

CHAPTER 4

THE NATIVE LANDS ACTS AND THE NATIVE LAND COURT

The Native Lands Acts and the establishment of the Native Land Court which provided for individualisation of title and direct sale to settlers might be seen as an inevitable outcome of the debates of the 1850s over native title and seigniorial rights. Both Maori and settler were dissatisfied with the Crown's handling of the land question. Settlers wanted easier access to land; many Maori were totally opposed to sale, although some wanted the freedom to sell on the open market, and others preferred to derive an income from leasing their land but retaining the freehold.

The system introduced in the early 1860s by the Lands Acts was supposed to acknowledge Maori rights as British subjects by recognising their legal right to all their land, and allowing them to do what they chose with it, including getting full market value if they sold it. It would also 'unlock' the lands hungered after by the settlers, yet prevent another disaster such as had happened at Waitara over the purchase of land with a disputed title. And it would curb the exercise of the chiefly veto – it would deny rangatiratanga. Although the Queen's assent had been withheld from a similar measure in 1858, the Colonial Office, with the experience of Waitara before it, had reversed its policy and advised the Governor that Her Majesty's Government would be:

willing to assent to any prudent plan for the individualisation of native title and for direct purchase under proper safeguards of Native lands by individual settlers, which the New Zealand Parliament may wish to adopt.¹

Various schemes had been suggested in the late 1850s to give Maori some measure of local autonomy and some say in the disposal of their lands. In 1857, F D Fenton was sent to the Waikato as resident magistrate in response to a request by Waikato Maori for an appropriate code of laws, to control problems such as adultery, trespass, European squatting, drunkenness, violence, and cursing, and to prohibit or restrain acts of muru and makutu and the power of tapu ('except in very special cases'). They wanted the laws to be binding on both races residing in native districts.²

1. Dispatch, 5 June 1861 (cited by Bell, NZPD, 1861–63, p 610)

2. Gore Brown memo, 28 April 1857, AJHR, 1858, e-5, p 7

Fenton, 'an ambitious, conceited and fractious man', according to Ward; 'a cultivated man' with an 'intellectual comprehension' of acculturation, according to Sinclair,³ had impressed himself on the Government, and especially on the ministers, through a series of memos written while resident magistrate at Whaingaroa in 1857. Fenton was impressed with the efforts of younger Maori leaders to come to terms with the new world through the activities of traditional runanga dealing with contemporary problems. It was these men who wanted a European magistrate to advise them and guide their efforts. The runanga movement of this period ran parallel to the King movement, and runanga were operating efficiently far beyond the Waikato. For the most part they aimed at social control – of both Maori and Pakeha in their area – and they expected Government approval, guidance, and support. Government, however, was more interested in acquiring Maori land and subjecting the people to British law and authority than supporting their efforts at self-help, and ultimately Fenton's role was to capture and contain Maori initiative and bring it under Government control:

the movement will, if properly guided, result in nothing more than the permanent establishment of a powerful machine, the motive power and *the direction of which will remain with the Government*. [Emphasis in original.]⁴

Fenton envisaged 'fixity of residence and thickening of the population' by concentrating the people in villages.

Amidst a fixed and large population individuality is lost, public opinion is formed, and can easily be moulded into a beneficial and productive form by the superintendence and care of the central power . . . Thus also will the waste land cease to be regarded as the bulwark of independence, and the importance attached to the possession of it will be transferred to the laws.⁵

According to Fenton, Maori were retaining their land principally from political motives, but if land purchasing was only properly regulated, and Maori shown that 'their importance and position [were] properly recognized and protected', they would 'cease to fear for their independence and . . . cease to regard the possession of the land as a matter of such deep interest'.⁶ Such was the reasoning of the man whose 'unusually perceptive reports' would 'do credit to a modern anthropologist'.⁷

3. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, 1973, p 94; Keith Sinclair, *The Origins of the Maori Wars*, Auckland [1957], 1980, p 100

4. Fenton memo, March 1857, AJHR, 1860, e-1c, p 8. See also 'Report of the Waikato Committee', 31 October 1860, AJHR, 1860, f-3, p 2: 'The Governor approves the appointment of Mr Fenton, and desires to urge on his Advisers the importance of giving him instructions without delay. The present moment is . . . a critical one; and if the Government does not take the lead and direction of the Native movement into its own hands, the time will pass when it will be possible to do so.'

5. AJHR, 1860, e-1c, pp 9–10

6. *Ibid*, p 10

7. Sinclair, pp 100, 102

Working in various villages throughout the lower Waikato, Fenton had some success as a circuit court magistrate, but his ulterior motives were very evident as he worked to create a 'Queen party' and deliberately ignored or slighted the great Kingite chiefs. Gore Brown withdrew him on McLean's recommendation before he exacerbated the situation further,⁸ and before the Native District Regulations Act, whose provisions he was supposedly trailing, was put in place.

The report of the Waikato committee, a select committee which reviewed Fenton's operations in September to October 1860 – and commended his work – was critical of his withdrawal and the abandonment of the great experiment, and against McLean's objections recommended further efforts to civilise Maori and introduce law and order through the medium of that 'old Maori custom . . . the Runanga'. While they were about it, the committee criticised McLean's view of and attitude towards the King movement, and his influence in the matter of Fenton's removal; and they called attention to 'the entire want of harmonious action between the Ministry and the Department of the Native Secretary'.⁹ This was indeed a crucial factor in the whole mismanagement of the period, and the antagonism between Fenton and McLean endured until McLean's death in 1877, and reflected negatively in amendments to the Native Lands Acts and the operations of the Native Land Court.

When Grey returned for his second governorship in September 1861, he worked with the Fox ministry on a scheme which would involve Maori in their own local Government. Grey's 'new institutions' were not so new. Like Fenton's scheme they were based on the traditional runanga, operating under the direction of the resident magistrate, but they also involved the creation of district runanga under the direction of a civil commissioner. The districts of course were a European construct, overriding tribal boundaries, and grouping antagonistic tribes in a largely unworkable structure. Village runanga worked well in several areas, and dealt successfully with questions of stock trespass, fencing, and dog nuisance, as well as traditional questions such as puremu. But Grey's runanga were designed to have another function, that of determining tribal, hapu, and individual land interests, which could be Crown-granted, and alienated – but under tribal direction. Land of course was the sticking point, and nowhere did resident magistrates or civil commissioners have any lasting success in dealing with land issues. Settlers were impatient over the whole question of Grey's runanga. They were not interested in Maori self-government, and certainly not in the recognition of tribal title. What they wanted was rapid individualisation of title, and direct purchase from individual Maori.¹⁰

8. Ward, p 106

9. AJHR, 1860, f-3, pp 2–4

10. On Grey's runanga system, or 'new institutions', see Ward, ch 9.

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4.1 The Native Lands Act 1862

The Governor and ministers lost interest in their latest scheme for unlocking Maori lands when it became clear that it would not succeed, yet when Parliament met in 1862, Fox still had ideas of using the runanga system as the basis of new land legislation. On 22 July he introduced his Native Lands Bill to Parliament, and it was read a first time but lapsed when the Fox Government resigned a few days later.¹¹ Fox's Bill would have enabled Maori to determine their own land titles and alienate their land directly to settlers; and it would have prevented speculation by delaying the granting of freehold title for 10 years to one economic block per settler, conditional on occupation. Such far-sighted restrictions on wholesale alienation of Maori land were bound to find little favour among settlers, speculators, and most parliamentarians.

Within a month there was a new Native Lands Bill before the House, 'more calculated to suit European tastes'.¹² It was brought in by Dillon Bell, Native Minister in the Domett ministry, with the backing of Thomas Russell and Frederick Whitaker. Sewell, Attorney-General in both the Fox and Domett ministries, voted for the Bill, but he had grave reservations about it and regretted the loss of the safeguards built into the earlier Bill.¹³ He predicted that within five years it would be worth £10,000 a year to Russell. 'I am frightened of it all', he wrote. 'I detect influences at work out of sight which are not simply dangerous, they are corrupting'.¹⁴ His qualified acceptance of this legislation led to his replacement as Attorney-General on 1 January 1863 by Whitaker, a member of the Legislative Council, who took the position, 'but not in a ministerial capacity'.¹⁵ It was typical of Whitaker to accept an appointment to office on his conditions, which did not include denying himself time and space to continue the lucrative legal and land speculation practices he conducted in partnership with Russell. It was also indicative of the ministry's intentions: there would be no impediment to the alienation of Maori land.

All signs of Fox's 'peace policy' were swept away in this new Native Land Bill. This was a hard-line ministry. Alfred Domett, the Premier, was a Wakefieldian settler and one of Nelson's early leaders; he had told the House 'he still believed that, if the Natives had been taught first to respect the power of English arms, the schemes proposed for their benefit would have had much better chance of success'.¹⁶ Now he explained that he would still argue in favour of the theories of Vattel and Arnold, but it would be 'of very little use nowadays to assert and prove their correctness . . . unless we could get the natives to take the same view as ourselves'. Unfortunately, he said, Europeans had given Maori the idea they owned

11. NZPD, 1861–63, pp 421–426

12. Ward, p 152

13. NZPD, 1861–63, pp 686–691

14. Sewell journal, 9 September 1862 (quoted in J Rutherford, *Sir George Grey KCB, 1812–1898: A Study in Colonial Government*, London, 1961, p 478)

15. *Statistics of New Zealand 1891–93*, pt 1, p 5

16. NZPD, 1861–63, p 516

all the land in New Zealand and the Treaty of Waitangi, for which he had no more respect now than he had 20 years ago, had only confirmed them in this idea. He said:

But there was something mean, insidious and almost dishonest in the Treaty. For while thus professing to acknowledge their ownership, it gave a right of pre-emption to the Queen which took away all the value of the ownership.

