Report of the Waitangi Tribunal on the Orakei Claim

05 The Clouds Before the Storm 1869-1912

5.1 The Orakei Decision

5.1 The Orakei Decision

Surrounded by water on three sides, and with a ridge separating it from Mission Bay on the fourth, Orakei was a distinctive headland separated from the rest of the Auckland isthmus. It had potential as a tribal haven for though it was readily reached by boat or the steamer that ran from town to the Orakei wharf, it was in every aspect, or at least until Hobson Bay was bridged, a separate entity, with water access only from Auckland. The Orakei Bridge, built in 1862, made little difference to the block. The road skirted the southern perimeter, provided no access to Okahu village, and was built to service other areas. A bowl of hills secluded the basin fronting Okahu Bay on the Waitemata Harbour and it was there the people lived, in Okahu papakainga or village on the beach, for in those days people did not live on farm allotments but moved out each day to tend the outlying cultivations. The only noticeable differences were changes in building styles and a blending of animal husbandry with traditional horticulture. All that was needed, in Te Kawau's view, was 'a deed to make it safe'.

Te Kawau had sought such a deed for many years and the Native Lands Act 1862 seemed to make one possible. But it also opened the way for rival claimants backed by European purchasers. In May 1863 Hetaraka Takapuna of Ngati Paoa claimed Orakei. He maintained Ngati Whatua were squatting on it and had made a secret agreement to sell to a European (Southern Cross, 23 May 1863). Representatives of Ngati Whatua replied that it was Takapuna who was trying to sell the land (New Zealander, 6 June 1863). The dispute bubbled on, with the rival claimants trying to occupy Orakei. In September 1864, T S George, a lawyer representing Takapuna, suggested the only way to solve the dispute was to proclaim Orakei a district under the Native Lands Act 'which would settle this case once and for ever' (Southern Cross, 13 September 1864). However, the Act was repealed and replaced by the Native Land Acts 1865. It was not until November 1866 that a case was begun before Judge Monro, under the new Act. Both sides were represented by Auckland lawyers (Southern Cross, 3 November 1866). The case was to drag on for two years. Chief Judge Fenton took over the case and delivered judgment on 8 December 1866 - in favour of Ngati Whatua who, he said, had beneficially occupied the land in and since 1840. Fenton went on to make a revealing and prophetic observation

That in this case interests to the amount of tens of thousands of pounds are involved, and, moreover, that principles are concerned which will tend either to settlement

or to the continuous confusion of titles involving enormous values (Southern Cross, 10 December 1866).

Takapuna refused to accept the judgment and two years later the case was reheard. No fewer than ten groups then made rival claims, for this was the last of the Auckland Maori lands, and while Te Kawau's claims for Ngati Whatua could not be disputed, there were others who relied on the extended genealogical lines of Maoridom, past fighting and occasional occupations, to seek a share of the block.

On 22 December 1868 the Court found in favour of the three subtribes of Ngati Whatua - Te Taou, Ngaoho and Te Uringutu. It was a lengthy decision famous for its recitation of the long history of the area but not remarkable for its finding except to say had it been otherwise, Auckland would have been sold by the wrong people!

What happened after that is not so famous. The Court adjourned to enable three lawyers representing three factions of the successful Ngati Whatua to meet with the people and seek an arrangement as to the actual persons to take title. A meeting was held in 1869. We do not know who attended or what was said for no record of the meeting was kept but from subsequent accounts it appears that Te Kawau was not there. He was thought to be over 90 years old, and was to die that November.

In the recent past, Te Kawau had sent his nephew, Paora Tuhaere, to be his agent in the Native Land Court hearings at Kaipara and Helensville. Tuhaere was present at this meeting, but although he was a leader in the affairs of the people, and had enjoyed recognition as an authoritative spokesman amongst European officials, he was not then recognised as paramount at Okahu or as 'heir apparent' to Te Kawau. Eventually on 9 February 1869 the lawyers advised the Court a settlement had been reached. The Court resumed and a list of names was handed in, one lawyer, for Te Kawau and others putting in seven names, another for Wiremu Watene and others submitting four, and the third representing Arama Te Karaka putting in one, a total of twelve.

Immediately there were objections that people were left out. Tuhaere was one of the objectors. He was opposed to the list for although his own name was on it, too many others were not. As was usual, the Judge's notes or minutes did not record the full debate. It could well be that Tuhaere was aware of the section 17 option and argued it. His knowledge of the 1865 and 1867 laws in the award of titles is apparent in his statements to the first Maori Parliament on 1879, of which he was chairman (AJHR 1879, G-8 at p17). The Court would also have known of Tuahere's status amongst Government officials, and that he had represented Te Kawau in the past, but still Tuhaere's objection was not upheld and does not seem to have been given much thought. The Chief Judge dealt briefly with each objection and dismissed them all.

The Court was still left with a problem. As a matter of law no more than ten could go onto a title. It was open to the Court to direct a further meeting and insist that the list be cut to ten, but in view of the number of objections,

and especially that of Tuhaere, that may have seemed unwise for the people might insist on extending the list further and the whole settlement could fall apart. The lawyers were ready with an answer. To avoid further argument they proposed that only one person go onto the title, the paramount elder Te Kawau, to hold the land on trust for all twelve.

The Court chose that expedient and minuted as follows

Ordered that a certificate of title issue to Apihai Te Kawau and that the names of the following persons appear in the grant as cest qui [sic] trusts and that they be tenants in common and not joint tenants.... (there followed the names of Apihai Te Kawau and the others).

As a matter of law the order as minuted had then to be drawn and sealed, and because the sealed order enables broad intentions to be spelt out with particularity, the sealed order prevails over the minute. The order as scaled simply vested the land in Te Kawau upon trust for himself and the others. No mention was made of cestui que trusts or tenants in common and not twelve but now thirteen names appeared as beneficiaries. This is because one name on the list, Wiremu Watene Ngawaka Tautari, was rendered as Wiremu Watene and Ngawaka Tautari in the sealed order. There are therefore thirteen beneficiaries, at law, and not twelve as suggested in the minute.

The next step was that the order was referred to Government for a Crown Grant to issue, and from the grant, a Certificate of Title was drawn. The Crown grant did not issue until 1873, but it did issue, and both the grant and the title followed the form of the sealed order.

---

05 The Clouds Before the Storm 1869-1912

5.2 Analysis of the 1869 Decision

5.2 Analysis of the 1869 Decision

It is pertinent to analyse the 1869 decision in view of the later debate and the conflicting conclusions of later Courts and Commissions. We have little to go on, for an historical account, for we are bound to rely on the Courts minutes and sealed order. The minutes are merely the Judge's own notes and are of necessity only brief summations of what to the Court seemed important to record. In adjourning the matter, for a settlement to be reached, we are not informed whether the Court alerted the people to the various options. That seems unlikely, given the account of the personal preferences of the Chief Judge in para 4.7.

We cannot say for sure whether Tuhaere raised the option in section 17. It seems he may well have done but that the Court - and possibly also the lawyers - were minded to have their own way and to do what they thought easiest or best. Although he had acquired a grasp of many laws, Tuhaere, like most laypersons, Maori or European, could not have matched the lawyers use of phrases like 'cestui que trusts', 'tenants in common' and 'joint tenants' to describe the proposed arrangement. The word 'trust' was probably all he noticed.
Irrespective of what was said or intended we know the third option was not used. Section 17 of the 1867 Act required that the section be cited in the order, grant and title. We have examined the sealed order. It does not cite section 17 but instead purports to be made under the 1865 Act. The grant and title do not cite section 17 either but, using a printed form, refer generally to 'the Native Lands Acts'.

05 The Clouds Before the Storm 1869-1912

Section 17 also required the compilation of a list of each and every member

of the tribe to be recorded separately on a memorial entered in the records of the Court. We know for a fact that such a memorial was not entered. Even if that had been intended, although on the face of the record it was not, the thirteen names did not comprise the total membership of Ngati Whatua. We know there were over a hundred. There are contemporary references to 150 living at Orakei village on the plateau, as mentioned earlier, while the 'majority' were said to live at Okahu in the valley. No women were included on the list but we can safely assume that women were included in the tribe. Forty years later Otene Paora sought to upset the 1869 decision upon the grounds, amongst others, that women had been excluded and that tribal membership was well over one hundred.

We know the second option was not chosen, to divide and apportion the land and so we are left with the first. It seems clear to us that the first option of vesting the whole estate in absolute owners, was the option chosen. The trust proposal was simply a device to circumvent the requirement, which incidentally was common to all three options, that no more than ten could take the legal title. The expedient, in legal language, gave to Te Kawau (alone) a legal estate vested in possession, and to the others, a beneficial estate. It did not create a tribal trust. It made it perfectly clear that the thirteen were absolutely beneficially entitled.

Did the people understand this? We know there was a meeting. We know that afterwards many of the people presumed that the thirteen were trustees only. They acted on that presumption - and that is not surprising for it is inconceivable to us that so many would voluntarily have disclaimed all interest in their
tribal homeland. It seems natural to us that various groups within the tribe would have wanted their own representative and all under the cloak of their one leader.

We do not know the true basis for the settlement. In later evidence Wiremu Watene thought five names were put in for Te Taou, eight for Ngaoho and none for Te Uringutu. This does not tie in with the submission of seven, four and one names.

We cannot explain why Wiremu Watene Ngawaka Tautari appears as one name on the lists and two names on the order. Wiremu Watene was a son of Ngawaka Tautari aged only 20 years. It explains why he was still alive in 1930 long after the other grantees had died. It seems unusual that a father and son were both put in to give the son a double entitlement later and it raises the question of whether that was intended.

It was later claimed in a petition to Parliament that some were left out because they took bigger shares in Kaipara. Others hotly disputed that. We can only say that if that were so, it ought not to have happened because there was no provision to effectuate an exchange of interests on an investigation of title. It had properly to be the subject of a separate and subsequent application for exchange and a separate determination by the Court. There is also no evidence that some took bigger shares in Kaipara.

Later, Wiremu Watene implied Tuhaere was trying to keep some out but that claim was made in 1930, sixty years after the event. There is some evidence, although also much later in time, of an objection to the inclusion of one, Arama Te Matuku, but Arama took part in the Wars against the Crown, and it would have been well known to the likes of Tuhaere that on the division of lands at that time any award to a 'rebel' was to be confiscated to the Crown. At the hearing itself, it was in fact Tuhaere who urged the inclusion of more names because some of his people had been left out, thereby proposing a diminution in his own share.

But most significantly of all, an important chief, Uruamo was left out. At Orakei Uruamo may have ranked equally with Te Kawau. He was one of the first two chiefs to return to Okahu after the Ngapuhi raids, to uphold the people's entitlement, while Te Kawau went to Mangere where he remained for some time. Uruamo himself died shortly before 1869 but none of his children was 'put in'. It was usual in Maoridom, that a 'successor' was not named when a leader died, for only time could prove who was best equipped to fill the vacancy.

Some of the descendants of Uruamo, like Otene Paora, later came in as owners as a result of intermarriage but for lesser entitlements than they would ordinarily have received and the exclusion of the Uruamo line was to cause considerable consternation in later years.

It seems more likely the main argument would have centred on the extent of representation for the three sub-tribal groups, for that debate was to continue for many years. Native Minister Bryce, speaking in the House of Representatives in 1882 on the Orakei Native Reserve Bill, gives credence to that view. He thought Te Kawau was chosen as trustee because he was the Chief "descended from both sections of Native claimants - namely, the conquerors and the conquered" (NZPD 1882:). He also went on to claim that the thirteen were not meant to be owners. He claimed to have been informed officially by Te Kawau of a "distinct understanding" that when Te Kawau died the case was to come before the Court again for final adjudication. Mr Sheehan, who was one of the lawyers in the case, was also in the House at that time. He denied that any such arrangement was ever put to the Court (though that is not to say that no such arrangement was put to the meeting of the people).

