

CHAPTER 5

THE REMOVAL OF RESTRICTIONS

5.1 POLITICS AND RECORDS IN THE 1880s

Restricted grants for Maori landowners came into the political limelight in the course of the 1880s. There were several reasons why this happened. These were not primarily concerned with protecting Maori interests, though this was generally one of the reasons. The Pakeha settler population generally distrusted speculators and their political allies. Their spokesmen could be expected to express suspicion of an area which offered so many legal loopholes as the purchase of Maori lands, and particularly of those aspects of land purchase where governments had a flexible policy.

Some members of the General Assembly had axes to grind. They believed their own districts were being held back by needlessly complicated laws. They argued that without the security of a Crown grant, Pakeha farmers would not develop lands they had acquired in all but legal title. These spokesmen saw restrictions as small print to be dispensed with by some sort of validation process. The wider context was an economic depression, which did not lift until the next decade. In these circumstances, political attention fixed on restrictions as a barrier to development and prosperity.

There were other areas of contention, where critics in Parliament saw the Crown as acting restrictively. For example, the Government Native Land Purchases Act 1877 allowed the prohibition of private purchasing of a block in which the Crown had taken an interest. Proclaiming restrictions over whole districts, as with the Thermal Springs Districts Acts 1881 and 1883, and later legislation for the Rohe Potae and the Urewera, gave the Crown a monopoly of purchase. This policy was different in scope and purpose from that of imposing restrictions on titles. The partial and then full re-adoption of Crown pre-emption is a separate issue from the subject of this report, though this development contributed to the general level of criticism governments faced over questions to do with land purchases in the 1880s.

In 1882, Robert Hart, a member of the Legislative Council, made a speech linking the removal of restrictions on alienation with the improper use of political power. He spoke about the two principles which he believed had guided the Legislature in dealing with the land Maori possessed under the Treaty of Waitangi. One had been to facilitate its transfer to European settlers, under peaceful conditions and with a legal title. The other had been to prevent Maori from pauperising themselves by improvidently selling land and becoming a burden on the State. Having entered briefly into the reason for imposing restrictions on

alienation, he came to the point. He believed that private interests had been involved in their removal. Hart then called for a return of all cases in which restrictions on alienation in grants of land to Maori had been removed by the Governor prior to the end of March 1882. He asked that the return should be an annual one.¹

There was little further discussion. The Premier, Frederick Whitaker, thought that it would take a great deal of time and money to extend the survey back to the earliest years. Hart amended his motion, proposing March, 1880, as a starting point. Dr Pollen, who had held office as Native Minister for 10 months during 1876 and 1877, did not agree that it would be difficult to table the information because he believed the Governor had been called on to remove restrictions in very few cases. 'During the time in regard to which he could speak of his own knowledge, the power was exercised not more than half-a-dozen times.'²

Printed returns of cases where restrictions had been removed from grants of land to Maori were presented to the General Assembly annually from 1883 to 1891. In order to provide this information, the Native Office for a number of years set aside the files of applications for the Governor's consent to the removal of restrictions. There are, then, two levels of information available to historians: the printed tables of returns which are readily accessible, and the documents from which they were drawn. The printed tables alone, though they give information about particular cases, are misleading as a guide to general policy. From archival records, it is clear that the Government turned down far more cases in the 1880s than it accepted.

The Native Office assembled material on this subject, which has been kept in a special series. Some files contain records that go back 20 or more years. After 1886, the applications were no longer kept together. To trace all those which came before or after the special series, through registers and indexes to the records of the Maori Affairs and the Justice Departments, would take weeks, if not months. What the special series has made possible is a relatively rapid investigation of departmental practice and Government policy for a limited number of years.

What do these records tell us about how restrictions had been put on a grant in the first place? What was the background of the restrictions on grants which turned up for the consideration of the Native Office? First, the Native Land Court was not the only source of restrictions. Whole categories of land automatically carried a restricted title from Government decisions that had been made outside the court. A large class of lands carrying restrictions on their grants were those in the special districts where confiscation had been carried out. Lands in Waikato, on the West Coast (Taranaki), and the East Coast had been dealt with through commissioners. Lands were awarded to individuals and groups, and these grants generally carried restrictions. Again, there were exceptions, particularly in Taranaki. Some of this restricted land, in the Tauranga district, had been awarded to Maori soldiers who had served with the Government. These sections were automatically inalienable because of the location and because the grants were to Maori, but as the owners had

1. 31 May 1882, NZPD, vol 43, p 195

2. Ibid

served under the same conditions as the European militia, the restrictions were seen as anomalous.³

By the Native Reserves Act 1882, all lands defined as reserves were supposed to go under the administration of the Public Trustee. The complicated history of reserved lands, particularly in Wellington, meant that a number of them dating from the pre-land court era escaped categorisation as ‘reserves’. These were presented as cases for the Native Office to consider, as the property of individuals who were prevented from alienating them.

