waitangi Tribunal Rangahau Whanui Series, 1997.

<sup>33</sup> See the Tauranga District Lands Act 1867 and Poverty Bay Grants Act 1869. On the Tauranga confiscations and commissioners, see Evelyn Stokes, 'Te Raupatu o Tauranga Moana. The Confiscation of Tauranga Lands,' 1990, and Evelyn Stokes, 'The Allocation of Reserves for Maori in the Tauranga Confiscated Lands. Volume 1: Report,' December 1997. On the Poverty Bay legislation and Poverty Bay Commission, see Daly.

knowing the provocative consequences of such action. He also dealt with rebel chiefs personally and 'toured disaffected areas, meeting rebel chiefs, assuring them that they would be allowed to dwell in peace as long as they did not molest settlers, and making them gifts of food, seed potatoes, wheat and agricultural implements, to help them settle to farming.'<sup>34</sup> Ward attributes McLean's success in ensuring peace to his ability to communicate to 'rebels' the message that the government would not confiscate any further land and would leave them alone.<sup>35</sup>

After the retrenchments of the second half of the 1860s McLean built a vigorous and large empire. McLean maintained close links with his officers in the various districts and monitored carefully the work of the Resident Magistrates, Native Officers and Medical Officers (which he had re-appointed after they were removed by Russell). Moreover, his vast network allowed him to keep close tabs on Maori communities throughout the islands. He established the new position of Native Officer. Like the civil commissioners, the job was non-judicial and concerned with land issues and relations between Maori and Pakeha.<sup>36</sup> He increased the number of Resident Magistrates and appointed Charles Heaphy Commissioner of Native Reserves giving him extensive powers. McLean also introduced the Native Lands Frauds Prevention Act<sup>37</sup> and five trust commissioners, all part-time government officials, were appointed to investigate sales of Maori land. All were firmly controlled by McLean.

At the same time as McLean was negotiating with 'rebels' to end any further conflict and improving communication with Maori communities he was preparing for a return to large-scale Crown purchase activity. In 1870 the Crown resumed land purchasing to provide the land required for Vogel's immigration and public works schemes.<sup>37</sup> Land Purchase Officers were originally appointed to the Public Works Department but they were all former or present members of McLean's staff and worked under his direction. In 1873 they were re-organised into a Land Purchase Branch of the Native Department. McLean also took a much greater interest in the land purchase activities of private agents.<sup>38</sup>

The new Native Land Act 1873 was the legislative manifestation of both these elements of McLean's policy.<sup>39</sup> There was, however, an additional factor involved. Ward argues that land legislation during the 1870s 'was heavily influenced by the

<sup>34</sup> Ward, p.229.

<sup>35</sup> *ibid.*, p.230.

<sup>36</sup> *ibid.*, p.238.

<sup>37</sup> Funds for this purpose were appropriated under the Public Works and Immigration Act 1870, the year following his appointment as minister.

<sup>38</sup> Ward, p.232.

<sup>39</sup> Peter Spiller, Jeremy Finn and Richard Boast, *A New Zealand Legal History*, Brooker's: Wellington, 1995, p.149.

resurgence of the long-standing rivalry between Fenton and McLean which had been temporarily buried by McLean's retirement to Hawke's Bay in 1861.<sup>40</sup> This rivalry was personal and also a product of the competing ambitions of both men. Fenton wanted to exercise as much control as possible over native policy through his Court while McLean wanted to control native affairs through his expanded Native Department.

McLean was ready to attack the Court created by Fenton as early as 1869. It took a further three years and three inquiries before he did so. The first, undertaken by T.M. Haultain, was established in 1869 to investigate grievances relating to the Court.<sup>41</sup> Its report and recommendations were supposed to be embodied in a bill introduced during that year. However, it was not forthcoming and a further commission was established in 1870 to deal with the same problems. In 1872 new legislation was prepared by a Wellington lawyer. Instead, McLean waited while another commission sitting in the Hawke's Bay chaired by the Supreme Court judge, J.C. Richmond, and the inquiry into the operation of the Court conducted by Haultain were completed.<sup>42</sup> Further advice was also solicited, including that of Sir William Martin and Edward Shortland.<sup>43</sup> Native land legislation was increasingly considered highly technical and the advice of experts became a necessary part of tinkering with the Court's legislative framework.

The statute, pushed through the General Assembly by McLean, was a product of all this advice. It was, he told the House, designed to improve the process by which the title to Maori land was determined. The fundamental change in the new legislation was to improve the definition of Maori lands by careful survey and the proper registration of all the owners.<sup>44</sup> A government officer in each district would be responsible for preparing district maps and maintaining a record of all titles to Maori land. This official would report to the judge of the Native Land Court on the issue of titles to Maori land in each district. He would also be required to set aside sufficient land for the needs of each Maori community which would be inalienable.<sup>45</sup>

<sup>40</sup> Ward, p.251.

<sup>41</sup> See 'Papers Relative to the Working of the Native Land Court Acts, and Appendices Relating Thereto,' *AJHR*, 1871, A-2A.

<sup>42</sup> 'Report of the Hawke's Bay Native Lands Alienation Commission,' *AJHR*, 1873, G-7.

<sup>43</sup> See 'Memorandum on the Operation of the Native Lands Court, by Sir William Martin,' *AJHR*, 1871, A-2. This includes a memorandum by Shortland.

<sup>44</sup> McLean argued that one of the greatest defects of the former legislation was that only ten persons were included in the title. As for surveys, problems had arisen because surveys had been arranged by Maori landowners and surveyors charged very high fees for their work contributing to the high cost of getting land adjudicated by the Court. When land was purchased the landowners received only a fraction of the purchase money, the balance being used to meet not only survey costs, but court charges, legal fees and other expenses.

<sup>45</sup> *NZPD*, 14 (1873), p.621.

During debates on the bill, McLean emphasised the importance of provisions designed to maintain peace and stability in the colony. While the new legislation would ensure judges could exercise their judicial functions independently of the government, he believed he needed to take greater responsibility in the administration of the Court. For this reason the legislation allowed the Governor to prohibit any hearing of the Court at any stage of proceedings and the effect of such a prohibition was to cancel the jurisdiction of the Court. Furthermore, the Court established by the new statute was to become an investigative tribunal. McLean described as 'vicious' the rule that judges knew nothing of the case they were hearing except what was actually brought to their attention in the Court. He believed that 'the Judges ought to acquaint themselves with a great deal of what took place outside the Court.'<sup>46</sup> It had been found much evidence was not presented and because judges had made decisions in cases on only part of the relevant information the peace of the colony had been threatened in some instances.

The most significant change the new legislation brought was the requirement that the Court enter the names of all those with legitimate claims on a memorial of ownership. Each memorial of ownership was to contain a restriction which prohibited the sale of the land and only permitted the owners to lease the land for a period not exceeding twenty one years. However, the significant exception was that the land could be sold where all owners in the memorial agreed, or if there was not unanimous agreement, then the Court could partition the land and award the parts. The new legislation had a marked impact on land purchase activities. Under the 1865 Act title to land was vested in ten owners and purchasers usually had little difficulty in gaining the signatures of those owners to a deed of sale. From 1873 the ten-owner title was replaced by a memorial of ownership and all owners had to be entered into the title. The consent of all owners was required before a sale could be registered. This was a much more difficult task as large numbers of people had to be identified, located and induced to sell their interest.

The debates on this legislation were conducted in an environment where politicians feared a return to large-scale conflict, and it was the fear of war, a fear created by the confiscations, which dominated debate over the legislation. McLean himself hoped the proposals contained in the bill meant 'they would hear very much less of those troubles which had been afflicting the country from time to time, and which, he might say, had unavoidably arisen from the various modes of proceeding which had been adopted at different times and in different parts of the country in the administration of Native lands.'<sup>47</sup> He believed the work of the Native Land Court could be considerably improved if the investigation of ownership of territory was dealt with 'carefully and slowly' rather than with haste.

<sup>46</sup> *ibid.*, p.605.

<sup>47</sup> *ibid.*

This approach did not find favour with one member, T.B. Gillies. A former attorney-general in the Whitaker ministry of 1863, he characterised McLean's tenure as Native Minister as one of constant vacillation. He was critical of McLean to the extent that 'he had never seen anything like a consistent idea enunciated or carried out' in any of the legislation presented by the Native Minister prior to the Native Land Bill. He argued 'it had been a groping in the dark, a feeling of the way; and the general opinion of the policy of the Native Minister was, that it was a "taihoa" policy, it was a policy of delay, - hold on, or wait a bit; go a little and a little, and draw back if you find you cannot go so far.'<sup>48</sup> Gillies and McLean illustrate well two sides of a debate which had been ongoing since 1840 and would continue for many decades yet: a cautious and pragmatic approach to dealing with Maori customary rights to land or one which was much more arbitrary and dictatorial. Each side would gain the upper hand at different times during the rest of the nineteenth-century.

McLean had the support of members from the South Island who as usual feared any return to conflict. Conflict remained a major concern for many politicians and native land legislation was seen as a major factor in the preservation of peace. John Sheehan, a future Native Minister, believed that had the government waited any longer, Maori discontent with the Court was so great that conflict might have occurred.<sup>49</sup> And despite all the problems many saw the Court as an instrument of peace which had effectively prevented conflict on several occasions. These included the member for Western Maori, Wiremu Parata, who supported the bill claiming that where the Court had adjudicated on title to Maori land – and he referred specifically to Te Aroha, Manawatu, Horowhenua and Rangitikei – conflict had been avoided by its actions. It was probably the Compensation Court and the confiscations which had increased tension rather than the operation of the Native Land Court which had done a great deal to diffuse disputes among Maori over land.

McLean had total control over Maori affairs. He delivered peace and was able to acquire Maori land in the North Island and open it for settlement. According to Ward, 'Native affairs came to be regarded as McLean's speciality, a subject where the uninitiated could not trespass.'<sup>50</sup> However his position was much less certain by 1876. Years of peace meant that the fear of war had declined. In 1876 Grey and Sheehan succeeded in reducing the estimates for the Native Department while McLean was absent. At the same time responsibility for confiscated lands and surveys of Maori land was transferred to the Crown Lands Department. They were the first inroads into McLean's empire. In December 1876 he resigned and died a month later.

<sup>48</sup> *ibid.*, p.610.

<sup>49</sup> *ibid.*, p.619.

<sup>50</sup> Ward, p. 261.

The death of Sir Donald McLean is a convenient end point in the first phase of development of the Native Land Court. By 1876, the Court had been invented and re-invented three times. The Native Lands Act of 1862, 1865 and 1873 were all quite different, all were a product of a particular political context and each established a different kind of court. The 1862 Act was particularly vague and placed all authority and responsibility for its operation on the governor at a time when responsible ministers wanted to avoid the financial burden of war and therefore had to reject any suggestion they were responsible for native policy. In 1865, the situation was very different as ministers were by then in control of native policy having decided that the cost of war with Maori would be paid for using revenue generated from the sale of land confiscated from Maori. The new statute was much more prescriptive in laying out the structure and powers of the Court and established a tribunal which was judicially independent but responsible to ministers not the governor.

The 1873 Act was quite different again. It established a new Court and was designed to allow much greater intervention by the Native Minister in its operation. It was an attack on the independence of its judges, especially Chief Judge Fenton. This was about personalities: it was not really a matter of preserving peace as the Native Land Court was only operating on a limited basis until the early 1870s; the Compensation Court and resolution of the post-war confiscations were a much more significant cause of tension and violence than the Native Land Court. It was McLean's much more conciliatory relationship with Maori which prevented further conflict rather than the new Native Land Court. Moreover, holding office for seven years allowed him to cultivate relations with Maori which had been impossible for Native Ministers in the past and would cause further problems during the late 1870s and 1880s.

The most important impact of the 1873 Act was the type of title it created. The memorials of ownership listing the names of all those interested in a block of land as equal owners would have major implications for the acquisition and administration of Maori land. The new title system would eventually lead to a major crisis in the early 1890s which would not be resolved until 1909. This chapter has shown that even after the Court was established, the question of how to define Maori customary rights and acquire Maori land remained unstable and uncertain; still the subject of constant debate and experimentation. The Court was re-invented on three occasions, driven by political priorities and the continuing threat of further armed conflict by Maori. Each piece of legislation and the kind of Court it created reflected the specific political context in which it was enacted. The Court was not the end of the debate or the struggle colonial politicians faced in finding a way of effectively dealing with Maori customary rights to land – it was rather a continuation.

## MARGINALISED:

### STRANGLING SETTLEMENT AND SPECULATION

By the late 1870s, the problems which would severely restrict the acquisition of Maori land for the next three decades were beginning to emerge. The new Grey government focused on cleaning up purchases begun by McLean – the title system established in 1873 made this a very difficult task because the consent of all those listed in the memorial of ownership was required. Just as important, however, was the state of the Crown's balance sheets: the high levels of debt accrued through the Vogel public works and immigration schemes saw the government playing a more limited role in Maori land purchase.

Throughout the 1880s, the Court was regularly re-invented in a way which increasingly marginalised and limited its role. Not only was it increasingly apparent that the Court was struggling to establish stable and settled title to Maori land, but also the nature of the title created by the Court restricted both speculation and settlement. Concluding transactions as the lists of owners grew considerably in size was a major problem. Private purchasers were unable to provide the capital and expertise to bring complex transactions to a conclusion and the Crown was in no position to engage in extensive and expensive negotiations. The acquisition of Maori land was effectively at stalemate and in response, colonial politicians experimented with different mechanisms designed to make acquiring Maori land easier – and which avoided the problems associated with the title created by the Court. This chapter argues that just as in the previous four decades, colonial politicians and officials struggled to find a way of effectively dealing with Maori customary rights to land, this trend continued during the 1880s. Many of these problems were caused by Maori participation in the Court process and attempts to resolve them were generally driven by specific political considerations.

In 1881, the Taranaki war finally came to its conclusion and F.D. Fenton, the first chief judge of the Native Land Court, retired from the bench. At Parihaka, to the cheers of settlers, John Bryce marched on the peaceful Maori inhabitants of the

*No! Sacking of Parihaka not the end of war but an act of provocation instigated by the crown.*

village. Parihaka was the last, albeit one-sided, battle in the Taranaki war. Confiscation, confusion and peaceful protest had created pressure on both sides and Bryce was forced to act. Maori, after all, had to submit to the 'rule of law.' The rhetoric of colonial politicians was confident: the conflicts of twenty years earlier were a distant memory and peace was entrenched. Despite the fear of war receding, there was no attempt to usurp Maori customary rights to land; twenty years earlier that was certainly a possibility.

The problem of acquiring Maori land for Pakeha settlement was, however, still very much alive. There was no question that Maori land would simply be proclaimed Crown land, even if the pressure from the Colonial Office, missionary societies and other humanitarian organisations was essentially non-existent. The practice of negotiating with Maori for the purchase of their land was now firmly embedded and the Native Land Court was well established as part of that practice. During the political crisis of 1881 surrounding Parihaka, the possibility that the Court might be replaced by something was still very high. Moreover, the retirement of the first chief judge further destabilised the Court's continuing operation. And yet it survived in a very different political environment when there was very little reason for it to do so. The reasons for its survival during the 1880s and the various forms in which it was re-invented on three occasions by three different governments are the subject of this chapter.

Donald McLean was succeeded briefly as Native and Defence Minister by Daniel Pollen. Whereas under McLean, the Native Department was an empire which fed information back to the minister and was essential to the preservation of peace in the colony, the Atkinson government moved away from this approach.<sup>1</sup> Pollen began to scale down the Native Department, shifting functions to other departments and retrenching staff. When the Grey government was elected in 1877, Pollen was replaced by John Sheehan. Sheehan was a lawyer who had a strong Native Land Court practice and, like the new Premier, had been the loudest critics of McLean's Native Department. Together they continued to reduce the size of the Department.<sup>2</sup>

Ministerial changes were matched by shifts in native land legislation. By 1876, the government's purchase of land slowed as Vogel's public works programme neared completion and Grey and Sheehan entered office promising to introduce an entirely new system for the alienation of Maori land. Their plans did not even get formulated into a bill. They found instead that they had to tidy up several Crown purchases left over from the Vogel scheme. This was because by the mid-1870s, the problems associated with the land purchase regime established by the 1873 statute had made even Crown land purchase activities difficult. Crown officials had to identify

<sup>1</sup> Alan Ward, *A Show of Justice. Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland: Auckland University Press, 1973, p.276 and pp.281-83.

<sup>2</sup> *ibid.*, p.277.

and locate all the owners in a block of land, determine their shareholding, get successions determined for deceased owners as well as persuade as many owners as possible to sell their share.

Legislation was required to make the job easier; these were the first major amendments made to the 1873 statute. An amendment in 1877 gave the Crown the ability to apply to the Native Land Court for an order partitioning out those individual shares it had acquired.<sup>3</sup> The following year, another statute, the Government Native Land Purchases Act 1877, gave the Crown authority to prohibit the private purchase of interests in blocks where the Crown had acquired an interest. It was designed to ensure the government's land purchase agents were not competing with private purchasers for interests.

With the retrenchments in the Native Department and consequent failure to maintain close contact with Maori leaders and communities, Sheehan and Grey were unable to maintain McLean's peace and many localised incidents of violence occurred.<sup>4</sup> The old fear of conflict returned and both came under attack with the possibility that fighting could return to the colony. In July 1879 the Grey Ministry was ejected from power, replaced by a new government led by John Hall. Retrenchment in the Native Department remained a key policy along with a strong desire to force Maori to submit to the 'rule of law.'<sup>5</sup> The patience of colonial politicians with sites of Maori independence was rapidly running thin.

John Bryce was appointed Native Minister in the new government. He attacked the Native Department with some vigour and expenditure was cut at a rapid rate: staff were dismissed and functions transferred to other departments. Bryce took a very different approach to his own relationship with Maori. The close contact between the government and Maori in the districts, fostered by McLean and continued by Sheehan and Grey, ended. Instead, Bryce used aggressive force to remove Maori resistance (such as Parihaka), even if that resistance was peaceful.<sup>6</sup> He did not tour the islands to meet with Maori communities. Whereas McLean's policy had emphasised peaceful diplomacy, Bryce was willing to use force and strongarm tactics. Military dominance was assured among colonial politicians confident of Maori submission to their authority.

Bryce, unjustly characterised by his critics as a bully and an unreconstructed imperial thug in his dealings with Maori because of Parihaka, radically reduced the

<sup>3</sup> Peter Spiller, Jeremy Finn and Richard Boast, *A New Zealand Legal History*, Brooker's: Wellington, 1995, p.150.

<sup>4</sup> Ward, pp.278-80.

<sup>5</sup> *ibid.*, p.284.

<sup>6</sup> *ibid.*, pp.285-88.

size and scope of the Native Department.<sup>7</sup> Bryce was, however, in no way a puppet for the interests of land speculators: indeed much of his native land legislation was fundamentally concerned with preventing fraudulent dealings in Maori land.<sup>8</sup> He resisted wholesale land acquisition despite the strong free trade thrust of many of his ministerial colleagues. This conflict can be seen in the native land legislation proposed by the government. In June 1880 a mass of bills relating to native affairs were introduced in the Legislative Council. They were the Native Reserves Bill, the Native Lands Frauds Prevention Bill, the Native Lands Act Repeal Bill, the Native Succession Bill and the Native Land Court Bill. Another group of eight bills were introduced into the House of Representatives relating to native affairs as well. It was the government's intention to simplify native land law by dividing the various aspects of the administration of Maori land into separate statutes. McLean was dead, Grey was no longer in power and the new decade was to herald a new approach to Maori affairs. The Hall government was preparing the way for a marked shift in the administration of native affairs.<sup>9</sup>

John Bryce's view of native affairs is best expressed in his contribution to the debate on the Native Land Sales Bill, one of the eight bills he introduced into the House. The bill was revolutionary in that it proposed giving the Waste Lands Board power to dispose of Maori land. Even more radical, it was not compulsory: Maori would be given the opportunity to hand their land over to the board for disposal voluntarily. Thus, once title had been determined and completed by the Native Land Court, the Maori landowners could apply to the board to have their land sold and after determining that all the owners agreed, the land was sold at public auction according to the provisions of the Land Transfer Act. The purchase money would be used by the board to pay the cost of survey, Court expenses and any other expenses incurred in the sale of the land. A part would also be set aside for the purposes of constructing

<sup>7</sup> G.W. Rusden, *History of New Zealand*, 3 vols, Melbourne: G. Robertson, 1883, vol. 3, pp.352-65; Hazel Riseborough, *Days of Darkness. Taranaki, 1878-1884*, Wellington: Allen and Unwin with the Port Nicholson Press, 1989.

<sup>8</sup> For example, his Thermal Springs Act 1881 ratified an agreement between the government and Ngati Whakaue to establish a township in the Rotorua thermal region where land was leased long term at public auction. The township was to be administered by the Native Land Court. However the scheme foundered when the settlers stopped paying rents and began petitioning the government to repeal the legislation and grant them the freehold. Another of Bryce's amendments, Native Land Laws Act 1883, finally made purchasing interests prior to a Court hearing illegal and punishable by fine. See Ward, p.289.

<sup>9</sup> At that time there were thirteen statutes dealing with native affairs. They were the Native Lands Frauds Prevention Act 1870, the Native Land Act 1873, the Native Lands Duties Act 1873, the Native Grantees Act 1873, the Native Reserves Act 1873, The Native Lands Frauds Prevention Act Amendment Act 1874, the Intestate Native Succession Act 1876, the Government Native Land Purchases Act 1877, the Native Land Act Amendment Act 1877, the Government Native Land Purchase Act Amendment Act 1878, the Native Land Act 1873 Amendment Act 1878 and the Native Land Act Amendment Act (No. 2) 1878.

roads and the balance paid to individual owners. Bryce wanted to make this scheme attractive to Maori by giving the board authority to make advances to Maori landowners.

This approach was in fact in Bryce's view a compromise: he supported a return to pre-emption. He recognised this was a political impossibility but entirely rejected any free trade approach. Why was he so keen to push the legislation through? He believed the greatest benefit of the system he suggested was that 'it would deliver them from that horde of people who have been pestering them for years past to sell their lands' – both private and government agents whom he described as 'persecutors' and 'hucksters.'<sup>10</sup> He wanted to lift the pressure to which they had been subjected to sell their land. Bryce hoped that the bill would go some way to achieving his two objectives in native land legislation: a fair price for Maori landowners and the settlement and occupation of the land.

His attack on agents was based on a very clear and concise view of past methods of acquiring Maori land. In speaking in support of the bill, Bryce traversed the history of the purchase of Maori land since 1840 focusing on the pre-emptive right of the Crown and concluding that 'I think it is a thousand pities, for the sake of the Maoris as well as for the sake of the colony, that the pre-emptive right was waived in 1865.'<sup>11</sup> He argued that in the first six years of the Native Land Court little progress was made in the acquisition of Maori land by private purchasers because of adverse economic circumstances. The situation changed considerably after 1871 when the Crown began competing with private purchasers to acquire land as part of Vogel's public works scheme. It was at this time, in Bryce's account, that purchase activities of private and Crown agents went very wrong. It was their conduct that, he believed, 'has done more to demoralize and degrade the Maori race than all our efforts at colonization can ever redeem.'<sup>12</sup>

His criticism of the agents was vigorous. Maori landowners were 'pestered,' 'bribed' and supplied with alcohol. Bryce considered it was 'no wonder that the old habits of industry for which the Maoris were so remarkable fell into disuse' and 'debauchery' and 'drunkenness' became so common.<sup>13</sup> He told the House that by the late 1870s there was a strong feeling among colonial politicians that free trade in Maori land had to stop. He himself was convinced that the present system of free trade was so bad it could not be allowed to continue. He was particularly scathing of government agents who provided advances to storekeepers for Maori to purchase

<sup>10</sup> NZPD, 36 (1880), p.274.

<sup>11</sup> *ibid.*, p.267.

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

goods and alcohol on the basis of land they owned and used dodgy accounting techniques to hide what they were doing from their superiors and ministers.<sup>14</sup>

The bill provoked very little debate. All the Maori members opposed the bill, not so much because of its terms but rather because Bryce had not discussed his policy with them.<sup>15</sup> Despite the lack of opposition, the bill was never enacted and two reasons emerge for its failure to pass. First, the bill was introduced very early in the session, rather than rammed through in the last days and hours as was the usual practice with complex and controversial native land legislation. This was common through the late nineteenth-century and into the twentieth-century. Second, the government's legislative programme on native land bills was very ambitious and some bills simply got lost – especially as the question of Parihaka came to dominate political debate.

Bryce's proposals were supposed to protect Maori landowners from unscrupulous agents, provide them with a fair price for their land while ensuring the costs of pushing it through the Court were met, and create a mechanism for maintaining the efficient flow of land into the hands of settlers. They were a radical shift with the past in terms of the mechanism by which Maori land was alienated: it represented a compromise between the Crown domination of purchasing as occurred during the 1870s (and which was roundly condemned by both Maori and Pakeha in subsequent years) and open slather free trade. The Crown was an agent for both parties to the transaction rather than either purchaser or protector. There was, however, one strong continuity with the past. The proposals were a further attempt to deal with the continuing problem of how to acquire Maori land in a way which recognised Maori customary title but also ensured land was available for settlers. In 1880, there were clearly defined problems especially in relation to fraud. By 1885, it was increasingly clear to politicians that attempts to prevent fraudulent activity and the structure of titles to Maori land were precluding the acquisition of Maori land. For this reason the proposals, although they failed to pass in 1880, would be taken up in a modified form by John Ballance five years later and, after further delay, finally enacted in 1886.

The Native Land Sale Bill would have removed the Court from any role in the alienation of Maori land. It was designed to marginalise the Court. This trend was further emphasised by the other major piece of legislation dealt with in 1880 and which was enacted: the new Native Land Court Act. The latter re-invented the Court as it had been constituted in 1873. Introducing the bill in the Legislative Council, the

<sup>14</sup> He used the purchase of the Patetere block and several others blocks as examples of highly questionable activities on the part of private and Crown purchase agents, *ibid.*, pp.269-71. Papers relating to these negotiations were also published around this time, see 'Correspondence Relative to Lands in the Patetere District,' *AJHR*, 1880, G-1.

<sup>15</sup> *ibid.*, pp.363-66 (Tainui and Te Wheoro), pp.379-80 (Tawhai) and pp.386-87 (Tomoana).

Attorney-General, the ubiquitous Frederick Whitaker, claimed that the legislation relating to Maori land was a mess.<sup>16</sup> Statutes were often in conflict with others, and some of the provisions within the Native Land Act 1873 contradicted others. This had created considerable difficulty for the Native Land Court and in consequence the government had decided to repeal all these statutes. The government also intended to secure the position of the Court entirely independent of the Executive as a part of the Judiciary and remove any political considerations from the operation of the Court.<sup>17</sup>

The bill contained no provisions relating to the sale of land and was merely designed to give the Native Land Court power to determine the owners of a defined block of land. In simplifying the Court's powers, the bill was designed to reduce significantly the cost of its operation. Bryce claimed that under the 1873 Act, the Court had become cumbersome and expensive to run.<sup>18</sup> Whereas prior to 1873 the Court had produced a surplus, each year since then the expenses of the Court had exceeded its revenue considerably. The new bill was designed to return the Court to the more streamlined and simplified procedure which existed prior to 1873. In its new form as a tribunal determining title to Maori land only, Bryce did not see the Court having a very long life. Within a few years, 'if it did not see this Court completely done away, would at any rate see the business of the Court so much reduced that the Court would have to be reduced too.'<sup>19</sup>

During the debates on the bill, trenchant criticisms of the Court emerged in the speeches of many politicians. In the Legislative Council Francis Dillon Bell told the Council that he had 'long looked upon it as utterly hopeless to imagine that any Bill introduced would have the effect of establishing a really sound and advantageous system of dealing with Native lands.'<sup>20</sup> Sir William Fox was deeply concerned at the expenses the Court process imposed on Maori claimants, especially the cost of lawyers who could charge huge fees for very little work.<sup>21</sup> He knew of cases where the cost of passing land through the Court had taken the whole value of the land.

Others suggested the problems with the system were a product of the incompetence of judges. Wilson believed the Court was a source of major injustice to Maori and blamed Maori dissatisfaction on the chief judge.<sup>22</sup> He described Fenton as 'antagonistic to the Native race' and was highly critical of the capacity of other judges, questioning their competency to carry out their functions.<sup>23</sup> Johnson told the

<sup>16</sup> *ibid.*, p.51.

<sup>17</sup> *ibid.*

<sup>18</sup> *NZPD*, 37 (1880), pp.48-49.

<sup>19</sup> *ibid.*, p.57.

<sup>20</sup> *NZPD*, 36 (1880), p.5.

<sup>21</sup> *NZPD*, 37 (1880), p.51

<sup>22</sup> *ibid.*, p.3.

<sup>23</sup> *NZPD*, 36 (1880), p.46.

Council that the problems arose because few judges were trained lawyers: they had no experience of operating in a courtroom.<sup>24</sup> He believed legally trained men would be more effective because they would be able to assess the evidence better, rather than the present judges who were appointed as experts of Maori custom and language. This was not a view supported by the Maori members. All spoke in favour of the new Court and although Tomoana did think Maori should have much greater participation in the process of determining who owned Maori land, he also believed judges should understand Maori custom and language – ‘men of ability, like Chief Judge Fenton.’<sup>25</sup>

There were two other major sources of criticism. The first was the lack of an avenue by which complaints about decisions could be addressed. Rehearings were considered ineffective and several members noted that decisions of the Court were increasingly challenged in the Native Affairs Committee. The other major criticism was the notification issued by the Court. The 1873 Act had made ‘a clumsy attempt’ to notify Maori who might have an interest in land that it was under consideration but even so, the new bill made no provision for requiring interested Maori to be notified of a title investigation.

The Court came under sustained and trenchant attack from politicians during the passage of the Native Land Court Act in 1880. For the first time, they raised real and significant doubts regarding the operation of the Court. Unlike the Native Land Act passed in 1873, and with the threat of war no longer so real, colonial politicians were no longer so willing to give an unqualified endorsement of the view of an ‘expert’ Native Minister like McLean. Bryce proposed measures to address many of these limitations but for whatever reason they were not enacted. His proposals were designed to make the system of acquiring Maori land fairer to owners but they were not intended to prevent the acquisition of Maori land; in fact they were supposed to do entirely the opposite. The subsequent government, led by Robert Stout, picked up the proposals, developed them further, and was eventually able to push them through.

In 1884 the Hall government was replaced by the Stout-Vogel government which held office until 1887. John Ballance was appointed Native Minister. There are some significant parallels between Ballance’s term as Native Minister and that of Bryce. In particular, Ballance was finally able to enact the legislation first proposed by Bryce in his failed Native Land Sales Bill. However, Ballance took his lead from McLean in cultivating relations with Maori. Although he did not attempt to rebuild the Native Department, he put much greater effort into keeping in touch with Maori by touring districts and attending meetings to discuss policies and hear concerns.<sup>26</sup>

<sup>24</sup> *ibid.*, p.8.

<sup>25</sup> *NZPD*, 37 (1880), p.50.

<sup>26</sup> Ward, p.294.

Ballance's approach to administering Maori land, like Bryce's, was quite revolutionary; the two proposed very similar changes but Ballance was more successful in pushing them through. But only just. His Native Land Court Consolidation Bill was first introduced in 1885. It did not introduce any major changes in the constitution and function of the Court but rather, five years since the previous consolidation, brought together the legislation relating to Maori land. There were some new provisions relating to rehearings of decisions of the chief judge and it gave the Court the power to determine whether lawyers could appear to represent claimants in the Court (an issue which caused heated debate).<sup>27</sup> More significant, although not particularly controversial during the bill's passage, was the inclusion of clauses to solve defects in several judgments, so beginning a practice which would become increasingly common in succeeding decades. It failed to pass, however, and when taken up by Ballance in the following year's session it passed through the General Assembly with very little debate.

The Native Lands Administration Act 1886 was even more problematic; it was the product of two years of false starts to get similar bills through the House. First introduced into the House in 1885 as the Native Land Disposition Bill, it was referred to the Native Affairs Committee.<sup>28</sup> According to Ballance this move was at the request of the Maori members so that they could carefully consider the bill and make any appropriate amendments. Considerable evidence was heard by the Committee and it was discussed at a large meeting on the East Coast attended by Ballance.<sup>29</sup> This was a significant meeting: the proposed legislation was supported by W.L. Rees and Wi Pere, the partners in the East Coast land settlement schemes.

The bill was designed to deal with the problems which were emerging in the administration of Maori land. Instead of huge numbers of names fragmenting title and allowing the interests of individuals to be purchased, the legislation allowed tribal title and tribal dealing to be possible by incorporating the owners. The incorporated owners could then elect a block committee which would act on their behalf. The statute allowed block committees to determine whether the land should be sold or leased. They could place their land with a government official who could sell or lease the land by public auction. All private land dealings were prohibited.<sup>30</sup>

<sup>27</sup> The bill originally provided that lawyers were not permitted to appear before the Court but was subsequently amended.

<sup>28</sup> 'Report of the Native Affairs Committee on the Native Land Disposition Bill, Together with Minutes of Evidence and Appendix,' *AJHR*, 1885, I-2B.

<sup>29</sup> The meeting was held at Waipatu, near Hastings, in January 1886. According to the notes of the meeting, representatives of all the tribes except Waikato attended to discuss the proposed Native Land Administration Bill. See 'Notes of Native Meeting at Hastings,' *AJHR*, 1886, G-2.

<sup>30</sup> Ward, p.296.

As a result of all the discussions, the bill had to be held over until the following session, and in the interim, a major change (apart from the name) was made. Whereas the Native Land Disposition Bill provided for the disposal of Maori land by boards which included Maori representatives, after meetings to discuss the bill, Maori landowners had asked that the boards be replaced by an individual commissioner who would deal with the sale of land. This suggestion was incorporated into the Native Land Administration Bill. At same time, Ballance accepted the strong view presented at the meeting that the individual commissioner should not be the Public Trustee. Ballance told the House he did not 'know why the Natives should have such an objection to the Public Trustee, but they have a deeply-rooted aversion, not to the officer himself, but to the Public Trust Office, and they urged that the Public Trustee should not be allowed to deal with Native affairs.'<sup>31</sup>

The central principles of Ballance's bill were to prohibit any direct dealing with individual Maori landowners and where Maori land was not sold to the Crown but to private interests it would be arranged in the same way as any ordinary land transfer. He told the House that 'we shall have the land dealt with by a responsible person, and on a uniform system, and in such a way that those who want to get Native lands can acquire them as they now acquire Crown lands.'<sup>32</sup> The primary aim of the legislation, according to Ballance, was not to stop the sale of Maori land, but rather so that 'under it we can carry on in Native territory the great work of colonization.'<sup>33</sup> He argued that under the existing regime for purchasing Maori land it was impossible for colonisation to proceed. This was because the land was purchased by a specific group of people who did nothing to open the land for settlement. He added 'as far as I know, most of the purchasers of Native land have allowed the land to rest just in the state it was in when it was held by the Natives. They had done nothing to cut it up and make it fit for people to occupy and settle on it.'<sup>34</sup> Wealthy individuals purchased large blocks of Maori land but took no action to make it available for settlement. These were the sorts of abuses Ballance identified and he believed the legislation of the previous years had made it much more difficult for private individuals to acquire Maori land.

Critics of the bill objected to the committees to be established to administer the land claiming they would be subjected to many abuses. Others saw the measure as a backdoor return to pre-emption and highly questionable government land purchase practices. Russell also raised the spectre of McLean's approach to native affairs, telling the House that the bill placed 'absolutely despotic power in the hands of the Native Minister, and is perpetuating that system of personal rule over the

<sup>31</sup> *NZPD*, 54 (1886), p.328.

<sup>32</sup> *ibid.*, p.329.

<sup>33</sup> *ibid.*, p.330.

<sup>34</sup> *ibid.*

Natives which it is the duty, and, I believe, the wish of the great majority of members of this House to see ended forever.<sup>35</sup>

The response of supporters of the bill to criticisms which focused on the destructive impact of government land purchase activities on Maori in the past shed light on the intention of the new structures. Wi Pere, for instance, noted with some irony that those objecting to the bill on this basis did not acknowledge the problems for Pakeha purchasers: they raised 'no objection to it on the score that it will bring trouble to the Europeans. They have not even alluded to the fact that Europeans will not be able to purchase individual shares. I say the only trouble which will come upon the Europeans will be this: They will have to buy the Native lands at public auction.'<sup>36</sup>

The bill reflected the emergence of the Liberal's Maori land policy which would be developed further and implemented in the following decade. The prohibition on the purchase of individual shares and the establishment of land boards, were designed to prevent land speculators locking large blocks of land instead of making them available for settlement. At the same time, the government wanted to improve the ability of men of small means to acquire small blocks of land for farming. Hence, in response to criticism that his bill would halt settlement in the North Island, Ballance replied 'I am convinced that settlement does not go on at present, under the system now in force.'<sup>37</sup> The problem, as the Premier, Sir Robert Stout, told the House was that the present system meant Maori land passed into the hands of a few monopolists and speculators rather than small settlers. The bill was designed to prevent fraud in the purchase of Maori land and ensure that once land was acquired it was subdivided and made available for settlement by small farmers; it would stop speculators purchasing Maori land and holding it until it rose in value. However, it was not intended to halt the purchase of Maori land either. In fact, the very opposite was the case.

The legislation failed comprehensively.<sup>38</sup> Maori land owners were unwilling to vest their interests in block committees having seen how land had been alienated when tribal leaders owned it themselves. Certain chiefs were distrusted for this reason. The district commissioners appointed by Ballance waited for land to be vested in them. They were disappointed. Politicians at the time recognised these problems but also claimed, as discussed below, that the legislation failed because the Crown was not in a position to acquire the funds to purchase Maori land. Otherwise

<sup>35</sup> *NZPD*, 55 (1886), p.285.

<sup>36</sup> *ibid.*, p.293.

<sup>37</sup> *NZPD*, 54 (1886), p.462.

<sup>38</sup> Ward, p.297.

the Native Land Court retained its power to investigate title and determine successions.

The unpopularity of the Native Land Administration Act also contributed to the collapse of the Stout-Vogel government in the 1887 election.<sup>39</sup> The Atkinson ministry took office and Edwin Mitchelson replaced Ballance as Native Minister. The Native Land Administration Act was quickly repealed by the very brief Native Land Act 1888. It removed the prohibition on purchasing Maori land and the activities of speculators and private purchasers resumed with vigour. The new act restored private direct purchase but retained some controls on fraud. It allowed Maori landowners to dispose of their interests in any way they saw fit subject to the provisions of the Native Lands Frauds Prevention Acts. Trust commissioners would have to be satisfied that the landowners had received the purchase money and that they had enough land for the occupation of themselves and their family. Restrictions on alienations were, however, relaxed considerably. Restrictions could be removed by the Court when a simple majority of owners applied and the consent of the Native Minister was no longer required. The legislation did much to facilitate the alienation of Maori land, especially the provision giving the Court power to partition out the individual shares of the landowners who had sold their interests.

Free trade in Maori land returned with Harry Atkinson. After two years, Mitchelson argued, the government had found 'that the Natives have most strenuously objected to allow their lands to be dealt with under it [the 1886 Act]' and the Act had failed to work.<sup>40</sup> The evidence was the '[e]normous tracts of country ... at present lying waste – uncultivated and unproductive – and I think the sooner portions of these lands are brought into use the better it will be for the colony.'<sup>41</sup> The decision to repeal the Act was in addition a response 'to the shoals of petitions received from Natives throughout the colony.'<sup>42</sup> These were not, however, the main reasons he believed the Act had failed.

The major problem identified by Mitchelson, with which most politicians agreed, was that the government had not been able to provide the funds to purchase Maori land. He believed that had funds been available, the Act would have been a major success. Mitchelson concluded that 'I regret that the colony is not in such a position, as I personally think it would have been the best solution of the whole difficulty if we could ourselves have purchased the whole of these lands, and so

<sup>39</sup> *ibid.*

<sup>40</sup> *NZPD*, 61 (1888), p.668.

<sup>41</sup> *ibid.*, p.669.

<sup>42</sup> *ibid.*, p.670.

extinguished the Native title to all lands other than what would be sufficient for their use and occupation.<sup>43</sup>

Ballance agreed with this view but added that his statute failed because it removed all the interpreters and other middle men who had urged Maori to sell their land. They were closely associated with speculators and Ballance again argued that speculation was the major problem with the land purchase system. This was because land was 'bought not for the purpose of holding the land they acquired, not for the purpose of putting settlers upon the land, but for the purpose of holding for a rise.'<sup>44</sup> He argued that the government was far better positioned to foster settlement because it was able to prepare the land for settlement by having surveys carried out and roads constructed. Large scale private purchasers were not able to do so, 'unless they have large capital, and are animated by the spirit of colonisation.'<sup>45</sup> Ballance was convinced that private sales would severely restrict the settlement of the North Island.

The Maori members, however, did not accept that either lack of funding or the reduction in pressure from land purchase agents were the reasons why the Native Land Administration Act failed. They all characterised the system created by the statute as a form of pre-emption which was strongly opposed by Maori. James Carroll rejected pre-emption while Hoani Taipua argued previous negotiations by Crown agents were highly dubious and designed to extract maximum areas of land at the lowest price. He told the House that he thought the Stout-Vogel government was 'to acquire the whole of their land by purchase at the Government's own price.' That is, 'to buy land from the Natives without paying them the proper price.'<sup>46</sup>

The operation of the Native Land Court was closely scrutinised by the Maori members too. Their comments focused on improving the capacity of the Court to settle titles quickly. Carroll suggested the native committees should be allowed to 'make preliminary investigations so as to settle questions of boundary or to define lines – in fact, to do all the preliminary work which the Native Land Court is called upon to do when investigating the title to a block of land.'<sup>47</sup> The committee would report to the Court when the block came up for hearing on which it could base a decision. His proposal was supported by Taipua who argued that the committees would ensure 'the land will be awarded according to Native custom.'<sup>48</sup> He believed such a move would ensure title was properly determined. These suggestions would be taken by Carroll and turned into the Maori Land Administration Act 1900, which is

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.*, p.671.

<sup>45</sup> *ibid.*, p.672.

<sup>46</sup> *ibid.*, p.689.

<sup>47</sup> *ibid.*, p.685.

<sup>48</sup> *ibid.*, p.690.

examined in the next chapter. Twelve years earlier, however, they were discussed at a time when the question of how to deal with Maori land was far from settled.

A Native Land Court Amendment Bill was considered at the same time as the Native Land Bill. It was an amending bill, albeit a large one, rather than a major shift in policy. Key provisions, however, indicate the problem which was beginning to arise in relation to the purchase of Maori land. Legislation validating transactions had been common prior to 1888 but the bill took a much broader approach to this problem by empowering the Court to deal with them where they arose. The proposed legislation extended the powers of the Court beyond those provided for in 1877 by allowing the government to apply to the Court to have its interest in land determined based on advances made prior to the investigation of title. Once the Court had determined the Crown's interest this could be partitioned out. It went even further though by giving the Court power to validate private transactions too. The Court was given the power to investigate the sale of undivided interests in a block of land and determine the area sold which could be awarded to the purchaser.

Even more controversial was the way the bill dealt with negotiations conducted during the operation of the Native Land Administration Act. During its operation, any dealings with individual Maori were expressly prohibited and enforced by punishments including large fines and imprisonment. This, however, had not prevented negotiations and they had flourished in expectation of the imminent demise of the Act. The Native Land Court Bill introduced by Mitchelson validated these transactions. Sir George Grey was particularly incensed about the open nature of the provisions demanding the Native Minister provide a return showing the extent of the land which would be affected by such transactions.<sup>49</sup> He also complained vigorously that it would only be the wealthy speculators who benefited from the proposed legislation while Maori landowners and small settler farmers would lose. These provisions reflected the growing complexity of the title created by the Court and the rapidly increasing difficulties faced by private purchasers and the Crown when they tried to acquire Maori land. Negotiating to purchase interests was usually not the problem. The problems emerged when attempts were made to bring negotiations to a conclusion and establish the transfer of title. This required the consent of all the owners or at least their signature on a deed and locating all the owners and then convincing them to sell was extremely difficult for anyone who could not afford to employ a small army of well-connected agents.

During the 1880s, the Native Land Court itself was a subject of little importance during debates on native land legislation. Certainly in 1880, its operation was subjected to considerable criticism by politicians. But as the various mechanisms for acquiring Maori land were debated throughout the rest of the decade, the Court

<sup>49</sup> *NZPD*, 62 (1888), pp.18-19.

was a marginal consideration. It continued to operate but its powers were severely restricted when compared to its activities during the 1870s. From 1880 to 1888 its functions were limited almost entirely to title investigation, partitioning of land and succession and it went about these tasks diligently. Decisions continued to be challenged both in the Native Affairs Committee and increasingly (and more significantly) in the Supreme Court and Court of Appeal. There was, however, one major problem: the title system established by the 1873 Act which created memorials of ownership listing the names of all interested Maori landowners was preventing the large scale acquisition of Maori land.

This problem was emerging as early as the late 1870s when legislation had to be enacted to clean up the tail end of the lands acquired under Vogel's immigration and public works schemes. It was a problem which worsened during the 1880s as it became increasingly difficult to purchase land from Maori; the numbers of owners in individual blocks and the mechanics of getting each signature made negotiations protracted and difficult to bring to a successful conclusion. And so the Court was marginalised as colonial politicians searched for other mechanisms for acquiring land from acquiescent Maori landowners. Thus in 1880, Bryce proposed a system of committees designed to bypass this problem and also ensure Maori received a fair price. The proposals failed to pass and were taken up by Ballance in 1885 and finally enacted in 1886. The new structures were not designed to prevent the alienation of Maori land but rather to make it easier and ensure that the land was opened up to settlement.

The connection with the Liberal government's later rhetoric is clear and unambiguous. In the debates of the mid-1880s, the small man had to be settled on the land and this would be achieved through government intervention. Private purchase and speculation was entirely inimical to such an outcome. The system failed for several reasons. Probably most important was the government's failure to provide adequate finance to make it work effectively. It was abolished and the Court's powers were expanded again in 1888. The legislation of 1877 was extended to include private purchases so that Maori land could be divided and alienations effected with greater ease. Even Mitchelson, their architect, did not think these measures were a solution to the problem of choked titles to Maori land and they were not – but quite what would constitute a solution was not at all apparent. The 1880s was a decade of further experimentation in native land legislation as politicians were unsure how they could rapidly acquire Maori land. McLean succeeded by maintaining close relationships with Maori communities through a network of officials and drawing on decades of experience in negotiating the acquisition of Maori land. Both were central to the successful operation of the title system he created in 1873. In contrast, his successors found it worked effectively against them and struggled to find a way beyond it. More than two decades after the Court first sat, colonial politicians were

still no closer to finding the solution to the continuing problem of how to deal with Maori customary rights to land.

## CRISIS:

## LIBERALS AND THE RE-INVENTION OF THE COURT

The election of the Liberal government coincided with a period of major economic expansion in New Zealand. This allowed a return to substantial Crown purchase activity and so in 1894 almost all private purchase was prohibited. Like Ballance in the mid-1880s, Seddon's Liberal government in the mid-1890s shut down private purchase because speculators were holding on to land they wanted for small farms. In contrast, in the early twentieth-century there was growing concern that Maori were very close to losing all their land. The Liberal government, and in particular the Native Minister, James Carroll, were worried about this possibility because Maori could become a burden on the state – the very outcome the Liberals wanted to avoid through their small farms policy. This concern, however, had little effect on policy because of a significant shift in the Liberal Party's electoral support base which eventually led to the election of Massey's Reform government. William Herries, the new Native Minister, was more than happy for Maori to continue to sell what little land was left with limited procedural protections and his view was embodied in the Native Land Laws Amendment Act 1913. Once again, the pattern identified in the previous chapters is evident: a new government with new legislation and a new direction for the Native Land Court and the system of purchasing Maori land.

This chapter argues that, just as in earlier decades, the Court was re-invented several times in response to shifting political and policy contexts and to crises created by Maori participation in the process of defining Maori customary rights to land. By the early 1890s, the situation was one of major crisis: establishing stable and settled title to Maori land was highly problematic because disputes among Maori over their rights to land had become so intransigent. And as the lists of owners increased in size, the basic mechanics of gaining the consent of all the owners was much more difficult. Many of the problems associated with the alienation of Maori land were resolved after 1909 when a fundamentally altered framework for acquiring land was

established. Nevertheless, the problems associated with establishing clear title remained, even if they were increasingly irrelevant as the area of customary land still to be investigated by the Court rapidly diminished. Through the 1890s and into the early twentieth-century, politicians and officials continued to struggle to find a way of effectively dealing with Maori customary rights to land.

The new Liberal government which took office in 1891 was led by the former Native Minister, John Ballance, and Alfred Cadman was appointed Native Minister. The acquisition of Maori land for closer settlement was a high priority for ministers. One of the Liberal government's fundamental policies was the settlement of the land with small farmers. This required the acquisition, division and settlement of large blocks of land, be they owned by Maori or by Pakeha landowners. In relation to Maori land, the 1890s, like the 1870s, were a decade of large-scale Crown purchase activity.

The approach taken by the Liberals in the 1890s was, however, very different to that of McLean in the 1870s. Indeed, under Cadman the last vestiges of McLean's empire were dismantled. In December 1891, T.W. Lewis, the Under Secretary of the Native Department and McLean's private secretary died and twelve months later the department was disestablished. The administration of the Native Land Court was transferred to the Justice Department. The Crown Lands Department took over land purchase matters. The remaining Resident Magistrates became Justice Department magistrates and their courts shut down. The Native Department was no more. According to Ward, the most important consideration in this decision was the nature of civil unrest between Maori and Pakeha.<sup>1</sup> Isolated incidents did still occur but settler authorities believed they were able to deal with them when they arose. The crucial role of the Native Department in maintaining peace had ended.

In contrast, the role of the Native Land Court was significantly increased by the Liberals in the 1890s. During the 1880s the Court was marginalised as politicians searched for a mechanism to allow either the Crown or private purchasers avoid the huge cost and complication associated with acquiring Maori land. In contrast, the Court was central to Liberal policies and aspirations during the 1890s. It was certainly subject to intense criticism by Liberal politicians, particularly R.J. Seddon. But it was also an institution which allowed the Liberal government to achieve many of its most fundamental policies especially where those policies required large quantities of land for closer settlement. Liberal land legislation in the 1890s expanded the powers of the Court and gave it a much greater role in the process of alienating Maori land. In this, the Court proved extremely successful.

<sup>1</sup> Alan Ward, *A Show of Justice. Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland: Auckland University Press, 1973, p.302.

From 1899, the Court was marginalised again as Liberal politicians became increasingly concerned at the frightening possibility that Maori might soon become landless and a burden on the state. So much Liberal rhetoric was directed against this outcome in relation to Pakeha, that most of the first decade of the twentieth-century was taken up with legislative experiments designed both to administer the land remaining in Maori ownership and attempting to settle Maori on that land. James Carroll, as Native Minister, designed native land legislation and pushed it through the General Assembly drawing heavily on the Liberal's own rhetoric – there was a particular focus on leasehold tenure. Moreover, many attempts were made to demonstrate how near to landlessness Maori were. Carroll's efforts were in vain. Political opinion, especially that of the small farmers who had benefited from the Liberal government's policies, swung away from original Liberal policies towards the Reform Party and freehold land ownership. The Liberal party desperately followed its supporters, and this too is reflected in native land legislation as new structures were put in place to deliver Maori land to private purchasers with as little difficulty as possible. These structures were made even more efficient by the Reform government after it came to power in 1912.

The Liberal government remained in power for just over two decades and their native land legislation was highly experimental. The first period, from their election in 1891 until around 1899, was one of extensive Crown land purchase activity.<sup>2</sup> The Liberals were elected on a platform of acquiring large blocks of land, not only from Maori but from Pakeha speculators and runholders. These blocks were to be divided into small farms and made available for settlers. Thus, of the 3.1 million acres of Maori land purchased by the government between 1891 and 1911, 2.7 million acres was acquired prior to 1900. In the same decade, private individuals purchased about 400,000 acres.<sup>3</sup> This compared with the 865,000 acres of Maori land purchased during the Atkinson ministry from 1887 to 1890.

Large scale land acquisition was conducted using a series of statutes which were to prove extraordinarily effective. This legislation was the key to the success of the Liberals' policy. They included the Native Land Purchases Act 1892, the Native Land Purchase and Acquisition Act 1893, the Native Lands (Validation of Titles) Act 1893, and the Native Land Court Act 1894. The native land legislation enacted by the Liberal government in the first few years of its tenure dealt very effectively with the problems which had arisen in establishing clear title to Maori land during the 1880s. They retained the Court and enhanced its powers. During the 1890s, the Court was

<sup>2</sup> Peter Spiller, Jeremy Finn, and Richard Boast, *A New Zealand Legal History*, Brooker's: Wellington, 1995, p.154.

<sup>3</sup> Tom Brooking, "'Busting Up" the Greatest Estate of All. Liberal Maori Land Policy, 1891-1911,' *New Zealand Journal of History*, 26:2 (October 1992), p.78.

increasingly given special powers in specific cases to deal with problems which had arisen as a result of its own actions in earlier decades.

The four architects of the Liberal's native land legislation during the 1890s were Richard John Seddon (Premier and Native Minister for much of the decade), John McKenzie (Minister of Lands), James Carroll (Member of the Executive Council and later Native Minister) and Alfred Cadman (Native Minister until 1893).<sup>4</sup> The department responsible for implementing the policy was the Native Land Purchase section of the Department of Lands. This meant that the Minister of Lands (John McKenzie) was responsible for the purchase of Maori land, rather than the Native Minister.

These four men produced a massive number of statutes as the legislation was amended and adjusted, all for the purposes of making it work more effectively.<sup>5</sup> Some legislation was designed to protect Maori interests. Much of it was enacted, however, to facilitate the purchase of Maori land by the Crown. Titles were tidied up to avoid fraudulent purchase practices and ensure secure tenure. The Native Lands (Validation of Titles) Act was passed in 1892 for this purpose and the following year a Validation Court was created to accelerate the clearance rate. The Native Lands Purchases Act 1892 re-introduced partial pre-emption in that the Crown could proclaim land in negotiations prohibiting anyone else from negotiating with the owners for two years. The Native Land Purchase and Acquisition Act 1893 removed the time limit, effectively re-instating full pre-emption. The Native Land Court Act 1894 re-introduced full pre-emption.

The Native Land Court Bill was highly controversial for this reason and was driven through both houses of the General Assembly by the Premier and Native Minister in 1894. Seddon replaced Cadman as Native Minister in 1893 when the Liberal government was re-organised following Ballance's death.<sup>6</sup> Seddon re-introduced the practice of travelling to Maori communities to meet with Maori and discuss their needs and concerns face to face. These informed his speeches during the debates on the bill. He described them as an opportunity to promote harmonious relations with Maori, establish confidence among Maori of the government's intentions and dispel any distrust. Seddon claimed there were two fundamental

<sup>4</sup> *ibid.*, p.82.

<sup>5</sup> *ibid.*, pp.83-89.

<sup>6</sup> According to Butterworth, Cadman did not want the portfolio of Native Affairs. In 1893, Cadman was accused by Rees of speculating in Maori land in the Hawke's Bay. The allegations were strongly denied by Cadman who took libel proceedings and was awarded damages. At Cadman's suggestion, he and Rees resigned their seats to have the issue determined decisively by the people. In Rees' own electorate, Cadman won with a large majority. This ended Rees' political career and on returning to Parliament Cadman 'declined the offer of his old portfolio of native affairs.' Graham Butterworth, 'Cadman, Alfred Jerome,' in *The Dictionary of New Zealand Biography. Volume Two, 1870-1900*, Wellington: Bridget Williams Books and the Department of Internal Affairs, 1993, pp.71-73.

complaints: the first was the management of Maori land and the second was the expense, delay and difficulty in gaining title to land. He had concluded from his meetings that change was necessary.<sup>7</sup>

In introducing his Native Land Court Bill, Seddon told the House he had worked closely with James Carroll during its preparation. The bill was divided into two parts. The first dealt with the Native Land Court and the second with the administration of Maori land once title had been determined by the Court. Like so many before him, Seddon argued his bill was a consolidation which simplified native land law and that action was necessary because 'the laws relating to the Native Land Courts and dealing with Native lands are very defective.'<sup>8</sup>

The way in which the Native Land Court determined title to land was a particular target for his criticism. His major concern was the delays in the Court process and the expense associated with these delays. There were delays in arranging a survey, hearing evidence and conducting the investigation, further delay where rehearings were granted and in the requirement that three months elapse before the Court's decision was final.<sup>9</sup> All these delays contributed to great expense so that Maori claimants 'saw that they would become landless and penniless through going to the Courts as the law stood.'<sup>10</sup> According to Seddon, Maori claimants were highly critical of the delays and attendant expense imposed upon them, 'and has kept back settlement so much as the difficulties in ascertaining titles and the constant applications to the Court and the contingent expenses.'<sup>11</sup> Significantly, he believed the existing rehearing process was a major problem because of the impact it could have in unsettling titles. Seddon's bill removed the right to apply for a rehearing and the right to appeal to the Supreme Court on certain questions. It established a Native Land Court and a Court of Appeal, and the decision of the latter was final. He told the House the bill was designed to simplify court proceedings and reduce costs while ensuring 'that the method of ascertainment of title is more complete.'<sup>12</sup>

The bill also expanded the powers of the Court. It abolished the position of trust commissioners and transferred their functions to the Native Land Court to avoid the extra expense. Likewise, the power to remove restrictions on alienation previously exercised by the Governor-in-Council was passed to the Court. Another important change was provisions which gave the government direct responsibility for the survey of Maori land through the Surveyor-General. This meant that the

<sup>7</sup> *NZPD*, 86 (1894), p.370.