The main problem is that the Court neither determined nor recorded the basis of the settlement. Had it done so the picture would be much clearer. The Court was an inquisitorial titles Court and we think it ought to have determined the matter and recorded its reasoning.

Some play has been made of the fact that the Crown grant did not issue to Te Kawau until 1873, well after his death. At law no significance attaches to that. It is usual that survey delays the drafting of orders and grants and the law provides that grants, once issued, relate back to the date of the order as minuted. The law goes further to provide that Native Land Court orders and Crown grants are not invalidated by an intervening death (see now section 35 Maori Affairs Act 1953).

In any event we conclude that while many if not all of the people thought the original thirteen were representatives only, the Court ensured that they were absolutely entitled to the exclusion of all others. But no-one had real cause to be concerned at that time. We have yet to mention that the Chief Judge did that which Ward considers he did rarely, he made the land inalienable, that is to say, it could be neither sold nor leased.

The effect of the restriction on alienation was to make the owners mere paper owners unless they were minded to physically remove the majority from their homes and cultivations, a most unlikely course. The decision to exercise the Court's authority to impose such a restriction is not remarkable either, despite the Chief Judge's usual reluctance to exercise that power, for Orakei was all that the people had left, section 11 of the 1867 Amendment cast a duty on the Court to consider the need for such a provision in such cases and Te Kawau had lobbied for many years for such an arrangement.

In this claim great reliance was placed on the decision of the Court to make the land inalienable and to decry the resolve of the Government to remove an restrictions on alienation in 1909. In fact the Crown had no policy favouring reservations in any manner akin to those secured for North American Indians. Restrictions on alienation were regarded as temporary aberrations to maintain a status quo until things had settled down. They could be removed by the Court or the Crown at any time! Orders in Council were regularly used to remove existing restrictions on particular blocks when owners wished to sell and the Crown wished to buy. The 1909 Act merely opened Maori lands to all comers, and while it removed old restrictions it also enabled new restrictions to be made.

The same comment can be made of Native Reserves, those areas reserved for tribes within early deeds of sale. These Reserves were supposed to be inalienable but were in fact alienated through particular or general legislation and then by the Crown as their trustee rather than the owners, if that seemed necessary or desirable at the time. This was particularly so if the Reserves were in town areas. Ward (1974:215) refers to the Pipitea and Te Aro Pa Reserves in Wellington and "the continued hostility of the settlers to the Maori communities in their midst". He refers to "the unusual steps" taken by the Native Office in 1886 to explain the sale restrictions in the law in a press release to local papers as follows

It is not meant to restrict permanently the alienation of any native land, but only to retard the alienation of some small portion till the Maori race have taken their

ultimate position in the colony, and can be relied on to provide for themselves as the European does.

But at least Orakei was on a headland with some geographic severance from the rest of Auckland. And Apihai Te Kawau must have died happy. He had the authority for a Deed and a restriction on alienation that seemed to make the land safe. With symbolic significance he died in the year of the Court's decision in November 1869. It was certainly the end of an era. The old order passed yielding place to one that was entirely new. And Te Kawau's mantle passed to his nephew Tuhaere.

Waitangi Tribunal, Department of Justice, Wellington.

05 The Clouds Before the Storm 1869-1912

5.3 Paora Tuhaere and The Orakei Reserve

5.3 Paora Tuhaere and The Orakei Reserve

In his administration of the Orakei lands the ageing Paora Tuhaere demonstrated clearly his place in two worlds. The remarkable transition of Maori society is summed up in this one man. He appeared first in this story of Orakei as the tattooed warrior that he was, and a tribal mediator with Potatau Te Wherowhero and Hone Heke in 1846, seeking alliances against a pending attack on Auckland, and promoting the safety of the new town on his lands. He figured again in this story in the hearings before Judge Fenton, when Te Kawau was dying, seeking the admission of more names to the Orakei title. He was to bring his enormous experience to bear on both the maintenance of the customary tribal principle for Orakei, and the attempted propulsion of Orakei into the cash economy of the modern world by seeking to lease sections to settlers to provide an endowment for his people. Had he lived longer he may have succeeded for he was on the verge of success when he died.

Tuhaere was also a national figure in both European and Maori political affairs. He was a loyal peacemaker who took up both the assertion of Maori demands and the challenge of European settlement. His obituary in the New Zealand Herald described him as a good friend to the Europeans, loyal to the Crown during the wars, an honest and straight-forward adviser to Governments and a conciliator between races in times of trouble. He was an adviser to Governments for over thirty years. He was involved not only in the worship of the Anglican Church but its parochial and synodical management. Governor Gore Browne appointed him to chair the Kohimarama conference in 1860, the nearest gathering to a Government sponsored Maori Parliament in New Zealand history. In 1869 Tuhaere tried to reconvene the Kohimarama Conference (Ward, 1974: 272). Ten years later he erected at Orakei a large meeting hall named Kohimarama in commemoration of the 1860 conference. There he conducted further major tribal meetings, specifically called Maori Parliaments, in l879, 1880 and 1889 (the proceedings of the first two gatherings have been officially recorded, Kohimarama Conference AJHR, 1860 E-9, First Maori Parliament AJHR Sess II 1879 G-8).

Tuhaere was a mature man of considerable experience when his uncle Te Kawau died. From the transcript of the proceedings of the 1879 Orakei Maori Parliament we learn something of his thinking. He was both pragmatist and visionary wanting tribal ownership of lands but aware that neither Government nor the Court favoured it, opposed to the sale of lands but alert to the reality that as the Crown could not be restrained from buying he could only urge his people not to sell. He knew that restrictions on the alienation of prized blocks were continually being removed either by the Crown or the Court whenever it suited the Crown to buy. Tuhaere realised further the Maori were

now living on European terms, liable for taxes and rates and subjected to loans but in the case of Ngati Whatua at Orakei, with no lands that ought properly to be sold to provide ready cash. He urged the tribes to hold the Government to the terms of the Treaty of Waitangi while planning the management of the remaining lands by Maori themselves to provide an economic base for the people as a whole. All this was well before Carroll and later Ngata were to espouse the same policies.

Tuhaere had no love for the Native Land Court. Perhaps still smarting from his treatment before Chief Judge Fenton, when tribal ownership was denied, he addressed the chiefs assembled at Orakei in 1879, with reference to Maori lands generally,

It was the Native Land Court that took away the authority over the land from the owners and put the authority in a Crown grant ... if the land had remained under the old authority of your fathers there would have been no Crown grants, and your lands would not have been wasted.

Tuhaere moved quickly after the 1869 decision to prevent the individualisation of the Orakei title and the disintegration of the tribe as had happened elsewhere. The Orakei decision was promulgated in February. In March it was arranged that Te Kawau make a will and in it, Tuhaere became his trustee and sole beneficiary. Te Kawau died in November. From then, Tuhaere took charge of the Orakei land preventing its dismemberment by reminding his people to avoid the Court.

It was soon apparent however that no-one could prevent individuals from applying to the Court and eventually Tuhaere and six others filed Petition 153 to the House of Representatives for a Bill to hold the Orakei Estate intact and turn it into a tribal endowment. With the assistance of Dr Pollen, Legislative Councillor from Auckland, a private bill was drafted and eventually became law.

The Orakei Native Reserve Act 1882 enabled Paora, with the consent of the thirteen others, to lease any part of the Orakei block for terms up to 42 years. In the claimant's submissions to us there was criticism of this Act because it was a first inroad into the principle of inalienability. Given the politics of the time, we think it rather showed a shrewd and informed move by an astute Maori leader. For Tuhaere knew only too well the restriction on alienation was not inviolate. It was only a matter of time before it would go. By removing it now, but for leasing not sales and by securing not a deed but a statute to govern Orakei, Paora was setting in place a system for the allocation of the land through the collective decisions of the owner group as a whole, ousting at the same time the alternative control of the Native Land Court, the vagaries of legislative amendments to the main Act, and the facility of Orders in Council to remove restrictions on alienation entirely. Given the conflict between Maori aspirations and the politics of the day, the Orakei Act was a brilliant plan, conceived of great cunning and born of a need to change.

The Act was limited in the authority that it gave but was pregnant with potential. Had Tuhaere sought more at that time, a tribal trust, he would have made no progress for other tribes seeking that had been turned away. It was called the Orakei Native Reserve Act but, as Edwards J was to note in Solicitor-General v Tokerau District Maori Land Board (referred to later), it was not a Native Reserve. Likely it was described that way because that is how Tuhaere saw it and hoped it would in law become. The Act refers to thirteen owners but effectively made them only managers. The Act, introduced on the basis that it was necessary to enable the land to be leased, and rationalised on a claim (well merited) that it took too long to achieve results through Native Land Court proceedings, was really intent on securing the structure of a Native Reserve but under Maori management.

Tuhaere was intent on going much further. With the income from short term grazing leases he embarked on an ambitious plan for residential development on long term leases to capitalise on Auckland's growth, highlighted by a spectacular land boom between 1878 and 1886, and to provide an endowment for the tribe. At that time local authorities and the Anglican Church had similar schemes on nearby lands to endow their own enterprises. Tuhaere surveyed one acre building sections on the perimeter of the block at what is now Bastion Point, capitalising on magnificent harbour views. Access was to be by water with roads leading from a new wharf near Bastion rock. At the same time he arranged with the Hon Dr Pollen to promote a new Orakei Native Reserves Bill. This Bill as introduced to the House in 1887, proposed a permanent trusteeship, new trustees to be appointed on Tuhaere's death, and authority for the trustees to subdivide land (after reserving sufficient areas for tribal dwellings and cultivations), to lease house sections to Europeans for up to sixty years, to raise loans (on the security of rents) and to develop roads, wharfs and approaches. None of the land, however, could be sold.

During this initial period of his planning no-one made application to the Court, by way of succession, partition or otherwise but through the action of the Crown, Tuhaere's plans began to fall apart. The first application for succession came in 1882, then five in 1883 at which point Paora himself succeeded to Te Kawau's interest. (The latter succession had the unfortunate effect of excluding Te Kawau's own children but, in 1896, after Tuhaere's death, the succession was overturned by the Native Appellate Court, restoring Te Kawau's issue to the ownership list on the ground that the block was inalienable and could not therefore have been alienated by Will). But the major attack came in 1886 when, as seen at para 4.4, the Crown took the Bastion Point area for defence purposes, destroying the subdivisional plans.

Tuhaere quickly applied for compensation, exposing his proposals to view. The Crown responded by seeking an amendment to Tuhaere's Bill, to block compensation by claiming the land as an exchange for the gift at Takaparawha. In counter reaction Tuhaere withdrew his Bill altogether and required that compensation be paid. Compensation awarded in 1890 was eventually applied to survey and other costs incurred. Tuhaere died in 1892, his plans unfulfilled.

Had Tuhaere lived longer he may have achieved what seems to have been the ultimate objective, the management of the Orakei block through a representative committee for the benefit of the people as a whole, and under a separate and special statutory authority. The 1882 Act was a good attempt. There was not another like it until 1978.