And the result of this was that Maori felt ‘a deep sense of wrong . . . a feeling that they had been unjustly dealt with’, since the Government made such a profit on the resale of their land. He was sure this Bill would remove a great grievance and restore Maori confidence in the British Government. It was the maintenance of the Queen’s right of pre-emption, he said, that had been ‘one of the main causes of producing actual civil war’ in the country. Such were the views of the Premier of the time.¹⁷

The Domett ministry proposed that all land over which the native title had not been extinguished be declared ‘the absolute property of the persons entitled to it by native custom’, then once ownership had been ascertained and registered by properly constituted courts under the control of the Governor, the owners would be able to deal with it as any of Her Majesty’s European subjects dealt with their own Crown-granted land. Bell argued that Maori would thus ‘obtain the full benefit of their wealth’, they would regain confidence in the Government, they would have an interest in submitting to British law, and by doing so they would ‘infallibly themselves become wealthy men’.¹⁸ He denied his Bill would promote landsharking, but suggested that anyway it would not be a bad thing if one wealthy man bought up the whole of the Waikato. He would have to pay a decent price for it, the Maori owners would receive vast sums of money – and most of it would return to Europeans in trade. He wound up his speech by assuring the House that the new system would be workable, beneficial to both races and to the colony as a whole – and infinitely preferable to the system which led to war in 1860.

Others in the House were not convinced by Bell’s suave reasoning, calling the Bill illegal, an abnegation of the fundamental principle of the Treaty, an adroit evasion of clause 73 of the Constitution Act (which entrenched pre-emption), and warned that it would ‘attract a host of land jobbers and speculators’ from across the Tasman and all around New Zealand. One member though, would rather see the land ‘in the hands of a few white men than of the Natives’; at least roads would then be made through it.¹⁹

I E Featherston, superintendent of Wellington, was appalled that the Treaty was being ‘denounced as an insuperable barrier to colonising operations’; and that any sane man would believe ‘that the Natives had not received full value for the lands sold . . . to the Government’, since obviously the land had ‘no value but what it acquired by colonization’, and the Government made no profit from selling high-

17. Ibid, p 650

18. Ibid, pp 650–611

19. Ibid, pp 616, 623, 624, 646

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priced land, since all of the money was ploughed back in the shape of roads and bridges.²⁰ Featherston, though, had an ulterior motive. He was determined that the Manawatu–Rangitikei block, which he claimed was already under negotiation between the ‘owners’ and the Wellington Provincial Council, would be exempted from the workings of the Act. Individualisation of title and direct purchase by settlers would, he claimed, ‘be the financial ruin of the Wellington province’.²¹

Bell brought up again one of the arguments advanced in favour of the Act – that the illegal leasing of land was threatening the peace in more than one area, where disputes over ‘grass money’ had broken out. If they were unable to enforce the Native Land Purchase Ordinance 1846, which prohibited the purchase, use, or occupation of customary land not clothed with a Crown title, then it must be repealed or amended. ‘You cannot carry out the ordinance; you cannot any longer tolerate the public scandal of its violation; and therefore legislate in some direction you must’. And, going back to the Newcastle despatch of 5 June 1861, he claimed the Queen’s Government had ‘expressly invited’ them to waive the right of pre-emption.²²

The Bill required the royal assent, and possibly an Act of the British Parliament, since it varied the terms of the Treaty and was in conflict with section 73 of the Constitution Act, so despite their reservations about a lack of safeguards in the Bill a sufficient number of members supported it for it to pass through both the upper and lower House by 15 September 1862. In relation to the Fox ministry Bill, Grey had proposed that no one be allowed ‘to grasp’ more land than he could use, that a 10-year occupancy be required of the purchaser, and that the runanga concur in the sale of the land.²³ None of these safeguards Grey had considered essential were built into this Bill, but both he and many members of Parliament felt that despite its faults it was essential that it be passed; ‘an indispensable condition for quieting Native difficulties’ was to recognise customary native title and put in place an orderly means of extinguishing it.²⁴

The preamble to the Act recited the provisions of article 2 of the Treaty and stated that it would be in the interests of ‘the peaceful settlement of the Colony and the advancement and civilization of the Natives’ if their rights to land were ascertained and defined and then ‘assimilated as nearly as possible to the ownership of land according to British law’. The primary interest of the legislature was to advance the peaceful settlement of the colony, and that necessitated destroying the ‘bestly communism’ of Maori society. Transmuting communal title to freehold title would break down Maori society – in the language of the politicians, it would ‘allow Maori to advance in civilization’ – and of course it would destroy their power base. However, under the 1862 Act a certificate of title could be issued by a specially constituted court to a ‘Tribe Community or Individuals’. If the certificate

20. Ibid, p 647

21. Merran Lambeth, ‘Ture, Manawhenua, me Tino Rangatiratanga: Rangitane and the Crown’, BA (Hons) research exercise, Massey University, 1994, pp 17–18

22. NZPD, 1861–63, pp 652–653

23. Ibid, p 686

24. Ibid, p 687; AJHR, 1863, a-1, pp 7–8

was issued to an individual, or to fewer than 20 persons, they could retain native title if they wished, or they could have the certificate endorsed by the Governor, and it would have the force of a Crown grant. The person or persons named in the certificate could have the land partitioned if necessary and then be free to sell or lease to whomsoever they chose. If more than 20 persons were named in the certificate they could have some or all of the land partitioned and individualised, or they could sell or lease if they wished on a tribal basis, subject to certain restrictions.²⁵ They could not sell under the certificate of title, ‘because the “tribe” cannot make a conveyance’; they would have to go back to the court for a partition order or ‘a new certificate issued in the names of trustees, with a proper declaration of trust to act on their behalf’.²⁶

The Governor, not the Governor in Council, was to have the responsibility of constituting the courts which would have the power:

to declare, record, and amend the Native law or custom relating to land: so that in process of time some Canons of Native Tenure may be laid down, and the varying customs of different Tribes acquire some settled form; and so that the same tribunal which ascertains title by Native Custom, may purge it from barbarous practices by refusing to admit these as Custom at all.²⁷

The court was to be ‘mainly composed of Native Chiefs’ of the district, although they would work under the ‘presidency’ of a European magistrate. But there were no provisions to safeguard the disposition of the land once title was ascertained, apart from the restrictions the Governor could impose on the wholesale alienation of tribal land. He could make:

Tribal or other Reserves for the special benefit of the tribe . . . or of particular Chiefs or families . . . to prevent the whole of their land being improvidently disposed of by them.²⁸

It was late 1864 before the Act received the royal assent and could officially be brought into force. In the meantime, the speculators had had a field day, making private arrangements with ‘complaisant chiefs’ in anticipation of the passage of land through the courts.²⁹ The 1891 report of the Commission into Native Land Laws called the 1862 Act ‘practically a dead letter’,³⁰ but it did operate quite successfully in the north for a few months from June 1864. The land purchase officer at Kaipara, John Rogan, assembled a court to determine the title to a block under negotiation by an anxious buyer and willing sellers. The assessors – some leading men of the district – did a good job of determining the rightful owners, and the press reported they seemed well suited to the task.³¹

25. AJHR, 1867, a-1, p 10

26. Bell memo, 6 November 1862, AJHR, 1863, a-1, p 11

27. Ibid, p 9

28. Ibid, p 10

29. Ward, p 152

30. AJHR, 1891, sess ii, g-1, p vi

31. Ward, p 180

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When the Whitaker–Fox ministry were notified in August 1864 that the Act could come into operation they made some tentative moves towards setting up a court. George Clarke, once Protector of Aborigines and now Civil Commissioner at Waimate, was asked to draw up regulations for its operation, to take the chairmanship himself, and to suggest a panel of assessors who could work with him. But the ministry was on its last legs after a long battle with Grey over land confiscation, and in late November it was replaced by a ‘self-reliant’ ministry under Weld. It fell to Weld to bring the Act into operation in December 1864, and he appointed three judges, George Clarke, W B White, and John Rogan, each to act in his own district; and as assessors for each court a number of local chiefs, including W Kukutai, A Kaihau, H Tauroa, W Te Wheoro, H Matini, H Nera, and T Tarahau.³²

This was the sort of court envisaged by the 1862 Act, and the sort of role for Maori leaders intended by Fox when he introduced his Native Land Bill, by Grey in his ‘new institutions’, and by those who had advocated working through traditional runanga. It could have worked well – Rogan’s court was evidence of that. Maori leaders, denied any official role since Waitangi, had long sought to play a part in ‘native administration’, especially in the vital sphere of deciding land boundaries in their own areas. They were the experts, the only ones competent to ascertain and declare, in the words of the Act, ‘who according to Native Custom are the proprietors of any Native Lands and the estate or interest held by them therein’. But no ministry could hope to survive in that climate of racial tension and antagonism if they made serious efforts to involve Maori in decisions relating to land. The settlers were intent on getting land out of Maori hands, their parliamentary representatives were intent on ‘getting rid of the Native difficulty’.³³ The 1862 Act was part of their pacification programme, a means of giving Maori something to do to take their minds off politics – those endless ‘discussions of the runanga which lead to no practical result’.³⁴ As such, the effort to ‘involve Maori in their own administration’ was little more than window dressing, as was shown clearly after F D Fenton was appointed chief judge of the Native Land Court by Weld early in 1865.

Fenton, ‘who was eventually to have a fateful influence on the whole future of Maori land legislation . . . was given virtually a free hand in reorganizing the Court and making appointments’, and he held the position until his retirement in 1882.³⁵ His condition of accepting the appointment was that the court be founded on his ‘own principles’, and that he held office ‘during good behaviour, responsible only to Parliament’.³⁶ Far from continuing with the type of court Rogan had put into operation in the far north, Fenton set up a new one, closer to the Supreme Court model, whereby the districts established under the 1862 Act would be replaced by a colony-wide system, with judges moving from centre to centre, and supposedly

32. Ibid, pp 180, 333

33. NZPD, 1861–63, p 649

34. Ibid, p 684

35. Ward, p 180

36. Fenton evidence to Native Affairs Committee, 1 September 1885, AJHR, 1885, 1-2B, p 31

handing down uniform decisions. The loss of knowledgeable local magistrates and assessors, and the imposition of eurocentric court procedures, resulted in a system far removed from anything previously envisioned. But it was one favoured by many settlers, who believed decisions must be imposed on Maori, and that it would be impossible otherwise to get them to agree over disputed boundaries – and this despite the successful resolution of such issues by runanga in many areas.³⁷ What settlers really meant was that the Maori way of solving such problems took time, and this they were not prepared to concede.