Secondly, even when restrictions on grants had arisen from a hearing in the Native Land Court, it was often not the judges who had taken the initiative. Inquiries were made to judges about why particular grants had been restricted. In a number of cases, their replies indicate that this had little or nothing to do with them. Nor could they give a reason, beyond stating that restrictions had been placed at the request of the owners. Judges apparently did as they were told. There was even a case where Fenton replied that restrictions had been reluctantly imposed by the court at the unanimous request of the owners.⁴ These answers reinforce an impression gained from sketchy records in the Native Land Court minute books that it was often because of Maori input in the court that land was restricted from alienation.

Individual judges differed. Some were quite clear about why decisions had been made, having themselves taken an active part. They intended that some form of protection should continue to be exercised. Brookfield, for example, showed that he knew something about whether owners had inadequate resources. He suggested in several cases that if land was sold, the proceeds should be invested for financial security.⁵

There is evidence of carelessness in the process of making records in the court and transmitting them correctly on to the titles. Parties appealed to the Native Office to sort out problems which had come about when one thing was decided in the court, and another appeared on the grant. Sometimes it was claimed that the clerk had made an error in entering restrictions that nobody wanted in the minute book.

5.2 THE REMOVAL OF RESTRICTIONS – THE PROCESS

The Native Minister was responsible for recommending that the Governor assent to the removal of restrictions. A new grant free of limitations would then be signed. It depended on the wording on the original grants whether it was the Governor alone or the Governor in council whose consent was required. If it was the latter, the Native Minister would presumably have to carry his Cabinet colleagues with him. Cases which were turned down at the ministerial level got no further.

3. Brabant, resident magistrate, Tauranga, to Native Minister, 4 July 1882, gives this as the first of a number of reasons for granting the request for removal of restrictions. ‘Return of Cases of Removal of Restrictions on Alienation of Maori Lands, 1883 to 1884’, AJHR, G-5, 1884, p 2.

4. 15 September 1882, MA 13/27, NO 86/1539

5. For example, 11 December 1882, MA 13/23, NO 82/3343

The Native Office had an advisory role only. None the less, the advice officials offered was generally taken by the minister. There were exceptions to this. John Bryce, as Native Minister, refused some applications which his staff had been prepared to accept. He was increasingly intolerant of legal irregularities which they had perhaps come to regard as normal.

In theory, the first request to have a restriction on a grant altered or removed was supposed to come from the owners. There are a number of Maori letters in the files. Almost all have contemporary translations. Some are very brief, but others go into considerable detail. They offer insight into a great range of economic conditions.

There was no guarantee that because the first letter appeared to have come from Maori owners, that this was indeed the beginning of the sequence. All too often, several layers down, it became apparent that a lawyer had been involved from a very early point, and a form of alienation had already taken place. The Native Office and the minister had to decide what the merits were of each individual case.

How was each application approached? It was often thought advisable to inquire from the local resident magistrate or district officer. As noted earlier, there were rules, and a list of guidelines exists. It was drawn up in 1882 to advise John Bryce on how to answer a request from H W Brabant. As district commissioner in Tauranga, he was unclear about what sort of points were required in these cases. T W Lewis wrote a memo to the Native Minister, which Bryce initialled for transmitting to Brabant:

The points on which you require to be satisfied before advising His Exc[ellenc]y to consent to alienation are generally these.

1. That the Natives have amply sufficient other land for the maintenance of themselves and their successors, or that from the unsuitability of the land to be alienated, for native occupation, or other considerations, if it is to their interest to dispose of it
2. That the owners of the land proposed to be alienated are *unanimous* in their desire to sell
3. That the price proposed is prima facie fair and reasonable. [Emphasis in original.]⁶

This basic set of rules is very like those which were given to the fraud commissioners. It was, on the whole, more tightly administered. Lewis had been in the Native Office long enough to be giving a reasonably accurate account of its conduct. Even so, there was room in these rules for interpretation.