Tuhaere had adhered to the tribal principle. Income was applied not to individuals but to the benefit of the people as a whole. Reflecting back on this time, while giving evidence before the Native Affairs Committee of the House of Representatives in 1912, Otene Paora described how the people cultivated communally and how profits were applied to general purposes and tribal gatherings. There was at that time no cause for anxiety. But sixteen succession orders had been made by 1892, a new generation was coming onto the titles, and even before Tuhaere died, the first application by owners to partition 'their' shares had been filed, in 1891. The people were returning to the Native Land Court, following the precedence of nearly all other 'owners' in Maoridom, while those adhering to the tribal principle were increasingly concerned that Crown Grants, the 'ten only rule' and even special statutes gave the tribes no protection at all.

---

05 The Clouds Before the Storm 1869-1912

5.4 Renata Uruamo and Equitable Owners

5.4 Renata Uruamo and Equitable Owners

With Tuhaere ailing, and the people returning to the Native Land Court, Renata Uruamo came onto the scene in another attempt to block the individualisation of the Orakei title and maintain the tribal principle that Tuhaere had sought to uphold. He relied not on the 1882 Orakei Act, but other legislation the origin of which is now explained.

Many throughout the country who attended the early Native Land Court expected the ten or fewer persons appointed to titles took in a representative capacity only. They learnt later to their chagrin and surprise, that that was not so. Sometimes those who attended knew the position very well. Some Chiefs favoured the ten owner system as they were "downright extravagant, living in flashy imitation of the settler gentry" or needing "cash to provide traditional feasting and hospitality for the large and frequent political meetings which developed through the 19th century" (Ward 1974:213). Te Kooti named such chiefs "the money rangatira." They were significant phenomena from 1865 to 1910.

There were numerous complaints of chiefs taking the tribal lands for themselves. Matters came to a head in Hawkes Bay when a chief persuaded his people not to submit their claims to the Court but to allow only his own name to go onto the title. He would, he said, hold the land unsold, as an inheritance for the tribe. The chief duly obtained sole ownership of thousands of acres but then dealt with the land as his own. Then others of the tribe sought declarations in the Supreme Court that the chief held as a trustee only, but without success. The matter went to the Court of Appeal. It was held the certificate was conclusive and the chief must be taken to be the absolute owner Ani Kanara v Mair [1886] NZLR 216).

It is of passing interest to note the opinion of P G McHugh that Ani Kanara v Mair, heard by Chief Justice Prendergast, was a direct application of the Chief Justice's earlier position, in Wi Parata v Bishop of Wellington (referred to in para 4.6) where the Treaty was declared "a simple nullity". McHugh (1987:39) refers to a line of decisions of the Privy Council from 1921, on cases arising from Africa, which, though subsequent to Ani Kanara, held clearly that a Crown grant of land did not extinguish the native title at all. Indeed the presumption was the other way. A native holding land under grant from the Crown was presumed to hold on behalf of his family according to customary law. In New Zealand it was not until 1982 that a High Court felt able to apply customary understandings to a case involving the disposition of native lands, albeit in family protection (Rogers v Rogers and Tatana, 18.11.82 High Court, Whangarei, A34/81, Barker J).

What next happened is explained by Sir John Salmond (Salmond, 1909,1931: Vol 6,87).

In 1886 the Native Equitable Owners Act was passed, to enable the Native Land Court
to make enquiry as to whether the persons named as owners in former certificates of title and memorials of ownership were entitled beneficially or were merely trustees for a larger number of native owners, and to include in the title the persons so found to be entitled. The limitation imposed by the earlier Acts on the number of names that could be inserted in a certificate of title had led to the practise of inserting a small number of nominal owners on behalf of the rest, instead of the full number beneficially entitled (Salmond 1931:87).

In 1891 Renata Uruamo of Orakei applied under the 1886 Act for an order that the Orakei land was intended for the original thirteen as trustees only. The matter did not proceed to a substantive hearing. Indeed, Renata was not even present or represented in Court when the then Chief Judge dismissed the case minuting

I see an order for a certificate of title was issued on 10 February 1869 to natives so that the case clearly does not come under the Act of 1886. Upon the certificate a Crown Grant was to issue to Apihai Te Kawau, on trust for several other natives dated 8 July 1873; this also shows that the case does not come under the Native Equitable Owners Act 1886 - application dismissed (4 Auckland Minute Book 66).

It is difficult to know what to make of this. It may be the Chief Judge thought

- the 1886 Act was to enable the Court to review those cases where ten or fewer owners were on the title as absolute owners

- but in this case the title was held by one person as trustee (for thirteen absolutely beneficially entitled) and therefore the 1886 Act could not apply.

If the Chief Judge thought that, he must have presumed the 'Fenton' order was made under section 17. We consider it was not, for reasons given earlier. Either way

(a) the question of whether section 17 was in fact used was important and needed to be argued, and

(b) it was also open to argument that even if Te Kawau were named on the title as a trustee he and others were also named on that title as absolute owners when they too ought to have been only trustees so that the 1886 Act still applied.

Yet the matter was dismissed without anyone being heard.

The result is frankly amazing. The 1886 Act seems to have been specifically designed to remedy the mischief complained of. But dismissed it was, and

those who have always maintained the original thirteen were or ought to have been representatives only were denied the legal avenue specifically provided to put the matter to a proper test. It was dismissed so the matter could not be raised again, at least in the Native Land Court.

Since then the claim that the original thirteen were trustees only, or were meant to be trustees only, has been raised at every opportunity but could be adverted to only as an adjunct to some other proceeding where it was not really in issue. Had the land been vested in all members of the three hapu entitled, then who knows, given the policies of the time the land may still have been lost, but at least Ngati Whatua would have been spared the costly, divisive and many proceedings that were to follow. The opinion that the land ought to have been held for all is the root cause of the debates and divisions spawned in a long list of legal inquiries that came later and of divisions amongst the people that facilitated eventual sales. The question arose, but was never conclusively determined, in three further applications in the Maori Land Court, three Supreme Court hearings and one in the Court of Appeal, at least six Parliamentary petitions, and before one Committee of Inquiry, one Commission of Inquiry, and one Royal Commission of Inquiry until eventually direct confrontation was sought when an Action Group occupied Crown land at Bastion Point in 1977. That unfortunate event and the long history of previous legal wrangles may not have been necessary had the question been directly confronted on Uruamo's application in 1891. But that application was dismissed - and without even a hearing!

To add salt to the wound, the 'principle' in Ani Kanara was soon codified into statutory law. The Native Land Act 1894 made it clear that thereafter the Court could not vest title in representatives only, a position which yet survives in Part XV in the current Maori Affairs Act 1953.

The Native Equitable Owners Act 1886 was not the only Act that the legislature found necessary to pass to sort out the muddled state of affairs then pertaining to Maori lands. It is helpful to pause here to consider them.

---

05 The Clouds Before the Storm 1869-1912

5.5 Legal Confusion and Validations

5.5 Legal Confusion and Validations

As has already been seen the basic legislation affecting Maori and their land was that contained in the Native Lands Act 1865.

By 1890 the legislature had passed a bewildering array of Acts in an endeavour to sort out particular problems as they arose or to introduce new lines of policy. They were in two classes - local acts designed for particular problems in particular places, like the Orakei Act, and general acts to sort out problems of general application, such as the Native Equitable Owners Act 1886, or to effectuate particular Government policies. For the 21 years 1865 to 1886, we have counted no fewer than thirty six general Acts affecting native lands, inclusive of lengthy amendments, and a brief survey revealed numerous local Acts too to give at least three Acts per annum on native land matters for nearly one generation! From this legislative profusion five main policies emerge. Maori lands were to be "individualised" by being vested in individuals. They could be divided (partitioned) amongst them. They could be freely alienated to anyone. Only land with particular significance could be made inalienable but any restrictions on alienation could also be removed. Finally, as first provided for in 1870, no alienation was to be valid if it was contrary to equity and good conscience or if the alienor did not have sufficient other land for his support.

Though those principles may be gleaned from the Parliamentary harvest they were well hidden under piles of straw. Ordinary people, both Maori and European, made illegal transactions contrary to laws they could not, or would not understand. In those circumstances an extraordinary Act came to legalise past illegalities. The preamble to the Native Land (Validation of Titles) Act 1893 recited the confused circumstances, how Europeans held lands under arrangements that could not be perfected through the repeal of laws, because they lacked some statutory approval or were invalidated by "some unlawful act ... by the Native Land Court or some other Court", how some Europeans had gained title to lands despite prohibitions and irregularities, how native claimants considered there was "no Court with sufficient jurisdiction for the redress of their grievances", how native land laws had become so cumbersome, conflicting and contradictory "that obedience to them has been always difficult and sometimes impossible" and how "it would be a scandal that such a state of things should be allowed to continue".

For all those reasons a Validation Court was established to validate past transactions though ultimately Parliament itself was to legalise irregularities by special Acts. The Act, however, was primarily designed to assist Europeans to gain titles from unlawful transactions and did nothing to assist Maori

grievances that, contrary to the Treaty of Waitangi the tribal principle was outside the law too, and that that was the source of their troubles.

The 'Validation Act' was therefore one sided but was not without support from some Maori quarters. Maori people at this time were consuming their energies in protracted litigation at distant towns incurring enormous legal and accommodation expenses in an endeavour to hold to their land. The war had simply shifted to the Courts. It was common that the land itself was sold, assuming the case was won, or other land sacrificed if it was not, simply to meet costs. Sir James Carroll, first Maori Minister of the Crown, supported the Act, not because it was right, but because in his view, his people lost even if they won and would do better to absent themselves from the debilitating procedures involved.

But neither the Act nor Sir James' opinion could give Ngati Whatua any respite. They had no other lands to return to but that at Orakei, and they had either to capitulate to European demands for the use of that land, or secure to the land the traditional preference for customary tenure even if that meant recourse to the Courts must continue. Paora Tuhaere had maintained the Orakei block intact, as a home and resource for his people as a whole. But Tuhaere died in 1892. Renata Uruamo had sought the same thing, but Renata's attempt was shortlived. Thereafter there was to be no clear leader to pull the people to order and prevent the divisions and sales that were to follow.

---

05 The Clouds Before the Storm 1869-1912

5.6 Successions and Partitions

5.6 Successions and Partitions

When Tuhaere died, one might have expected the election of a replacement trustee to administer the Orakei estate in terms of the Orakei Act 1882, allocating lands for the people's use and other lands for leasing. But no replacement trustee was appointed and the Orakei Act fell into obscurity. The original owners were succeeded to, the land was partitioned (divided) amongst them, and owners dealt individually with their allotments, leasing them and using the rents themselves. There were still many who believed the land was meant to be held for the tribe as a whole but their beliefs did not match what was happening on the ground for it was now the turn of the individualists to hold sway.

It is not entirely clear why this happened. One scenario is that it was really the Court that held sway or influenced owners attitudes. In strict law there was not a trust, apart from the trust for the administration (only) of the land in terms of the Orakei Act 1882 (and then for the benefit of the owners, not the tribe), and everything the Court did stressed the owner group were absolutely entitled to the benefit of the land. In the first instance, Renata Uruamo's application to assert tribal ownership had been peremptorily dismissed. In the second, successions were completed, thirty from 1882 to 1910, each on the basis that the deceased was absolutely entitled. Strangely, not all entitled succeeded. An average of only 2.5 persons succeeded each deceased, which is evidence not of low fertility but the concern of the Court at that time to avoid fragmentation of ownership by putting in only some successors. To illustrate the point, only two next of kin were put in to replace Tarena Hengia deceased, in 1883. One of them died without issue so effectively the Court had to redo the succession for a half share, in 1910. By then Judges' opinions had changed and the Court was willing to put in more successors. Not one but eleven next of kin were then found entitled, as at 1883, and their issue resulted in an order to forty successors, despite the fact that representatives only were put in for some lines (9 Auckland MB 189, 191, 4 and 9 August 1910). How many were excluded from other successions is not known but it seems the disinheritance of the many was continued, even in respect of the successors to the original thirteen.

