

FENTON, THE 10-OWNER RULE, AND THE THEORY AND PRACTICE OF THE EARLY MAORI LAND COURT, 1865–79

10.1 Introductory Notes

This section further discusses the practices of the Maori Land Court in its initial years of operation. As has been shown in the previous sections, the interpretation of Maori land tenure by the Maori Land Court was a problematic exercise. A number of variables came into play, not the least of which was the complexity of Maori land tenure and the court's desire to find 'owners' to land. This section will therefore critically connect a number of the points raised in the sections above to statements made by Chief Judge Fenton, some of the early judges of the Maori Land Court, and the legislation under which the court was established. The texts referred to are taken primarily from 'official' reviews of the Maori Land Court published in 1867, 1871, 1884, and 1893 respectively.

This section is divided into four parts, each covering a separate but related issue. Firstly, statements that indicated the general intent of the Maori Land Court will be reviewed. These statements help explain the overall direction taken by the Maori Land Court. Secondly, the problem of establishing precedents or principles will be briefly examined. Here it will be argued that while Fenton was concerned to develop a body of 'common law', the court's desire to individualise Maori land tenure and the practice of making out-of-court arrangements overrode any comprehensive understanding of Maori land tenure that may have been developed. Thirdly, the 10-Owner Rule will be examined in light of the legislation under which the Maori Land Court was formed. A number of 'problems' that were recognised by the court will be discussed. Fourthly, the reforms of the Maori Land Court under the Native Land Act 1873, will be examined. It will be argued that despite these reforms, the court appeared to continue with the practices established under earlier legislation.

10.2 Judicial Statements of Intent

The judges initially appointed to the Maori Land Court (for example Fenton, Clarke, Rogan, Maning, Mackay, White, and Monro) all had some prior knowledge

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of Maori custom. All could speak Maori, and most had been involved in the purchase of Maori land or had in some way acted as agents for the Crown. Fenton, for example, had acted as resident magistrate in the Waikato region, while James Mackay was the civil commissioner for Auckland.¹ Indeed, in 1891 James Mackay was asked, 'Do you consider that the Native Land Court since its commencement has improved in efficiency in the discharge of its duties?'.² He replied:

I do not think it has improved. A great many appointments that have been made to it of late years have been of men who knew nothing at all about Native custom, and who could not speak Maori, whereas the original Judges were men who had been engaged in Native-land transactions for the Government, and were well acquainted with the Maori language and customs. I am not reflecting upon anybody in what I now say. I am simply speaking of the practice.

This prior knowledge and the experience gained by individuals 'in the field' was therefore taken into, and in many ways created, the Maori Land Court. In 1860 Fenton commented that:

No system of government that the world ever saw can be more democratic than that of the Maoris. The chief alone has no power. The whole tribe deliberate on every subject, not only politically on such as are of public interest, but even publicly they hold their 'komitis' on every private quarrel. In ordinary times the *vox populi* determines every matter, both internal and external. The system is a pure pantocracy, and no individual enjoys influence or exercises power, unless it originates with the mass and is expressly or tacitly conferred by them.³

This understanding of the communalistic nature of Maori society was shared by other judges (on the whole it was an accurate albeit limited view). However, Fenton's understanding did not translate into sympathy. 'Communalism' was considered to be 'primitive' and, ultimately, based on violence. It was an aspect of Maori society that British colonists commonly sought to change. Furthermore, in a paternalistic manner the early judges appear to have believed that their work was of benefit to Maori – that the court was designed to exchange a faulty or imprecise system for one that provided security and precision.

A number of statements made by Maning and Monro in a report on the workings of the Native Lands Act 1865, further illustrate these points. For Maning:

the 'Native Lands Act, 1865', satisfies a great want and vital necessity of the Maori people, by offering them a means of extricating themselves from the Maori tenure, and obtaining individual and exclusive titles for land. That most of the middle-aged and younger Natives take this view of the matter is beyond doubt, as is proved by many circumstances . . .