<sup>8</sup> *ibid.*, p.374.

<sup>9</sup> *ibid.*, pp.372-3.

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*, p. 374.

<sup>12</sup> *ibid.*

government could ensure that the cost of surveys was fair and that a reasonable amount of land would be taken to pay for the survey. There were two other innovations which should be noted. The first gave Maori the opportunity to administer their interests individually, or have the block vested in a management committee by incorporation of the owners. These provisions were the first occasion on which native land legislation contained proposals for administering Maori land retained in Maori ownership. The other provided for the Land Transfer Act to apply immediately from the time the Court issued an order for a title. It was intended to remove the confusions between certificates of title, memorials of ownership and orders of the Court.

Carroll strongly supported the incorporation of the owners as a means of facilitating lease, sale or development. He argued that those landowners who held an undefined interest in tribal estate should be incorporated to allow them to better administer their land. On this basis, the government could purchase the land it needs from the incorporated owners in the public interest. On the other side of the House, Edwin Mitchelson, the former Native Minister, thought Seddon was being very optimistic in claiming his bill 'would end litigation and settle all the difficulties previously experienced regarding Native legislation.'<sup>13</sup> He considered it impossible to pass legislation which would 'at once and forever set the question of Native legislation at rest.'

However, much of the detail of the bill was lost in the debate because the return to Crown pre-emption was the key focus. Whereas in 1886 Carroll had opposed pre-emption, he supported government purchase particularly because the Native Land Purchase and Acquisition Act required that any negotiations entered into by the government had to be based on a fair valuation of the land. At the same time he observed that Maori had never profited from private purchase and when they sold to the government they were usually provided with reserves. The other Maori members were not convinced. Heke objected to pre-emption because the prices paid by the government were too low.<sup>14</sup> He did not accept the government's view that private purchase was much less just than Crown purchase and was willing to bring 'evidence to show that the transactions which have taken place between the Government and the Natives have been just as bad as the dealings which have transpired between private individuals and the Natives.'<sup>15</sup> Pere told the House that Maori simply wanted an end to land sales. They wanted to farm their remaining land and he supported the suggestion that committees should be appointed to administer

<sup>13</sup> *ibid.*, p. 464.

<sup>14</sup> *ibid.*, p. 384.

<sup>15</sup> *ibid.*, p. 385.

Maori land for the purposes of lease, sale or development and the provision of financial assistance to develop the land.<sup>16</sup>

All of this legislation was in place by 1895 and required only minor amendment until it was swept aside by the legislative revolution and the district Maori Land Councils of 1900.<sup>17</sup> In 1899 McKenzie withdrew from active political life, his job of acquiring large areas of Maori land complete. While he was responsible for the acquisition of Maori land, the Liberal government purchased vast tracts of Maori land at very low prices. In the decade after 1900 much of the legislation which was designed to slow land sales was a product of collaboration between Carroll and Ngata.<sup>18</sup> In 1899 Crown purchase activity was suspended by statute. During the decade Maori political institutions were very active and it was after 1900, under James Carroll, that policy shifted from alienation to retention of Maori land.<sup>19</sup> Carroll became Native Minister in 1899 and was assisted by the increasingly prominent Apirana Ngata.

This was made quite clear in Carroll's Maori Land Administration Bill of 1900. It stopped any further alienation of Maori land by sale. Land would be developed through leases allowing the land to be retained for the benefit of Maori landowners and their descendants. The leases would be administered by a board and were designed to permit the settlement of land. Carroll told the House, that '[b]y leasing on liberal terms we can promote settlement in this colony, and bring into profitable use large areas of Native land, at the same time preserving the freehold for the owners, and for the benefit of those who come after them.'<sup>20</sup> It was in this way that the needs of both Maori and Pakeha would be met.

The bill took several years to prepare. A bill containing similar provisions was drafted in 1897 but abandoned. The following year another bill was prepared and circulated among Maori communities. Their suggestions were embodied in a bill introduced in 1899. As a result of lobbying from the Maori members that bill did not proceed, but the purchase of Maori land was prohibited by the Native Land Laws Amendment Act 1899 to give Maori a further opportunity to consider the proposed legislation. Immediately prior to the introduction of the bill in 1900, a large number

<sup>16</sup> *ibid.*, p. 376. Maori were not able to participate in the government's advances to settlers scheme so that they had little opportunity to develop this land.

<sup>17</sup> The year following the enactment of the Native Land Court Act 1894, the Native Land Laws Amendment Act 1895 varied the terms of pre-emption exempting small blocks of land (less than 500 acres and inside town districts or boroughs). The same year, the Native Township Act allowed the government to establish townships on Maori land and thereby extinguish native title. Brooking, p.87.

<sup>18</sup> *ibid.*, p.97.

<sup>19</sup> See John A. Williams, *Politics of the New Zealand Maori. Protest and Cooperation, 1891-1909*, Seattle: University of Washington Press, 1969.

<sup>20</sup> *NZPD*, 114 (1900), p.503.

of Maori leaders had travelled to Wellington to discuss the proposed structures for administering Maori land. The bill was subject to considerable review as a result although those Maori consulted continued to disagree as to whether Maori land should be vested absolutely in the boards or whether vesting should be voluntary. This was a question which would be the subject of continuous debate. Carroll himself favoured the absolute approach 'because under the optional system you would not get much done for some time.'<sup>21</sup>

The bill signalled a major revolution in the investigation of title to Maori land and, once owners were determined, its subsequent administration. It established district Maori Land Councils made up of members appointed by the government and elected by Maori landowners. The councils gained full power to administer all Maori lands, including land still held under customary title, and were required to prepare the land for settlement by commissioning surveys and constructing roads. The councils also gained all the powers held by the Native Land Court in terms of determining ownership, partition, succession, the definition of relative interests, and the appointment of trustees. However, the exercise of these powers was subject to the direction of the chief judge of the Native Land Court. Where land was still held under customary title, the claimants were to elect a block committee who could determine the boundaries and ownership of the land. These decisions would be confirmed by the council which would then take over the administration of the land.

As part of this process, the council was required to take any land vested in it and set aside and declare parts papakainga. Certificates would be issued to the owners and these areas would be absolutely inalienable by sale or lease. The papakainga parts were designed to ensure that all Maori had land to occupy. Any surplus land would be leased and the councils had full power to do so on behalf of the owners. The bill did make provision for the alienation of Maori land by sale but any such transaction required the consent of the Governor-in-Council. The only exception was where land was owned by no more than two owners. They were able to deal with their land as they liked subject to the requirement that they held a papakainga certificate.

The Court came in for prolonged and sustained criticism. Seddon, the Premier and now former Native Minister, identified the cost of the court process and the threat of Maori landlessness as the two fundamental problems with the existing system of administering Maori land. Maori had to go to the Court and fight for their lands and the boundaries of their land and in doing so incurred huge expense so that 'after the land has gone through the Court their position is worse than ever.'<sup>22</sup> Seddon's criticism of the Court was intense:

<sup>21</sup> *ibid.*

<sup>22</sup> *NZPD*, 115 (1900), p.168.

It would have been a good job for the colony if there had been no law establishing them at all. As I said four or five years ago, what we want to do is to sweep away the Native Land Courts altogether, and do away with your Judges altogether. The whole system is bad. Through the operation of the existing system – partitions, succession orders, and so forth – there is one continual stream of expense and delay, until at last, with the expense of getting the land through the Courts, the poor unfortunate Natives have lost everything, and are worse off than when they started to get their titles investigated.<sup>23</sup>

Seddon was particularly concerned that Maori could sell all their land once they had freehold title and become landless and thought the provisions relating to papakainga certificates the best solution. He believed that by setting papakainga aside for each Maori landowner as reserves then they can settle on them and cultivate the land. Seddon believed that by giving each individual Maori a block of land, providing access to it, 'you will find him becoming an industrious settler, and you will save the Natives as a race.'<sup>24</sup>

The papakainga certificates were a direct response to growing concerns that Maori could become increasingly dependent on the state. Seddon told the House there were many older chiefs who were concerned that the present generation and future generations would become destitute and dependent on the state unless action was taken. He recognised this was also a problem created by the nature of titles to Maori land. This was because, he argued, there were large numbers of Maori who held considerable areas of land but were living 'wretched' lives because the land did not provide them with any income. They were unable to do much because often their interests were scattered across a wide area and although they were a large area in total individually they were not of a sufficient area for the owner to cultivate and live from. These problems were so endemic that Seddon claimed 'there is a general consensus of opinion among the Natives that they are getting so depleted of their lands that, rather than go on as they are going, they are prepared to accept anything almost.'<sup>25</sup> He believed major change was necessary and he implored the House to 'give this measure a trial.'<sup>26</sup>

Carroll saw the most important part of the bill was that relating to the incorporation of owners. He argued this was an effective way of dealing with second or third class land where it was owned by three or four hundred Maori. Individualisation into small blocks was not possible and the large numbers of landowners was a major problem in terms of settlement. Maori land could not be individualised and dealt with in that way because of the cost of surveys and other

<sup>23</sup> *NZPD*, 114 (1900), p.506.

<sup>24</sup> *ibid.*

<sup>25</sup> *ibid.*, p.505.

<sup>26</sup> *NZPD*, 115 (1900), p.168.

expenses. He told the House 'you cannot individualise large blocks of land of inferior quality in which there are a large number of owners without it costing you far more than the land is worth.'<sup>27</sup> Carroll argued that such land gained value in large blocks, not tiny sections. The existing legislative framework provided for such an approach but he wanted to extend it further and improve the effectiveness of incorporation as a way of administering Maori land.

The bill had the support of all four Maori members, reflecting the extent of input of Maori leaders and politicians. Heke stated without ambiguity that the alienation of land by sale had to end. However, he also drew heavily on the Liberals' own rhetoric, arguing that Maori landowners did not want 'large areas of land and see that land lie idle. The wish of the Natives is to satisfy the wish of the pakeha – the desire to acquire land for the purpose of settlement – because the Maoris see that that is the only means by which they can get advantage of the benefits of the land which they hold.'<sup>28</sup> For this reason, he wanted the legislation to 'enable them to obtain money at a low rate of interest for the cultivation of their lands.'<sup>29</sup> He noted that Maori could not borrow from the Advances to Settlers Office and he asked that the difficulties of borrowing money against Maori land be removed. Heke told the House 'that they should be given easier means of obtaining moneys for the purpose of carrying out their own improvements and so benefiting themselves and the colony at large.'<sup>30</sup> Maori wanted to develop their own land and they wanted money to do so.

Liberal rhetoric was one of the main sources of opposition to the proposals contained in the bill. One Liberal member, for example, opposed the bill arguing that it would create Maori landlords. He told the House that:

to create a landlord class of Maoris and their descendants in this country; to appoint by statute permanent trustees to preserve the landlords for ever; to practically re-enact – but in a worse form – the laws of settlement and entail which the Liberals of this country and of Great Britain have for generations striven to abolish, and thereby to free the land; to hedge round and shelter by statute for ever a Native class of landlords, so that they and their descendants may, in fact, be the masters of the European inhabitants, especially in the North; to enable Maoris to derive fat incomes from the toil of white men, to lead indolent lives – I say a system of that sort is not a system which is in accordance with what I conceive to be the traditions of the Liberal party, and any system of that kind will meet with my resolute opposition.<sup>31</sup>

In response, the Minister of Lands noted wryly that if the provisions of the present Lands for Settlement Act were applied to Maori land and each owner received their

<sup>27</sup> *ibid.*, p.185.

<sup>28</sup> *ibid.*, p.189.

<sup>29</sup> *NZPD*, 114 (1900), p.511.

<sup>30</sup> *NZPD*, 115 (1900), p.190.

<sup>31</sup> *NZPD*, 114 (1900), p.506 (W.J. Napier).

allocation according to its provisions there would be no land remaining to be purchased. Most speakers were concerned to ensure that Maori had adequate reserves to occupy and cultivate so that they would not become landless and dependent on the state. The future Native Minister, William Herries, for example, argued that Maori should be given a small piece of land on which to settle and was willing to 'give it to them free of cost, because everyone knows that when you survey land the costs eat up the whole of the value of the land.'<sup>32</sup>

Spiller, Finn and Boast argue that the Maori Land Administration Act 1900 and its provisions to limit the alienation of Maori land was a response to widespread concern among Maori at the policy of aggressive acquisition of Maori land during the first decade of the Liberal government.<sup>33</sup> The debates also show the extent to which senior Liberal politicians were concerned that, after the extensive purchasing of the 1890s, Maori were nearing landlessness. For a Liberal government elected on rhetoric of settling land with small independent farmers, such an outcome would have been in direct contradiction to their rhetoric. The political ground was, however, shifting and the broad based councils and the limits on the alienation of Maori land did not last long. Once questions about the councils began to emerge the limited autonomy offered to Maori landowners by the councils was slowly withdrawn. Boast argues this was because Carroll 'isolated and under siege in Parliament, found himself forced to make a series of concessions in the face of attacks not only from the opposition but also from his own Liberal party.'<sup>34</sup> This is possibly too simplistic, especially in terms of Carroll's political skills. Nevertheless, the land boards, which took over the functions of the councils in leasing Maori land and administering alienations, were a response to problems with the councils. Rather than local Maori landowners, the boards were made up of government appointed officials.

The Maori Land Settlement Act 1905 eased back on the absolute protection of Maori land imposed by the 1900 legislation. The system of investigating titles through committees and then the council remained in principle. However, the councils were streamlined into smaller boards which were appointed rather than elected. According to Carroll, the 'whole Bill, while preserving the main principles of our Native policy, tends to simplify the machinery. The trouble hitherto has been the cumbrous machinery – the unwieldy constitution of the Councils.'<sup>35</sup> The 1905 Act was designed in particular to facilitate leasing of Maori land. Settlement through leased land, even if it was Maori land, fit very neatly with Liberal rhetoric and Carroll's growing political abilities were certainly evident in pushing the new

<sup>32</sup> *ibid.*, p.510.

<sup>33</sup> Spiller, Finn and Boast, p.156.

<sup>34</sup> Richard Boast, Andrew Erueti, Doug McPhail and Norman F. Smith, *Maori Land Law*, Wellington: Butterworths, 1999, p.86.

<sup>35</sup> *NZPD*, 135 (1905), p.972.

measures through Parliament. His own party could not oppose a measure for Maori which was based on their own policies of settlement through leasehold.

The debates on the bill also show the growing concern regarding Maori landlessness and, even worse, the possibility that Maori could become dependent on the state when they no longer received income from the sale of land. Carroll told the House '[w]e must realise that for some time there has been no purchasing of land by the Government. It used to be a source of revenue to the Natives. The proceeds of the land they sold – sorry admission to make – they lived upon and consumed, and it was getting less year by year.'<sup>36</sup>

As well as facilitating leasing of Maori land, the bill returned to the Crown the power to purchase Maori land, re-established pre-emption and provided for the appropriation of funds. It did not permit private purchase at all but it also ensured that the problems the government encountered in the 1890s in acquiring Maori land no longer prevented purchase. Instead of requiring the consent of all owners of the land, the bill required a simple majority of shareholders. This process would evolve rapidly over the subsequent four years and provide the basis for system of alienation established in 1909 and which would facilitate the last major period of land purchase from 1909 to 1928.

The Maori Land Settlement Act 1905 was not Carroll's only attempt during this period to use Liberal rhetoric to protect Maori land. The Royal Commission on Native Lands and Native Land Tenure was established in January 1907 and worked for nearly two years auditing Maori land and Maori landownership.<sup>37</sup> The Chief Justice, former Liberal politician and premier, and well-known advocate for settling the land with small farmers, Sir Robert Stout, chaired the commission. He was supported by the young Apirana Ngata. Ngata was Carroll's principal political confidante and was proving himself very effective as a member of the House of Representatives. He was well-known and respected among Maori communities throughout the land. The commission actually met in these communities to hear applications from Maori landowners regarding their future needs for land. It was to decide what land was required for Maori occupation and cultivation and what land could be made available for European settlement.<sup>38</sup> The land considered by the commission had been vested in the Maori Land Boards and they were permitted to lease the land and sell parts: the proportion was half leased and half sold. The reports

<sup>36</sup> *ibid.*, p.710.

<sup>37</sup> The commission produced 42 reports throughout 1907 and 1908. For its final report, which includes a summary of its earlier reports, see 'Native Lands and Native-Land Tenure: Final report of the Native Land Commission,' *AJHR*, 1909, Sess. II, G-1G.

<sup>38</sup> 'Native Lands and Native Land Tenure: general report on lands already dealt with and covered by interim reports,' *AJHR*, 1907, G-1C, p.1.

of the commission were detailed and extensive and their recommendations were implemented by the Native Land Settlement Act 1907.

The commission reflects the concern among senior Liberal ministers at the possibility that Maori could soon be landless and that they would consequently become a burden on the state. The Liberal government had after all for nearly fifteen years insisted that the best way towards independence was to settle men on their own block of land which they could then farm.<sup>39</sup> The whole thrust of Liberal rhetoric was to foster economic independence, not dependence on the state: the state was simply a means to an end. Carroll, as a very senior minister in the Liberal government and whose political patron was the impregnable Seddon, used this rhetoric very effectively in the legislation of 1905 and 1907:

I refer to the necessity for providing the owners who are primarily interested in those lands. In all our efforts to pass legislation so as to give encouragement to and bring about the settlement of Native lands we have always studied the question from the point of view of satisfying the earth-hunger of the Europeans – of securing to the Crown large areas of Native lands in order that the same might be cut and let for general settlement. But we have never made any provision up to the present time indicating how we should deal with the balance of those lands, or how we should settle the Maoris thereon.<sup>40</sup>

The Stout-Ngata Commission was designed by Carroll and carried out by Stout and Ngata to show that Maori barely had enough land remaining for their needs and no more should be sold.<sup>41</sup> This meant that if the remaining land were divided and awarded to Maori using the formulae applied to the Liberal government's settlement schemes, there would very little surplus for general settlement.

What Carroll did not anticipate, however, was the extent to which Liberal rhetoric was being pushed further away from its original core by the Reform Party. Led by W.F. Massey and with William Herries as spokesperson on Native Affairs, the

<sup>39</sup> David Hamer, *The New Zealand Liberals. The Years of Power, 1891-1912*, Auckland: Auckland University Press, 1988, pp.64-75.

<sup>40</sup> *NZPD*, 142 (1907), p.1033.

<sup>41</sup> The commission's instructions were predicated on the assumption that there were 'large areas of Native lands of which some are unoccupied and others partially and unprofitably occupied.' The commission was to determine the extent of this land and then make recommendations for settlement: 'What areas (if any) of such lands could or should be set apart – (a) For the individual occupation of the Native owners, and for purposes of cultivation and farming. (b) As communal lands for the purposes of the Native owners as a body, tribe, or village. (c) For future occupation by the descendants or successors of the Native owners, and how such land can in the meantime be properly and profitably used. (d) For settlement by other Natives than the Native owners, and on what terms and conditions, and by what modes of disposition. (e) For settlement by Europeans, on which terms and conditions, by what modes of disposition, in what areas, and with what safeguards to prevent the subsequent aggregation of such areas in European hands.' *New Zealand Gazette*, Vol. 1, 24 January 1907, p.241.

Reform Party was able to cut into the Liberal's electoral strongholds through the first decade of the twentieth-century. Massey and Herries were able to launch a successful assault on the alliance between small farmers and urban workers which had kept the Liberals in power for so many years. This can be seen in relation to small farmers and particularly small farmers who had been settled on the land by the Liberal government schemes during the 1890s.<sup>42</sup> In response, the Liberal party moved away from settlement through state leasehold towards freehold for the small farmer. This left Carroll out in the cold arguing in favour of settlement through Maori leasehold land.

And then the Reform Party pushed Liberal politicians campaigning for the votes of small farmers even further. Initially, Herries supported Carroll's moves to settle individual Maori on their own blocks of land. He was even willing, from the opposition benches, to use funds from the consolidated accounts to meet the costs of survey and roading involved in doing so. However, under pressure from his own supporters he increasingly shifted his position from one of settling Maori on the land to allowing Maori to sell all their landholdings if they had some other means of supporting themselves. For Liberal politicians trying to retain the support of their core small farmer constituency, their only choice was to follow. Carroll had no choice and despite his best efforts to use Liberal rhetoric to his advantage, the attempt ultimately failed because Liberal rhetoric had followed its supporters and moved on. The outcome was the Native Land Act 1909 and a comprehensive rejection of Stout-Ngata.

The Native Land Act 1909 was a legal watershed in the history of native land legislation and the Native Land Court. It was a massive exercise consolidating in one comprehensive statute the mass of legislation which had emerged in the decades after 1865.<sup>43</sup> It brought together 72 statutes or parts of statutes. Preparing the bill was, Frame argues, an 'intractable' task which had frustrated many legal minds and specially appointed commissions due to the 'statutory chaos' of native land legislation.<sup>44</sup> The task was lumped on John Salmond in 1907 when he was appointed Counsel to the Law Drafting Office. He was assisted by Apirana Ngata, who had recently concluded the work of the Royal Commission on Native Lands. The judges of the Native Land Court were also involved through two conferences of judges held during September and October of 1909.<sup>45</sup>

<sup>42</sup> Hamer, pp.271-307.

<sup>43</sup> Boast, Erueti, McPhail and Smith, p.88.

<sup>44</sup> Alex Frame, *Salmond. Southern Jurist*, Wellington: Victoria University Press, 1995, pp.111-12. 'Second ad interim Report of the Commissioners under the Reprint of Statutes Act, 1895,' *AJHR*, 1904, A-7, p.7 and 'Report of Commissioners Appointed under the Reprint of Statutes Act, 1895,' *AJHR*, 1908, A-6, pp.2-3. Carroll referred to these reports and the difficulties the commissioners (including the Chief Justice, Sir Robert Stout) identified in his introductory speech.

<sup>45</sup> *NZPD*, 148 (1909), p.1100.

Thus, when the bill came before the House of Representatives and the Legislative Council, members were advised by ministers not to interfere with the provisions because the legislation was highly technical. Carroll, still Native Minister, introduced the bill, stating that it was 'chiefly a consolidating measure, here and there slight amendments and alterations of the law have been made, but nothing of a drastic nature.'<sup>46</sup> He acknowledged that certain areas of legislation relating to Maori land was not included but claimed that it did 'include all legislation of general application and special legislation which has been either spent, or is no longer necessary in view of the proposals in the Bill.'<sup>47</sup> If the bill was a moderate evolution of Maori land law, it was belied by Carroll's exhaustive and lengthy overview describing the intention and provisions of the bill and another by the Attorney-General in the Legislative Council.

It would be fair to say that the bill was much more than a simple consolidation. In fact, it represented a major revolution the way Maori customary rights to land were dealt with and in the administration of Maori land, especially in relation to alienations. It was to prove the most effective response to the problems of choked titles which emerged in the late 1880s and which had never been dealt with properly since then. The structures set up in the Native Land Act 1909 provided the basis for the last significant period of the alienation of Maori land. It also reflected the extent to which the debate in the Liberal government over freehold and leasehold land ownership had evolved over nearly two decades.

The bill had three main divisions and twenty-three parts. The first division dealt 'with the ascertainment, determination, and registration of titles to Native lands up to such point that the customary title is extinguished, and the land is brought under the Land Transfer Act.'<sup>48</sup> For nine years the Court had not so much been marginalised, for it still existed and sat regularly, but much of the work of investigating title was undertaken by the councils and block committees. In the new proposals, this work was returned to the Native Land Court and the Native Appellate Court was retained to hear appeals. After another brief hiatus, the Court would again be the key institution administering Maori land. The bill also allowed for the appointment of commissioners to process some types of routine Court business and free the judges to deal with more important matters such as the investigation of titles and the partition and sub-division of land. Assessors were retained but at the

<sup>46</sup> *ibid.*, p.1099.

<sup>47</sup> *ibid.*, p.1100. The exceptions were statutes relating to Native reserves controlled by the Public Trustee, Native townships, trust land in the Poverty Bay district, and land in the Rotorua and Urewera districts.

<sup>48</sup> *ibid.*, p.1100.

discretion of each judge – Carroll’s comments suggest this was, at its most basic, a cost-cutting exercise.<sup>49</sup>

More significantly, especially in terms of the recognition of Maori customary rights to land, the bill ‘provided that the Native customary title shall not be enforceable against the Crown or against grantees from the Crown by any legal proceedings.’ This made it impossible for Maori claims of customary title to be considered and resolved judicially and was designed to secure the title to all land in the Dominion and remove the possibility of litigation involving customary title to land.<sup>50</sup> The act gave the Crown the right to prohibit the Native Land Court from issuing a freehold order although it did not prevent the Court from receiving and hearing such an application. Frame argues Salmond’s response to Maori customary rights ‘was to resist the “judicialisation” of Maori claims and instead recognise them as political.’<sup>51</sup> This meant that where the Crown and Maori disagreed over customary rights the matter had to be resolved by Parliament rather than the Courts. These provisions were inserted in the context of major litigation over Maori customary ownership of waterways, especially the ownership of the Rotorua lake bed.<sup>52</sup>

Two other groups of new provisions illustrate the extent to which the Liberal government was laying the foundation for the settlement of Maori land by private purchasers. The first related to partition and required judges to lay out roadlines on any block of land at the time of subdivision.<sup>53</sup> When land was vested in a board, it was also required to lay out and form roads. Furthermore, a board could not sell or lease land vested in it unless roads were formed and constructed and this work had to be carried out within five years. The second involved surveys. Surveys would be arranged through the Chief Surveyors when requested by the Court or the district Maori Land Board. The cost would be met by the Crown through the Survey Department but become a charge against the land. According to the Attorney-General, J.G. Findlay, the European settlement of Maori land had been delayed because there were no surveyors to undertake the work required for the investigations of title. He believed the bill would remove this problem ‘and you will have the European settlement of Native Land greatly expedited.’<sup>54</sup>

The greatest revolution heralded by the new bill was, however, in relation to the alienation of Maori land. The district Maori land boards were retained but their membership was reconstituted again. They were to be appointed and made up of a

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*, p.1101.

<sup>51</sup> Frame, p.115.

<sup>52</sup> They were repealed in the 1913 amendment as a concession to Maori. See *NZPD*, 167 (1913), p.389 (Herries).

<sup>53</sup> *NZPD*, 148 (1909), p.1101.

<sup>54</sup> *ibid.*, p.1279.

president who 'will have been Native Judges of experience, and all of whom will be men in the Civil Service, of proved knowledge in these matters, and of undoubted integrity' assisted by two assessors, one of whom had to be Maori.<sup>55</sup> These boards were much more important because the bill provided for the removal of all existing restrictions imposed in any way against a title. The Attorney-General characterised this provision as an essential legal necessity because of the confusion created over restrictions. Restrictions on alienation had been imposed on Crown grants in the past by a number of different statutes. The problem was that the specific 'statute has passed away – it has been repealed; but the restrictions still appear upon the grant.'<sup>56</sup> This had led to litigation over the status of some Crown grants creating uncertainty as to the validity of the title. The boards would remove this confusion; they were the lynchpin in the new approach to the administration of the alienation of Maori land set out in Part XVIII.

How specific blocks of land would be dealt with depended on the nature of their ownership structure. Where a Maori was the sole owner of a defined piece of land, that land could be converted to European freehold title. Where a block of land was owned by fewer than ten owners it could be sold to a private person subject to confirmation by the board of the terms of the transaction. The board was required to consider the adequacy of the purchase price, the contract and landlessness. An amendment was included to allow a Maori who may not have sufficient land but had some other means of supporting themselves to dispose of all their lands with the consent of the Governor-in-Council.

Where the owners exceeded ten a new system of alienation was established. Carroll described it as 'practically a resuscitation of the old runanga system, under which from time immemorial the Maori communities transacted their business.'<sup>57</sup> Where there were more than ten owners of a block of land a meeting of assembled owners would be called by the Maori land board. Certain resolutions which were set out in the bill could be considered by the meeting. These related to the sale or lease of the land. Any resolution had to be confirmed by the board before it took effect. A decision might also be confirmed by an Order in Council. Carroll told the House he could not 'think of any fairer way of ascertaining the wishes of the Native owners in regard to the disposition of communal areas, or of consulting them in all larger questions relating to the settlement of their lands.'<sup>58</sup> The bill contained a number of provisions which were designed to prevent Maori landlessness and ensure Maori retained sufficient land which could not be alienated 'to support him.'<sup>59</sup> And having

<sup>55</sup> *ibid.*, p.1278.

<sup>56</sup> *ibid.*, p.1274.

<sup>57</sup> *ibid.*, p.1102.

<sup>58</sup> *ibid.*

<sup>59</sup> *ibid.*, p.1279.

established a new system for the alienation of Maori land, the bill got rid of the old one. The Validation Court, established in 1893 to validate transactions which were held up by incomplete or contested titles, was abolished and any outstanding applications were transferred to the Native Land Court.

As for alienations to the Crown, one key objective was, after the criticisms of the Stout-Ngata Commission, to limit the ability of the Crown to purchase undivided shares. The success of the Liberal government's extensive purchasing in the 1890s was based on precisely this practice. Instead the bill established a Native Land Purchase Board. The Crown would purchase from individuals where land was owned by fewer than ten persons and from the runanga if more than ten at or above the government valuation. The bill appropriated £500,000 for the purchase of Maori land as well as the costs of survey and roading.

As well as revolutionising the administration and alienation of Maori land, the bill illustrates the extent to which Liberal land policy had shifted by 1909. The Attorney-General, for example, concluded his speech by telling the Council that:

It is not through the State alone that we are going to settle large areas of Native land: we are going to settle them as much through private operations between the Native owner and the settler as between the State and the settler, and I would ask whether, by providing a cheap and expeditious method for the European settler to go on to Native land, we have not done much for settlement in the North Island today.<sup>60</sup>

With the exception of one lone Maori voice, there was little opposition to the bill. Pere argued that what Maori needed were funds to settle and develop their own land themselves. He argued that the government refused to provide the funds because 'if the Government were to give the Maoris the money to improve their land the Government would have no land to buy, for the Maoris would not sell.'<sup>61</sup> Nothing would happen for another two decades. The Native Land Act 1909 set up a large decentralised bureaucracy. The administration of Maori land was to be undertaken by the district Maori land boards and the Native Department no longer had the primary role in this work. The settlement of Maori land shifted from Wellington out into the main centres of the North Island.

And with the election of a Reform government in 1912, the alienation of Maori land entered its last vigorous phase. This was quite different to earlier periods in that the land board system and mode of dealing with Maori land administration through meetings of owners meant problems associated with large and unwieldy titles were finally dealt with. By setting low quorum requirements for the meetings of owners where decisions could be made affecting the interests of all owners of a block of land, private purchasers were given a mechanism by which they could effectively

<sup>60</sup> *ibid.*, p.1339.

<sup>61</sup> *ibid.*, p.1335.

acquire Maori land. After 1909 private purchasers surpassed the Crown in buying Maori land.<sup>62</sup> By 1920 Maori owned less than five million acres and three million of this was leased. The new Native Minister, William Herries, and the Reform government, supported by the small farmers who had done so well out of the Liberal government's settlement schemes, supported private land purchase. Herries' amendment in 1913 was possibly the last significant piece of legislation to be enacted affecting the alienation of Maori land.

The 1913 amendment further streamlined the boards established in 1909. In response to budget pressures the stand alone boards were re-organised and became very closely associated with the Court. Rather than separate presidents and members, the new district Maori land boards were constituted by the district judge of the Native Land Court as chairperson and the district registrar of the Court. In this form, and with such a close relationship with the Court, the boards acted as a very effective mechanism for the alienation of Maori land through private purchase. Successors and partitions could be arranged with much less difficulty, in particular, because the personnel processing the applications and making the decisions were the same.

In addition to the 1913 amendment, there continued to be churned out amendments to the principal Native Land Act and other statutes to deal with individual blocks on an annual basis. They rendered the impact of the consolidation on Maori land legislation short-lived. Land claims and adjustment legislation was increasingly common after 1890 particularly as a way of validating individual purchase transactions. Under the Reform government, this fiddling became regularised with annual Native Land Amendment and Native Land Claims Adjustment bills. They were passed through the House of Representatives to establish inquiries, tidy up titles, and order rehearings and the system for seeking redress became quite formalised. Ngata, for example, told the House during the committal of the Native Land Amendment and Native Land Claims Adjustment Bill in 1924:

that this Bill has received the thorough consideration of the Native Affairs Committee. Unlike the European "washing-up" Bill, the procedure for getting clauses into the Native "washing-up" Bill is regular and formal. No clause can be inserted into the Native Land Claims Adjustment Bill except as a result of a petition to the Native Affairs Committee, and a favourable recommendation from that Committee. If there were a similar safeguard in respect to the European "washing-up" Bill there would be less trouble when the measure comes before the House. The *ipse dixit* of a member of Parliament is not sufficient to get a clause inserted into the Native "washing-up" Bill; there must be a petition from persons in the district presented to the House.<sup>63</sup>

<sup>62</sup> Brooking, p.78.

<sup>63</sup> NZPD, 205 (1924), p.1047.

Maori or Pakeha who had a problem with a title to Maori land could petition the Native Affairs Committee to seek an enquiry into that title and cases regularly came up where the Court had investigated title to the land several decades earlier.

Ironically, the native land claims and adjustment acts often delegated powers to investigate and recommend to the chief judge of the Native Land Court, Robert Noble Jones, who then appointed a judge to hold hearings into the disputes. Throughout the second decade of the twentieth-century, land claim report after land claim report was published annually in the *Appendix to the Journals of the House of Representatives*. Throughout Herries tenure as Native Minister, and throughout that of his successor Gordon Coates, the Native Land Court was used as an institution for investigating continuing disputes relating to Maori customary rights to land. It seldom undertook new investigations but it was still an important institution in terms of dealing with continuing disputes over Maori customary rights to land.

Its other major area of work involved cleaning up problems of the past: greater attention was also given to the state of titles to Maori land. Two problems had to be dealt with: overcrowded titles and uneconomic blocks. Consolidation schemes were introduced in 1913 to deal with these problems and different ways of administering Maori land using incorporations and trusts were trialed. The consolidation schemes, in particular, were an increasing part of the Court's workload especially as the finance to develop Maori land was provided after 1928. There were some significant legal questions that continued to be debated inside the Court, more especially between Maori kinship groups and the Crown rather than among themselves. These were questions relating to the Court's jurisdiction over, and Maori ownership of, inland water ways and the foreshore. Otherwise, its work was much more concerned with routine matters such as partitions and succession. By the early twentieth-century title investigations were no longer the primary focus of the Court's work.

In 1921, William Herries retired from all his portfolios, but remained a member of the Executive Council, and Gordon Coates was appointed Native Minister. A change was evident as governments came to recognise that Maori needed financial assistance to develop the land they still owned. Whereas Herries had pursued a policy which required Maori landowners to use their land or have it sold, Coates was much more sympathetic to their needs.<sup>64</sup> The land purchase section of the Native Department was reduced in size and importance and instead greater emphasis was placed on cleaning up fragmented and overcrowded titles. Coates worked closely with Ngata on legislation relating to Maori land and instructed the Native Trustee to only lend its funds to Maori landowners and farmers to assist in the development of unproductive Maori land. Finally, in 1929 finance was made available by the government to assist in the development of Maori land. The impact on the Court was

<sup>64</sup> Michael Bassett, *Coates of Kaipara*, Auckland: Auckland University Press, 1995, p.132.

dramatic as it became closely identified with development schemes and the bureaucracy which eventually grew into the Department of Maori Affairs. The Court was no longer simply concerned with keeping titles to land and other records up to date, it became much more directly concerned with the administration of Maori land.

The nearly four decades from 1890 saw the Court re-invented three times. Each time, different policy priorities meant the role and powers of the Court were subject to sometimes quite revolutionary change. The experimental nature of many of these changes was also evident as politicians tried to find better ways of dealing with Maori customary rights to land. During the 1890s, a Court which could create a stable title was essential for a massive programme of land purchasing. The number of owners in blocks did not matter because small armies of land purchase officers could be employed to locate and procure their consent.

From 1899, as senior Liberal politicians, especially Seddon and Carroll, grew increasingly uncomfortable with the possibility that Maori could soon be rendered landless, attempts were made to find ways of preserving Maori landownership and administer the land remaining in Maori ownership. There were also some tentative moves towards developing Maori land in Maori ownership which involved the Court. Carroll attempted to associate his reforms with Liberal rhetoric which asserted economic independence could be achieved through settling men on their own block of land which they could then farm. The debates show politicians continued to struggle to find an effective way of dealing with Maori customary rights to land, whether the land was alienated or retained in Maori ownership. As political opinion shifted away from the original Liberal land reforms, however, the Court was re-invented again in a way which allowed private purchasers to acquire land. The problems associated with the title created by the Court, which emerged most clearly in the late-1880s, were solved by establishing a process where the consent of all landowners to any transaction was no longer required. The process was made even more efficient by the subsequent Reform government.

Despite the attempts to maintain Maori land in Maori ownership during Carroll's tenure as Native Minister, it was only a brief hiatus. Before and after there remained an overwhelming consensus of opinion among politicians on all sides of the political spectrum to use the Court to establish clear title to Maori land for the purposes of negotiating its acquisition. Politicians and officials tried to impose order on Maori customary rights and searched for a way to define those rights quickly, effectively and certainly in a stable and settled title. The new regime established in 1909 and adjusted in 1913 to manage the alienation of Maori land dealt with many of these problems because it no longer required the consent of all the landowners – the requirement for a clear title or the consent of all owners were no longer absolute requirements.

However, the last term of the Liberal government and the years of the Reform government were a period of transition for the Court and the struggle to establish title to Maori land re-appeared in a new form. After 1909, its core business was no longer the investigation of title to Maori customary land. This still made up a part of its work and where it had to undertake title investigations, they were generally prolonged and problematic, especially where the blocks of land had areas in the several thousand acres. But the occasions on which it was required to do so were limited in number.

Instead, the Court's work shifted towards maintaining records of ownership, particularly through succession, and partition. The attempts to develop Maori land, primarily through incorporations and consolidation schemes, were still, at this time, a very small part of the Court's activities. The judges' time was also taken up with the work of the district Maori land boards and the alienation of Maori land but a major function of the Court during this period was the investigation of historical grievances. These were usually referred to the chief judge by the Native Minister and authorised by special legislation which directed the Court investigate petitions submitted by Maori to the Native Affairs Committee.

By 1928, the Court was seldom required to undertake title investigations and was, in any case, about to be re-invented again, this time by the new Native Minister, Apirana Ngata. These subsequent developments are examined in the next chapter as policy priorities again determined the type of Court needed to deal with Maori land. Whereas prior to 1909 the Court was re-invented to ensure it could establish a stable and settled title for the purposes of alienation, after 1909 the Court continued to be re-invented but for the purposes of operating in an administrative environment. Alienation was still important; increasingly, so too was the administration and development of land remaining in Maori ownership.

Alienation did not cease during this period of transition but land was not pushed through the Court for the purposes of alienation; most of the land sold generally had some form of title which was administered by the Court. However, the maintenance of such a title was extremely difficult. The 1909 re-invention of the Court solved this problem in terms of alienation but it did not address the problems associated with defining Maori customary rights to land and establishing stable and settled title. In particular, the title created by the Court became highly fragmented into unprofitable farming units through partition and choked by huge number of owners as generation after generation succeeded to the interests of their elders. The interaction between the title system and custom over many decades caused major problems in attempting to make land productive which required strict bureaucratic control. This was found impossible and title was anything but settled. These problems remained constant throughout the rest of the twentieth-century. The nature of the problems continued to change but they did not disappear.

## JUDICIAL BUREAUCRACY

### AND THE ADMINISTRATION OF CUSTOM

The appointment of Apirana Ngata as Native Minister in 1928 was the watershed in the Court's development in the twentieth-century. Although Maori land continued to be sold until the mid-1970s, for the first time, a sustained and systematic attempt was made to assist Maori landowners to develop their land for the purposes of generating an income. Ngata's administration of the schemes was informal and quite at odds with the public service through which he worked. Nevertheless, his activities provided a firm foundation for the retention and development of Maori land. The major difficulty Ngata encountered related to problems arising out of the title created by the Court. His informal administration of the development schemes was in part a direct response to the years he spent attempting to clean up extraordinarily complex titles.

The bureaucracy which administered Maori land from the 1940s to the 1970s likewise struggled to deal with these problems and the solutions proposed are examined in this chapter. The major problems were associated with choked titles following generations of successions and the fragmentation of land through constant partition of blocks of land. As a result of decades of interaction between Maori custom and the title system administered by the Court, the titles themselves became so complex that the Court remained necessary throughout the twentieth-century to make impartial decisions regarding the management of Maori land.

In this chapter it is argued that just as politicians and Court in the nineteenth-century struggled to render Maori customary rights to land certain and stable in a clearly defined title, the bureaucracy spawned by the development schemes and expanded after the Second World War found administering land through the title created by the Court highly problematic. Moreover, as in the nineteenth-century, the Court continued to exist because it was able to re-invent itself in constantly shifting policy environments. After 1928 the Court was completely re-invented twice. The first, in 1953, created a Court which sat at the head of a substantial bureaucracy and

the second, forty years later in 1993, created a Court which was able to operate without any bureaucracy in a policy environment where government took a more limited role in developing and administering Maori land.

The function of the Native Land Court in the twentieth-century was fundamentally different to its role in the nineteenth-century. As shown in the previous chapter, after 1909 its core business was no longer the investigation of title to Maori customary land. This still made up a part of its work and where it had to undertake title investigations, they were generally prolonged and problematic, especially where the blocks of land had areas in the several thousand acres. But the occasions on which it was required to do so were limited in number. Instead, the Court's work shifted towards maintaining records of ownership, particularly through succession, and partition. The Court was also regularly directed by legislation to investigate petitions submitted by Maori to the Native Affairs Committee.

From 1894, the Court became involved in the small, tentative steps designed to give Maori the opportunity to use the land they still held for their own benefit. The Native Land Court Act 1894 included provisions for incorporation to allow Maori landowners to create a legal entity to manage their lands. The Liberal government did not, however, extend credit schemes to assist Maori landowners to develop their land into productive farms. The Reform government was more concerned with facilitating the alienation of land remaining in Maori hands and it was not until the appointment of Apirana Ngata as Native Minister in 1928 that rapid progress was made in developing Maori land. Ngata was well aware of the problems which faced those seeking to use Maori land. Ranginui Walker has written of the importance Ngata attached to the development of land.<sup>1</sup> Throughout his political career, Ngata took any opportunity to emphasise the importance of the consolidation of interests and the incorporation of owners in the process of developing land into viable farming enterprises. The system of title created by the Court had become choked as a result of generations of succession and Ngata himself had spent many years working through lists of owners in an attempt to consolidate fragmented interests into viable farming units.

During 1926, when Ngata was in his early fifties, he worked long hours on several East Coast consolidation schemes. According to Walker, he spent many weeks 'working night and day on the lists for the consolidation schemes in Waiapu and Tuparoa.'<sup>2</sup> Court staff at the Gisborne office of the Native Department were also working on the schemes. Walker's description of the work is accurate:

<sup>1</sup> Ranginui Walker, *He Tipua. The Life and Times of Sir Apirana Ngata*, Auckland: Viking, 2001, p.172.

<sup>2</sup> *ibid.*, p.210.

It was painstaking work requiring knowledge of whakapapa, the interconnections between various whanau and hapu, the lands for which they had been issued Crown grants and the boundaries of their entitlements. The difficulties were compounded when shareholders in a hapu block died intestate and the Court made awards to all their descendants, leading to a fragmentation of the land into units that were not economically viable. The principle of consolidation involved identifying where the fragmented interests of a beneficiary were scattered throughout the tribal domain, assessing their value and exchanging interests with others elsewhere to form a block large enough for dairying. The work required skilful diplomacy in negotiating agreements between beneficiaries to the exchanges of their scattered pieces of land, especially when there was emotional attachment to particular areas.<sup>3</sup>

The Prime Minister and Native Minister, Gordon Coates, was deeply impressed with the success of the consolidation scheme at Waiapu when he visited in 1926.<sup>4</sup> Following Ngata's advice, he agreed to extend the schemes across the North Island and this work was directed by Ngata who appointed officials to manage a number of separate schemes.

After the 1928 election, Ngata was appointed Native Minister in the government of Sir Joseph Ward. He promptly established development schemes to assist Maori to manage their land and use it productively. The schemes were structured around the traditional kinship group. They were run separately but all the schemes were closely managed by Ngata who appointed officials reporting directly to him to run each one. Problems emerged over the administration of the schemes, particularly in relation to accounting for government funds, which caused considerable controversy and eventually led the National Expenditure Commission to carefully scrutinise Ngata's activities in 1932.<sup>5</sup> In fact, there was growing concern about the schemes prior to this investigation, particularly among public servants and the Auditor-General – especially in relation to the expenditure of public funds. The accounts were in chaos and budgets overspent. The commission was amazed to find the number of funds the Native Minister had either direct or indirect control over without any oversight by Parliament; it was primarily concerned about the degree to which the Native Minister controlled the schemes and expenditure on the schemes. Criticism from the press and Ngata's political opponents was also considerable.<sup>6</sup> In response to the recommendations of the commission, the public service re-asserted its authority and the administration of native affairs was extensively re-organised in a way which limited the powers of the Native Minister.

This was nevertheless not the end of the problems with the schemes. Further auditing of accounts raised more questions about the administration of expenditure.

<sup>3</sup> *ibid.*, pp.210-11.

<sup>4</sup> *ibid.*, p.230.

<sup>5</sup> *ibid.*, pp.273-75.

<sup>6</sup> *ibid.*, p.277.

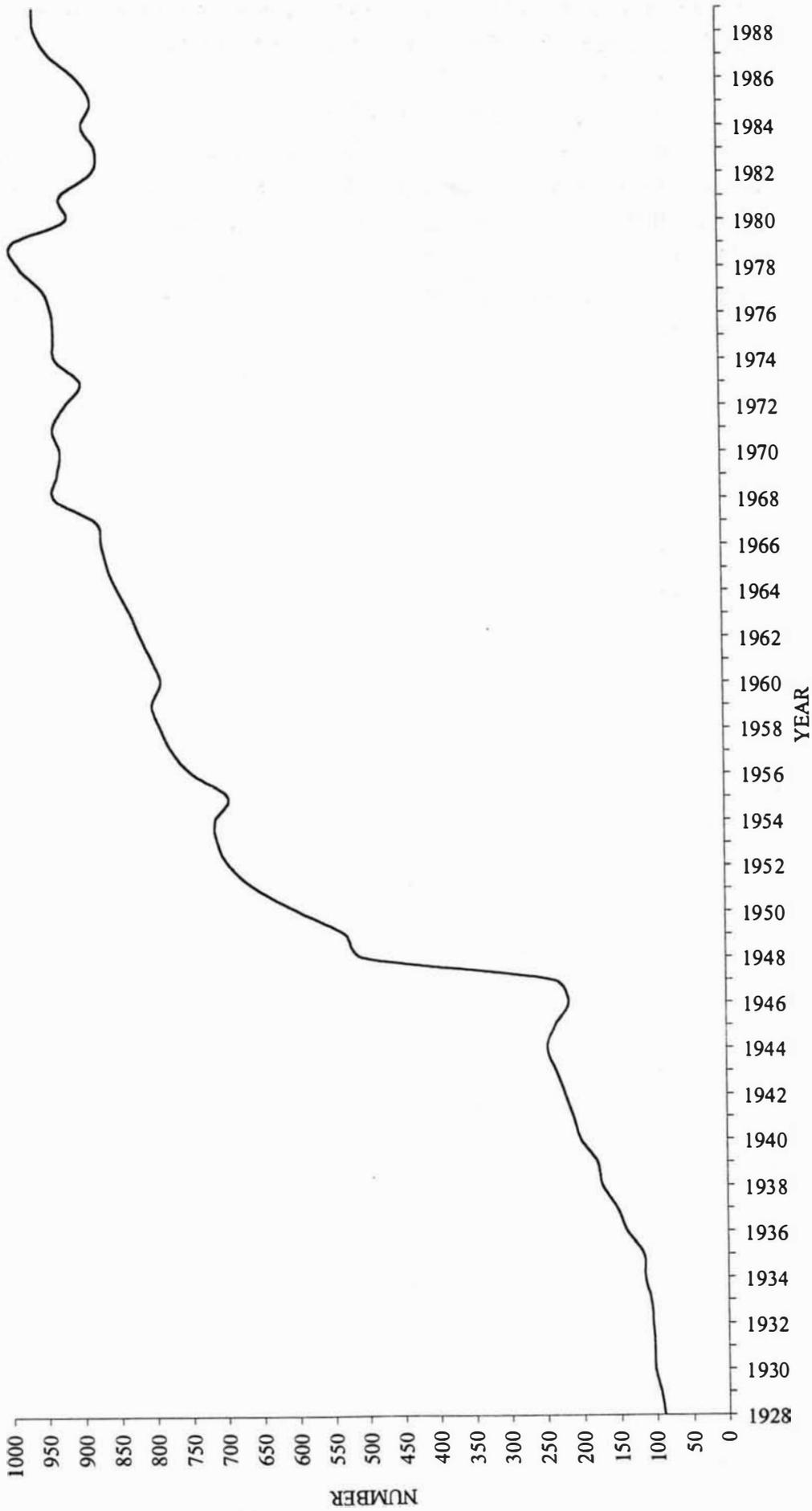
Chief Judge Jones resigned his position as Under Secretary of the Native Department and was replaced by an official from the Public Service Commission. However, the irregularities kept arising and a Royal Commission was appointed to investigate the department's administration of the development schemes. Chaired by the Supreme Court judge, Sir David Smith, the commissioners heard complaints by the Auditor-General of poor recording keeping and failures to account for expenditure together with accusations of fraud. A consequence of Ngata's close involvement in the schemes meant that many of these problems were traced back to him. He was subject to massive criticism, again by the press and his political opponents and, despite widespread support from Maori, he resigned in November 1934.

This unfortunate and premature end to Ngata's ministerial career was a consequence of his close personal involvement in all aspects of the development schemes he established. Problems in using and developing Maori land, primarily associated with the form and complicated nature of the title through which much Maori land was held, required novel solutions or at least ways of getting around them. Ngata's informal approach managed from the centre relied heavily on tribal structures and was based on his long experience of dealing with these problems, but it was one fundamentally at odds with the public service organisations with which he had to work.

Despite his resignation, Ngata had provided the basis for the continued existence of development schemes. They were re-organised in a more bureaucratic structure run from the Native Department in Wellington and later the district offices of the Department of Maori Affairs.<sup>7</sup> The Court was of less importance in Ngata's development schemes because much of the funding was administered through the district Maori Land Boards – which were admittedly controlled by the judges of the Court. However, the shift towards more bureaucratic development schemes meant the Court was re-invented yet again. It played a key role in the consolidation schemes and much later was the judicial arbiter of actions of the Department of Maori Affairs. The substantial bureaucracy that emerged after the Second World War was embodied in the Maori Affairs Act 1953 and the Court sat at its head: an impartial judge to whom officials went either to have decisions made or to have their own decisions confirmed. This was a reflection of the situation caused by the system of title created by the Court in the nineteenth-century. As new generations succeeded to the interests of their elders, the number of owners in a block of land increased exponentially and the size of the interests of each owner decreased at the same rate. The Court was still needed because the system was so complex.

<sup>7</sup> See Alan Ward, *National Overview*, Volume II, Wellington: Waitangi Tribunal Rangahaua Whanui Series, 1997, pp.417-18.

STAFF AT THE DEPARTMENT OF MAORI AFFAIRS, 1928-1990



The growth in the number of staff at the Native Department increased considerably following the election of the first Labour government in 1935. The rate of growth was maintained throughout the Second World War, declining in 1945 and 1946 before taking off rapidly in the post-war years. From 1947 to 1948, the number of staff more than doubled from 239 to 506. The growth rate remained high throughout the fifties and sixties and during the 1970s, staff numbers were always between 900 and 1000. This growth in the Native Department and later the Department of Maori Affairs reflected the thriving bureaucracy needed to administer Maori land and manage the development schemes. The Department was not, however, just concerned with land and also dealt with Maori welfare, health, education, employment, housing and other issues. Many of these issues involved Maori land, especially welfare and housing. As well as the Court, a large bureaucracy was necessary to administer Maori land because of the complexity of title created: maintaining up to date records and developing land required a large number of officials.

This massive post-war bureaucracy and the shifting focus from the alienation of Maori land to the development of Maori land was embodied in the massive Maori Affairs Act 1953. The Native Land Act 1931 contained provisions relating to the development of Maori land based on Ngata's early activities. It was not, however, until 1953 that the work of the previous 25 years was acknowledged in legislation. The Department of Maori Affairs was, for the first time, recognised in statute. The Act itself was huge – containing 473 sections in 29 parts – and this too reflected the complexity of the issues which had arisen in the administration of Maori land and in particular the difficult title system the Court had created and the Department administered. The post-war years were particularly concerned with how unproductive Maori land could be developed into profitable landholdings, how uneconomic interests in Maori land could be dealt with and finally how problems associated with the fragmentation of interests could be resolved. All these issues arose out of the ownership and title structure created by the Court.

There are instances where, despite the growth in the number of staff at the Native Department, the judges themselves took a lead role in the administration of Maori land, much as Ngata did in his development schemes. This was fundamentally a response to the level of complexity of titles faced by Maori land owners which meant only the judges were in a position to direct schemes. For example, Judge Acheson engaged in some major empire building in Northland. All linked to land development schemes, at Awanui he encouraged fishing and fish-canning, market gardening (for the canning factory), and sand extraction for glass production. He also

got the Court involved in dairy farming and a co-operative store at Te Kao, supported by a bus passenger service and a cream service to Awanui.<sup>8</sup>

Elsewhere, Graham Butterworth has written of the attempt by Judge Harvey at Rotorua to marginalise title problems in a way which placed considerable strain on the bureaucracy because it was so unorthodox. According to Butterworth, Judge Harvey created 'an almost self-sufficient house-building industry' almost entirely from Maori resources. It was designed to deal with the major housing shortage which developed during the Second World War when the Labour government's building programmes severely drained sources of material for building houses. Butterworth found little reference to Judge Harvey's activities in the voluminous officials records of the Department of Maori Affairs and was referred to them during interviews with senior officials in the Rotorua office:

Using unclaimed monies and other funds available from the Waiariki District Maori Land Board, Harvey set about to hack through the tangle by the shortest route. At the height of the building programme the Department of Maori Affairs was cutting timber from Maori land on a royalty basis, had a joinery factory and a tile factory, timber yard and bulk store as well as employing its own tradesmen.<sup>9</sup>

Subsequent documents also show the department was running a limeworks at Te Araroa. The Maori Trade Training Scheme provided a means of training young Maori as builders and contributed to Judge Harvey's building empire. According to Butterworth, about 80 houses were built a year near Rotorua for several years. There was, however, growing concern regarding the administrative influence of the judges and Judge Harvey's retirement in 1955 provided an opening to reduce the empire he had built. For the officials involved the scheme was an administrative nightmare which was not properly budgeted.

Ngata's development schemes, together with the efforts of Judges Acheson and Harvey, were attempts to use and develop Maori land in ways designed to avoid the growing problems associated with the title system administered by the Court. They were, however, administered in ways fundamentally at odds with the public service organisations which these men directed. From the early 1960s, several investigations were conducted into the issues associated with the complex and intractable problems in dealing with title to Maori land. They suggested solutions which took a much stricter public service oriented approach to administering Maori land, but were also quite often very punitive because their recommendations involved either taking interests off Maori landowners or forcing them to sell their interests.

<sup>8</sup> G.V. Butterworth and S.M. Butterworth, *The Maori Trustee*, Wellington: Maori Trustee, 1991, pp.60-61.

<sup>9</sup> *ibid.*, p.61.

The first was the Hunn Report. Commissioned by the Labour Prime Minister and Minister of Maori Affairs, Walter Nash, in 1960, it was published the following year by the new National Minister of Maori Affairs, Ralph Hanan. The first sentence of the Hunn Report gives some indication of the issues Nash wanted examined: 'Atomisation of ownership too often dissipates the revenue from Maori lands in idle fractions or inhibits the profitable use of the land altogether.'<sup>10</sup> Nash wanted to determine the extent of 'Maori assets' and to develop a way of using them to benefit all Maori. Hunn, a public service mandarin and Public Service Commissioner, was appointed Acting Secretary for Maori Affairs and Maori Trustee to advise on these two issues. James Belich argues the Hunn Report was a genuine attempt to address issues arising out of post-war Maori migration to the cities and the significant growth in the Maori population. However, its approach was still fundamentally assimilationist. According to Belich, it was a 'renewed attempt to turn Maori into Brown Britons [and] was also an attempt to solve their persisting disadvantages in health, education, economics and housing.'<sup>11</sup> The reports recommendations were nevertheless based on state leadership rather than Maori leadership.