In any event a new generation came onto the title less convinced that they were merely representatives for the tribe and in 1891 the first application was filed to partition the shares of an owner to a separate block. By 1896 there were six applicants and they were by then seeking the apportionment of the whole block, save the village, or papakainga, amongst the various owners.

The several applications were not heard until 1896 because in those days the Chief Surveyor had to prepare an overall scheme for division before partitions

could be made. That took time and very nearly resulted in the Crown gaining another foothold in the block (it already held the Battery Reserve). The Chief Surveyor wired the Surveyor-General to report "old Arama Te Matuku (an original owner) who owns a full share worth say 6000 had taken part in the Wars. His interest was liable to be confiscated and the Chief Surveyor wrote "it is worth while setting up the claim on behalf of the Crown". The Surveyor-General disagreed as a Crown Grant had issued in 1873. Any confiscation, in his view should have been done then and the matter was dropped. The partition however went ahead. In 1898 the farm lands were divided by the Court into several allotments ranging from 10 to 20 acres and owners were allotted different portions. The papakainga, said to contain 43 acres but later surveyed at 39, was awarded to the owner group as a whole.

Another scenario suggests the people were fighting amongst themselves and it was that which caused the partition. This comes from the Judge's notes of evidence and correspondence on the Court file. It was claimed there was a feud between Taou and Ngaoho factions. There were disputes over who could use what parts and the Court was asked to accept an arrangement to put the Taou cultivations in one place and Ngaoho in another with the papakainga to remain common to all.

The position was put this way in a letter from the lawyer to the Court.

They complain they can do nothing in the way of permanent improvements until they ascertain what portion will be allotted to them. The male owners are behaving very unfairly and are taking possession of the best portions and even parts that have been occupied on behalf of the female. Disputes are constantly arising and nothing satisfactory can be done until a subdivision is made.

In this scenario the Court acted merely to fulfil the wishes of the owners, but speaking later, in 1912 before the Native Affairs Committee of the House of Representatives, Otene Paora painted a different picture, effectively blaming the Court

I would just like to say this: the year before the partition of the land was made we held a large meeting at Christmas-time, and the Orakei rents were the moneys which paid for the expenses of that meeting. We had 40 acres in wheat and 20 acres in potatoes, and all together worked and planted those. This will show, I contend, the position of the land before the partition was made - that it was land held in common by the tribe ...

It is apparent moreover that if there was an occupational dispute the alternative option was open under the Orakei Act 1882 to define allotments and award occupational licences to various individuals, without Court interference, thus still maintaining corrective ownership, at least amongst the owner group. A third scenario is that it was neither the owners nor the Court that initiated the move to partitions, but rather prospective European lessees. The documentation establishes the Court did not file the application - owners did and indeed, at that time, no one other than an owner could invoke the jurisdiction of the Court. The same documents disclose the apparent intention

behind the applications, to divide the lands for the more orderly user by owners themselves. The most telling factor in the Court record however is that following partition, several blocks were promptly leased to Europeans, with a readiness suggestive of prior arrangements. Personal use was not the main objective at all. It transpires, from the subsequent record, that the lawyer who filed the partition applications on behalf of client owners, and who wrote to complain that the partitions were urgent to end disputes amongst the people (disputes that Otene Paora knew not of), acted also for those who eventually gained leases of partitioned areas, and was later to represent the lessees in their endeavours to buy the freehold.

It was well known to Judges of the Native Land Court that behind owner applications for the exercise of the Court's jurisdiction is often an intending alienee, a circumstance still prevalent in the Maori Land Court today. At para 4.7 we quoted Chief Judge Fenton's recognition of that practice - ". . . most frequently land was purchased by a European before (an application for title investigation) came into Court. . . ". It was common that where prospective lessees felt unable to gain the consent of all owners of a large block, or rival lessees agreed to divide parts between them, owners disposed to alienate were persuaded to seek partitions to allow leases of at least 'their' parts. We think this third scenario the more likely.

The claimants have been most critical of the Court's action in partitioning the block. Even if owners had applied to partition, in their view the Court ought to have refused it. It is claimed the Court destroyed the concept of trusteeship that existed.

We are of the opinion that the Court did negate the effect of the Orakei Act 1882 for although that Act did not provide for a tribal trust, it did provide for overall administration of the whole block, without Court control, by a trustee acting with the consent of the owner group as a whole. The effect of partitioning was to negate that which Parliament had specifically provided for. The Court did know of that Act. In making partition orders it repeated the restriction in the Orakei Act that the farm blocks could not be alienated except by lease for a term not exceeding forty-two years. There was an important difference however. The consent of the owner group as a whole would not be required to any lease but only the consent of those owners of the affected block. (The papakainga remained inalienable for all purposes).

Yet the main problem was not the manner in which the Court effectively negatived then varied a statute. The Court destroyed the limited trust in the Orakei Act but it did not destroy the concept of a trust in favour of the tribe as a whole because in law no such trust existed. The partition order was a problem but it was mainly symptomatic of a wider one - the failure of the legislature to provide for tribal ownership. The tribal principle was an essential part of Maori society, and when it was destroyed, Maori society crumbled too.

It was after the partitions that those who considered the original thirteen merely trustees had more cause to be concerned. The partitions involved

extensive legal and survey costs. Mortgages were registered against the titles. The people were thrust into a new business economy from which they could not retreat. It was now necessary to lease, even if that were opposed, for costs had now to be paid and instalments met.

Some owners gave long term leases of their farm allotments. To those left out, and some of the 'owner' group too, this was unacceptable. In their view, not only was the land meant to belong to all, but the people as a whole had the right to decide such matters of tribal policy as to whether any part of the 'reserve' should be leased, and if so, who might be admitted to the tribe as lessees.

There was a dispute on this score. The adherents of the tribal principle argued the consent of everyone, or at least the owner group, was required to lease any block. Others denied that was so. They claimed the 1882 Act was effectively at an end. All that was needed was confirmation of the leases by the Native Land Court (as then provided for in section 117 of the Native Land Act 1894).

The dispute was put to the test when some owners applied for confirmation. The Court stated a case to the Supreme Court. But the issue stated to the Supreme Court was not whether the consent was needed of all owners to the leasing of each block, but only, whether confirmation was needed by the Native Land Court having regard to the specific provisions of the Orakei Act.

The Supreme Court held (In re Hawke's Leases [1901] NZLR 34) that the Orakei Act 1882 was a specific Act designed to deal with leasing in the Orakei Reserve. Accordingly the Native Land Act did not apply and confirmation by the Native Land Court was not needed.

The unstated corollaries were that the consent of all owners was needed to each lease in terms of the Orakei Act, and that the partition orders were themselves invalid, for the Court had no business to apply the partition provisions of the Native Land Act while the specific provisions of the Orakei Act applied. That in turn would invalidate the leases. But those matters were not considered by either the owners or the lessees. The owners in various blocks in fact leased them without reference to other owners and neither - as a result of the Supreme Court decision - was confirmation obtained. Accordingly while the Supreme Court upheld the supremacy of the Orakei Act, it was at the same time put down, to fall into disuse. Still, for quite some time Tuhaere's Act had served to protect Orakei from the national demand for more land.

---

05 The Clouds Before the Storm 1869-1912

5.7 Orakei and the Need for More Land

5.7 Orakei and the Need for More Land

During the period that Orakei was protected under the Orakei Act 1882 large areas of other Maori lands were sold in the wake of individualisation. As the pace of settlement rapidly increased, so did demands for more land and with equal rapidity policies were introduced to acquire it.

The Orakei block, as has been described, was comparatively insulated from demands to buy. But the protective cloak was removed when the Partition Orders were made, and ironically the initiative to buy the block came from the very Judge who thirty years earlier had declared the land inalienable.

Chief Judge Fenton retired from the Native Land Court in 1882, the year in which Paora's Orakei Act was passed, but he was engaged immediately in other work on behalf of the Crown. The Thermal Springs Districts Act 1881 had deemed it expedient that Rotorua "should be opened to colonisation and made available for settlement" and that a Crown agent should be appointed "to make arrangements for effecting that object".

It was Chief Judge Fenton who secured the job to negotiate with the Rotorua tribes for the establishment of what is now the City of Rotorua. He was responsible for much of the town's layout, design and reserves.

Rotorua was no isolated case. The legislature gave wide powers to the Executive to acquire Maori land for the establishment or extension of towns.

The Native Townships Act 1895 for example, entitled "An Act to promote the settlement and opening up of the interior of the North Island" acknowledged the exigencies that "in many cases the native title cannot at present be extinguished in the ordinary way of purchase by the Crown, and other difficulties exist by reason whereof the progress of settlement is impeded" and provided for townships to be laid out on Maori land, even without owners' consents.

It seemed only a matter of time before the Orakei block, bordering Auckland, would be considered for township extensions. That time came in 1898 when Chief Judge Fenton, now sixteen years retired, proposed an arrangement for the Orakei block (and perhaps hoped for further employment). He wrote to Premier Seddon as follows

I see by the papers that the block of land called Orakei has just been cut up by the Native Land Court and awarded to individual natives. This block contains about 600 acres, and is of great value. When I held the first Court upon it many years ago, it was valued at £50,000. I think I am warranted in saying that if let alone it would

gradually fall into the hands of speculators, in the form of mortgagees and others (by the way, the power of mortgaging by Maoris ought to be prohibited). I feel strongly that this block in its entirety ought to go to the Government and should be laid out by them as a town, for it is in fact, by its position etc, part of Auckland. I do not profess to understand the Native Lands Acts, as they are at present, but surely there must be some power for the Government to intervene in a case like this.

I take the liberty of calling your attention to the matter and think the chief surveyor, Mr. Muller, would concur in the views I express. I hope you will pardon me for interfering in a matter in which I am not concerned more than any other citizen is.

We would be less inclined to give that pardon. So much for the opinion of some that Fenton intended Orakei to be inalienable for all time! That option was never seriously regarded. Te Kawau's plea had carried no weight. It was clearly open to the former Native Land Court Chief Judge, in 1898, to recognise a greater need to make Orakei "safe", for if there has been a danger that the land would fall into the hands of speculators in 1869, then how much greater was the need, in 1898, to secure it as an inalienable endowment for Ngati Whatua? That however would have required a concern for the maintenance of Maori tribes and the principles of the Treaty of Waitangi. The Chief Judge, with hindsight, had no real regard for either.

Fenton's letter was referred to the Surveyor-General who in February 1898 wrote for a report on the condition of the title, the intentions of the owners and a plan of the partition. It was reported to the Minister of Lands, and then to Cabinet "it is unquestionable that were this land in the hands of the Government it could be dealt with to great advantage." It was added however the owners intended to lease the divisions for 42 years under the Orakei Act 1882 and "as the land has now to be disposed of under a special Act of Parliament all the Government can do in the matter is to see that there are no obnoxious clauses introduced into the leases when the lands are let". Cabinet considered the position on 18 March and directed that Government be kept informed of the position and of any lease terms.

Meanwhile the tribe was divided between those of the 'trustees only' view and those who maintained they were absolute owners. The division was exacerbated by intra-tribal differences. The Te Hira line from Te Kawau was paramount at Okahu while others had greater eminence at Hurinui, Reweti, or at Kaipara and clear leadership could not emerge.

Many still living at Orakei were not legal owners. Many legal owners had moved elsewhere, leasing their interests outside the tribal group for personal advantage and though some residents were without lands for even subsistence cropping. Some owners stayed on and adhered to the tribal principle that Renata Uruamo had sought to re-establish. It was still the belief of many, at Orakei as elsewhere, that only the restoration of tribal ownership and authority could bring to order the recalcitrant members of the tribe.