That disputes, and even cases of violence, may occur about the division of lands is not at all unlikely amongst a people who value land now more than ever, and who,

1. AJHR, 1860, e-1c

2. AJHR, 1891, g-1, p 43

3. AJHR, 1860, e-1c, p 11

like the Ngapuhi, are ready to take arms on a small occasion. Every Court, however, which is held, and every block of land which is adjudicated upon, will render the recurrence of these land disputes more and more unlikely, merely by defining precisely and finally the boundaries of the lands of tribes and individuals, and thereby removing the causes for contention . . .

it is scarcely to be expected that in that time [fifteen months] any very great progress would appear in a movement, the success of which would create to a certainty a completely new set of circumstances with regard to the Maori people – a revolution in fact – which must of necessity displace barbarism and bring civilisation in its stead, for the difference between a people holding their country as commonage and holding it as individualised real property is, in effect, the difference between civilisation and barbarism.⁴

In 1867, Monro reported that:

The Natives, wherever I have been, have repeatedly expressed their satisfaction at the mode of procedure, and appear to have the utmost confidence in the Court. Questions which a few years ago used to be decided by an appeal to arms, they are now content to leave to peaceful arbitration.

In the majority of cases no restriction on alienability was imposed, the grantee having abundance of other land. Where such was found not to be the case, the land was made inalienable. Several long standing disputes have been settled, which on more than one occasion had nearly led to bloodshed, and the bitter feeling engendered by such disputes is gradually dying out, by the removal, through the action of the court, of the causes which gave rise to it.⁵

Likewise, in 1871, Monro further commented that:

but inasmuch as it was plain that many of the rights of citizenship are inseparable from an individual tenure of property, and that land is one of the most important species of property . . . an instrument for the conversion of the Native communal [title] into an English proprietary tenure, which would confer upon its possessors of either race, not only the rights of owners of the soil, but those also of freeholders – in a word, of citizens.

so far from being averse to seeing large tracts of land alienated from their aboriginal occupants and passing into the hands of the European colonists, I have always looked upon the wide extent of the uncultivated holdings of the Maori as a curse to them rather than a blessing; and I maintain that every legitimate encouragement should be held out to them to part with their surplus lands to those who can make the use of them for which they were intended, care being taken that each Native has ample land secured to him for his own maintenance.⁶

This, therefore, was the court's overriding purpose – to extinguish Maori customary tenure and transform Maori society. Moreover, the understanding of the nature of Maori society had by Fenton and his fellow judges enhanced the court's power –

4. AJHR, 1867, a-10, pp 7–8

5. AJHR, 1867, a-10, pp 8–9

6. AJHR, 1871, a-2a, p 41

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the early judges saw, albeit in a limited fashion, how Maori society functioned, and thus they were the individuals most able to orchestrate its transformation.⁷

10.3 The Formulation of Principles

From the outset, Fenton, with his legal training, was concerned to establish the principles of law under which the court operated. The Rees commission of 1891 recorded the following statements:

[Fenton] . . . I made an attempt, after I found that the men who acted as Judges disregarded precedents, to have men appointed who had had a legal education, and who therefore, of course, would have a religious regard for precedent . . .

Another point I have to speak upon was a question as to whether I desired an appeal to the Supreme Court . . . I have been thinking it over, and my idea is that the less you have to do with the Supreme Court the better. All the principles which guide the one tribunal [the Maori Land Court], and which are founded on the original principles of equity, are entirely absent from the Supreme Court. The Supreme Court has the advantage of being guided by a long series of decisions from the learned men who have gone before us; and I say with all respect, men whose minds have been trained in that direction are almost incapable, at first at any rate, of beginning at the beginning and asking themselves, 'How did this principle arise?' They find it, and apply it; but when they are forced into the position they make one for themselves, and go to first principles. I think that is about as unfit a tribunal as can be to deal with Native matters.

[Mr Rees] You consider that in dealing with these Native lands, and attempting to apply our system of administration to Native customs, we must resort to first principles?

[Fenton] Yes, until you have established a common law. The Native Land Court must respect its own precedents, or you will never build up a system of common law.⁸

Likewise, under the 1871 review of the court, Heale identified:

The want of settled rules as to Native title and evidence; that is, some outlines, at least, of a code of received Native custom and usage and a settled and simple law for the guidance of the Court.⁹

Heale was primarily concerned that the court had started out without a clear definition of what constituted Maori title to land:

7. One problem that these early judges may have had, however, was to confuse exclusive use-rights that were held by individuals or whanau and the wider rights of the hapu, particularly with regard to the disposal of rights. Indeed, comments about the communalistic nature of Maori society often miss these finer distinctions.