On Maori land, Hunn noted that '[a]fter 90 years of established Government in New Zealand it still remained for a Maori of vision [Ngata] to originate State-aided Maori land development and settlement as he did in 1929.'<sup>12</sup> Much of the analysis in the report on this subject was statistical together with a discussion of the management of financing Maori land development. The report showed that since 1931, 403,569 acres of Maori land had been sown in grass. This was from an estimated total of Maori land suitable for development prepared by the Land Department in March 1955 of about 3,200,000 acres. The report also noted that in 1949, Cabinet had established a guideline of development of Maori land for the next ten years, but during the 1950s, only 53% of this target was actually achieved. Hunn observed that at the existing rate of about 10,000 acres of grassed land per year, it would take 60 years to develop the remaining Maori land. Title complications were a major problem which required solution to speed up the process of developing land. His proposal: 'Crown purchase of multiple interests – in trust for the Maori race – would be the ideal solution.'<sup>13</sup> Hunn was at pains to point out that Crown purchase of Maori land was not a novelty and produced statistics which showed from 1909 to 1937, the Crown purchased just over 3,300,000 acres. He did not point out that this land was not held in trust for Maori. However, he did complain about the lack of an accurate record of Maori land.

<sup>10</sup> 'Report on the Department of Maori Affairs with statistical supplement by J.K. Hunn, 24 August 1960,' *AJHR*, 1961, G-10, p.13.

<sup>11</sup> James Belich, *Paradise Reforged. A History of the New Zealanders from the 1880s to the Year 2000*, Auckland: Allen Lane, 2001, p.477.

<sup>12</sup> 'Report on the Department of Maori Affairs,' p.46.

<sup>13</sup> *ibid.*, p.48.

The land titles system was a major subject for discussion. According to Hunn:

Everybody's land is nobody's land. That, in short, is the story of Maori land today. Multiple ownership obstructs utilisation, so Maori land quite commonly lies in the rough or grazes a few animals apathetically, while a multitude of absentee owners rest happily on their proprietary rights, as small as they are.<sup>14</sup>

He recognised that fragmentation was 'a serious bar to the proper use of the land in the interests of the Maoris themselves.' Interests were growing smaller and smaller and Hunn hoped that home ownership would become the basis for *turangawaewae* as these interests became progressively smaller. Fragmentation was a consequence both of succession of new generations and of partition. The report sets out in some detail, and with considerable accuracy, the problems which had arisen. These were illustrated with two tables. Column A below shows the largest number of owners in one title in each district, and Column B shows the number of separate titles in each district:

District	A	B
Whangarei	1,107	7,000
Auckland	966	9,455
Rotorua	2,329	13,000
Gisborne	1,805	6,167
Wanganui	5,000	10,000
Palmerston North	634	7,695
Christchurch	1,350	3,028
Total		56,345

This was a major crisis. This 'degeneration' in titles had been addressed in two ways – consolidation and conversion – and neither had worked. Hunn found 28 consolidation schemes in five districts affecting nearly 290,000 acres, but the process was so time-consuming and difficult it had been largely abandoned. Moreover, once completed, the trend towards fragmentation simply begins again. Conversion was a more recent development where the Maori Trustee purchased 'uneconomic interests' and resold them to other owners or incorporations. Hunn believed this process should be accelerated as the best way of simplifying titles to Maori land. He wanted to increase the definition of an uneconomic interest from £25 to £50 and proposed a moratorium on succession or partition orders (for small interests). Any owner with an interest of this size would have the option of selling their interest to another landowner, selling to an incorporation, selling to the Maori Trustee or gifting the land to any of these three. The proposed sale to incorporation was significant in that Hunn also suggested each tribe be established as an incorporated entity to purchase and hold 'uneconomic interests' in trust for the tribe.

<sup>14</sup> *ibid.*, p.52.

As for the Maori Land Court, Hunn was unambiguous: 'it is not too soon to start thinking about curtailing its jurisdiction.'<sup>15</sup> The Court's continuing existence was designed 'to throw a protective mantle over the Maori in his land transactions and a few matters of family status.' Although Hunn did not think his report was the appropriate place to discuss the question, he did raise the issue of whether this protection was still necessary and suggested the Court's oversight of the alienation of land valued at less than £500 was unnecessary. He recommended a complete review of the Court while recognising 'that the Court will be needed for some time yet, especially as an instrument for bringing any new system of title simplification into being.'<sup>16</sup>

This complete review came in November 1964, when Hanan, still the Minister of Maori Affairs, established a committee to examine Maori land law and the Maori Land Court.<sup>17</sup> The committee was chaired by a former chief judge of the Court, Ivor Prichard, and had one other member, Hemi Waetford, a public servant from the Whangarei office of the Department of Maori Affairs. They presented their report in December 1965; it was long and detailed and focused almost entirely on the fragmentation of title to Maori land through succession and partition. The recommendations were in the main highly controversial primarily because they would severely restrict the ability of Maori landowners to manage their interests in land, especially where those interests were very small. The recommendations were also designed to make alienation easier by giving the Court greater discretion in administering transactions. For example, they proposed doing away with appeals against decisions of the Maori Land Court on amalgamation of blocks. They also recommended that on the death of a Maori landowner, where his or her interests were worth less than £100, such interests should pass to an administrator with the power to sell. Where these interests could not be sold over a period of two years, the Crown would purchase them. Another recommendation suggested that, where Maori land was either sold, leased or mortgaged, price, rent and rate of interest should be entirely a matter for the discretion of the Court.

A large group of recommendations related to the process called 'conversion' where uneconomic interests were purchased by the Crown. Prichard-Waetford recommended a massive increase in this process together with a change in the definition of uneconomic interests from £25 to £100. They also specifically suggested conversion be undertaken by the Crown and not the Maori Trustee. Unlike Hunn, they did not think this land necessarily had to be made available to Maori landowners. Another proposal was the conversion of small residential sections from

<sup>15</sup> *ibid.*, p.76.

<sup>16</sup> *ibid.*, p.77.

<sup>17</sup> 'Report to Hon. J.R. Hanan, Minister of Maori Affairs, of the Committee of Inquiry into the laws affecting Maori land and the jurisdiction and powers of the Maori Land Court,' 15 December 1965.

Maori to European land. Two further recommendations are instructive. The first involved increasing the power of the Maori Trustee to sell interests where owners had not taken any action for six years. After recommending an extensive name indexing project be undertaken to locate and identify Maori landowners, Prichard-Waetford recommended that 'from a specified date (being one year from the calling for filing for addresses) the Maori Trustee may, in respect of any person whose address has not been filed and who has not during the preceding six years withdrawn any funds from a beneficiary card, elect to act as agent for such person in respect of any interest in Maori freehold land, such agency to include the power both to vote at meetings and to execute documents of alienation.' Another recommendation suggested the beneficial owners of land held under the Maori Reserved Land Act 1955, 'be permitted to alienate their interests.' The 'evil' of fragmentation was to be resolved by allowing Maori landowners to sell their interests or by taking those interests from them.

The extent of the problem was illustrated by two examples used by the committee.<sup>18</sup> In Haumingi No. 13, there were 580 owners. The entire block was worth £1,290, the largest interest was worth £16 and the smallest interest was worth thirteen pence. The other example was Waione No. 1B which was vested in 583 owners. The entire block was worth £1,940, the largest interest was worth a little over £11 and the smallest interest was worth three pence. Another table also demonstrated the extent of the problem:<sup>19</sup>

Category	Solely/ jointly owned	2 – 10 owners	11 – 100 owners	101 – 1000 owners	Over 1000 owners	Total
Less than 2 acres	8,853	4,368	1,494	226		14,941
Less than 5 acres	1,537	1,722	953	71		4,283
Less than 10 acres	995	1,359	1,008	65	1	3,428
Less than 20 acres	947	1,433	1,241	52	2	3,680
Less than 100 acres	2,024	3,118	3,014	222	4	8,382
Less than 250 acres	525	912	1,333	175	4	2,949
Less than 1000 acres	183	358	1,072	349	5	1,967
More than 1000 acres	23	45	172	251	40	531
Total						40,161

The report's recommendations to deal with the 'evil' of fragmentation were drawn on in developing the Maori Affairs Amendment Act 1967. When introduced, the bill generated widespread protest from Maori landowners; it is described by Belich as 'naïve.' The National Government and Hanan, the Minister of Maori Affairs, argued the legislation was based on the Prichard-Waetford Report prepared in 1965. Where a block of Maori land was held by four or fewer owners, and where none of the

<sup>18</sup> *ibid.*, p.23.

<sup>19</sup> *ibid.*, p.35.

interests were held in trust or any of the owners under a disability, the amendment allowed a registrar of the Court, without application by any of the Maori owners, to declare such a block European land. Such provisions were first included in the Native Land Act 1909. Their scope and application was subsequently expanded considerably but generally related to Maori land used as a residential site.<sup>20</sup> The 1967 amendment was a quite radical departure because the provisions had general application to all Maori land and an application was not required; the land could be dealt with by Court staff without consulting the Maori landowners.

The second part of the legislation was even more controversial in that it provided for the appointment of 'Improvement Officers' who could 'determine' what action should be taken with a block of land. The powers of these officers to restructure titles were extensive and the legislation provided for land to be vested in tribal incorporations. This part did follow the recommendations of the Prichard-Waetford committee. Although all proceedings had to be dealt with in Court, which had to take account of the owners interests and ensure adequate consultation, the Court could issue orders despite objections from Maori landowners.<sup>21</sup>

The legislation generated a storm of protest from Maori while it was passing through Parliament. Ranginui Walker argued Maori saw the legislation as 'the "last land grab" by the Pakeha' and opposition to it was the foundation for the Maori land rights movement of the 1970s.<sup>22</sup> Hugh Kawharu's account of Maori concerns gives a comprehensive view of this response.<sup>23</sup> The response was well-organised and worked through a wide range of Maori committees from small trust committees which administered individual blocks, to the committees managing large incorporations, to

<sup>20</sup> Provisions in native land legislation giving the Native Appellate Court power to convert Maori land into European land were first introduced in Section 208 of the Native Land Act 1909. It allowed a Maori who owned land to apply to the Court for an order declaring the land European land. At that point, the land was no longer subject to the jurisdiction of the Native Land Court and came under the ordinary land transfer statutes and regulations in force. These provisions were included in Section 257 of the Native Land Act 1931 and Section 433 of the Maori Affairs Act 1953. They were further extended by Section 14 of the Maori Purposes Act 1963. It amended Section 454 (involving joint farm undertakings) of the 1953 legislation and allowed a judge or registrar of the Maori Land Court to issue certificates declaring a block to be European land. An application could be made but was not necessary for the certificate to be issued. The amendment in 1963 dealt specifically with Maori land that was less than half an acre in area, where a dwelling was located on the land for the exclusive use of the owners or one of the owners. The section related specifically to land used for a residential house and excluded land which was used in conjunction with other blocks to form part of a farm.

<sup>21</sup> The second part was repealed in 1970, apparently because the provisions had been seldom applied. See Ward, *National Overview*, p.402.

<sup>22</sup> Ranginui Walker, *Ka Whawhai Tonu Matou. Struggle Without End*, Auckland: Penguin, 1990, p.207.

<sup>23</sup> I.H. Kawharu, *Maori Land Tenure. Studies of a Changing Institution*, Oxford: Clarendon Press, 1977.

the New Zealand Maori Council. The tenor of most of the responses, and Kawharu's own view, was that the legislation was 'designed to hasten European ownership.'<sup>24</sup> The New Zealand Maori Council's view was, according to Kawharu, embodied in three principles: '(i) the preservation where possible of kin-group estates, (ii) but this should not override the right of the individual to alienate, if he freely chooses to do so, (iii) while land should be fully utilised, the rights of owners should be paramount and not outweighed by any economic argument.' Kawharu saw the organised response to the legislation as the basis for a resurgent Maori leadership to articulate the concerns of Maori regarding land legislation and provide a basis for successful engagement with the government on matters of significance for Maori.

The 1967 amendment brought a co-ordinated response from a wide range of Maori organisations which were concerned that the provisions relating to change of status of Maori land failed to provide for Maori participation in the decision making process and allowed individual owners to determine how the land would be dealt with, without regard to the other owners. This protest activity gathered momentum – increasing both in frequency and volume – during the 1970s and drove two major shifts in the way Maori land was dealt with. Both were associated with the election of the third Labour government in 1972. The appointment of Matiu Rata as Minister of Maori Affairs, in particular, was a decisive turning point in the administration of Maori land.

The first major shift involved halting the alienation of Maori land.<sup>25</sup> Throughout the twentieth-century, Maori land continued to be alienated; from the mid-1970s, there was a clear break with the past in that there was a fundamental policy shift: no further Maori land would be sold. This first shift was not repudiated or reversed by subsequent governments. In fact, the National government which enacted the Te Ture Whenua Maori Act in 1993 did so on the basis that the statute would not allow further Maori land to be alienated. Whereas in earlier years attempts to maintain Maori landholdings by statute were later undermined through electoral pressure, this was not the case in the last two and a half decades of the twentieth-century. There was a clear consensus that what Maori land remained should remain Maori land.

The second shift, also under Rata and picked up by later governments, was away from trying to rectify the problems associated with title to Maori land by compulsion. In the past, legislation had forced Maori landowners to give up small or 'uneconomic' interests in blocks of land. Those who owned them could be forced to sell them to the Maori Trustee or on the death of the owner, those interests had to be sold to the Maori Trustee rather than succeeded to in the usual way. This practice was

<sup>24</sup> Statement of the secretary of the Horouta 3 Maori Committee writing to the editor of the *Auckland Star* and quoted in *ibid.*, p.275.

<sup>25</sup> Ward, *National Overview*, pp.402-404.

on the recommendation of both Hunn and Prichard-Waetford and embodied in the 1967 amendment. In subsequent policy and legislation, interests were no longer taken off people for the purposes of cleaning up titles.

Nevertheless, rather than attempting to deal with problems arising out of the title system, there was a clear preference in favour of ignoring them. The problems identified by Hunn and Prichard-Waetford were still unresolved when the Royal Commission of Inquiry on the Maori Land Courts submitted its report to the Governor-General in May 1980.<sup>26</sup> The three-member commission was chaired by Sir Thaddeus McCarthy who sat with Whakaari Mete-Kingi and Marcus Poole (later a member of the Waitangi Tribunal). It was probably the broadest review of the Court since 1891. The commissioners were asked to investigate 'the structure and operation of the Maori Land Court and the Maori Appellate Court.'<sup>27</sup> The proclamation establishing the commission set out nine specific questions for the inquiry to answer but the brief was wide.

A major source of concern for the commission was the poor administrative service the Department of Maori Affairs provided to the Maori Land Court. This problem had been articulated both by the judges of the Court and Maori landowners. After noting the Secretary of Maori Affairs had taken action to address these concerns, the commission suggested that if there was no improvement 'then those services should be supplied through the main judicial administration of the Department of Justice.'<sup>28</sup> The close relationship between the Department and the Court was another area of concern for the commission. It had heard a number of submissions regarding the Court's involvement in administrative matters. The commission was deeply concerned about this possibility:

The Maori Land Court should be a *court of justice* with traditional judicial standing and independence. But if it is to be that, it must strive to be predominantly a judicial and less of an administrative body. Once a court involves itself substantially in administrative action, especially in areas which are traditionally the fields of State administration, it places in jeopardy its claim to independence and sow the seeds of conflict between itself and the machinery of the State. Furthermore, it runs a real and substantial risk of being not only interfering, but of being partisan in its rulings, not consciously but by allowing itself to become a promoter of its own opinions about the use of land to the exclusion of those of the litigants before it. More than one legal practitioner of experience in the Maori Courts claims that this has already happened.<sup>29</sup>

<sup>26</sup> *The Maori Land Courts. Report of the Royal Commission of Inquiry*, Wellington: Government Printer, 1980.

<sup>27</sup> *ibid.*, p.vii.

<sup>28</sup> *ibid.*, p.127.

<sup>29</sup> *ibid.*, p.81.

Its recommendations on this issue were quite unambiguous: judicial and administrative functions regarding Maori land should be separate and the Court had to be a 'Court of law and not an administrative body.' For this to occur, the Department had to improve 'the efficiency of its operation in land use and development and in its Maori trustee duties.'<sup>30</sup>

And the Court itself? The commission believed its continued existence ought to be limited:

We would hope that the need for its separate existence will disappear in little more than a decade. But that depends upon the resources which the Government is prepared to make available for surveys and for the ascertainment of contemporary ownership. We have no doubt that once title matters are rectified, with contemporary ownership identified and land transfer title available, the work of the Court in respect of Maori land will contract markedly.<sup>31</sup>

It was this question of cleaning up highly problematic titles which required the attention of the Court, but once this was resolved, the Court was no longer required. In their recommendations they suggested both the Maori Land Court and the Maori Appellate Court should retain their existing structure and jurisdiction 'until the existence and ownership of Maori land are adequately recorded in the land transfer register.' Having done so, their judicial functions could be taken over by the other courts 'and their administrative functions relating to land undertaken by the Department of Maori Affairs supplemented by such bodies as the Maori Land Board and the Maori Land Advisory Committees.'<sup>32</sup> The commission was not the first occasion on which the short-term demise of the Court was anticipated or recommended. One hundred years earlier, the Native Minister, John Bryce, had predicted the Court's continuing existence would be limited.

However, the Court had a long and remarkable capacity for re-invention. In the two decades after the Royal Commission, the bureaucracy which administered Maori land was taken apart but, after prolonged and intense debate, the Court emerged unscathed with a new role in a fundamentally altered policy environment. New legislation relating to Maori Affairs had been introduced by Duncan McIntyre in 1978, prior to the appointment of the commission.<sup>33</sup> At the time he described the bill as a consolidation of existing statutes which did not contain any significant changes. This proposed legislation was subject to considerable consultation with Maori organisations and did not return to the House until 1983. McIntyre's successor as Minister of Maori Affairs, Ben Couch, introduced a new and considerably slimmer

<sup>30</sup> *ibid.*, p.127.

<sup>31</sup> *ibid.*, p.73.

<sup>32</sup> *ibid.*, p.127.

<sup>33</sup> *NZPD*, 420(1978), pp.2758-60.

bill.<sup>34</sup> This had been the product of extensive consultation and dialogue with the New Zealand Maori Council, but its slimness was not the product of a comprehensive reconsideration of the legislation.<sup>35</sup> Rather, Couch told the House, because the issue was so complex, both in policy and in ensuring legislation properly articulated that policy, further parts would be added to the bill as they were prepared.

With the election of the fourth Labour government in 1984, the legislation did not re-appear until 1987. Oddly enough, the Department of Maori Affairs remained almost untouched by the revolution of the 1980s – at least until 1989 when it was entirely dismantled. During this time, the Court continued to operate under the Maori Affairs Act 1953 and its amendments, escaping the McCarthy Commission's recommendation that the Court could be disestablished. In doing so, the government was able to avoid the massive problem of titles to Maori land; the Court's administration was easier to maintain than to find a way of dealing with highly problematic titles. Nevertheless, in the early 1990s, the Court's remarkable capacity to be re-invented in a way relevant to new social, policy and political environments was illustrated again.

Another Maori Affairs Bill was introduced by the Minister of Maori Affairs in the fourth Labour government, Koro Wetere, in April 1987.<sup>36</sup> He described it as a consolidation of the 1953 statute and referred specifically to major amendments in 1967 and 1974. With 407 clauses in 19 parts, the bill was massive and after a short debate, it was read for the first time and referred to the Maori Affairs Select Committee for consideration.<sup>37</sup> It did not come back to the House until November 1992.<sup>38</sup> Submissions were heard on the bill in 1987 and 1988. In 1989, however, the massive re-organisation of the Department of Maori Affairs began. A Ministry of Maori Affairs was established to provide policy advice to government and the interim Iwi Transition Agency was set up to manage the transfer of the old department's operational functions to iwi authorities. Responsibility for the Maori Land Court was transferred to the Department of Justice as the McCarthy Commission had recommended in 1980.<sup>39</sup> In 1990, the new National government replaced both organisations with Te Puni Kokiri, the Ministry of Maori Development. During this time, the Maori Affairs Bill remained with the Maori Affairs Select Committee until

<sup>34</sup> NZPD, 455 (1983), pp.4950-60.

<sup>35</sup> The view of the New Zealand Maori Council was contained in *Kaupapa. Te Wahanga Tuatahi. A Discussion Paper on Maori Affairs Legislation*, published in February 1983.

<sup>36</sup> NZPD, 480 (1987), p.8609.

<sup>37</sup> *ibid.*, p.8618.

<sup>38</sup> NZPD, 531 (1992), p.12237.

<sup>39</sup> The Department of Justice was restructured in mid-1995 and three organisations were created: the Ministry of Justice, the Department of Corrections and the Department for Courts. The Maori Land Court was included in and is today part of the Department for Courts.

early 1992 when officials from Te Puni Kokiri began work on an entirely new bill designed to reflect the considerably altered administrative situation.

It was announced, when the bill was sent back to the House, that the short title to the legislation would become 'Te Ture Whenua Maori Act' and this change was made during the second reading.<sup>40</sup> The change in title reflected the re-invention of the Maori Land Court. As the Minister of Maori Affairs, Doug Kidd, told the House:

This long-awaited Bill is a milestone that charts a new course in Maori land legislation. It turns away from earlier agendas of dispossession, alienation and fragmentation, which have characterised Maori land law over much of the past 120 years. Retention of Maori land in Maori ownership is at the heart of this bill.<sup>41</sup>

The Maori members who spoke on the bill praised the degree to which it was the product of Maori input and focused almost entirely on the ongoing administration and management of Maori land. The legislation contained provisions relating to the management of incorporations and the establishment of a number of different kinds of trusts designed to effectively administer Maori land; they were designed to deal with the problems associated with large numbers of owners in titles. The bill received bipartisan support in the House and was enacted without any division requiring a vote. Labour opposition MPs, both Maori and Pakeha, rose to support its passage.

There was, however, one lone and significant voice of dissent. The member for Eastern Maori, Peter Tapsell, was critical of the legislation because although it was based on the retention of Maori land, it did nothing to promote the use or development of Maori land.<sup>42</sup> He took particular issue with problems associated with the multiple ownership of residential sections where none of the owners could actually use the land. Tapsell repeatedly expressed his disappointment with the bill, primarily because it focused on maintaining Maori ownership of land without providing for the effective use of that land by Maori:

There is a feeling in Parliament among many members that, by placing restrictions on the sale and purchase of land, one can somehow force Maori people to treasure their land more than they do now. That is a mistake. The only way that one can do that is to demonstrate to Maori people that the land will be of use to them in the future; that they can use and benefit from it. Two hundred years ago, Maori people had land. If it had no value to them in terms of providing or security, it had no value to them, and that is the situation today.<sup>43</sup>

<sup>40</sup> *NZPD*, 531 (1992), p.12238.

<sup>41</sup> *ibid.*, p.12363.

<sup>42</sup> *ibid.*, p.12414.

<sup>43</sup> *NZPD*, 533 (1993), p.13742.

Tapsell's opposition to the bill arose out of his concern that it did nothing to help Maori landowners use and profit from their land. His criticism reflected the approach taken by the 1993 statute to address the old problems associated with title to Maori land. Its approach was to comprehensively ignore them while modifying existing legal structures such as trusts and incorporations designed to provide an overarching administrative mechanism through which land could be managed. Nevertheless, the problems of fragmented and choked titles were left unresolved.

The revolution of the late-1980s and early-1990s was preceded by another seismic shift which started from the 1970s and which fundamentally affected the Maori Land Court. Under Rata, and continued by his successors, the Department of Maori Affairs began a gradual shift away from focusing on land development and the provision of services in rural areas.<sup>44</sup> This reflected the changing demographic profile of the Maori population; there was a clear need to develop policy which addressed directly the needs of urban based Maori. The land development schemes were maintained but scaled back as training and employment programmes became more important. This process was continued throughout the 1980s and by 1990, the Department's involvement in developing land was extremely limited. With the creation of Te Puni Kokiri, government was no longer directly involved in developing Maori land. This was now a matter for Maori landowners within the legal structures created by the 1993 statute.

And this is a fundamental point. Over several decades from around 1910, the government and Maori landowners had, at different times, spent a great deal of money and time attempting to clean up choked and fragmented titles. In the early years this had involved redistributing the interests of owners in different blocks so that individuals could consolidate their holdings. From the 1950s onwards, these activities were managed by the Department of Maori Affairs and could involve the 'compulsory purchase' of small interests. Neither of these approaches proved successful: the nature of the title created by the Native Land Court in the nineteenth and early twentieth-centuries, after decades of interaction with custom, was found to be beyond redemption. In the 1970s and 1980s, these problems were fairly comprehensively ignored. The Te Ture Whenua Maori Act 1993 confirmed this approach. Maintenance of the traditional lists of owners continued, but trust structures were established in legislation. They were designed to overlay titles and manage the land. Many of the problems associated with titles to Maori land, as identified by Hunn, the Prichard-Waetford Report and the McCarthy Commission, were never dealt with. Instead, legal structures were put in place to allow the problems to be ignored.

They were problems with a long history. For over sixty years from the late-1920s, politicians and officials tried and failed to deal with these problems. They

<sup>44</sup> G.V. Butterworth and H.R. Young, *Maori Affairs*, Wellington: Government Printer, 1990, pp.108-15.

were fundamentally a product of decades of interaction between Maori custom and the title system administered by the Court. Titles to Maori land became so complex that the Court remained necessary throughout the twentieth-century to make impartial decisions regarding the management of Maori land. But they had an even longer history. Politicians and the Court in the nineteenth and early twentieth-centuries struggled to render Maori customary rights to land certain and stable in a clearly defined title. Likewise, the bureaucracy spawned by the development schemes and expanded after the Second World War found administering Maori land through the title created by the Court highly problematic because it was so uncertain and unstable. No solution to these problems was ever found and rather than solve them, the current statutory framework allows them to be ignored through alternative legal structures in which the Court, as impartial arbiter, plays a primary role.

PART THREE:

VOICES

## INTRODUCTION

The problems associated with establishing stable and settled title to Maori land together with the process of acquiring land held under that title emerged from the mid-1880s. Both were associated with custom: the number of owners increased considerably and disputes over customary rights among Maori became more complex and difficult to resolve. In Part Two, it was argued that through the nineteenth and early twentieth-centuries colonial politicians and officials struggled to find a way of dealing with the complexity of Maori customary rights to land. Where problems arose, a new system was introduced and used until its own limitations precluded the large-scale alienation of Maori land. The creation of the Native Land Court in 1862 and its widespread application from 1865 did not end the struggle of dealing with Maori customary rights to land. Throughout the nineteenth-century and well into the twentieth-century, the Court was regularly re-invented in response to problems and the policy priorities of different governments.

Part Three of this thesis shifts from political debates about Maori customary rights to land and focuses entirely on the way Maori argued their claims in Court and the way the Court went about resolving disputes over customary rights where they arose. It is argued that the many complex narratives of rights presented to the Court by witnesses in support of claims by their kinship or tribal group reflected long relationships over general areas of land. It is also argued that fixing customary rights and these relationships in order to establish a clear title given the degree of complexity was a difficult task for the Court. Where claimant groups were unhappy with the recognition of their rights, it was possible to articulate the relationships between kinship and tribal groups in other ways through rehearings, appeals and petitions, and this continuing debate had the effect of limiting the Court's ability to establish a stable and settled title.

In the first instance some major methodological issues need to be addressed to explain how it has been possible to get a clear understanding of what went on inside the Court during this period. This entire thesis has attempted to avoid the problem of some existing approaches that tend to focus on a number of key texts which are assumed to accurately represent the activities of the Court. By drawing on the massive volume of material generated by the Court's operation and the huge range of narratives contained in the minute books, a very different and more complex and subtle picture of the Court emerges. However, some significant problems, primarily involving the quantity and diversity of the material available, had to be overcome and

solutions developed. This introduction gives an outline of the sampling process used to select cases and an overview of the rest of the chapters in Part Three. The sampling process is important because of the huge volume of material contained in the minute books of the Court. To make this material manageable cases have been selected on the basis of specific criteria designed to provide enough data from which firm conclusions can be drawn.

Although, as was argued in Chapter 1, much has been written about the Court, no attempt has ever been made to produce a sustained analysis of the Court's own records of its hearings. There are three main reasons for this. Until quite recently, the Court's minute books were relatively inaccessible. They were stored in the Maori Land Court's seven regional offices around the country and although they were open to public scrutiny it would have been difficult for a researcher to undertake the sort of detailed research required in so many locations. The problem no longer exists because of a large-scale project which produced copies of the minute books. This project, started in 1984 in the Maori Land Court office at Whangarei, was a result of the rapid deterioration of the minute books due to their considerable use by Maori landowners and Court staff.<sup>1</sup>

The project was not completed until 1990 when it was included in the sesqui-centennial celebrations of that year (which were organised by the Department of Internal Affairs). The project was administered by National Archives and involved the participation of the Department of Internal Affairs (of which National Archives was a part), the Department of Maori Affairs and the Department of Justice.<sup>2</sup> The minute books, numbering nearly 3,000, were all copied and the bound copies distributed to the Maori Land Court's offices. However, bound copies were also deposited in the regional offices of National Archives. Researchers now have the opportunity to access all the minute books at three central locations in Auckland, Wellington and Christchurch. The Macmillan Brown Library at the University of Canterbury also holds a significant collection of the minute books. This has made the task of accessing the minute books much easier.<sup>3</sup>

The second problem which has also only recently been resolved was that researchers had no tool whatsoever which would give some point of access to the contents of the minute books. It was only possible to work through single minute

<sup>1</sup> Stevens to Green, 24 April 1985, NA 2/31/1, NA, Wellington.

<sup>2</sup> 'Meeting of officials regarding the proposed Maori Land Court minute book copying project,' 10 November 1988, *ibid.*

<sup>3</sup> The joint project reproduced 2,968 minute books. Maniapoto to Stevens, 2 February 1987, *ibid.* The originals are held at Archives New Zealand in Wellington and access is restricted. Bound copies of relevant minute books are also held at each of the offices of the Maori Land Court. Microfilm of the minute books is held at Archives New Zealand in Wellington, the Alexander Turnbull Library and the University of Auckland Library.

books; there was no way of gaining even a remote idea of what land was dealt with in the other minute books without also looking at those. This situation was rectified during the 1990s by the University of Auckland Maori Land Court minute book indexing project. With funding from the New Zealand Lottery Grants Board the project began in 1993 and by 1996 had indexed the Court's minute books from 1865 until 1910. The index was stored on a computer database and the software used allowed quite complex searches to be undertaken. For the first time, the researcher had a tool which would make the task of searching the Native Land Court minute books manageable.

The final problem was related. Not only did the researcher not have any way of getting an idea of the contents of the minute books without actually physically going through each minute book, there was the huge number: over 3,000 minute books were generated in the one hundred years after the Court's establishment in 1865. Each minute book contains between three and four hundred pages of hand written notes and they take up many metres of archive shelving. The volume of material was and is simply overwhelming. This problem, however, has been significantly reduced by the resolution of the other two problems: the copied minute books and the index deal with the issues of access and content. Dealing with this last problem was also one of method. That is, a systematic sampling process was required to use the index to generate data which gives some idea of the operation of the Native Land Court on a day to day basis, especially in relation to the place of Maori customary rights to land, and ensure that rigorous and robust conclusions can be reached.

The results of this sampling process were, in short, that Part Three of this thesis is based on an examination of the minutes of hearings of the Native Land Court of approximately 250 title investigations and rehearings or appeals relating to around 160 discrete blocks of land. This constitutes around 300 minute books or about ten percent of the total number of minute books.

Time and place were the two fundamental considerations in the sampling process. This was designed to ensure that specific cases were spread across the time period and were geographically spread across the North Island and across the South Island (as far as possible). This was primarily to avoid placing emphasis on one particular decade or period of time and to give the possibility of exploring the way in which the place of Maori customary rights to land inside the Court changed over time. Moreover, it would allow analysis based on economic considerations and an assessment of the impact of changes in policy and the legislative framework on the operation of the Court. There may be some imbalance in the actual number of cases: fewer in the twentieth-century, some in the late 1860s, a large number in the twenty years after 1880. The main point though is that the cases were systematically selected from across the time period to illustrate this kind of change. As for the geographical

spread, this was to allow the examination of the characteristics of each region and provide a basis for discussing regional variations where they arose.

Several other important decisions also impacted on the sampling process. The first was the decision to focus exclusively on original title investigations of customary land. Hearings relating to partition and succession (the other core functions of the Court for most of the nineteenth-century) can be important in terms of shedding light on earlier title investigations but were of limited significance in terms of Maori customary rights to land. Partition and succession were always important, and partitions, in particular, could be sources of considerable litigation. However, the starting point was always the original title investigation and it is at this point that Maori customary rights to land were of greatest significance. It should be noted that a very small number of title investigations were conducted after 1920 and, for this reason, no such proceedings after 1928 are included in the sample. Moreover, as argued in Chapter 7, the core function of the Court had shifted by this time and title investigations were of increasingly marginal importance.

Secondly, it was decided, given the volume of material available and the impossibility of examining all of it for this project, that sampling would have to avoid any sort of quantitative analysis. And not only was the volume of material a problem: the diversity of particular circumstances affecting each and every individual hearing by the Court was also a major difficulty. Thus, rather than look for a breadth of analysis, it was decided to approach the material looking for a depth of analysis. On this basis, general statements regarding the place of Maori customary rights to land in the Court process could still be made and illustrated using evidence from the minute books.

As well as time and place, four other issues were taken into account when selecting cases. The most important was the specific judge who presided over a Court in a particular title investigation. Based on preliminary research, general weightings were attached to a number of judges in terms of their importance, especially in terms of the number of title investigations they conducted. Thus, William Mair and David Scannell, were significant judges simply because of the number of title investigations they undertook. Others in this category were W.E. Gudgeon, Alexander Mackay, Laughlin O'Brien, Robert Ward and J.A. Wilson. It is also essential to note that they were generally located in one particular region – Gudgeon on the East Coast, Mackay in the Southern North Island, Mair in the Central North Island, O'Brien was more peripatetic but spent some time in Wanganui, Scannell, likewise was more peripatetic although he was associated closely with Thames, Paeroa and the Coromandel peninsula, Ward was in Wanganui exclusively and Wilson was mostly in Rotorua and the adjacent East Coast regions. Most of these judges undertook title investigations during the ten years from 1885 to 1895 although there were some exceptions after 1895. Economic depression at this time meant the purchase of Maori land was severely restricted while the Court continued to hear claims to land. It appears that

early judges (prior to 1885) and later judges (after 1900) undertook few title investigations in comparative terms. It may be that those earlier judges investigated much larger blocks of land, while those who came later investigated a large number of smaller blocks.

Three other minor factors were also considered in the sampling process. The first was the size of the block. Attempts were made to achieve a balance between larger and smaller blocks of land to compare the kinds of issues which arise out of title investigations of blocks of different size. It is apparent too that larger blocks were more common in the first fifteen to twenty years of the Court's existence and after this time the area of blocks investigated were smaller – even if there were occasionally very large blocks which came before the Court. The length of the hearing was another consideration. Short hearings were included particularly to see whether little intervention by the judge was necessary. Longer hearings were, however, essential since it was at these hearings that there were greater disagreements between claimants over rights to the land, especially if these disagreements continued through to rehearings and appeals. Finally, in selecting cases, there was a preference for those which were never given prominence because they were published or because they have some sort of legal significance through subsequent consideration in higher courts. This would allow some appraisal of whether the importance attached to these cases is justified.

A brief comment on the nature of these sources is also necessary. Angela Ballara has made the most extensive use of the minute books in her study of the origins of Ngati Kahungunu. Her analysis of their value as historical evidence is the most significant and systematic assessment undertaken. She argues that the minute books 'contains a mine of factual information about the past' but adds that 'further acquaintance with the evidence leads to the inevitable conclusion that much of it can not be accepted at face value as factual accounts of actual events in the past.'<sup>4</sup> This is because there is the question of 'whether Maori evidence given in the Land Court can be used by scholars as a reliable source of genuine local tradition' in a situation where interested parties attempted 'to substantiate their claims to large areas of land.'<sup>5</sup> These last questions, she answers in the negative: the system did not allow witnesses to distort their evidence in the pursuit of their own interests.<sup>6</sup> Where claimants and counter-claimants were closely related care had to be taken in presenting evidence as others would point out errors. More importantly, Ballara quite correctly points out that the different accounts of the same block of land allow the historian to compare the competing evidence of different witnesses to appraise its efficacy.

<sup>4</sup> Angela Ballara, 'The Origins of Ngati Kahungunu,' PhD Thesis, Victoria University of Wellington, 1991, p.504.

<sup>5</sup> *ibid.*, p.504.

<sup>6</sup> *ibid.*, p.529.

For Ballara, translation from spoken Maori evidence to written English text is a much more problematic issue. The problem is conceptual rather than a consequence of fraud or tampering: 'in attempting to relate the concepts of one language and culture to those of another, interpreters imposed their own choices of terminology on the institutions and events they were recording.'<sup>7</sup> It is a problem which cannot be resolved.

Ballara concludes that the Land Court records are a significant source for historians. There may be many problems with them, but 'a comprehensive and critical approach can yield fresh information.'<sup>8</sup> These sources are useful 'provided historians are aware of the economic or other interests of the witnesses, know about their kin connections and likely aims resulting from them, are able to find inconsistencies in accounts and document the likely intentions behind them.'<sup>9</sup> A wider knowledge of other documentary evidence is essential for the historian to come to terms with these issues. If appropriate techniques are applied and caution exercised, then the minute books can be used productively.

Thus, the problems associated with the minute books can generally be resolved through the appropriate application of the historian's traditional methods, particularly through careful and critical scrutiny of documentary sources. What it is important to note at this point, is that in her study of Ngati Kahungunu, Ballara used the evidence of witnesses recorded in the minute books to reconstruct a particular and earlier past. She was not using the minute books to examine Native Land Court sittings in the second half of the nineteenth-century, she was using the minute books to examine Maori social organisation prior to European contact.

This thesis does not seek to reconstruct an earlier past using the evidence given by witnesses appearing in the Court. The past it does seek to reconstruct is that in which the minute books themselves were created. That is, this thesis is concerned with the dialogue and debates over customary land among Maori claimants, judges and assessors inside the courtroom. This is not a past independent of the minute books, they are the very remnants of this past. As such, disputes over evidence, translations and even 'authenticity' or 'genuine local tradition' are significant features of the dynamics with which this thesis is concerned. And as suggested in the Introduction, 'authenticity' and 'tradition' are both deeply problematic concepts. The static and unchanging meaning Ballara attaches to them imposes considerable limitations on her ability to explain what witnesses in the Court were doing.

Many of the so-called problems identified by Ballara then, even if she does suggest solutions, are not problems at all. Rather they often provide the opportunities

<sup>7</sup> *ibid.*, pp.515-6.

<sup>8</sup> *ibid.*, p.555.

<sup>9</sup> *ibid.*, p.556.

for the most revealing analysis. Using the minute books to reconstruct an earlier past would be problematic because witnesses were deploying historical narratives for a very important purpose in their present. In contrast, using the minute books to examine debates over Maori customary rights to land and courtroom dynamics is extremely productive; they are a rich, complex and very rewarding source.

Part Three of this thesis takes as its starting point the view that Norman Smith's model of four take is not the last word on the operation of the Native Land Court in relation to Maori customary rights to land in the nineteenth and early twentieth-century. Using the sampling process described above, it draws on the contents of the minute books to examine and explain two fundamental issues. The first focuses on the way in which Maori claimants argued their customary rights to land and the nature of the development of these rights over this period. The second focuses on the methods and techniques used by different Courts (judges and assessors) to resolve disputes over land and the way they developed over the same period, especially as the disputes became more complex and difficult to settle.

Each of the following six chapters examine different aspects of these two issues. Chapter 8 examines Norman Smith's four take and argues that Smith's account of the Court's operation is highly problematic for two reasons. First, his antecedents are far from clear and secondly, other earlier accounts produced by judges define Maori customary rights to land in different ways. Smith's model of take is significant and is discussed first because it is generally taken as the starting point for discussing the Court's approach to Maori customary rights to land. This chapter is designed to show that Smith codified the practice of the Court by imposing twentieth-century order retrospectively on nineteenth-century flexibility. It will be argued later in Part Three that rather than approaching these rights in a strictly defined way, the Court dealt with the claims argued in individual cases rather than attempting to apply some sort of legal abstraction.

Chapter 9 focuses on the backgrounds of the Pakeha judges and the role of Maori assessor in the Court. In relation to the first, it is argued that all the key qualification held by all the judges appointed during this period was a significant background of working with Maori, particularly in relation to land. A small minority had legal training and had practised as lawyers prior to their appointment to the bench and the chief judge was, with one exception, always a lawyer. However, the other judges tended to have a background of close contact with Maori. There was good reason for this: the judges were in no position to impose their will on the Maori claimants appearing before them. Their primary role in the process of converting Maori customary rights into a Crown-granted title was fundamentally about creating a settled and stable title.

They had to navigate a careful path through the claims and disputes of those appearing before them and where they failed to do so, Maori had options available to

them and which they were able to make use of to ensure that it took many years to establish a settled and stable title. Through the nineteenth-century, the judges came successively from several distinct groups. They included New Zealand Company surveyors, missionary families, soldiers who fought with Maori contingents in the wars of the 1860s and subsequent guerilla conflicts, and finally a number were former registrars of the Court who had entered the office as clerks and were promoted over their career. All of these men had experience of working with Maori and they were appointed for precisely this reason: they had to engage with the claims of the Maori kinship groups before them and negotiate acceptable solutions to all parties when they arose. The Court was fundamentally about creating stable and settled title so that purchase could follow.

As for the assessors, they have in the orthodox history of the Court been marginalised as an irrelevancy in a Court dominated by a Pakeha judge. In Chapter 9, it is argued, drawing on the minute books recording the hearings, that in fact the Maori assessors were central figures in the Court and essential to the process of creating titles. This was particularly the case from about the mid-1880s when disputes over customary rights became more complex and much more difficult to resolve. In such situations the assessor was essential and it was common for assessors to play a much greater and more important role in resolving these disputes than the judge. Witnesses seldom avoided examination by the assessor and often the questions asked by assessors were carefully designed to discover the root cause of any dispute. Moreover, there are a number of instances which show the power assessors could wield inside the Court and also the importance Maori claimants themselves attached to the impartiality of the assessor. The minute books show that assessors were very active during hearings and in the process of creating a stable and settled title to Maori land they were essential.

The two chapters which follow, Chapters 10 and 11, both examine the role of Maori in the Court focusing in particular on the way claimants asserted and argued claims to land based on customary rights and the way both changed over time. The two chapters are chronological but there is no clear dividing point between the two. This is because it is argued that around the mid-1880s, or about twenty years after the Court was first established, the way in which claims were argued by Maori changed fundamentally. This was a product of a number of factors but most importantly it reflects a generational shift. Chapter 10 therefore focuses on the first twenty years or so of the Court's operation and explores the role played by Maori during that time. The way customary rights were argued inside the Court during this time tended to focus on the battles and wars of the period from around 1830 until 1850.

The claims tended to be large scale tribal claims and focused on conflict and conquest. This is, in some ways, the classic view of the Court's engagement with Maori customary rights to land: the Court focused on long histories of conflict, of defeat and victory, and its decisions carefully charted this history until 1840. At this

point, the victorious tribe was able to assert a valid right and the Court issued an order in their favour. Characterising the role of the Court in this way in fact misses the entire significance for Maori: the Court was another opportunity for the tribes to continue the war and fight the battles again. This time rather than muskets and carnage, the weapons were words and the battle was won or lost on the word of the judge and assessor. These early claims usually involved large blocks of land and those who argued them and gave evidence in support were often the elders of each tribe who were either children at the time of the conflicts of the first half of the nineteenth-century or had heard the stories at the feet of their elders who had been involved in the fighting. They were the sons and daughters of the great rangatira who had led their tribes and preserved them from destruction at the hands of their traditional tribal enemies. Their mana was derived from this relationship and was considerable. It is clearly reflected in the role they played in the Court during this first period.

By the mid-1880s, however, this generation was beginning to die. It was a process which would take many more years – Keepa Te Rangihwinui did not die until the late 1890s, after he had secured the Manawatu-Kukutauaki lands for his people against his tribal enemies and his own usurpers – but its impact on claims before the Court was increasingly apparent. The claims were no longer large scale and the blocks of land were smaller. The mana of the rangatira who held the tribe together was not passed onto the next generation and the claims Court came to resemble a landscape of voices. The claims were argued on a smaller kinship groups basis against other kinship groups within the same tribe. Hearings became much longer and protracted with extensive evidence and cross-examination of witnesses. While the earlier claims could be heard and decided on in a matter of weeks, the later claims could take several months and could on occasion extend over two years of sitting. These trends can also be seen in the limited number of title investigations which were conducted in the early twentieth-century. The nature of these claims and the way they were argued are the focus of Chapter 11.

Having addressed the way in which claims were argued in the Court by Maori and the way they developed over the nineteenth-century and early twentieth-century, Chapter 12 shifts entirely the focus to the decisions of the Court. It examines the techniques and strategies used by judges and assessors to resolve disputes and the way they changed over time. Parallels are drawn between changes in these strategies and the responses by judges and assessors to the shifting grounds on which claims were argued by Maori. Until the mid-1880s resolving disputed claims was generally a matter of locating tribal boundaries and determining the party who was the most recent victor where there was a long and intense tradition of conflict. As claims became more complex and the nature of the disputes increasingly ambiguous, the Court did have to deploy a range of strategies to navigate between the various kinship groups and provide a considered decision which would be acceptable to all those

involved. This included, in particular, those claimants who were unsuccessful to ensure decisions were not subject to constant appeal and litigation.

Such strategies had to be appropriate to the circumstances of the particular case judges and assessors were dealing with. Certainly, over time Court decisions grew considerably in length as the disputes become increasingly complex and difficult to resolve. The Court was forced to find ways to deal with the mass of evidence accumulated during hearings to determine the Maori owners of a block of land. These strategies included drawing on evidence given in previous hearings, seeking out contradictions in the evidence of witnesses and a growing emphasis on occupation or at least clear evidence of occupation at some point. What is clear is that the Court had no model or system of take which was applied to its decisions. Judges and assessors might draw on earlier decisions of the Court but they did so selectively and there was definitely no attempt to create a body of precedent. The vast majority of Court decisions remained buried deep in the bound volumes of minutes. Deciding the rights of parties was a complex process and the strategies applied to do so depended on the nature of the individual circumstances. There were no clear and fixed rules defining take and when they might apply to certain circumstances. Take were certainly not a model which was simply applied to a block of land; the diverse and numerous narratives presented by Maori witnesses rendered this approach entirely impossible.

Chapter 13 deals with another significant issue in relation to the operation of the Court. Rehearings, appeals and petitions (usually considered by the Native Affairs Committee) were all central to the process of establishing a settled and stable title to Maori land on the basis of Maori customary rights. These avenues were available to Maori claimant parties and although there were obviously significant costs associated with taking such action (Court costs, living expenses and the charges of lawyers and agents), where the first Court failed to satisfy the claims of all parties, or where the traditional disputes were intense, it was very common for decisions to be appealed. If this outcome was still unsatisfactory, it was possible to pursue the matter further through petitions to Parliament and actions in the Supreme Court and Court of Appeal. The reasons for some of these appeals will be examined in this chapter and it will be argued that the continuing struggle, while costly, also shows the extent to which traditional disputes over customary rights to land continued to influence the conduct of Maori claimants in the Native Land Court.

Overall, each of these chapters are designed to show that Smith's attempt to create a model of Maori customary rights to land is fundamentally flawed because it entirely misunderstands the nature of these rights. They cannot be fixed in time and place nor can they be defined in terms of the way they changed over time. For customary rights to land, as argued in the Court, were not an object which could be defined. They were about a process, an opportunity to debate complex relationships over resources between different kinship groups. The Court was a site where this could occur and it was also a judicial body which could reach decisions which fixed

these rights; it was not the process of converting Maori customary rights into a Crown grant title which was inimical to Maori but the settled title itself was. The Court allowed Maori to continue their traditional practice of negotiating rights to land and it did so in a fundamentally peaceful way. Conflict and slaughter was no longer necessary. However, once title to a block of land was determined the situation shifted entirely and it was no longer possible to continue discussing these relationships in the Court. Rehearings and appeals gave some opportunity but they were not inexhaustible – at some point either the money or the legal avenues would run out and the negotiation would stop. For a while at least.

## JUDGE NORMAN SMITH: IMPOSING ORDER

This chapter examines Norman Smith's four take. Both the texts in which he articulated his take and the background to those texts are discussed. It is argued that Smith's account of the Court's operation is highly problematic for two reasons. First, his antecedents are far from clear and secondly, other earlier accounts produced by judges define Maori customary rights to land in different ways. This analysis of Smith is significant and is dealt with first because it is generally taken as the starting point for assessing the Court's approach to Maori customary rights to land. It will be argued later in Part Three that rather than approaching these rights in a strictly defined way, the Court adopted strategies to deal with disputes where they arose and dealt with the claims argued in individual cases rather than attempting to apply some sort of legal abstraction.

The Ngai Tahu decision of the Maori Appellate Court was a response to a question stated by the Waitangi Tribunal regarding the boundary between Ngai Tahu and its northern neighbours.<sup>1</sup> Section 6A of the Treaty of Waitangi Act 1975 was amended in 1988 to give the Tribunal power to refer questions of rights of ownership and tribal boundaries for resolution by the Maori Appellate Court, 'according to customary law principles of "take" and occupation or use.' The issue to be determined was defined by the Court and the parties to the litigation as one of customary rights to land. Significantly, the Tribunal in its question defined these rights as an archaic and historical entity fixed in time. The boundary could be determined as at the dates of the Kaikoura and Arahura deeds of purchase and that was the boundary for all time.

<sup>1</sup> The decision is printed as an appendix to the Waitangi Tribunal's Ngai Tahu report. See Appendix 4 in Waitangi Tribunal, *The Ngai Tahu Report*, 3 vols, Wellington: Brooker and Friend, 1991, pp.1122-45.

To do so, the Court first had to determine what those take were and briefly stated it found four take.<sup>2</sup> They were discovery, ancestry, conquest and gift, each of which had to be supported by some form of occupation. The Court found these take had been developed by Maori over many centuries and were absolute and unchanging. The one exception was the right through conquest which was limited by the Treaty of Waitangi. This meant that 'where an iwi have proven one of the customary take supported by occupation but were absent in 1840 they could revive their ahi kaa as long as the re-occupation was peaceful and within three generations of their leaving the area.'<sup>3</sup>

In essence, to resolve the competing claims regarding the location of the boundary, the three judges, Heta Hingston, Hoeroa Marumaru and Andrew Spencer, reached for their Norman Smith. They recognised the importance of their decision as it was the first case to be determined under the new legislation but at its most basic, the Ngai Tahu decision gave judicial authority to Smith's model of take. In contrast, this chapter fundamentally questions the suggestion that his model reflects the practice of the Native Land Court in the nineteenth and early twentieth centuries.

In 1942 Norman Smith codified the rules used by judges of the Native Land Court to determine according to Maori custom and usage who owned land held under customary title. Ironically, by then such codification did not really matter in terms of the Court's practice. Its primary role was no longer the investigation of title to customary land as it had become part of a large and rapidly growing bureaucracy which administered the land remaining in Maori ownership. Applications for title investigations were received infrequently and the area of land affected was quite small. The model of take developed by Smith therefore was produced as an abstraction rather than as a product of the Court's practice.

Smith's first book, *Native Custom and Law Affecting Native Land*, was written when he was a Research Officer at the Native Department in Wellington and published in 1942 by the Maori Purposes Fund Board.<sup>4</sup> He was part of the bureaucracy referred to above and the book was a direct response to the administrative imperatives of the Native Department. In the preface, he indicated that his intention was to identify what he called the 'rules of custom' which provided the basis for customary title to assist those concerned with the administration of Maori land.<sup>5</sup> These 'rules,' contained in the decisions of the Court, had been buried unpublished in the minute books and he wanted to make them available to the public, lawyers and officials.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid.*

<sup>4</sup> Norman Smith, *Native Custom and Law Affecting Native Land*, Wellington: Maori Purposes Fund Board, 1942.

<sup>5</sup> *ibid.*, p.1.

If in practice Smith's codification was of limited significance, it has had a major impact on the way in which historians have considered the activities of the Court. Historians and other scholars, such as Bryan Gilling, Ann Parsonson and David Williams, have used the four take developed by Smith to argue that the judges rigorously applied a narrowly defined series of rules which were totally alien to and destructive of Maori customary rights to land.<sup>6</sup> The chief judge of the Maori Land Court, Joe Williams, has done the same. Smith's texts, consequently, require careful scrutiny. His antecedents are difficult to determine for Smith does not provide any indication, other than statute or a few of the Court's decisions, of the authority on which his views are based. Although he did acknowledge the assistance and authoritative knowledge of R.N. Jones, a former chief judge of the Court, it is far from clear how Smith arrived at this particular model of take.<sup>7</sup>

Smith's opening chapters in *Native Custom and Law* laid out a history of legislation relating to Maori land and provided background to the ways in which Maori customary rights to land had been defined. Chapter Three, constituting about one third of the whole book, focused entirely on the question of investigation of title to customary land by the Native Land Court and is the subject of this chapter. The final three very brief chapters covered succession, adoption and marriage, examining the powers of the Court in each of these subjects as prescribed by legislation then in force.

In 1960, Smith published a second book entitled *Maori Land Law*.<sup>8</sup> By then two major changes had occurred. The first, in 1952, was Smith's appointment to the bench of the Maori Land Court. The second, the following year, was the enactment of the mammoth Maori Affairs Act 1953. It would govern the administration of Maori land, with some significant amendment, for forty years until 1993. This legislation was the statutory embodiment of the substantial bureaucracy which managed Maori land through the Department of Maori Affairs. It was ambitious in its scope and formally marked a transition which had been occurring for nearly three decades: a shift in the function of the Court from the investigation of title to the administration of Maori land.

As a result, the new book was a technical legal manual which focused primarily on the new legislation. Over one third of the book was taken up with

<sup>6</sup> See for example Bryan Gilling, 'Engine of Destruction? An Introduction to the History of the Maori Land Court,' *Victoria University of Wellington Law Review*, 24:2 (1994), p.128; Ann Parsonson, 'He Whenua Te Utu,' PhD Thesis, University of Canterbury, 1978, Chapter 4: 'The Maori and his Land: the Establishment of a Claim,' and David V. Williams, 'Te Kooti Tango Whenua.' *The Native Land Court 1864-1909*, Wellington: Huia, 1999, pp.187-89. See also Chief Judge Joe Williams, 'Maori Land Court – a Separate Legal System?,' *Te Pouwhenua*, 8 (November 2001), p.4.

<sup>7</sup> Smith, *Native Custom and Law*, p.v.

<sup>8</sup> Norman Smith, *Maori Land Law*, Wellington: A.H. and A.W. Reed, 1960.

appendices setting out different groups of regulations which applied to Maori land and there were chapters on a host of topics including marriage, adoption, wills, succession partition and so on. Chapter Eight, which dealt with papatipu lands, was in essence exactly the same chapter as had appeared in *Native Custom and Law*. The two major differences were that the relevant sections of the Maori Affairs Act 1953 were quoted and a new introduction was included. The latter was largely a re-organisation of the text in the earlier book: parts were cut out, re-arranged, and re-presented verbatim. The four take had not changed.

In his account of the practice of the Native Land Court in determining ownership of customary land according to Maori custom and usage, Smith made two important concessions. The first was that while the decisions of the Court had codified custom, and the Supreme Court had recognised the Native Land Court was the authority on such questions, it is 'nevertheless somewhat difficult to elaborate the rules governing that question.'<sup>9</sup> Even if the Native Land Court had established the grounds on which rights to customary land could be claimed, the question was not, it would seem, easily answered. Smith was caught in a contradiction which had to be resolved: the Court had to make its decisions according to Maori custom and usage and it must have done so – it was a statutory requirement.

The problem was defining Maori custom and usage. To resolve this problem, Smith acknowledged that the Court had, in its first years, 'experienced considerable difficulty in ascertaining in particular cases what the ruling customs really were, and this difficulty has doubtless been responsible for an apparent, if not altogether real conflict in some of the earlier judgments of the Native Land Court.'<sup>10</sup> By around 1895, this problem had been rectified, however, and customary rights had become 'more or less clearly defined.'<sup>11</sup> At the same time, and here is Smith's second concession, the Court was forced to modify Maori custom. The original custom remained central but other parts were 'grafted' onto it for the purposes of meeting 'the equities of each case as well as the demands of a changing society.'<sup>12</sup> Once clearly defined by the Court, of course, change ceased and take were known. So the difficulty was resolved, it would seem, by the evolution of Maori custom, the growing expertise of judges, and 'equity,' that rather vague principle of fairness.

Smith identified four principal take recognised by the Court when considering the applications of Maori claimants to customary land. Briefly, they were discovery, ancestry, conquest and gift.<sup>13</sup> Along with these four take there was the essential

<sup>9</sup> Smith, *Native Custom and Law*, p.47.

<sup>10</sup> *ibid.*, p.48.