But Orakei was merely a microcosm of the country. It is necessary to understand what was happening nationally in order to understand what happened at Orakei. Everywhere Maori society was crumbling as anguish and despair followed the New Zealand Wars. The Maori population dropped significantly from an estimated 56,049 in 1857 to its lowest recorded level of 42,113 in 1896. The European population was then 701,094. The popular opinion was the Maori was a dying race. It was symbolic for Ngati Whatua that on their former fighting pa of Maungakiekie or One Tree Hill a pine was planted to replace the single totara, the Maori symbol of chiefly authority. (The totara, called Te Totara-i-ahua, was reputedly planted by Tupaha about 1640).

The authority of the chiefs had indeed been broken. It was not only at Orakei that a leader failed to emerge after Tuhaere's time. Throughout the country chiefly authority waned as lands were broken down to allotments and allocated to individuals, often a privileged minority. Owners were willing to sell the patrimony of their tribe, sometimes anxious to do so in case the tribal claims succeeded. Selfish individualism on the one hand, drunkenness and despair on the other became the main threats to the Maori.

Maori society, thus divided, could not withstand the settlers insatiable demands for more land. The Liberal Government that took office in 1891 was committed to expanding the rural sector through the cheap acquisition of Maori land (see Williams 1969:17) but at the same time another awareness was developing. Pakeha politicians were ceasing to be British migrants. Maori politicians were becoming prominent in the House. At this critical period in Maori history the race was represented by some of the finest politicians it has ever seen. Not only in Parliament but through Maori schools, church committees, councils and village Komiti, a new form of leadership was filling the gap left vacant as chiefly authority passed.

The period has recently been illuminated by G V Butterworth in an address to the Stout Research Centre Conference, Wellington, 1985 (and see Butterworth 1985:242). Much of what follows is summarised from his work. A new generation of leaders spearheaded a resurgent Maori personality. They appealed to the native born Pakeha as Governments swung wildly between hard and soft policies on land acquisition. Carroll, Wi Pere, Heke, Ngata, Parata, Pomare and Buck ventilated a Maori view in the House of Representatives but, Butterworth reflects, what a weight of prejudice they had to overcome and how little formal political power they had to deploy! Their strength lay in their ability to stand astride both worlds as polished performers in the arts of each.

Carroll's charm and humour, Ngata's literary articulateness, and the outstanding oratory of each gave them an influence they lacked in numbers. If their numerical weakness forced compromises at a point lower than some of their Maori contemporaries could accept it was still much higher than any the House had previously known.

The Maori political advocates fought valiantly for the retention of Maori lands and the resurrection of the tribal principle, against considerable odds, but Carroll, and later Ngata, who led the field, were each from eastern regions of

the North Island, less affected by war and settlement and where large acreages were still Maori owned. In their determination to retain the bulk of the large tracts of land to which they were accustomed, they were not averse to sacrificing the smaller and scattered allotments of other tribes. To make matters worse for those holding lands near towns, they adhered to the popular view that the Maori was better off in the country. The Maori members were not united and no less than on this question. Orakei, as it turned out, was sacrificed to Carroll's wider cause but not without protest from Hone Heke of Northern Maori and opposition, as it turned out later, from Ngata himself. Heke, however, lacked Carroll's astuteness for Carroll rarely advanced a proposal without first lobbying his colleagues and ensuring there was a reasonable prospect of success.

Sir James Carroll, of Maori-Irish descent elected for Eastern Maori in 1887, represented a European constituency in Wairoa from 1893 and was Native Minister from 1899. He was a senior member of both the Seddon and Ward Governments. He advocated tribal control but his view on 'city Maoris' was less enlightened (unless it was intended to bolster his stand for the retention of Maori land). He stated in the House in 1894

Maoris must always remain what might be termed an agricultural and pastoral people ...we cannot expect them to come into our industrial life. They are not capable of entering into our manufactories ... (1894 NZPD 557)

His views on tribal control of land were first expressed while a member of the 1891 Royal Commission on Native Land Laws. The Commission identified as the key problem the failure of the Legislature and Native Land Court to recognise the tribal principle. For the Maori there was nothing new in that finding but the recommendations for the administration of Maori lands through tribal councils were expressed in a form more acceptable to Parliament than the Kotahitanga movement had proposed, as later articulated in the House by Hone Heke between 1893 and 1896. The Commission's recommendations were very much due to the philosophies of Carroll and W L Rees, a Pakeha parliamentarian and lawyer who had a long association with the East Coast tribes, and a great respect for them.

The Liberals as a whole were more interested in speeding up the purchase of Maori land. They established the Validation Court and gave liberal funding to the Native Land Purchase officers; but when the extent of the Crown purchases became apparent (over 3,000,000 acres of fertile land was acquired from 1892 to 1900) Pakeha politicians, increasingly sympathetic to the Maori view, also voiced the fear that the rate of buying would render the Maori landless and bequeath an even greater problem to the nation. Maori discontent erupted in a welter of tribal protests and petitions. In the wake of threatened rebellion in Urewera (1895) and Hokianga (1898) Carroll, and the four Maori MP's led by Heke were able to push through the Native Lands Administration Act 1900 for the administration of Maori lands through Tribal Councils.

The Act did not survive beyond 1905. The concept of tribal administration was acceptable to Government only if it still produced land for settlers. It failed

to do that. As a compromise Carroll had agreed the tribal councils would delineate areas excess to tribal needs, but he was intent on reserving 7.5 million acres as a permanent Maori heritage and proposed that surplus lands would merely be leased. His colleagues strenuously objected to what they labelled 'Maori Landlords' but still, in the exigencies of the time, the 1900 Act was passed. The Government confidently awaited hundreds and thousands of acres for lease but despite Carroll's urgings the Tribal Councils offered a mere 170,000 acres. The Act was repealed in 1905 (and £200,000 was voted to the Land Purchase Board) but Carroll continued to urge his people to lease, not sell.

For the people of Orakei the problem was different. They had not the large tracts of land that Carroll was concerned to retain for other tribes and it was apparent that the pressure for more land was not limited to that which might be farmed.

To those of Orakei opposed to any loss of the land the position was desperate. Though Carroll stopped State buying between 1900 and 1905 a tremendous opposition to his policy was continually being applied and it seemed only a matter of time before Carroll's embargo would crumble. And it did. The Maori Land Settlement Act 1905 authorised the resumption of Crown purchases. Carroll and Heke were left to fight a rearguard action to protect their own tribal areas. Carroll with Wi Pere succeeded in obtaining an exemption from the 1905 Act for the Tairawhiti District, which held until 1908. At the cost of agreeing to compulsory leasing Heke obtained a similar exemption for the northern Tokerau district which extended to Orakei. That held until February 1909 when Heke, a doughty fighter for Maori land rights, came to a premature death. Still it appeared to others their Parliamentary leaders were merely trying to stand against the tide. At Orakei it seemed clear, early in the 1900s, that the only hope was to pursue Uruamo's attempt to restore the entitlement of the whole tribe.

To this end Otene Paora of Orakei took up the cudgels in 1904. He continued the fight for thirty years. He was one of Maoridom's most persistent advocates for the tribal principle.

Otene applied first to the Native Land Court to repartition the land so as to include others on the title. At that time he asked that at least 40 acres be held as a general reserve "so that other descendants of Tuperiri, who are not in the title, might have a place to live on." He was unsuccessful. His application was dismissed after a brief hearing.

Then Ngata was appointed Member of the Executive Council Representing the Native Race on 7 January 1909 and for the first time, though not without criticism, there were two Maori in cabinet. From 1905 Carroll and Ngata promoted, in addition to 'lease don't sell' the policy of 'use don't lose'. If the problem was, as was alleged, that the Maori was not developing his land, then, Ngata argued, give him the money and training to do just that. Ngata went much further than merely proposing that concept to his party. He went out to his people, urging them with or without money, to work their lands. It was

a huge task that faced him. It was to tax his enormous energy over the next twenty years. He had to convert a people who were traditionally horticulturalists to pastoral farming and from the apathy and dejection that prevailed.
It seemed unreal to Ngata that there could be any reliance on Government to maintain statutory restrictions on the alienation of Maori land and his message to his people was clear - use it or lose it.

Ngata's proposals had an effect. It was agreed to set up a Commission to investigate what Maori lands might be leased or sold and what might be kept and developed by the Maori themselves. The Native Land Settlement Act 1907 provided that the Commission investigate the areas of native land which are unoccupied or not profitably occupied and the mode in which such lands can best be utilised and settled in the interests of the native owners and the public good.

That may have seemed innocuous but by the Act the Commission was to determine what Native Land might be retained for native use and occupation, and what parts ought to be given over to settlers to either buy or lease. It is extraordinary, as we reflect now on the Treaty of Waitangi, that subject to the report of the Commission the Governor-General could, by Order in Council, vest native land in a District Native Land Board for sale to settlers, with or without the consent of the native owners, simply on the ground that the land was considered excess to their requirements. But that was only one aspect of the Act. By Order in Council the Governor could declare land that ought to be retained for Maori occupation as subject to the restrictions on alienation in Part II of the Act. It was stated, in the debate during the Bill stages the Government intended that of the available land, half would be leased and half sold.

The Maori people were fortunate in the two persons appointed to the Commission, the former Premier and then Chief Justice, Sir Robert Stout and Mr A T Ngata, later Sir Apirana Ngata. Ngata considered Stout a great success.

He put matters plainly and simply before them and they were impressed with his dignity and kindliness (1911:15 NZPD 731).

This was fortunate for the protection of Maori land now depended largely on their discretion.

The Commission made recommendations in respect of 1.3 million acres. It recommended that about half be reserved for Maori people and that of the balance, 400,000 acres be leased and only 200,000 acres sold. It was considerably less than the Government had hoped for.

Of more interest for this inquiry is the Commission's consideration of Orakei. It was considered the whole should be kept. Not one bit of it should be sold.

05 The Clouds Before the Storm 1869-1912

5.8 The Stout-Ngata Inquiry

5.8 The Stout-Ngata Inquiry

In 1908 the Commission on Native Lands and Native Land Tenure (the Stout-Ngata Commission), came to review the position at Orakei. In doing so it extended its brief to consider the events of the Orakei past.

The Commission began its report on Orakei with an over-view that the block was communal land meant to be preserved in trust for the tribe. It must be taken to have presumed rather than determined that was so or that it should have been the case, for the Commission could not settle points of law. It said

It is the only land on the peninsula owned by the remnants of the once - powerful tribes who occupied the territory between the Manukau Harbour and the Hauraki Gulf.

It is plain that at the time of the investigation of the title it was thought only fitting and proper that this small remnant of land should be preserved for the ancient Tribes of Ngaoho, Te Taou and Te Uringutu, more generally known as Ngatiwhatua. By the certificate and order issued by the Native Land Court it was made inalienable ...

...the grant was not issued directly to the people entitled, but to Apihai Te Kawau, the Chief of the Taou, Ngaoho and Uringutu Tribes, and his heirs, upon trust for [and the thirteen names are then recited] It must be remembered that this is Native land and communal land and was meant to be preserved as a dwelling-place for the remnant of a tribe.

The Commission then queried whether the Native Land Court had authority to partition the land.

It may be a question whether the Native Land Court had any jurisdiction to destroy the trusteeship that existed, but the Court did do so, and partitioned the land amongst the owners, specifying them.