As far as having land for support, it has already been pointed out that there was no common understanding of how much land was ‘amply sufficient’ for an individual’s needs. There were cases where it was recognised that there was so little left that all remaining land was strictly inalienable, as in Canterbury. In many cases, this criterion was becoming almost impossible to assess because of increasing fragmentation of holdings, with numerous owners. The Native Office relied for information on the Government agents in the field. The system seems to have been

6. Lewis to Bryce, 9 December 1882. This note was forwarded to Brabant, who headed it ‘The Native Minister’s Instructions as to reporting on applications from Natives to be allowed to sell reserved lands’; Waitangi Tribunal, RDB, vol 126, p 48638.

at its least protective when very large areas were involved. This is very clear from the pattern of the printed returns. When it came down to individuals, with clearly defined property, officials held the line, insisting that land must be retained.

Decisions about whether land was unsuitable for Maori occupation also rested on the advice of officers in the field. In the case of Wellington urban land at Te Aro and Pipitea, Charles Heaphy's advice seems extraordinarily short-sighted. He wrote that 'the pas in the Town form an exception to the rule of conserving for the natives the reserves in this district. The Te Aro Pa is a perfect centre of immorality'.⁷

In rural areas, land surrounded by European properties was sometimes seen to be no longer suitable for Maori. This was on occasion argued by the Maori owners themselves. Otherwise, 'unsuitable' land might include pieces which owners could not cultivate, because they were located a long way from where the owners lived. Swampy lands and rugged, bush-covered blocks which the owners themselves could not 'develop' were also thought to be better sold. Their value as a food source was not seriously considered, indeed, it was explicitly dismissed. Lands were described as not required by Maori for their support, not being used except for pig hunting and shooting birds.⁸ In these cases, it was always stated by the local officers that the Maori owners had plenty of other land for their support.

The Native Department made inquiries about ownership. Here again they had to rely on the officers in the field, not all of whom were habitually careful. Some applications came to an abrupt halt when the real owners wrote objecting to having to make any change in the status of the grant. To make the process more visible, after the passage of the Native Laws Amendment Act 1883 it was not lawful to remove restrictions upon the alienability of land owned by Maori, unless at least 60 days' notice had been given in the *Kahiti* or *Gazette*. The department was responsible for inserting the notices.

A 'fair price' required local officers to have an idea of relative land values. Sometimes a private valuer was consulted. A 'good price' was a recommendation; a 'fair enough price' seems to have been officially acceptable.

Pakeha, disappointed when applications were turned down, often argued that the rules had been broken for other people. If this had happened, it is more likely to have been a political decision, out of the hands of the office, or a case of mistaken identity, involving the trust commissioner. There was a great deal of questionable activity going on round the edges of land purchasing which the Crown seemed unable, perhaps unwilling, to control. One example of this was the readiness to remove restrictions in the Tauranga district, which was being 'opened up' in the later 1870s and early 1880s. The most difficult area was where decisions had to be made about transactions that were very far advanced before they came to official notice. The system was not foolproof, but the department itself seems to have tried to keep to the rules as they were understood.

Lewis characterised the general approach he believed was being taken by the department:

7. Heaphy to Clarke, 11 December 1877, MA 13/22, NO 78/929, NA Wellington

8. 'Return of Alienations of Native Lands, 1880 to 1883', AJHR, 1883, G-4, pp 3-4

It has always and I think fairly been presumed by the Native Department that when restrictions are imposed it is not intended that the land should be alienated unless very good reason is shown.

It is difficult to make the purchasers and even the natives see the question from this point of view, the former simply looking at it from the standpoint that they desire to obtain the land and the natives that they want to satisfy their present desire for money or what it will procure. The latter never I think considering the requirements of succeeding generations in view of which the restrictions are no doubt specially imposed.⁹

There is a certain amount of unjustified complacency in the paternalism expressed here. The officials themselves did not have a very extended sense of 'the requirements of succeeding generations'. This was one of the major weaknesses in the criteria which they applied. Questions were seldom asked about the long-term interests of Maori as a social and economic community when restrictions were removed from large blocks.

In this, Native Ministers and officials reflected contemporary Pakeha opinion. The involvement of such prominent public figures as Whitaker and Russell in purchasing inalienable lands raised questions in Parliament about political interests. Though there were differences of opinion about whether the Crown or private speculators should purchase large blocks, the reasons given for recommending the removal of restrictions were consistent with the views of most Pakeha. They were convincing ones for the authorities, however short-sighted they seem from a late-twentieth century perspective.