<sup>11</sup> *ibid.*

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*, p.49.

requirement of occupation 'or the exercise of some act or acts indicative of ownership in order that the claims made might be deemed well grounded and effectual.'<sup>14</sup> Some form of occupation based on one of the four take was required to prove any claim conclusively and Smith went on to describe in considerable detail the degree of occupation required to support a right. To illustrate these points and discuss the four take further, he drew on Fenton's *Important Judgments*, Alexander Mackay's 'Opinions of various authorities,' and several decisions of the Native Appellate Court.

Although Smith acknowledged the complexity of the issue, he came up with four clearly defined and unambiguous take used by the Court to determine ownership of customary land according to Maori custom and usage. His antecedents, however, are not easily located. Certainly his account was not a result of a comprehensive and systematic assessment of the decisions of the Court. There is also no indication as to why 1895 was chosen as the year when Maori custom and usage was clearly defined.

Where did Smith find his four take? That is a question which is very difficult to answer. One possibility was *Important Judgments*, the collection of decisions of the Court printed by direction of the first chief judge, F.D. Fenton, in 1879.<sup>15</sup> However, problems arise almost immediately. The basis for which 'importance' was attached to a particular decision of the Court, and therefore worthy of inclusion in the volume, is ambiguous. In a preface, presumably written by Fenton although not signed, much greater importance was attached to the decisions 'as a record of some of the most interesting events in Native history.'<sup>16</sup> Rather than addressing significant legal questions, the decisions included in the volume contained 'interesting records of Native history for a period of 200 years preceding the present time, and will prove of great assistance to any one who may hereafter compile a complete history of the Maori race.'<sup>17</sup> Was Fenton's primary concern therefore to lay down a body of precedent to guide the decisions of judges? Or was he more concerned to publish source material for Maori history?

In the decisions included, none of the judges and assessors took much care to set out the type of evidence they needed to consider in reaching their decisions. There were instead lengthy narratives on matters of conflict between Maori tribal groupings. One issue on which all were clearly agreed though were the difficulties they found in

<sup>14</sup> *ibid.*, p.48.

<sup>15</sup> F.D. Fenton (ed.), *Important Judgments Delivered in the Compensation Court and Native Land Court*, Auckland: Henry Brett, 1879.

<sup>16</sup> *ibid.*, n.p.

<sup>17</sup> *ibid.* In his retirement, Fenton himself produced a publication entitled *Suggestions for a History of the Origins and Migrations of the Maori People*, Auckland: H. Brett, 1885. Howe has described it 'as among the most bizarre accounts of Polynesian origins.' See K.R. Howe, 'The Intellectual Discovery and Exploration of Polynesia,' in *From Maps to Metaphors*, Robin Fisher and Hugh Johnston (eds), Vancouver: University of British Columbia Press, 1992, p.257.

dealing with confusing and contradictory evidence given by witnesses during hearings. This may suggest why the judges made little effort to codify their activities in a comprehensive way in the nineteenth-century. The types of cases and the complexity of the evidence were too diverse and difficult to generalise into a series of simple rules. Apart from vague references to conquest, ancestry and occupation the judgments provided very little indication as to the grounds on which the Court determined according to Maori custom and usage ownership of customary land. Fenton's focus was apparently on preserving an historical record of Maori – one which was determined by judges too, not Maori claimants – rather than creating a body of legal precedent for the purposes of regulating the operation of the Native Land Court. For an overview of the Court's approach to Maori custom and usage in the nineteenth-century, *Important Judgments* is not particularly useful. Smith quotes from them, but the decisions would have provided little assistance in determining the Court practice.

So, *Important Judgments* is not particularly useful. Mackay's 'Various opinions' may have been a little more useful.<sup>18</sup> This was a collection of extracts from papers and correspondence published in March 1890, containing the views of a range of colonial officials, missionaries, soldiers, Maori leaders and judges on the question of Maori customary rights to land. Extracts from papers and letters written by several Native Land Court judges and a memo from a group of assessors were also included.

Of the documents, only Maning's letter to Fenton in November 1877 directly addressed the question of determining customary rights to land. Long and rambling, it was full of complaints, especially of 'the impossibility of doing what is really the reduction of an unwritten, and in some degree still disputed, law to writing.'<sup>19</sup> His account of Maori customary land ownership focused on original discovery and subsequent conquests. Gifting, usually as a result of support in war, was also recognised as a valid title by Maning. His principal conclusion regarding customary rights to land was that rights to land had to be maintained by force. But in general he had 'never been able to fix upon any established principle for my guidance.'<sup>20</sup> He simply dealt with the circumstances of each case 'in the best manner I could.'<sup>21</sup> Where there were still questions, 'natural equity' was used to resolve them.

Mackay himself attempted to provide some sort of synthesis on the question of Maori customary rights to land. He too sounded a warning: 'the opinions expressed in the aforesaid papers are very conflicting on many points' but believed there was a 'general consensus of opinion.'<sup>22</sup> Rights were based on either ancestry through

<sup>18</sup> 'Opinions of Various Authorities on Native Tenure,' *AJHR*, G-1, 1890.

<sup>19</sup> *ibid.*, p.17.

<sup>20</sup> *ibid.*, p.21.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*, p.1.

possession of land over several generations or land was acquired by conquest, occupation or gift. Mackay's approach to occupation was very similar to that of Smith's: 'possession of land, even for a number of years, did not confer a right unless the occupation was found on some previous take of which the occupation could be regarded as a consequence, and this take must be consistent with the ordinary rule governing and defining Maori customs.'<sup>23</sup>

Perhaps, though, Mackay's concluding comments are the most significant. Claiming that his general principles were those usually accepted by the Court he concluded nevertheless that it was 'almost impossible to lay down any fixed rule for fully defining the law of Maori land-tenure, as the customs vary in different localities.'<sup>24</sup> Like Maning, he believed fixed rules were difficult to define and where disputes could not be resolved, judges had to fill the holes with 'equity;' their own opinion or 'good conscience' based on the particular circumstances. The Court's practice appears much less clear than Smith's four take would suggest.

This is not, however, the end of the tale, for Smith had three other 'authoritative' accounts to draw from as well. The first was a short essay written by Judge F.O.V. Acheson and published in 1931.<sup>25</sup> He had been a judge of the Court since 1919. He was highly critical of those who claimed conquest was the fundamental right determining land tenure in Maori custom but also identified a number of other rights: adoption, ohaki or verbal will, dowry, gift for service rendered or injury committed, tapu or sacred sites, vassalage (distinct from slavery), and tribal treaties. He added that 'the most common source of right to land was through ancestry, combined with occupation.'<sup>26</sup> Acheson may well have challenged the 'strong arm' approach to Maori land tenure but he did not dismiss it entirely. Conquest was a consideration but he argued it was not the only consideration. He too emphasised the importance of occupation as the determining factor in the ownership of customary land.

The second 'authoritative' publication on the Native Land Court's practice in adjudicating on customary title was published in the *New Zealand Law Journal* in August 1941. The then chief judge of the Court, C.E. MacCormick, prepared a short essay on Maori customary rights as they related to the ownership of land.<sup>27</sup> MacCormick was a contemporary of Jones and succeeded him as chief judge. He

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*, pp.1-2.

<sup>25</sup> Frank O.V. Acheson, 'Maori Land Customs and Education: their Inter-relation,' in *Maori and Education. Or the Education of Natives in New Zealand and its Dependencies*, Patrick M. Jackson (ed.), Wellington: Ferguson and Osborne, 1931, pp.133-143.

<sup>26</sup> *ibid.*, p.141.

<sup>27</sup> C.E. MacCormick, 'Native Custom. As Relating only to the Ownership of Land,' *New Zealand Law Journal*, 19 August 1941, pp.173-75.

identified four sources of rights on which claims could be based. They were ancestral right by descent (tupuna), conquest (raupatu), gift (tuku) and strong hand (ringakaha) although the last was not a valid right alone. Occupation was not a right in itself either but along with a specific take was a central consideration in determining relative interests.

The final 'authoritative' account of Maori land tenure available to Smith was an unpublished and undated typescript prepared by Judge W.E. Rawson and held with the Native Land Court's office papers.<sup>28</sup> Rawson was appointed a judge in 1906. Like *Native Custom*, his account gave background to Maori land tenure, the arrival of Pakeha in New Zealand, the impact of colonisation on Maori land rights and the establishment of the Court. Rawson quoted at length from a number of decisions of the Native Land Court and the Native Appellate Court and concluded there were three principal take. They were ancestry, conquest and gift. Once a claim on the basis of one or more of these take was established, the question of occupation arose. Rawson argued that for a take to be validated, occupation was essential while occupation without a take gave no title.

This left Smith with five very different and disparate sources of information to draw from. *Important Judgments* can be dismissed most easily. For determining the grounds on which the nineteenth-century judges determined ownership of Maori land according to custom and usage the volume is of little use. Instead it illustrates the degree to which the early judges were particularly vague about the legal principles they applied and types of evidence they considered authoritative when reaching decisions on this question. Although Smith quoted from these decisions, they would have provided little guidance for him in terms of defining his take. Fenton was much more concerned with preserving an historical record rather than establishing a system of precedent to guide the Court in its determinations and ensure some co-ordination between the different judges.

Beyond *Important Judgments*, there were a number of other alternatives. 'Various opinions' did include several extracts from documents written by judges of the Native Land Court but the only synthesis was that by Mackay. Maning was not much help because he was so vague. On the other hand there are certainly some links between Mackay's rights and Smith's take. Like Smith, Mackay defined four take but whereas Smith absolutely dismissed occupation as a right, Mackay admitted it. Mackay did not acknowledge any take based on discovery but did accept ancestry, conquest and gift.

Comparing Smith to the other models of Acheson, MacCormick and Rawson, similar inconsistencies over the definition of take emerge. Acheson recognised up to

<sup>28</sup> MA 16 3, Native Land Court, Manuscript prepared by W.E. Rawson, Archives New Zealand, Wellington.

ten different types of right. MacCormick identified three take but did not acknowledge rights by discovery as Smith did. Likewise, Rawson found three take and they were essentially the same as those identified by MacCormick. All four judges emphasised the importance of occupation in validating one of the take and their conclusion on this issue does provide a basis for Smith's account of occupation. What is just as striking though is the extent to which each of these models differ in quite fundamental ways, especially in relation to their definition of what the basic take were. Smith had several different models of Maori land rights from which to draw and together they do not provide a coherent definition of take.

Apart from the obvious point that these three 'authoritative' models differed from Smith's model in the number and definition of take, there is another significant observation worth making. By the time Acheson came to consider customary rights in 1931 the ambiguities identified by both Maning and Mackay which they dealt with using 'equity' had disappeared. As time passed and the significance of title investigations in the work of the Court declined, the definition of Maori customary rights became much clearer.

MacCormick's model of Maori customary rights, published ten years after Acheson's essay, does not refer directly to the earlier judicial summary but he was not nearly so certain that his was the only way of dealing with take. He had practised as a solicitor specialising in Maori land since the mid-1880s and was appointed to the bench in 1906. Over sixty years he had seen the work of the Court change fundamentally, from title investigations to the administration of Maori land. As the more experienced judge, he admitted that Maori custom was created by the Court through its considerable discretion in relation to such questions. And it was the judges 'sense of justice' which governed the 'modification' of Maori customary rights to meet the Court's requirements. So there were take, there were rights and there were valid claims but these were determined by judges. In this sense, MacCormick's account was very different to that of Acheson who argued that Maori rights to land were independent of the Court and that the Court simply applied these customary rights in title investigations.

Smith codified the practice of the Court by imposing twentieth-century order retrospectively on nineteenth-century flexibility. Bureaucratic prescription and knowledge displaced colonial confusion and contingent understandings. Yet as this chapter has shown, even the judges who were adjudicating on questions of Maori custom and usage in the nineteenth-century were very ambivalent about the possibility of a group of rules which governed their decisions. Smith had to find something on which their judgments rested: statute required that the Court determine the owners according to Maori custom and usage. The fact that custom and usage was so elusive that the judges themselves were unwilling to define their practice clearly is particularly significant given the discretion statute had always given the Court in such matters. The extent to which each judge and assessor simply dealt with the

circumstances before them is therefore very much a valid question. Certainly, Smith's take are not the starting point many historians or indeed judges have assumed them to be when describing the process by which Maori customary land tenure was converted to individual title by the Native Land Court in the first sixty years of its operation. It is necessary, instead, to start with a broad and rigorous analysis of the practice of the Court using its principal records – the very detailed minutes of the Court's proceedings.

## PAKEHA JUDGES AND MAORI ASSESSORS

Most of the judges appointed to the Native Land Court had extensive experience in dealing with Maori and with Maori customary rights to land. This experience might be derived from a previous work as a interpreter, surveyor, land purchase agent, military officer, registrar of the Court or (much less often) lawyer. In this chapter it is argued that judges had to engage with Maori customary rights to land; the whole function of the Court was to establish a stable and settled title for the purposes of alienation. The only way the Court could achieve this was by engaging with the relationships and rights as they were argued by Maori claimants in the Court and where disputes arose they needed to be able to resolve them. The judges were ably assisted in this task by the Maori assessors. In much of the existing historiography, the assessors are marginalised as irrelevant. In contrast, this chapter argues that the assessors could be crucial to the resolution of customary disputes and that they did have real power in the Court. For this reason, this thesis refers to the Court, as constituted by a judge and one or more assessors, rather than referring to the judge only.

The judges and assessors were the two groups who were central to the process of negotiating the resolution of disputed claims. Part Three of this thesis deals with the different ways Maori argued customary rights before the Court and how the Court went about resolving these disputed claims. This chapter gives a brief overview of how the Court operated when hearing claims based on customary rights to land but focuses primarily on the judges and the assessors. Agents and lawyers representing Maori claimants will be referred to briefly but the emphasis is placed on the men who presided over sittings of the Court. The role of such representatives will become clearer when examining the way in which Maori argued their claims in the Court in subsequent chapters.

In relation to the judges, this chapter places emphasis on the different backgrounds of these men and the common pathways which led them to the bench of the Native Land Court. The judges were drawn from four particular groups. The first were the lawyers. During the nineteenth-century, very few of the judges appointed had legal training or legal experience but there were a small number. However, three

further groups provided the training ground for the judges throughout the nineteenth and early twentieth centuries. The first were drawn from missionary families or were associated with the New Zealand Company, especially as surveyors. Most of the early judges were appointed from this background. The second group were soldiers who fought in the wars of the 1860s. They were often closely associated with the Maori contingents who fought with imperial troops during these conflicts and were appointed to the bench from the early 1880s. The final group who were appointed from the mid-1890s were from within the Court's own institutional structure and they were the clerks and registrars who were promoted through the public service and were finally appointed judges. Their background and experience in working with Maori claimants and applicants was the basis for their appointment.

The common characteristic which draws these three diverse groups together is that all had long experience in dealing with Maori customary rights to land. The surveyors who had worked on the early Crown and New Zealand Company purchases were forced to deal with disputes among Maori over rights to pieces of land on the ground. The soldiers turned judges had lived, led and fought with the Maori warriors who were quite often fighting not for the Crown but as part of long and clearly defined conflicts over land with neighbouring tribes. As for the clerks, they had many years experience of dealing with applications for investigation of title and the institutional framework in which the Court operated.

In all these instances, the judges had a background of dealing with Maori customary rights to land. Ironically, it was generally the lawyers who had little or no prior experience of dealing with those rights. There are obvious exceptions to this suggestion, such as F.D. Fenton and R.N. Jones, but generally it was the lawyers turned judges who had the least experience. Those most likely to codify custom, therefore, were often in the weakest position to do so. Among the vast majority in the three groups referred to above, who were not practising lawyers prior to their appointment, the main prerequisite for the job was experience of working with Maori and with Maori land. And there was good reason for this. As will be shown in subsequent chapters, resolving disputes to land was a difficult task, especially when the key function of the Court was to provide stable and settled title to Maori land.

The failure to do so entirely undermined the operation of the Court because avenues were available, in the form of rehearing, appeal and petition, for Maori claimants to continue litigation long after the original decision. There was a cost consideration in doing so and there is plenty of evidence to show that continuing the fight beyond the initial hearing did cause significant economic problems for those who continued disputes over customary rights to land in this institutional framework. But there is also a great deal of evidence to show that Maori took these opportunities to continue the fight and would go all the way to the Court of Appeal if necessary. What all this meant is that the failure of the Native Land Court to negotiate a path agreeable to all those claimants at the initial hearing tied the land up in litigation for

many many years. This issue will be examined in much greater detail in a subsequent chapter but the point here is that the failure of the judges to engage with and respond to the claims of the Maori asserting rights in relation to a particular block of land meant the Court failed to provide a stable and settled title to provide the basis on which purchasers, whether Crown or private, could negotiate.

There has, in the past, been a tendency to produce one dimensional caricatures of judges which do not reflect their role in the Court process.<sup>1</sup> They are generally portrayed as, if not racist then righteously ethnocentric and in consequence almost entirely unable to comprehend the diverse and complex nature of Maori customary rights to land. The argument here is entirely the opposite. That is, the judges had to engage and respond to the claims argued before them and to help negotiate a resolution where disputes existed to establish an effective title. Judges could not impose their will on the various kinship groups asserting claims before them because their decisions were always subject to appeal and rehearing and as noted above this avenue to challenge was used regularly when the Court failed to provide a satisfactory resolution of claims. As will be shown below, the judges had to have and usually did have long experience of dealing with Maori customary rights to land. They had to or else the Court would have been entirely irrelevant as a mechanism for establishing title to Maori land.

Having examined the judges, the second half of this chapter deals with the other group required to constitute a Court until 1909. They are the assessors. In some of the existing historiography, the assessors are dismissed as entirely irrelevant, having a very limited role when the Court was hearing claims to land and no role in a decision-making process dominated by the judge.<sup>2</sup> In fact, the minute books suggest entirely the opposite and it is argued here that the assessors were central to the resolution of disputed claims to land. There were many more assessors than judges appointed during the nineteenth-century and no attempt has been made here to collate the entire list. Moreover, with the exception of a number of prominent tribal leaders, very little is known of the vast majority of assessors and again no attempt has been made here to provide a general picture of their collective background. Rather, emphasis has been placed on the examples which illustrate the role of the assessor in the Court and the occasions which suggest their position was of some significance. The Court had to engage with the claims of the Maori who appeared before them and

<sup>1</sup> See, for example, Alan Ward, *A Show of Justice. Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland: Auckland University Press, 1973, p.216 and p.289; Angela Ballara, *Iwi. The Dynamics of Maori Tribal Organisation from c.1769 to c.1945*, Wellington: Victoria University Press, 1998, pp.88-92; and, David V. Williams, 'Te Kooti Tango Whenua.' *The Native Land Court 1864-1909*, Wellington: Huia, 1999, pp.152-55.

<sup>2</sup> See, for example, Alan Ward, 'Law and Law-enforcement on the New Zealand Frontier, 1840-1893,' *New Zealand Journal of History*, 5:2 (October 1971), p.141; and, Williams, 'Te Kooti Tango Whenua,' p.325.

the assessors, it will be argued, played a central role in defining and resolving such disputes.

During the nineteenth-century, the first thirty-five years of the Court's existence, forty-two judges were appointed to the Native Land Court bench. In the twenty-eight years after the turn of the century, a further fifteen judges were appointed. Their backgrounds were extraordinarily diverse. Some, surprisingly few though, had a legal background. The chief judge was usually legally trained – G.B. Davy was the one exception. A number had dabbled in provincial and national politics although there were also some career politicians. Of the earlier judges, many were associated with the New Zealand Company, particularly as surveyors, and others were descended from early missionary families. A second, later, group of judges had served in some capacity in the conflicts of the 1860s. From the late nineteenth-century, there was an increasing preference for selecting judges from the staff of the Native Department. It was very common for judges to enter the Department as cadets, be promoted through the ranks of clerk, interpreter, registrar of the Court or land purchase officer and then be appointed to the bench. There were some others though who were selected from different parts of the civil service, especially those involved in the administration of land in some way. In general, all of the judges had, prior to their appointments, held positions which involved dealing with Maori land in some way.

Throughout 1865, eleven judges were appointed to the Native Land Court. Without question the most important appointment was the first: Francis Dart Fenton was appointed chief judge of the Court on 9 January 1865. The same day George Clarke and John Rogan were appointed ordinary judges. Later that year they were joined by James Mackay, W.B. White, T.H. Smith, W.L. Buller, G.F. Swainson, James Booth, H.A.H. Monro, and F.E. Maning. So many appointments were required because a number – Buller, Clarke, Mackay and White – did not last long. They retained other appointments, particularly as resident magistrates and civil commissioners, which was considered inappropriate after the re-establishment of the Court in 1865.<sup>3</sup>

All of these men were well established in New Zealand and had a long association with Maori, either through missionary activities, the New Zealand Company or trade. For example, Clarke arrived in New Zealand as a catechist with the Church Missionary Society and was later appointed Chief Protector of Aborigines by Hobson.<sup>4</sup> Buller, likewise, was closely associated with missionaries.<sup>5</sup> The son of a

<sup>3</sup> Ward, *A Show of Justice*, pp.180-81.

<sup>4</sup> Ray Grover, 'Clarke, George,' in *The Dictionary of New Zealand Biography. Volume 1, 1769-1869*, W.H. Oliver (ed.), Wellington: Allen and Unwin and the Department of Internal Affairs, 1990, pp.82-84.

Wesleyan missionary, he was raised at the mission station at Tangiteroria, and after an appointment as native interpreter at the Wellington Magistrate Court, he was rapidly promoted through the Native Department. Booth was another judge drawn from a missionary background.<sup>6</sup> He came to New Zealand to assist the CMS missionary, Richard Taylor, at Wanganui where he settled and farmed for some years. He assisted military forces who were engaged in the guerilla campaigns there.

Several other judges were former surveyors for the New Zealand Company. White, for instance, came to New Zealand and worked for the New Zealand Company on roads in the Wellington region.<sup>7</sup> Grey later appointed him Resident Magistrate there and gave him the job of settling disputes between Te Rarawa and Nga Puhi over land sales. Rogan and Smith were both surveyors of the New Zealand Company too. Rogan, born in Ireland and trained as a surveyor, was employed by the New Zealand Company and in 1840 traveled to New Zealand as a part of the advance party preparing for the arrival of settlers.<sup>8</sup> He was sent to Taranaki and eventually became assistant chief surveyor for the Company where, as settlers arrived, he was involved in the survey of land purchased from Maori. In 1854 he was appointed Land Purchase Commissioner in the Waikato and four years later was transferred to Auckland where he engaged in land purchase activities in the Kaipara district. Smith arrived at Port Nicholson in 1842 as a surveyor's cadet but three years later was appointed to the Protectorate Office at Auckland and was later sent to Maketu where he learnt Maori.<sup>9</sup> During the 1850s he held several appointments in the Native Department.

Three other judges were very early settlers who had no association with either missionary organisations or the New Zealand Company. Monro's background was neither the missionary families nor the New Zealand Company but he also gained experience in working with Maori in the Native Department.<sup>10</sup> Born in Tasmania, he arrived at the Hokianga as a child with his family in 1835, and in 1857 was appointed an interpreter in the Department at Auckland where he remained until his appointment as a judge. Swainson was another early settler: he was the second son of the first

<sup>5</sup> Ross A. Galbreath, 'Buller, Walter Lawry,' in *The Dictionary of New Zealand Biography. Volume 1, 1769-1869*, W.H. Oliver (ed.), Wellington: Allen and Unwin and the Department of Internal Affairs, 1990, pp.53-54. See also Ross Galbreath, *Walter Buller. The Reluctant Conservationist*, Wellington: GP Books, 1989.

<sup>6</sup> *The Cyclopaedia of New Zealand: Industrial, Descriptive, Historical, Biographical Facts, Figures, Illustrations*, 6 vols, Wellington: Cyclopaedia Co., 1897-1908, Volume 2: Auckland Provincial District, p.979.

<sup>7</sup> Barbara Bolt, 'William Bertram White – 1821-1910,' *Auckland-Waikato Historical Journal*, 46 (April 1985), pp.9-12.

<sup>8</sup> W.G. Russell, 'John Rogan – Surveyor and Magistrate 1821-1899,' *Auckland-Waikato Historical Journal*, 24 (April 1974), pp.32-35.

<sup>9</sup> *The Cyclopaedia of New Zealand*, Volume 2: Auckland Provincial District, p.275.

<sup>10</sup> *ibid.*

Attorney-General, William Swainson.<sup>11</sup> Like Monro, Mackay arrived in New Zealand as a child and settled with his family at Nelson.<sup>12</sup> Fluent in Maori, he was appointed assistant Native Secretary in 1858 to deal with problems involving Maori which arose out of gold mining at Nelson. He became influential under the patronage of Donald McLean and was involved in two South Island purchases, negotiations after the Waikato conflict and the negotiations to open the Hauraki region to mining. Maning, whose life as an early settler is well-known, was the only former trader appointed to the bench.<sup>13</sup> He arrived in the Hokianga in 1833 and settled there permanently, living in Maori communities and developing a business as a trader. During the 1850s he became a major timber merchant but scaled back his business activities in the early 1860s and was appointed judge of the Court amid considerable political intrigue.

Of the eleven appointments made during 1865, only seven were to actually sit as a judge. Clarke, Mackay, White and Buller held other positions as resident magistrates or civil commissioners which prevented their sitting, although Mackay did preside over one sitting at Waiheke Island in Auckland.<sup>14</sup> It is not clear that Swainson sat as a judge while Booth's role was also very limited. The most important of the first judges were Fenton, Monro, Smith and Rogan. Maning also held Courts during this time, especially in Northland, and did participate in the Aroha hearing and sittings of the Court to deal with the East Coast confiscations, but it is not clear that he was as prominent as the other four judges. There is one other observation worth raising at this point and this is the relationships between the judges. Of these early judges, White's brother-in-law, J.S. Clendon, was much later appointed a judge, James Mackay's cousin, Alexander Mackay, was subsequently a very influential judge of the Court and Walter Buller's brother-in-law, William Mair, would become another distinguished judge.

Of these first group of judges, Fenton was the only lawyer. He was no doubt the most important appointment but his importance should not be overstated. Fenton's background was very different to that of the other judges. In particular, he was a much more recent settler having trained and practised as a solicitor in Huddersfield before setting out to New Zealand in 1850 with the Canterbury

<sup>11</sup> *Australian and New Zealand Gazette*, 31 March 1860.

<sup>12</sup> Harry C. Evison, 'Mackay, James,' in *The Dictionary of New Zealand Biography. Volume 1, 1769-1869*, W.H. Oliver (ed.), Wellington, Allen and Unwin and the Department of Internal Affairs, 1990, pp.252-53.

<sup>13</sup> David Colquhoun, "'Pakeha Maori." The Early Life and Times of Frederick Edward Maning,' MA Thesis, University of Auckland, March 1984. See also David Colquhoun, 'Maning, Frederick Edward,' in *The Dictionary of New Zealand Biography. Volume 1, 1769-1869*, W.H. Oliver (ed.), Wellington: Allen and Unwin and the Department of Internal Affairs, 1990, pp.265-66.

<sup>14</sup> Waiheke Island Native Land Court minute book 1, 6 November 1865, fols 1ff.

Association.<sup>15</sup> He did not make it to Canterbury, getting off the ship at Auckland. Settling at Waikato, he farmed land there and, as an Anglican, associated himself with the local CMS mission. In 1851 Grey met him at the mission and offered him a position as clerk in the Registry of Deeds. He accepted the offer and throughout the 1850s held various appointments in the Native Department and other parts of the public service at Auckland. His well-known conflict with McLean while he was temporary native secretary caused his appointment to a position away from Auckland and in 1857 and 1858 was Resident Magistrate at Waipa and the Waikato. He returned to Auckland as an assistant law officer and was the Crown Law Officer from 1862 to 1865 when he was appointed chief judge of the Native Land Court – his last appointment in the public service and a position he retained to his retirement in 1882. Throughout this time the Court's head office and its chief judge remained at Auckland, even after the capital had transferred to Wellington. Ironically, McLean won the war: he was appointed Native Minister in 1869, a position he retained almost continuously until shortly before his death in 1876. For much of his tenure as chief judge, Fenton was forced to work with his arch-nemesis.

Despite the importance traditionally attached to Fenton's position as chief judge his significance should not be overstated. His office was based in Auckland and he seldom left the city: he did not hold many Court sittings in the more remote towns. There are a number of celebrated exceptions such as the sittings of the Compensation Court, the Kauaeranga foreshore at Thames and the South Island reserves. As the only legally trained judge he was also called on when legal questions had to be addressed. Nevertheless, Fenton stayed close to Auckland and was much more an administrator than judge. He took care of the day to day business of the Court, responded to correspondence, processed applications, prepared the *Kahiti* which contained the notices of the Court sittings and applications to be heard, prepared the documents required by the judges at sittings and processed orders as they were sent through by the judges in order that Crown grants could be issued.<sup>16</sup> The role was essentially administrative and Fenton focused on this work, supported by a registrar and clerks. Fenton himself undertook very few title investigations, sending instead the other judges of the Court out into the settlements. Later chief judges left much of the day to day office work to the registrar and spent more of their time travelling to sittings outside the main centres where they heard applications for rehearing and appeals. Fenton's importance was as an administrator whose attention was drawn to detail in maintaining the Court's records and expediting its business; as

<sup>15</sup> W.L. Renwick, 'Fenton, Francis Dart,' in *The Dictionary of New Zealand Biography. Volume 1, 1769-1869*, W.H. Oliver (ed.), Wellington: Allen and Unwin and the Department of Internal Affairs, 1990, pp.121-23.

<sup>16</sup> Fragments of the early correspondence to and from the Native Land Court Office at Auckland are held at Archives New Zealand at Auckland. See BBOP 4309 4a, Correspondence, 1874; BBOP 4309 5a, Correspondence, 1874; and, BBOP 4309 6a, Correspondence, 1875, NA, Auckland.

a judge dealing with Maori customary rights to land, his significance is much more limited.

Once this initial group of appointments settled down into investigating land as required by the Native Lands Act, no subsequent appointments were made for eight years. In fact, McLean made only three appointments to the bench. They were J.J. Symonds, Samuel Deighton and Henry Halse. Symonds, like some of the earlier judges was a former surveyor and his father was closely associated with the New Zealand Association.<sup>17</sup> A former private secretary to Grey during his first term as governor, Symonds held a variety of positions which gave him considerable experience in dealing with Maori customary rights to land: he was an acting protector of aborigines who surveyed and purchased Maori land, a former Native Secretary and resident magistrate. He had also joined the armed forces during the north wars and was elected to the House of Representatives in 1858. Symonds was a link with the earlier judges.

Deighton and Halse represented a new generation of judges who had been closely involved in the wars of the early 1860s. Deighton was of little consequence, adding the appointment of judge for the Chatham Islands, primarily for the purposes of appointing successors to owners of Maori land, to his existing responsibilities as Resident Magistrate there.<sup>18</sup> He arrived in New Zealand in 1840 and was appointed clerk and interpreter to the resident magistrate at Wanganui in 1846. He was an officer in the colonial militia during the 1860 wars and afterwards gained a position in the Native Land Purchase Department. Halse was another former soldier who was involved in the wars of the 1860s, having entered the public service in 1846 as a sergeant in the New Plymouth Armed Police. He was shortly thereafter promoted to inspector in charge of the police of the New Plymouth Province by McLean and also gained a great deal of experience working with Taranaki Maori as sub-protector of Aborigines and from 1858 commissioner of native reserves in Taranaki and assistant native secretary.

They were the first two judges to have experience of the wars but such a background would become more common, especially among the judges appointed during the 1880s. During the late 1870s the judges still tended to come from missionary families or have been New Zealand Company surveyors. An example of the former was J.A. Wilson, son of the CMS missionary, J.A. Wilson.<sup>19</sup> He fought in the Waikato war and after 1866 held a number of different positions in the civil

<sup>17</sup> 'Symonds, John Jermyn,' *A Dictionary of New Zealand Biography*, G.H. Scholefield (ed.), vol. 2, Wellington: Department of Internal Affairs, 1940, pp.355-56.

<sup>18</sup> 'Deighton, Samuel,' in *A Dictionary of New Zealand Biography*, G.H. Scholefield (ed.), vol. 1, Wellington: Department of Internal Affairs, 1940, p.199. On the nature of his appointment, see McLean to Atkinson, 23 February 1875, MA 18 2, NA, Wellington.

<sup>19</sup> *The Cyclopaedia of New Zealand*, Volume 1: Wellington Provincial District, pp.141-42.

service including Crown agent administering confiscated lands, as Land Purchase Commissioner on the East Coast and Commissioner for Tauranga Lands. Wilson was also a former provincial politician. Another with a political background was Charles Heaphy.<sup>20</sup> He arrived in Wellington as an assistant surveyor with the New Zealand Company and was later involved in surveying the military road south from Auckland and fought in the Waikato war for which he received the Victoria Cross. As chief surveyor for the general government from 1864 to 1865 he was involved in surveying the Waikato confiscations. He was elected unopposed to the General Assembly in 1867 but resigned to take up the position of commissioner of native reserves.

During the 1880s, two judges with a legal background were added to the bench. One was George Barton who was very prominent in colonial politics.<sup>21</sup> The other was F.M.P. Brookfield, a former Crown prosecutor, who was also very active in provincial politics.<sup>22</sup> Missionary families remained a source of judges in the 1880s. E.M. Williams, son of the CMS missionary Henry Williams, was appointed a judge in 1881.<sup>23</sup> Another was H.T. Clarke, son of George Clarke.<sup>24</sup> Henry Clarke had a long career in the Native Department and prior to his appointment as judge was its under secretary. Alexander Mackay had similar early connections to the Court and a long association with Ngai Tahu in the South Island where he held various positions in the Native Department.<sup>25</sup> Robert Ward was another judge appointed during this time who had a long association with the Native Department having entered the public service as a clerk and been promoted through to Native Agent at Wanganui prior to his appointment as a judge.<sup>26</sup>

Three judges appointed during the 1880s had played a significant role in the conflicts of the 1860s. The first, William Mair, also had an impeccable missionary background.<sup>27</sup> The son of an early Bay of Islands merchant and trader, he was born in New Zealand and educated by missionaries. He farmed in Northland and spent time on the Australian goldfields before returning to New Zealand in 1863 at the start of the Waikato war. He was appointed interpreter to Colonel Nixon of the Colonial

<sup>20</sup> *The Cyclopaedia of New Zealand*, Volume 2: Auckland Provincial District, p.105.

<sup>21</sup> *The Cyclopaedia of New Zealand*, Volume 1: Wellington Provincial District, p.264.

<sup>22</sup> 'Brookfield, Frederick Morris Preston,' in *A Dictionary of New Zealand Biography*, G.H. Scholefield (ed.), vol. 1, Wellington: Department of Internal Affairs, 1940, p.97.

<sup>23</sup> *The Cyclopaedia of New Zealand*, Volume 2: Auckland Provincial District, pp.275-76.

<sup>24</sup> *ibid.*, p.574.

<sup>25</sup> *The Cyclopaedia of New Zealand*, Volume 1: Wellington Provincial District, p.140. See also David A. Armstrong, 'Mackay, Alexander,' in *The Dictionary of New Zealand Biography. Volume 2, 1870-1900*, Claudia Orange (ed.), Wellington: Bridget Williams and the Department of Internal Affairs, 1993, pp.289-90.

<sup>26</sup> *The Cyclopaedia of New Zealand*, Volume 1: Wellington Provincial District, pp.140-41.

<sup>27</sup> *ibid.*, p.141. See also Johannes C. Andersen, *The Mair Family*, Wellington: Reed, 1956.

Defence Force and was present at the Waikato, Tauranga, East Coast and Urewera campaigns. He was appointed major in the New Zealand Militia in 1866 and also held a number of positions in the Native Department, particularly at the Waikato where his role was to improve relations with the kingitanga. Another soldier was David Scannell.<sup>28</sup> Born in Ireland, he enlisted as a soldier there in 1854. He arrived in New Zealand with his regiment in 1861 at Taranaki and fought in the conflicts there. In July 1866 he left the Imperial Army and joined the colonial expeditionary force and later the Armed Constabulary where he was rapidly promoted during the guerilla conflicts. Both Mair and Scannell are important judges for they undertook a huge number of title investigations. The third judge with a military background as an officer in the New Zealand Militia was H.W. Brabant.<sup>29</sup> He held a number of different positions, including commissioner of Tauranga lands and Stipendiary Magistrate on the West Coast and in Auckland and presided over a small number of sittings of the Court.

From the 1890s, judges tended to be restricted more closely to lawyers and public servants, particularly staff of Native Land Court offices – the Native Department ceased to exist from 1893, so this was no longer the source of judges it once was. One of very few exceptions was W.E. Gudgeon who like many of the judges appointed during the 1880s had served in the colonial militia and Armed Constabulary during the wars of the 1860s and subsequent guerilla fighting.<sup>30</sup> He was also a former land purchase officer on the East Coast and later Resident Magistrate for Wairoa and Waiapu. In 1880, after political disputes over land sales, he was transferred back to Taranaki and became involved in the Parihaka dispute leading one of the company's which invaded the settlement. He continued to have a close association with the colonial military forces and the police throughout the 1880s before being appointed judge in 1890.

The other judges appointed during the 1890s tended to be judges or government officials. The third chief judge, H.G. Seth-Smith, was, like Fenton, a lawyer trained in Britain, and he was, also like Fenton, appointed chief judge directly; he had not previously been appointed an ordinary judge.<sup>31</sup> He had considerable judicial experience having been District Judge and Resident Magistrate at Auckland. He was also the first president of the Polynesian Society. He retired in 1892 to return to private legal practice and was succeeded by G.B. Davy, who was not a lawyer and

<sup>28</sup> *ibid.*, p.140.

<sup>29</sup> *ibid.*, pp.1401-02; *The Cyclopaedia of New Zealand*, Volume 2: Auckland Provincial District, p.274.

<sup>30</sup> David Green, 'Gudgeon, Walter Edward,' in *The Dictionary of New Zealand Biography. Volume 2, 1870-1900*, Claudia Orange (ed.), Wellington: Bridget Williams and the Department of Internal Affairs, 1993, pp.181-83.

<sup>31</sup> *The Cyclopaedia of New Zealand*, Volume 2: Auckland Provincial District, p.281.

had not previously been appointed an ordinary judge.<sup>32</sup> Davy was a former public servant and his positions included District Land Registrar at Auckland, Registrar-General of Lands and District Judge at Wellington. Another appointment, J.M. Batham, was like Davy a former District Land Registrar.<sup>33</sup> His father-in-law was a former judge, J.J. Symonds. Among the other notable judges appointed to the bench during the 1890s, J.S. Clendon, son of the Northland trader James Reddy Clendon, was a former court clerk and Resident Magistrate.<sup>34</sup> W.J. Butler trained as a surveyor and was later appointed land purchase agent for the Wairarapa and subsequently Wanganui.<sup>35</sup> He served as private secretary to three successive native ministers: Bryce, Rolleston and Ballance.

The appointment of H.F. Edger began a tradition of Court staff becoming judges.<sup>36</sup> He was appointed a clerk in the Native Land Court at Auckland in 1879 and was later promoted to senior clerk. During this time he studied law and in 1889 was admitted to the bar. After the retirement of the registrar of the Court in 1891, he filled the vacant position for two years before he was transferred to Wellington to be registrar of the Native Land Court office there. H.D. Johnson followed Edger to the bench during the 1890s.<sup>37</sup> A former clerk and interpreter in the Native Department, he succeeded Edger as Registrar of the Court in March 1894 when the latter was appointed a judge.

After 1900, the judges were either lawyers or government officials – usually Court staff and less often from other government departments. Both the chief judges appointed in the early twentieth-century had been practising lawyers. Jackson Palmer trained in the law office of John Sheehan in the late 1880s and was active in colonial politics during the 1890s.<sup>38</sup> Palmer was not the only lawyer turned politician to become a judge. Another was Michael Gilfedder. Originally a school teacher in Southland, he entered Parliament as MHR for Wallace in 1896. He lost his seat in 1902 and trained as a lawyer, practising in Invercargill prior to his appointment. Another lawyer, R.N. Jones, led the Court's transition from investigating ownership of, to administering, Maori land.<sup>39</sup> He was appointed judge for the Tairāwhiti district in 1903 after gaining experience in Court work there and was appointed chief judge in

<sup>32</sup> *The Cyclopaedia of New Zealand*, Volume 1: Wellington Provincial District, pp.139-40.

<sup>33</sup> *ibid.*, p.1502.

<sup>34</sup> Louisa Worsfold, 'Social history of Russell,' 1965, qMS-2294, ATL, Wellington.

<sup>35</sup> *The Cyclopaedia of New Zealand*, Volume 1: Wellington Provincial District, p.141.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*, pp.142-43.

<sup>38</sup> *The Cyclopaedia of New Zealand*, Volume 2: Auckland Provincial District, pp.839-40.

<sup>39</sup> Bryan D. Gilling, 'Jones, Robert Noble,' in *The Dictionary of New Zealand Biography. Volume 4, 1921-1940*, Claudia Orange (ed.), Auckland: Auckland University Press with Bridget Williams Books and the Department of Internal Affairs, 1998, pp.259-60.

1919. Other lawyers to be appointed to the bench during this time were C.E. MacCormick of Auckland, a partner in the legal practice Dufaur and MacCormick; and W.E. Rawson of Wellington, a partner in the law firm Bunny, Rawson and Petherick.<sup>40</sup> H.F. Ayson was another lawyer appointed to the Native Land Court bench, but he remained there for only three years before becoming Chief Justice and Resident Commissioner for the Cook Islands.<sup>41</sup>

Two government officials who were legally trained were also appointed judges of the Court. The appointment of T.H. Wilson in 1911, son of Major John Wilson and his Ngati Ruanui wife, caused considerable excitement in the colonial press as he was the first judge of Maori descent.<sup>42</sup> He was educated at Waitaki High School and articled to a Cambridge solicitor and later the Auckland law firm Russell and Campbell. He was admitted as a solicitor of the Supreme Court at Auckland before moving to Wellington where he joined the lands branch of the Railways Department. He was eventually given charge of conveyancing work and was chief clerk of the land branch of the Department at the time of his appointment. The other government official who trained as a lawyer was F.O.V. Acheson.<sup>43</sup> While working as a clerk in the public service Acheson studied for a law degree. He later held positions in the Native Department and Native Land Purchase Board.

Five other judges were former officers of the Native Land Court or the Native Department and none were legally trained. Three were former registrars of the Court. J.W. Browne was appointed to the bench in 1905 having been the Registrar of the Court since 1894.<sup>44</sup> He was replaced as registrar by A.G. Holland, who had joined the Native Department as a clerk and was subsequently appointed a judge.<sup>45</sup> The other registrar to become a judge was R.C. Sim.<sup>46</sup> Born and educated at Wanganui, like Holland, Sim joined the Native Department as a clerk and was promoted to registrar first at Gisborne and then Wellington before his appointment as a judge. Two other judges, T.W. Fisher and Harold Carr, were both former staff of the Native

<sup>40</sup> *The Cyclopaedia of New Zealand*, Volume 2: Auckland Provincial District, p.278 (MacCormick); *New Zealand Free Lance*, 8 September 1906 (Rawson).

<sup>41</sup> Ron Crocombe, 'Ayson, Hugh Fraser,' in *The Dictionary of New Zealand Biography. Volume 4, 1921-1940*, Claudia Orange (ed.), Auckland: Auckland University Press with Bridget Williams Books and the Department of Internal Affairs, 1998, p.26.

<sup>42</sup> *New Zealand Free Lance*, 17 December 1910.

<sup>43</sup> John Acheson and Richard Boast, 'Acheson, Frank Oswald Victor,' in *The Dictionary of New Zealand Biography. Volume 4, 1921-1940*, Claudia Orange (ed.), Auckland: Auckland University Press with Bridget Williams Books and the Department of Internal Affairs, 1998, pp.1-3.

<sup>44</sup> *The Cyclopaedia of New Zealand*, Volume 2: Auckland Provincial District, p.275.

<sup>45</sup> *Dominion*, 21 April 1954.

<sup>46</sup> *Who's Who in New Zealand and the Western Pacific*, Wellington: the Rangatira Press, 1932, p.313.

Department.<sup>47</sup> Fisher had held a number of positions in relation to the West Coast Settlement Reserves and was also Under Secretary of the Department from 1907. Carr joined the Native Land Court as a clerk and was promoted through the office. His father-in-law was Patrick Sheridan, the government's mandarin for several decades in matters relating to the acquisition of Maori land.

Assessors were always required to sit with a judge to constitute the Court; under the original 1865 provisions, two assessors were required but this was reduced to one in 1867. They were rendered optional in 1873 but the following year, after petitions were received from Maori, the legislation was amended to make an assessor mandatory and this requirement was retained until 1909. As suggested above, some accounts of the Court dismiss the assessors as irrelevant to the process of investigating title and reaching decisions. The evidence presented in support of this interpretation is very limited but there are two possible pieces of evidence which might support this view and they will be examined below. One consequence of this interpretation is that very little is known of the background of the assessors. While judges were prominent public figures who on the whole left a great deal of evidence of their existence, this is not the case with assessors. There are some who were very prominent and well-known Maori leaders, such as Paratene Ngata of Ngati Porou and Te Heuheu Tukino of Ngati Tuwharetoa, but the majority were people who, although no doubt prominent in their own communities, did not have a national reputation. There were many many assessors and appointments were made regularly and published in the *New Zealand Gazette*.

In the early years there is correspondence which shows that applications were made to the chief judge at Auckland and the chief judge also received and solicited suggestions from individual judges. These applications or suggestions were forwarded by the chief judge with a recommendation in support of the nomination to the Native Minister who then made the appointment which was published in the gazette. Little is known of some of the early assessors. People like Hori Riwhi of Whirinaki or Wiremu Mita Hikairo of Rotorua were important assessors during the first years of the Court's existence but little is known of them.<sup>48</sup> Especially in the first two decades after its establishment, certain judges were closely associated with

<sup>47</sup> *Who's Who in New Zealand and the Western Pacific*, Napier: G.W. Venables and Co, 1908, p.53 (Fisher); *Evening Post*, 12 March 1973 (Carr). See also Vincent O'Malley, 'Carr, Harold Herbert,' in *The Dictionary of New Zealand Biography. Volume 5, 1941-1960*, Claudia Orange (ed.), Auckland: Auckland University Press with Bridget Williams Books and the Department of Internal Affairs, 2000, pp.94-95.

<sup>48</sup> Hikairo belonged to Ngati Rangiwewehi and is mentioned in a biography of his father, Wiremu Hikairo, who led Ngati Rangiwewehi through the conflicts of the first half of the nineteenth-century. See Jennifer Curnow, 'Hikairo, Wiremu,' in *The Dictionary of New Zealand Biography. Volume 1, 1769-1869*, W.H. Oliver (ed.), Wellington: Allen and Unwin and the Department of Internal Affairs, 1990, pp.188-89.

particular assessors. Judge Monro and W.M. Hikairo worked together in Hauraki for instance. Assessors could only work in certain areas too. They, like the judges, had to be impartial and they were selected to sit at particular sittings because they had no relationship with the local people; this was a significant issue on occasion as will be shown below.

No attempt has been made to produce a comprehensive list of assessors from the gazette but a record book of a large number of assessors was prepared by the Native Land Court.<sup>49</sup> The list is not comprehensive and does not appear to include the names of prominent assessors who sat in the Court during its first twenty years. It contains the names of over 130 assessors many of whom sat in the 1890s and early years of the twentieth-century. It also shows their place of residence and the broad geographical spread from which the assessors were drawn. Those appointed were not confined to one geographical or tribal location. They came from Hokianga in the north to Kaiapoi in the south. Some of the more prominent assessors included John Bryers of Rawene, George Cook of Foxton, Hori Ngatai of Tauranga, Hemi Erueti of Kawhia, Henare Kaihau of Waiuku, Hamiora Mangakahia of Mercury Bay, Hohepa Mataitaua of Thames, Hori Tait of Rotorua, Hemana Pokiha of Maketu, Kamariera Te Wharepapa of Whangarei, Karaka Tarawhiti of Huntly, John Ormsby and Pepene Eketone both of Otorohanga, Retireti Tapihana of Maketu, Tuta Nihoniho of Gisborne, Wiremu Pokiha of Akuaku and Ratema Te Awekotuku of Ohinemutu.

In 1906, Apirana Ngata and Hone Heke with the Under Secretary of the Native Department, H.F. Edger, revised the list of assessors, removing those who had died or were incapable of attending a Court sitting and recommended a number of new appointments.<sup>50</sup> Others wrote directly to James Carroll, the Native Minister, asking to be appointed an assessor.<sup>51</sup> The practice of soliciting names also continued although at this time the suggestions came from the Maori members of the House of Representatives. The list contained a total of 62 names and they were divided into regions. Seven came from North Auckland, ten from the Waikato and Hauraki, eight from the West Coast (Taranaki and Manawatu), fifteen from the Bay of Plenty, Whakatane and Opotiki, sixteen from the East Coast (including Gisborne, Napier and Hastings), and six were appointed from the South Island.

Ironically enough, updating the list was shortly thereafter rendered irrelevant for in the Native Land Act 1909, Carroll although retaining the assessors, amended the statute and allowed the Court to sit without an assessor. There would still be assessors but the question of whether they were required was left to the discretion of the presiding judge. The Native Minister told the House that the assessor 'will only

<sup>49</sup> See 'Native Land Court, appointment of assessors,' MA 18 3, NA, Wellington.

<sup>50</sup> Ngata to Carroll, 23 October 1906, *ibid*.

<sup>51</sup> See for example, William Fox (Wiremu Pokiha) of Hawera to Carroll, 2 April 1907; and, K.T. Te Ahu of Huntly to Carroll, 14 June 1909, *ibid*.

be called in when his assistance is required by the Judge.’<sup>52</sup> And it would appear that even in the instances of title investigations, judges did not bother with an assessor. The celebrated and controversial cases of Moerangi and Mokoia, both heard after the requirement for an assessor to constitute the Court was relaxed, were heard by a Court where the (same) judge sat alone without an assessor.

This was a major change although its impact on the Court’s activities was probably limited by the shift in the Court’s business away from the investigation of title towards more routine matters such as succession, partition and incorporation. Carroll’s reason for the change was brief, blunt and quite off-hand: ‘This, from a monetary standpoint, is an important amendment, and will tend to a saving of something like £3,000.’ This was the only reason given and it would appear the assessors were disposed of for no other reason than that of economy. The Court overall would be cheaper to run by reducing the number of people statute required to constitute a Court. After over forty years of playing a central role in the Court’s investigation of title to Maori customary land the assessors were dispensed with because the Government no longer wanted to meet the cost of paying them.

It is not clear how assessors were appointed to specific Court sittings. In general, the practice appears to have been for individual judges, when appointed by the chief judge to preside over a sitting, to nominate an assessor and arrange the attendance of that assessor at the Court hearing to constitute a Native Land Court. What is clear is that the assessors were central to the resolution of disputes among Maori over customary rights to land and the minute book contain a considerable volume of evidence which shows assessors participating in Court hearings, often in very significant ways. There is also evidence to show that Maori claimants in the Court attached a great deal of importance to the assessors. Examples of both will be examined below. First, however, some attention will be given to the evidence drawn on to support the view that the role of assessors was very circumscribed. There are three main sources: Maning’s correspondence, Te Wheoro’s opinion of assessors and the decision in the De Hirsch case.

In the first instance, Alan Ward concludes ‘the extent of his [the assessor’s] influence depended very much on the attitude of the presiding judge.’<sup>53</sup> The basis for this statement is Judge Maning’s private correspondence in which he ‘boasted that he took no account of his Assessors’ opinions and bemoaned his misfortune at having to sit “cheek by jowl” with them for days on end in the court.’ Ward also quotes Wiremu Te Wheoro’s considerable disillusionment with the position of the assessor in the Court. Te Wheoro’s statements were made during Haultain’s investigation of the Native Land Court in 1871. With Paora Tuhaere, Te Wheoro wanted to do away with assessors entirely stating:

<sup>52</sup> *NZPD*, 148, (1909), p.1100.

<sup>53</sup> Ward, ‘Law and Law-enforcement on the New Zealand Frontier, 1840-1893,’ p.141.

They are of no use, and have little or nothing to say to the cases that are being tried; they sit like dummies, and only think of the pay they are going to get. Wiremu Hikairo is perhaps an exception, but he was taught at school. None of the other Assessors have done any good, and always support the side in which they have friends or other interest.<sup>54</sup>

Te Wheoro had earlier described assessors as 'blocks of wood' who 'pays no regard to the questions affecting the land, and in some cases he is biased through his relationship to the parties.'<sup>55</sup> Wiremu Hikairo, however, had a different view and endorsed the work of the assessors: 'There are some intelligent men amongst those generally employed, and there are others who care very little for the duties of their office, and think only of the pay they are to get.' He believed that those who lost their case often accused the assessor of bias, and it was likely that the recent decision in the Te Aroha block, against Te Wheoro, was one cause of his trenchant criticism of assessors in general.

There is one other piece of evidence which suggests the marginal position of the assessors. Decisions of the Court were generally given jointly by the judge and assessor. The only instance found where a judge and assessor presented two decisions (which nevertheless concurred) involved the case of *De Hirsch v. Whitaker and Lndon*, involving the Kauaeranga lands at Thames. There the judge was H.A.H. Monro and the assessor Wiremu M. Hikairo. Given in January 1870, the decision involved an amendment to the Court's certificate for the purposes of validating a lease. Judge Monro gave his decision and Hikairo gave his decision. The case was one which caused considerable political controversy and the papers were all published in the *AJHR*. In the first sentence of his brief decision, Hikairo stated that 'Many difficult words have been used by the lawyers during this investigation, which I have been unable to catch or understand.'<sup>56</sup> He went on in fact to identify what he considered the key issues in the case, proceeded to state the principles of Maori custom which applied to the situation and reached a decision on this basis. But the damage was done in the first sentence: admitting he did not know what was going on at times meant he was condemned by his own words. This interpretation of the role of assessors is one widely accepted in the current historiography which, along with the other fragments of evidence referred to above, points toward the marginalisation of the assessors in the Court process.

The Court's own minutes of its proceedings, and other evidence, would suggest otherwise. It is quite clear from the contents of the minute books themselves. Notations in the margin of each page usually show when the assessor was cross-

<sup>54</sup> 'Joint Evidence given by Te Wheoro and Paora Tuhaere,' 18 February 1871, *AJHR*, A-2A, p.26.

<sup>55</sup> Te Wheoro to Haultain, 23 May 1870, *AJHR*, A-2A, p.28.

<sup>56</sup> 'Petition of John Lndon and Frederick A. Whitaker,' *AJHR*, 1870, G-1.

examining a witness and often show both the questions asked and the answers given. For this reason, it is possible, when considering these exchanges in relation to statements made by others involved in a title investigation, to attach some importance to the questions asked by an assessor.

In general, the minutes show that the assessors played a central and often pivotal role in the Court's operation. When, especially in the later years of the nineteenth-century, disputes between kinship groups became particularly intractable as one denied the claims and evidence of the other and vice versa, it was often the assessor who questioned witnesses on ancestors, whakapapa, the location of ancestral sites on the land and the occupation of the land by the witness's kinship group and elders. It was the assessor who was able to identify the significant parts of a witness' testimony, probe ambiguities and clarify contradictions exposed by cross-examination. In some instances it was the assessor who questioned witnesses extensively while the judge asked no questions at all. Where the disputes were intense, witnesses were seldom able to avoid the questions of the assessor.

The assessors played an active role in all cases but some specific examples are useful to further illustrate that this pattern was widespread both over time and place. These are, it should be emphasised, typical rather than exceptional. In both Puhipuhi, heard at Kawakawa in April 1882 and Whakahokiatapango, heard at Otaki in July and August 1898, the assessors, Pirimi Mataiawhea and Atanatiu Te Kairangi respectively, were very active in questioning witnesses on their claims.<sup>57</sup> In the latter case, and in many other instances, at least one of the witnesses, Hakaria Ringakura, was questioned by the assessor but not the judge. Another example which demonstrates the role played by assessors is the Waimana block. It was first dealt with at a hearing at Opotiki in June 1878.<sup>58</sup> The subsequent rehearing was conducted at Opotiki in March 1880 by Judge Monro and Assessor Hone Peeti.<sup>59</sup> The land was the subject of considerable dispute between Tuhoe and Upokorehe. Both the judge and the assessor, but particularly Hone Peeti, questioned witnesses at some length as to the nature of the conflicts between the two tribes.

Beyond the Court's own minute books, there is other evidence which demonstrates the role of assessors in its operation. In the first instance, the correspondence of Paratene Ngata, father of Apirana, would suggest that assessors were central rather than marginal figures in the Court. Paratene was an assessor of the Court and with Judge Mair heard the claims to the Rohe Potae lands. The Court sat for four years at Kihikihi, Otorohanga and Kawhia from 1882 until 1887. According to Ranginui Walker, Paratene resigned as an assessor 'disenchanted over the disparity

<sup>57</sup> Northern Native Land Court minute book, 5, 18 April 1882, fol. 151ff; Otaki Native Land Court minute book 31A, 12 July 1898, fol. 299ff.

<sup>58</sup> Opotiki Native Land Court minute book 1, 11 June 1878, fol. 22ff.