Although Fenton had warmly recommended the working of runanga in the Waikato in 1857, he had more than once expressed his disapproval of Government-appointed assessors. He told the Board of Inquiry in 1856 that they lacked weight, that they acted partially in matters concerning their own tribe and ‘injuriously’ when dealing with others.³⁸ The problem was that their position was not founded ‘on the only basis known to the usages of the Maori, the expressed approval of the people’. However, he thought that many of the Government-appointed assessors were the very men the people would themselves have chosen, and suggested it was in the Government’s interest to allow them this choice while retaining a veto in case of an ‘unsuitable’ decision.³⁹ However, when it came to running his own court he was not interested in Maori having a consultative – and delaying – role. ‘The pontifical decisions of Fenton and his brother Judges were expected to follow quickly from a hearing of evidence and alienation of land could ensue’.⁴⁰

4.2 The Native Lands Act 1865

There was opposition to a court such as Fenton intended to run being enshrined in legislation, but settler and speculator pressure won out and the Native Lands Act 1865, ‘suggested’ by Fenton himself, provided for the establishment of a formal court, not one comprised of a panel of chiefs working with a European judge or magistrate.⁴¹ Two assessors would be assigned to each court, they would be appointed by the Governor and would hold their office ‘during pleasure’. There would be a chief judge and other judges, also appointed by the Governor, and they would hold their office ‘during good behaviour’. The chief judge could make, revoke, or alter the rules by which the court would operate, and he would have the same power as any Supreme Court judge to summon witnesses and punish those who failed to attend or were hostile to the court. All the laws relating to land over

37. Ward, p 181. For examples of successful resolutions achieved by contending parties in the 1860s, 1870s, and 1880s, see Ward, p 182.

38. BPP, vol 11, p 505

39. AJHR, 1860, E-1C, p 11

40. Ward, p 182

41. He told the Native Affairs Committee that while he suggested the 1865 Act, the 1862 Act ‘was not mine’; 4 September 1885, AJHR, 1885, I-2B, p 52. However, he is reported elsewhere to have helped draft the 1862 Act; W L Renwick, ‘Francis Dart Fenton, magistrate, judge, public administrator, musician’, in W H Oliver (ed), DNZB, Wellington, 1990, vol 1, p 122.

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which native title had not been extinguished were to be amended and consolidated by this Act. As it repealed the Native Land Purchase Ordinance 1846, it would no longer be illegal to make private deals with Maori before title was ascertained. J E FitzGerald, Native Minister in the Weld ministry, had had 'to give up' some of his earlier-stated intentions and give in to land speculators, who were now free to risk their money by financing a claimant group in the expectation that the court would award them title.⁴² There was little fear of the speculator losing his money. Non-sellers could not hope to afford an expensive court appearance without having to sell land to pay for it, but neither could they avoid one, since Fenton required all claimants to appear in court if their claim was to be considered. A move to require sale to be by auction only was defeated,⁴³ but in contrast to the lengthy debate in both House and council over the 1862 Bill, this one created almost no debate. It was introduced by one Government and passed by another, and obviously it suited the mood of the times, for it faced almost no opposition from the time of its introduction until it was passed a few weeks later. After several years of war, settler and Government attitudes had hardened, and the new Act reflected this. Despite Sir William Martin's pleading,⁴⁴ British legal procedures and ideas on land holding and descent were to be imposed on Maori with little or no consultation and no leeway such as under the 1862 Act.

Over the years, great things were claimed for the Act. It was, of course, said to be in the natives' own best interests. F E Maning, one of the earliest Native Land Court judges, maintained that it held out to Maori 'their last chance of temporal salvation', for the difference between holding land 'as commonage and holding it as individualized real property' was 'the difference between civilization and barbarism'.⁴⁵ As Fenton expressed it:

in the destruction of the communal system of holding land is involved the downfall of communal principles of the tribe, and the power of combination for objects of war or depredation. When a man is comfortably settled on his own farm, he is not ready to follow his chief in an agitation which promises nothing beyond a little excitement, and jeopardizes all he has got.⁴⁶

According to him, nothing that had yet been tried had 'so largely tended to produce in the minds of the Maori peaceful desires and a grateful confidence in the Legislature' as the 1865 Act.⁴⁷ He qualified this in later years by saying that 'it could not have been expected that the first Act, drawn when nobody had any experience, should have been very good'.⁴⁸

42. NZPD, 1864–66, pp 370, 371

43. Ibid, p 729

44. W Martin, 'Notes on the best mode of introducing and working the Native Lands Act', 30 June 1865, *Epitome*, g, pp 3–13

45. Maning to Fenton, 24 June 1867, AJHR, 1867, a-10, p 8

46. Fenton to McLean, 28 August 1871, AJLC, 1871, p 10

47. Fenton to J C Richmond, 11 July 1867, AJHR, 1867, a-10, p 5

48. AJHR, 1885, i-2B, p 47

The success of the Act was judged by the fact that in less than two years from its passage into law the court had awarded title to 1,220,477 acres, 957,774 of them in the Auckland province.⁴⁹ But the Act was said to have two objectives: to bring the bulk of the North Island ‘within the reach of colonization’; and to detribalise native society:

to destroy if it were possible, the principle of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the native race into our own social and political system.⁵⁰

This conscious attack on Maori society was exacerbated by the way the Crown permitted the court to operate under Fenton. Since there was no case law to guide him, he aimed to create his own, and after some months of operation he laid down the rules that were to guide his fellow judges. They were to return to ‘the original principles of equity’ until such time as they had established a common law.⁵¹ The Native Land Court, he said, must respect its own precedents, or it would never build up a system of common law. The practice of the court fell far short of this ideal. The 1865 Act required the court to investigate title according to ‘Maori proprietary customs’, but it was free to interpret those customs as it should ‘think fit’. As each judge had his own ideas about Maori custom, court decisions were far from uniform. It took years – until about 1895 – before ‘the rules of Native custom, with proper regard to any exceptions prevalent in different parts of the country, became more or less clearly defined’.⁵² Norman Smith, a judge of the Native Land Court in the early twentieth century, admitted that at times court-defined custom did differ from traditional Maori custom, but he thought much of the original custom remained, though with necessary changes grafted onto it:

Where a custom was uncertain or appeared to be inapplicable then the Court had to make modifications to fit as nearly as the basic custom would permit, consistent of course with Maori idea and the dictates of equity and good conscience.⁵³

This left ample leeway for personal or idiosyncratic judgments.

Maori customary tenure was seen to arise from four major take: discovery – take kitea; ancestry – take tupuna; conquest – take raupatu; and gift – take tuku. In each case occupation or use of the land – ahi ka or ahi ka roa – was required to substantiate the claim.⁵⁴ The court found it necessary to fix a time at which native customary titles would be ‘regarded as settled’, and that time was the signing of the Treaty and the ‘coming of the law’ in 1840:

49. AJHR, 1891, sess ii, g-1A, p 9

50. Henry Sewell MLC, NZPD, 1870, vol 9, p 361

51. AJHR, 1891, sess ii, g-1, p 55

52. Norman Smith, *Native Custom and Law Affecting Native Land*, Wellington, 1942, p 48

53. Ibid

54. Ibid, pp 49, 62–72

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All persons who are proved to have been the actual owners or possessors of land at that time must be regarded as the owners or possessors of those lands now, except . . . where changes of ownership or possession have subsequently taken place with the consent . . . of the Government.⁵⁵

This '1840 rule' was first laid down in the Compensation Court in 1866, but it was applied also in the Native Land Court. In a judgment on the Orakei block in 1869, Fenton ruled that the court:

would recognize no titles to land acquired by intertribal violence since 1840. . . . It would be a very dangerous doctrine for this Court to sanction that a title to Native lands can be created by occupation since the establishment of English sovereignty, and professedly of English law, for we should then be declaring that those tribes who had not broken the law by using force in expelling squatters on their lands, must be derived pro tanto of their rights.⁵⁶

The '1840 rule' was clearly a very arbitrary decision, which served to impose a static state on a dynamic society. It worked to the benefit of those tribes such as Ngati Toa who had conquered territory in the years immediately preceding Waitangi, and to the detriment of those conquered who had held their territory for generations and who, through the imposition of Pax Britannica, did not have the time or opportunity to regroup and reoccupy their ancestral lands. It was a mixed blessing to north Taranaki tribes. Those who remained in the Chathams were ruled in the Native Land Court to be the rightful owners according to Maori custom; those who returned to Taranaki were excluded from Compensation Court awards on the grounds that they had lost their rights there since they were not in occupation of their ancestral lands in 1840.