5.3 THE REMOVAL OF RESTRICTIONS – CASE HISTORIES

In some cases, the Native Office's role was paternalistic, or protective. There was a great range of different circumstances among the applicants. Some required little more than the completion of formalities. But there were also cases of almost inextricable confusion where both parties, Maori and Pakeha, intended to stretch or break the law. As inquiries progressed through the hierarchy, more and more notes were scribbled on files. Difficult cases provoked lengthy consultation. There were also straightforward cases, those of people whose applications were most likely to be approved, and those whose applications were most likely to be turned down.

There are two important qualifications to make at the outset. First, what follows is intended to show a broad pattern. It is not an exhaustive list. Examples which appear to illustrate a general point have been selected from a rapid reading of the complete MA13/22 to MA13/29b files. Brief details of the cases for which assent was given were noted in annual returns which were printed either in the *Appendices to the Journals of the House of Representatives* or the *Appendices to the Journals of the Legislative Council*. There is no printed information about cases that failed to gain consent. These have been drawn on relatively heavily in the discussion that follows. Principles tended to emerge more clearly from applications which were

9. Lewis to Bryce, 9 December 1882, Waitangi Tribunal, RDB, vol 126, p 48638

refused. Secondly, beneath the surface of the documents, all may well not have been what it seemed. Other researchers will bring more detailed knowledge to particular cases. The intention here has been to deal with general policy.

Individuals and families who were economically secure were the most straightforward group. This sort of case was usually checked for the standard requirements: whether the applicants were the only parties involved in the title, and their other principal land-holding.

‘I do not think we need to maintain the restriction on this. The Nicholls family are quite able to take care of themselves’, was the Native Office memorandum on one such application. The background was a claim through a Maori mother to 100 acres at Tauranga. Almost immediately, her family began negotiations to sell it.¹⁰ There were families and individuals who were recognised as not requiring any paternalism or protection from the Crown. The usual reason given for wanting to sell land was in order to invest the funds in some other property.

The name of Mrs Jane Brown, of Taranaki, cropped up in the course of evidence before the 1891 commission. She was described as thoroughly conversant with business and more able to manage her own affairs than any European woman in the colony. She arranged to have restrictions lifted from some of her property.¹¹ The Native Office received a very stiff letter from a young woman, Mere Tarawhiti, who wrote in English and explicitly stated there was no need for the Crown to intervene in her case.¹² Mrs Forsythe, the sole inheritor of her Maori mother’s land at Wanganui, lived in England. She used an agent to gain permission to have restrictions removed from her land and arranged for its sale.¹³

Another group who were likely to have their applications recommended were those Maori soldiers who had served with the Crown’s forces. Like their Pakeha counterparts in the ranks, they had been paid partly in land. Like their Pakeha counterparts, very few found that they were ready, without further instruction, to become farmers on 20 acres. The parcels of land they were paid with at Tauranga held no traditional associations for them. The Native Office might vet the bargains they made. It would not otherwise intervene as ex-soldiers turned land into ready cash.¹⁴

Ex-soldiers were permitted to sell ‘inalienable’ land; ex-rebels were not. It was not intended to return confiscated land for people to make a financial profit. There was a degree of political or social control in the policy towards this category of titles. Rebels were to ‘come in’, settle on land, and demonstrate the benefits of civilisation to those who were still holding back. Restrictions prevented ex-rebels from making a temporary return for the sake of a quick sale.

10. Head office memo, 13 June 1877; MA 13/22, NO 77/4384, NA Wellington

11. ‘Report of the Commission . . . into the Native Land Laws’, AJHR, 1891, G-I, p 93; MA 13/22, NO 77/4384, NA Wellington. *Heni te Rau o te Rangi* was always referred to as Mrs Jane Brown in official circles.

12. MA 13/23, NO 82/1109, NA Wellington

13. MA 13/22, NO 82/2613, NA Wellington

14. Apparently these had been promised without restrictions, but other arguments for the removal were also given by Brabant, resident magistrate, Tauranga. ‘Return of Cases in which Restrictions on Alienation . . . have been Removed’, AJHR, 1884, G-5, pp 2–3.