8. AJHR, 1891, g-1

9. See Heale to Fenton, 7 March 1871, AJHR, 1871, a-2, p 19

whether conquest absolutely extinguished the rights of the conquered? What right remained to conquered or submitting tribes suffered to remain on land in some subject capacity? (Rahi) rules of inheritance, &c.¹⁰

Various other commentators have seen the need for the court to attain a clear understanding of Maori custom. William Martin, in his memorandum of 1871, noted that the question of succession was particularly vague.¹¹ However, the court does not appear to have responded to this challenge until Fenton published *Important Judgements*, preferring to rely on the background knowledge of its judges. From the text of *Important Judgements* a number of ‘principles’ can be deduced. But these often appear to be ‘common-sense principles’ and, moreover, are not set out in a systematic manner. Nonetheless, it is possible that judges of the Maori Land Court used this work as a body of case law, however limited it may have been. For example, in the judgement for the Tiritirimatangi block, Fenton elucidated the ‘rules of evidence’. He believed that the Native Land Court had ‘relaxed these rules in matters of pedigree as to allow parties to have recourse to traditional evidence, often the sole species of proof that can be obtained’.¹² Fenton later stated that in situations where evidence was contradictory, the court ‘has had to trust to the evidence of a few apparently uninterested witnesses’.¹³ In the Orakei hearing, Fenton appears to have distinguished between the ‘take’ of ‘descent, conquest, and possession and occupation’ and stated that:

No modern occupation can avail anything in establishing a title that has not for its foundation or authority either conquest or descent from previous owners, except of course in the case of gifts or voluntary concessions by the existing owners.¹⁴

This ruling in many ways follows the discussion of ‘take’ detailed in sections 2 and 3 above. Three other cases, for Owharo, Waihi, and Te Aroha, gave Fenton an opportunity to discuss the rights held in cases of conquest. The well-accepted principle that conquest had to be followed by occupation was made clear, and the court also took the position that conquered peoples who remained on the land could be awarded title to their cultivations. In all these cases, however, it would appear that the residual rights of other groups remained, or that certain rights were still being contested (see sec 3.6), and that the court thus came to a somewhat arbitrary decision. Nonetheless, *Important Judgements* is a significant text, and should be further consulted for questions of court policy and practice.¹⁵

But it is only with Smith that a comprehensive collection of the ‘principles’ of the court and of Maori land tenure is composed.¹⁶ This is, of course, many years

10. Ibid

11. AJHR, 1871, a-2, p 4

12. Fenton (1879): 25

13. Ibid, p 123

14. Ibid, pp 86–89

15. This report has not attempted to make a thorough study of *Important Judgements*, although such a study may be of future use.

16. Norman Smith, *Native Custom and Law Affecting Maori Land*, Wellington, 1942

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after the majority of title investigations were completed. Moreover, from evidence contained in minute books it would appear that matters other than questions of law influenced the early court. As has been detailed (sec 3.4), the court often let Maori resolve their own disputes over tenure. As a further example, Wi Te Wheoro wrote that:

My opinion with regard to the Land Court is, that proper decisions are not arrived at. I may state that Mr. Rogan is the man whose proceedings are wise so far as this, that he allows the Maoris to come to some arrangement themselves, and that is why the disputes respecting land in that district have been amicably settled.¹⁷

It would appear, therefore, that a distinction could be made between the early judges, who tended to work perhaps on a case-by-case basis, trusting to their ability to rule equitably, or leaving difficult questions to the claimants themselves to work out, and later judges, who came from a legal background, and who may have worked more with precedent and principles.¹⁸ Further investigation would be required, however, to draw a firm conclusion on this question.

In other respects, it can be argued that the political and social agenda of the court as discussed in the preceding section came to the fore, creating an environment in which investigations of title were dominated by the court's concern to create an individualised system of tenure above and against an accurate interpretation of Maori land tenure. In this case, the court's desire to individualise Maori land tenure, and the constraints imposed by such a move, overrode any comprehensive understanding of Maori land tenure that the court may have developed. We shall now discuss this problem.

10.4 Provision for 'Tribal' Title in the Early Native Lands Acts and the 10-Owner Rule

A close reading of the initial statutes under which the Maori Land Court was established suggests that a degree of flexibility was provided for the manner in which Maori land tenure was to be transmuted into legal title. Indeed, it appears that the court was given the discretion not to enforce a strict individualisation of tenure. For example, under the Native Lands Act 1862, applications for an investigation of title could be made by any 'Tribe Community or Individuals of the Native Race', and the court was required to:

sign and issue a Certificate of Title in favour of the *Tribe Community* or *Individuals* whose title shall have been ascertained defined and registered as aforesaid. [Emphasis added.]¹⁹