Fenton ruled that court sittings would be scheduled only when, in his judgment, 'a sufficient number of claims' were 'in a sufficient state of forwardness' to make it worthwhile to hold a sitting in any district.⁵⁷ The result of this was that a backlog of claims – in one case an 'arrears of seven years' – would be gazetted for hearing on the first day of the sitting.⁵⁸ All the claimants involved had to be present on the opening day and then wait weeks or months for their case to be heard. In a landmark essay, M P K Sorrenson described the devastating effect this had on both the claimants, invariably far from home, and on Maori communities near European towns where the court sat.⁵⁹

The 1865 Act had four main aims: to amend and consolidate the laws relating to lands still subject to 'Maori proprietary customs'; to ascertain who, according to

55. Sitting of Compensation Court at New Plymouth, 1 June–12 July 1866, AJHR, 1866, a-13, p 4

56. Cited in Smith, p 50. For the effects of the application of the 1840 rule in the Chathams, see Bryan D Gilling, 'By Whose Custom? The Operation of the Native Land Court in the Chathams', *Victoria University of Wellington Law Review*, vol 23, no 3, 1993, pp 45–58

57. 'Rules and Regulations for the Procedure of the Native Lands Court', drawn up by Fenton, 26 January 1867, AJLC, 1871, p 239

58. Chief Judge J E MacDonald to Native Minister, 23 June 1883, AJHR, 1883, g-5, p 2

59. M P K Sorrenson, 'Land Purchase Methods and Their Effect on Maori Population, 1865–1901', JPS, vol 65, no 3, 1956, pp 186–192

these customs, were the owners of the land; to encourage the extinction of this customary tenure and replace it with titles derived from the Crown; and to regulate the mode of succession to deceased owners of native lands. The Act authorised ‘any Native’ to give the court written notice that he wanted his claim investigated, and this was sufficient to get the whole claim process started. Commenting on the process, Sir William Martin explained that capitalists looking for investment had ‘no difficulty in finding the single man needed’, and the rest of the owners were ‘forced to submit to the burden or risk the loss of their property’.⁶⁰ By the time the Act was in place a host of would-be purchasers had done deals with Maori claimants so that they would be ready as soon as the court began its hearing. It was already obvious that the Act would encourage irregular and fraudulent dealings, but recommendations that it be amended to prohibit speculation were ignored by both the Weld and Stafford governments. The Act:

was driven overtly by expediency. . . . Gone was the previously-declared need to honour the Treaty of Waitangi, to be replaced by aims seeking solely to expedite the conforming of Maori custom to English law and thus the easier acquisition by settlers of Maori land.⁶¹

Just as each judge had his own ideas on Maori proprietary customs, so too he had his own ideas on the aims of the Act. Maning believed it was there to satisfy the wants and needs of Maori ‘by offering them a means of extricating themselves from the Maori tenure’;⁶² he would have scant sympathy therefore for counter-claimants who opposed individualisation of title. But to Fenton the aim of the Act was to put an end to Maori communal ownership so that chiefs would become landed gentry while other Maori would be landless and forced to labour for a living.⁶³ He still espoused this view in 1885 when he told the Native Affairs Committee that the sooner Maori got rid of all their surplus lands the better for them; the sooner they were taught that every man must work for his living, the better for them. But one of his ‘most painful thoughts’ was that the operations of the Native Land Court had entirely destroyed the chiefs. He would have liked to see ‘a very considerable proportion’ of the proceeds of the lands that had been sold ‘invested in some way for the chiefs’.⁶⁴ This was a Wakefieldian view, a hangover from the 1840s, and one with some appeal – although there were many in the country who were totally against any entrenchment of chiefly status.

Fenton’s interpretation of section 23 of the Act was one of the worst features of his administration. The court was required to issue certificates of title to no more than 10 persons, unless the block before the court was in excess of 5000 acres, in which case the certificate could be made out to a tribe by name.⁶⁵ The intention was

60. Martin memo on the operation of the Native Land Court, 18 January 1871, *Epitome*, g, p 35

61. Bryan D Gilling, ‘Engine of Destruction? An Introduction to the History of the Maori Land Court’, *Victoria University of Wellington Law Review*, vol 24, no 2, 1994, p 124

62. Maning to Fenton, 24 June 1867, AJHR, 1867, a-10, p 7

63. Ward, pp 216–217

64. AJHR, 1885, i-2B, p 41

65. This was only ever done in ‘two or three instances’; AJHR, 1891, sess ii, g-1, p vii.

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that blocks with many owners would be subdivided into smaller blocks with a maximum of 10 owners. Fenton, however, anxious to pass land through the court and careless of the rights of 'ordinary' Maori, chose to award large undivided blocks to 10 'principal' owners. They were then 'in perfect legal possession' and 'could sell and do anything they liked with the land'. In no way, he said, were those 10 owners to be regarded as trustees, although he knew various members of Parliament were under the impression that they were.⁶⁶ When he was asked if it were not a dangerous practice to ignore the interests of the other owners, he put the blame for the situation squarely on the Maori themselves, saying they were supposed to have the land subdivided into smaller blocks but were not prepared to pay for the surveys, so were content to name but 10 owners for large undivided blocks. Those 10 were then 'treacherous': they cheated, they accepted no moral trust – and were under no legal one; so when tempted or badgered to sell they did so, and used the money to clear their debts or 'gratify their tastes for luxuriousness'.⁶⁷

From the start, Fenton had accepted that the operations of the Native Land Court would result in two classes of Maori: 'one composed of well-to-do farmers, and the other of intemperate landlords'. He had already noted 'intemperance and waste' among Maori landlords in Hawke's Bay, and while he regretted the situation, he felt it was not part of their duty:

to stop eminently good processes because certain bad and unpreventable results may collaterally flow from them, not can it be averred that it is the duty of the Legislature to make people careful of their property by Act of Parliament, so long as their profligacy injures no one but themselves.⁶⁸

The results of the processes were anything but unpreventable; the Crown had a moral duty and a responsibility under the Treaty of Waitangi to ensure the welfare of its Maori subjects, not to throw them to the speculator wolves. Apparently this was clear to the Crown in the first two decades after Waitangi: after all, it was not considered safe to allow government in European hands; the Crown would stand between the Maori and the settler. But with government in settler hands and Maori unrepresented in the Parliament, Treaty obligations were conveniently ignored.

It was clear even to Fenton that it was not Maori who initiated land sales: 'there always has been, and probably always will be, a strong desire on the part of the Natives to retain their lands as long as they can'. It was Europeans who initiated sales by advancing money and starting the process that inevitably ended with the land being taken before the court.⁶⁹ Maybe it was surveyors, maybe storekeepers or publicans who advanced credit, then threatened legal action if their bills were not paid. Once in the land court there were fees, and lawyers and interpreters with their

66. AJHR, 1885, 1-2B, pp 34, 39, 30

67. Ibid, pp 39–40, 51. Rogan, a close colleague of Fenton, commented approvingly on the 'marked improvement in the mode of living adopted by the chiefs' in his district; Rogan to Fenton, 29 July 1867, A-10A, p 2.

68. AJHR, 1867, A-10, p 4

69. AJHR, 1885, 1-2B, p 51

often exorbitant charges. Even those who had gone to court to prevent sale of their land ended up selling some to pay for trying to save the rest. But often the first the great majority of owners knew about the sale of their land was the arrival of a European already in possession of a Crown grant. At best, the land was sold without their agreement and against their wishes. Fenton claimed he knew nothing about deals done prior to the land passing through the court: ‘When I left the Court I found that I had to a certain extent been up in a balloon all the time; things were going on that I had not the slightest conception of.’⁷⁰

It was an unlikely story. He had already been denounced in Parliament in 1880 as incompetent,⁷¹ and the *New Zealand Herald* had reported that the working of the Native Land Court had been a scandal for many years, ‘but as the chief sufferers were the Maoris, nobody troubled themselves very much’.⁷² And the Premier, Robert Stout, had been very scathing about Fenton’s judgement (or lack of it) in the Owahaoko case:

No more monstrous injustice could be done by any Court than by declaring certain persons were owners, and treating them as absolute owners, when the Court knew they were not the whole owners, but only some of those who were owners. It was the Court’s duty to name all the owners, and not to select a few only and call them ‘absolute owners’. Communal title no doubt was and is bad, but depriving some of the ‘community’ of all their possessions was and is worse. So far as I can see, no Maoris wished to perpetrate any ‘monstrous injustice’: those who were the means of accomplishing that were Europeans.⁷³

The next chief judge of the Native Land Court, J E MacDonald, whom Ward described as ‘equally careless of Maori interests and duller witted into the bargain’,⁷⁴ thought that the greatest evil arose from ‘lands being contracted to be bought from Natives before the ownership is ascertained’. He did not think highly of what he called European dealers, but, ‘to give . . . these people their due’, admitted that their ‘enterprise’ had hastened the passage of large amounts of land through the court.⁷⁵

The other most pernicious aspect of Fenton’s administering of the 1865 Act related to the question of succession. The Act required the court to decide ‘by such evidence as it may think fit who according to law as nearly as it can be reconciled with Native custom’ should succeed to the land of those who died intestate. Fenton decided that, in the interests of retaining individual title, land should not descend as it would by Maori custom to those children who continued to occupy and use their ancestral land. His fellow judge, John Rogan, explained in 1867 that:

70. Ibid, p 49

71. Ward, p 289

72. 2 March 1883 (cited in Sorrenson, p 189)

73. AJHR, 1886, g-9, p 14

74. Ward, p 289

75. MacDonald to Native Minister, 22 June 1883, AJHR, 1883, g-5, p 2

4.2 The Crown's Engagement with Customary Tenure

it would be highly prejudicial to allow the tribal tenure to grow up and effect land that has once been clothed with a lawful title, recognised and understood by the ordinary laws of the Colony . . . it will be the duty of the Court in administering this Act to cause as rapid an introduction amongst the Maoris, not only of English tenures but of English rules of descent as can be secured without violently shocking Maori prejudices.⁷⁶

Fenton's arbitrary decision then was to divide the estate of both parents equally among all surviving children, regardless of their place of residence. This was the beginning of absentee ownership and the disastrous fragmentation of title which bedevilled Maori land from then on. Soon shares in land became so scattered and so miniscule that they were good for only one thing – sale to a European who would accumulate share after share until he could freehold the whole block. Only a latter-day solution, incorporation – a return to communal tenure – could keep land in Maori hands.