It is more difficult to understand what was behind the Native Office's customary refusal to allow people to exchange the land they had been awarded for more suitable pieces. The land in question might be described as useless, with the applicant residing elsewhere but no matter how sensible the applications appeared, they were often turned down without giving a reason. Though exchanges were not unknown, they were considered 'very troublesome', or 'not expedient'.¹⁵

A straightforward rejection was the response to applications from Canterbury Maori to alienate in any way the land reserved from the sales of the 1840s and 1850s. Why was this so? Requests were initially directed by the Native Office to Alexander Mackay for comment.¹⁶ As an official, he was particularly cautious. But regardless of Mackay, there seemed to be a general recognition that no further land could be alienated in Canterbury.

Did this help Canterbury Maori? It probably did in the long run, though it did not prevent poverty at the time. Possibly it obstructed the way in which individuals might have used their property to improve their economic circumstances. The period of early prosperity from timber, when the Maori community at Kaiapoi had been able to hire Europeans to work their land, had long passed by the 1880s. Maori landowners in Canterbury, and no doubt elsewhere where people held individual titles, often raised cash by leasing their land for years in advance. The land was restricted from sale, mortgage, or lease for more than 21 years, but no one could prevent the owners from leasing for shorter periods on whatever terms they chose. They arranged to purchase goods or borrow cash against future rents.

These arrangements kept them poor. Anticipating rentals several years in advance was the recognised practice in 1887.¹⁷ But the Government was unable to give encouragement to individuals in Canterbury who tried to improve their economic situation. For example, one very worthy applicant, Hamiora Tini from Wairewa or Little River, on Banks Peninsula, sought permission in 1884 to mortgage his land in order to raise capital and become a contractor. He needed £100 to buy a dray and two horses. His 14 acres at Kaiapoi were leased for a term of several years at £17 10s per annum. As the European writing on his behalf pointed out, Hamiora Tini could go to a money lender but that was not a desirable course of action. He hoped to raise the money by mortgage in the ordinary way at a reasonable rate of interest and to repay the loan in the course of three years.¹⁸

The Native Office gave no recognition to his record as a hard-working man, of respectable character, who had been in steady employment with a local settler for 26 years. He was turned down on the basis of clause 4 of the Native Land Act 1878, which stated 'that it shall not be lawful for any person to pay any sum of money by way of mortgage on any land held by a native under memorial of ownership or

15. For example, Morpeth, minute, with Bryce, 4 July 1883, MA 13/24, NO 83/2970, NA Wellington

16. 'Report of the Commission . . . into the Native Land Laws', AJHR, 1891, G-1, p 93

17. Mackay, 'Reports by Commissioners under the Native Land Administration Act 1886', AJHR, 1887, G-8, p 2

18. M Hart, Sydenham, to the Native Minister, 29 September 1884, MA 13/25-26, NO 84/2944, NA Wellington

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Crown grant.¹⁹ It is not clear that the office was bound by this Act. This was paternalism of a particularly unhelpful kind, given the individual context.

Mackay had cited the same clause in another case, only to say that the clause was ambiguous and required interpretation. Once again, the land was at Kaiapoi, and though the applicant was a person of standing, with other property, personal circumstances were not taken into account. Mackay wrote:

This is the first application as far as I know to be allowed to mortgage these lands, and irrespective of any law there may be to the contrary, I am of opinion that it would be very improvident to sanction a procedure of this nature as it is impossible to predict the ultimate effect it would have.²⁰

Applications for mortgages were a difficult category for the Native Office to assess. Officials tended to turn them down. This was hard on people like Hamiora Tini who required capital to start a business.

A long and complicated case in which the Crown became involved began in 1874 with a plan to raise capital on the Ngati Tamainu block of around 14,000 acres at Waipa. As this was land the Crown had awarded to the hapu after the wars of the 1860s, it came into a category for which alienation was restricted. The applicants already had £200, but more money was needed to buy a coastal vessel and build a store. While they could have gone to private lenders, they preferred to deal with the Crown.²¹

The Government responded – on the advice of H T Kemp – by providing £350 at 5 percent for three years. It was set down that all the owners had to agree, not just the names on the mortgage, that all the block was under mortgage, and that no sale could take place in that time except to the Crown. A long series of complications followed. The capital was slow to turn up, and there was consequently an objection to paying the interest. But worse: the vessel was lost and the store burned down. The tribe lost close to £600, was unable to meet interest payments, and drifted deeper into debt.