<sup>59</sup> *ibid.*, 8 March 1880, fol. 299ff.

in pay between himself and Judge William Mair.’<sup>60</sup> Walker quotes from Paratene’s journal: ‘I did the bulk of the work but my colleague got the big money.’ The work, according to Walker, was a source of pride for Paratene because none of the cases were subject to an appeal.

Governments took the judicial integrity of assessors very seriously too. In September 1885 the old political war horse and muckraker, Sir George Grey, rose in the House of Representatives to ask the Native Minister, John Ballance, what action he intended to take in relation to an allegation of corruption made by the chief judge of the Native Land Court against an assessor. He quoted, to this effect, from a decision of chief judge on an application for a rehearing of the Maungatautari block:

But this much I am satisfied of: that the Assessor, shortly before the case and during its progress, did receive from a Mr Moon pecuniary accommodation; and I do not imagine that the distinction between that and bribery can be worth considering, always assuming the transaction to have been done with a view of affecting the Assessor’s judgment in the interest of any the parties.<sup>61</sup>

The entire proceedings relating to this block had recently been considered by the Native Affairs Committee and Grey wanted the government to hold an inquiry into the allegations as recommended by the committee. Grey had no doubt the assessor had been bribed and wanted the government to pass legislation to have the case reheard. Te Ao agreed, telling the House that the assessor had corruptly inserted his wife and children into the Court’s certificate under false names. He too wanted title to the block reheard. In response, Ballance, although at pains to emphasise that he had no information on the validity of the allegation, announced that an inquiry into the conduct of the assessor would be held.

The District Judge and Resident Magistrate at Auckland, H.G. Seth-Smith, was appointed by special commission to investigate the allegations made against the assessor who was identified in the report as Waata Tipa. The Native Minister also asked him to investigate allegations of bribery made against another assessor, Pomare Kingi. After hearing evidence from those involved, except Waata Tipa, Seth-Smith concluded that money had been lent to Waata prior to and after the hearing of Maungatautari. He found the circumstances in which money was lent to Waata and subsequently repaid did not support any charge of bribery. The allegations against Kingi were similar and Seth-Smith found that the money lent to him was repaid before the conclusion of the case. Seth-Smith did not think the allegation of corruption could be sustained in this instance either. He nevertheless concluded his report by stating:

<sup>60</sup> Ranginui Walker, *He Tipua. The Life and Times of Sir Apirana Ngata*, Auckland: Viking, 2001, p.61.

<sup>61</sup> *NZPD*, 53 (1885), p.448.

While it seems to me that the evidence does not disclose any corrupt motive on the part of Waata Tipa or Pomare Kingi, or of the persons from whom they respectively obtained loans of money, I would call attention to the fact that in both cases the money was borrowed by a person holding a judicial office from another who was interested in the pending proceedings, and the transactions cannot in any circumstances be regarded as otherwise than improper.<sup>62</sup>

Such allegations against judicial officers were extremely serious and Ballance's response would suggest that the role of the assessors was one to which importance was attached by the government and other judges.

Maori likewise attached some importance to the position of the assessor and were quick to raise questions about a particular assessor if there was the possibility that they might be related to a particular kinship group appearing in the Court. For example, there was discussion during a sitting at Cambridge over the assessor who had been appointed to sit with Judges Williams and O'Brien at the rehearing of the Whakamaru Maungaiti block which was scheduled to begin in late November 1882. Akuhata Taupaea of Tauranga had been nominated and Judge Williams announced that 'he had heard that objections were raised to the Assessor who had been selected.'<sup>63</sup> He told those present that 'he could not take cognizance of any mere outside talk, he wished the parties interested to state in open Court their objections, if any, to the man in question.' There were indeed objections and the minutes record the general view that those present 'considered him to be far too nearly connected in blood with the Ngati Raukawa, to be able to pronounce an impartial and satisfactory judgment on the question of any lands in this District.' Further discussion followed regarding 'a more suitable person' and it was decided to wire the Registrar in Auckland and asked him 'to endeavour to obtain the services of Rakena Wi Kaitaia of Mangonui.'

Similar issues arose during a sitting at Ohinemuri in August 1889 before Judge Scannell and Assessor Mita Taupopoki. The cross-examination of witnesses during the hearing of Komata North No. 1 was interrupted on the afternoon of 6 September. The Court was in the process of hearing claims for inclusion in the lists of names by people of Ngati Tamatera of Marutuahu. All present discussed at some length a concern among several claimants that the Assessor was related to people interested in claims that were to come before the Court. A letter had been sent to the chief judge in Auckland and forwarded to the Court for consideration. It stated that the Assessor was related to Ngati Tamatera. The complainants were able to address the Court and were questioned by the Assessor and the Judge. There were also allegations that the

<sup>62</sup> 'Report of Inquiry by Mr Commissioner H.G.S. Smith into Charges of Bribery Against Certain Native Land Court Assessors,' *AJHR*, 1886, G-13.

<sup>63</sup> Waikato Native Land Court minute book 8, 17 November 1882, fol. 215.

Assessor had improperly discussed the cases with people he was supposed to be related to. The claimants, against whom the decision had recently been given, objected to the Assessor. The Assessor belonged to Tuhourangi and one of the party's in a claim alleged Tuhourangi had been welcomed by Ngati Tamatera and were connected. This was rejected by Ngati Tamatera speakers. However, the Assessor announced the following day that he would stand aside: 'The Assessor informs those present that he has expressed a wish to be relieved because some persons have stated they will withdraw their cases if he continues sitting.'<sup>64</sup>

The role of assessors in the decisions of the Court is much more difficult to assess. This is primarily because the decisions of the Court were generally issued jointly by the judge and assessor. They were usually expressed using plural personal pronouns (we) and presented as a collaborate decision rather than as the view of the judge alone.<sup>65</sup> Nevertheless it is impossible to state with certainty that the assessors were excluded from the decision-making process by the judge. The circumstances of each case no doubt depended heavily on the willingness of the judge to allow the assessor to participate. There is little doubt that the Court was an environment in which the assessor could play an active role if given the opportunity. The minute books show that they took an active role in examining witnesses. And the minutes of the Court suggest that not only were assessors extremely active during hearings, they were crucial to the resolution of difficult issues and significant disputes. There are even indications in the minutes that judges relied on and deferred to the experience and insight of the assessors in these situations. An assessor never sat alone without a judge but could take care of procedural matters, such as adjournments, if the judge was ill or late for the hearing. The minute books do not provide any indication as to the role of the assessors in the decisions of the Court but it is clear from their intervention during the hearing that they often played an important role in clarifying evidence and resolving disputes over claims.

The case of Waotu North illustrates the ability of the assessor to play a key role in the Court's proceedings. The Court heard claims to the block at Cambridge in October 1882.<sup>66</sup> Before Judge Williams and Assessor Hori Riwhi (George Leef), the

<sup>64</sup> Hauraki Native Land Court minute book 23, 6 September 1889, fol. 45.

<sup>65</sup> The only instance found of a situation where the decision was partly presented using a singular personal pronoun was the case of Pukeamoamo heard at Napier in November 1880. This sitting of the Court was one of the few occasions at which Chief Judge F.D. Fenton presided and he was joined by the novice Judge O'Brien (who was appointed the previous month) and the experienced Assessor Wiremu M. Hikairo. In this instance the chief judge read the decision and most of the decision was expressed in the usual way in terms of judicial collaboration and the use of the personal pronoun 'we' but at one point digressed into his own views on Maori custom and expressed himself using the singular personal pronoun. This was probably Fenton's last major sitting as chief judge before his retirement was announced the following year. For this decision, see Napier Native Land Court minute book 6, 13 November 1880, fol. 40.

<sup>66</sup> Waikato Native Land Court minute book 8, 12 October 1882, fol. 3ff.

sitting degenerated into a farce but one in which the capacity of an assessor like Hori Riwhi to influence proceedings can be examined. The hearing of Waotu North was not a major problem although the presence of both Sheehan and Buller representing opposing parties to the case was an immediate difficulty as they were constantly addressing the Court in respect of the various decisions that were made to bring the investigation of the block to a conclusion. Neither played a major role in the actual conduct of the investigation; Buller was present but did not call or cross-examine witnesses.

Claims were asserted by a number of kinship groups, all associated with Ngati Raukawa, in the usual way and witnesses gave evidence in support of these claims and were cross-examined by the Maori agents representing other parties. The minutes show that Buller represented five of the seven different claimant groups but each was represented in the Court at this stage of the hearing by their own Maori agent. After hearing evidence for about six weeks, the Court gave its decision on their claims. In reaching its decision, the Court divided the land among the various kinship groups according to its conclusion on the strength of their claim: the main dispute appears to have been the rights of those whose parents had migrated to Kapiti after the battle of Matamata and the Court found strongly in favour of those who remained.

It was at this point in the hearing that the Court lost control of the proceedings. Major problems arose in subdividing the land and settling the lists. The key issues appear to have been the question of the inclusion of those who had emigrated to Kapiti and whether one chief who claimed with one hapu could also seek inclusion through another hapu from which he was descended. The lists remained incomplete by the time the Court adjourned for Christmas and a great deal of further evidence had to be heard. The Court resumed the following year in early February but resolving the lists was still impossible. Sheehan and Buller continued to represent opposing parties. Lists were submitted and a further three days of evidence was heard regarding personal occupation and whakapapa. Judge Williams was, by this time, becoming extremely agitated. Another problem then arose when on 25 February, the judge announced 'that he was compelled with regret to inform the claimants and others that the Court had been unable to arrive at an agreement' on the issue of the inclusion of a particular hapu.<sup>67</sup> He advised the claimants to reach agreement by themselves and told those present that he was writing to the chief judge to inform him of the situation. Two days later it was announced that Chief Judge Macdonald was on his way from Auckland.<sup>68</sup>

The following day, 28 February, the Court sat and was joined by Macdonald and Puckey. No agreement on the list had been reached over night. After some

<sup>67</sup> Waikato Native Land Court minute book 10, 25 February 1883, fol. 92.

<sup>68</sup> *ibid.*, 27 February 1883, fol. 93.

discussion, the chief judge announced 'that it was proposed that one or other of the members of the present Court, for the purpose of advancing the case (and for that purpose only) should "pro forma" concur in the opinion of the other.'<sup>69</sup> The unsuccessful party would then apply for a rehearing and 'while being granted as to this portion of the Case only (viz. the admission or exclusion of the 16 names) would enable the Court as newly constituted by himself and Judge Puckey, to hear the case over again at once.' At this point the chief judge and Judge Puckey left the Court and Judge Williams announced that 'acting under the suggestion of the Chief Judge and for the purpose of advancing the case he would waive his own opinion and deliver the Judgment of the Court in compliance with that of the Assessor.' That decision excluded a number of those represented by Buller.

The chief judge then returned to the Court and Buller applied for a rehearing. After lunch, the Court resumed constituted by Chief Judge Macdonald, Judge Puckey and Assessor Hori Riwhi. After dealing with a number of other applications, the Court proceeded to hear further evidence regarding the inclusion of Buller's clients. This took one morning followed by addresses from Buller and Sheehan the same afternoon. The Court gave its decision the following day observing that the claims of those seeking inclusion 'has been the subject of protracted and (we regret to say) to the Judge and Assessor who presided in the earlier stage of the case, somewhat painful enquiry.'<sup>70</sup> Its decision was that none of those seeking inclusion had any right, those people or their elders having 'abandoned their own people and identified themselves with the Ngati Haua and other tribes.' They did not believe any 'alleged occupation' could justify rights for this reason.

In the case of Waotu North, the impact of Assessor Hori Riwhi on proceedings is clear. His disagreement with Judge Williams caused major problems in resolving a highly controversial dispute over rights to the land. In general, assessors played an important role in proceedings. Moreover, the actions of both Maori claimants in the Court when they were concerned assessors were too closely related to opposing parties, and the government in response to allegations of corruption, indicate the role of the assessors was of some importance. Although their specific influence or contribution in particular instances cannot be determined because the Court generally acted collectively, the role they played in cross-examining witnesses and clarifying the issues in dispute in this way was significant. As for the judges, their backgrounds generally show long experience of dealing with Maori customary rights to land. The Court process forced them to engage with and address such rights and where major disputes arose they had to negotiate a careful path between the disputing kinship groups. They had to do so to establish a settled title – the Court's core function – and in general, the judges had to have experience in addressing these kinds of disputes.

<sup>69</sup> *ibid.*, 28 February 1883, fol. 94.

<sup>70</sup> *ibid.*, 9 March 1883, fol. 146.

The nature of these disputes and the way rights to land were argued by Maori claimants in the Court are the subject of the following two chapters.

## BATTLES AND WARS

This chapter is the first of two which deal with the ways Maori argued claims in the Court. The two chapters are arranged chronologically and this chapter deals with the first twenty years or so after the Court was established. Around the mid-1880s, the way Maori argued claims changed significantly and the nature of this shift is examined in Chapter 11. This chapter argues that many of the claims during this earlier period and the way they were argued were large-scale conquest claims. Such claims illustrate the extent to which the Court was a site where Maori were able to debate and discuss their claims to land. Moreover, they show that events which occurred earlier in the nineteenth-century were central to the way such claims were argued.

This is because the large-scale conquest claims arose out of the inter-tribal conflicts of the first half of the nineteenth-century. Many of the characteristics of these claims drew on this period of conflict and the way they were organised also reflects these conflicts. They were claims intimately bound up with recent history and the accounts presented by witnesses giving evidence in support of these claims were informed by these events. They were fundamentally driven by long histories of conflict and were a consequence of the experience of those who appeared in Court; such claims were deeply rooted in the experience of those asserting their rights. These patterns are examined in this chapter using specific examples drawn from the sample of cases examined using the Court's minute books. The sample suggests these kinds of claims were common in a particular period but that, nevertheless, there were some important regional variations.

In its first twenty years or so the Native Land Court was a site where battles fought in earlier decades could be continued. The weapons in these battles were very different to those of the earlier conflicts but the outcome was much more significant. In the Court, Maori fought with words, not patu and muskets. However, whereas in earlier conflicts the victor was always the militarily strongest tribe, the new battles were conducted before a Pakeha judge and a Maori assessor and it was they who decided the victor. More importantly, however, was the possibility that this decision could determine once and for all who won the war. Military forces could be

withdrawn to rebuild their strength to attack again; this was not necessarily the case when fighting battles in the Court. A decision could always be challenged in a variety of ways, and they were used extensively by Maori claimants, but at some point the money (and seldom the enthusiasm) would run out and a tribe in such a situation would be forced to admit defeat. Long histories of conflict between traditional enemies were ended and certain tribes were elevated by Court decisions as the final victors.

This type of claim has often been used to characterise the way the Court operated in the nineteenth-century. It is argued that judges produced decisions which listed conflict after conflict between disputing tribes together with victories and defeats until 1840. At this point whichever tribe was the victor and in possession of the land received the award. It was simple and an approach which had the characteristics of a mathematical equation. The variables were defined, specific events were applied and the solution calculated. As will be shown below in relation to the Te Aroha case, this was not how the Court operated. This view also ignores the struggle judges and assessors had in negotiating a path through so many narratives of victory and defeat.

Nevertheless, the large-scale conquest claims were not the only claims the Court dealt with during this early period. They were the largest and probably the most significant especially when competing tribes were arguing about military conflict in the aftermath of the wars and confiscations of the 1860s. But they are only a part of the story. Linked to the large-scale conquest claims and the massive population movements caused by the tribal conflicts of the 1820s to 1850s were the claims of Te Arawa to Maketu and Ngati Raukawa to Kapiti. Te Arawa had conquered the land at Maketu and Ngati Raukawa occupied Kapiti at most two generations earlier and this is reflected in the way they argued their claims. The term 'kotikoti' was regularly used to assert a claim based on the division of the land at the time of the occupation by migrants and the way these claims and the nature of the evidence given reflects this shorter albeit strong relationship to the land.

And on top of these claims associated with the tribal conflicts of the first half of the nineteenth-century were the lands which passed through the Court without significant dispute. These were the smaller blocks of land where people lived and cultivated. Claimants asserted their rights through ancestors and recited whakapapa. Disputes often arose over the location of boundaries (the ridge or the stream) or the ancestor through whom the land was claimed. Where disputes arose they were discussed and whakapapa compared. Individuals seeking to have their right recognised, or more likely the right of their family, appeared and asked the claimant for inclusion. Many of these cases, especially for the very small blocks, were resolved without objection or if other claims were raised, they could be accepted without much discussion. The intervention of the Court was not required and orders were issued quickly and without difficulty. These were quite likely the papakainga

lands where occupation and the continuous and regular assertion of rights put the issue of competing rights beyond question. There were some exceptions, especially where gifts of land had been made, but in general these were lands which were not disputed.

The large-scale conquest claims always involved huge blocks of land of many tens of thousands of acres. The example which is examined in some detail below is that of Te Aroha but there are many others and a number were very prominent. They include Orakei and Manawatu-Kukutauaki which, together with Te Aroha, were published in *Important Judgments*.<sup>1</sup> Other cases, of varying prominence, included the Chatham Islands, Wakapuaka near Nelson, Taupaki west of Auckland, Pukenui near Mangonui, Otangaroa near Whangaroa, Ruarangihaere at Kaipara, Tatua and the Kaingaroa blocks in the central North Island and Ruakituri, near Wairoa.<sup>2</sup>

All these conquest claims, and the evidence given to support them, have a number of common characteristics. The first, and most important, is the extent to which they were decisively influenced by the tribal conflicts of the period from 1820 to 1850. Moreover, they show that the opposing claimant groups inside the Court had a long history of conflict and dispute over the land before it. Second, the claims were argued at an iwi or supra-tribal level. That is, they involved kinship groups which encompassed large populations and came together through a common whakapapa for significant events, such as war, but otherwise lived independently in smaller communities scattered about their rohe. They came together inside the Court to assert their claims in the face of their common and long standing enemies.

Third, these claims were led by men and women of mana. Senior leaders asserted claims and gave evidence to support them. Many of the men who appeared before the Court were those who as young men had actually fought with their elders in the conflicts of the earlier decades. Others were children who had not participated in the fighting but knew of the events and their impact having heard the stories at the feet of their fathers and uncles and lived through them at the margins. They were men and women whose mana was derived from these conflicts. On the whole, this mana was derived from their elders and the capacity of their elders to protect their people from destruction at the hands of their traditional enemies. It was in this sense mana which was earned in the face of major threats to the continuing existence of the kinship group and was decisive. The mana of these men and women was unimpeachable and this is reflected in the evidence they gave in the Court and the way these cases were conducted. They controlled the conduct of their respective

<sup>1</sup> 'Orakei' in *Important Judgments Delivered in the Compensation Court and Native Land Court*, F.D. Fenton (ed.), Auckland: Henry Brett, 1879, pp.53-96; 'Rangitikei Manawatu,' in *ibid.*, pp.101-08; and 'Kukutauaki,' in *ibid.*, pp.134-35.

<sup>2</sup> Chatham Islands Native Land Court minute book 1, 14 June 1870, fol. 1ff.

cases with absolute authority and any challenge to this authority from within the kinship group was rapidly dispatched.

These conflicts had a significant and destructive impact on the Maori population. The new technology of warfare brought death on a massive scale. In addition to the high level of killing, there were significant population movements as whole tribes uprooted and moved to strategically better locations to avoid death at the hands of their enemies. These shifts, and the disruptions they caused, are also reflected in the evidence given to the Court in support of this kind of conquest claim. In particular, the migration of Ngati Raukawa to Kapiti and the occupation of Maketu by Te Arawa illustrate the extent to which claims during this early period of the Court's existence drew on the recent and massive disruption caused by the conflicts of the preceding decades.

During these cases, senior tribal leaders gave evidence and cross-examination was limited. Many witnesses gave evidence for each party and their evidence tended to be brief and focused primarily on the various conflicts which were fought over the generations rather than evidence of occupation. In any one case, the Court heard many narratives of these histories of conflict between traditional tribal enemies, each witness reciting an account as they gave evidence. In some instances, whakapapa was quite limited other than giving structure to the history: the claim was based on conquest and ancestors were drawn on when they were involved in conflict. This was not a matter of giving straight line whakapapa back to the ancestor who originally held rights to the land. Although many witnesses gave evidence, there tended to be only two major claimant groups (the traditional enemies). Sometimes there were smaller claims but these were generally marginal. One other significant characteristic of these cases was that despite the conflict they represented, they were not long and usually all the evidence was given over several weeks. A number of these characteristics contrasted directly with cases after the mid-1880s which could take many weeks but hear only one witness who gave highly complex whakapapa, detailed evidence of occupation, and was subject to extensive cross-examination over many days and in some instances weeks.

The case of Te Aroha has always been celebrated, not least because the Native Land Court's second decision was published by Chief Judge Fenton in his *Important Judgments*.<sup>3</sup> In doing so the Te Aroha case became accessible to a wider audience but it also meant that the long and complex hearings into the claims of Marutuahu and Ngati Haua were left buried in the minute books of the Court. There were in fact three hearings involving the Te Aroha block, two focused on the rights disputed between Marutuahu and Ngati Haua and the third investigated the claims of the

<sup>3</sup> 'Aroha,' in *Important Judgments*, pp.109-33.

Crown to the block and the distribution of rights to the land among the Marutuahu tribes.

In essence, the investigation of title to Te Aroha revolved around generations of conflict between the Marutuahu tribes and Ngati Haua. The claims by these two groups were presented in Court on a tribal basis and the major question for the Court to resolve was the identity of the final victor. That is, after a long history of conflict, who won the last battle. For this reason, the evidence of witnesses focused on the battle of Taumatawiwi and many very senior tribal leaders on both sides gave evidence in support of their respective claim to have held the land by conquest from the opposing party. After carefully considering the evidence presented to them and producing lengthy judgments which attempted to resolve the points in dispute and reach a firm and unambiguous conclusion, two different Courts came to completely opposite conclusions.

The first Court, constituted by Judge Rogan and Assessor Hemi Tautari, decided that the final victor was Ngati Haua and awarded the block to the tribe in its entirety. The circumstances of the hearing were controversial. The case was originally called on at the Cambridge sitting of the Court in November 1868. There Searancke appeared with a number of Ngati Maru men and asked that, at the request of Mackay (then Civil Commissioner at Thames), that the case be adjourned. Gillies appeared for Ngati Haua and opposed this request. Searancke presented a number of reasons for requesting the adjournment:

1. Because the Aroha is not in the Waikato district.
2. Because it would be much easier for Ngati Haua as a tribe to go to Shortland than for Ngati Maru to come to Cambridge as the majority of Ngati Haua tribe live at Matamata.
3. That the Ngati Maru tribe has been detained at the instance of Mr Civil Commissioner Mackay and told not to appear at Cambridge.
4. That it was very questionable if the lawful portion of the Ngati Maru tribe would be allowed to proceed through the portion of country occupied by the Hauhau portion of Ngati Haua.
5. That the land in dispute is of vast importance, it is a dispute between two distinct tribes who are not on friendly terms and therefore the land should have been surveyed or otherwise distinctly defined; great interests are involved and great things may be the result should a decision be made without the appearance of Ngati Maru.<sup>4</sup>

Piniha Marutuahu and Te Keepa Te Wharau, both of Ngati Maru, supported Searancke's request for the adjournment and asked that the hearing be conducted at Shortland. Gillies, supported by Te Raihi of Ngati Haua, addressed the Court and asked for the hearing to commence. He produced a sketch plan of the block but no survey had been undertaken by the Ngati Haua claimants.

<sup>4</sup> Waikato Native Land Court minute book 2, 9 November 1868, fols 96-96A.

After taking time to consider the issue the Court decided that since Mackay had told Marutuahu not to attend, it could not continue with the hearing 'as it is not from any fault of their own that they have not appeared to maintain their claim.'<sup>5</sup> The Court did not think there was any good reason for holding the hearing at Shortland and announced that it would be held at either Matamata or Cambridge. Searancke asked the Court to adjourn to Matamata and commence the investigation as soon as possible.

In late February 1869 the Court opened at Matamata to hear the evidence in the Te Aroha case.<sup>6</sup> Gillies again appeared for Ngati Haua with Preece as his interpreter, and the Marutuahu tribes were represented by Davis and White. A large number of witnesses gave evidence for the claims asserted by each side. Marutuahu claimed through an ancestral right while Ngati Haua claimed by right of a more recent conquest. The Marutuahu claim was supported by a large number of witnesses who were described in the minute book as 'Ngati Haua hauhau.' It would appear the Court was dealing with land held by the king and occupied by supporters of the kingitanga. At one point during the hearing Tarapipipi Te Aukati of Ngati Paoa appeared to give evidence and immediately asked that the hearing cease. He told the Court that his king had issued a grant to the land and he had been given responsibility for looking after it. The land had been delivered into the king's hands to deal with. He wanted to stop the investigation because he expected trouble would arise with the 'kupapa people.' In response:

The Court stated that it had nothing to do with his protest. It had been taken down and would be laid before the Government. That notices had been sent all over the Island that the land would be investigated. That the Court had its own duties to perform. Consequently the investigation would go on notwithstanding the protest.<sup>7</sup>

The minutes note that at this point '[m]ost of the Ngatipaoa, Ngatitamatera and Hauhau natives left the Court on the invitation of Tarapipipi Te Aukati.' The kingitanga had tried to engage with the Court and found its inability to respond in kind wanting. They left.

The hearing continued from 23 February to 2 March when the Court adjourned to Kapanga, Coromandel. There, ironically in the heart of Marutuahu's territory, the Court gave its decision in favour of Ngati Haua absolutely on 30 March 1869.<sup>8</sup> This decision, which is examined in detail in Chapter 12, was described as interlocutory and when in January 1870 Preece raised the question with Judge Rogan at the next

<sup>5</sup> *ibid.*, fols 100-101.

<sup>6</sup> Waikato Native Land Court minute book 2, 23 February 1869, fol. 211.

<sup>7</sup> *ibid.*, 26 February 1869, fol. 254.

<sup>8</sup> Coromandel Native Land Court minute book 1, 30 March 1869, fol. 142; the decision was recorded in Waikato Native Land Court minute book 2 fols 300-304.

sitting of the Court at Kapanga, the judge replied very curtly that ‘the case was entirely out of its hands and [the Court] has no opinion to give on the matter.’<sup>9</sup>

The reason was that applications for a rehearing had been submitted. Twelve months later, in January 1871, a Court was convened at Point Britomart in Auckland to rehear the case. It was, at the time, a very large tribunal consisting of Judges Monro and Maning and Assessors Hare Wirikaki and Rawiri Te Tahua.<sup>10</sup> At this hearing, Marutuahu brought along some high-powered representation. Mackay assisted Hesketh with Davis as their interpreter while MacCormick and Bennett represented Ngati Haua with Preece as their interpreter. The survey had still not been undertaken as Marutuahu had threatened to shoot anyone who attempted to survey the block. Tension over the land was, and remained, high.

As in the earlier hearing, a *prima facie* case was set up by Te Raihi of Ngati Haua and they were treated as claimants by the Court. The Marutuahu tribes objected to the claim and presented their evidence first. They were led by Te Waraki of Ngati Maru and he was supported by nearly 40 witnesses. Whereas in the earlier hearing the Marutuahu case relied heavily on the evidence of witnesses described as Ngati Haua ‘hauhau,’ at this hearing only one Ngati Haua witness gave evidence in support of the Marutuahu claim. The rest were drawn from all four Marutuahu tribes and they lived across Hauraki. Two Pakeha witnesses also gave evidence in support of the Marutuahu claim. In response seventeen witnesses, including lengthy evidence given by Te Raihi, was presented in support of the Ngati Haua claim. After hearing a further claim by ancestry (descending prior to Marutuahu occupation of the land) distinct from the Marutuahu and Ngati Haua claims, the Court adjourned on 11 March and just under two weeks later, on 23 March, the Court reconvened at Point Britomart to give its decision in favour of Marutuahu. This decision is also examined in more detail in Chapter 12.

The investigation of the Te Aroha block illustrates many of the points arising out of the operation of the Native Land Court in its first twenty years. The nature of the claims arose specifically out of conflicts of the first half of the nineteenth-century but they also drew on and reflected a longer history of conflict. The sitting of the Court at the Chatham Islands in June 1870 before Judge Rogan and Assessor Charles Wirikoki was another case based on conquest claims arising out of the conflicts and migrations of the earlier period of conflict.<sup>11</sup> The two Taranaki tribes, Ngati Tama and Ngati Mutunga, asserted claims to the islands by conquest over the Moriori inhabitants in the late 1830s. In response, the opposing Moriori kinship groups rejected the conquest claims and argued they held the land. However, they also

<sup>9</sup> Coromandel Native Land Court minute book 2, 25 January 1870, fol. 11

<sup>10</sup> Auckland Native Land Court minute book 2, 12 January 1871, fol. 46.

<sup>11</sup> Chatham Islands Native Land Court minute book 1, 14 June 1870, fol. 1ff.

admitted that they lived in servitude to the Taranaki tribes, had no control over the resources of the land and referred to Ngati Tama and Ngati Mutunga as their masters. This was a very different situation to the way in which Maori argued claims to land in the Court in the rest of the colony. There, long histories of conflict were debated through narratives of victory and defeat. In the case of the land at the Chatham Islands, there was no long history of conflict between Moriori and the Taranaki tribes.

Moreover, whereas in mainland conquest cases, opposing tribes vehemently denied the conquests of their traditional enemies – either because it did not happen or because it was superseded by a subsequent military victory – in the Chatham Islands cases, Moriori, on numerous occasions, accepted they were defeated and conquered by the Taranaki tribes. For instance, during the Kekerione hearing, Ngamungangapaoa Karaka, giving evidence in support of the Moriori claim, referred regularly to Ngati Tama and Ngati Mutunga as their masters. His evidence also mentioned two occasions where Moriori approached the Taranaki tribes for small pieces of land to live on and later for some of the rents received from leasing the land, and on both occasions they were declined. For the Court, this was clear evidence that Moriori had very marginal rights to the land. Another Moriori witness, Harawanu Tapu, when cross-examined by Pomare, who led the Ngati Tama claims, willingly admitted the killing of Moriori by Pomare's father and Ngati Mutunga. And in response to a question from the assessor, the same witness stated he had never tried to drive them away.

For the Court, this was a very straight-forward case. Moriori admitted the military invasion, decimation at the hands of the Taranaki tribes and occupation of their land by the invaders. In such circumstances and in the context of the conquest claims heard elsewhere the decision was very easy to reach.<sup>12</sup> However, this is far from the end of the story of the Chatham Islands' investigations especially in terms of the way Moriori asserted their rights to the land. For although they admitted the conquest, they did not admit the rights of the Taranaki tribes and the way they debated those rights – although well beyond the Court's understanding of custom and conquest in relation to land – was an extraordinarily clever attempt to engage with the European judicial system and develop a claim designed to appeal to a world they were introduced to through missionaries.

Ngamungangapaoa's evidence above focused almost entirely on the slaughter of Moriori by the two Taranaki tribes. Some Moriori survived and lived with Ngati Tama and Ngati Mutunga 'in servile bondage until the gospel was preached here.' Even after they were released, their access to the resources of the land was restricted and requests to their 'masters' for land to occupy and a portion of their rental payments were rejected. From this time, he told the Court, 'we made up our minds to

<sup>12</sup> *ibid.*, 23 June 1870, fols 63-67.

take up a different line of action with regard to our masters because of their innumerable acts of deceit towards us. Hence at the present we will not obey their orders. I still hold the right to my land to this day.'<sup>13</sup> Ngamungangapaoa's evidence focused on the killings, slavery and redemption when the European missionaries arrived.

It was a theme picked up and taken further by another Moriori witness already mentioned, Harawanu Tapu. He told the Court that when the Taranaki tribes arrived in 1836, they did not immediately start to kill the local inhabitants. The situation soon changed:

At that time they lived at peace with us, they did not destroy us then but soon after this they commenced to kill us, our chiefs of the Moriori held a meeting at a place called the Awapatiki. At this meeting it was suggested that we should attack the New Zealanders [the Taranaki tribes] and fight them because it was said in history that they were cannibals this proposition was rejected because our ancestor Pakihau had put an end to war and cannibalism.<sup>14</sup>

At the time of Ngati Tama's arrival, a meeting of the people was held to discuss what should be done and it was proposed the migrants should be killed, but this suggestion was rejected by their leaders, Torea and Tapata. The decision of the meeting was 'that they should be friendly with the New Zealanders.' Shortly after, however, the Taranaki tribes 'commenced to kill us like sheep.' Harawanu did not shrink from describing the slaughter: 'some of our people were eaten and others were thrown to the birds of heaven.' He then proceeded to draw parallels between Moriori land rights and European land rights:

As a child I learned the history of our rights to this land and having compared our right to land with those of the laws of England I was induced to write to Governor Browne respecting our lands. I communicated with him and Sir George Grey my communicating with them was on account of my wishing to have our lands investigated according to English law. Captain Drake of the Barque Harriet was our first informant as to English law with respect to land.

He entirely rejected the claim by the Taranaki tribes and claimed rights to all the islands. A third Moriori witness, Kerei, spoke of the unprovoked nature of the killings by the Taranaki tribes and this gave them their right to the land. Wetini stated that the invaders had left the island in 1859 and that the land should be returned to Moriori.

The standard explanation for the way in which Moriori argued their claim has been that their custom operated differently to that of Maori and being fundamentally a peaceable people they held the mana of the land only because they did not resist the

<sup>13</sup> *ibid.*, 17 June 1870, fols 11-12.

<sup>14</sup> *ibid.*, fol. 16.

invasion; they would have lost rights if they had killed people arriving on the islands.<sup>15</sup> However, the minutes of the Court hearing suggest this is only a partial explanation. The evidence of several Moriori witnesses suggests that military force to resist the Taranaki migration was considered. Then there was the emphasis a number of them placed on the unprovoked nature of the slaughter by Ngati Tama and Ngati Mutunga followed by references to acts of cannibalism. When Moriori welcomed the Taranaki tribes they were repaid with death and destruction. There were also the references to English law, the gospel and the decision by Moriori to put an end to war and cannibalism. This was presented in the evidence as a decision, not a customary practice.

The Moriori claimants through frequent reference to evidence of 'uncivilised' behaviour appeared to be arguing a case which both emphasised their civilised status – unlike the Taranaki tribes they did not engage in unprovoked warfare or cannibalism – and their consequent stronger claim to European property rights. The influence of several decades of contact with both traders and missionaries can be seen in their evidence. The way they argued the claim seems to have been designed to appeal to what they thought might be Judge Rogan's understandings of what it was for indigenous peoples to be civilised in the nineteenth-century. The Moriori witnesses, especially Hirawanu Tapu, attempted to draw parallels between their understandings of property rights and European property rights and tried to use these parallels as a way of both asserting rights and having them recognised.

Like the other large-scale conquest claims, the way in which claims to the Chatham Islands were argued reflected the experience and history of Moriori and the Taranaki tribes over the previous four decades or so. Ngati Mutunga and Ngati Tama drew on the conquests of this period while the Moriori emphasised their contact with the 'civilised' European world. The claims were argued on a tribal basis by leaders who were either involved in the conflicts or whose parents led them. The Moriori case failed almost completely in that, with the exception of some small reserves recognising their occupation, the land was awarded to Ngati Tama and Ngati Mutunga. This was, as noted earlier, a consequence of the sort of conquest claim the Court had come to expect elsewhere in the colony. Nevertheless, the claim asserted by Moriori to the Chatham Islands and the way it was argued shows a considerable degree of thought had gone into how they would argue the claim in the Court. It was based on an intelligent understanding of their existing contact with the Pakeha world which had suggested what might be recognised by the Court.

The large-scale conquest claims were not the only kind of claim to arise out of the tribal conflicts of the first half of the nineteenth-century. There were some regions where the outcome of these conflicts was either the obliteration of the

<sup>15</sup> Michael King, *Moriiori. A People Rediscovered*, rev. ed., Auckland: Viking, 2000, pp.131-34.

defeated occupants through death or intermarriage, or they were driven off the land entirely. Claims to this kind of land were not argued between two tribes denying defeat at the hands of each other; they were debated among the tribal and kinship groups of the victors who had on conquering the land divided it among themselves. It was these divisions and subsequent occupation of the land which was the focus of these kinds of claims. In contrast to the large-scale conquest claims, in these cases there was no long history of conflict to debate, there were at most two generations of occupation to draw on. The two instances of these kinds of cases drawn on here are the claims of Te Arawa to Maketu and Ngati Raukawa to Otaki and other Manawatu lands. In the latter instance, Ngati Raukawa had previously fought the local people but occupied the land when they fled from the central Waikato in the 1830s. Their claims focused on the subsequent heke rather than the earlier conquest.

At Maketu, the previous occupants to challenge the claims by Te Arawa to the land had been routed and withdrew defeated at the earlier battle of Te Tumu. Ngai Te Rangi and Ngati Ranginui had returned to Tauranga after they were defeated at Te Tumu and the Te Arawa tribes, particularly Ngati Whakaue and Ngati Pikiao, had re-occupied the land there. When this land came before the Court, the competing claimants were all from the Te Arawa tribes and their claims were based on the division of the land after Te Tumu. This claim would later be formally known in the Court as the 'kotikoti' following conquest. Like the large scale conquest cases, these claims were usually organised on a supra-tribal basis and reflected the major population movements caused by conflicts in the earlier years. Much of the evidence given in support of these claims was based on this experience and subsequent occupation and cultivation of the land; there was no ancestral relationship to speak of for the claimants had only held undisturbed rights to the land for one or two generations. Examples of these cases includes Ohineahuru, heard at Tauranga in 1871, Waitepuia No. 1, heard at Maketu in May 1878, Pukemaire, heard at Tauranga in December 1870, and Tirotirowhetu, heard at Maketu in June 1880.<sup>16</sup>

In Pukemaire, Petera and Henare Pukuatua of Ngati Whakaue claimed the land through conquest when Ngai Te Rangi was defeated and Maketu divided among the victors.<sup>17</sup> Their father occupied and cultivated the land until he died and they themselves had cultivated the land and their cultivations were never interfered with. Much of their evidence related to the extensive cultivation of the land. Pukemaire was one of a number of blocks of land at Maketu which were hotly contested between the various iwi of Te Arawa. Two surveys were produced when the hearing

<sup>16</sup> Maketu Native Land Court minute book 1, 5 January 1871, fols 316-329 (Ohineahuru); Maketu Native Land Court minute book 2, 16 May 1878, fol. 161ff (Waitepuia No. 1); Maketu Native Land Court minute book 1, 5 December 1870, fols 120-1ff (Pukemaire); and Maketu Native Land Court minute book 4, 16 June 1880, fol. 31ff (Tirotirowhetu).

<sup>17</sup> Maketu Native Land Court minute book 1, 5 December 1870, fols 120-1ff.

commenced by two different surveyors, neither of whom were surveyors for Petera and Henare. Equally problematic, one of the surveyors, Goldsmith, told the Court that the boundaries of his survey were pointed out by Petera. Henare immediately denied any knowledge of Goldsmith and stated that the surveyor he authorised was at Maketu. Petera too had not seen him in connection with Pukemaire. When the other surveyor, Mitchell, appeared to give evidence, he told the Court that he had cut the boundary lines and was then told by Rota Te Wharehuia of Tapuika that the land had been included in another survey two years earlier. Davis appeared on behalf of Waitaha and Ngati Pikiāo and opposed the claim of Henare and Petera.

The disputes over this land arose out of the conflicts during the 1830s, 40s and 50s between the iwi of Te Arawa and Ngai Te Rangi and Ngati Haua. The evidence of all the witnesses focused on these conflicts around Maketu and Te Tumu and the control of the lucrative flax trade there. In the Court, the disputes over ownership of the land were among Te Arawa only (Ngai Te Rangi did not make claims) and were fiercely contested. The witnesses who gave evidence in support of the Ngati Pikiāo case, particularly Wi Matene, argued that they led the assault on Maketu which defeated Ngai Te Rangi. They accepted they were supported by other Te Arawa iwi but they claimed Ngati Whakaue was not one of them. The land conquered was divided among the victors and because they did not fight, Ngati Whakaue received no land. Later, there were further conflicts at Te Tumu in which Ngati Whakaue did fight and in return, Ngatipikiāo gave them some small pieces of land but the bulk remained with them. Waitaha objected to the claim by Henare and Petera because the land they claimed had been allocated to another person. Two other Waitaha witnesses gave evidence in support of Wi Matene's account.

It is, however, the Tapuika case which is of considerable significance in this investigation. After telling the Court a few days earlier that he appeared for Ngati Pikiāo, Davis later stated that he represented Tapuika. The Tapuika case was very straightforward. They claimed absolute ownership of the land by ancestry. Hamiora Te Tumu told the Court Tapuika was the son of Tia whose possessions were at Maketu. He gave a very lengthy and detailed account of conflicts over Tauranga and Maketu starting from his ancestor Tapuika. He had continued to cultivate the land belonging to his ancestors and claimed the land on the basis that the Te Arawa tribes did not permanently occupy the land. The ancestors of Tapuika, therefore, maintained their interest in the block. Utiku Te Tuhi also rejected the suggestion that Maketu was conquered and told the Court that on the basis of Maori custom, the land belonged to Tapuika alone:

When the Arawas portioned off Maketu I thought it was simply for cultivating but I now find it is the taking of these lands absolutely. Tapuika did not remonstrate when they portioned of these lands because they thought it was simply for cultivation.<sup>18</sup>

<sup>18</sup> *ibid.*, 8 December 1870, fol. 164.

Te Arawa were allowed to scrap flax at Maketu by Tapuika with whom they were related. They prepared the flax for Tapsell so they could buy guns and ammunition; they all wanted arms and so they did not object. Under cross-examination by Henare, Utiku told the Court that Tapuika did not object to Te Arawa occupying the land at Maketu 'because in former days according to Maori custom merely cultivating the land 2 or 3 or even 10 years was not considered giving the person so cultivating a title to it.'<sup>19</sup> He believed the conflicts over the land were about cultivation rights, not about ownership of the land. Tapuika's final witness, Rota Te Wharehuia, told the Court that despite the fighting they still had rights to the land and concluded that they had 'waited patiently to have our claims investigated according to Maori custom that land now before the Court is ours having derived from our ancestors.'<sup>20</sup>

The claimants case focused on their cultivation of the land and there were major disputes between them and Ngati Pikiao as to the location of their cultivations in relation to the boundaries of the block. Other hapu and iwi not claiming the land also objected to the boundaries. For example, Wiremu Hikairo appeared on behalf of Ngati Kereru and told the Court that the south west boundary included portions of the cultivations belonging to other people.

Tapuika were to be disappointed. Their claim was dismissed out of hand by the Court which concluded the claim was designed 'to dispossess the present occupants of Maketu.'<sup>21</sup> As for the claims of Ngati Whakaue and Ngati Pikiao, the Court could not decide, finding that 'when Tapsell arrived it does not appear clear in whose hands the land was as at that time land was taken and kept by strong arm.'<sup>22</sup> The decision concluded that both would be awarded the Crown grant but the boundaries had to be corrected to exclude portions containing cultivations belonging to others.

A similar pattern can be seen in the Manawatu, Otaki and Kapiti with the claims of Ngati Raukawa there. Migration of a large part of the tribe to these regions during the first half of the nineteenth-century was a response to the threat of traditional enemies. They established themselves there with the consent of the traditional owners and divided the land among themselves. The fact that they had occupied the land for only one or at most two generations was reflected in the evidence given in support of claims in the Court. Reference was regularly made to the original heke, the subsequent agreement with local people to settle on the land and the division of the land among the migrants. Other tribes, especially Rangitane, Ngati Apa, Muaupoko, Ngati Awa and Ngati Toa, appeared in the Court as their rights and

<sup>19</sup> *ibid.*, fol. 165.

<sup>20</sup> *ibid.*, fol. 172.

<sup>21</sup> *ibid.*, 19 December 1870, fols 203-4.

<sup>22</sup> *ibid.*

relationships were tightly bound up with Ngati Raukawa and their claims to the land. It was common for one or more of these tribes to appear to claim land with or against Ngati Raukawa and Ngati Raukawa also gave evidence in support of or against the claims of other tribes. The evidence shows that they were closely related through whakapapa but the relationships referred to were usually those developed over the previous fifty years.

Evidence focused on how the land was acquired following periods of conflict or migration, subsequent occupation and cultivation of the land. Where traditional owners allowed the migrants to settle, witnesses from these tribes gave evidence in support of the claims too. Ngati Raukawa's rights were regularly challenged but it was usually in terms of locating the boundaries of their interests; blocks were claimed by several tribes and internal boundaries had to be determined. There was little ancestral evidence given because, unlike the conquest claims, there was no long relationship with the land over many generations. These claims were, however, intimately linked to these conquest claims for although the migrants settled on the land with the consent of others, they were a product of the disruption caused by the conflicts from 1820 to 1850. Examples include Paremata, heard at Otaki in July 1866, Ngawhakaraua, heard at Otaki in February 1869, Manawatu-Kukutauaki, heard in Foxton from November 1872, and Otairi, heard at Marton in May 1880.<sup>23</sup>

Paremata was heard by Judge Monro and Assessor Ihaia Porutu.<sup>24</sup> This block was claimed by two hapu of Rangitane (Ngati Mairehau and Ngati Hineaute) and Ngati Raukawa. The two Rangitane hapu disputed each others rights while there was no strong objection from either party to the Ngati Raukawa claim. Witnesses on behalf of Ngati Mairehau argued that the rights of the ancestor through whom Ngati Hineaute did not extend as far as Paremata. The Ngati Raukawa witnesses accepted the Ngati Mairehau claim to the land and asserted their own rights. These were derived from a previous conquest of Rangitane when they had intermarried with them. When they migrated from the north, they occupied the land and Ngati Mairehau did not object. The evidence recorded in the minute books suggests that those appearing in the Court as witnesses were closely related through Ngati Raukawa and Ngati Mairehau of Rangitane whakapapa.

The land was not occupied by either group of claimants permanently but both used it as a source of food and travelled there when they wanted to snare birds and rats or catch fish. The evidence focused on the use of the food resources of the land by the generation of those giving evidence and their parents generation. Evidence of

<sup>23</sup> Otaki Native Land Court minute book 1B, 7 July 1866, fol. 4ff (Paremata); Otaki Native Land Court minute book 1G, 6 February 1869, fol. 58ff (Ngawhakaraua); Otaki Native Land Court minute book 1A, 13 November 1872, fol. 1ff (Manawatu-Kukutauaki); Wanganui Native Land Court minute book 2, 17 May 1880, fol. 319ff (Otairi).

<sup>24</sup> Otaki Native Land Court minute book 1B, 7 July 1866, fol. 4ff.

several disputes between Ngati Mairehau and Ngati Hineaute, over rights to the land during this time were referred to along with runanga held to resolve the problems. Part of the land was also cleared and cultivated by hapu of Rangitane, Ngati Raukawa and Ngati Kahungunu, and several witnesses referred to these events. Even the Rangitane witnesses, who did assert claims by ancestry, did not argue these claims using ancestral evidence focusing instead on events relating to their more recent occupation.

By no means were all the cases heard before the Court associated with the tribal conflicts of the first half of the nineteenth-century. The land affected by the large-scale conquest claims were, as we have seen, the subject of long and intense rivalries and conflicts between traditional enemies. However, a great deal of land passed the Court during this period with little or no debate. They were usually blocks of land which were not disputed between tribes and a matter for settlement between kinship groups within tribes. Such land was not a site of great dispute in terms of settling title; there were discussions over the location of boundaries but there were no fundamental disagreements over rights. Much of this land was dealt with during the first twenty years of the Court's operation.

Objections to claims were common but these tended to be over matters such as the location of boundaries and the names of those who were legitimate descendants from the ancestors accepted as the rightful owners of the land. The latter usually took the form of claims for inclusion in the lists of owners and although whakapapa evidence might be taken to prove these claims, they were generally accepted by those leading the claims. That is, if someone wanted to be included and their whakapapa was accepted, they usually were. It was also very common for cases to be called on, a claim stated and no objection raised. In some instances there were comments by witnesses in the Court which suggest arrangements had been reached prior to the hearing.

Resolving boundary disputes could be difficult. Boundaries were set by some member of the claimant group or several people, showing the surveyors the boundaries of the block. For this to happen some interaction with those claiming adjacent lands was necessary. However, counter-claimants would often claim part of a block of land was part of an adjacent block. The Tawhiti block, investigated in April 1876, is a good illustration. The hearing before Judge Rogan and Hone Peti held at Tolaga Bay took several days primarily because of a dispute over the boundary.<sup>25</sup> The 4,960 acre block was claimed by Hare Parehako. He submitted a list containing 162 names for the two hapu who claimed the block by ancestry: Whanau o Te Ao and Whanau a Rakairoa. Hare proceeded to tell the Court that several people in his party had pointed out the boundaries of the block to the surveyor and that it had

<sup>25</sup> Waiapu Native Land Court minute book 1, 17 April 1876, fol. 101ff.

been disputed by another party, Te Whanau a Ira Te Kura of Waipiro. He was not present at the time of the quarrel and did not know how it was settled. He had eight witnesses who would give evidence in support of his claim.

A number of objections were raised regarding the boundaries, and after hearing evidence, Judge Rogan described the area in dispute as a small strip of land located on the northern boundary line of the block. The Court decided that the boundaries which had been described had to be marked on the ground by the surveyor. There was some delay in doing so and when the plan returned to the Court with amended boundaries, four witnesses gave evidence in support of the claim by Te Whanau a Ira Te Kura to the disputed part of the block. One noted that the land had been disputed by his ancestors and Hare's ancestors, and that this quarrel had continued through to the present.

After hearing these witnesses, the Court stated that the problems regarding the disputed portion had not been resolved and that the Court would visit the land before further evidence was taken.<sup>26</sup> All parties were invited to attend. At the same time, on the application of Rapata Wahawaha, the Court made an order for a memorial of ownership to be issued to the people whose names were submitted at the start of the investigation. The memorial did not extend to the disputed northern portion. At a subsequent sitting of the Court at Waiomatatini the following May, the block came before the Court for consideration.<sup>27</sup> The only note recorded in the minute book shows that the Court had visited the land and that the case was discussed. The matter was finally arranged in April 1877 at another sitting of the Court, this time at Whareponga.<sup>28</sup> The hearing itself was held in Tuta Nihoniho's house. Rapata Wahaha applied to have Tawhiti settled. The Court summarised the continuing dispute over the boundary:

The Court stated that during the hearing of this case there was a great deal of dispute about one of the boundaries which resulted in the Court directing a surveyor to go on the ground and alter this boundary, when the map was produced exhibiting the new line Rapata objected to it, after which His Honor the Judge himself went on the ground and another alteration was made which still did not meet Rapata's views and the Court proposed that the persons interested should go outside and endeavour to settle this disputed boundary.<sup>29</sup>

The case was adjourned again for two days when Rapata Wahawaha appeared again and told the Court that an amicable arrangement had been reached over the disputed land. It had been decided that the original plan would be used and the subsequent

<sup>26</sup> *ibid.*, 28 April 1876, fol. 337.

<sup>27</sup> *ibid.*, 16 May 1876, fol. 629.

<sup>28</sup> Waiapu Native Land Court minute book 3, 19 April 1877, fols 244-45.

<sup>29</sup> *ibid.*

boundary line done away with. The Court minutes show that several persons appeared in the Court in support of the arrangement which they indicated was satisfactory. No further objection was raised. The Court decided in favour of the agreement and an order for a memorial of ownership was issued in favour of the 162 people whose names were originally submitted with the claim.<sup>30</sup>

There are four further points regarding the operation of the Court which need to be discussed. First, judges went to some length to ensure all those who might have a claim had the opportunity to argue it.<sup>31</sup> Telegrams were received during hearings from individuals claiming an interest in a block and this could be a basis for an adjournment. In other cases, witnesses might be late or unable to attend the Court and this was another cause of adjournments. In the Whangamata-Hikutaia case, the Court sat at the home of one witness who was too ill to attend the Court.<sup>32</sup> At the Court sitting at Tauranga in December 1870, the Court sat outside because there was insufficient room inside the Court building to accommodate all those attending.<sup>33</sup> In addition, it was very common for the Court to adjourn to allow the people to attend tangi. This could occur for the most senior tribal leaders or for children who died. Certain judges could at times be quite grumpy about such interruptions, especially if the case they were hearing was proving frustrating, but they seldom turned down such requests. Adjournments for the morning or an afternoon were also common where parties requested time to discuss their cases.

Second, Pakeha agents and lawyers played a very limited role in the Court. As has been shown, Pakeha did play a role as witnesses, and lawyers certainly did appear for the large and controversial cases. Some, non-lawyers like Preece and Davis, were ubiquitous, appearing on the East Coast, Kaipara, and everywhere in between. The prominent lawyers such as Sheehan and Buller, and even someone as significant as James Mackay, were not yet of very great importance in the Court. Gillies, Buller and Sheehan were three of only a few lawyers to appear infrequently in the Court during its first fifteen years. Most of the cases were run by Maori agents.

Third, it is striking to observe that there is very little indication in the Court's minute books that the sale of Maori land was a significant agenda in Court proceedings, during this period or later. In particular, few witnesses referred to the

<sup>30</sup> *ibid.*, 21 April 1877, fols 268-9.

<sup>31</sup> This is in contrast to the prevailing historiography, which argues that because the Court could only consider evidence presented to it when reaching a decision, many who had a legitimate claim but did not know of the hearing were excluded. See, for example, Bryan D. Gilling, 'Engine of Destruction? An Introduction to the History of the Maori Land Court,' *Victoria University of Wellington Law Review*, 24:2 (1994), pp.127-28; and, David V. Williams, 'Te Kooti Tango Whenua.' *The Native Land Court 1864-1909*, Wellington: Huia, 1999, pp.158-59.

<sup>32</sup> Hauraki Native Land Court minute book 7, 29 November 1872, fol. 437.

<sup>33</sup> Maketu Native Land Court minute book 1, 5 December 1870, fol. 120.

sale of a block of land during its investigation, either in support of their own claim or more generally. While it was common, especially during later title investigations, for witnesses to mention the earlier sale of adjacent lands when giving evidence in support of their claim, the sale of land was not a subject dwelt on in the Court. This may be at odds with the emphasis others, such as Ward and Sorrenson, place on the Court as a key site in the alienation of Maori land. There are two possible explanations. The first is that the sale of a block of land was generally not a concern when ownership of that block was considered by the Court. The other, which is more likely, is that issues relating to sale were an agenda at work in the process of determining title but one which was articulated in very different ways inside the Court. Any sale of land, that is, was part of the wider and layered debates about customary rights argued by different tribal and kinship groups when asserting their claims.

Lastly, the minute books show that during this period, some very senior Maori leaders were participating in the Court process and leading the claims of their people. Others were young men who would become important leaders in subsequent years. They led their elders through the Court process and arranged claims, witnesses and evidence. Non-participation is a matter on which the minute books are silent. However, there is considerable evidence to show that judges did adjourn cases for some time to ensure claimants who might have a valid claim were given the opportunity to present their argument. In only one case, *Te Aroha*, did a counter-claimant refuse to give evidence and this refusal was recorded in the minute book.

The first twenty years or so of the Court's existence saw some major battles fought over land which had been in dispute between tribal enemies for many generations. One of the key dynamics operating in these hearings was the very recent conflicts of the first half of the nineteenth-century. Those who led the claims in the Court either fought in these conflicts or were the children of those who had led their people into battle or to safety. They were men and women who had survived brutal fighting and acquired mana because they were able to protect their people from destruction. The large-scale conquest claims argued in the Court reflect these events. Other claims, especially at Maketu and Kapiti, are also related to the conflicts of the early nineteenth-century. In the first instance, claims were argued between the victors who conquered the land and divided it among themselves. Claims to land at Kapiti also reflected the large movements of population as tribes, such as Ngati Raukawa of central Waikato, tried to escape their traditional enemies.

These were claims developed by Maori who drew on recent events to support their claims to land. The attempts by Moriori to do the same on the Chatham Islands reflect this pattern and also show a very clever attempt to use nineteenth-century European notions of civilisation to argue their claims. The impact of the conflicts of the first half of the nineteenth-century should, however, not be exaggerated: the land affected by the large-scale conquest claims was significant but it was also often land

which had been violently disputed by tribes for many generations. Elsewhere, particularly land which was not disputed between tribes, title to land was settled without major difficulty. Sometimes objections might be raised over boundaries and by those seeking inclusion in the title but these were generally resolved amicably. The first twenty years of the Court's operation reflected the events of the forty years prior to 1865 and Maori participated vigorously in the Court process to protect and enhance the interests of their tribal and kinship groups, often against their traditional enemies.

## A LANDSCAPE OF MANY VOICES

From the mid-1880s, a shift in the way claims were asserted and argued in the Court can be identified. This shift cannot be identified in any clear way; it is a trend or pattern rather than an event. However, from about this time, it is argued, significant change can be seen as many long and complex narratives were presented to the Court in support of claims. They were narratives of ancestors, ancestral occupation and more recent occupation and they were often highly contradictory. They were asserted by smaller kinship groups and often reflected intra-tribal relationships. These narratives and the way the claims were argued drew on long and complex histories of interaction between distinct kinship groups which were nevertheless bound together by a common whakapapa. They illustrate, it is argued, the extent to which rights to land were not so much about abstract rights but about relationships between different kinship groups. Furthermore, the growing complexity of these narratives created problems for the Court in attempting to resolve customary disputes and some of the techniques used by the Court to resolve these disputes are discussed in Chapter 12. These patterns are reflected in the sample of cases examined using the Court's minute books and are illustrated in this chapter using specific examples drawn from the sample.