17. Wi Te Wheoro to Colonel Haultain, 23 May 1870, AJHR, 1871, a-2a, p 29

18. See also Mackay's evidence to the Rees commission, AJHR, 1891, g-1

19. V26, no 42, s 7

Likewise, applications for an investigation of title under the Native Lands Act 1865, were to be made by an individual, but such an application was required to state the name of ‘the tribe or the names of the persons’ who claimed an interest. Moreover, the Native Lands Act 1865, provided an option under which a certificate of title could be issued to a ‘tribe’ in blocks over 5000 acres:

the Court shall order a certificate of title to be made and issued which certificate shall specify the names of the persons *or of the tribe* who according to Native custom own or are interested in the land describing the nature of such estate or interest and describing the land comprised in such certificate or the Court may in its discretion refuse to order a certificate to issue to the claimant or any other person Provided always that no certificate shall be ordered to more than ten persons Provided further that if the piece of land adjudicated upon shall not exceed five thousand acres such certificate may not be made in favour of *a tribe by name*. [Emphasis added.]²⁰

This section thus provided for the creation of a quasi-communal title (perhaps akin to ‘tenants in common’) under the rubric of ‘tribe’. In many respects such a provision responded to Maori practice. Maori could, conceivably, have continued to manage their own tenure and social relations within such tribal blocks.

But such provisions stood in stark contrast to the preambles of both the 1862 and 1865 Acts, that is, the declared intention of the Acts to transform Maori land tenure and thus transform Maori society (‘to encourage the extinction of such modes of ownership into titles derived from the Crown’).²¹ In other words, the provision for the creation of title held in common appears to contradict the court’s stated purpose of changing the ‘communistic’ nature of Maori land tenure.

Suffice it to say, in practice the court did not make use of these provisions, preferring instead to place up to 10 owners on the title and thus following the general aims of the Act set out in the preamble.²² Indeed, the fact that such options existed in the statute, and the fact that the court clearly took one option over the other, points strongly to the court’s preference for procedures that would convert Maori land tenure into individual ownership, and not, for example, a legalised communalism of ‘tribe by name’.

Yet again, however, the court faced a contradiction. The Native Lands Acts clearly stated that the court was to ‘ascertain by such evidence as it shall think fit the right title estate or interest of the applicant and of *all other claimants to or in the land*’ (emphasis added).²³ But if the court declined to award title to a ‘tribe by name’, the only option left was to place up to 10 owners on a certificate of title.

Given the complexity of Maori land tenure, such restrictions were certain to cause problems, and many early critiques of the Maori Land Court focused on this issue.²⁴ For example, William Martin launched a sustained attack on the 10-owner

20. 29v, no 71, s 23

21. 29v, no 71, preamble

22. Fenton later stated that to his knowledge title was awarded to a ‘tribe’ twice. See Fenton’s evidence in AJHR, 1891, g-1. Such ‘tribes’ were typically a long list of names, including individuals from a number of different hapu.

23. 29v, no 71, s 23

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rule in a memorandum on the operation of the Native Land Court. His criticism is worth citing in full:

The original enactment was so framed as to secure the object of the Act as stated in the preamble, 'the ascertainment of the owners' meaning, doubtless, all the owners. But upon that enactment a proviso was grafted, out of which these troubles have arisen, namely, 'That no certificate shall be ordered to more than ten persons.' This was added, no doubt, for the purpose of avoiding the inconvenience which would, in many cases, lie in the way of a persons desiring to rent or buy land, if it were necessary for him to deal directly with all the owners. It was therefore provided that such intending lessee or purchaser should have a limited numbers of persons to deal with, and that the names of these persons should appear on the face of the document. That was a very reasonable object, and capable of being attained, as we shall see presently, without any unjust or injurious consequences. It could not be intended that the convenience of the purchaser was to be secured by ignoring or sacrificing the rights of any of the owners.

The grievance of which we now hear is this: that the proviso and the original enactment have not been reconciled, but that the proviso has been allowed to overrule and defeat the substantive enactment to which it is appended; that, although the land comprised in the Certificate may belong to more than ten persons, a Certificate is granted which names only ten of the owners, and gives no indication of the existence of other owners; that the ten persons named in the Certificate or the Grant have not, on the face of the Certificate or the Grant, been made to appear as only joint owners with others unnamed and trustees or agents for those others, but have appeared on the face of those instruments as the sole and absolute owners; that, as such, they have, either of their own motion, or being induced by other parties, conveyed the land to purchasers; and that in this way many persons have been deprived of their rights.²⁵