The administration refused to allow the owners to retrieve their situation by 42-year leases or by trying to re-finance through private lenders. Private parties with offers were standing in the wings, but quite apart from other consequences, these sorts of arrangements would have put the Crown's own security at risk. The Native Office contemplated selling off part of the block itself.²²

The hapu's case was put by Wiremu Patene and others in a letter to Bryce. (The original is in Maori.) It was pointed out that the money had not been spent foolishly, but in a 'pakeha speculation':

Therefore it is that we appeal to you the Guardian of the Maori people, to shew your consideration for us in the same manner that you would if you were our father,

19. T W Lewis, memo to Native Minister, 13 October 1884, MA 13/25-26, NO 84/2944, NA Wellington

20. A Mackay, Commissioner Native Reserves Office, to Under Secretary, Native Department, 30 July 1883, MA 13/24, NO 83/2336, NA Wellington

21. Anaru Patene (The Reverend Andrew Barton), Auckland, to T Kemp, Civil Commissioner, Auckland, 22 June 1872, MA 13/25, NO 84/488, NA Wellington

22. Memos and correspondence in MA 13/25, NO 84/488, NA Wellington

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and wipe off the mortgages upon the lands before mentioned. It is a matter of great grief to us that we have no means whatever to pay off this heavy debt, and these lands are our only means of subsistence, we have no other lands. If the Government will forgive us this debt we will never incur another.²³

In the end, the whole thing was resolved by the Crown writing off the debt, by the Special Powers and Contracts Act 1882, and sending the deed of reconveyance to Wi Patene. Though there may be other examples elsewhere, this is the sole case of its kind found in these files. It shows that the Crown had the capacity to act protectively and positively, to invest in an enterprising venture, and when this failed, to save the land for the Maori owners.

Funding required for the development of other lands was often presented by applicants as a reason for wanting to alienate restricted lands. There were several cases in this period, particularly from the Wairarapa, where groups of owners requested the lifting of restrictions so that they could use the cash to develop farms on other land. The Native Office, after checking that all parties were acting in good faith, were inclined to approve these applications.

Conversely, it was argued that some land should be alienated because it was beyond the financial resources available to Maori to develop. It might be described either in applications or reports from the local officers as unsuitable for 'Maori use'. This description, for example, was applied by the district officer to rough and swampy land at Taupo, which would require capital to make productive. Small pieces of land surrounded by the properties of Europeans were also occasionally seen, by Maori and Pakeha, as not suited for Maori use. The impression one gains is that this argument alone would not sway the Native Office.

Urban land in Wellington was going out of Maori ownership in these years, with the encouragement of Heaphy, the trust commissioner, who was always consulted. Heaphy wrote variants on the following theme on a number of occasions:

It is desirable for moral and sanitary reasons to let the Maoris leave the Pas in the Town. These people have country land sufficient for their requirements . . . this sale should be permitted, but on condition that the £200 now paid should be invested on mortgage for vendors' benefit.²⁴

In the 1880s, others as well as Heaphy saw Pipitea as an area of run-down buildings, which was not likely to improve. Maori were absentee owners and the land was leased. An effort was made to ensure that buyers paid market prices, and that the sellers had other land, but there was no attempt to suggest other options. Rolleston, as Native Minister, from January to October 1881, was one of the few who did not accept Heaphy's view:

I have again and again stated my disapproval of the alienation of these Reserves and will take no steps in advance of the N R Commissioner's Report in this matter. In

23. Wiremu Patene and others, Karakariki, to J Bryce, Native Minister, February, 1882, MA 13/25, NO 84/488, NA Wellington

24. Heaphy, 27 February 1880, MA 13/23, NO 82/2490

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view of the N R Bill before the Houses I don't propose to take any action till it is known whether that will pass.²⁵

Alexander Mackay, who was to report on these sites, has been praised by historians for his administration of the South Island West Coast Reserves, particularly his role in retaining urban land in Greymouth in Maori ownership. He evidently did not regard Wellington land in the same light; it would be interesting to understand more about why he handled it differently. He reported that the site at Te Aro, which Rolleston had seen as a reserve and therefore worth preserving in Maori ownership, was badly placed, that it had been used as a gravel pit, and that the price at £400 for 20 perches worked out at over £2800 an acre. On this advice, Bryce went ahead and advised assent.²⁶

In several of these Wellington cases, Walter Buller was involved as lawyer for one or other of the parties, the owner or the would-be buyer. On one occasion, when the Native Office had turned down a transaction on the grounds that the price was inadequate, the sum of £200 was advanced to an owner in circumstances which caused Rolleston, then Native Minister, to write:

I cannot see why these Natives should be divested of the only thing which stands between them and the lowest pauperism.²⁷

Rolleston was exceptional in expressing concern for the long-term consequences of selling restricted or reserved land. Preserving Maori ownership for its own sake was not Crown policy. Good reason had to be shown for withholding consent from Maori applicants who were able to show that they had other means of support and that they would receive a good price for land.