As Alan Ward said, J E FitzGerald, J C Richmond, and the Stafford government all bear a responsibility for making the Act so destructive to Maori society and so rewarding to speculators. The great tragedy:

was not simply that the utter disruption of Maori social relations was deliberately initiated but that it was initiated through a system of land purchase that encouraged cupidity and unscrupulousness among Maori landholders rather than thrift and responsible use of land.⁷⁷

The greater part of the debate in Parliament on the 1865 Act concerned section 82, which repeated section 31 of the 1862 Act by which the Manawatu block was excepted from the operations of the Act. Featherston had been successful in having the block excluded from the 1862 Act on the basis of a provision of the Land Orders and Scrip Act 1858, which reserved the right to select lands to settlers who held land orders issued by the New Zealand Company. Although Spain had ruled in 1843 that the company's purchase was invalid and the New Zealand Company had collapsed in 1850, the Crown still chose to treat the Manawatu block as 'under negotiation and subject to New Zealand Company conditions'. The exclusion of the block from the Act meant ownership of the land was never ascertained through any formal process of investigation. The New Zealand Company had negotiated the 'purchase' with Ngati Toa, and subsequently a hapu of Ngati Raukawa resident on the Manawatu coast, and any later investigation began from the assumption that they were the customary owners.⁷⁸ The rights of Rangitane, resident on the land for some centuries, were first overlooked and then denied when Featherston succeeded in making a deal with other provincial authorities for their support in allowing Wellington 'monopoly rights of purchase' in the block. The deal (under which Otago got possession of the Princes Street reserve), did not bear close investigation,⁷⁹ but it left Featherston free to purchase 'the finest and

76. Cited in Ward, pp 186–187

77. Ward, p 187

78. Lambeth, pp 4–11, 17–20

richest block of Native land' in the Wellington province.⁸⁰ The southern boundary of the block had somehow been designated in the Act as at the Ohau River, halfway down the Horowhenua. Featherston took it upon himself to decide how the purchase money should be divided among the iwi, and he gave £10,000 to Ngati Raukawa, whose territory was south of the Manawatu River, and £15,000 to Ngati Apa, whose territory was north of the Rangitikei River. Those two tribes were to share their windfall with any other claimants; it was up to them how they should distribute it. Thus Rangitane, tangata whenua of the Manawatu, got £600, and Whanganui, whose territory was even further distant than that of Ngati Apa, got £2000.⁸¹ The Crown had once more failed to take McLean's advice not to buy from the most insistent sellers, but to have regard to the least clamorous, whose title would likely prove to be the best. Having surrendered to Featherston its responsibility, the Crown was seemingly satisfied that justice had been done under the Native Lands Act 1865.

4.3 The Native Lands Act 1866

The negative consequences of the 1865 Act were soon evident. Within a year it was amended to give the Governor in Council the power to restrict the alienation by sale or lease of native reserves, and to direct the manner in which any sale or lease money should be invested or applied. The Act also declared it now to be not just 'lawful', but the duty of the court to consider whether or not restrictions on alienation should be written into certificates for blocks awarded by the court. Even these minimal restrictions on the alienation of Maori land, designed 'to protect the public generally, and the Natives themselves from the curse of pauperism', incurred the wrath of the Auckland Provincial Council, which did not want any restrictions to stand between them and the acquisition of Maori land. J C Richmond, the de facto Native Minister in the second Stafford ministry, explained with brutal clarity that they would not affect the majority of cases or permanently prevent alienation, but would simply:

tend, with respect to a small part of the Native property, to retard its sale, so as to give a somewhat longer time and better chance for the adoption of European habits of mind before the Maori settles down to the poverty and necessity for labour to which he must in most cases come.⁸²

A further provision of the 1866 Act ensured that the Government could maintain its pre-emptive right in certain cases. Section 18 of the Act made it lawful for the

79. Ibid, p 21; Ward, p 190

80. Buller memo, 5 August 1865, AJHR, 1865, e-2B, p 5

81. Lambeth, pp 22–23

82. J C Richmond to J H Burslem (surveyor), 15 January 1867, AJLC, 1867, p 41. See also Colonial Secretary (Stafford) to Superintendent of the Auckland Province (Whitaker), 7 January 1867, AJLC, 1867, pp 39–40.

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Governor in Council from time to time 'to suspend the Native Lands Act, 1865, or any part of it, in districts to be defined'. Stafford argued that this provision was simply to enable the Government to fulfil the obligations it had incurred to both 'loyal and rebel Native inhabitants' in the suppression of insurrection in a district; although he admitted that the Government already had the power of suspending the Native Lands Act 1866, albeit 'in a less convenient manner', through the New Zealand Settlements Act 1863.⁸³

4.4 The Native Lands Act 1867

The 1866 Act was said to be 'mischievous, needless and inoperative'⁸⁴ and it was repealed by the Native Lands Act 1867, with the aim of curing 'the defect in the Act of 1865 which enabled the land to be vested in 10 persons, thereby ignoring the interests of the majority'.⁸⁵ It did not achieve this aim, but it did require the court to ascertain the names of all the owners of a block and record them on the back of the certificate and enter them in court records. J C Richmond obviously still regarded the 10 owners as trustees, but admitted the trusts were tacit, unrecorded, and unacknowledged. He wanted those who held certificates 'virtually in trust' to be required by the court to execute a declaration of trust,⁸⁶ as was required under the 1862 Act, but as long as Fenton had his way – and speculator interests in Parliament saw that he did – this would not happen. Under the 1867 Act the court could still issue a certificate of title to 10 of the owners, and those 10 were free to lease the land for up to 21 years – and pocket the lease money. However, the land could not be permanently alienated before subdivision, and this required the knowledge and consent of the majority of the owners.

The few safeguards in the Act, such as these restrictions on alienation, were outweighed by provisions which enabled speculators and surveyors to obtain mortgages over the land. There were any number of people eager to offer their services or advance money to claimants as a lien against the land. And, whereas the 1865 Act had required that interpreting of conveyances and deeds be supervised by a judge or justice of the peace, the 1867 Act simply required the presence and approval of any 'male adult'. Many fraudulent deeds were executed by unscrupulous interpreters.

It was evident that the provisions of the Acts were not widely known to a lot of owners. In 1871, T M Haultain, who had been Minister of Defence in the Stafford Cabinet, was asked by McLean to report on the working of the Native Lands Acts. He consulted widely and reported Maori generally satisfied with the operations of the court; although he commented with some surprise on the strange fact that Hawke's Bay Maori had registered their names as 'interested claimants . . . in only

83. Stafford to Whitaker, 7 January 1867, AJLC, 1867, p 40

84. NZPD, 1867, vol 1, pt 1, p 31

85. Thomas Mackay minority report, AJHR, 1891, sess ii, g-1A, p 10

86. NZPD, 1867, vol 1, pt 2, p 1136

twelve blocks of some 42,000 acres'. But he admitted that the people of the district knew little or nothing of the Native Lands Acts 'for they have never been instructed, and no translations . . . or full information of their details, have ever been circulated amongst them'.⁸⁷

It was all part of Fenton's campaign to run the courts as he saw fit, regardless of Parliament, ministers, and Native Lands Acts. He took little notice of the 1867 amendment, claiming 'discretion on the grounds that the overriding individualising and "civilizing" principles of the . . . 1865 Act would be compromised by reintroducing numerous "communal" owners',⁸⁸ and he managed to resist naming his 10 owners as trustees and creating trusts under which they should operate. There were many instances where Maori had complained of being greatly disadvantaged by the operation of the Acts, and especially of the 10-owner provision and the ruinous cost of surveying. But according to Fenton, the 'entire submission of the Maoris to the decisions and orders of the Court is a feature of most encouraging promise'. The few objectors the court had had to deal with were, he said, drunken chiefs.⁸⁹

By the end of 1870, North Island land courts had heard 3489 applications for investigation of title, and awarded 2619 certificates of title or Crown grants for nearly two and a half million acres. There had been only 35 applications for rehearing – hardly surprising, given the cost of taking claims before the court, and the fact that only six rehearings had been granted – and only two of those had resulted in the previous judgments being reversed.⁹⁰ In 1875, upper Whanganui Maori petitioned for a rehearing of the investigation of title to a block in which they had interests. Fenton advised the Native Minister that he did not recommend a rehearing, but it was pointed out that these people lived more than 100 miles up the river and they had not received a *Kahiti* or any other notice of the court sitting at Patea. Five years later they heard that their application had been refused.⁹¹ It was as though the court was run for anyone but customary owners.

Some of the worst excesses generated by the operations of the court were to be seen in Hawke's Bay. The blocks dealt with there by the court were larger than usual – great pastoral runs, many of them illegally leased for many years. The principal chiefs had been in the habit of collecting and distributing the rent money, generally without much hassle, but once the law enabled the runholders to legalise their tenure, there was a scramble to get the signatures of the 10 owners specified by the court. A commission of inquiry into abuses complained of in the sale of Hawke's Bay lands revealed some 'unsavoury' transactions. Typically owners were led into debt, then threatened with law suits unless they agreed to take their land before the court. Squatters, storekeepers, publicans, interpreters, and even missionary families and the provincial authorities all played a part in what were, at best,

87. Haultain to McLean, 18 July 1871, AJHR, 1871, a-2A, p 4

88. Gilling, 'Engine of Destruction?', p 131; see also Ward, pp 216–217

89. Fenton to J C Richmond, 11 July 1867, AJHR, 1867, a-10, p 4

90. AJHR, 1871, a-2A, pp 3–4

91. See Aroha Harris, 'Crown Acquisition of Confiscated and Maori land in Taranaki, 1872–1881', report commissioned by Waitangi Tribunal, claim Wai 143 record of documents, doc h3, 1993, p 29

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sharp business deals and at worst fraudulent practice. Some chiefs lost their land through debts incurred when they fought as kupapa in the campaign against Te Kooti. Payment for their service to the Crown was delayed until it was too late for the claimants to clear their debts and save the land. As M P K Sorrenson said of the loss of the 20,000-acre Heretaunga block:

This was not an isolated example but typical of nearly all transactions under the Native Land Act 1865 in Hawke's Bay. By 1873, when the Act was repealed, all the valuable grazing land had been secured by squatters. The Ngati Kahungunu . . . were friendly and fought the battles against Te Kooti which made Hawke's Bay safe for European settlers. But they could not fight the battle for land against the European squatters at the same time.⁹²

4.5 The Native Land Act 1873

After McLean's appointment as Native Minister in 1869, the old feud between him and Fenton flared anew. McLean turned to the ex-chief justice, Sir William Martin, for advice on how the defects in the Native Lands Acts should be remedied. Over the years, Martin wrote several lengthy, erudite, and thoughtful memos on the working of the Acts and the court, and on how justice could be done to Maori.⁹³ Martin was very charitable towards settlers and politicians, and had great faith in British justice, but it seemed no one was interested – least of all Fenton. Martin's suggestions of naming the 10 'owners' as trustees, prohibiting the mortgaging or selling of undivided shares, and adopting a just rule of succession to hereditaments,⁹⁴ were all rejected outright by Fenton as ill-advised, ill-informed, or unworkable, as well as ridiculously pro-Maori.⁹⁵ Fenton wrote his own draft Bill to counteract the one Martin had sent to McLean, and to increase the power of the court where Martin had sought to reduce it to the status of a commission working locally, on the ground. He asked:

Why keep up the resort to English counsel in a Court which is not constituted for the administration of English law, but only for the ascertainment of Native custom, and of the facts of occupation and ownership?⁹⁶

Alan Ward answered Sir William's question when he said that the status Fenton demanded for his court and his unwillingness to reform Maori land law, stemmed largely from his 'own ambition and vanity', his 'wilfulness and self-aggrandisement'.⁹⁷

92. Sorrenson, p 188

93. See, for example, *Epitome*, g, pp 2–20, 33–35, 37–38; AJHR, 1871, a-2, pp 3–5

94. AJHR, 1871, a-2, pp 3–5

95. Fenton to McLean, 28 August 1871, AJLC, 1871, p 10

96. Martin memo, 18 January 1871, AJHR, 1871, a-2, p 5

97. Ward, pp 181, 216

Although McLean used Martin's draft as the basis of a new Bill, it was Fenton's Bill that appealed to Parliament, 'and the Native Land Act of 1873, re-established the Land Court and Fenton's powers much as before'.⁹⁸ There were some reforms though, especially with regard to the vexed question of surveys. The Government at last undertook the responsibility for authorising and regulating surveys and surveyors and ensuring that the maps so produced could become part of the national register. The costs – at least now fixed by the Government – were still to be paid by the owners 'in money or land'. Maori had long complained of the ruinous cost of surveys and the number of times the same piece of land had to be surveyed, and several reports from surveyors and various officials had pointed out that in fact Maori were virtually funding the national survey.⁹⁹ The Haultain report had noted that the expenses incurred by the Survey Department were far outweighed by the value of the maps acquired by the provinces 'at the expense of the Natives',¹⁰⁰ and a surveyor's report stated that the land court insisted on 'a far more elaborate and expensive survey for Native lands than the Provincial Government undertakes in completion of the title to lands sold by it'.¹⁰¹

One of the aims of the 1873 Act was to reduce the cost to Maori of surveying and determining title to their land. The Act was a major amendment and consolidation of the existing Native Land Acts, supposedly to obviate many of the difficulties and disadvantages associated with the operations of the courts. And yet it was little, if any, improvement on any of the earlier Acts. Perhaps this was inevitable; the Bill was prepared with 'the valuable assistance and advice of Judge Richmond',¹⁰² fresh from the Hawke's Bay Native Lands Alienation Commission. Hawke's Bay Maori had lodged over 300 complaints with the commission, but only a fraction of them were heard, as Richmond, the chairman, had to hurry away to his Supreme Court work. The complaints referred to the actions of prominent local runholders, store-keepers, grog-sellers, interpreters, lawyers – even Government officials and missionaries.¹⁰³ According to M P K Sorrenson:

From the evidence presented to the commissioners it seems obvious that widespread use was made of credit, the sale of liquor, and the threat of court writs to force Maori grantees to dispose of the freehold of land. But Richmond, who wrote the main report, was content to criticise the way in which the Native Land Court had interpreted the Act of 1865 and saw no reason why any of the transactions should be declared invalid, simply on the ground that some of the consideration money had in fact been paid in liquor.¹⁰⁴

98. Ibid, p 254

99. See, for example, Fenton to McLean, 28 August 1871, AJLC, 1871, p 11; Heale report on surveys, 2 August 1867, AJHR, 1867, a-10B, p 5

100. AJHR, 1871, a-2A, p 9

101. H C Field to G S Cooper, 27 June 1871, AJLC, 1871, p 21

102. NZPD, 1873, no xiv, p 604

103. See AJHR, 1873, g-7

104. M P K Sorrenson, 'The Politics of Land', in *The Maori and New Zealand Politics*, J G A Pocock, Auckland, 1965, p 41. It was illegal at the time to sell liquor to Maori.

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An important provision of the 1873 Act concerned the listing of the name of every owner of a block on the memorial of ownership which replaced the earlier certificate of title. Land buyers would now be required to get the signature of every owner before a sale could be effected. This slowed the process of alienation but it did not stop determined purchasers from gaining the coveted freehold. It was McLean's intention to end Fenton's notorious 10-owner provision and ensure that each owner was safe from the actions of irresponsible 'trustees', but the effect of the provision was to accelerate fragmentation of titles, since a group of willing sellers could opt to have their shares partitioned and other owners could be left with scattered and uneconomic holdings which were not worth retaining. The principle of individual ownership, carried to an extreme in the 1873 Act, only served to perpetuate the evils associated with individual dealing with tribal lands.

The Government apparently was becoming concerned about the minimal land holding remaining to some Maori, for the Act required Native Department officers to ensure that sufficient lands were reserved from sale in each district to aggregate 'not less than fifty acres per head for every Native man woman and child resident in the district'. Unfortunately this safeguard, like many others, was rendered ineffective, first because too few reserves were created, and then because reserves could be leased, sold, or mortgaged with the consent of the Governor in Council, and that consent was too often given. Thus:

the 1873 Act did little but prolong the passing of the land. Indeed, in a sense, it made things very much worse. Since all owners were listed, such chiefs as were still good trustees of their people's land, were powerless to stop surreptitious sales by rank and file owners. Consequently those chiefs who had long resisted now tended to sell in their old age because the land was passing anyway and they sought to share the proceeds before they died.¹⁰⁵

The 1891 Commission of Inquiry condemned the 1873 Act and all its 'amendments, repeals and alterations . . . and their name is Legion, for they are many', as the source of all later difficulties with regard to the transfer and settlement of land. The Act, they said, undermined Maori leadership and placed even slaves and children on equal terms with the 'noblest rangatira'. European agents, interpreters, and lawyers, armed with the money of capitalists and speculators, would pester owners for signatures; and once the 'charmed circle' was broken, Europeans would gradually push Maori out and take possession:

The crowds of owners in a memorial of ownership were like a flock of sheep without a shepherd. . . . The right to occupy and cultivate possessed by their fathers became in their hands an estate which could be sold.¹⁰⁶

In the Auckland province in the year ending 30 June 1873, before the Act was passed, title was ordered by the court to 221,776 acres; in the following year this

105. Ward, p 256

106. AJHR, 1891, sess ii, g-1, pp viii-x

figure had risen to 283,896 acres, and by 30 June 1875 to 767,339 acres, before falling back in 1876 to 207,042 acres. At the same time for the Wellington province the figures were 270,111 acres, 358,651 acres, and by 1875 only 2077 acres, although they rose again in the 1876 year to 61,627 acres.¹⁰⁷

Fenton, predictably, put the shortcomings of the 1873 Act down to the Act itself, not his interpretation of it. He thought the lawmakers had departed from the true aim of the Native Land Acts when they omitted ‘all reference to the expediency of extinguishing or converting the Maori customary title to land, or to the advantage of clothing these lands with titles derived from the Crown’. He was concerned that now native title was simply to be ‘ascertained and recorded’, with no mention of the need to then seek a Crown grant; and that native custom, not good English laws of inheritance, would decide who succeeded to Crown grants.¹⁰⁸ Fenton and his fellow judges were at pains to point out to the Government the defects in the Act, which would frustrate its operation – although it was largely Fenton himself who frustrated its operation.¹⁰⁹ His insistence that claimants must appear in court if their claim was to be considered led to more than frustration. In 1873, it almost led to a renewed outbreak of fighting in the Waikato when a European worker, Timothy Sullivan, was murdered on leased land on the Kingite side of the aukati. Some of the traditional owners were Kingite Maori, who did not recognise the Government’s right to determine their land titles. They had not appeared when their land was taken before the court, so they were excluded from the grant. They took their frustration out in violence, and the affair left the frontier in a state of high tension with new redoubts and blockhouses being constructed and manned by the armed constabulary. The Government sent James Mackay to the Waikato to inquire into the situation there. Among other things, he reported that he had had to stop the survey for a patrol road and the building of a blockhouse to protect settlers living at Taotaoroa, because of the uncertain attitude of some Maori who were ‘at present friendly’, but who:

claim to have a right to have their names inserted in the Crown Grant of the Taotaoroa block, and they were excluded from it in consequence of not knowing of the sitting of the Native Land Court.¹¹⁰

Fenton may have been right in saying the 1873 Act was unworkable; but his claim that the Act of 1865 was preferable was untenable. No Land Act that required Europeans to decide what constituted native custom and thus determine title and questions of succession in a formal court, could hope to be workable. What was needed was a return to a system whereby knowledgeable local Maori played a major role in determining land boundaries – a situation that would never be tolerated by a settler- and speculator-driven legislature.

107. AJHR, 1873, g-5, p 2; AJHR, 1874, g-3, p 2; AJHR, 1875, g-9, p 2; AJHR, 1876, g-6, p 2

108. AJLC, 1874, no 1, pp 2, 7–8

109. Ward, p 255

110. Mackay to Native Minister, 10 July 1873, AJHR, 1873, g-3, pp 9–10

4.6 The Native Land Administration Act 1886

The 1873 Act went through five or six amendments in the next 10 years, but it was not until a Government of an entirely different hue came to power in 1884 that major changes were proposed. By then, the Native Land Court had determined title to over nine million acres of customary land.¹¹¹ John Ballance, Native Minister in the Stout–Vogel ministry, revived the practice, which had died with McLean, of travelling to Maori districts to meet and talk with the local people at a series of hui.¹¹² Ballance referred to this as ‘consulting’ with Maori, but he was too paternalistic for that; he was more inclined to tell the people about his proposed legislation and explain why it was good for them. It was not that he was unsympathetic or unaware of their plight, but simply that he knew best: ‘it is beyond doubt that the Native is in many respects an infant needing a guardian’, he wrote.¹¹³ Ballance looked forward to the day when Maori and European would be assimilated and there would be no need for special ‘Maori’ measures, but until then Maori would need protection and he intended to legislate to achieve it. His ultimate aim was nationalisation of all land, but meanwhile he wanted to see Maori land leased. He envisioned native committees – representative bodies of owners – with the power of leasing tribal land. ‘The Native [would] become by our proposal the landlord, with the right of sale limited to the State.’ Half of the proceeds would be converted ‘into stock, to be held by the Public Trustee for their benefit’, and thus ‘the welfare of the Natives would be combined with the best interests of the colonists’, and within a few years the country would see ‘the nationalization of sixteen million acres of land’.¹¹⁴ Ballance’s policy was clear: Maori would be relieved of their land, but naturally they would benefit financially in the process.