The Commission considered that in partitioning the land the Court (wrongly) varied the restrictions on alienability. Previously, all owners had to consent to a lease. Now, only those in the particular block had to consent to the lease of that block. (In addition, although the Commission did not take the point, it appears that an individual might have leased his undivided individual share).

It was one way of breaking down the control of the group as a whole. The Commission commented, with reference to the Orakei Act,

it may well be that the Legislature meant that no single owner should be permitted to bring a European into a Maori settlement without the consent of all the owners

or residents. This would be in accordance with Maori law or custom, and it might be calamitous to the life and good order of a Maori pa that Europeans not approved of by the Maoris should be allowed to settle on such communal land. The fact that the land was given to the chief as trustee, and that he had to execute leases together with all the owners, shows that the land was not treated even as ordinary Native Land was treated.

The Commission considered that the partition orders were therefore "illegal and void."

The Commission noted that no leases, save grazing leases for one year terms, had been executed before the land was partitioned, but since it had been partitioned, 18 leases for 15, 21 and 42 year terms had been effected with Europeans. Although the Supreme Court had held that confirmation was not needed, the alternative requirement of the Orakei Act 1882 that all owners consent had not been complied with either.

Be that as it may the Commission then noted that section 16 of the Native Land Settlement Act 1905 had since been enacted to do away with "all restrictions, conditions, or limitations against the alienation by lease of any lands owned by Maoris, whether such restrictions, conditions, or limitations are contained in any Act or any instrument of title."

Leases could now be effected in respect of all land, or of any share in it, with the approval of a District Native Land Board provided the Board was satisfied

(a) That the rent was adequate

(b) "That the Maori alienating had a papakainga, or sufficient other land for the purposes of a papakainga, or (with the rent payable under such proposed lease) an income sufficient for his support"

(c) "That the proposed lease is for the benefit of the Maori lessor" and

(d) "That such lease takes effect in possession and not in reversion."

The Commission noted that three of the approved leases were contrary to (d). Another three had not been executed by all the owners in the block, and in all cases, sufficient reserves for Maori occupation had not been made.

But in all the circumstances the Commission considered the "illegal" leases should be validated, the Commission noting

the history of the legislation dealing with Maori land shows that the validating of illegal sales and leases of Maori land is continually going on.

The Commission proposed instead that an area of eighty-five acres be set aside for Maori occupation and that the balance be available for leasing. It concluded There have been no doubt thousands of transactions between Europeans that have not been enforceable by law, but Europeans have not asked for the aid of legislation

to validate or carry out their illegal contracts. It is only when the transactions are between Europeans and Maoris that the aid of Parliament has been sought. A precedent has been set in many past Native Land Acts, and as we believe the lessees in this settlement have been acting bona fide and the lessors are anxious that the leases should be given effect to, we have, though we generally disapprove of validations, made the recommendations above set out.

In particular the Commission recommended

- that the papakainga and nearby lands extending across the ridge above it be reserved for Maori occupation, that area to comprise some 85 acres

- that certain existing leases be affirmed or validated where need be in respect of some 496 acres

- that allotments be surveyed and leased for general settlement by public auction through the Maori Land Board in respect of some 63 acres; a total of 644 acres.

---

05 The Clouds Before the Storm 1869-1912

5.9 Proposals to Buy, Attempts to Retain

5.9 Proposals to Buy, Attempts to Retain

The recommendations for the extension and protection of the papakainga and the alienation of the balance by lease only were never followed - although there was the facility to provide for them in a new Act passed in 1909.

The Native Land Act 1909 was a consolidating and amending Act designed to rationalise a plethora of confusing and conflicting laws, and, in a sense, to start again. It removed all existing restrictions on alienation imposed by any previous enactment, Court order or Crown Grant but made provision for restrictions on alienation to be re-imposed. Accordingly while the Orakei lands were now exposed to sales for the first time, there was provision to reformulate restrictions in terms of the Stout-Ngata recommendations.

More particularly the provisions in the Native Land Settlement Act 1907, under which the Stout-Ngata Commission had reported, were continued in force in Parts XIV and XVI of the 1909 Act. Read with the Act, the Commission's recommendations offered a solution to the Orakei problem. The papakainga could be vested in a Board able to give occupational licences to owners and non-owners alike (for licences could issue to any 'Maori'). Through the Board the balance could be leased.

There was still a compromise. The Maori Land Boards constituted in 1905 and 1909 were not tribal councils. They covered districts too large and included too few members to represent tribes, there being only three persons with one Maori representative and under the presidency of a Maori Land Court Judge. They were really in the nature of courts with parental powers. Maori land was open to purchase by anyone but the Boards had to approve each sale and could impose restrictions. With that, and a heavy emphasis on leasing, the Boards represented a compromise between the opposing political views of 'no sales' and 'free trade'.

The drafting of the 1909 Act was a monumental task. Carroll helped formulate the broad principles and Ngata assisted the drafting but the main work was undertaken by the Solicitor-General Sir John Salmond. It replaced 49 Public Acts, 18 Local Acts, 2 Private Acts and had to fit with a host of general laws. The current Maori Affairs Act 1953 is based upon it. It did not go as far as Carroll and Ngata wanted but they thought it the best compromise they could get. The Prime Minister Sir Joseph Ward thought it went too far and sought to delay its second reading as a Bill. On 15 December, in the dying stages of the session a deputation of six Members of Parliament waited on Ward to urge the second reading without further delay. They could gain no firm committment. The Bill was on the Order Paper however and at 11.30 that night, with Ward absent from the House, Carroll moved its second reading. Massey was

alarmed and tried to stop it by speaking for an hour and a half but it was too late. Carroll, emphasising the removal of restrictions on alienation in the context of "the undoubted advances made by the Maori people" was able to push through the Bill clause by clause before a minimum of members, and as arranged none of the Maori members spoke.

Amongst the European members there appeared genuine concern that the Act should guard against defrauding the Maori, but there was rare sympathy for them as Maori, some impatience for them to be Europeanised, criticism that the Bill did not go far enough in speeding the destruction of communal ownership to divest (the Maori) of all his native trappings (per Herries, with a similar view from Ormond), and criticism of proposed leases making Maoris the landlords of whitemen (Pearce). Maoridom however was not convinced the Act went far enough. Land which formerly could be acquired only through Crown agents, could now be acquired by anyone. Maori land was on the open market and even individual interests fcould be acquired. Wi Pere opposed the Act when it was introduced to the Legislative Council by the Attorney-General, Sir John Findlay.

Kawharu (1977:25) says of the Act

for the majority of Maori people there appeared to be little to relieve the gloom, and what little there was, was illusory.

In fact the 1909 Act marked the commencement of even stronger Government initiatives to acquire Maori land. The Act established a Native Land Purchase Board within the Native Department, the latter having been established in 1906 with dual roles in servicing the Native Land Court and buying native land. Government authorised the Board to expend up to $1,000,000 per annum on land buying. Between 1911 and 1920 Maori holdings were reduced from 7,137,205 to 4,787,686 acres and Carroll's hopes of retaining a patrimony of 7 million acres were shattered. Of that left, 750,000 acres were leased to Europeans and over 750,000 acres were unsuitable for any development. The tempo increased yet further under the Reform Government from 1912. William Herries became Native Minister, rationalising wholesale acquisitions by espousing the view

the Maoris would survive best if forced to be as resourceful and acquisitive as pakehas
(King 1981:285).

Ngata was left to fight a rearguard action for the continued retention of Maori land but he was not to get any substantial development funding until 1928.

For Orakei the developments meant only that the Stout-Ngata recommendations were not followed. Instead a race was on to buy the land. Orakei became the bride sought by many suitors.

The lessees moved first in February 1910, with a delegation to Prime Minister Ward for an arrangement to enable them to buy the land, pointing to the

extensive improvements they had made. In turn the Prime Minister
announced an intention to re-examine the purchase of the land by the Crown.
The announcement appeared in the Auckland Star on 3 March 1910 under the
heading "Orakei Estate - possible acquisition by the Government?" But when
by August the lessees had had no firm reply, the local Member of Parliament
raised the matter with the Prime Minister on their behalf. He in turn referred
it to the then Native Minister, Sir James Carroll, suggesting revival of enquiries
for acquisition by the Crown begun in 1898. Carroll, conscious of the demands
on Maori land and still anxious to hold the larger tracts of central North Island
and the East Coast was willing to compromise in other areas. Orakei was part
of the price. Though the Minister was later to change his mind on 21
September 1910 he minuted

Rt Hon the Premier

I have always favoured the acquisition of the Orakei Estate by the Crown. Though
there are leases over a portion of it and the price will be pretty big yet I would
strongly
recommend the purchase. The Crown must get a good return besides satisfying a
strong and growing public demand.

J Carroll

Thus was the Crown confirmed as a rival contender for this last bastion of
Ngati Whatua land. On 7 November Cabinet directed a report. The
Under-Secretary for Lands directed the Commissioner of lands to make a personal
inspection and "a thoroughly good and confidential report thereon". He
added

the matter is rather urgent. I may state, confidentially, that the Crown wishes to
purchase the block. A full report followed. Only two impediments were seen - "the
successors now number upwards of one hundred" and the validity of the partitions
and leases was in doubt the Commissioner of Lands writing "Personally I am satisfied
that none of the titles are valid".

Updated valuations were obtained and on 13 February 1911 Cabinet directed
an inquiry into the validity of the titles and leases. The Solicitor-General replied
he saw no advantage in questioning them. Valid or not the purchase price
would be the same. If the leases were invalid the Crown would have to pay
full price to the owners and compensation to the lessees for improvements
and if valid the price would simply be divided between owners and lessees
according to lessor and lessee valuations. It did not even cause concern that
the Crown should be satisfied that any seller would have proper title. That
was thought to be the problem of the Maori.

Then the Auckland City Council became the third contender. Auckland had
stretched to Orakei and building was going on all around. The adjoining
Lucerne Estate at Pukapuka and the Kohimarama Estate which had earlier
been built on, were in the process of being further subdivided. High prices
were being paid for building sites on adjoining lands much inferior to the

Orakei block with its commanding views on the ridges and prime location. It was the choice site for housing development as every developer involved with adjoining projects would have known. "Acquisition of Native Lands Orakei" was on the agenda of the Auckland City Council from at least March 1911 when the matter was referred to the Finance Committee. On 1 June the Council appointed an Orakei Estate Purchase Committee comprising representatives of the Council, Auckland Harbour Board, Chamber of Commerce and Mayor of Mount Eden to enquire and report on the advisability of the purchase of the Orakei Estate by the City of Auckland "with power to ascertain particulars of title and price and call for expert opinion as to the best method of subdividing and dealing with same." The move was widely publicised. The Auckland Trades and Labour Council responded quickly (12 July) with a submission urging the acquisition, but, "for the erection of workers' dwellings". The Committee favoured the development of an experimental garden suburb. "If you can get Parliament to permit your City Council in proper circumstances to acquire that large area to provide for future expansion of the city you should wisely take that step" counselled Sir John Findlay in an address at his Parnell electorate (New Zealand Herald 10.10.1911 p7).

The City Council lobbied the House throughout 1911 and 1912.

The media publicity covered more than the proposed Bill to compulsorily acquire Orakei. Articles appeared on model garden suburbs established overseas (e.g., New Zealand Herald 15.9.1911 p6), unsanitary living condition threatening Auckland with "the serious danger of plague" (New Zealand Herald 8.8.1911 pp4,6), and Native Land laws seen as stifling progress. The Herald (4.4.1911 p4) delivered a scathing commentary on figures released by A T Ngata on unoccupied native lands and those, over four million acres, assessed to be "under profitable occupation" - ". . . by which he means of course" read the Herald leader "that this land is occupied by European tenants or leaseholders who pay rent for the privilege of improving it for the Maori owners." (Native land leased to Europeans was in fact given as 2.5 million acres.) The article continued

Mr Ngata and Sir James Carroll may preach the doctrine of education and monetary assistance for the Maori, but their actions speak louder than their words and all their actions are in the direction of building up a Maori landlord caste, which will grow rich on the exertions of the European. And the amazing thing is, the mystery of mysteries, that this attempt to establish a hereditary landlord caste is supported by those who profess to hold progressive ideas.