Martin also argued that the 10 owners were not often equal owners: 'the interests, even of the several grantees themselves, however diverse and unequal, are not defined'.²⁶

Of course, the Native Land Act 1867,²⁷ significantly changed the requirements of the 1865 Act by requiring the court to ascertain the:

right title estate or interest of the applicant and of all other claimants . . . and that the Court shall order a certificate of title to be made and issued which certificate shall specify the names of the persons or of the tribe who according to Native custom own or are interested in the land . . . [and] that a certificate in favour of persons should be ordered to issue to certain of the persons interested therein not exceeding ten in number in such case . . . and the Court shall *cause to be registered in the court the names of all the persons interested in such land* including those named in such certificate and the particulars of the interests of all such persons . . . [Emphasis added.]²⁸

24. Maori often complained about this restriction. See the various submissions included in the Appendix of AJHR, 1871, a-2a.

25. AJHR, 1871, a-2, p 3

26. Ibid

27. See also the Native Lands Act 1869

In other words, the court was required to keep a record of all individuals interested in the land, while up to 10 individuals were to be placed on the certificate of title. This provision was something of a mix-and-match, retaining the restriction of 10 owners but recording all who were interested.

But Fenton did not agree with Martin's criticism of the 10-owner rule or section 17 of the Native Lands Act 1867. Fenton stated that the effect of section 17 'would be to make perpetual the communal holdings of the Natives'.²⁹ Moreover, he questioned whether the section had lost sight of the overall aim of the Acts and argued that the court would continue nonetheless:

I think the discretion is still left with us; and, believing that the great object of this system of legislation is the abolition of communal ownership of land, and the substitution of titles known to the law in lieu thereof, the inclination of my mind will be so to exercise the discretion with which the Court is still, in my view, entrusted, as to refuse to issue a certificate of title, which will not on the face of it disclose the names of all the persons who are shown to the Court by evidence to be the owners, according to Native custom, of the lands described therein; or, in other words, to order subdivisions until the names in the grant are brought within the legal number, and display the whole of the persons interested in the property.³⁰

The problem with Fenton's position was, as will be detailed immediately below, the subdivision of land. Given the multiplicity of Maori rights in larger blocks, something that Fenton no doubt recognised, a vast number of surveys were required if such blocks were to be given 10 or fewer owners. Such surveys were extremely expensive, and it should be assumed that Maori, when faced with Fenton's insistence on 10-owner titles or the simple need to pay for survey costs, would have continued to appoint de facto trustees.³¹ Interestingly, Fenton appears to have recognised this contradiction. In a letter to Donald McLean of August 1871, Fenton argued that:

As early as 1866 I stated my views, that where counter-claimants, claimants, and proposed lessees had all a direct pecuniary interest in preventing the minute subdivision of lands, it would be impossible for any Court to discover the ownership of these lands beyond such a point as would suffice to terminate all contest amongst the claimants themselves. I therefore never expected that the Act of 1866 or 1867 would stop the mischief to which they were directed, as they threw upon the Court *a duty which it was quite incapable of performing*; and so it has proved. Having once decided the class of claimants to which an estate belonged, the Court became powerless to discover more than these recognised claimants chose to disclose, as all opposition ceased.³²

28. 31v, no 43, s 17

29. Opinion of the chief judge on 17th clause of Act 1867; Letters, 7 April 1868, AJHR, 1871, a-2a, p 41

30. Ibid

31. The question of survey costs has not been detailed in full in this report. It is, however, an extremely important problem.

32. Fenton to McLean, 28 August 1871, AJHR, 1871, a-2a, p 10

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Fenton's statement is extremely revealing. Firstly, he clearly acknowledged that the court worked to 'decide the class of claimants to which an estate belonged' while being unable to properly apportion individual interests. Fenton thus admitted that the court would ascertain the general group who held the strongest use-rights in a particular blocks, but that the court failed to execute its primary purpose – the ascertainment and apportionment of individual title in a European sense. Indeed, it appears that under the 10-owner rule, the court manufactured a pseudo-individualistic tenure of 'joint tenants, but one in which the tenants acted as individual owners, and not as trustees for the other right holders under Maori land tenure.

Secondly, Fenton appeared to suggest that the 10-owner rule was the product of a Maori reluctance to subdivide their land. This argument is quite problematic. As has been discussed, the court ignored provisions provided by the Native Lands Act 1865, for the award of title to a 'tribe by name', wishing instead to encourage individualisation of title. Moreover, Maori were clearly unwilling or unable to pay for the costs of extensive surveys. Fenton himself stated:

The fact is that now Maori are fully aware of the frightful expenses of the present system of surveying – a system which, in some cases almost consuming the entire proceeds of the land when sold, is still burdensome and unremunerative to the surveyor himself.³³

We can therefore ask, why did the Maori Land Court continue to operate if the chief judge himself believed that the court was unable to satisfy its statutory requirements?