Ballance tried without success in 1884 and 1885 to get Bills through the Assembly, but in 1886 he finally saw a modified version, the Native Land Administration Act 1886, passed into law. The Act, which according to its preamble was simply to control dealings with land owned by natives, combined Ballance’s own philosophy whereby the Crown would act as agent for Maori, and the idea of incorporation proposed by W L Rees, a lawyer, and Wi Pere, an East Coast leader, ‘partners in a scheme for land settlement’ on the coast.¹¹⁵ Incorporation was a move away from individualisation of title and back towards tribal land holding. The Act allowed for elected block committees of seven owners, who would decide which land should be held, sold, or leased. Dissenting owners could opt not to have their land come under the Act, in which case the land would be partitioned by the Native Land Court. Committees or individual owners could deal directly with the Crown – but not with individual purchasers – and any sale or lease of communally-held land would have

111. E J Haughey, ‘The Maori Land Court’, *New Zealand Law Journal*, vol 9, 1976, p 206

112. See AJHR, 1885, g-1

113. John Ballance, ‘Nationalisation of the Land: A Native Land Policy’, *Dunedin Echo*, 6 May 1882, reprinted in John Ballance, *A National Land Policy Based on the Principle of State Ownership*, Wellington, 1887, p 15

114. *Ibid.*, pp 16–17

115. Ward, p 296; Rees memo on the Native Land Laws, not dated, AJHR, 1884, sess ii, g-2, pp 3–4

to be approved by a meeting of the ‘incorporated’ owners, and effected by a commissioner appointed under the Act. The commissioner would bank the proceeds and pay appropriate shares to each owner after the deduction of all expenses, or owners could opt to have some or all of the money invested on their behalf.

Ballance was confident that he had the approval of Maori generally for his Act, but although it did have the sanction of several notable leaders, in practice the Act was a dismal failure. After negative experience of the 10-owner system, Maori were reluctant to put their land into the hands of block committees, who after all, could only operate under a European commissioner – another Government official. G W Williams, a Hawke’s Bay commissioner, in his first annual report on the operation of the Act, noted that when ‘certain owners’ who wanted to do something with their land found ‘they could not carry out their intentions without proceeding under the Act they positively refused to take any further steps’. Williams gathered that their opposition ‘was based less on the ground of distrust in Government administration than upon a deep-rooted distrust of one another, and therefore of any Committee which might be elected’. None of the commissioners that year was able to report any activity under the Act, except for some applications under section 24 which allowed a person in the process of purchasing or leasing some of the shares in a block to complete his transaction or have it validated.¹¹⁶ It appears there was but one transaction under the Act; for the rest, ‘Ballance’s Commissioners waited in vain for land to be invested in them’, and land speculators fulminated over the virtual resumption of Crown pre-emption.¹¹⁷

4.7 The Native Land Act 1888

While Ballance’s Act was in place, land purchasing practically came to a standstill. The Act pleased no one, and when the Government lost the 1887 election it was replaced by yet another Atkinson ministry – the ‘scarecrow ministry’ – in which Whitaker was again Attorney-General and Edwin Mitchelson, Native Minister – John Bryce having lost his seat. The new Government moved quickly to repeal the 1886 Act and restore direct purchase – ‘free trade in Native lands’ – the Government’s only option since they did not have the money to purchase ‘the whole of the lands, and so extinguish the Native title to all lands other than what would be sufficient for their use and occupation’.¹¹⁸ Three of the four Maori members elected to Parliament had campaigned against the 1886 Act, but Atkinson’s assumption that they would therefore support his ministry’s Bill was misplaced. Hirini Taiwhanga opposed it ‘vigorously’, and introduced his own Bills, aimed at restricting the land court and returning to tribal, not individual, land dealing.¹¹⁹

116. AJHR, 1887, g-8, pp 1–2

117. Ward, p 297

118. NZPD, 1888, vol 61, p 669

119. Ward, p 298

4.8 The Crown's Engagement with Customary Tenure

Section 4 of the Native Land Act 1888 provided that, subject to the Native Lands Frauds Prevention Act 1881 and its 1888 amendment, Maori could 'alienate and dispose of land or of any share or interest therein as they think fit' – which gave free licence to speculators to pursue owners and accumulate individual shares until they had enough to secure the freehold. However, the Government managed to explain the clause as putting 'the land of the Natives . . . in the same position as the land of Europeans', while at the same time preventing them 'selling the whole of their lands, and so becoming a burden upon the State'. The fraud commissioners were to ensure that they retained 'sufficient land for the occupation of themselves and their families'.¹²⁰

An even worse clause was section 5 which allowed the Governor in Council to remove restrictions on alienation which for 20 years had protected major reserves around the country. The Act required only an application of a majority of the owners to have existing restrictions removed or declared void; but section 6 of the Native Land Court Act 1886 Amendment Act 1888, passed the same day, did include some provisos. The court had to be satisfied first that the owners of the land from which the restrictions were to be removed had enough other land or shares in land for their maintenance and occupation; and second that all beneficial owners, not just those making the application, concurred as to the removal of the restrictions. These provisos did not satisfy everyone. Hoani Taipua, Western Maori, thought the Government was sweeping away all the safeguards that had 'prevented the Natives from pauperizing themselves'; and J C Richmond, who had originally legislated for the restrictions, accused the Government of 'abdicating a trust it had assumed for the Maori'.¹²¹ If the Atkinson ministry 'only managed to buy some 865,000 acres between 1887 and 1890' then it must have been the result of the economic climate of the time, and not a lack of opportunity presented by this predatory legislation.¹²²

4.8 Land Legislation of the Early 1890s

New Zealand historiography has bestowed upon the Liberals epithets they do not merit when it comes to Maori land legislation. The 1890 election ushered in one of the greatest Maori land-buying sprees the country has ever seen; about 3.6 million acres was purchased between 1891 and 1911, most of it in the 1890s. 'This penultimate grab of farmable Maori land ensured that most first class land had passed from Maori hands by 1900.'¹²³ It was underpinned by a raft of interlocking legislation passed in the early 1890s.

120. NZPD, 1888, vol 61, p 670

121. Ward, p 298

122. Tom Brooking, "'Busting Up" the Greatest Estate of All: Liberal Maori Land Policy, 1891–1911', NZJH, vol 26, no 1, 1992, p 82

123. Ibid

Less than three weeks after the first Liberal ministry was formed, a commission under W L Rees was established to inquire into the native land laws and the practice and procedures of the Native Land Court.¹²⁴ Ballance had come to power promising more land for small farm settlement – and a ready source for it: Maori land which he intended to acquire on perpetual lease.¹²⁵ He had also taken the portfolio of Native Minister, although that passed to A J Cadman for the second session of Parliament in June 1891.

The Rees commission ‘traversed nearly the whole of the North island’, sitting in 19 centres and interviewing a wide range of Pakeha and Maori, including leading chiefs and representatives from ‘all the principal tribes’.¹²⁶ Rees had already publicly criticised the activities of the Native Land Court, and especially its judges, who ‘seemed quite unable’ to understand the law they had to apply.¹²⁷ Rees was ‘an astute choice as chairman of the commission’ because of his strong liberal (and Liberal) views, and his association over many years with Maori land matters.¹²⁸ The commission’s report was ‘harshly critical of both the Legislature and the Court’.¹²⁹ It condemned the endless stream of native land legislation that had emanated from Parliament for over a quarter of a century, and reported that the attempts of successive Governments to establish individual title over communally-owned land had resulted in chaos.¹³⁰ But true to Liberal philosophy, the commission had no intention of locking up Maori land – in fact it was ‘proposing to render available for settlement an area of land greater in extent than some kingdoms and independent States’. However, safeguards must be built into new legislation since it would deal with ‘the land of great multitudes of a semi-savage race of whom the majority, including women and children and old and ignorant people [were] incapable of prudent management’.¹³¹ For all that, the commission was in favour of Maori playing a greater role in the management of their lands which should be leased, not sold.

James Carroll, one of the commissioners, disagreed with certain of the commission’s findings – especially the one concerning the resumption of Crown pre-emption, which he felt would be a retrograde step, and little short of confiscation. What he wanted was legislation which would grant Maori the power to control their own affairs, and encourage and support those wishing to farm their own lands.¹³²

Some of the commission’s recommendations found their way into Liberal Maori land legislation in the next few years, but certainly none that had to do with Maori having more control or being encouraged to farm their own land. John McKenzie, Minister of Lands and Minister of Agriculture, and one of the architects of the

124. AJHR, 1891, sess ii, g-1, p iii

125. Timothy McIvor, *The Rainmaker: A Biography of John Ballance, Journalist and Politician, 1839–1893*, Auckland, 1989, pp 183–184

126. AJHR, 1891, sess ii, g-1, p v

127. Rees memo, not dated, AJHR, 1884, sess ii, g-2, p 1

128. Brooking, p 84

129. *The Maori Land Courts*, report of the Royal Commission of Inquiry, Wellington, 1980, p 12

130. AJHR, 1891, sess ii, g-1, pp vi–xi

131. *Ibid*, pp xviii, xix

132. *Ibid*, pp xxvii–xxx

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legislation, 'ensured that Maori farming could never become a serious competitor to the heavily subsidized . . . white settler farmer'; and Seddon, who claimed he accepted the position of Native Minister 'with some diffidence',¹³³ boasted that the Liberals would break the annual record for Maori land purchase.¹³⁴ This was a foundation stone of Liberal policy – but the only new thing about it was that they admitted it – proclaimed it with brutal honesty – after 50 years of cant about simply having the 'natives' own best interests at heart, and not intending to take an acre more Maori land than was necessary.