Edwards J, in a case on Maori lands then before the Court of Appeal was reported in the Herald (8.8.1911 p4) as advancing the theme, with a comment in the course of hearing

if the present system of restricting dealing with native land were continued long enough it would in the end create a Maori landed aristocracy.

The Herald agreed, adding

although the Chief Justice (Stout) expressed his disagreement with this, it will be generally agreed by all who do not hold preconceived ideas as to the desirability of preserving the Maori race from the necessity to work and the responsibilities of citizenship, that Mr Justice Edwards is unquestionably correct. . .. this unpardonable establishment in our midst of an hereditary Maori aristocracy [would] be supported by the rack-renting of a land-hungry European tenantry, through whose toil the native wilderness is to be transformed into fertile and productive farms.

A deputation led by the Mayor of Auckland approached Sir Joseph Ward who in turn undertook the Government would facilitate the passage of a Bill enabling the compulsory acquisition of the block by the Council. Drafting of the Bill was not complete when in March 1912 the Ward ministry resigned. A new Liberal ministry formed under Hon T Mackenzie, to resign in July, and then a Reform ministry emerged the following month under Hon W F Massey. The Council found it necessary to lobby both the citizens of Auckland and the Members of the House and there was considerable newspaper publicity for the proposal during both 1911 and 1912.

Meanwhile during 1911 the lessees, seeing the Crown was not allowing them to buy, took steps of their own. Through the legal firm that had arranged the 1896 partitions and first leases, a syndicate was formed under Matthew Henderson, an entrepreneur who was negotiating land acquisitions from a northern hapu of Ngati Whatua at Reweti. It was at Reweti at the beginning of 1912 that the purchase of the Orakei lands was first discussed with owners. It was then also that the legal firm engaged a young Orakei man, Ngapipi Reweti, to translate the discussions and assist them. Some owners, envisaging the passage of the Bill and the compulsory acquisition of Orakei land and believing forced sales yielded the lowest prices, were anxious to treat. For even as these discussions continued huge sewage storage tanks and sewer pipelines were being built on the papakainga foreshore, despite the Orakei residents' protests, on Maori land already compulsorily acquired for those works. Many owners relied on Ngapipi to arrange things quickly. There was no point in testing the market more widely. There was a time constraint and who other than the syndicate would buy on the open market if their lands were subject to long term leases?

There had always been, of course, a fourth group of contenders - Ngati Whatua people opposed to sale although still considerably divided over the owner versus trustee question. Prominent amongst them was Otene Paora.

Otene was born at Orakei in 1870. He spent some time 'working in the bush'. Later he was ordained a priest in the Anglican Church. But it is as a preacher for the collective ownership of the Orakei land that he is best remembered for he was to urge recognition of the customary entitlement from at least 1904, at age 34 and relatively young to be involved in tribal affairs, until his death in 1930. Like Paora Tuhaere before him he had an unhappy beginning in the Native Land Court when, in 1904, he unsuccessfully sought a repartitioning of the land to admit more to the title. Like Tuhaere he sought in the alternative a political solution, for also in 1904, he filed a petition through Hone Heke, Member for Northern Maori, for an investigation into the Orakei situation. The

Native Affairs Committee recommended an inquiry and that inquiry eventually came when the Stout-Ngata Commission, appointed in 1907, included the matter in its general land use survey. As we have seen the Commission concluded the land was intended for the tribe as a whole and should be preserved for them as such. When no steps were taken to implement the Commission's recommendations and the lessees moved to buy, Otene petitioned the House again, in 1911, claiming the sellers' title was defective. A majority of five to four in the Petitions Committee considered title questions should be settled in the Courts and the petition was put aside. In some desperation Otene returned to the Native Land Court, this time seeking leave to appeal against Chief Judge Fenton's original decision. The grounds were

1. That the thirteen owners were merely representative of the tribe.

2. That at the time the tribe then in occupation greatly exceeded thirteen.

3. That only men were included but women were entitled.

4. That some of the thirteen were not resident on the block while occupiers with greater rights were excluded.

5. That the shares of the thirteen were equal, which suggests they were merely trustees.

6. That Renata Uruamo had not only a personal right to inclusion, but a special right under the mana of his grandfather Uruamo, but Renata had been excluded.

Leave to appeal was refused the Chief Judge stating

It is quite possible that names were omitted from the list of owners when the decision was given some 38 years ago, but if the matter is to be re-opened it must be done by Parliament, as I am not going to order a new trial of a decision given in 1873 (sic).

Otene, who lacked Tuhaere's knowledge of law and legal process and was without legal counsel, petitioned the Legislative Council. Once more it was recommended that Government hold an inquiry. Otene knew this would take time and when the City Council became a contender with the Crown, and the lessees began worrying people to sell, he petitioned the House once more, in 1912, seeking a stay on sales pending an inquiry. "They have received payments" Otene was to complain in evidence, when the petition was heard, " of £50 a piece, £10 a piece and so on; this man has signed, that man has signed and so on; and the lawyers approach me at every corner of Queen Street and drag me in to sign away my living."

Otene wrote to Prime Minister McKenzie on 29 April 1912 for himself, and he claimed, some 50 others. He stated

I earnestly assure you that there is great difficulty existing about this land. The difficulty is that many persons in the title have shares which are too large, some of

them having no original rights thereto, while on the other hand many included in the title and having original rights have shares alloted to them which are altogether too small, whilst others again having original rights have been omitted from the title. I represent these, therefore our Petition is now prepared. I need not dwell on the details. You will find sufficient information as to these by referring to the [Stout-Ngata
Commission Report] and the decision given at Auckland by Judge McCormack of the Native Land Court on 6 August 1910 [a decision to include all successors on a succession rather than selected representatives]. Therefore our Petition to Parliament and we earnestly entreat of you not to enter into even a provisional arrangement with [the Mayor of Auckland] until the difficulties referred to are adjusted
...

Otene and his party were not the only ones to complain of the lessee's activities. Media controversy raged when the Council learnt too, following a complaint to the Mayor on 2 May 1912. "Everyone in Auckland knows the position" said the Mayor calling on the lessees to desist in favour of the Council (Herald 4.5.1912 p7). The action was seen as pre-empting the Council's initiatives but the lessee's lawyers responded " [the owners] resent the proposal to confer upon any person or corporation a pre-emptive right." Ngapipi Reweti led a deputation to the Mayor assuring him that if the price was satisfactory the owners would prefer to deal with the Council (Herald 6.5.1912). The Town Clerk meanwhile had already written to the Minister of Native Affairs on 3 May 1912. He pointed out the City Council had set up a Special Committee with the object of promoting the acquisition of Orakei and had been in communication with the Government before, "requesting that the Auckland City Council might be afforded necessary facilities to acquire the freehold of the property", and that the Council had received every encouragement in response. He advised of the syndicate's intervention "not-withstanding the fact that the Council's intentions with respect to Orakei were publicly notified on several occasions last year", and requested that steps be taken to protect the interests of the City "as against mere speculators". He recommended

that the Government should at once issue an Order-in-Council under Section 363 of The Native Lands Act 1909 operating for 12 months and prohibiting the alienation of any part of Orakei, thus affording time for the City Council to promote legislation at the next Session of Parliament dealing with this matter.

The Crown did respond, albeit to appease the Council, issuing on 9 May 1912 a prohibition on the sale of any part of the Orakei Block - to anyone other than the Crown. But it was already too late. Four transfers for the sale to lessees of 104 acres in all had already been lodged with the Maori Land Board for confirmation. One was dated April 1912, two I May 1912 and the fourth May 4 1912 (New Zealand Herald 6.5.1912, 7.5.1912, 8.6.1912). Soon after, at least according to the transfer dates, many more were signed bringing the total area to 387 acres. Although each lacked legal effect without prior confirmation by the Board, it was to transpire the owners had been paid substantial deposits, committing them, where the money was spent, to supporting the

confirmation applications. Wiremu Watene, the largest owner and a seller contended later that year

when the Acts of the Council were issued I became frightened and I said, well, I would be willing to sell at a proper price.

The lessees filed the transfers for the confirmation of the Tokerau District Maori Land Board arguing that the Order in Council did not apply to those transfers predating it. The Council responded by letter to the Prime Minister of 10 June 1912 urging that the Crown Solicitor seek an adjournment of the proceedings before the Board "until a fair opportunity had been given to the public of Auckland to decide as to the acquisition of this property", adding

the public feeling here is that at all costs this fine Reserve should not be allowed to get into the hands of private speculators.

The Crown did indeed move to stymie the lessee's putt, by-passing the District Native Land Board and even the Supreme Court by an action moved direct to the Court of Appeal, but since the decision came later, in 1913, it will be dealt with later in this report. In the meantime Parliament was pre-occupied with Otene's petition on the one hand and the Council's Bill on the other. The latter was dealt with first. It reached the floor of the House in August 1912 under the sponsorship of Hon A M Myers, Member for Auckland East.

The Orakei Model Suburb Empowering Bill was an amazing proposal for the compulsory alienation of the Orakei people from all but the papakainga area of their land, (given as 31 acres not 43 as originally partitioned or 85 acres as the Stout-Ngata Commission proposed). It was presaged that even that area might pass to the City in the course of time. It was to be inalienable to anyone other than the City Council (although parts could be taken for roads). The New Zealand Herald thought the Bill offered

a magnificent field for an experiment which can hardly fail and which win result in a remarkable gain to Greater Auckland, a remarkable advance in the social life of the community.

There was no unanimity amongst House members. Prime Minister Massey was generally supportive following a deputation from the City Council and the advice of the Town Clerk that the natives were willing to sell, but he questioned whether native land could be taken compulsorily except for public works (Herald 2.8.1912 p8). Hon. A M Myers questioned whether a model suburb was not a public work. A second deputation reported however "amongst many members, Maoris in particular, there is a distinct undercurrent of feeling against the Bill" (Herald 5.8.1912 p6).

A heated debate followed in the House. Those supporting the Bill argued that special provisions had been made for the Maori and that a reserve, to be inalienable, was to be established. But the Maori members opposed the Bill vehemently. Dr Maui Pomare replied that there was other land available in Auckland without compulsorily taking Maori land. He claimed "Maori land

was being filched gradually until the Maori had no security. They made the land inalienable one day, and the next they did away with it. What was the use of making a reserve inalienable if they were going to do that sort of thing". Pomare believed the Bill to be a violation of the Treaty of Waitangi and the Constitution Act; the Maori would lose their heritage. The land under consideration was made inalienable - for what purpose? So that the Maori people in that district should have a heritage for all time. It was now proposed to take that heritage away from them. An exact parallel, he said, would be a proposal by the natives to establish a pa in Auckland Domain. Dr. Buck was equally opposed. Prime Minister Massey was eventually to conclude that Orakei "(should remain inalienable in the hands of the Natives" (NZPD, Vol 161, 1912, P98).

Still the Bill passed a first reading and while it stood referred to the Local Bills Committee of the House, Otene Paora's petition was before the Native Affairs Committee. The composition of the latter had undergone some change - there were now five Maori among the twelve members (Carroll, Ngata, Parata, Pomare and Buck). Amongst the Ngati Whatua witnesses there was division. Twelve appeared in favour of the petition, thirteen, led by twenty-three year old Ngapipi Reweti, were opposed.