The opinions of other early judges on this subject are also of interest. On the whole they did not present a radical critique of the 10-owner rule and, while being aware of difficulties, supported the continued operation of the court. In 1867, Monro commented that:

Apart from the question of surveys, I cannot say that I have experienced any difficulty in the practical working of the Native Lands Act of 1865, except what may have arisen from clause twenty three limiting the number of grantees to ten persons, but this difficulty has in each instance been easily overcome; and as one great object is to induce the Natives to individualise their titles as far as possible, I think it would be inadvisable to alter it.

Monro's comments about the ease with which arrangements were made appears extremely optimistic. White, in contrast, stated that 'the Natives have shown anxiety to place as many names on the grant as possible, which, of course, adds considerably to the expense when they are required to go to a distance to transfer their property.'³⁴ But White tempered this criticism with reassurance. He did not believe that the Court should be abolished. As a final example, in 1871 Monro commented extensively on the 'ten owner rule'. His comments provide a good outline of Court practice. For Monro:

33. Ibid, p 11

34. AJHR, 1867, a-10, p 10

Defects in the working of so entirely new a system are, of course, to be expected; and perhaps the most prominent of these is to be found in the difficulty arising from the number of claimants interested in particular blocks. Although the entire lands of any tribe were owned by the whole of it, in its widest extent, yet sections of that tribe had their several portions of territory restricted to them by the same condition of occupancy by which the larger tribe held the larger area.³⁵

In bringing the Native Lands Court Acts into operation, it was trusted that the Maoris would see the wisdom of practically allowing such subdivisions of the territory to take undisputed effect, and such has been to a great extent the case, each sub-tribe or family waiving their rights over the lands occupied by others, on the condition of being allowed undisputed ownership of their own particular holdings. Thus, one much-desired result, the individualisation of land title, has been advanced a great step towards its accomplishment. With a view to that end, it was decided that not more than ten names should be inserted in any Crown grant . . . the Legislature having in further view, when making this provision, the great practical inconvenience certain to result, in any subsequent transactions, from having any larger number to deal with where unanimity in action would have become essential.³⁶

Monro then argued that these arrangements had been carried out satisfactorily, with the exception of the large run holdings in Hawke's Bay:

These runs therefore were passed, in accordance with the proviso, in the names of ten claimants, in reality and equitably, trustees for the benefit of themselves and of their co-proprietors; but in appearance and at strict law, absolute owners of these tracts. I need not enlarge upon the abuses to which such a state of things has opened the door.

The question, how this evil may best be remedied, is a difficult one. The insertion in the grant of the name of each individual interested in it is, in practice, in many cases so evidently impossible that it may at once be dismissed. The most effectual remedy, a more complete subdivision of the land, so that no more persons should be interested in a single grant than could practically be dealt with, is in the hands of the Maoris themselves . . . The registration of the names of the claimants in the Court, under the 17th section of the Act of 1867, and the issue of a certificate only to determine the proper parties to be dealt with, is the only remedy as yet discovered for this acknowledged difficulty.³⁷

But contrary to Monro's assertion, there is little suggestion in the early Native Lands Acts that the Crown expected Maori to 'waive their rights over the lands occupied by others'. The text of all the Acts is quite clear: the court was to ascertain all the owners of any block of land according to Maori custom. Monro's comments are, therefore, an indication of the practice adopted by the judges of the court, rather than the policy prescribed by statute. That the Crown acquiesced to this departure from statute is of serious concern.

35. Monro to Fenton, 12 May 1871, AJHR, 1871, a-2, pp 15–16

36. AJHR, 1867, a-10, p 10

37. Ibid

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It is also clear from the above comments that the court believed that it faced a number of problems when it translated multiple rights under Maori land tenure into freehold titles. Indeed, it may be a mistake to use the term 'translation', as this implies a degree of compatibility and no compatibility was intended. And, as Fenton and Monro explained, the court appears to have acknowledged that it was not able to make a comprehensive assessment of that tenure. To turn the problem upside down, however, the court did know enough about Maori land tenure to see that it had a problem.