In this later period, two major changes can be identified. The first was a move away from conquest claims. Ancestral claims had always been asserted in the Court and they were often supported by evidence of occupation. However, cases of this kind heard during the early years of the Court tended to be resolved without much dispute. Boundaries were amended where objections were raised or individuals seeking inclusion were added to the final list of owners. The Court's role was limited to calling the block, asking for objections and announcing the proposed order. From the mid-1880s, however, the most controversial cases involved ancestral claims. Evidence relating to conflict over the land was often given in support of these ancestral claims but they were always part of a longer narrative of ancestral and more recent occupation of the land.

Linked to the move away from the conquest claims was the second major change. It was a move away from arguing large scale claims at the iwi or supra-iwi

level. Those arguing claims in the Court tended to come from smaller kinship groups representing hapu and whanau. The way claims were argued shifted down the social structure so that no longer were several kinship groups coming together to fight a common enemy. Rather claims to land became a matter to be argued within these tribal groupings among the various kinship groups which constituted the iwi or other broader tribal structures. This was in part a reflection of generational change. The rangatira who had led the conquest claims in the Court were by this time beginning to die. The next generation of leaders were unable to maintain their mana because the threats of the first half of the nineteenth-century were gone. Their capacity to hold the supra-tribal structures together was limited for this reason and this transformation is quite clearly shown in the way claims were argued in the Court.

Both changes were evident in the way Maori claimants asserted and argued their rights to land in the Court. In the first instance, it took many weeks and sometimes even months to hear all the evidence for even moderately sized blocks of land in the tens of thousands of acres. Witnesses gave a great deal of evidence, which if even only a portion was carefully recorded is still a huge volume, on the occupation of the land by their ancestors and their own occupation of the land in more recent years. The cross-examination of witnesses by each of the parties also took much longer with some witnesses answering questions day after day for over two weeks. It should be noted that characteristics of this kind, while significant in relation to medium and large sized blocks of land were not confined to these kinds of blocks alone. In some instances, settling title to small blocks of land could be difficult and take a great deal of evidence and time before the ownership could be finalised.

Together with these two major changes, there was also a shift in the way evidence was presented. Whereas in the earlier years, a small number of claims were set up and argued in relation to each block and many witnesses appeared to give evidence in support of each of those claims, from the mid-1880s, there were often a large number of claims set up but only one witness gave evidence in support of the claim. Giving evidence and cross-examination still took much longer but the evidence came from only one witness. Even if there were fewer witnesses, claims to a block were still vigorously debated. Now, instead of one claimant and one or two counter-claimants, as many as fourteen or fifteen groups or increasingly individuals would set up a claim. Moreover, the capacity for any recognised claimant to have a representative cross-examine witnesses meant that although a witness's evidence-in-chief could take only half a day, the cross-examination of the same witness could stretch over weeks.

In fact, each group claiming an interest in a block usually had two people in the Court: their agent and their witness. Agents played a very important role in the Court after the mid-1880s if only because cross-examination became so long and complex. They were common and many of the agents were Maori; sometimes they came from within the kinship group and at other times they were prominent in the

Court across the country. Paratene Ngata and James Carroll are two examples but there were many others who appeared for different kinship groups at different Court sittings. Pakeha lawyers were not at all common; other than the judge and Court staff, the environment was predominantly Maori.

The Taheke block, for example, took several months to hear and there were fourteen claimant and counter-claimant groups. Commencing on 24 March 1885, the Court heard evidence until 12 June when the sitting was adjourned as Judge Mair had been instructed to open the sitting of the Court at Maketu.<sup>1</sup> When the Court resumed hearing Taheke on 19 May 1886, several further weeks of evidence was taken before a decision was given on 14 June 1886. During the nearly five months of hearing, a considerable volume of evidence was heard.

The Court found dealing with the large number of claimants and claimant groups difficult and some were much more adept than others. In Taheke, the difficulties began prior to the hearing with the first few days spent in discussion and debate over the various counter-claims which were set up. Disagreements arose among claimants belonging to the same kinship group which were not resolved prior to the hearing. One part of the kinship group wanted to deal with the land located on one side of the lake (the block surrounded Lake Rotoiti) and have the other party deal with the other side. For each of the fourteen cases, there was in general only one witness, but each witness was cross-examined thirteen times. Claims on the basis of ancestry and conquest were set up by each of the parties, some to the entire block to the exclusion of any other claimant and some to parts of the block only. All those who asserted a claim did so through a different kinship group. One claim was argued through Ngati Whakaue for six hapu but most of the other claims were dealt with at a hapu or smaller kinship group level.

Elsewhere, Judge Puckey and several assessors dealt with four cases in the far north – at Waimate and Rawene – where there were large numbers of claimants. In Whirinaki, for example, the claim was opposed by over forty objectors.<sup>2</sup> This was a 2,800 acre block of land which first came before the Court in November 1885. The case was adjourned for a day to allow the different objectors to arrange themselves into groups but in the end it had to intervene and help form parties among the counter-claimants. Eventually eleven counter-claimant parties were formed out of the objectors and the case could proceed. The hearing which began on 11 November was concluded by the 8 December with only two hearing days lost through illness of the judge. Most of the parties were descendants of the same ancestor but each claimed the land through a different child of that ancestor. Some very complex whakapapa

<sup>1</sup> Taheke Native Land Court minute book 1, 24 March 1885, fol. 20ff.

<sup>2</sup> Northern Native Land Court minute book 7, 11 November 1885, fol. 225ff.

were submitted to the Court; branches were carefully defined rather than the simple straight line whakapapa of the earlier years of the Court.

Even smaller blocks of land were hotly contested although the hearings were not nearly so lengthy. The forty-three acre Hariru block was dealt with by Judge Puckey and Assessor Hamiora Mangakahia at Waimate North in October 1887.<sup>3</sup> Four different parties asserted claims to the land primarily on the basis of ancestry and the hearing still took eight days. Detailed evidence of ancestral occupation and cultivation, especially in relation to rat catching sites, was given and there was also evidence of a conquest but this was given in the context of an ancestral claim. Evidence of more recent occupation and cultivation of the land was also given. The conquest right was dismissed by the claimants who told the Court that the fighting never affected the Hariru block and it was also rejected by the Court.

This development was not, however, simply localised in Northland or Rotorua. It was also very evident on the East Coast where some of the most difficult and longest cases were heard. The 15,000 acre Hereheretau No. 2 block, for example, was heard by Judge David Scannell and Assessor Hemi Warahi in February 1888.<sup>4</sup> Fourteen objections were raised against the original claim and after discussion, seven counter-claimant parties were acknowledged by the Court. Each of these parties called only one witness to give evidence for them but the hearing still ran from 22 February until 21 May 1888. The hearing was interrupted for ten days so that all those present could attend a tangi at Napier but otherwise this was the only investigation heard by the Court over the three month period. Several of the witnesses spent considerable periods giving evidence and being cross-examined. One gave evidence over eleven days while another took thirteen days. Such long periods giving evidence were not uncommon. What is perhaps unusual is that increasingly, each party had only one witness to give evidence. Whereas in the past claimant groups would have several witnesses give evidence – particularly for the purposes of convincing the Court that their evidence was correct – it became much more common for only one witness to give evidence in support of a case. At the same time, the cross-examination of those witnesses increased considerably.

Kapuarangi was another large East Coast block. Title to this 32,000 acre piece of land was investigated by Judge Scannell and Assessor Nikorima Poutotara sitting at Opotiki in March 1895.<sup>5</sup> The two principal antagonists in this case were Te Whanau Apanui and Ngaitai. However, due to disputes within each of these tribal groupings, two other cases were set up. The first was by Ngaariki and was the product of a dispute with Ngaitai and the second by Te Whanau a Harawaka, a hapu of Te Whanau

<sup>3</sup> Northern Native Land Court minute book 8, 27 October 1887, fol. 385-402; North Native Land Court minute book 9, 5 November 1887, fol. 8.

<sup>4</sup> Wairoa Native Land Court minute book 3, 22 February 1888, fol. 69ff.

<sup>5</sup> Opotiki Native Land Court minute book 7, 25 March 1895, fol. 96.

Apanui. Despite the close relationships between these two groups, the claims were fiercely contested. Paora Ngaoki of Te Whanau Apanui gave evidence in support of his people's claim. The evidence began on 1 April and continued for about a week when it was interrupted by Kopu Erueti who was concerned that some of the evidence Paora had given did not support their case and was 'not quite correct.'<sup>6</sup> Paora and Kopu were the two witnesses for Te Whanau Apanui and their evidence and cross-examination took most of April.

Taking interruptions into account, the Te Whanau Apanui evidence took about three weeks. Only one witness gave evidence for Ngaariki and it was quite brief; Paratene Waewae, who conducted their case, presented a long list of minute book references to support their claim. Ngaitai's case was very lengthy. Two witnesses were called and they gave evidence and were cross-examined from 6 May through to 7 June. The final witness to give evidence claimed to be part of Ngaitai but set up his own case and gave evidence from 10 June and concluded on 26 June. The hearing which had begun on 25 March was finally concluded with the addresses from agents on 2 July. The Court had taken evidence almost exclusively in this case for most of that period, the only exception being an adjournment for less than a week to allow those present to attend a tangi for a Ngaitai chief who had recently died.

If the number of cases and objections to claims increased considerably, so too did the volume and complexity of the evidence presented. The evidence given by and cross-examination of witnesses generated a huge volume of minutes. It was also common for appeal hearings to take much longer to hear too. In some instances, the minutes of the hearing could extend over two or three volumes; this was unheard of in the earlier years. The extensive evidence is a significant source and one of the key concerns in this chapter is to give a sense of the many and varied narratives presented to the Court. Often these narratives were highly contradictory and they reflected the increasing fragmentation of claims to land. References to conflict and conquest were common in the sense that they were woven into narratives of long occupation. Conflict involving ancestors became another stage in the narrative and further grounds for asserting rights rather than a claim in and of itself.

During the 1880s and 1890s, as the evidence presented to the Court in support of claims became more complex and the volume of evidence increased dramatically, judges and assessors increasingly drew on evidence presented at earlier hearings and at the hearings of adjacent blocks to reach their decisions. As this practice became more common, agents representing parties drew on the evidence contained in other minute books or even submitted lists of references to minute books in support of their parties' claim. Witnesses also referred to other hearings where either they or their

<sup>6</sup> *ibid.*, 10 April 1895, fol. 278.

recent ancestors had given evidence in order to show that their evidence was correct or consistent with earlier evidence.

At the same time as the evidence increased in volume and became much more detailed and complex, two other dynamics can be identified in the type of evidence submitted by witnesses to the Court during title investigations. The first was the increasing detail applied to ancestral evidence. There was a noticeable shift away from claims based primarily on conquest. Instead, conquest claims became part of a much broader account of ancestral rights to land. Conquest became a part of a much larger claim based on ancestry and occupation and was increasingly marginal as a claim in and of itself.

Ancestral evidence itself became very complex as witnesses described in considerable detail their whakapapa, the boundaries which defined ancestral rights to the land, the particular ancestor who had rights to that land along with sites of ancestral occupation, wahi tapu, eel-weirs, bird-catching and other cultivation. Witnesses would retell in great detail where and when the particular ancestor lived on the block, what happened there and any significant events such as a dispute, the way in which any disagreement was resolved and any marriages between different tribal groupings which affected the land. This type of evidence could shift in time very rapidly. For example, the occupation of the original ancestor identified by the witness would be discussed. That ancestor may have lived on the land ten generations before the witness. The evidence could then move on to discuss the occupation of another ancestor four generations later and another ancestor two generations after that. Three generations prior to the witness would be considered evidence of contemporary occupation and this would form the other major part of the claim.

Evidence of contemporary occupation was also very detailed and very lengthy. Witnesses would speak at length about the occupation by themselves or by their parents or grandparents. In some cases, particularly as Maori lived in towns, the evidence of occupation would centre on the witness's occupation as a child and more significant emphasis was placed on the occupation of his or her parents and grandparents. The witnesses would speak of the burial of the dead, the cultivation of parts of the land and the location of pa and kainga sites. Over time, this type of evidence became much more systematic so that witnesses when giving evidence of more recent occupation of the land would list the names of wahi tapu, cultivation sites and pa sites and give a brief description of its location and account of its importance.

What became increasingly difficult for the Court to deal with was the contradictory nature of the evidence. This will be looked at in greater detail in the next chapter for the purposes of explaining how judges and assessors reached their decisions. What it is important to identify at this point is that groups who opposed each other regularly, and readily, denied the evidence of the opposing parties. This also contributed to extensive and intensive cross-examination of witnesses. Witnesses

constantly denied the evidence put forward by opposing parties. Thus under cross-examination a witness would reject the suggestion that the ancestor claimed by an opposing party had ever lived on the land.

The answers to this type of question could take one of several forms. For example, the witness could tell the Court that he or she had never heard of the ancestors; did not know of any relation to other ancestors; had never heard this ancestor spoken of in relation to this particular block of land; his or her elders had told the witness all about the land and they had never mentioned the ancestor's name or had expressly said to the witness that the ancestor had no right; or that the ancestor did indeed exist, was related to their party, but the land of that ancestor was beyond the boundaries of the block in question. There were different kinds of denials where ancestral evidence was concerned but they were still outright denials. Other witnesses to give evidence would take a similar approach, rejecting the claims and the ancestral evidence of earlier witnesses on the same basis.

Evidence of more recent occupation was just as problematic. Again, the approach was standard and it was essentially outright denial. A witness would give evidence of their own ancestor's occupation and their personal occupation and then go on to tell the Court that they had lived on or near the land for years and never seen those belonging to other parties living on or cultivating the land. The other parties would then present evidence telling the Court that they had lived on or near the land all their lives and had occupied and cultivated it and that in that time they had never seen the opposing parties living on or cultivating the land. In this sense the evidence went round in circles in terms of attempting to resolve whose ancestors had rights to the land and who had occupied the land and who had not. Increasingly the Court was forced to visit blocks of land and have witnesses point out the marks and sites they referred to in their evidence. Where witnesses failed to do so adequately or convincingly, as will be seen below, their case was generally found to be flawed and dismissed. In this avalanche of constantly shifting and contradictory evidence, the difficulty judges and assessors had in reaching decisions should not be underestimated.

The disputative nature of the Court during the 1880s and 1890s was not, as it had been in the 1860s and 1870s, a matter of neighbouring tribes disputing the outcomes of conquest. Increasingly, it can be seen, and was seen by the judges and assessors of the Court, as internal tribal disputes. It was very common for claimants groups who belonged to the same whanau, hapu or iwi to present opposing cases to the Court (usually for different parts of a block) and vigorously slug it out to the very end, even after they had both been awarded a portion of the block continuing to dispute the lists of names of owners. Decisions regularly commented on the fact that the various parties to the case were all related and that the matter was a family one for the parties to resolve. Its solution to these sorts of problems was to award the block to the disputing parties and leave the question of rights to subsequent partition. In other

words, in order to shut the dispute down, the Court was forced to put off the day when the issues at the base of the conflict could be addressed.

One of the best examples of all these trends is the Aorangi block, heard at Hastings in April 1923 before Judge Gilfedder.<sup>7</sup> This was one of the last large-scale title investigations conducted by the Court. Like so many of the later hearings, the records for the investigation and appeal of this block cover hundreds of pages over three volumes. In this case, unlike other cases before it, Pakeha lawyers were present in the Court and did represent different claimant groups but this probably reflects the special circumstances of the hearing. Of the sixteen different parties asserting a claim, ten were represented by Pakeha and the remaining six were represented by Maori agents.

The block had an area of about 7,200 acres and was located near Takapau. It was land incorrectly included in a block sold to the Crown in 1854. The purported sale of the land was a matter which caused considerable distress among local Maori and was the subject of numerous petitions. The Hawkes Bay Alienation Commission rejected the claims in 1873 but the grievance remained and a number of petitions were submitted to Parliament over many years. A commission was established in 1920 to investigate the matter and it concluded that a mistake had been made. In response, Section 33 of the Native Land Laws Amendment and Native Land Claims Adjustment Act 1922 empowered the Native Land Court to determine interests in the land. The government had not decided how to redress the grievance but it wanted to determine who owned the land for the purposes of distribution.

Sixteen lists were submitted to the Court when the case was called on. Lewis represented the three kinship groups who were the claimants. He told the Court that they occupied the land and although there had been conquest and gifts, their occupation had not been challenged. Lewis called Hemi Pakea of Ngai Tahu to give evidence; they had rights with Ngati Toroiwaho and Ngati Kikiri. He admitted that Tamaiwaho had gifted land but stated that the gift did not include Aorangi. He also gave evidence of occupation and cultivation together with two whakapapa. After establishing the prima facie case, several days were spent in discussion between the parties, both inside and outside the Court, to combine cases. This involved some major whakapapa issues in terms of ancestors and the relationship of later generations of ancestors to their descendants appearing in the Court. Committees of the claimants were also holding meetings outside the Court to resolve these disputes and work out how people would amalgamate their cases. Agents and lawyers appearing in the Court admitted that several cases were identical and that if they could arrange to amalgamate, the hearing would be shortened considerably.

<sup>7</sup> Napier Native Land Court minute book 71, 10 April 1923, fol. 84ff.

The Court decided to start hearing the claims and evidence even though the lists of names were still incomplete. In some instances, parties did not bring any witnesses to give evidence in support of a claim; instead, their agent addressed the Court and drew on the extensive body of written evidence contained in the Court's minute books. This opened up to the claimants all the narratives presented by their elders and ancestors to the Court in support of claims to blocks heard in the previous decades. Others did call witnesses who spoke of their ancestors, ancestral occupation and more recent occupation. One particular focus of the evidence was the role each claimant group played in attempts to have their grievance over the sale investigated by the government. Myers, for instance, appeared for Ngai Toroiwaho and Ihaia Hutana and told the Court that it was through the efforts of Ihaia that the opportunity to redress the mistake had arisen: 'Mr Lewis is wrong in attributing all the success in getting redress to the efforts of his clients.'<sup>8</sup> One of the other parties established an ancestral claim and called one witness who gave a detailed narrative of his ancestors, ancestral occupation and his own occupation. They also called an elderly Pakeha man to give evidence regarding those he saw living on the land over his lifetime.

The Court finished hearing all the evidence of the counter-claimants at the end of August but then had to adjourn the case until the next sitting in October. From April to August the Court had heard evidence from witnesses and statements from agents almost daily with a number of short interruptions to deal with other business or to allow the parties to attend other Court sittings. On 19 October, the case of the claimants was finally opened by Lewis who addressed the Court at length and then called several witnesses. They gave very considerable evidence both ancestral and evidence of more recent occupation. The claimants' evidence was interrupted when the Court adjourned for the sitting and had to be resumed the following February when further evidence of ancestral occupation and contemporary occupation was given. All these witnesses were cross-examined at great length. The hearing finally ended, after all agents and lawyers had addressed the Court, on 22 February when the Court reserved its decision. The hearing, over two years, heard many months of evidence in support of at least sixteen different claims. The volume of evidence was considerable as was the complexity of the narratives of ancestral occupation given by witnesses.

As evidence of ancestral occupation became more complex, whakapapa, which gave structure to the evidence, were increasingly larger, longer and contained many branches. Gone were the straight line whakapapa which traced ancestry from an original ancestor through ten or twelve generations to the witness giving evidence. They were replaced by whakapapa containing many branches and these could in some instances stretch across many pages. In other cases, judges would require written whakapapa to be submitted prior to a witnesses evidence because they were simply

<sup>8</sup> Napier Native Land Court minute book 71, 24 April 1923, fol. 147.

too complex to be described orally. Whakapapa were complex diagrams of relationships between many families. In many instances, because parties were so closely related, whakapapa was used to exclude competing claimants. Ancestors and their location in the whakapapa were selected to deny the rights of others. At the same time, however, competing kinship groups could use whakapapa in the same way to seek inclusion through their relationship to the successful ancestor. The close relationships between different claimant groups was evident in this way.

The reason for this change is related to the disputative nature of the Court hearings during this two decade period. This is because whakapapa was used as a means for excluding others. In the earlier period, witnesses drew from an original ancestor to the land and anyone who could prove a relationship to that ancestor was entitled to admission into the certificate of ownership. Hence the straight line whakapapa. All those belonging to a particular tribal grouping were able to obtain an interest in the block and these were later divided into smaller holdings for families and groups of families within the tribe. In the 1880s and 1890s, titles to land were disputed by hapu and whanau within the larger tribal grouping, rather than between tribes. That meant that all those who claimed an interest in a block were descended from the common ancestor. Those disputing ownership had to find a way of excluding those within their tribal group and whakapapa provided the mechanism.

The evidence given in the Court hearings show that generally disputing parties were related to each other through a common ancestor. However, where a block of land was heavily disputed, each party still set up a different ancestor. When the whakapapa of each party is examined it can be seen that each of these ancestors was usually a descendant of the common ancestor: a daughter or son. It was also very common for the particular ancestor from whom the land was claimed to come several generations after the common ancestor. Whakapapa could be deployed in a very flexible way so that claimants could select their ancestor in a way which they hoped would trump any opposing party. This often led to claimant groups arguing that their ancestor was the only ancestor who had rights to the land and that the land was passed through the previous descendants by gift to the individual from whom they claimed. Another way of attempting to isolate one ancestor was by arguing that other ancestors had no offspring so that the land reverted to their ancestor. The use of ancestral evidence to argue these types of cases was very common and added further layers of complexity to the evidence given in the Court.

In Taheke, for instance, the Court observed in its decision that the evidence had been of a very conflicting nature and noted that many contradicted evidence of other parties except where it was of mutual benefit to them.<sup>9</sup> Members of the same family argued against each other and a number of claims arose during the hearing in

<sup>9</sup> Taheke Native Land Court minute book 3, 14 June 1885, fols 217-23.

consequence of disagreements between members of the same kinship groups. The Court awarded the entire block to Ngati Te Tahinga and all the hapu of that tribe (which included some of those who argued against the claim of Ngati Te Tahinga). This was unusual in that the Court did not divide the land to recognise at least some of the other claims but it did rely heavily on evidence of occupation given by witnesses. However, the Court did add the rider that 'we hope that as victors, that they will be generous and instead of showing a spirit of bitterness towards the counter-claimants, will admit to their list any whom they think are entitled to some consideration.'<sup>10</sup>

Wharekahika is another example. The block was located west of Te Araroa and dealt with at Te Araroa from early October 1908 to late February 1909 before Judge Sim and Assessor Herepeti Rapihana.<sup>11</sup> As in many other cases heard after the mid-1880s, there was considerable discussion inside the Court prior to the start of the hearing regarding the cases to be set up. In the first instance, the applicant, Te Hati Houkamau set up his ancestral claim which also involved two conquests and a gift. This claim was objected to by Paratene Ngata who set up an ancestral claim through different ancestors but also referred to the conquests and the gifts. Sixteen other people appeared separately to object to the claimant's prima facie case. Discussions were then held among those present for the purposes of joining their cases and conducting together where the same ancestors were cited. The judge participated in this discussion observing that many of those who asserted common 'take' should unite:

It was not in the interests of either the natives or the Court that a case should be split up into several divisions. It was done possibly because many persons each desired to have control of a list of names – this being a lucrative position to occupy.<sup>12</sup>

In many instances, claimants who derived their right from a common ancestor had set up a separate claim through each of the ancestors children. The judge wanted each of the claims asserted in this way to combine and where 'any of the children were denied rights under the claim then the descendants of those so denied would be allowed to set up cases when lists of names were before the Court and would be allowed to call evidence.'<sup>13</sup> He assured those present that this evidence would be given as much attention as evidence given during the earlier hearing. If there were strong enough grounds for setting up a separate case, then the Court would allow the claimants to do so and it would not prevent any one who could show a right to appear before it. All parties were then given the afternoon to arrange their cases and amalgamate them where possible.

<sup>10</sup> *ibid.*

<sup>11</sup> Waiapu Native Land Court minute book 40, 5 October 1908, fol. 1ff.

<sup>12</sup> *ibid.*, fol. 14.

<sup>13</sup> *ibid.*

After these discussions, the parties returned to Court and the original eighteen claims had been reduced to seven. All those who participated in the hearing, including the agents, were Maori; no Pakeha lawyers or purchasers were present. Evidence for five of the cases was presented by a single witness; evidence in support of the other three was presented by between two to five witnesses. All witnesses gave long and detailed narratives of ancestors, sites of cultivation and occupation of ancestors and other marks of ancestral evidence. Complex whakapapa were presented to the Court and recorded over many pages in the minute book. Woven into narratives of ancestral occupation were reference to conflict among ancestors over the land. Another major issue which ran through these narratives was the way in which the land was divided by different generations of ancestors. Both were significant because they were attempts by different claimant groups to use whakapapa as a tool for exclusion. By shifting from a general ancestor to a descendant of that ancestor (who either conquered the land or who received the land when it was divided among a later generation of ancestors), it was possible to exclude others who claim through a different descendant of the general ancestor. It was very common for witnesses in opposing cases to simply deny the statements of other witnesses or assertions embodied in questions put by agents for other claimant groups. As in many other cases, the Court complained in its decision of the vast amounts of evidence which was 'contradictory and inconsistent in the extreme.'<sup>14</sup>

A further example is Whatitiri, a 20,000 acre block of land located south-west of Whangarei, which was investigated at Whangarei in December 1894 and January 1895 by Judge W.E. Gudgeon and Assessor Pirimi Mataiawhea.<sup>15</sup> In this case there were five claimant groups. Each group had only one witness, but each witness was cross-examined by the agent representing each of the other groups and the evidence of some witnesses took several full days to hear. Much of the evidence related to ancestors and contemporary occupation but one party also argued a claim for part of the land based on conquest. The claim was argued primarily between Ngai Tahu and Ngapuhi, the two kinship groups identified by the Court were Parawhau and Te Uri o Roi. The ancestral evidence given in the hearing focused on a gift by Pae, a woman of Ngai Tahu, to Takahore, her Ngapuhi husband. Other parties made claims on the basis of gifts by Takahore and his descendants. Another claim was based on the division of the land but it was a very recent division by the fathers of the claimants and was a result of the sale of some of the land.

After carefully considering the ancestral evidence presented during the hearing in a long and detailed decision, together with evidence presented to earlier hearings, the Court eventually concluded that several ancestors had rights to various parts of the block. It awarded one part of the block to the Parawhau hapu and another to Te

<sup>14</sup> Waiapu Native Land Court minute book 43, 20 March 1909, fols 145-49.

<sup>15</sup> Whangarei Native Land Court minute book 4, 14 December 1894, fol. 114ff.

Urioroi noting that Parawhau had occupied the land and had exclusive mana over the surrounding land and that while Te Urioroi's original title was 'defective' (referring to the gift which it had found was more correctly occupation only), they had occupied the land for several generations. It concluded that the 'case has presented many difficulties for the Court for it is a "riri Whanaunga" in which one section of a hapu seeks to exclude the other.'<sup>16</sup> As in the other cases, the evidence was highly contradictory and whakapapa was used in a way designed to exclude others.

These kinds of cases tended to arise out of disputes between kinship groups on an intra-tribal basis. There were, however, two occasions during this period where land was dealt with on a tribal basis in the Court. They were the Rohe Potae hearings held over several years from March 1886 at Te Kuiti before Judge Mair and Assessor Paratene Ngata, and the Tauponuiatia hearings held from January 1887 at Taupo before Judge Scannell and Assessor Nikorima Poutotara. The latter Court was appointed to adjudicate on the claims of Ngati Tuwharetoa and Ngati Maniapoto. The Rohe Potae came before the Court in the first instance to locate the tribal boundaries of Ngati Maniapoto and Waikato in the north and Ngati Maniapoto and Ngati Hikairo in the south. Once this had been determined (and Waikato excluded), the Court then went on to consider claims to the land within the boundary and at this point, the claims to land moved from a tribal basis to a smaller kinship basis.

The hearings for the Rohe Potae lands were generally dealt with by parties outside the Court. Boundaries and lists of names were the major questions brought before the Court. Much of this work was done by discussion among the claimants who came before the Court to advise on progress and any disputes which may have arisen. All those involved were Maori and no Pakeha representatives appeared in the Court. The Court's minutes show constant dialogue between the Court and claimants but it was the claimants who had to resolve the boundaries and lists of owners. In many instances, no witnesses were sworn or evidence taken in a formal manner. The Court asked for boundaries, objections were called for and discussed, and if necessary, the case might be adjourned for further consideration. Lists of names were dealt with in the same way. For this reason, the Court often considered many different blocks during the day.

In other cases, witnesses were called and evidence taken to establish a claim to the land and to set out *prima facie* boundaries of the subdivision. For example, Orahiri was called in July 1889.<sup>17</sup> The claimant belonged to Ngati Rangi and Ngati Maniapoto. He asked for a subdivision and gave a very detailed description of the boundaries and named the people who had a right. Some ancestral and occupation evidence was given and a second witness who belonged to other hapu of Ngati

<sup>16</sup> Whangarei Native Land Court minute book 5, 28 January 1895, fol. 140; see fol. 249.

<sup>17</sup> Otorohanga Native Land Court minute book 7, 5 July 1889, fol. 40.

Maniapoto supported the claim and described the settlements of his ancestors and elders. This witness asked the Court to let them discuss further a disputed portion and the case was adjourned. Although the matter came up on a couple of occasions, the block was not considered again until 9 September when the Court announced the partitions of the land based on the applications put before it.<sup>18</sup>

Other blocks, such as Pukeroa-Hangatiki, were subject to significant dispute and much evidence was taken regarding boundaries and rights to the land.<sup>19</sup> Thirty-seven days were spent hearing evidence on claims to the block. All the parties involved belonged to Ngati Maniapoto. The claimant asserted a right on the basis of ancestry and occupation by his party. He named several ancestors. Each of the five counter-claimants also belonged to hapu of Ngati Maniapoto and they all asserted rights to the land on the basis of ancestry and occupation by them. All the ancestors named appear to have been either children of Maniapoto or later descendants of Maniapoto.

Again, whakapapa was used for the purposes of excluding others from within the same tribe. Each party also claimed a discrete part of the block and described the boundaries carefully; there was nevertheless overlap between the claims and this was the reason for the lengthy hearing. In total, sixteen witnesses gave evidence in support of the various claims and the Court also called several further elderly and 'unconnected' witnesses in an attempt to clarify some of the issues. The witnesses all gave long and detailed narratives of ancestors, their marks, ancestral activities on the land (including divisions and cessions) and occupation (particularly in relation to ancestral settlements and the use of eel-weirs located on the land). The evidence of the ancestors and the occupation or otherwise of different ancestors was very detailed and complex.

These claims were also managed, in the first instance, on a tribal basis. When the Court opened at Taupo in January 1887, both Te Heuheu Tukino of Ngati Tuwharetoa and Rewi Maniapoto of Ngati Maniapoto were present and addressed the Court. They were both concerned that they did not have food or money and Rewi asked that money held by the government for another block of land be advanced so they could buy goods. Once the boundaries between the tribes were determined, however, claims of each tribe to the land within them shifted from a tribal focus to a smaller kinship group focus.

One of several sub-divisions of Taupouiatia investigated at this sitting, for instance, was Waihaha, located in the west of Taupouiatia.<sup>20</sup> A 78,500 acres block, it

<sup>18</sup> Otorohanga Native Land Court minute book 7, 9 September 1889, fol. 308.

<sup>19</sup> Otorohanga Native Land Court minute book 7, 8 July 1889, fol. 31ff. For decision, see Otorohanga Native Land Court minute book 8, 5 November 1889, fols 225-44.

<sup>20</sup> Taupo Native Land Court minute book 7, 9 February 1887, fol. 10ff.

was disputed between hapu of Ngati Tuwharetoa and hapu of Ngati Parekawa. Three hapu of Ngati Tuwharetoa, led by Papanui Tamahiki, claimed a right to the land through ancestry (Tuwharetoa and Tia) and occupation. Papanui rejected any claim by Ngati Parekawa and Te Arawa, telling the Court that they had been attacked but had never been defeated. In response, Hitiri Te Paerata, on behalf of Ngati Parekawa of Ngati Tuwharetoa, objected to the claim and he was joined by other hapu of Ngati Parekawa and Tureiti Te Heuheu, who represented Te Heuheu Tukino and also claimed through a hapu of Ngati Parekawa.

Hitiri Te Paerata gave evidence in support of his claim to the land through ancestry, occupation and conquest. He gave the names of places where his ancestors lived and other evidence of ancestral occupation together with a very lengthy account of settlements and cultivations. He also gave a whakapapa from Parekawa. Under cross-examination by Papanui, he told the Court that Te Heuheu held the supreme mana in Taupo and was descended from Tuwharetoa and Tia and that he had never heard that the land was divided by the ancestors. He was the only witness for the counter-claimants. Papanui Tamahiki gave evidence for the claimants. His evidence, likewise, focused on ancestral occupation, settlements and cultivations including bird-catching on the land. His ancestral evidence was long and detailed. He was cross-examined by Ngakuru, who represented Hitiri and his party. He was questioned at length on ancestors, including Tia, Tuwharetoa, and particularly on Kiri and Parekawa. Kiri was a descendant of Parekawa. The other major issue was the division of the land by the ancestors. Papanui vigorously rejected the counter-claim: Parekawa had no right over Waihaha; her land was elsewhere.

This hearing, like that of the Rohe Potae, was a rare case in that it dealt with land on a tribal basis. The Court's main function in this regard did not involve conquest but in establishing a clear boundary between Ngati Tuwharetoa and Ngati Maniapoto. However, when the Court moved on to deal with the lands after establishing that boundary, the shift in the mid-1880s can be seen. Rather than dealing with claims to land at a tribal level, disputes shifted down the social structure as kinship groups within the tribe argued their claims to land before the Court. In Waihaha, different kinship groups within Ngati Tuwharetoa disputed each others' rights to different parts of the block. The ancestral claims were argued in long and detailed narratives which the Court found 'unsatisfactory in the extreme.' Bound into these narratives were ancestors, their occupation, conflicts between them and divisions of the land. Stories were constructed for the purposes of using whakapapa in a way which validated the claim of one party while denying the rights of others. The two witnesses who presented evidence regularly contradicted each other and refused to acknowledge the other's rights to the land in any way.

This chapter has shown the extent to which many diverse and divergent narratives were presented to the Court from the mid-1880s until the 1920s by witnesses in support of claims to land. It has attempted to tease out the range and

extent of the narratives presented by witnesses in the Court of their ancestral claims and more recent occupation. It has also set out the diverse and contradictory nature of these narratives as a basis for discussing the way the Court went about trying to resolve title to these blocks of land.

One major characteristic of title investigations during this later period, which will be looked at in more detail in the next chapter, was the increasing marginalisation of the Court's decision in establishing a settled title. That is, the ability of the Court to impose order on this evidence was extremely limited. This was because once the Court had issued a decision and decided which parties would be allowed to submit lists for consideration and the area or interest in the block to which they were entitled, significant debate often continued as claimant groups negotiated the lists of names. For this reason, gaining control of the list was of major importance and this was regularly acknowledged both by claimants and the Court. Those who controlled the list would have a pivotal role in determining who would be included and who would be excluded.

However, when the lists came before the Court for confirmation, those whose ancestral claims were rejected could still seek inclusion by using their whakapapa and convincing the Court that they had legitimate rights of occupation based on their relationship to the successful ancestor. Those whose ancestors were not accepted could also negotiate directly with the agent of the successful party for inclusion in the list and this was a common practice. It would appear though that they received a smaller interest than those who were awarded the land by the Court. Debate over the lists of names was nevertheless a way by which those against whom the decision was given could still seek to have their claims recognised.

Nevertheless, further evidence of whakapapa and personal occupation of the land continued after the decision both from those seeking inclusion in a list and those seeking to exclude them. Finalising these lists did not occur only in the Court and parties regularly went out of the Court, either by their own application or by direction of the Court, to discuss those who would be included. However, where agreement could not be reached, further evidence had to be heard and decisions reached and this could sometimes take several more weeks before the lists could be approved. This further added both to the length of the hearing and the complexity of the evidence presented to the Court.

From the mid-1880s, the claims to land argued by Maori in the Court revealed a landscape of many voices. Witnesses presented long, detailed and complex narratives of their ancestors occupation of the land, conflict among ancestors and resolution of these conflicts together with their own experience living on the land and using its resources. They were cross-examined at considerable length by other claimants as competing narratives denied and contradicted each other. And claims were no longer argued at tribal or supra-tribal level. Traditional conflicts with

common tribal enemies were no longer strong enough to establish a robust tribal identity and claims were argued within the tribe between smaller kinship groups.

Whakapapa was used in this sense for the purposes of either excluding others or taking control of lists; those arguing before the Court over a block of land regularly descended from a common ancestor but different kinship groups selected different ancestors later in their whakapapa to claim rights over others. This was not, however, necessarily about exclusion. It could be about taking control of the list and having a strong position when it came to determining who would be included in the final list of names. Excluding individuals or families was often very difficult, if not impossible, when whakapapa was subsequently redeployed to gain inclusion in the lists through another related ancestor. Control of the lists, therefore, might better be explained in terms of contemporary tribal politics and authority (intimate internal relationships nevertheless bound up in whakapapa and narratives of the past) rather than exclusion. Debates and disputes over rights to land were carefully and vigorously argued in strategic ways. It was a highly ritualised process, and one just as important as the outcome in that the process gave structure to the outcome, into which the judges and assessors were drawn. The Court's task, which became increasingly difficult as the range, number and detail of these narratives grew, was to negotiate a resolution of disputes in a way which would establish a stable and settled title to the land. Its task, that is, was to make sense of many voices.

## MAKING SENSE OF MANY VOICES

The Court's primary function was to establish a stable and settled title to Maori customary land. The claims argued by Maori, as seen in Chapters 10 and 11, were complex and drew on long histories of interaction between different kinship and tribal groups asserting interests in a defined piece of land. Where disputes arose, the Court had to engage with the claims argued before it and this chapter examines how they did so. It is suggested that the Court found it very difficult to resolve disputes and regularly expressed its confusion over the evidence. On many occasions, different Courts reached quite different conclusions on similar issues. Moreover, it is argued that the Court used a range of strategies, depending on the specific circumstances of the case, to resolve disputes. It did not deal with rights in the abstract, as Norman Smith and others would suggest, but rather navigated a careful and cautious path between the different kinship and tribal groups in dispute.

Just as the way Maori asserted and argued claims changed over time, so too did the way in which the Court went about resolving disputes where they arose. Prior to the mid-1880s, decisions tended to be brief, even one line in favour of a particular claimant group. There were exceptions and they were generally the large-scale conquest claims examined in Chapter 10. The degree of controversy (which usually meant a longer hearing) did not necessarily lead to a long decision; some of the more controversial cases were concluded with a one line decision. From the mid-1880s, however, decisions grew considerably in length as the Court was forced to discuss and resolve disputes by carefully assessing and analysing the evidence presented during the hearing. In other words, decisions of the Court had to engage with debates over customary rights as they were argued before it in relation to a defined block of land.

Although it was often common practice to draw on the evidence and decisions in relation to adjacent blocks of land to do so, it was not possible for judges and assessors to address these disputes at an abstract level. This is because they involved particular kinship groups whose interaction with each other and with the land over several generations were bound up in long histories. These relationships were presented as evidence in support of claims in the form of long and detailed narratives to the Court. Such narratives, like the kinship groups involved and the nature of their

relationships with each other and with the land were unique. Certainly, they might extend beyond the boundaries of a particular block before the Court, but they were finite in terms of the land they affected. And although a particular kinship group might have a certain relationship with another kinship group on one piece of land, their relationship with a third kinship group in relation to another piece of land could have produced an entirely different history and an entirely different narrative to support their claim in the Court.

For this reason, the Court had to engage with what was argued before them; they could not impose some sort of abstract view of Maori rights on particular circumstance. Failure to engage with the debates in relation to a particular block of land would leave all those who argued claims unhappy and lead to rehearings and appeals. The Court had to resolve disputes where and when they arose. They had to navigate a clear path through long histories of conflict, dispute and compromise between different kinship groups in relation to a particular block of land.

The decisions of the Court show that rather than building a body of precedent which could be applied to particular situations, the judges and assessors used a range of strategies to resolve disputes. These strategies primarily involved ways of determining the weight given to the evidence of witnesses presented during the hearing. They included: comparing evidence presented during the hearing with that of 'credible' witnesses given at earlier hearings; discrediting one witness to privilege the evidence of another witness; use of 'agreed' versions of the original settlement or later conquest of a wider area of land (such as an entire region) from which the claims are derived; identifying and emphasising contradictions in the evidence of individual witnesses; whether or not witnesses were vague in describing the location of ancestral and contemporary sites of occupation; and, finally, witnesses whose evidence of ancestral and contemporary occupation were not borne out by a tour of the land, were fatally discredited. This list is not exhaustive but it includes many of the most common strategies applied by the Court to resolve disputes among kinship groups over a block of land.

There is one other important consideration. In their decisions, the Court regularly complained about the lack of agreement in the evidence. Some of these complaints were seen in the previous chapter. Witnesses for one kinship group would deny entirely and absolutely the evidence of witnesses given in support of an opposing kinship group's claim. When claims were being argued there was often very little common ground between some kinship groups. This was part of the process of debating customary rights to land but it also caused considerable confusion for the Court in trying to resolve disputes. It was for this reason the strategies above focused on how to determine which evidence was credible; this was not so much about finding evidence which was either accurate or true but the evidence which was the most consistent. Nevertheless, judges and assessors regularly expressed in a variety of ways the confusion they saw unfolding before them when kinship groups

were arguing their customary rights to land. The decisions of the Court were often not a clear statement of their determination of Maori customary rights to land; they were often a statement which reflected the confusion and contingent understandings of judges and assessors of often long and entrenched disputes over land which had continued over several generations.

This chapter takes a number of decisions of the Court, including one of the large-scale conquest claims, and teases out some of the strategies used by judges and assessors to reach conclusions on disputed rights. These decisions have been selected from the sample of cases examined using the Court's minute books because they illustrate such strategies well. They reflect patterns evident in the wider sample. Since it is impossible to discuss the decision without some background to each of the hearings, a brief overview of the claims and the way they were argued is given. This chapter also examines instances of confusion expressed by judges and assessors in considering the claims before them and the significance of these admissions.

Te Aroha was examined in some detail in Chapter 10 as an example of one of the large-scale conquest claims argued in the Court by Maori claimants prior to the mid-1880s. The Te Aroha decisions are significant as well in terms of illustrating how the Court dealt with this sort of claim. Hearing evidence continued at Matamata until 2 March 1869, when the Court adjourned to its scheduled sitting at Kapanga, Coromandel. There, ironically in the heart of Marutuahu's territory, the Court gave its decision in favour of Ngati Haua absolutely on 30 March 1869.<sup>1</sup> It was a brief decision. Marutuahu, the Court found, had relied almost entirely on the evidence of Ngati Haua 'hauhau' who lived on the land. These witnesses had shown that after the battle of Taumatawiwi, Te Waharoa of Ngati Haua had not returned the Te Aroha lands when peace was made. The Court concluded nevertheless that Marutuahu's subsequent attempts to defeat Ngati Haua all failed and accepted the Ngati Haua claim that in 1840 they were in possession of the land.

The decision of the Court at the rehearing of Te Aroha, at Point Britomart in Auckland, came to entirely the opposite conclusion. On 23 March 1871, the Court reconvened at Point Britomart to give its decision and the minute book contains a brief statement: 'Brief decision given in favour of Marutuahu. A fuller statement of the reasons would be published at a later time in order to allow those present to return to their settlements.'<sup>2</sup> This 'fuller statement' was published in the Auckland newspapers and much later in Fenton's *Important Judgments*. Like Fenton's Orakei decision, this Te Aroha decision was long and wended its way through a long history of conflict, victory and defeat between Marutuahu and Ngati Haua. It was a decision which reflects the classical view of the Court's process of determining the owners of a

<sup>1</sup> Coromandel Native Land Court minute book 1, 30 March 1869, fol. 142; the decision was recorded in Waikato Native Land Court minute book 2 fols 300-304.

<sup>2</sup> Hauraki Native Land Court minute book 4, 23 March 1871, fols 249-50.

block: the Court worked its way through each conflict between two large and clearly defined warrior tribes characterising each subsequent conflict as a response to a prior defeat until such point as one party was finally victorious. In this case it was the final victory at the battle of Taumatawiwi on which this Court, like the earlier one, focused its attention: in this great conflict, who were the victors?

Judge Rogan and Hemi Tautari found the victors to be Ngati Haua. Judges Maning and Monro and Hare Wirikaki and Rawiri Te Tahua reached the opposite conclusion and found Marutuahu to be the victors. The second Court did find Ngati Haua to be the victors at Taumatawiwi but did not believe this equated with conquest: 'A victory is not necessarily a conquest.'<sup>3</sup> It was around the question of whether Ngati Haua could take and hold the land at Te Aroha from Marutuahu that the decision revolved. The Court then moved on to consider the evidence given during the hearing by witnesses relating to occupation of the land after Taumatawiwi. Complaining on a number of occasions that the evidence was 'contradictory,' the Court considered and relied heavily although not exclusively on the evidence of the two Pakeha witnesses who they described as 'uninterested.' And after a lengthy narrative, they concluded that Ngati Haua had been unable to effectively occupy Te Aroha and were harassed over the following years by Marutuahu tribes. Furthermore, the Court found that during this time those living on the land belonged primarily to Marutuahu, that those Ngati Haua who lived on the land since peace was agreed did so with the consent of the Marutuahu people, and that although Ngati Haua had won the battle of Taumatawiwi, they were unable to turn their victory into conquest of the land at Te Aroha. Marutuahu were therefore the proper owners of the land.

The claims to Te Aroha were heard twice, once at Matamata and again at Auckland, and the two hearings conducted by two different Courts reached entirely opposite conclusions. The approach of the Marutuahu tribes in arguing their claim to the land was very different in each hearing. In the first, the majority of their witnesses belonged to Ngati Haua 'rebels' who acknowledged the Marutuahu claim; the Court found in contrast, however, that their evidence supported the Ngati Haua claim of conquest over Marutuahu. In the second hearing, almost all the witnesses who gave evidence in support of the Marutuahu claim came from one of the four Marutuahu tribes. They gave overwhelming evidence of their occupation of Te Aroha after Taumatawiwi and the inability of Te Waharoa and Ngati Haua to occupy the land. Both decisions reviewed in detail the long history of conflict between Marutuahu and Ngati Haua but they came to different conclusions on the basis of what constituted conquest. The two decisions suggest even if there was something random about the decisions, the Court did apply a certain logic to the situation. In doing so, Marutuahu won the latest battle in their long conflict with Ngati Haua.

<sup>3</sup> 'Aroha,' in *Important Judgments Delivered in the Compensation Court and Native Land Court*, F.D. Fenton (ed.), Auckland: Henry Brett, 1879, p.115.

Twenty years later, the Court was the site for another big battle involving the Marutuahu tribes but this time it would not involve a large-scale conquest claim. Marutuahu conquered the original occupants of Hauraki and settled there many generations before the Native Land Court was established. The Court, however, gave the original occupants, and in particular Ngati Hako, the opportunity to assert rights independent of the tribes through which they had obtained rights to occupy the land. The land in question was substantial in area and primarily the Piako swampland located on the northern Hauraki plains on both sides of the Waihou River. Rather than dealing with the land as one block, it was broken into about twenty with areas ranging from several thousand acres to over ten thousand acres.

These cases would clog the Native Land Court and the Native Appellate Court through the 1890s. All were argued at length and in considerable detail and all were appealed. The major difficulty which arose was that the Marutuahu tribes claimed the land absolutely by conquest over Ngati Hako, but did not permanently live on the land even though they regularly used the substantial food resources located there. Those who did live permanently on the land, Ngati Hako, denied the land was conquered by Marutuahu and were able to show the Court through evidence of occupation that they had a detailed knowledge of the land and its resources. Ngati Hako witnesses could deny the conquest of the land by arguing that they were conquered by Marutuahu but not on the Hauraki plains land. Through most of these hearings, the Ngati Hako people appearing in the Court were the same: Paora Tuinga of Ngati Hako gave evidence and Hare Teimana acted as their agent.<sup>4</sup> The role of the latter would be referred to as a major source of complaint for several Marutuahu leaders.

At the sitting of the Court in October 1893 at Shortland before Judge Gudgeon and Wiremu Fox, for example, nine large blocks of land located on the Hauraki plains, north of Paeroa and on both banks of the Waihou River, were dealt with.<sup>5</sup> The blocks dealt with were sizeable: Makumaku had an area of 1,244 acres, Kopuarahi of 3,000 acres and Ngataipua of 2,700 acres. All the decisions were appealed and it is not difficult to see why: the Marutuahu tribes found themselves receiving awards far below what they considered appropriate and Ngati Hako were extremely successful in securing large shares in the blocks. In many cases the awards made were increased by the Native Appellate Court (Judges Scannell and Edger and Assessor Hare Matenga) when it considered the appeals in February 1896.

All these cases became closely bound up with each other when the original investigation was conducted. As one decision was given, agents and those they

<sup>4</sup> Agents often belonged to the kinship group on whose behalf they appeared in Court, but this was not always the case. It is quite likely that Hare Teimana did not belong to Ngati Hako and was possibly Harry Simmons of Ngati Raukawa.

<sup>5</sup> They were Makumaku, Wairau, Tiritiri, Kopurauwai, Koukourahi, Kopuarahi, Ngataipua, Umutawa and Pouarua Pipiroa.

represented worked to develop their cases in order to present a stronger and more convincing argument in the investigation of the subsequent block. In Makumaku, the Court did not accept many of the claims by the Marutuahu tribes.<sup>6</sup> During the appeal hearing, Hare Renata of Ngati Maru stated his claims to the land all failed because the judge rejected the argument that Ngati Hako were their serfs:

Hoani Nahe replied we were unable to bring forward any other take besides those already stated by us. These are the only take handed down from our ancestors to our parents and to us, the judge replied 'yes those false statements.' The judge appeared incensed against Ngati Maru. After the judgment had been given some of Ngati Maru and Ngati Whanaunga set up claims as Ngati Hako in Makumaku and other blocks. The judgement in Kopuraruwai and Koukourahi was given before the claims in Makumaku were set up.<sup>7</sup>

The Court would not hear claims based on conquest over Ngati Hako, by gift from Ngati Hako for protection and when Ngati Maru people set up claims through the Ngati Hako whakapapa, Hare Teimana told the Court they were doing this because they were prevented by the Court from arguing their own rights.

Judge Gudgeon and Assessor Fox rejected out of hand the claim of conquest on the basis of one of its earlier decisions (at the same sitting) and were also deeply suspicious of the evidence given by Marutuahu witnesses which showed they collected food from the land. It would appear that one of the biggest problems with the Marutuahu cases was that they were not argued together and the evidence of witnesses for one tribe contradicted that given by other witnesses. At the original hearing of Makumaku, small awards were made to Ngati Whanaunga and some Ngati Maru who also claimed with Ngati Hako. Judge Gudgeon and Assessor Fox were convinced, however, that the Marutuahu tribes had no significant rights to the land at Piako.

The Native Appellate Court sitting in September 1896 was not so certain.<sup>8</sup> It noted that the Native Land Court had dismissed the conquest claims at the sitting in December 1893, but at another sitting in March 1895, which heard the Pouarua Pipiroa block, the conquest claims had been accepted.<sup>9</sup> The Appellate Court was more than a little confused by the Ngati Maru conquest claims. They found that '[w]ith respect to the claim of Ngati Maru by conquest and gift, we must say that the evidence brought forward in support of these take is too conflicting and too contradictory in itself to allow the Court to receive it as an undoubted base of claim.'

<sup>6</sup> Hauraki Native Land Court minute book 34, 9 October 1893, fol. 10ff.

<sup>7</sup> Hauraki Native Land Court minute book 37, 10 February 1896, fol. 270.

<sup>8</sup> Hauraki Native Land Court minute book 41, 21 September 1896, fols 171-79.

<sup>9</sup> In appealing that decision, the Marutuahu appellants argued it had not awarded them a share which sufficiently recognised their interest.

<sup>10</sup> Nor were they satisfied that the evidence showed that Ngati Hako were allowed to remain on the land as 'rahi.' They did acknowledge that there was plenty of evidence to 'show that however Ngati Maru may have acquired a footing in the Piako lands they did acquire such a footing and used it.' The Court found therefore that although it could not determine how Ngati Maru gained their rights, they definitely had rights.

The decision continued to examine this question:

It has been shown to our satisfaction that Ngati Maru exercised from time to time various acts of ownership on these lands not by actual permanent residence but by resorting to them for obtaining such food as the land produced, at their pleasure or convenience without obstruction from those who now oppose them, that from generation to generation since they claim to have first formally taken possession of the land they have taken eels from the Piako and other streams, snared ducks in the lagoons and caught patiki and other fish in the shallow waters on the Coast, that during the lifetime of the present generation they have bred horses and pigs on suitable lands in these places, always without opposition from Waitaha Ngamarama or Ngati Hako.<sup>11</sup>

Not only did they find there was no opposition from Ngati Hako, they added that Ngati Hako's 'opposition to the Ngati Maru owning any part whatever of these lands is a comparatively recent departure on the part of Waitaha, Ngamarama and Ngati Hako.'<sup>12</sup> Whereas the earlier Court had denied any and all but the smallest of Marutuahu rights to the Piako lands, the Appellate Court found they must have had rights for they made use of the resources of the land without opposition from Ngati Hako even if it did not know the source of those rights and importantly, even if the Marutuahu tribes did not have permanent residences on the land.

Later investigations such as Horahia Opou, Puhangateuru and Otakawe illustrate the same kinds of issues involving the dispute between the Marutuahu tribes and Ngati Hako.<sup>13</sup> The various claims confused the different Court's appointed to consider the blocks and there was a great deal of variation in the different conclusions reached in different decisions. In Horohia Opou (4,245 acres) and Puhangateuru (9,800 acres), heard in August 1897 before Judge Mair and Assessor Te Huirama Tukarini, explanations for some of the problems were noted in the decision:

It is pointed out that the Ngati Maru have not been quite consistent in their versions given at different times of the 'tukus' to Korohura, upon which they place so much reliance now, and that some of them have cast in their lot with the claimants. In reply to this Ngati Maru say that owing to adverse circumstances they have during

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*

<sup>12</sup> *ibid.*

<sup>13</sup> Hauraki Native Land Court minute book 45, 26 August 1897, fol. 255ff (Horahia-Opou and Puhangateuru); Hauraki Native Land Court minute book 46, 17 February 1898, fol. 351ff (Otakawe).

the past four or five years suffered constant defeats by Paora Tiunga and Ripikoi under the skilful guidance of their conductor, Hare Teimana, and it is not to be wondered at that some of them should have given way and joined the winning side, especially when they were told that it was their only chance of getting anything. As a matter of fact some of the Ngati Maru have joined Ngati Hako, while others have consistently adhered to the 'taras' which they originally set up in the Piako cases, although they have often sustained defeat. Ngati Maru also say that, emboldened by success Te Ripikoi and Paora now lay claim to land which they had no idea of claiming a few years ago.<sup>14</sup>

This Court accepted that the Marutuahu tribes had conquered the land and the people. And as in the earlier decision in which Judge Mair was a member of the Court, considerable emphasis was placed on the use of the land by Marutuahu tribes: 'Ngati Maru say that when it suited any of them to do so, they went to Piako to get eels, or rear pigs, or perform any other acts in assertion of their rights, and at other times they brought the Horowatea to Hauraki to render service to their masters.'<sup>15</sup> It would not accept that Te Horowatea (Ngati Hako) were rahi but it did conclude they were under the mana of Ngati Maru. In the case of Horahia Opou, after making several separate awards to Ngati Maru parties, the block was divided almost equally in half between the Ngati Maru and Ngati Hako tribes.<sup>16</sup>

The Hauraki Plains were a site of major dispute, primarily between the Marutuahu tribes and Ngati Hako. Hearings were long, evidence and cross-examination detailed, and appeals were often lodged by either one group or the other. Very few, if any, of these cases, which involved blocks of land of several thousand acres in area, avoided an appeal. In attempting to resolve these disputes, the Court recognised that both Marutuahu and Ngati Hako had rights to the land but the extent of those rights was the major issue in dispute and a source of considerable confusion for the Court. Indeed, different Courts reached different conclusions on the claims, and the awards to Marutuahu and Ngati Hako varied over the 1890s. Moreover, there

<sup>14</sup> Hauraki Native Land Court minute book, undated, fols 205-18.