The Liberals continued the reduction in Maori administration that had been going on since Bryce became Native Minister in 1879, all through the years of the 'long depression'. In 1892, Cadman took the process to its inevitable conclusion and disbanded the Native Department; the need for special provisions for Maori no longer existed. Maori were to be treated like any other citizen – except in matters concerning their land.

The Native Land Purchases Act 1892 enabled the Government to borrow in order to finance Crown purchase of Maori land. Once the Government had notified its intention to purchase a block, private dealing with that land was prohibited for up to two years, and anyone but the owners who went onto the block would be treated as a trespasser. Restrictions on alienation were no bar to the Crown's purchase of a block; they could be removed or declared void by the Governor in Council. Government tentacles extended beyond Maori land to the proceeds of land sale: half the purchase money was to be compulsorily invested in the Public Trustee as an 'endowment in perpetuity' for the luckless vendors.

The Native Land Purchase and Acquisition Act 1893 authorised the acquisition of at least some of the seven million acres of Maori land 'lying waste and unproductive' in the North Island; it was in the interests of both Maori and settlers that 'such land . . . be made available for disposal'. There was a rapidly increasing demand for land for settlement, and Maori were retarding the progress of colonisation. This Act, adopting Rees' suggestion, constituted a Native Land-purchase Board of three Pakeha and two Maori (one of them to be the local Maori member of Parliament, and the other nominated by the four Maori members and appointed by the chief judge of the Native Land Court). The Pakeha chairman's casting vote ensured Pakeha control of the board. The Crown could declare its interest in any Maori land in a 'proclaimed' district and the board would be required to report on its suitability for settlement. The owners would be given a 'limited' time to decide whether to sell to the Crown or have the land leased. Either way it immediately became Crown land 'vested in fee-simple absolute in Her Majesty', or 'vested in Her Majesty in trust for the Native owners . . . and their heirs' – until and unless they thereafter elected to sell the land to Her Majesty. Regardless of any restrictions on the land, the decision of a simple majority of owners bound all the owners, whether assenting or dissenting, and again half the proceeds of alienation were to

133. NZPD, 1894, vol 86, p 370

134. Brooking, pp 82, 88

be paid to the Public Trustee for the 'benefit' of the owners, as directed by the Governor.

Owners could refuse to have their land acquired in this way – but it took 'a duly authenticated petition . . . signed by not less than two-thirds of the owners' – whose bona fides had been established – to prevent it happening. Owners who were not heard from were of course assumed to have assented; but there was provision for a dissenting owner to have his shares partitioned out of the block. The only lands safe from the predatory eyes of the Liberal Government were those which were part of a pa 'for the time being in use or occupation', or a kainga or a cultivation. This much at least, as in Wakefieldian times, was to be reserved to Maori. But in fact the Liberals went further. Before alienation to the Crown was completed, the Governor was to ascertain whether vendors had 'other land sufficient for their maintenance'. If they did not, reserves were to be set aside at the rate of 25 acres of first class land, 50 acres of second class land, or 100 acres of third class land, for each man, woman, or child. Since development finance did not become available to Maori until the first decade of the new century, any man, woman, or child would be hard-pressed to maintain themselves on these acreages. But the Liberals were acknowledging their often expressed fear of having the natives on their hands as paupers for the rest of their lives; of having landless Maori drifting into the towns. And they were ensuring that Maori would still need to labour for a living, working for the white man.

4.9 The Native Land Court Act 1894

Since there was no time limit on the Government's dealing with land under the 1893 Act, full Crown pre-emption had virtually been resumed, but Seddon and Carroll (who had had his ideas changed for him by Cabinet) put it beyond doubt in section 117 of the Native Land Court Act 1894. It was now unlawful for any private person to acquire any estate or interest in any Maori-owned land. The Liberals justified the resumption of pre-emption by saying that if 'free trade' in Maori land were allowed to endure, 'it would all be owned by land speculators and lawyers within twenty years'.¹³⁵ There had been some discussion about the necessity of reserving the Act for the royal assent. They had had to do so for the 1862 Act, which waived pre-emption; perhaps it was necessary for this Act which restored it. Certainly the Governor entertained some doubts, but he was persuaded by his responsible advisers that it was not necessary. Incidentally, the Governor described the pre-emptive right as 'the most important part of the treaty with the Natives under which they acknowledge the sovereignty of the Crown', which was an interesting reflection of European perceptions of the Treaty.¹³⁶

Since the demise of the Native Department the court had come under the jurisdiction of the Justice Department, but its basic operations were not greatly

135. NZPD, 1894, vol 86, p 237

136. Glasgow dispatch, 12 November 1894, AJHR, 1895, a-1, p 3

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changed by this Act. It was still to ascertain titles to Maori land 'according to Native custom', and determine succession. But it also had the power to remedy some of the mistakes or omissions of the past, and it could do what Fenton had always held it could not do: determine whether owners named by the court were intended to hold the land in trust for others whom the court had not named in the title, but who were now to be included. The provision, of course, could only apply to land not yet alienated, and it would only apply if the Governor in Council so ordered. It was little enough, but it was an admission that the 10-owner system had been a gross miscarriage of justice. The court could still summon witnesses to appear and produce evidence, but it would now accept written evidence, given by a person who could not attend the land court, to any judge or stipendiary magistrate in a more convenient court. Little by little Fenton's ghost was being exorcised from the Native Land Court.

A further move in that direction came with the creation of the Native Appellate Court under the provisions of the Native Land Court Act 1894. Maori had not previously been able to appeal decisions made by the court. The Native Rights Act 1865 had declared every Maori (whether or not their tribal leaders had signed the Treaty) to be a 'natural-born subject of Her Majesty to all intents and purposes whatsoever'; and it gave the Supreme Court jurisdiction in all cases concerning Maori people and property, including titles to customary land – but questions of disputed title had still to be referred to the Native Land Court. The Supreme Court was obliged to accept unchallenged the decisions of the Native Land Court as to fact and as to Maori custom or usage. Fenton would have no interference with his decisions; he told the Native Land Laws Commission in 1891 'the less you have to do with the Supreme Court the better'.¹³⁷ Now 'aggrieved' Maori could appeal a Native Land Court decision in the Appellate Court, but it was quite a complicated and costly process and the Appellate Court judges were the very land court judges whose decisions were being appealed. And while provision was made for points of law to be referred to and decided by the Supreme Court, in the end the Appellate Court's decisions were to be 'final and conclusive'.

A further provision of the 1894 Act concerned incorporation, an idea strongly favoured by Rees.¹³⁸ It was the first move back to tribal dealing and away from Fenton's determined individualisation of title. A majority of the owners of a block or adjoining blocks could be constituted a body corporate and appoint a committee of from three to seven persons, not necessarily owners, to administer the land. They would, of course have the right to alienate the land (it was Liberal legislation after all) – and, as Seddon boasted, it would be more readily alienable in large blocks; on the East Coast, 'with plenty of money available for land-purchase, with these corporations or committees appointed, we shall have no difficulty in obtaining as much land as we require'.¹³⁹ But committees would not have the right to administer

137. AJHR, 1895, sess ii, g-2, p 55

138. See, for example, AJHR, 1884, sess ii, g-2, pp 3–4; AJHR, 1891, sess ii, g-1, p xviii

139. NZPD, 1894, vol 86, p 371

the proceeds of sale; they were to be paid in their entirety to the Public Trustee and used for the 'benefit' of the owners in any way the Governor in Council saw fit.

Liberal legislation was characterised by its paternalism. Maori were to be protected, especially from themselves, lest they become a charge on the state. But their grip on their last remaining acres was to be broken to enable Pakeha family farmers to be settled on the land. Maori were to be subsistence farmers at best, and a convenient source of seasonal labour. It was almost the last act in a long drama begun by the Wakefieldians. As long as land remained in Maori hands, Pakeha agitated about the bar to progress. If Maori wished to lease their land there was an outcry about Maori landlordism.¹⁴⁰ Every facility was given to Maori to sell their land; leasing was circumscribed with difficulties. If Maori wanted to farm their land they would constitute unfair competition to struggling whites; if they wanted to run their own affairs they were told they were children needing guidance – but if they complained about the loss of the Native Department they were told it was time to stand on their own two feet, that they were to be 'placed in the same position' as Europeans. Fifty years after the signing of the Treaty all the old arguments still got a regular airing – and the myth of the liberal Liberals hid the brutal reality that it was in the 1890s that Maori aspirations to farm their own land and take their place in te ao hou received a blow from which Maori society is still struggling to recover.

The operations of the Native Land Court in the nineteenth century had very detrimental effects on Maori society, stripping tribes of land, weakening tribal structure, undermining leadership, and destroying trust among and between hapu and whanau. The worst effects, at least in the first two decades of its operation, fell on kupapa tribes who had taken up arms on the side of the British during the wars of the 1860s. They were ill-rewarded for their trouble.

It cannot be argued that the deficiencies of the Native Land Court were the responsibility of the court, not the Crown. Parliament passed the laws that gave the court its being and its structure; and it was the Governor who approved the rules and regulations under which it operated. When it became obvious that Maori society was suffering grave damage through the operations of the court, Parliament continually heeded settler and speculator demands and overlooked wiser counsel that warned changes were essential. The only Maori the Native Land Court advantaged were those whom the court should have named as trustees, not outright owners, or those prepared or actually encouraged to defraud their fellow claimants. The 1873 Act supposedly gave the House more control over the court, and the court was required to be guided by equity and good conscience, yet Fenton was 'soon back to his high-handed ways with Maori land, playing fast and loose with requirements about succession and reserves' – and it was not until the early 1880s that he was 'at last exposed and denounced as incompetent and an antagonist of the Maori people'.¹⁴¹

140. See, for example, Angela Ballara, *Proud to be White? A Survey of Pakeha Prejudice in New Zealand*, Auckland, 1986

141. Ward, pp 255, 289

The Crown, by omission and commission, had exposed Maori to 30 years of legalised malpractice. No wonder a Maori elder, disillusioned by the working of the court and expressing the sentiments of his people, said: 'The law has been our ruin. In the time of our ancestors . . . we received no hurt similar to this. Give us back what land is left.'¹⁴²

142. Cited in Sorrenson, 'Land Purchase Methods', p 187