This observation supports the discussion presented in sections 1 to 3 above: that the court believed it was able to assess the general ownership of land with some degree of certainty (when that land was not 'contested'), but that lesser use-rights or overlapping rights were passed over. What is important here, though, is that these lesser rights were not passed over because they were entirely invisible to the court, but because the court believed that to acknowledge them was tantamount to supporting the continuation of communistic forms of tenure. Thus two main limiting factors appear to have operated during an investigation of title:

- (a) how well the court (or individual judges) understood the evidence presented to the court; and
- (b) to what degree the court deliberately distorted this evidence in order to make rights under Maori land tenure fit the limitations of the 10-owner rule or later restrictions.

10.5 The Native Land Act 1873 and the Continuation of the General Principles of Court Practice

It can be argued, therefore, that the early judges of the Maori Land Court personally acknowledged the complexity of Maori rights to land but generally chose to ignore this complexity so as to facilitate the individualisation of title. Indeed, given the early judges wide experience, language skills and their stated recognition of the communal rights of tribal groups (although this understanding may have been limited), the restrictions enforced by the 10-owner rule appear not to be a mistake or a misinterpretation, but a conscious strategy contrived to transform Maori social organisation and make Maori land available for European settlement.

In this case, the court supported the perceived objective of the Native Land Acts (the destruction of Maori land tenure) over and above the just and accurate translation of Maori land tenure into a form cognisable in English law. Indeed, one of the most ardent nineteenth-century Pakeha critics of the 10-owner rule, William Rees, observed that:

The gentlemen who were appointed Judges of the Native Land Court very likely knew enough of Maori customs to decide who were the rightful owners of any block brought before them; but they seem, as their successors have often since seemed, quite unable to understand the meaning of the English law which they had to apply.³⁸

Likewise, the Hawke's Bay Native Lands Alienation Commission of 1872 presented a strong criticism of the 10-owner rule:

No one can doubt the expediency of legislation to promote the breaking up of tribal property. But, in effecting this, justice or at least good policy, requires two things: first, that the Native ownership be ascertained; secondly, that the general consent of the Native owners to the extinction of the Native tenure be given. Simple as are these requirements, they have been disregarded in the existing law as practically administered. . . . The Court is thus put in a false position of certifying, that the Natives chosen by the body are 'owners according to native custom' of the land in question – this plainly importing that they are exclusive owners. Such a certificate is necessarily false; for, if the native title is to be considered as subsisting, the persons are not exclusive owners; if the Native title is to be considered as extinguished in their favour, they are not owners according to Native custom.³⁹

Of course it could also be argued, as Rees did, that the entire project of individualising Maori land tenure was 'a very gross act of cruelty and bad faith as well as folly'.⁴⁰

However, criticisms of the 10-owner rule made in the late 1860s and early 1870s, contributed to a reform of the Maori Land Court under the Native Land Act 1873. Section 47 of this Act stated that memorials of ownership were to be issued to all individual persons interested in the land (any number of individuals could be included):

After the inquiry shall have been completed, the Court shall cause to be inscribed on a separate folium on the Court Rolls a Memorial of ownership . . . giving the name and description of the land adjudicated upon, and declaring the names of all the persons who have been found to be the owners thereof, or who are thenceforward to be regarded as the owners thereof under any voluntary arrangement . . . and of their respective hapu, and in each case (when so required by the majority in number of the owners), the amount of the proportionate share of each owner.⁴¹

Nonetheless, this provision had serious problems too, and it should not be assumed that the defects of the earlier Native Lands Acts were remedied by the 1873 Act. Firstly, evidence suggests that the court did not change its basic practice of determining the 'general group' to which the land belonged, and awarding the title to such a group. In this case, overlapping or secondary rights were still passed over, but the group who 'won' the title investigation was typically asked to provide a list of all the owners. Indeed, the Native Land Act 1873, recognised 'voluntary arrangements', and thus sanctioned the practice informally adopted (and encouraged by the court) whereby Maori had 'exchanged' rights to various areas of land so as to fit into the restrictions of the 10-owner rule:

38. AJHR, 1884, sess ii, g-2, p 1

39. Hawke's Bay Native Lands Alienation Commission Act 1872; Reports by Chairman of Commission, Mr Justice Richmond, AJHR, 1873, g-7, pp 6-7

40. AJHR, 1884, sess ii, g-2, p 4

41. 37v, no 59, 1873

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In carrying into effect the preceding sections [relating to the investigation of titles], or any of the sections hereinafter contained regarding partitions, the Court may adopt and enter a record in its proceedings of any arrangements voluntarily come to amongst themselves by the claimants and counter-claimants, and may make such arrangement an element in its determination of any case concurrently or subsequently pending between the same parties.