<sup>15</sup> *ibid.*

<sup>16</sup> On appeal in September 1899, the Native Appellate Court (Judges Scannell and Batham and Assessor R.P. Uruamo) confirmed the decision after considering the issues raised by Ngati Hako. The main question the Court considered in the appeal was the extent to which the decision of the Native Land Court in Horahia Opou and Puhuhangateuru 'deviated' from the various decisions of the Court and Native Appellate Court in earlier Piako cases. It found that the one third, two third rule was applied to Puhuhangateuru and showed that the decision of the Appellate Court in 1896, 'that the more permanent occupation carried the greater area,' was followed. It also found that the awards made to Ngati Whanaunga and Ngati Maru and a separate award to Taipari's family were justified. On this basis the appeals were dismissed and the Court concluded: 'The Court awards are based on the occupation which, whatever other theories as to origin and ancestry or any other base of claim may be advanced, is the only reliable test of ownership and where any awards are made they are made and must be considered so made to those who can prove such occupation as the Court considers gives a right of ownership.' Hauraki Native Land Court minute book 52, 20 October 1899, fols 129-134.

was disagreement over the location of the conquest argued by Marutuahu: some Courts accepted the land had been conquered but others refused to recognise the conquest claim on the basis that witnesses in earlier hearings had acknowledged the limited boundaries of the conquest. Emphasis was placed on the evidence of occupation given by Ngati Hako and Marutuahu, particularly in relation to the capacity of the witnesses to demonstrate a clear and detailed knowledge of the land. Nevertheless, the ability of the Marutuahu tribes to use the resources of the land, without any restrictions on their access, meant the Court had to engage with the Marutuahu conquest claims. It was not possible to ignore them and they did create confusion for the Court.

The cases on the Hauraki plains show the difficulties the Court faced in trying to come to terms with the customary rights argued before it. They also reveal some of the strategies used by the Court to deal with the complex and contradictory evidence presented by Maori claimants in support of their claims. Many of the Court's decisions could be used to illustrate these same strategies. Discussed below are eight decisions of the Court involving land located about the North Island. These are decisions which were given across the late nineteenth and early twentieth centuries. That is, they are not confined to particular times and places. Each is used to explore some of the strategies used by the Court to resolve disputes over land where they arose.

The Whirinaki block was heard at Rawene from November to December 1885.<sup>17</sup> In this case, the Court recognised the rights of the ancestors named and then heard further evidence of whakapapa and occupation to finalise the lists of owners. The block, with an area of just under 3,000 acres, was heard before Judge Puckey and Assessor Renata Ngahana. A *prima facie* case through three ancestors, Tuteauru, Tamatea and Taonui, was established. Reference was also made to conflict among the ancestors and several revenge killings; out of all this, the claimants' three ancestors, led by Tuteauru, avenged the deaths and drove away those who attacked his people. Later, a claim based on conquest by Tuteauru was added. Forty-three counter-claimants appeared and after discussion, 27 were admitted and 18 rejected. The Court found, however, that most of these people did not dispute the claim, they wanted to be admitted with the claimants. Of the 27 admitted, nine decided to establish their own claim. Some of these claimed under a different ancestor (Kairewa), while others claimed under Tuteauru alone. Most of the witnesses for the various counter-claimants belonged to Ngati Kairewa and argued their ancestral rights through different sons and daughters of Kairewa. Other witnesses in the counter-claims belonged to Ngati Tuteauru and claimed through Tuteauru.

<sup>17</sup> Northern Native Land Court minute book 7, 11 November 1885, fol. 225-324.

The Court found that Tuteauru did not conquer the land. Rather, 'that his descendants acquired rights by occupation, and by intermarriage with those of Kairewa, is undeniable; for nearly all the persons now living at Whirinaki have the blood of Tuteauru intermingled in their veins with the blood of Kairewa.' However, claims had to be validated by either clear evidence of occupation or an admission of right by those who did occupy the land. The Court decided that 'the principal owners of the land are those persons who are descended from both Kairewa and Tuteauru; and who can prove the exercise of rights of ownership.' The Court then went through the nine cases argued before it and stated the rights of each on this basis. Some were found to have rights while others were rejected entirely; it would appear the grounds for this determination was evidence of occupation or where others recognised their rights. The Court did not allow these people to submit lists; it did, however, require the claimants, who were successful, to submit their lists. There was considerable debate over who would be included and at one point the judge and assessor were forced to leave the bench until order was restored. One family was refused admission but the claimant's agent eventually agreed to accept them and the matter was resolved and orders issued.

The Waihaha block was considered during the Tauponuiatia hearing in February 1887.<sup>18</sup> Like Whirinaki, this Court dealt with the disputes in a similar way, albeit on a much larger scale, by recognising the ancestral claims and then hearing further whakapapa and evidence of occupation to finalise the lists of owners. In Waihaha, two principal ancestral claims to the land were asserted on behalf of six hapu, three as claimants and three as counter-claimants. The three hapu who appeared as counter-claimants did not deny the right of the three hapu claiming the land but wanted to have their rights recognised in the title. The Court found the 'evidence of both sides unsatisfactory in the extreme.'<sup>19</sup> Both sides had only brought forward one witness to speak of sites of settlement, bird catching places and burial grounds. Each had also given 'a blank denial to the statements of the other, and stating that all the places mentioned by the other are the property of his hapus and the evidence on each is so uncertain and so contradictory in itself, that really very little reliance can be placed on it.'<sup>20</sup> The Court did find that the ancestor of the counter-claimants did once have authority over the land and the people but at some point this authority ceased: 'but when or how that authority ceased is not shewn, the claimant acknowledges such authority in one part of this evidence but denies it in another.'<sup>21</sup> The Court also thought that those of the counter-claimants who had occupied the land did so through their whakapapa connections with the claimants.

<sup>18</sup> Taupo Native Land Court minute book 7, 9 February 1887, fol. 10ff.

<sup>19</sup> Taupo Native Land Court minute book 8, 22 February 1887, fols 88-90.

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*

The Court chose to resolve this dispute through a conciliatory decision which awarded the land to the claimants and those of the counter-claimants who could prove occupation. One consequence of this, however, was considerable debate over the lists of names. A list was subsequently submitted in early March and several objections raised; a number of individuals appeared in the Court seeking admission to the list. One seeking inclusion had a witness give evidence of their whakapapa (to establish their ancestral relationship) and evidence relating to their personal occupation of the land (whether permanent or more transient in nature) and also gave evidence himself.<sup>22</sup> In response, four other witnesses looked to exclude him by telling the Court that his kainga were located outside the Waihaha block and that they had never seen him living on or cultivating the land. After hearing this evidence, the Court decided his claim was not proved and it was dismissed. Many more weeks were spent trying to finalise the list of names. Through May and June the case continued to come before the Court with more people seeking inclusion in the lists; the Court took further evidence, including two weeks spent only on this case in June, and visited the block to view the sites of occupation.

Judge Mair and Assessor Aperahama Te Kumi heard claims to the 42,000 acre Porangahau-Mangamaire block at Waipawa from March 1886.<sup>23</sup> In this hearing, the Court placed emphasis on the importance of actual occupation rather than just knowledge of the land and drew on earlier cases to recognise a disputed claim. The claimants set up their *prima facie* case and eight objectors appeared. After several days of discussion, it was agreed there would be four cases, including that of the claimants. The hearing took about six weeks; all the claims were ancestral and witnesses weaved a gift of the land with a number of conflicts among the ancestors into their narratives along with recent assertions of rights to the land.

The difficulties facing the Court were explained in a paragraph in their decision:

The evidence given has been very lengthy and very contradictory. Indeed it seems to be the custom now to twist, if not to manufacture evidence to make it fit certain cases. Almost the only point upon which all parties are agreed being the gift by Te Angiangi, but there a difference of opinion arises directly, claimants asserting that Te Whatuiapiti took possession of and occupied the land, which then descended to his heirs, while Henare Matua and his party of counter-claimants state that Te Whatuiapiti never possessed himself of the gift, but at once transferred it to the different hapus who had collected the food, and that these hapus quarrelled and one section expelled the other. The accounts of two of some of the so-called 'conquests' are not proved to have had any reference to this land, others were mere killing expeditions (*patu tangata*) one was a case of wholesale witchcraft, while some of these fights are denied absolutely by the other side. Gifts of land too have been

<sup>22</sup> *ibid.*, 9 March 1887, fol. 193.

<sup>23</sup> Napier Native Land Court minute book 11, 15 March 1886, fol. 131ff.

detailed which are highly improbable, notably that said to have been made by Te Angiangi in favor of Manuhiri who thereupon occupied the land given to him after bewitching an entire hapu of Te Angiangis.<sup>24</sup>

The Court found that all those claiming the land were descended from the same ancestor, Whatuiapiti, but subsequent divisions of the land meant that not all his ancestors were entitled to an interest in the land. Evidence of occupation was problematic because all the people had left to go to Te Mahia during an exodus to Nukutaurua around 1828. They returned in 1844-45 and re-established themselves and their rights remained uninterrupted.

The claims of one party were dismissed because they had no permanent occupation; their ancestors were driven off the land and settled nearby, retaining knowledge of it but no rights. The Court found that another group of claimants had named many ancestors from whom they derived rights in the land and shown a great deal of familiarity with the sites of ancestral occupation, settlement and places of cultivation. They had left for Nukutaurua but later returned after the fighting and remained there ever since. The Court was quite disparaging of their evidence of conquests, noting that 'some of the ancestors named had better have been left unmentioned, for their chief characteristic was to run away.'<sup>25</sup> The descendants of one of these ancestors attempted to assert a right to the land in the Court six generations later and this was entirely rejected by the Court. The other section of this group were, however, considered to be the people resident on the land, living there under the mana of the senior chief. As for the claimant's case, attempts to exclude one family from the land, on the basis that three generations earlier they were sent off the land but later allowed to return through intermarriage, were rejected by the Court. It found their rights had been freely admitted during a case in 1870 and this was found to be 'conclusive evidence.'<sup>26</sup> This party, together with the other successful party, were awarded the bulk of the land and the lists were resolved with comparative ease.

Mangahauini was claimed by various kinship groups of Ngati Porou and the Court took a quite different approach to resolving disputed rights. Its strategy in this case was to recognise the common ancestor of the different claimant groups on the basis that they were all related and so would receive some rights, even those who lacked permanent occupation. The block was heard at Tokomaru Bay in October 1897 by Judge Scannell and Assessor Hone Kaora.<sup>27</sup> A prominent figure in the hearing was Colonel Thomas Porter, who appeared on behalf of his wife, Herewaka Poata, and others. He gave evidence in support of her ancestral claim including a

<sup>24</sup> Napier Native Land Court minute book 12, 3 May 1886, fols 51-56.

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

<sup>27</sup> Waiapu Native Land Court minute book 27, 13 October 1897, fol. 1ff.

number of substantial whakapapa. In response to this claim, 20 counter-claimants, representing different kinship groups of Ngati Porou, appeared in opposition and claimed through many ancestors. In total thirteen kinship groups claimed an interest in the block. After further discussion and amalgamation of cases, there remained nine different cases.

In its decision, the Court divided the block in two and considered the claims to each part separately.<sup>28</sup> In one, the Court decided against a detailed review of the evidence, preferring instead to give a brief statement of the rights of each of the six kinship groups claiming an interest. Several claims were dismissed because the Court found that their ancestors had been expelled from the block or forfeited the land during a dispute and their descendants ceased to occupy the land. The claim of one, Whanau a Tawhaki, was dismissed because there was no evidence of occupation. The Court found another claim very strong because the kinship group's elder was a senior Ngati Porou leader who lived on the land for a time. But, other than his marriage to a woman there, his descendants were unable to identify the right by which he occupied the land and the Court would not admit a right by ancestry alone and that claim was also dismissed. The claim of Whanau a Aotawarerangi and Whanau a Te Ngoi for different parts of the block were those recognised as having proved ancestral rights and occupation. As for the balance of the Mangahauini block, the four counter-claims were dismissed because the evidence they presented was 'insufficient.' The Court, however, expected many of these people would be able to get into the title through the general ancestors, Tamatea, Kiwhakauri, Tumokai and Wehiwehi, and it was to their descendants, represented by Porter, that the land was awarded. For this reason, it took some considerable time and a great deal of debate to finalise the lists of names for each of the divisions of the block.

The 9,000 acre Te Komiti block was heard at Helensville in October 1898 before Commissioner Clendon and Assessor John Bryers.<sup>29</sup> Like Mangahauini, this Court dealt with the disputed rights by finding the people were closely related and should therefore receive rights in the block. The land was not a matter for great dispute and the hearing took only four days. Three cases were argued, one on behalf of Ngati Kura and another for Te Uri o Hau. It is not clear from the minutes, the nature of the third claim or on whose behalf it was argued. The claimants asserted ancestral rights and referred to a conquest by their ancestor, Ranginui. They had also occupied the land continuously. The counter-claimants asserted rights through different ancestors and denied the conquest by Ranginui.

In their decision, the Court found that 'the respective parties are so inter-mixed by marriage and other relationships, that the several hapus have lately all

<sup>28</sup> Waiapu Native Land Court minute book 29, 12 March 1898, fols 214-9.

<sup>29</sup> Kaipara Native Land Court minute book 7, 10 October 1898, fols 161-225.

merged into one namely “Uriohau.”<sup>30</sup> Over the previous decades, the adjacent land had been claimed by various kinship groups – Ngati Kura, Ngai Tahu, Ngati Kauae, Ngati Rangi and Ngati Whare – but they were now all incorporated into Uri o Hau. It decided that all those claiming an interest through these kinship groups should be included in the title because ‘the course followed by the old people of the past generation, relating to the ownership of all these lands, must be followed out by the Court in this instance.’<sup>31</sup> All of Te Uri o Hau would therefore be recognised as having a right. The conquest referred to by witnesses was dismissed: ‘The conquest spoken of appears to have been an intertribal disturbance and therefore could not be considered a conquest, in the same way that a war with outside people would be considered.’<sup>32</sup>

The Taumatotara block was heard at Te Kuiti in February 1899, before Judge Edger and Assessor John Bryers.<sup>33</sup> In this case, the Court drew on previous decisions of the Court to determine a conquest claim and also distinguished between permanent and transient occupiers to finally determine the extent of the land awarded to each kinship group. The 11,500 acre block was located at Kawhia and the case was controversial because one kinship group decided to argue a conquest claim (Ngati Maniapoto over Ngati Toa). Those arguing the conquest claim admitted it had been deliberately suppressed during the Rohe Potae hearings to ensure Waikato were excluded from the land there.<sup>34</sup> As usual, there were problems in deciding who the claimant was and arranging the various counter-claimant cases: there were a number of ancestors for different parts as well as the conquest claim. Once under way, the hearing took about a month. Agents representing different claimant groups made extensive use of the evidence recorded during earlier hearings.

In its decision, the Court posed two questions:

1. Did this block form part of the land of Ngati Toa, and was it, after the migration of Ngati Toa to Kapiti, taken possession of, and occupied by Ngati Maniapoto or some section of that tribe, by right of conquest over Ngati Toa: and, if so, by which section of Ngati Maniapoto?
2. If there was no conquest over this block, what ancestor owned it and to what section of people has that ancestral right now descended?<sup>35</sup>

To address the first question, the Court relied entirely on previous decisions of the Court in the Rohe Potae block and the partition decisions of two blocks, Awaroa and

<sup>30</sup> *ibid.*, 14 October 1898, fol. 221.

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> Otorohanga Native Land Court minute book 34, 7 February 1899, fol. 140ff.

<sup>34</sup> *ibid.*, 10 February 1899, fols 176-8.

<sup>35</sup> Otorohanga Native Land Court minute book 35, 11 March 1899, fols 98-105.

Kinohaku West. The Court observed that the Rohe Potae decision described Ngati Maniapoto and Ngati Hikairo as the main tribes at Kawhia but that Court could not decide how they derived their rights. Using the evidence presented to it, the Court rejected the suggestion that Te Rauparaha and Ngati Toa were not conquered and that they left after peace was made:

Pepene argues that it cannot be said that Te Rauparaha was conquered because he did not leave the district till peace had been made with Ngati Maniapoto and Waikato. But the Court cannot see it in this light. It is true that peace had been made: but Te Rauparaha went to some extent secretly and hurriedly, and taking every precaution against attack. In fact, he was followed up and attacked at Waitara by Te Hiakia. This does not look like settled peace. It rather suggests that he went away because he did not feel strong enough to maintain himself in his ancestral home at Kawhia.<sup>36</sup>

On this basis, the Court accepted that the lands at Kawhia were occupied by Ngati Maniapoto by right of conquest and went on to deal with the ancestral evidence and the disputed rights of various ancestors to the land at Kawhia.

The Court was concerned to resolve discrepancies in claims of ancestral rights with the conquest it had found did occur and the evidence of ancestral occupation and more recent occupation. They did so by distinguishing between different types of occupation: more permanent settlers and those who came on to the land on a transient basis. The claimants, whose ancestry was derived from both Ngati Maniapoto and Ngati Toa, were able to show that they and their ancestors permanently occupied the land, although the Court was sceptical of the permanence of their occupation. The Court also doubted that the claimant's ancestors were able to re-occupy the land through Ngati Toa; and for this reason looked at the occupation since Te Rauparaha had gone to Kapiti. The claimants were nevertheless awarded most of the block. Portions were awarded to those of Ngati Maniapoto who had claimed by conquest only but who could show some, more limited, occupation; the Court acknowledged their ancestors had rights to the land with small awards.

The Moerangi block was a huge piece of land which lay between Aotea Harbour and Mount Pirongia, south of Auckland, which took just under two years to hear. Like Taumatotara, the Court drew on earlier cases and compared them to the evidence of witnesses appearing during the hearing to decide a conquest claim. Other strategies applied in its decision included detailed examination of contradictions in the evidence of witnesses regarding ancestors and occupation and the Court also encouraged the successful parties to recognise the rights of those whose claims it rejected. Moerangi was an extremely controversial case which was heavily disputed by all the tribal and kinship groups involved and the hearing generated a huge volume of minutes. The block first came before the Court in early June 1908 and the orders

<sup>36</sup> *ibid.*

were not finalised until early May 1910. The hearing was held in Ngaruawahia and heard by Judge MacCormick and Assessor R.P. Mokonuiarangi. When the case first came before Judge Edger and Assessor Wikiririwhi Te Tuahu in June 1908, those present asked the case be heard immediately.<sup>37</sup> It had not, however, been notified and two weeks later a notice was received from the chief judge stating that the case would be heard by a different judge; those present in the Court were very keen for the case to be taken immediately.

Further delays in getting the hearing under way arose because Kaihau and Mahuta were both attending a sitting of Parliament and wanted the case adjourned until they could attend in person.<sup>38</sup> The discussions over these delays were long and reflected the disputes which would arise when the hearing finally commenced. Those present, particularly representatives of Ngati Te Wehi and Ngati Mahanga, were incensed that Kaihau and Mahuta had taken it upon themselves to have the case delayed. Many had come inland from Kawhia to Ngaruawahia and had spent a lot of money waiting weeks for the case to be heard. Even those who supported Kaihau and Mahuta wanted the case to be heard. Others believed they could have appointed people to represent them while they were at Parliament.

The hearing did not get under way until September 1909.<sup>39</sup> First, there was considerable discussion over who would act as claimants. A number of people associated with Ngati Te Wehi and Ngati Mahanga appeared to assert claims. Several were assisted by Pakeha lawyers. All asserted ancestral claims, several different parties through Mahanga, and claims by occupation. Henare Kaihau appeared for some of the Ngati Mahanga, Ngati Te Wehi and other kinship groups and claimed the land was gifted to Potatau and subsequently to Tawhiao and Mahuta. He was joined by another agent for Ngati Mahanga and other kinship groups who supported his claims. However, several other representatives of Ngati Mahanga asserted separate cases through similar ancestors. After two days, no agreement could be reached as to who would be the claimant and so the Court decided that all the parties would be treated as claimants and no party would be permitted to bring 'rebuffing evidence' unless there were special reasons. The Court laid down the order of the seven cases to be heard.

One of the dynamics running through the evidence was the fact that those who supported the king had left the Waikato at the end of the war while others had remained on the land. Those who supported the king had later returned when the Rohe Potae was awarded to Ngati Maniapoto through ancestry and resumed their occupation of Moerangi with those who had remained. According to Kaihau,

<sup>37</sup> Mercer Native Land Court minute book 11, 8 June 1908, fol. 145.

<sup>38</sup> *ibid.*, 8 July 1908, fols 359-61.

<sup>39</sup> Mercer Native Land Court minute book 12, 28 September 1909, fol. 17ff.

Moerangi was adjacent to the Rohe Potae and was the land set aside for the Waikato people; the land had been given to Potatau and these gifts had subsequently been transferred to Tawhiao and Mahuta.

The Court's decision was very long and engaged at length with the disputes and customary rights argued before the Court during the hearing.<sup>40</sup> After the usual complaint regarding the confused and contradictory nature of the evidence, the Court went on to observe that the 'Waikato war and the subsequent confiscation of the bulk of the lands of the Waikato people and consequent uprooting of much of the ancient occupation have no doubt had their effect upon the people in regard to their knowledge of their ancestral lands.'<sup>41</sup> The judge and assessor were confident, however, that the evidence had allowed them to reach a number of concrete conclusions. One was that the deeds produced by Kaihau had no standing either in law or in custom. The decision went on to review at some length the ancestral claims asserted by each of the seven parties and the evidence they produced in support of those claims. The Court further grouped these into three main cases: claims by Ngati Mahanga through Mahanga, claims under the ancestor Kakati, and the claims of Henare Kaihau (including an ancestral right through Hekemaru).

A great deal of this discussion focused on the rights of Mahanga to the land – how he obtained them and subsequently retained them – and how those rights descended through the ancestors and elders to the time of the hearing. The Court found that they had a strong claim to the land through ancestry linked with clear evidence of occupation. At the end of their decision, the Court listed those hapu of Ngati Mahanga who had a right and agreed to include all those who show occupation. Some of the claims by other hapu asserted under Mahanga were dismissed because the Court could find no evidence of occupation and believed that they only went on the land when invited by their kin. A conquest claim by another section of Ngati Mahanga was dismissed because an earlier Court decision found the conquest did not occur; in the same case, Ngati Mahanga elders who gave evidence denied any such conquest; and finally, during the Moerangi hearing, the chief witness for another Ngati Mahanga claim also denied the conquest.

The ancestral claims asserted through Kakati were recognised. The Court noted that all the people present were probably descended from Kakati and it was not suggested that all his descendants had a right. The decision went on to refer to the ancestral evidence and whakapapa presented by witnesses for this claim and for other claims and produced a great deal of analysis of the places where they agreed and disagreed. There were numerous references to conquests and people being driven off the land. The Court concluded that if Ngati Te Wehi were driven off the land by

<sup>40</sup> Mercer Native Land Court minute book 13, 17 February 1910, fol. 152-177.

<sup>41</sup> *ibid.*

Taranaki and Ngati Maniapoto, they regained their ancient right with the support of Ngati Mahanga and Waikato. This was not denied by the other parties and the Court was convinced its conclusion was correct because during a visit to the land, all people admitted a large number of places along Aotea Harbour which were occupied by Ngati Te Wehi. The Court found that certain hapu of Ngati Te Wehi had rights and would admit those who could show occupation.

As for the claim of Henare Kaihau, the Court spent a substantial part of its decision examining the claim's merits. Much of the ancestral claim through Hekemaru was dismissed because the Court did not find the evidence of the witnesses, which focused primarily on whakapapa and where ancestors were buried, convincing. This arose because many of the witnesses called contradicted each other or their evidence contradicted statements made in earlier hearings. The analysis of this ancestral evidence was nevertheless careful and detailed. Kaihau's claim through conquest was likewise dismissed primarily because the events referred to in evidence (an act of reprisal followed by a marriage to establish peace between the two tribes) could not be construed as a conquest and in earlier hearings witnesses had denied the land was subject to a conquest. In dismissing the claims, the Court observed that many of those who supported Kaihau would be able to have their rights recognised through Ngati Mahanga and Ngati Te Wehi. It added, however, that 'the right of Mahuta and the other members of the family of Tawhiao to an interest in the land before the Court does not seem to be disputed. And it certainly seems to us that, whatever their strict right may be, the people ought and we believe will meet Mahuta in a generous spirit having regard to all the circumstances of this case and the connection of his family with the people of this land for so many generations.'<sup>42</sup>

The Court recognised the rights of eight hapu of Ngati Mahanga and ten hapu of Ngati Te Wehi. This was not, however, the end of the hearing and disputes over the lists of names continued through late February, March, April and May 1910.<sup>43</sup> There were those who were looking for inclusion and there was also a major dispute as to the land to be given to Mahuta and to Tawhiao's family (his sisters). From time to time, Mahuta was represented in the Court by the prominent King's Counsel, Henry Dillon Bell, as well as Kaihau. In support and in opposition of claims for inclusion, there were major disputes over whakapapa and their accuracy and further evidence of personal occupation was given. Debate over the gifting of land to Mahuta and Tawhiao's family was intense.<sup>44</sup> After many days of discussion, the lists were finalised in late April and early May and the block divided into eighteen pieces.

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*, 19 February 1910, fol. 180ff.

<sup>44</sup> In the end, Mahuta was awarded 4,000 acres and Tawhiao's family was awarded 1,000 acres. Further protest arose when Kaihau announced that the award to Mahuta would be vested in himself, Mahuta and Mahuta's wife. Following yet more discussion, Henare Kaihau and Mahuta signed a

The last case to be examined, Mokoia Island, located at Lake Rotorua, was just as controversial. Heard by Judge MacCormick, now sitting alone, at Rotorua, the hearing opened in January 1916.<sup>45</sup> Orders for the block were not finally issued until April 1956.<sup>46</sup> At the outset, the island was claimed by twenty-nine parties, although a number of these were from the same families and subsequently amalgamated. All were associated with tribes of Te Arawa. The claims were all ancestral and focused on the division of the island by the ancestors; there was also extensive evidence of more recent occupation and cultivation of the land. The disputes were considerable and the debates heated. At one point, the minutes record that 'a violent quarrel arises between Rangiteaorere Te Kiri and his brothers. Court after vainly trying to quell it is obliged to send for the police and Court is adjourned till tomorrow.'<sup>47</sup> The hearing continued the following day. In its decision, the Court applied a number of strategies to resolve such difficult disputes. They included identifying contradictions which arose in separate claims argued by the same tribal group, emphasising the close relationships between the claimant groups, the admissions of rights by different witnesses, by recognising most of those claiming rights did indeed have legitimate rights and finally by making small awards to claimant groups where the question of their rights was uncertain.

Evidence was presented to the Court at three sittings throughout 1916. A great deal of evidence focused on conflicts between ancestors and it was very detailed. Many witnesses denied the evidence of earlier witnesses too. Several problems emerged during the hearing when families were unhappy with the evidence given by the witnesses they were associated with. They wanted to set up their independent claim because they believed the rights of their ancestor or elders had not been fully acknowledged in the narratives presented to the Court. There were disputes not just between the tribes of Te Arawa, particularly Ngati Whakaue, Ngati Rangiwewehi, Ngati Uenukukopako and Ngati Rangiteaorere, but also between individuals and families within their kinship group. There were many cultivations located on the island and each of the parties asserted rights to some of them.

The Court's decision opened with a strong and unambiguous denunciation of the conduct of the hearing:

document agreeing to forgo all right of appeal of the Court's decision if the parties agreed to have the block vested in this way. The document was signed by Kaihau and Mahuta and witnessed by the Court clerk, A.J. Puckey, and Judge MacCormick. The other people in the Court found this proposal very attractive, one stating he wished 'to express my strong approval,' and another saying 'I hope the Court will tie up Henare and Mahuta very tightly.' See *ibid.*, 7 May 1910, fol. 93-96.

<sup>45</sup> Mokoia Native Land Court minute book 1, 7 January 1916, fol. 1ff.

<sup>46</sup> Rotorua Maori Appellate Court minute book 3, 6 April 1956, fol. 278.

<sup>47</sup> Mokoia Native Land Court minute book 1, 20 January 1916, fol. 88.

This is about the most unsatisfactory case in this Court's experience. The evidence is a mass of contradictions, and the parties are so mixed up that it is impossible to deal with them as hapus. The Court finds a mother against her children, brother against brother, uncle against nephew and so on. And all the hapus are broken up amongst the different parties. There should have been four cases set up instead of twenty.<sup>48</sup>

Judge MacCormick immediately dismissed the ancestral claim by Ngati Rangiteaorere through Rangiteaorere on the basis that the claim was 'so completely disproved' by the evidence given in earlier hearings and he went on to cite some of those cases.<sup>49</sup> He found that Ngati Rangiteaorere and Ngati Uenukukopako were closely related and travelled together when they left Mokoia. He believed they were the same people, being descended from the same ancestors and closely intermarried and concluded that they had only separated for 'Native Land Court purposes.' The contradictory claims of the several parties associated with Ngati Rangiteaorere was taken as evidence to prove this point.

The Court also rejected Ngati Uenukukopako's claim to the entire block: there was plenty of evidence that Ngati Rangiteaorere and Ngati Whakaue both had rights although this did not mean that all the people of these tribes had occupation. The Court noted too that Ngati Uenukukopako's witness admitted Ngati Rangiwewehi had rights. These four tribes, the Court found, all had rights. The vexed question the judge then raised in his decision was the location of boundaries between them: his main observation was that there were no ancestral boundaries on the land and that more recent attempts to establish boundaries were 'too inconclusive to act upon.'<sup>50</sup> For this reason, he would have preferred to make tribal awards, so that each tribal group could resolve the boundaries, but this was not possible due to the many different claims raised by people from the same tribe. The judge went through the claims and gave his decision on each one; in a number of cases he rejected the claim due to lack of occupation but added the claimants may have a right through the wider tribal claim. In cases of doubt, small awards were also made.<sup>51</sup>

<sup>48</sup> Mokoia Native Land Court minute book 3, 16 November 1916, fols 85-91.

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*

<sup>51</sup> As usual, this was not the end of the debate. Several weeks of discussion ensued over the lists of names and the names of those who would be included in the orders. Those who objected wanted to be included or wanted the number of shares they received to be increased. Witnesses gave evidence of descent from relevant ancestor and personal occupation of the land at some point. One of the key issues was whether individuals were in other lists or whether they were seeking to increase their interest in the island by gaining inclusion in more than one list. By 20 December, the lists of names and shares had been finalised and were provisionally approved. The case was adjourned to the next sitting when it was hoped a survey would be ready for final orders to be issued. When the case came again before the Court in April 1924, Judge MacCormick found the sketch plan inadequate. Once it was improved the Court spent most of May working through each portion of the land and finalising the owners. Each piece was very small and often had an area of less than a quarter of acre. When the

The Native Land Court was established to investigate Maori customary rights to land and provide a mechanism for gaining a settled or stable title. Maori debated and discussed their customary rights to land before the Court in complex and subtle ways designed to assert and promote the interests of their kinship groups. The Court, required to provide a settled and stable title, could not ignore these debates; quite the reverse in fact. The decisions of the Court indicate that it did engage with debates by different kinship groups regarding their interests in land and it was forced to navigate a difficult path through the different disputes to individual pieces of land. Rather than imposing its own conceptualisation of customary rights on Maori claimants before it, the Court had to engage with the debates as claims were argued. This situation became increasingly necessary through the late nineteenth and early twentieth centuries.

The Court did draw on strategies to resolve disputes. They included, for example, dismissing all claims for later ancestors and awarding the land to the ancestor through whom all those disputing rights before it were related. Another strategy involved comparing the evidence of a witness given in the Court with the actual landscape and looking for contradictions. These strategies involved, in the main, assessing the evidence, rather than determining abstract rights. A key consideration in this process was judging the credibility of witnesses. Comparing the different narratives of competing witnesses required an engagement with the substance of the evidence but was also fundamentally dependent on who was speaking. The decisions of the Court indicate very clearly that those arguing claims in the Court were debating relationships with each other rather than abstract rights. This was recognised by the Court as it went about trying to make sense of many voices.

Court adjourned in late May 1924, the case remained incomplete. Further hearings were held in June 1945, July 1952, March 1953 (when a further decision was delivered by Judge Smith to clarify Judge McCormick's first decision), March 1955 (when the Native Appellate Court considered a number of appeals and dismissed them), and April 1956 when Judge Smith issued orders for the land. See Mokoia Native Land Court minute book 3, 29 November 1916, fol. 99; *ibid.*, 25 April 1924, fol. 207-89; *ibid.*, 14 June 1945, fol. 290-99; Rotorua Maori Land Court minute book 98, 9 July 1952, fol. 365Aff; Rotorua Maori Land Court minute book 99, 18 March 1953, fol. 127 and fols 131-33; Rotorua Maori Appellate Court minute book 3, 11 March 1955, fols 277A-278; *ibid.*, 6 April 1956, fol. 278.

## REHEARINGS, APPEALS, PETITIONS:

### IS THERE AN END?

In arguing their claims before the Court, Maori were articulating the relationships between their own kinship and tribal group with those of others. It was a process of debating long and complex histories of interaction over many generations. Rehearings, appeals and petitions provided the opportunity to continue this debate. It is argued in this chapter that one of the key considerations which drove rehearings, appeals and petitions were traditional disputes. Where claimant groups believed their rights were inadequately recognised by the first title investigation, it was possible to continue the debate over rights to the land and customary relationships. Rehearings, appeals and petitions also had the effect of precluding stable and settled title to land because until these disputes were resolved and the debates ended, there was no such title. Moreover, it is argued that these continuing debates caused further confusion for the Court in trying to resolve disputes and there are a number of instances where similar claims were dealt with in very different ways by different Courts.

The decision of the Court of Appeal in *In re The Mangaohane Block*, out of which the Native Land Laws Commission was born, brought into stark relief in 1891 a problem associated with the Native Land Court for many years: the difficulty of establishing a fixed and settled title to Maori land. Rehearings, appeals, petitions and actions in the higher courts had for some years been an effective way of limiting the Court's capacity to provide alienable title to Maori land – this was after all the function given to the Court by colonial politicians. But if this was the effect, the cause was the desire of Maori claimants to continue debates regarding their customary rights to land and continuing disputes among kinship groups over these rights. Rehearings and appeals were generally about attempts to have rights recognised and they reflect the difficulties the Court found in trying to fix those rights with certainty. This chapter examines these patterns, focusing on the circumstances of Horowhenua, a case heard under the Maori Land Administration Act 1900 and several other appeals and rehearings. They have been selected from the sample of cases examined using

the Court's minute books because they clearly illustrate patterns evident in the wider sample. In all these examples, it is argued they demonstrate the extent to which rehearings and appeals were about traditional disputes over rights and the continuing articulation of relationships between different kinship and tribal groups.

Under the Horowhenua Block Act 1896, the Native Appellate Court was given special jurisdiction to determine whether trusts existed over any of the Horowhenua subdivisions. The Court, comprised of Judges Mackay and Butler and Assessor Atanatiu Te Kairangi, opened their hearing at Levin in February 1897. Keepa Te Rangihwinui of Muaupoko was the last witness to give evidence. At the conclusion of his cross-examination, and with the consent of the Court, he rose to address his people.<sup>1</sup> His speech, recorded in the Court's minutes and published in the *Appendix to the Journals of the House of Representatives*, was that of a group of men and women who had nearly disappeared: the great rangatira who had either proved their mana in the battles of the first half of the nineteenth-century or who had retained the mana of their elders. By this time, Te Rangihwinui was an old man but his gifts as an orator are evident over 100 hundred years later, even if only from the written word.

In his speech to Muaupoko, Te Rangihwinui told those present of his fight to retain the land. The speech is worth quoting at length, for it shows very clearly that this man worked very hard within legal structures to retain control of the land for his people. Now he had won the fight, he was returning it back to them for them to hold. His task was completed and he did not regret what he had done or the cost he had had to bear to do it. This man of mana had a message for his people:

Give me your attention, O Muaopoko. I have given evidence on many occasions with reference to this land, Horowhenua – the land which the Land Transfer Act says is for Warena Hunia and myself only, and which has been awarded by the Native Land Court in accordance with the provisions of that Act. I have always held that this land belonged to the tribe.

Te Rangihwinui referred to the original award, the rehearing, his petitions to Parliament, proceedings in the Supreme Court and the Court of Appeal, the Royal Commission and the sittings of the Native Appellate Court. All had been costly but in each instance, he referred to the importance of protecting his people against injustice: 'the wrongs of my people,' 'the people who had been out of their depths in the water stood upon dry land,' 'an injustice on me and my people.' The proceedings were not about his own property rights and he referred regularly to the actions of his 'opponents' in challenging his authority.

His references to the proceedings in the Native Appellate Court are the most striking and he was pleased to have the opportunity to argue his case in the Court:

<sup>1</sup> 'The Horowhenua Block: minutes of proceedings and evidence in the Native Appellate Court under the provisions of the Horowhenua Block Act 1896,' *AJHR*, 1898, G-2A, p.152.

I am pleased, because all my actions are referred to this Court to consider and adjudicate upon. This land (Horowhenua) has been guarded by my ancestors and elders and by myself. The chieftainship of the land which my ancestors possessed has descended from them to me, and I still retain the mana over it. I will now say this: that when these troubles are settled by Judges Mackay and Butler their decision will be accepted as final and conclusive. All the difficulties in connection with this land are now in the hands of this Court, and the Court will carefully investigate them and decide them equitably. I have told the Court my ancestral right to this land, my mana rangatira and prowess in defending it. I have also testified as to my occupation, and no one can controvert my evidence.

He then announced to his people that he would ask his name and that of his daughter be withdrawn from the title:

I give this land unreservedly to my people of Muaopoko. It is owing to my care of the land that it is available for them today. I now bid farewell to my land. Go, O my land, go! This land will go from my sight. For six years I have been endeavouring to get justice for my people, and have only now succeeded. I and my legal adviser tried many means, at great expense to myself; but I do not regret, as my people are again on their land, and now they must protect themselves.

He left the matter for the Court to deal with and thanked them for their patient consideration of the complex issues. At the conclusion of this speech, on 31 July 1897, the Court adjourned at Levin, and did not sit again until 14 April 1898 in Wellington. There, the Court gave a long and detailed decision in favour of Te Rangihwinui. A day later, he died, victorious.<sup>2</sup>

The dealings with the Horowhenua lands were conducted over several decades and were very complex. Two men were intimately bound up in all aspects of the land over this time: Keepa Te Rangihwinui of Muaupoko and the prominent Wellington lawyer, Walter Buller. What can be seen in the Horowhenua case is traditional rivalries at work. In the first instance, there was the rivalry between Muaupoko and Ngati Raukawa over the land at Horowhenua. Once awards had been made by the Native Land Court (and Ngati Raukawa was effectively excluded), the rivalry upon which two decades of actions in courts, commissions and Parliament were based was between leaders of Muaupoko, especially between Te Rangihwinui and Hunia.

This rivalry, and Te Rangihwinui's willingness to use legal and political structures to assert his pre-eminence, drove the continuing actions regarding the Horowhenua in the 1880s and 1890s. And his speech would suggest they were not the actions of a selfish individual owner but of the traditional rangatira seeking to preserve and protect the mana of his people and his ancestors. This rivalry did

<sup>2</sup> Tony Dreaver, 'Te Rangihwinui, Te Keepa,' in *The Dictionary of New Zealand Biography, Volume One: 1769-1869*, Wellington: Bridget Williams Books and the Department of Internal Affairs, 1990, p.493.

nevertheless become caught up in some serious political intrigue *within* the Liberal government, and the effect was to blow out of all proportion this rivalry. Similar rivalries both within and between tribes had similar effects in terms of different kinship groups using legal and political structures to continue to debate and discuss their customary rights to land. In the case of Horowhenua, however, a major quarrel between the Liberal government's Minister of Lands, John McKenzie, and Te Rangihwinui's principal legal counsel, Walter Buller, brought the dispute between Te Rangihwinui and Hunia into a much wider public and political forum.

The discussion below is brief and simply signals the various actions taken regarding Horowhenua and the customary patterns and political intrigue they demonstrate. No attempt is made to provide a comprehensive overview of the events affecting the Horowhenua lands and Muaupoko over nearly three decades. The point is to illustrate the extent to which appeals, rehearings and petitions were about continuing debates over customary rights to land.

The land at Horowhenua was a battle site where Muaupoko and Ngati Toa had fought in the past. As Galbreath notes:

Seventy years earlier the Muaupoko and their allies had plotted there to kill the great Ngati Toa warrior, Te Rauparaha. They failed, and he had taken his revenge at every opportunity and had cleared them away like weeds from his garden. He had then given the land to his Ngati Raukawa ally Te Whatanui, who allowed the remaining Muaupoko to return and shielded them from further attack. The next generation had continued the struggle under the new rules of combat, in the Land Court.<sup>3</sup>

Keapa Te Rangihwinui, the son of Muaupoko 'had applied the skill and influence he gained fighting with the Pakeha to recovering the land for Muaupoko.'<sup>4</sup> Title to the land was awarded by the Native Land Court in April 1873.<sup>5</sup> The Court, Judges Rogan and Smith and Assessor Hemi Tautari, heard a claim from the Ngati Raukawa descendants of Te Whatanui and an opposing claim from Muaupoko, led by Te Rangihwinui.<sup>6</sup> According to Galbreath, '[w]earing his military uniform and with his men parading outside, demanded that the Court award the land to Muaupoko.' The Court was taken by Te Rangihwinui to the beach where he showed them the boundary. On returning, the Court awarded the entire block of 52,460 acres to Muaupoko, to be held in trust by Te Rangihwinui. Ngati Raukawa were awarded 100

<sup>3</sup> Ross Galbreath, *Walter Buller. The Reluctant Conservationist*, GP Books: Wellington, 1989, p.194.

<sup>4</sup> *ibid.*

<sup>5</sup> See 'Horowhenua,' in *Important Judgments Delivered in the Compensation Court and Native Land Court*, F.D. Fenton (ed.), Auckland: Henry Brett, 1879, p.136; and, Otaki Native Land Court minute book 2, 5 April 1873, fols 52-54.

<sup>6</sup> Otaki Native Land Court minute book 1A, 11 March 1873, fol. 184ff.

acres.<sup>7</sup> Ngati Raukawa immediately appealed and in response, Keepa agreed to give them a further 1,200 acres; most of the land still remained with Muaupoko.

In 1886, the block was subdivided and in response to requests from younger men of his tribe, Te Rangihwinui agreed to include the name of Warena Hunia in the title to the largest portion, Horowhenua No. 11.<sup>8</sup> Other parts were divided among Muaupoko. The portion for Ngati Raukawa was cut off but they refused to accept it. Another portion was cut off elsewhere to satisfy the arrangement and both parts were vested in Te Rangihwinui's name until he could reach a settlement with Ngati Raukawa. After seeing off the Ngati Raukawa threat, Te Rangihwinui's authority was challenged by those from within his own tribe. This issue was the subject of constant dispute between Te Rangihwinui and Hunia during the 1890s and led to several investigations including a select committee hearing, a Royal Commission and legislation which gave the Native Appellate Court special jurisdiction to hear the case. The fundamental question in dispute on each occasion was whether or not the land was owned absolutely by these men or held in trust on behalf of the tribe.

Problems first emerged when Hunia applied to the Court to have his half of Horowhenua No. 11 divided from that of Te Rangihwinui. According to Galbreath:

Keepa protested; he had saved the land for all the Muaupoko, he was the rangatira and Hunia just a young man. But the court, taking a strictly legalistic view of the matter, could see none of that written on the title to the land and awarded Hunia his half.<sup>9</sup>

A rehearing was ordered and at a sitting in 1891, the judges agreed that the land was held for the Muaupoko people but decided there was nothing they could do as the law had been strictly applied: legislation was required and Keepa petitioned Parliament. Meanwhile, Hunia increased the pressure by offering, through Donald Fraser, his portion of the land to the government. There was disagreement between William Pember Reeves, the Minister of Labour, and McKenzie over this offer, but R.J. Seddon, the Premier, over-ruled McKenzie's caution because the Liberal Party needed a new candidate at Otaki. Donald Fraser agreed to stand when Seddon arranged for the purchase of the land offered by Hunia (who could then repay the debts he owed to Fraser).

Fraser failed to win the seat and Te Rangihwinui lodged a caveat against the title to prevent the transfer of land. The government was in a position where it had agreed to purchase the land but could not obtain title. Payment was withheld while Hunia took legal action to have Keepa's caveat removed. The Supreme Court hearing

<sup>7</sup> Galbreath, p.194.

<sup>8</sup> *ibid.*, p.196.

<sup>9</sup> *ibid.*

was set down for Wanganui in October 1894 and Te Rangihwinui was represented by Walter Buller and W.B. Edwards. Further problems arose at this point when Te Rangihwinui agreed to pay Edwards' fees by way of a mortgage to Buller over Horowhenua No. 14 (Papaitonga).<sup>10</sup> This would later become a major issue in the political dispute between Buller and McKenzie. During the Supreme Court hearing, Fraser gave evidence that the government had advanced £2000 on its purchase to Hunia.<sup>11</sup> This caused an uproar as McKenzie had already assured Parliament that no money would be paid until title to the land was clarified and stable.

Several days after Fraser's frank admission in the Supreme Court at Wanganui, Seddon introduced the first Horowhenua Block Bill into the House. There had been numerous petitions regarding the land and the bill prohibited further dealings until the trust question had been resolved.<sup>12</sup> In November, the Supreme Court decided in favour of Keepa and found there was a trust. Hunia immediately appealed and the government was still unable to complete its purchase. Opposition politicians attacked McKenzie with vigour and he responded in kind with a massive attack on Buller's activities at Papaitonga. In May 1895, the Court of Appeal rejected Hunia's appeal but there was still political and press criticism of McKenzie's payment to Hunia.<sup>13</sup> While Buller got on very well with Reeves, Ward and Seddon (to whom he carefully ingratiated himself; there was several prominent positions he had his eye on), he and McKenzie were fierce opponents.

<sup>10</sup> Buller and Edwards went up together but before the hearing began, Edwards demanded Keepa pay him £500. Keepa did not have the money ready and after discussion it was agreed that the money would be borrowed from Buller who would receive a mortgage from Keepa over Horowhenua No. 14 – land he already leased from Te Rangihwinui. This block, also known as Papaitonga, was vested in Te Rangihwinui at the time of the original subdivision of the Horowhenua lands. It was one of two parts set aside for Ngati Raukawa but awarded to Te Rangihwinui until the dispute with Ngati Raukawa was settled. On the morning the Supreme Court opened, Buller, Edwards and Te Rangihwinui attended the Native Land Court sitting to have the Trust Commissioner, Judge Ward, certify the mortgage deed (which required there be no trust over the land) so it could be registered against the title. As Galbreath wryly points out, after both Buller and Te Rangihwinui assured the Trust Commissioner there was no trust on Horowhenua No. 14, they took off to the Supreme Court to argue there was a trust on Horowhenua No. 11. *ibid.*, pp.201-2.

<sup>11</sup> Fraser had warned the government that Hunia was close to bankruptcy and unless he received an advance payment, the land might be seized. After Fraser met with Seddon and McKenzie, the payment was authorised.

<sup>12</sup> More controversially, the bill also validated the payment made to Hunia. Despite considerable opposition, Seddon was able to force the bill through the House. In the Council, Te Rangihwinui and Buller went into overdrive to stop the legislation. Buller suggested the bill be amended so that payments made on the land would be held in trust for all the Muaupoko, not just Hunia. This move was adopted by the Council but the bill was allowed to lapse by Seddon: he 'could never agree to such a clause – it would amount to an admission that the payment already made to Hunia had been improper.' *ibid.*, pp.202-3.

<sup>13</sup> *ibid.*, pp.204-5.

In late 1895, the government introduced a second Horowhenua Block Bill which established a commission of inquiry into the transactions at Horowhenua. When finally enacted, a royal commission of inquiry was established to examine all dealings in the Horowhenua lands.<sup>14</sup> Three commissioners were appointed in February 1896 and the following month it opened its hearings at Horowhenua.<sup>15</sup> The hearings extended over two months and witnesses were cross-examined at length. Six other lawyers and native agents appeared for the Crown, Muaupoko people and Ngati Raukawa. The Crown employed an agent to represent those Muaupoko who opposed Buller. The hearing went over the entire history of the block. Keepa was cross-examined at some length regarding his dealings with money received on account of the blocks. The question of the sub-division was also investigated in great detail. The commission completed its hearings in May 1896 and quickly produced its report finding there was a trust.<sup>16</sup>

The report was far from the end of the matter. McKenzie used it to attack Buller, while Buller and Te Rangihwinui continued to petition Parliament over the Horowhenua lands. In September 1896, a third Horowhenua Block Bill was introduced by McKenzie to the House to give effect to the recommendations of the commission. The Native Appellate Court was given jurisdiction to determine whether trusts existed over any of the Horowhenua subdivisions and the Public Trustee was

<sup>14</sup> During the passage of the bill, McKenzie's attacks on Buller were vitriolic, describing Buller's transactions with Keepa as scandalous. The political storm rapidly engulfed both Buller and McKenzie as the two squared off in Parliament and the press. McKenzie was furious that Buller taunted him with the suggestion that he repeat his allegations outside the House so the matter could be considered by the Supreme Court and argued that this threat constituted a breach of privilege. Buller was summoned to speak at the bar of the House to respond to the motion before the House decided what further action should be taken. He spoke for an hour of his involvement in Horowhenua and answered questions for another hour. The privilege motion failed, but the Horowhenua Block Bill was finally passed. *ibid.*, p.216. For McKenzie's speech, see *NZPD*, 91 (1895), p.684; for the debate on the privilege motion, see pp.741-70 and the response to Buller's statement, see pp.773-78. Buller's statement to the House and his answers to questions from members were attached to the volume as an appendix, see 'Speech and Examination of Sir Walter Buller at the Bar of the House of Representatives, 28th October, 1895,' pp.974-92.

<sup>15</sup> As Galbreath observes, there were many intersecting interests in this investigation. Buller represented Te Rangihwinui from whom he had leased Papaitonga; Te Rangihwinui's administration of the trust on behalf of Muaupoko was under investigation; Buller had been accused of fraud and corruption by McKenzie whose own department had been negotiating to purchase some of the land; Te Rangihwinui paid for Buller's legal services by extending the existing mortgage on Papaitonga. Galbreath, p.223.

<sup>16</sup> The report was highly critical of Judge Wilson, Keepa for his failure to keep proper accounts and the Crown for making the £2,000 payment to Hunia. It was, however, most critical of Buller and his decision to represent both Keepa and Muaupoko. They found that Horowhenua No. 14 was held in trust by Keepa and that Buller knew of this but still made several transactions over the land. The Commission recommended that legal action be taken to determine if Buller's dealings with the land were valid. See 'Report and Evidence of the Horowhenua Commission,' *AJHR*, 1896, G-2.

given the power to initiate proceedings in the Supreme Court to test the validity of Buller's negotiations in Horowhenua No. 14.<sup>17</sup>

The Native Appellate Court hearing began at Levin in February 1897. As the hearings continued from April to July, witnesses appeared and admitted they had given false evidence against Te Rangihwinui at earlier court hearings and during the Horowhenua Commission. Other Muaupoko witnesses told the Court the evidence they had given at the Horowhenua Commission was false: Horowhenua No. 14 was not held in trust by Keepa, it was his own land. Hunia's case was fatally undermined and Te Rangihwinui emerged from a decade of battles victorious.

The traditional account of the Horowhenua lands has always emphasised the role of Walter Buller as legal representative of Keepa Te Rangihwinui. Buller's wealth and his activities in relation to Papaitonga (even if he was exonerated) condemned him as one of the many parasitic Pakeha lawyers and agents who preyed on Maori and took advantage of them to make large sums of money out of dealings in Maori land. Perhaps the key consideration in this interpretation of the circumstances of Horowhenua during the 1890s was John McKenzie's constant and vitriolic attacks on Buller during this time. It was in fact the political intrigue surrounding the Horowhenua lands, including the Crown's attempts to acquire some of the land and Buller's actions regarding Papaitonga, which led to the Royal Commission, several actions in the Supreme Court and the hearings of the Native Appellate Court. Focusing on the political disputes, however, is only one part of the story and the role of Te Rangihwinui and his place in the disputes is much more important than has hitherto been acknowledged.

Te Rangihwinui's speech to his Muaupoko people at the conclusion of his cross-examination in the Native Appellate Court gives some indication of the other side of the Horowhenua lands. First, he had seen off the threat from the old Ngati Raukawa allies of their bitter enemies Ngati Toa. Having despatched their attempts to assert a claim to the Horowhenua lands he was then attacked from within Muaupoko by a younger generation who challenged his authority. Throughout the various hearings held into the Horowhenua lands, he maintained his authority to hold the land on behalf of the tribe and only returned it when the question of his authority was beyond question. After being challenged during the Royal Commission's hearings, he was able, at the Native Appellate Court, to re-assert his authority. There his people acknowledged they had earlier given evidence against him which was incorrect. He used appeals, petitions and the hearings of various Courts, commissions and even

<sup>17</sup> A time limit of six months was placed on the latter. It was recognised by the lawyer retained by the Crown to represent the Public Trustee, Stafford, that the action in the Supreme Court depended on the decision of the Native Appellate Court. If the latter found there was no trust on Horowhenua No. 14 then there would be no case against Buller.

Parliament itself to assert his authority as the leader of Muaupoko in the fact of a younger upstart who tried to encroach on his leadership.

Horowhenua demonstrates the degree to which Maori could seek to continue debates over customary rights through political institutions. Once Te Rangihwinui exhausted the options available to him within the Court's own legislative framework, there were still opportunities available to destabilise title to land. His success in gaining opportunities to continue arguing his rights may well have been a product of his involvement in the conflicts of the 1860s. Nevertheless, they were driven by his continuing desire to dispute customary rights to the Horowhenua lands and despite the Crown and Buller being drawn into the difficulties associated with the unsettled title, this was fundamentally a dispute within a tribal group regarding customary rights to land. A similar pattern, in circumstances which did not achieve such notoriety, can be seen in the use of the district Maori Land Council structures established by Carroll under the Maori Land Administration Act 1900. This legislation only applied in very limited circumstances but a clear case where it was used shows the extent to which it precluded establishing a settled title to the land. This was because it provided so many opportunities for appeal and these opportunities were exploited to continue debates about customary rights to land.

The only district where Carroll's land councils were fully implemented was Northland and the Tokerau District Maori Land Council, with E.C. Blomfield as President, was the only council which actually conducted title investigations.<sup>18</sup> One case has been located to illustrate what happened in the block committees and Council hearings held under the Maori Land Administration Act 1900. This statute shifted responsibility for hearing claims to Maori customary land from the Native Land Court to block committees elected by the different claimant groups. Decisions of these block committees were then supposed to be confirmed by the District Maori Land Council. If this was the intention, the practice was very different. In practice, this regime gave those who disputed the decisions of either the block committee or the Council several more avenues to pursue appeals. The experiment nevertheless lasted nine years: the Native Land Act 1909 returned the task of investigating customary land to the Native Land Court.

Block committees were appointed by the different claimants and usually constituted the elders of the tribe or kinship groups. The committees conducted their proceedings on marae and heard the various claims of different parties. The proceedings were generally conducted in Maori and recorded in Maori. This evidence

<sup>18</sup> References to block committee hearings can be found in the minutes of the Moerangi hearing referred to in Chapter 12. These hearings would have been conducted under the administration of the Waikato District Maori Land Council but no reference is made to the Council or any decision made by either the block committee or the Council; the actual title investigation was conducted after the Council's functions in relation to title investigations were returned to the Native Land Court.

was often considerable as the minute books of the Tokerau District Maori Land Council block committees show. The block committee then handed down a decision as to the ownership of the land. This decision was submitted to the Tokerau District Maori Land Council which either confirmed or rejected it. The Council was able to hear submissions from the parties before it issued an order confirming or rejecting the decision. If parties were unhappy with the Council's decision, they were able to appeal to the Native Appellate Court. A further hearing would be held and the Native Appellate Court could either reject the appeal or refer the case to the Native Land Court for investigation.

If the Appellate Court decided to refer the case to the Land Court, a further hearing would be conducted by that Court along the lines of a traditional title investigation where all the evidence in support of different claims would be heard. The Land Court would reach a decision on the different claims, take the names of those to be included in the titles and issue orders. If parties were unhappy with this decision, they were able to appeal again to the Native Appellate Court to have the decision of the Land Court reviewed in the usual way. In practice, the approach to investigating title to Maori customary land meant Maori claimants had a further three avenues for debating their rights to a defined piece of land. And as will be shown in relation to one block of land in Northland, all these avenues were regularly used by Maori claimants for the purposes of continuing to dispute rights to land.

That block was Motatau No. 5. This 22,000 acre block first appears in the minute books when it was dealt with during a sitting of the Native Appellate Court before Judges Seth-Smith and MacCormick and Assessor R.P. Mokonuiarangi at Russell in November 1907.<sup>19</sup> Eight appeals had been lodged against the decision of the Tokerau District Maori Land Council given in November 1905. Most of those who appealed wanted either the Land Court or the Appellate Court to investigate the title. Te Rua, agent for the respondents, appeared and argued in support of the report of the Block Committee.<sup>20</sup> He told the Court that the committee of five elders (four of whom were by then dead) held hearings to determine the ancestors and divide the land. A second committee heard other outstanding issues and after a large meeting lasting several days the report of the committee was read out and subsequently signed by over 200 people. Objections to the report were heard before the Council; several disputed boundaries remained unresolved. After a discussion regarding a possible settlement, the decision of the Tokerau District Maori Land Council confirming the report of the Block Committee was annulled.<sup>21</sup>

<sup>19</sup> Auckland Native Appellate Court minute book 4, 19 November 1907, fol. 35-59.

<sup>20</sup> Native Appellate Court minute book 4, 21 November 1907, fols 4-5.

<sup>21</sup> Native Appellate Court minute book 4, 22 November 1907, fol. 9; 26 November 1907, fol. 12; Auckland Native Appellate Court minute book 4, 26 November 1907, fol. 64; for decision, see fols 205-207.