Before the Native Affairs Committee Otene contended that all the descendants of Tuperiri should be included in the title, or if not that many, then at least the heads of all the families including in particular a descendant of Uruamo. It was said that Uruamo died shortly before the 1869 decision. A representative for his line had been omitted from the arrangement because his successor had not emerged. It was claimed the Uringutu Hapu had been left out and there were many others at Orakei without title or interest.

With regard to the sales he said

What I want to point out is that now certain of my co-owners in this land have sold. Now, under this representation it was found that this land was to be preserved for those ancient tribes and hapus. I contend that my friends who have taken this action have permitted the canoe of my ancestors and tribe to float about. I contend that I am right in maintaining that [the Stout-Ngata report] upholds my present claim. Now, Tuperiri was the ancestor under whom the Native Land Court heard this matter. I claim that all the descendants of Tuperiri should be included in this land. Some of them only have been put in, and some of them have been left outside to swim about in the sea, or where they like. I say that if this Government does not uphold this petition, then it would be better that this Government should build a canoe and put on board that canoe those descendants of Tuperiri who are not included in this land, and let them drift away into the ocean ...

With regard to tribal ownership Otene referred to Carroll's Act of 1900 for the administration of Maori lands through Tribal Councils

The Council's Act was framed for that particular purpose - for providing for purposes such as this. What was the object of that Act - I mean the Maori Councils Act? The Acts have been passed by Parliament for the purpose of upholding and assisting and

furthering the welfare of the Maori race. I say that if those Acts were passed with that intention on the part of the Government when they passed them - namely, the upholding and the furthering of the interests of the Maori people - then this is a particular case in which this should be done. Now, I hope and pray that this Government, seeing that I have been for a long time past contesting with the other Government - eight years now - without any means of support, will, and that the present Committee will, give due consideration to this petition...

The opposition, who had in fact filed a counter petition, and some of whom admitted they had already sold and had received cash, maintained they were absolute owners.

They claimed others had been left out of the 1869 arrangement because they had taken larger shares in the Kaipara lands of Ngati Whatua. The petitioners denied that was the case. (Nor have we found evidence of it and nor was an exchange provided for on an investigation of title).

Wiremu Watene, the sole survivor of the original thirteen gave evidence in opposition. The transcript records his answers to Doctor Pomare's questions:

Do you maintain that this land was for the thirteen owners absolutely? Yes.
Do you think it was an equitable arrangement? No it was not.

The same witness was to say on another inquiry in 1930

I admit that the original thirteen owners were only trustees for the three tribes - Taou, Uringutu, Ngaoho. Owing to some feeling between us, I objected at Wellington (before the Native Affairs Committee) to the inclusion of the three tribes (17 Auckland MB 181 of 18 July 1930).

The Native Affairs Committee voted 7 to 5 in favour of the Petition on a motion, in October 1912, that the evidence be tabled in the House with a recommendation that the Petition be referred for an inquiry. Sir James Carroll, it should
be noted had now changed his view, voting in support of the motion. In the following month the Committee voted against the Orakei Model Suburbs Bill, though it had the prior approval of the Local Bills Committee, and that put an end to the Auckland City bid. The second reading was moved on 4 November but the Bill was dropped.

The Mayor's regret was conveyed in a telegram to the Prime Minister and published in the Auckland Star on 4 November 1912

Deeply disappointed over Orakei. Nothing can now prevent (name of legal firm) securing block for syndicate. Already fourteen transfers, signed by Maoris during last few months to pakehas at low prices. Maori opposition instigated by interested Europeans. I presume the Government accept the responsibility for the Native Minister's action, which means the triumph of private speculators and utilisation of Orakei in the worst interests of Auckland and the Maori owners. I regret I cannot

allow any party predilections to prevent me protesting against great wrong to Auckland.

In the Herald (6.11.1912 pl0) the Mayor also expressed regret for the natives, for the Bill also "reserved 40 acres for their own use forever" though he had previously given no prominence to that point. In fact, as earlier mentioned, the Crown had taken action in respect of the lessee's transfers, and the proceedings in the Court of Appeal will shortly be considered. But although, at long last, Otene had won a battle, he was about to lose the war. A Commission was never constituted to inquire further into the Petition, and while the lessee's bid was about to be thwarted by the Crown, it was not in order to protect Ngati Whatua, to place a caveat on sales until true ownership could be established, but in order that the Crown could acquire the land from those whose title was in dispute. Indeed, when the Model Suburb Bill finally lapsed on 7 November and the Hon A M Myers requested that the restriction on alienation be maintained "meantime", the Native Minister Hon W H Herries had no difficulty in agreeing, for, as he said, it was his intention to see if the Crown would buy the whole block!

---

05 The Clouds Before the Storm 1869-1912

5.10 Solicitor-General v Tokerau Land Board

5.10 Solicitor-General v Tokerau Land Board

Although it was held in In re Hawkes Leases (supra) that dealings in Orakei were governed by the Orakei Act 1882, and not the Native Land Act that required confirmation of dealings by the Board, by 1912 the general opinion was that the Orakei Act had been impliedly repealed by the Native Land Settlement Act 1905, so that confirmation under the 1909 Act was required. In any event it was inconvenient for the Crown to argue the 1882 Act still applied for while it would have prevented sales to the lessees, it would also have stopped a sale to the Crown. Neither would it have assisted the Crown's objective to argue the sellers' title was void as it was unlikely the tribe as a whole would sell.

The Crown developed instead the opinion of the Stout-Ngata Commission that the partitions were void for if they were, the private sales would be out of order, but the Crown could still buy. A writ of Prohibition was taken out by the Solicitor-General to prevent the Board from dealing with the applications until the question of the Commission's view had been determined by a Court of Law. The proceedings, instituted in the Supreme Court were moved direct to a hearing in the Court of Appeal. Judgment was given on 17 April 1913. The case was heard by the full bench of that Court comprising five Judges and is reported as The Solicitor-General v Tokerau District Maori Land Board and Others [1913] NZLR 866.

Two of these Judges, Chief Justice Stout and Mr Justice Edwards, had already expressed conflicting opinions. We quoted earlier (5.9) the view of the latter, in 1911, that restrictions on native land sales would lead to 'a Maori landed aristocracy' and the disagreement of the former, but surprisingly, the Chief Justice heard the appeal too, though he had reported on the Orakei issue as Chairman of the Stout-Ngata Commission. Not surprisingly they made conflicting judgments in the case on appeal.

The Court of Appeal did not address the wider issue of whether the thirteen owners were, or were meant to be trustees only for the tribe as a whole. It did not need to dispose of the matter before it. At law, Tuhaere alone (although deceased) held the legal estate when the land was partitioned. The other owners had what lawyers call a beneficial and equitable estate. That means, in this case, the others were entitled to the land though Tuhaere held the title. The question, for the Court of Appeal, was whether the Native Land Court could partition equitable interests to give legal estates to those whose interests had till then been merely beneficial.

By a majority of four to one the Court of Appeal held that the Native Land Court did have the power to partition equitable interests in the way that it

had and that the partitions were therefore valid. Chief Justice Stout, of course, was the dissentient.

The Court of Appeal gave brief attention to the validity of the Crown Grant of 1873. There were doubts about its validity because the land was vested in one person on trust for thirteen when the law said no more than ten could be recorded on a title and nor could the title record a trust. Four Judges considered this point. Three held it was irrelevant (neither counsel had raised the point anyway) for even if it were invalid, the Orakei Act 1882 validated it by giving the grant legislative recognition. The fourth judge, Edwards J, was also of the view that any invalidity was cured by the 1882 Act but went on to express the view that the grant was invalid when it was made, and that it was made under section 17 of the Native Land Act 1867.

It appears Edwards J presumed rather than determined that the grant was made under section 17 because, as he said, it was the only section that ever authorised or recognised anything in the nature of a trust affecting Native Lands. He added

> In order to put the matter beyond controversy the original of the orders of the Native Land Court have, however, since been produced from the official records through the Registrar of this Court. These show, as the grant itself shows, that the order of the Native Land Court, which was treated as the basis of the grant, was an order under the 17th section of the Act of 1867.

In fact the sealed order is expressed to issue pursuant to the Native Lands Act 1865 and the Grant refers simply to 'the Native Lands Act.' As noted at para 4.7 the prerequisite for a valid order under section 17 was that the section had to be expressly cited in the order and grant for the law did not allow the disclosure of a trust on a title. It allowed no more than the hint of a trust by reference to the empowering statutory provision in the order effecting conveyance.

In any event the Judge's opinion was not central to the Court's finding. The decision, as we read it, is authority for no greater proposition than that the Native Land Court can partition beneficial interests and equitable estates. That finding was important for the Native Land Court, for since then, and to this day, the Court has partitioned such estates, and in fact most Maori Land Court partitions are now in this category. But the decision is not authority for the proposition that the 1869 order was made under section 17 of the Native Land Act 1867 and nor did it determine that Chief Judge Fenton was correct in awarding the title so as to exclude the greater number of the tribe. That needs emphasis because later Chief Judge Jones, the Lee Committee and the Supreme Court in 1978 were all critical of Judge Acheson's opinion in 1928 that Chief Judge Fenton was wrong. Chief Judge Fenton's order, it was thought, had been upheld in the Court of Appeal. In our view, it was not.

In any event the Court of Appeal upheld the 1898 partitions, enabling confirmation of the lessee's transfers to be considered. Leave to appeal to the Privy Council was granted but as it turned out, was not needed and that for

the simple reason that the Maori Land Board declined confirmation of the lessees transfers!

Without abandoning its right of appeal to the Privy Council the Crown decided to let the matter run before the District Maori Land Board for in the Board's opinion, there was no order to further stay the confirmation hearings after the Court of Appeal had ruled. Although it was not a party to the proceedings before the Board, the Crown was in fact represented, arguing against confirmation of the sales on the ground that the Crown was a willing buyer. The Board did not consider this a proper ground but nonetheless declined confirmation of each of the seventeen transfers, for the reason, in each case, that the sale price was inadequate. The Board noted "the value of the lands as building sites, the opening up of the adjoining estates and the contemplated increase in value in the near future" and considered these "sufficient reasons to amply justify the Board in refusing confirmation". No chance was given the lessees to raise the purchase prices.

That put an end to the lessees' bid, but not to their interest. Money already handed over had to be repaid.

From the available information three other factors need stress. The Crown contended in 1978 that it moved to buy the land only because the owners were going to sell. In fact the Crown investigated buying the land as early as 1898 and had favoured compulsory acquisition before anyone sold.

The Crown has also pointed out it paid more than the lessees offered. It could hardly have paid less when confirmation of the lessees' transfers was refused because the price was too low!

The third factor is obvious. Two months after the Board's decision of June 1913 Cabinet approved the purchase of Orakei by the Crown. That decision was made five years after a statutory Commission comprising a former Premier and the then Chief Justice, and one of Maoridom's greatest politicians, had specifically recommended the reservation of the land for Ngati Whatua. It was also made ten months after a Petition challenging the title of the sellers had been favourably recommended by the Native Affairs Committee for inquiry.

There was never that inquiry. In November 1913, after the Crown's decision to buy had been made, the Legislative Council referred the Petition back to the Native Affairs Committee for further consideration. In 1914, after most of the Orakei block had been sold to the Crown, the Committee resolved against further action. That put an end to the tribal bid. And the question of who should really have owned the land, the original grantees, a greater number of persons, or the tribe as a whole, was never settled.