In part this provision appears to contradict the court's duty under section 41 to 'ascertain . . . not only the title of the applicants, but also the title of all other claimants to the land'.⁴²

Secondly, the list of names presented on a memorial of ownership were typically given equal shares. This meant that a chief could hold as large a right to the land as did a child. While the ownership of the land was partly protected (because all owners were required to agree to a sale), such an apportionment facilitated further individualisation and fragmentation, particularly with later cases of succession and subdivision.⁴³

Further measures that were intended to 'protect' Maori had dubious success. Survey charges were advanced by the Government, removing one of the difficulties in bringing the land to the court. But the 'owners' of the land remained liable for these charges, and the Government was able to take land in lieu of payment. District officers were required to make preliminary investigations into the title of the land in order to ensure that no interested parties would be ignored. Likewise, the judges of the court were required to make preliminary inquiries so that they did not have to rely on evidence provided in court. In practice, neither of these provisions were followed.

Fenton himself later commented that 'The intention [of the 1873 Act] was to do celestial justice, which I always believe to be impossible in this wicked world'.⁴⁴ With regard to the provisions of the Native Land Act 1869, Fenton was asked the following question:

Do you think it was deemed necessary to place the names of all the people interested on the back of the certificate because it was found that the ten persons whose names had hitherto been used in each of a number of cases were appropriating the land for themselves?

He answered:

No doubt. I thought at the time what a very bad remedy it was. The true remedy was to compel the tribe to subdivide. Supposing the number still limited to ten, to subdivide amongst themselves until each ten of the tribe had got his share. That was the true remedy, instead of endorsing these names on the certificate, which, to my knowledge, was productive of very great confusion afterwards. The objection to the scheme of subdivision was the expense of the survey, which of course was a real

42. Ibid

43. Sections 65 and 66 provided, however, for the partition of land in the case where individuals objected to a sale.

44. AJHR, 1891, g-1, p 47

objection; but you cannot subdivide millions of acres without hardship and difficulty in some cases. The true remedy, however, would have been the refusing to do anything until they had marked off for each ten men their own share.⁴⁵

We can assume, therefore, that the practice of ascertaining all the owners and apportioning an interest to these owners under the 1873 Act was attempted by the court in only a cursory or arbitrary manner. Indeed, Fenton was quite clear on this point with regard to earlier legislation:

Under the Act of 1869, which was mine, provision was made requiring the assent to a sale of the majority in value; but the Court in administering that Act found it to be practically impossible to discriminate between the values of individual Natives; and the shares of the owners were practically treated as equal, not because it was right, but because the Court could not do anything else.⁴⁶

Again, the court appears to have been faced with a series of contradictions. It was designed to abolish Maori land tenure, but was obliged to do so on the basis of such tenure. While under the 10-owner rule blocks were often awarded to individuals as de facto trustees, when further individualisation and subdivision occurred under the Native Land Act 1873, say when a number of individuals wished to sell their 'interests', nothing within Maori customary tenure could provide a basis for such a subdivision. As Edward Puckey was asked:

So far as you have any knowledge of Maori custom, is it in accordance with Maori custom to cut up the land between men, women, and children of the hapu? – Certainly not. They have no idea of it at all.⁴⁷

To conclude this section, while the Native Land Act 1873, officially abolished the 10-owner rule and other dubious measures of the early Native Lands Acts, the informal principles of practice adopted by the court through the period from 1865 to 1873 appears to have remained. While these 'informal principles' were never codified or officially recognised, they can be usefully summarised as follows. Further study should be done to see if these principles were practiced in the court after about 1880. As can also be seen, most of these practices have been alluded to in the preceding sections:

- to allow and encourage Maori to come to their own arrangements outside of court, and thus to simplify the overlapping rights to land and questions of title;
- to decide on disputed cases with reference to a wide range of 'take' but to stress the strength of rights supported by occupation over and above rights based on other factors, and, where such a process does not result in a clear title, to rule according to loosely defined principles of equity;

45. Ibid

46. Ibid, p 48

47. Ibid, p 66

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- to award the title to a single group while ignoring lesser rights of other groups, with the exception that particular sections of a block may be partitioned off to satisfy such lesser rights; and
- to apportion individual interests on an equal basis, with the occasional exception where circumstance demands (such as the inclusion of an important rangatira, who may receive a number of shares rather than one).