In its decision, the Appellate Court found that although the records of the Block Committee's proceedings were limited, a rigorous process had been followed using the procedure adopted by the Native Land Court. The Block Committee was elected and a meeting of the interested people was held at Tautoro. No record of its proceedings were produced at the appeal hearing. Statements from agents, however, indicated that a further committee was elected at this meeting to prepare a report to submit to the Block Committee. This report was prepared and adopted by the meeting and signed by more than 200 persons. An original copy of this report was not produced at the Appellate Court hearing although the minutes of the Block Committee contained what 'purports' to be a copy of the report including the names of those who were alleged to have signed. The land was divided into 26 parts and awarded to the descendants of named ancestors. Objections were raised when the report was presented to the Block Committee but at this point three people raised objections over the boundaries. Their objections were rejected and after adding two further divisions, bringing the total number of partitions to 28, the Block Committee approved the report and lists of names were prepared, submitted, reviewed and after dealing with objections and claims, confirmed. The lists passed contained about 5,000 names. The Block Committee's report was then presented to the Council where further objections were heard. The Council, however, decided to confirm the report of the Block Committee without amendment.

From this account of the procedure adopted in relation to Motatau No. 5, the Appellate Court concluded that it 'thus appears no formal investigation of the title has been held either by the Block Committee or by the Council.' This meant that 'there is practically no evidence to guide us to a final decision on the questions raised by the several appeals.' Of the four questions to be decided, three involved ancestral rights and whakapapa and as the Appellate Court recognised, it had no evidence on which it could even attempt to reach a decision on these issues. They included the question of whether the division was based on ancestral boundaries, whether certain ancestors had legitimate rights to a portion of the land and whether those who were included were actually descended from the ancestor. The Native Appellate Court concluded:

We are satisfied by the arguments laid before us that further enquiry is necessary and the only question we are called upon to consider at present is what form the enquiry should take and by what tribunal it should be held. The case must be practically be heard de novo and it seems to us that the Native Land Court is the proper tribunal to do it. The suggestion that this Court should itself undertake the investigation is impracticable for many reasons. The Appellate Court has its own proper functions to perform and even if it had time to do so it would not in our opinion be right for it to act as a Court of first instance. It would entail great and unnecessary expense upon the country and form a very undesirable precedent.

The decision of the Tokerau District Maori Land Council was annulled and the case sent to the Native Land Court for the investigation of title to the block.

That hearing commenced at Kaikohe in late April 1909 before Judge Gilfedder and Assessor Haerehuka. The hearing was conducted along the lines of a standard title investigation in that claimants set up a prima facie case and counter-claimants appeared to object and assert their own claim. Once the ancestors had all been named, there was the usual discussion and amalgamation of cases where the same ancestral claim was asserted. In this instance, the President of the Tokerau District Maori Land Council, E.C. Blomfield, represented the claimants. The claimants themselves relied heavily on the proceedings of the committees established to hear claims in earlier years. The major issue which caused so much controversy related to occupation; the disputes over ancestral rights were in fact limited. One witness, Maera Kuao, who was a member of the committee of elders, told the Court that during the negotiations at the Native Appellate Court, 1,000 acres had been offered to those with ancestral rights but no occupation if they would withdraw their objections.

At the conclusion of the hearing, and before giving its own decision, the Court encouraged the disputing parties to negotiate a settlement themselves. The Court told those present that they had now had the opportunity of hearing all the claims and could decide for themselves the strengths and weaknesses of each claim:

There had in the past been too much jugglery over setting up ancestors and defining ancestral boundary and as a consequence the same owners were included not only in many Blocks but also in the various sub-divisions of the same Block. There were other Blocks before this Court for investigation and it would be better if the Natives could agree among themselves for an apportionment of these on an equitable and sensible basis so that some would get into one Block and some into another rather than all to try to secure inclusion in every Block.<sup>22</sup>

A further attempt at conciliation failed and the Court delivered its decision the following morning.<sup>23</sup>

The fundamental dispute which the parties were unable to resolve related to the rights of individuals according to their occupation: the ancestral rights of all those claiming had been conceded. The question remained, however, of the extent of those rights according to occupation. Continuous and recent occupation was necessary. The Court was not convinced by those who could speak of the occupation of the land by ancestors four or five generations earlier but who knew very little about the occupation of the land by their grandparents. It was also not impressed by those who lived on the land in a transitory sense. The Court took one other consideration into account when determining the interests of the various claimants and this was the interests they held in other lands in the district. Those with large interests in other blocks received a smaller interest in Motatau No. 5. On these grounds, the Court

<sup>22</sup> Northern Native Land Court minute book 41, 12 May 1909, fols 320-21.

<sup>23</sup> *ibid.*, 13 May 1909, fols 322-36.

awarded differing levels of interest according to the permanence of each parties occupation. In an attempt to avoid an appeal, an offer of 1,000 acres was made by the claimants (who received 7,250 acres) to those who had received no award. This was accepted by the latter and the land was apportioned by agreement. The lists for the entire block were finalised, orders issued and the block vested in several hundred owners.

The offer did not, however, prevent an appeal. In September 1910, the Native Appellate Court sitting at Kaikohe before Chief Judge Jackson Palmer, Judge Holland and Assessor Horomona Te Apaipa, heard eight appeals against the decision of the Native Land Court.<sup>24</sup> Blomfield appeared again to represent the respondents and asked the Appellate Court to confirm the Land Court's decision. His submissions show that the Motatau block as a whole came before the Council in July 1902. On this occasion, the land was divided into five parts on the basis of ancestral boundaries and block committees for each were set up. Over eight years later, a stable title was proving elusive.

Three of the appeals were against the general decision of the Court and three appealed against the relative interests awarded or the lists of names included. One appeal was dealt with by agreement prior to the decision of the Appellate Court and another was to be dealt with during the appeal hearing for another block. All three appeals against the general decision were dismissed and the Land Court's general decision was upheld. One was dismissed in a sentence because the appellant was 'a very honest old gentleman who in his own mind believes that he has a legitimate right but except in this own imagination, we consider that he has no right whatever.' The appeal was lodged by Kamariera Wharepapa who was a former Land Court assessor. In the other two, the Appellate Court found both parties had received an appropriate share.

Two appeals on issues of occupation then had to be dealt with. On the question of relative interests, the Appellate Court was much more specific. It found the Land Court distinguished between a number of different kinds of occupation:

For the purpose of defining the relative interests, the length and strength of the occupation has had to be valued by the lower Court, and a relative interest given equivalent to such estimate. The lower Court has endeavoured to place a value on the different classes of occupation. Evidently there were different classes of occupation before it, which this Court can briefly be described as:- 'nomadic occupation' that is where a Maori goes to a block upon which he has a good 'take' and occupies for a short period, and then abandons it, and occupies another block, to which he also has a 'take' for another short period, then abandons it, and so goes on from time to time, making no place his true home or else having one place his true home, and making these nomadic exits from that place to a different block, and

<sup>24</sup> Northern Native Land Court minute book 44, 5 September 1910, fol. 152.

claiming occupation in these different block. The lower Court seems to have placed the highest value on the true home – the ‘noho tuturu’ – and the least value on the nomadic occupation. There also seems to have been a second class of nomadic occupation before the lower Court, which was held to be of less value than the general class of nomadic occupation and this latter class, was where some astute Native with a desire to prove a title to every block, he possibly could, went up each and all, for a short turn, so that he could prove that he had title in every block, and thus gain an undue advantage over the other Natives who were not cute enough to know about this ‘coup.’ This latter class of nomadic occupation does not seem to have weighed much with the Judge of the lower Court, who seems to have graded the value of occupation from the ‘noho tuturu’ down to the last class and apportioned the relative interest accordingly.

The Appellate Court approved of this scheme and went to note that there was one further consideration taken into account by the Land Court. This too led to a major exercise in determining the owners and their interests. That is, that the Land Court tried to ‘consolidate each owner’s interest into the block in which he had his ‘noho tuturu’ instead of having his interest scattered throughout each block.’ The Appellate Court found this approach was consistent with the consolidation principle contained in the Native Land Act 1909.

Later, after hearing evidence in relation to the occupation of six blocks of land, including Motatau No. 5, the Appellate Court gave a further decision regarding two of the appeals, increasing the awards made to the two parties in recognition of their evidence of occupation. Their decision dealt specifically with the issue of those who had tribal affiliations beyond the district but who also claimed land in the Far North. It comprehensively rejected their attempts to assert their claims to land if they had gone elsewhere, and particularly if they had been awarded land elsewhere.<sup>25</sup> The Appellate Court carefully investigated the interest of each owner to determine whether the award they received at the Land Court should be increased or reduced on

<sup>25</sup> In its decision, the Court focused on this issue: ‘In the present matter, some people have claimed occupation in each and every block, while some have claimed in one or more only. While again it has been proved to us, that some people have claimed and received large awards in blocks away from this district altogether, thus proving their absence from the land in this district for a considerable time. In fact the Court itself, knows that among the present claimants, are persons who as ‘Ngatiporou’ claimed occupation, in the Ngatiporou lands, and received awards there, also among the Arawa, in the ‘Arawa’ lands, and received awards there. It is clear that if a Maori leaves one district, and goes to live in another district, or leaves one block, and occupies another block, he weakens his occupation on the place that he has left, so that to a great extent, what he gains by his new occupation, he loses in this old occupation, in the place that he has left. Where he has not wandered from block to block, or district to district, his occupation centred on his true home must be great. Again we have to look at what his occupation consisted of, for if he made permanent improvements of a substantial character upon a block and thus enhanced the value of that block he has to be considered in a more favourable light than the person who did not improve it at all but merely lived on it or perhaps injured the block by selling the timber of it and pocketing the money himself.’ *ibid.*, 17 September 1910, fol. 210; decisions recorded fols 221A-221C.

this basis. They also acknowledged that some of those who received interests were 'mataotao,' who were gifted interests by the rightful owner. The Court did 'not feel disposed to prevent them' and was willing to confirm such gifts where there was no objection. Several lists had to be amended, but after seven hearings over eight years there were no further avenues available by which parties could continue disputing rights to the land; those who still felt aggrieved could only shift into the political arena to seek a remedy.

Horowhenua demonstrated the way in which debates over customary rights to land could be continued by Maori through political institutions. Motatau No. 5 illustrates what could happen when the Court's own legislative framework provided the opportunity for disputing kinship groups to continue such debates through several appeals. In both cases, every opportunity available was taken to continue debating customary rights where kinship groups thought their rights inadequately recognised and such appeals were generally driven by these debates. The structures established under Carroll's legislation provided many opportunities for appeal and rather than providing a basis for establishing settled title to Maori land instead gave claimants many more opportunities to continue these debates.

Horowhenua and Motatau No. 5 are both unusual cases which illustrate this point well. Nevertheless, general rehearings and appeals in the Court also support this argument. First, however, an important distinction must be made between rehearings and appeals. Rehearings were conducted by the Native Land Court constituted by two or more different judges and one or more assessors. They were not appeals in that the parties asserted their claims as they always did and presented the entire evidence to the Court again. In fact, in the early years, reference to the earlier hearing was in some instances prevented by the Court. In the rehearing of Tatura in March 1869, an agent asked the Court to refer to the evidence of an important witness given during the former hearing but was unable to attend the present Court.<sup>26</sup> The agent was chastised by Judge Smith who wanted the witness summoned to give evidence to the present Court. This often made rehearings a time consuming process to work through. From 1865 until 1873, rehearings were granted at the discretion of the governor. After 1873, rehearings were granted by the Governor-in-Council acting on the advice and with the consent of responsible ministers: essentially, the decision-making process shifted from the governor to the Native Minister, and in particular, Donald McLean. From 1880, applications for rehearing were considered and determined by the chief judge of the Court.

This remained the situation until 1894 when the Native Appellate Court was established by the Liberal government. Like the Courts constituted to conduct rehearings, the Appellate Court was constituted from two or more ordinary judges of

<sup>26</sup> Taupo Native Land Court minute book 1, 12 March 1869, fol. 171.

the Native Land Court sitting with one or more assessors. They were quite different from rehearings in that no further evidence was presented by witnesses except with the consent of the Court – this also required agents to convince the Court that the evidence should be heard. Instead, agents addressed the Court at length on the specific substance of their appeal making extensive use of the evidence given in the earlier hearing. Many also made use of the minutes of hearings for adjacent lands. Agents generally had the opportunity to respond to the submissions of other agents on at least one occasion. A respondent often appeared to defend the decision of the Native Land Court against the appeals.

Fundamental disagreements over rights regularly led to appeals and such disagreements were often a source of considerable confusion for the Native Appellate Court. In September 1899, for example, the Court, sitting at Thames, heard several appeals against the decision of the Native Land Court in Puhangateuru and Horahia Opou.<sup>27</sup> These appeals were about a fundamental disagreement over rights between distinct kinship and tribal groups. Ngati Maru claimed rights through ancestry and subsequent occupation; Ngati Hako asserted rights by descent and continuous occupation. In the appeals, Ngati Hako argued that the claim through conquest and subsequent occupation of the land argued by Ngati Maru was not supported by the evidence and the award to Ngati Maru should therefore be cancelled. Ngati Maru's appeal opposed the award made to Ngati Hako of any land. They argued the land was not owned by Ngati Hako originally but by Te Uri o Pou and associated tribes, Waitaha and Ngamarama, now known as Horoawatea – by conquest, the latter were rahi of Ngati Maru. Both directly opposed the claims of the other.

These debates had been the subject of continuous hearing and appeal over the past six years. This was recognised by the Court in opening their discussion of the disputes:

The takes of each party have been before the Native Land and Appellate Courts on other occasions previous to this and divisions given and our object now is to determine whether the decisions under review are in accordance with those already given in similar cases and if not how far such deviation is borne out by the new evidence adduced. The lands in question are part of a large tract of country known as Piako, the residue of which has been already dealt with by the Court on exactly the same grounds of claims as those now put forward.<sup>28</sup>

The most important question to be determined in the Court's decision was how to resolve apparent discrepancies in the awards of various Courts to the adjacent lands. They referred to one sitting in 1893 where all Ngati Maru claims were rejected and a second sitting in 1895 where Ngati Maru received a portion of the block and Waitaha

<sup>27</sup> Hauraki Native Land Court minute book 51, 15 September 1899, fol. 289.

<sup>28</sup> Hauraki Native Land Court minute book 52, 20 October 1899, fols 129-34.

and Ngamarama a larger portion. The decisions were all appealed and the appeals heard in 1896 where the Court found 'that in whatever way Ngati Maru had acquired a footing in these lands, the evidence of their occupation such as it was, was undoubted.' However, this occupation was 'intermittent' and 'not equal to that of the Horoawatea who were the admitted permanent residents.' Ngati Maru were awarded one third of that land.

The question the Court then posed was the extent to which the decisions in Puhangateuru and Horahia-Opou 'deviated' from the earlier awards. In Puhangateuru, Ngati Maru had received a much larger award but the Court found this was in order. The evidence showed Ngati Maru ancestors were the principal occupants and that, as found in the decisions of 1896, 'the more permanent occupation carried the greater area.' In Horahia Opou, several awards were made to Ngati Maru, Ngati Te Aute of Ngati Maru and Ngati Whanaunga but before dismissing the appeals, the Court had to deal with another aspect of Ngati Maru's conquest claim.

This was the gift from Korohera (of Horoawatea) to Ngati Maru for protection during conflict. The Court noted that this had been argued through the earlier proceedings but rejected. This Court found fresh, albeit conflicting, evidence which led it to the opposite conclusion: 'that whatever may have been the true facts of the case and different members of Ngati Maru, giving evidence on the same side, give different and conflicting accounts of the details of that gift, the broad fact remains that Ngati Maru have acted and were allowed to act in relation to these lands as if that gift were bona fide.' Neither was the Court convinced by the Ngati Hako response to this claim based on gift. They had argued that everyone got eels from the land. The Court found it had been given no evidence to support this assertion. It considered the claim slightly ridiculous: 'the statement that persons not admittedly owners of lands were allowed to resort to these lands and take the products whenever and wherever they choose to do so, as Ngati Maru are proved to have done without molestation or interference is entirely opposed to all native history and native custom.'

The Appellate Court concluded that this particular consideration was irrelevant to the question of owning land; the most important consideration was that of occupation. With that, the Court affirmed the decision of the Native Land Court and dismissed all the appeals. So although there was disagreement with the Land Court over the gift by Korohera, the Appellate Court agreed with its findings based on occupation. And although there is confusion evident from the variation in decisions reached by the different Courts determining rights to adjacent lands, in the case of Puhangateuru and Horahia Opou, discrepancies could be resolved by findings of different levels of occupation in relation to defined areas of land. The hearing demonstrates the extent to which continuing disputes over rights to land asserted by distinct kinship and tribal groups were central to appeals. The decision indicates that Courts did disagree over the recognition of claims but also that this could have no impact on the final outcome.

More importantly though, it shows the increasing confusion evident in the attempts by the Court to resolve disputes where they arose and the increasing importance attached to occupation as the fundamental yardstick for determining customary rights to land.

If Puhangateuru and Horahia Opou were about distinct kinship groups arguing fundamental rights, there were also instances where people descended from a common ancestor continued to argue their rights to land through rehearings and appeals. The rehearing of Porongahau, for instance, was conducted by the Native Land Court sitting at Waipawa before Judges Mackay and Scannell and Assessor Tamati Tautahi in July 1887.<sup>29</sup> In Porangahau, the claimants asserted their rights and four other parties objected; they were generally the same people who had asserted claims at the first hearing. The Court heard evidence for about six weeks before issuing a long and detailed decision.<sup>30</sup>

In their decision, the Court laid out the different claims asserted by various parties by ancestry, gift and occupation.<sup>31</sup> Most of the claims involved similar ancestors but the way the land was handed on by these ancestors was the source of considerable dispute. As the earlier Court observed in its decision, '[a]ll the parties are descended from the same stock, i.e., Whatuiapiti, but divisions afterwards arose and it is not reasonable to suppose that all Te Whatuiapiti's descendants are entitled to share in this land.' All the parties claimed interests in the land through a gift by Te Angiangi to Te Whatuiapiti and some referred to a conquest of the land by Taraia and Te Aomatarahi. All claimed by ancestry some through the same ancestors and others through quite different ancestors.

The evidence of occupation was also controversial because two generations earlier the people had fled the land en masse shifting to Nukutaurua at a time when Nga Puhi and Waikato threatened their existence. Some had returned and re-occupied the land while others had left Nukutaurua and settled elsewhere. This was a case where all the people were related and belonged to Ngati Kahungunu, descended through Taraia and Te Aomatarahi who came originally from Turanga conquered Rangitane and divided the land among themselves. But whakapapa and ancestors were used to exclude other hapu from having their rights recognised by the Court.

Given the conquest and gift were generally accepted, the major question for the Court was what happened after the gift to Te Whatuiapiti. Each party claimed through different ancestors and each party argued the other had only a limited right, usually to occupy the land under the mana of their ancestor, and that this right did not convey ownership. The Court reviewed in detail the various events which had affected the ancestors and how this affected rights to the land. Among the ancestors

<sup>29</sup> Napier Native Land Court minute book 13, 18 July 1887, fol. 146ff.

<sup>30</sup> Napier Native Land Court minute book 14, 27 August 1887, fol. 77.

<sup>31</sup> *ibid.*, 1 September 1887, fol. 78.

there was the collection of food, quarrels, killings, retribution and gifts of land to settle disputes.

The Court dealt with these complex claims to rights in a number of ways. The claim of Te Teira Tiakitai, was rejected entirely. The Court found that he only lived on the land by marriage, his wife being a member of the hapu permanently resident there. He never lived at Porangahau after his wife's death and had never lived there as a permanent resident. Te Teira tried to undermine the claimants' rights through occupation by arguing that they abandoned the land and went to Nukutaurua some time prior to 1830 and did not return until after 1840 as a result of incursions by Ngati Puhi and Waikato. Te Teira argued they lost their rights and that only those who remained, including his father, and defended the land retained their rights and allowed those who fled to return to occupy the land. In rejecting this claim, the Court noted:

It is well known that during the twenty years immediately preceding the establishment of British rule in the country, i.e., from 1820 to 1840, the people were in a state of continual warfare, the tribes congregated for purposes of defence and mutual protection at such places either on their own lands or in their vicinity as were most suitable for that purpose, leaving the bulk of the land unoccupied – this has never been recognised as entailing a forfeiture of those lands.

The Court did not find Teira's father had protected the people living at Porangahau; in fact they found the evidence suggested the obvious and that he had assisted the invaders to attack them. As for the problem of the 1840 rule, that was easily dealt with: '[w]e say in effect, there was no break in the occupancy of the land – whatever rights were held by the occupants of Porangahau previous to the exodus to Nukutaurua, they resumed those rights intact on their return; none of their old rights were prejudiced; they acquired no new ones.' The Court considered that this rule applied to new rights, and it was never suggested 'that a resumption of former rights would be invalidated.' When the people returned from Nukutaurua, the land was unoccupied and they were able to hold the land peacefully until the time it came before the Court.

The Court rejected all the counter-claims, except for the limited recognition of the right of Raina Rangikoianake, and awarded the balance of the block to the claimants, Henare Matua and his party. This was in accordance with the decision of the earlier Court which had accepted Raina's claim and decided that her name and those of her siblings should be included in the lists submitted by Henare Matua. However, the Rehearing Court's decision to reject entirely the claims of Te Teira Tiakitai and Hori Te Aroatua was at odds with the decision of the earlier Court which had awarded them land.<sup>32</sup> Whereas the Rehearing Court rejected the claims by both men that they were directly descended from Te Whatuiapiti and their fathers (Tiakitai

<sup>32</sup> Napier Native Land Court minute book 12, 3 May 1886, fols 51-56.

and Te Aroatua) had been prominent leaders in the region, the earlier Court awarded them land on the basis that there was 'ample evidence that the two chiefs named did in the past generation exercise paramount influence and power over all the hapus living on the coast from Cape Kidnappers to Castle Point.'

As suggested above, it was not uncommon for the second Court to disagree with the earlier Court's decision although seldom in such a direct way or when so much land was affected. In other instances, the second Court could only agree with the earlier Court's decision, stating it was in no position to disagree. Like Puhangateuru and Horahia Opou, the rehearing of Porangahau illustrates the extent to which appeals and rehearings were driven by continuing disputes over rights to land. Unlike the Hauraki cases, however, Porangahau did not involve disagreement between two distinct kinship and tribal groups but were between kinship groups who traced their descent from a common ancestor. The debates were about using whakapapa to exclude others although not necessarily entirely: once a decision was given in favour of particular ancestors, those who argued a case through different ancestors were often still included in different lists. The most significant observation regarding the Porangahau decision is the finding that the '1840 rule' did not apply. The attempt by a counter-claimant to use this rule to exclude others was entirely rejected by the Court as was his claim and this probably reflected the highly problematic evidence both of ancestry and occupation. To resolve the difficulties arising out of interrupted occupation, the Court distinguished the circumstances and dismissed the claim.

A number of rehearings and appeals show the extent to which claimants continued to use the Court as a way of continuing old battles, even in the twentieth-century. For example, in the Pukekitiri case, heard by the Native Appellate Court (Judges MacCormick and Rawson) in April 1923, the issue of the conquest or otherwise of Rangitane was a major cause of controversy which was debated at length during the appeal.<sup>33</sup> This was not, in contrast, a matter the judges dwelt on: they identified the heads of each family in 1851 and focused on occupation as a means of apportioning rights to the land among the claimants – and they did not believe those rights were equal.

A similar case in May 1900 dealt with an issue of conquest: the major question examined during the hearing of appeals in relation to the 11,500 acre Taumatotara block at Kawhia Harbour was the nature of the rights of Ngati Maniapoto after Te Rauparaha and Ngati Toa abandoned Kawhia. Sitting at Te Kuiti, the Court, Judges Scannell and Mair and Assessor Nikorima Poutotara, heard five appeals against the

<sup>33</sup> Wellington Native Appellate Court minute book 5, 19 April 1923, fol. 3ff. The block was reserved from sale in the Ahuriri deed when the block was acquired by the Crown in 1851. For the decision, *ibid.*, 26 July 1923, fol. 58 and see fols 67-68 which contains an extract from the Hawke's Bay Tribune, 28 July 1923.

decision of the Native Land Court.<sup>34</sup> All the appellants were related to kinship groups of Ngati Maniapoto and Ngati Toa. Several appeals related to agreements made by the claimant, Whitiui Hohepa. He had been able to get a number of parties to withdraw their claims prior to the Court hearing by agreement but complaints had arisen over the number of shares which were allocated on the basis of these agreements.<sup>35</sup>

The most controversial appeal, however, related to the conquest claim argued by kinship groups of Ngati Maniapoto. Haupokia Te Pakaru had originally claimed the entire block by conquest of the land from Ngati Toa after they were driven away in 1819, and subsequent occupation since. The Appellate Court gave a background to the investigation of the Rohe Potae blocks from 1886. It noted that the conquest claim now argued before the Court was not argued because it might have helped the Waikato tribes – whose claims to the land Ngati Maniapoto opposed:

At that enquiry which concerned the two main tribes Ngati Maniapoto and Waikato, it is admitted that it was agreed that Ngati Maniapoto should not put forward any claim by conquest, lest it should help Waikato who were their opponents at that Court. The claim itself was it appears put forward by Waikato and opposed by Ngati Maniapoto, and on the evidence given by their witnesses, some of whom now seek to set it up, was rejected by the Court as one of the takes giving a claim in the Rohepotae.<sup>36</sup>

This Appellate Court was quite clear in its view on the conquest of Ngati Toa: they left their ancestral lands at Kawhia and migrated south under Te Rauparaha to Kapiti and never returned to Kawhia. The land being vacant, it was occupied by Ngati Maniapoto and Waikato who remained. The Court was not concerned to determine whether these rights were derived by conquest or occupation; those rights were

<sup>34</sup> Otorohanga Native Land Court minute book 37, 23 May 1900, fol. 233ff.

<sup>35</sup> John Ormsby represented one of the appellants and asked the Court's permission to call fresh evidence regarding a claim. Ormsby wanted Te Houpapa to give evidence regarding his claim. Te Houpapa had not done so when the case came before the Land Court in consequence of this agreement. The major complaint was that Whitiui had failed to convey all the land promised when the Court made its awards. Whitiui denied Te Houpapa's statements, telling the Appellate Court that the gift was made through 'aroha' and that Te Houpapa had no right at all to the land. The Court had heard Te Houpapa's evidence on the issue and found 'that evidence is not sufficient to sustain' his claim. The appeal of Hanatare Kingi also involved an arrangement reached with Whitiui regarding inclusion in the lists of names. Hana objected to the proposed allocation of shares during the Land Court hearing and set up her own independent claim for eighteen people including herself. Three were admitted by the Court, each receiving two shares. This meant she was awarded four more shares than originally allocated by Whitiui. The Appellate Court could not see that Hana had any right to the land or why the Land Court admitted three people under her claim. The Appellate Court decided, however, not to disturb the original decision because Whitiui admitted he promised to include her and her brother 'because Hana had extended similar favours to him and his family in lands to which he had no right.'

<sup>36</sup> *ibid.*, 11 June 1900, fols 333-41.

established. However, not all the land had been abandoned and the Appellate Court had to reach a decision on the conquest to determine whether the area awarded to Haupokia by the Land Court represented those rights.

Those arguing the conquest claim before the Court admitted that Ngati Hineuru and Ngati Koperu were the original owners of the land. Neither did they suggest Ngati Hineuru had abandoned their land as Ngati Toa did. The Appellate Court believed that these admissions were 'sufficient to satisfy this Court that apart from the conquest claim, the Ngati Hineuru should be held to have been the owners by ancestry and occupation till a better ancestral and occupational claim was established.' They then considered whether Ngati Hineuru were 'forcibly expelled from their ownership, either wholly or partially' by Ngati Maniapoto or any kinship group of Ngati Maniapoto. Like the Land Court, the Appellate Court found Ngati Hineuru were related to both Ngati Maniapoto and Ngati Toa. However, it also found that Ngati Hineuru were active participants in the conflict against Ngati Toa which eventually led Te Rauparaha to abandon the land. After the fighting ended, Ngati Hineuru were placed on the land by a Ngati Maniapoto chief where they remained to the present day. On this basis, the Appellate Court concluded there was no conquest.

This finding was at odds with the decision of the Native Land Court and the Appellate Court did carefully justify its conclusion. A number of cases since the Rohe Potae hearings had found there was a conquest and these were cited during the hearing. This Court, however, distinguished the facts in this case with those of the earlier cases:

These were lands abandoned by the owners who went away and never returned and were taken possession of by those who found them deserted. Whatever title they had could only be by such occupation and was good enough against any others who could not show as good a title or a better one.

After dismissing the claim based on the conquest, the Court went on to find Haupokia's occupation was 'too slight' to justify a longer ancestral 'original right.' Occupation over the last generation or two did not constitute this 'original right' and with the conquest claim dismissed, the Court found he had no legitimate claim. The award of 1,500 acres made by the Land Court was annulled and the appeal dismissed. This was a large piece of land over which the two Courts disagreed but the Appellate Court took care to justify its decision on the basis of occupation which contradicted the conquest claim. The more important point to be made about the Taumatotara case was the extent to which conflict over the land continued to inform disputes over rights to land at the turn of the twentieth-century and the difficulty faced by the Courts in attempting to resolve these disputes. Taumatotara was not a straightforward case of conquest; abandoned land was an entirely different matter when it came to determining occupation and in this case there was further problems

over ancestry where Ngati Hineuru were descended from both antagonistic tribal groups.

Perhaps the most direct acknowledgment of the difficulties faced by the Court in resolving these kinds of disputes over customary rights is the decision of the Native Appellate Court in Mangahauini. In October 1899, the Court sat at Tokomaru Bay to hear fifteen appeals lodged against several decisions of the Native Land Court.<sup>37</sup> The two highly experienced judges comprising the Court, Judges Mackay and Mair, did not sit with an assessor. Some new evidence was given during the hearing but otherwise, agents representing the different appellants and the respondents addressed the Court at length. The minutes were recorded in three minute books and show the hearing continued for more than three months. The Court produced a mammoth decision of nearly two hundred pages.<sup>38</sup> This was written up in elegant long hand by the Court clerk, Alexander Mackay, son of the judge. The decision provided a detailed and exhaustive review of the facts of the case and the grounds upon which the Court dealt with each appeal. The evidence showed there was considerable conflict between hapu prior to 1847 when missionaries arrived. Much of the focus of the disputes involved the location of ancestral boundaries, conflict over the land and more recent occupation by the different kinship groups (including leases to Pakeha). All but one of the appeals was dismissed.

The difficulties associated with locating boundaries on the land were lamented by the Court: 'everyone appears to have fixed the position to meet their own particular claim.'<sup>39</sup> The Court acknowledged that in the past, 'Maori knew with as much certainty the exact boundary of his own land as if the boundary had been fixed by a surveyor.' They were always liable to alteration but nevertheless ancestral boundaries were carefully taught to the young people by the elders of the kinship group. When tribes gathered together to discuss disputed rights to land, it was on this knowledge that their leaders relied. Leaders also maintained their knowledge of the boundaries by going to the limits of their land and cultivating small portions. According to the Court, '[t]hese old custom have unfortunately passed away and it is a rare occurrence for hapus interested in the boundaries of their land to meet for the purpose of fixing them correctly the result is that each hapu fixes the boundary where conceives it ought to be in their opinion.' The judges lamented the fact that this knowledge had become dim as the elders died and land became more important as a commodity and source of money.

In response to other appeals, the decision noted the way ancestors had been used as a means of excluding others. That is, 'a case where the ancestor was used in

<sup>37</sup> Waiapu Native Appellate Court minute book 4, 28 October 1899, fol. 1.

<sup>38</sup> Waiapu Native Appellate Court minute book 6, 12 March 1900, fols 86-237 and 343-382.

<sup>39</sup> *ibid.*, fols 196-200.

an attempt to narrow down the number of persons who had a right were that ancestor found to be the correct one under such a claim.<sup>40</sup> After citing the original ancestor, the claimants shifted through two generations to name the ancestor from whom they claimed the land. To exclude others, they argued that '[l]and was passed to specific children by appropriation and was not passed to all the people.' The use of whakapapa to narrow down the lines of descent was used for the purposes of limiting the number of claimants. As they moved down their whakapapa, the claimant group referred to gifts by an ancestor to his child or grandchild alone of the entire block; the descendants of other children or grandchildren of this ancestor could then be excluded from this particular ancestral right. The appropriation of the land by one ancestor from his kin was another way of narrowing down the lines of descent.

This pattern is evident in many other title investigations and appeals although it is usually not articulated in such a direct way. Other Courts did refer to the importance attached by claimants to control of lists but Mangahauini was unusual in that the Court went further to refer to attempts to use whakapapa in a way designed to exclude others. Such disputes over ancestors between kinship groups belonging to the same tribal group and descended from a common ancestor was one of the key considerations which drove rehearings and appeals. It was also quite common for distinct tribal groups to use appeals as a way of continuing debates over customary rights to particular blocks of land. For the subsequent Courts, dealing with these debates shows the extent to which confusion reigned. It was common for a rehearing or appellate Court to defer to the judgment of the earlier Court accepting there was no new evidence to challenge their decision. However, examples have been given above where the later Court disagreed with the earlier Court and excluded those granted large pieces of land. They demonstrate the difficulties the Court faced in attempting to resolve disputes even though their decisions carefully defined and considered the key points at issue. The task given to the Court, as Judges Mackay and Mair pointed out in lamenting the problem of defining boundaries in Mangahauini, was extremely difficult.

Beyond rehearings and appeals within the Court's own legislative framework there were petitions to the General Assembly which were usually heard by the Native Affairs Committee. If that committee considered there was a problem with the actions of the Native Land Court, it could make recommendations to the government for the matter to be investigated further. Throughout the nineteenth-century, such commissions of inquiry were regularly established, although generally only in relation to large and controversial blocks of land. They included Pukekura, Puahoe, Ngamoko and Maungatautari in 1881, Patutahi in 1884, Owhaoko and Kaimanawa in 1886,

<sup>40</sup> *ibid.*, fols 56-57.

Ngarara, Porangahau, Mangamaire and Waipiro in 1889 and Taupouuiatia in 1889.<sup>41</sup> These commissions all responded to petitions submitted by Maori and most addressed complaints arising out of title investigations conducted by the Court. In the twentieth-century, this process was cranked up further with the regular Native Land Claims Adjustment and Land Laws Amendment Acts together with the reports of the Native Land Commissions published annually in the *Appendix to the Journals of the House of Representatives*.<sup>42</sup> It was generally the Court appointed to conduct these special commissions (like Horowhenua), often for the purposes of reviewing the actions of the same institution in earlier decades. These kinds of forum allowed debates over customary rights to be continued over many decades and across generations.

More recently, it is still clear Maori are using political and judicial forum to continue arguing customary disputes. They include, in particular, the Waitangi Tribunal and the Environment Court. There, claimants seeking to establish breaches of the Treaty of Waitangi and those asserting tangata whenua status under the

<sup>41</sup> 'Report of the Ngatikauwhata Claims Commission,' *AJHR*, 1881, G-2A; 'Report by H.T. Clarke, Esq., upon certain native claims to land, etc., Poverty Bay,' *AJHR*, 1884, Sess. II, G-4; 'Report of the Owhaoko and Kaimanawa Native Lands Committee, together with minutes of proceedings and evidence,' *AJHR*, 1886, I-8; 'Commissioners' report re. decision of Native Land Court in respect of the Ngarara, Porangahau, Mangamaire, and Waipiro Block,' *AJHR*, 1889, G-1; and, 'Report of the Royal Commission appointed to inquire into certain matters connected with the hearing of the Taupouuiatia Block,' *AJHR*, 1889, G-7.

<sup>42</sup> See for example: 'Report of the Royal Commission appointed under Section 18 of the Native Land Claims Adjustment and Laws Amendment Act, 1901,' *AJHR*, 1904, G-7; 'Report of the Royal Commission appointed under Section 11 of the Maori Land Claims Adjustment and Laws Amendment Act, 1904,' *AJHR*, 1905, G-1; 'Report and Recommendation under Section 18 of the Native Land Claims Adjustment Act, 1910, on petition No. 260/1897, relative to Pourewa Island,' *AJHR*, 1911, G-14; and, 'Report and recommendation under Section 18 of the Native Land Claims Adjustment Act, 1910, on petition No. 732/1910 relative to the Waimarino Native Reserves C and D,' *AJHR*, 1911, G-14A. This is only a small sample.

Resource Management Act 1991, draw on very old debates about customary rights to land and relationships between different kinship and tribal groups. Such forum provide another way of continuing these debates and although there is seldom land at issue, debates over the land continue to inform the way different kinship groups argue their position. The Native Land Court, rather than shutting down debate over land, was a site where these relationships could be argued in the first instance. Rehearings, appeal and petitions allowed the debate between kinship and tribal groups to continue and were driven by traditional customary debates as Horowhenua, Motatau No. 5 and other rehearings and appeals demonstrate. The Waitangi Tribunal and the Environment Court also allow these debates to continue and that they are able to do so after so much of the land has gone reflects the fluidity, flexibility and resilience of Maori customary rights to land and the relationships they embody.

## CONCLUSION:

### RELATIONSHIPS AND AUTHENTICITY

Throughout the nineteenth-century, imperial politicians and officials, followed by colonial politicians and the Pakeha settlers they represented, wanted to acquire Maori land at the lowest cost possible: the appropriation of land by force was impossible due to the military strength of Maori and the influence of humanitarian and missionary organisations. Some degree of consent was therefore necessary; the entire New Zealand Company scheme and the imperial government's rationale in annexing the islands by treaty was based on just this premise. Moreover, it was recognised very early on that the classic Vattellican approach to title to the lands of indigenous people could not be effectively applied in New Zealand. Appropriating land by declaration was impossible because Maori quite clearly asserted rights to land they did not occupy or cultivate. Some way of determining those rights and then acquiring them by consent was necessary. It was the struggle to find a method for determining those rights which defined debates about native affairs among official and politicians, first in London and, after responsible government, in New Zealand throughout the nineteenth-century.

In the two decades following the Treaty of Waitangi, the determination of these rights was primarily a matter for the Governor, first through the Protectors and later through the Native Office and Native Land Purchase Commissioners. Negotiations were conducted between leaders (tribal chiefs and the governor) and could continue over several years or even decades through a period of transition, where rights were argued through a series of overlapping and progressive purchase agreements as those asserting rights identified themselves and their interests. Finality, from the Crown's point of view, was often difficult to achieve and at times elusive. George Grey was the most successful practitioner of this approach and he acquired large areas of land, including most of the South Island and some substantial blocks in the North Island. Pragmatic purchasing, however, collapsed in war at Waitara and this crisis reflected both growing Maori opposition to land sales and, more importantly, the growing difficulties associated with trying to determine, with a degree of certainty, the rights of different tribal and kinship groups to particular areas of land. To speed up the acquisition of land and provide for increasing certainty, the

continuous process of negotiating (and renegotiating) to purchase land declined in the hands of Thomas Gore Brown and Donald McLean while kinship and tribal groups were less willing to accept sales negotiated with others.

During the early 1860s – a period of considerable unrest and instability, particularly within the colonial political elite – proposals regarding how Maori customary rights might be dealt with in a process where the acquisition of land was the final outcome were debated. Out of this debate emerged the Native Land Court; more importantly though, it was a debate which would continue for well over a century. Proposals for a court had been around for some years and they were adopted at this time as a way of dealing with a difficult and intractable problem (determining Maori customary rights to land) and the kind of court established reflected a specific political context. In subsequent decades, the Court was re-invented regularly for precisely these reasons. Shifts in the political context and changes in government policy are revealed by both native land legislation and the political debates associated with this legislation. With the exception of a period from around 1899 to around 1907, these debates focused almost entirely on how Maori land could be acquired for the purposes of settlement. They also show the extent to which native land legislation was designed to address problems arising out of the operation of the Court which precluded the acquisition of Maori land for settlement. Two key problems emerged from the 1880s: large numbers of owners made gaining consent to purchase a block of land difficult and intractable disputes could tie up land in litigation for many many years.

Both problems were a product of custom. Tribal and kinship groups attempted to recognise the rights of all those who had a legitimate interest in a block of land (whatever that interest may have been), thus increasing in length the burgeoning lists of owners. Moreover, ongoing disputes over many generations had to be argued until all parties were satisfied with the outcome, or at least as far as they thought possible under the Court system. The regular re-invention of the Court through ‘consolidating’ statutes, the constant flood of technical amendments, the provisions relating to particular defined cases and the debates over all this legislation reflect a continuous struggle by colonial politicians wanting to acquire Maori land. This struggle was about how Maori customary rights to land could most quickly, effectively and certainly be defined in a stable and settled title. The struggle proved intractable. Each approach worked for a time – and in the process Maori land was successfully acquired – but after a while the limitations of the approach became apparent, the flow of land declined and a new experiment was necessary. The perfect solution to this continuing problem was never and has never been discovered (primarily because, it will be argued below, of assumptions about the nature of Maori customary rights to land).

Part Two examined the shifting legislative framework and political debates in which the Court was established and subsequently operated. The politics of the Court

was one of five discourses examined in this thesis. These discourses revolved around and through the institutional framework of the Court and all five are central to developing a comprehensive account of its activities. In addition to the discourse of colonial politicians and officials, this thesis examined those of historians and scholars and of bureaucrats trying to administer Maori land in Maori ownership. Having dealt with these three discourses in Part One and Part Two, Part Three shifted the focus from histories, politics and bureaucracy to the operation of the Court on the ground. Two further discourses – those of Maori claimants inside the Court and of judges and assessors who had to resolve competing claims – were examined in this part. The evidence there showed that just as politicians found dealing with Maori customary rights difficult, so too did the Court as Maori asserted complex and confusing claims to land and establishing stable and settled title proved very difficult given long and intractable disputes.

Maori engaged with the Court and developed creative and carefully argued claims to land in the Court. Long and detailed evidence was given by witnesses who were cross-examined, sometimes at considerable length, by others disputing their claims. The minute books recording Court proceedings show many complex narratives over rights were argued by Maori claimants and they reflect long relationships, over many generations, in which land was significant. These relationships could be between individuals and families within a kinship group, between kinship groups within a tribal group or between tribal groups. The way these claims were asserted and argued developed over time. They always reflected the past experience of the Maori claimants in their own lifetime as well as drawing on whakapapa and the lives and actions of ancestors.

During the first twenty years or so of the Court's operation, the way Maori argued their customary rights inside the courtroom tended to focus on the battles and wars of the period from around 1830 until 1850. The claims were generally large scale tribal claims and focused on conflict and conquest. The Court was another opportunity for tribes to continue the war and fight the battles again. This time rather than muskets and carnage, the weapons were words and the battle was won or lost on the decision of the judge and assessor. These early claims usually involved large blocks of land and those who argued them and gave evidence in support were often the elders of each tribe who were either children at the time of the conflicts of the first half of the nineteenth-century or had heard the stories at the feet of their elders who had been involved in the fighting. They were the sons and daughters of the great rangatira who had led their tribes and preserved them from destruction at the hands of their traditional tribal enemies. Their mana was derived from this relationship and was considerable.

By the mid-1880s, however, this generation was beginning to die. It was a process which would take many more years but its impact on claims before the Court was increasingly apparent. The mana of the rangatira who held the tribe together was

not passed onto the next generation and claims to land asserted in the Court came to resemble a landscape of voices. The claims were no longer large scale and the blocks of land were smaller; claims were argued on a smaller kinship group basis against other kinship groups within the same tribe. Hearings became much longer and protracted with extensive evidence and cross-examination of witnesses.

It is not at all clear that shifts in the nature of claims reflected the impact of the decisions of the Court. Instead, there is evidence to show that although some claims were reworked on the basis of earlier decisions, the fundamental grounds on which they were asserted remained unchanged. Moreover, the decisions of the Court show that the judges and assessors had to engage with debates by different kinship groups regarding their interests in land and it was forced to navigate a difficult path through particular disputes to individual pieces of land. Rather than imposing its own conceptualisation of customary rights on Maori claimants, the Court had to engage with the debates as claims were argued before it.

Over time Court decisions grew considerably in length as disputes become increasingly complex and difficult to resolve. The Court was forced to find ways to deal with the mass of evidence accumulated during hearings to determine the Maori owners of a block of land. These strategies included drawing on evidence given in previous hearings, seeking out contradictions in the evidence of witnesses and a growing emphasis on occupation or at least clear evidence of occupation at some point. What is clear is that the Court had no model or system of take which was applied to its decisions. Judges and assessors might draw on earlier decisions of the Court but they did so selectively and there was definitely no attempt to create a body of precedent. The vast majority of Court decisions remained buried deep in the bound volumes of minutes. Deciding the rights of parties was a complex process and the strategies applied to do so depended on the nature of the individual circumstances. There were no clear and fixed rules defining take and when they might apply to certain circumstances. Take were certainly not a model which was simply applied to a block of land; the diverse and numerous narratives presented by Maori witnesses rendered this approach entirely impossible.

Since Judge Norman Smith codified Maori customary rights to land into four take in *Native Custom and Law Affecting Native Land* in 1942, these rights have been conceptualised in an abstract sense. They existed in and of themselves and can be defined. This view continues to inform historical and anthropological debates today: Maori customary rights to land are an object which can be defined. This interpretation sees Native Land Court judges and ethnologists of the nineteenth-century deeply embedded in a colonial social and cultural environment and argues that they could therefore never understand such rights. The simplistic model of four rights identified by Smith is evidence to support this view. Contemporary scholars assert, in contrast, that they are in a much better position to define these rights because they do not carry such cultural baggage. However, this approach, which is

still very similar to that of Smith and the late nineteenth-century ethnologists, is equally untenable primarily because it is still concerned with defining generalised 'rights.'

Maori customary rights to land did not exist in the abstract. Rather they were a practical application of tribal political and civil rights – social, economic and cultural – negotiated in particular circumstances, both geographically and historically. Maori customary rights to land were fundamentally about relationships. That is, how people interacted with each other over access to resources and land. They were always in flux and always subject to debate. This can be seen both in how Maori claimants acted in the courtroom and how the Court responded to the complexity of claims.

In the case of Maori claimants, the courtroom was a space where debates over rights to resources and land could continue. Claims could be heard and discussed, evidence presented in support of those claims and witnesses cross-examined. The terms may seem legalistic but the practice was not: this was a process of working through these issues in a customary way. If either party was unsatisfied with the outcome of the hearing then it was possible to continue the debate through an appeal or by petition. This was always subject to financial considerations but many tribal and kinship groups were willing to incur this cost when there were issues still to be discussed.

For this reason, the Court was forced to respond to and address the claims argued before it. There has been a tendency to see the Court as a destructive outsider imposing its decisions on Maori claimants based on its own narrow view of rights supported by evidence of use of specific resources such as soil, fisheries and rat runs. In fact few decisions of the Court rely on such narrow definitions of rights and there was a recognition in decisions of the complexity of the claims argued before the Court. Smith's approach to Maori customary rights was similar to that of colonial politicians and officials and the ethnographers of the nineteenth-century who believed clear, discrete and abstract rights to land could be drawn from Maori custom. These debates were lengthy and complex but they were founded on a failure to comprehend the basic nature of Maori customary rights to land. More recent scholars have adopted this misunderstanding when they attempt to define these rights. This goes some way to explain why no stable definition of those rights has ever been found; it was also, ironically, not the approach applied by the Court.

Tribal and kinship groups took the opportunity to continue the debate and this put pressure on the Court to navigate the complex claims carefully and acknowledge all the evidence. Failure to do so would lead to appeal and petition and the Court was supposed to establish a settled title. To achieve this outcome, the Court had to end the debate and this would only occur when the avenues for continuing were exhausted (petitions could and did continue regularly), when the kinship groups ran out of

money (a key consideration) or when the kinship groups were all satisfied that their claims had been recognised for now. This last consideration was more common than is traditionally suggested. Even after a decision was given by the Court all the parties could continue to debate claims through the process of compiling the lists of names to be included in the title. Those who argued through one kind of claim or a particular ancestor could use their whakapapa to seek inclusion through another claim or ancestor. Their claim would be inferior but recognised nevertheless.

The Court was an environment where these relationships could continue to develop; that is, it was a forum where debates over land could occur and where rights to land could be negotiated. This was not a new process at all: the narratives presented by witnesses show that over many generations these relationships were always shifting and a matter for debate. The Court's primary function, however, was to close down debate over customary rights to land and render previously fluid relationships fixed both in time and in place (a defined block of land). For, when the order was signed or the certificate issued, its job was done. It was at this point (rather than earlier) that the factor which would have the most egregious effect on Maori landownership emerged. The flux and fluidity of Maori customary rights to land was swept away. Shifts in relationships and rights were no longer recognised when the Court issued a title.

In the decades after 1928, a large bureaucratic structure was required to administer the land still in Maori ownership. The alienation of Maori land continued until the mid-1970s but there was also a concerted effort to develop Maori land to make it productive and return a profit to owners. However, the title created by the Court became highly problematic: fragmented into unprofitable farming units through partition and choked by huge number of owners as generation after generation succeeded to the interests of their elders. These titles caused major problems in attempting to make land productive.

Customary relationships were still able to operate in these bureaucratic structures even if they were severely circumscribed. The title system interacted with custom and over many decades caused more problems which required strict bureaucratic control. The most obvious were the exponential growth in the number of owners through succession, the division of land into tiny pieces through partition or the failure to succeed to the interests of deceased owners. Attempts to deal with these kinds of problems after 1928 failed and by 1993, these problems were ignored and have never been successfully addressed. Thus, in establishing fixed title, further problems were created both for officials and Maori landowners. Title was anything but stable and settled and just as nineteenth-century politicians and officials struggled to find a structure for effectively dealing with Maori customary rights to land in a way which defined those rights clearly, so too did officials and politicians in the twentieth-century. The policy context was quite different – twentieth-century officials and

politicians were trying to administer Maori land in Maori ownership – but the struggle was very much the same.

Equally, the Court's struggle to come to terms with custom in the nineteenth and early twentieth centuries shows confusion and contingent understandings. In Part One and in Chapter 2 it was argued that existing approaches to the Native Land Court derive key elements of their interpretation of its activities in the nineteenth-century from the 1891 Royal Commission on the Native Land Laws. Such historiography characterises the Court as the frontier in New Zealand history and emphasises its role in undermining existing Maori customary rights to land and facilitating the large-scale alienation of Maori land which began after 1865 and continued until the early 1920s. This thesis offers different and innovative understandings about the operation of the Court. Maori exercised a high degree of agency in asserting and arguing their claims to land and this continued a long tradition of negotiating relationships between distinct tribal and kinship groups who derived their identity from their whakapapa. Moreover, in the colonial context, the capacity of the coloniser to know the indigenous inhabitants for the purposes of control was never absolutely clear and power was never entirely in the hands of imperial authorities. Maori did, however, lose a considerable area of land. What must be recognised is that this did not occur easily or quickly; colonisation was a haphazard process which occurred over many decades.

## APPENDIX

This list contains the names of blocks, and the district in which they were located, included in the sample for which title investigations and any subsequent rehearings or appeals were examined.

BLOCK NAME	DISTRICT
Ahiateatua	Tairawhiti
Ahirau	Tairawhiti
Aratowaka	Aotea
Awapatiki	Waipounamu
Awaroa	Aotea
Hakuai	Aotea
Harakekeroa	Waiariki
Hariru	Taitokerau
Hauturu	Tairawhiti
Hereheretau No. 2	Tairawhiti
Hihiroroa	Tairawhiti
Horahia Opou No. 4	Waikato-Maniapoto
Horokawau	Waikato-Maniapoto
Horowhenua	Aotea
Huiarua	Tairawhiti
Iwituaroa	Waipounamu
Kaihu	Taitokerau
Kaingaraki No. 11	Aotea
Kaingarua	Waiariki
Kaingarua No. 1	Waiariki
Kaiwhenua	Waikato-Maniapoto
Kapuarangi	Waiariki
Karatia Karamuramu	Waiariki
Katihiku No. 1	Aotea
Katotane	Takitimu
Kaupapa	Tairawhiti

Kawhia	Waikato-Maniapoto
Kawhitiwhiti No. 2	Waikato-Maniapoto
Kiokio No. 4	Waiariki
Komata North No. 1	Waikato-Maniapoto
Koparakore	Takitimu
Mairekura	Aotea
Makirikiri	Takitimu
Manawatu Kukutauaki Ngarara	Aotea
Mangahauini	Tairawhiti
Mangakowhara	Taitokerau
Mangaoihe	Aotea
Mangaporau	Aotea
Manutake	Tairawhiti
Marangairoa No. 1A	Tairawhiti
Mataipuku	Waiariki
Maungaroa No. 1	Waiariki
Maungawaru	Tairawhiti
Mimitu	Taitokerau
Moerangi	Waikato-Maniapoto
Mohaka	Tairawhiti
Motatau No. 3	Taitokerau
Motatau No. 5	Taitokerau
Motiti	Waiariki
Motuotera	Tairawhiti
Motutere	Waikato-Maniapoto
Ngaihumutu	Waiariki
Ngamahau	Waiariki
Ngapuarua	Tairawhiti
Ngawhakaraua	Aotea
Oariki	Tairawhiti
Ohineahuru	Waiariki
Ohinekai	Tairawhiti
Ohutu	Waiariki
Omaewa	Tairawhiti
Omaunu	Taitokerau
Omiru	Taitokerau
Opitonui	Waikato-Maniapoto
Otairi	Aotea
Otamakapua No. 2	Takitimu
Otangoaroa	Taitokerau
Otaotarahi	Waikato-Maniapoto
Oterongo	Aotea

Otioro Te Topuni	Taitokerau
Otiranui	Aotea
Otuarumia	Takitimu
Otumore	Aotea
Oturei No. 2	Taitokerau
Owhataroa	Waikato-Maniapoto
Paeroa	Taitokerau
Paiakamangaoatua	Waikato-Maniapoto
Papahikawai	Waiariki
Papatea	Waipounamu
Paremata	Aotea
Pekamaroke	Tairawhiti
Pipiwai No. 2	Taitokerau
Piritaha	Taitokerau
Pohaoterangi	Tairawhiti
Pokohu	Waiariki
Poraangahau-Mangamaire	Takitimu
Puhangateuru	Waikato-Maniapoto
Puhipuhi	Taitokerau
Pukeatua	Aotea
Pukekowhai	Aotea
Pukemaire	Waiariki
Pukemanuhiri	Tairawhiti
Pukemoamo	Takitimu
Pukemokemoke	Waikato-Maniapoto
Pukemokimoki Te Waituhi	Takitimu
Pukenui	Taitokerau
Pukeroa Hangatiki	Waikato-Maniapoto
Pukeroa Oruawhata	Waiariki
Pukewhkapu	Aotea
Pumakitere	Taitokerau
Purakanui	Waipounamu
Purunui	Waikato-Maniapoto
Raekahu	Tairawhiti
Rangihoua	Waikato-Maniapoto
Rapaki No. 2	Waipounamu
Ratahi	Aotea
Rawhitiroa	Waikato-Maniapoto
Rohe Potae	Waikato-Maniapoto
Ruakituri	Takitimu
Ruarangihaereere	Taitokerau
Ruawahia	Waiariki

Runanga No. 1	Waiariki
Taheke	Waiariki
Tangiario	Waikato-Maniapoto
Tapatu	Tairawhiti
Tapuaeoteao	Tairawhiti
Tarewa	Takitimu
Tatua	Waiariki
Taumatatotara	Waikato-Maniapoto
Taupaki	Taitokerau
Tawaroa	Aotea
Tawhiti	Tairawhiti
Tawhitinui	Aotea
Te Aroha	Waikato-Maniapoto
Te Hopiti	Takitimu
Te Komiti	Taitokerau
Te Kuha	Takitimu
Te Pohue	Takitimu
Te Rape	Waikato-Maniapoto
Te Riwai	Aotea
Te Tarata	Takitimu
Te Tuhi	Aotea
Te Waiti Pohueroro	Waiariki
Tikirahi	Waikato-Maniapoto
Tirotirowhetu	Waiariki
Tokomaru	Tairawhiti
Tuahu	Tairawhiti
Tukurangi	Takitimu
Urewera	Aotea
Waihaha	Waiariki
Waikawau	Waikato-Maniapoto
Waikino	Taitokerau
Waikoropupu	Taitokerau
Waimimiti	Taitokerau
Waimoana	Waiariki
Waipukurau	Takitimu
Waitaki	Waikato-Maniapoto
Waitangi	Taitokerau
Waitepuia No. 1	Waiariki
Waiteti	Waiariki
Waituhi	Tairawhiti
Waiwhau	Waikato-Maniapoto
Wautu North	Waikato-Maniapoto

Whaiti Kuranui No. 2	Waikato-Maniapoto
Whakahokiatapango	Aotea
Whakapuaka	Waipounamu
Whakaterere Manawakaiaia	Taitokerau
Whangamata Hikutaia	Waikato-Maniapoto
Whareama	Waiariki
Wharekahika	Tairawhiti
Wharepu	Aotea
Whatiti	Taitokerau
Whawharu C	Taitokerau
Whenuahou	Takitimu
Whirinaki	Taitokerau

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Otaki Minute Book 2

Otaki Minute Book 4

Otaki Minute Book 5

Otaki Minute Book 6

Otaki Minute Book 8

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