The most complicated applications came from those who were not managing well, needed to have cash and wanted to draw on their inalienable lands. On inquiry, some sort of pre-arrangement might be detected. There were determined would-be settlers who had already invested in the land; storekeepers appeared with lists of debts; or, more often, there were lawyers who had already acquired some sort of hold over the land, and could prove it with signed documents. These were cases in which Maori, either as individuals or groups, had become part of the cash economy whether they liked it or not, as in the following case. Miria Ani wrote that she wanted to fence in her other land to keep stock from ruining her crops, that she also wanted to fence the graves of her children, and that she wanted to improve her lands by purchasing clover seed. 'I have no money that is why I wish to sell my share.' In response, the local agent wrote:²⁸

Miria has not plenty of other lands in fact she belongs to a tribe called Ngatikoi which is almost landless within the Hauraki district, and will depend upon what Reserves they get out of the Ohinemuri Goldfield, for land to settle upon and cultivate

25. Rolleston, 2 September 1881, MA 13/23, NO 82/2490

26. MA 13/23, NO 81/4185

27. Rolleston, 14 June 1881, MA 13/23, NO 82/2490

28. Miria Ani, Owaroa, 17 February 1882, MA 13/23, NO 82/2490

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– I do not know what price Mr Reid is offering for the land – There are two other owners besides Miria, but their names do not appear on Miria’s application . . .²⁹

As can be seen, the local agent objected to virtually every point in the original application.

Cases which passed the Native Office sometimes met with a blank refusal at the ministerial level. One example was initiated by a most elaborate petition drawn up in English, in legal language, and certified as interpreted to the Maori signatories. According to this document, the land in question was never intended by them to have been restricted, it was useless to them, let at a nominal sum, surrounded by European lands, and moreover they possessed ample other lands for their support.

The Native Office asked for a report on the circumstances of the restriction from the Native Land Court. The usual response to this sort of inquiry from the court was that the restriction had been put on at the owners’ request, there was no particular reason for it, and that it might as well be removed. This case was exceptional. Judge Brookfield minuted that he had made inquiries during the hearing under section 36 of the Native Land Court Act 1880. He had learned that the owners had parted with nearly all their land and had not sufficient for their support. He had therefore recommended that the block be inalienable without the consent of the Governor. He had also told them that if they gained such consent, he would require that any transaction was properly conducted. It was specified that if they sold the land, the money must be invested for them by the Public Trustee or some fit and proper person, and the owners would be paid the annual proceeds.³⁰

At this point, the opinion of J E Macdonald, the chief judge of the Native Land Court, was also sought. Without further research, it is not possible to say how many of Brookfield’s fellow judges shared his respect for laws which protected Maori interests, or whether they followed the chief judge’s interpretation. The only phrase Macdonald thought worth emphasising in the restrictions on the grant was the one that provided for the Governor’s consent to exemption. Macdonald’s reply gives a glimpse of the gulf that existed between the attitudes of the various judges. He wrote:

I think it desirable that the restriction should be removed but cannot concur in Judge Brookfield’s idea of investing the proceeds and etc. We would be undertaking a new and troublesome duty. The money is said in the petition to be wanted for the purchase of farming stock. If that is true they should be allowed to have it. If not true the purchase money may just as well be squandered at once as piecemeal when the rental on any lease was paid.³¹

He does not seem to have taken the trouble to read the original petition very carefully, since he misses some points in it and adds others. However, T W Lewis in the Native Office was prepared to follow the opinion of the chief judge, even though it showed a complete disregard for Maori well-being, or any sense of a

29. G S Wilkinson, Native Agent, Thames, to Lewis, Native Office, 9 March 1882, MA 13/23, NO 82/568, NA Wellington

30. Brookfield memo, 11 December 1882, MA 13/23, NO 82/3343

31. 19 December 1882, MA 13/23, NO 82/3343

wider responsibility. Bryce, as Native Minister, was not similarly impressed. He noted:

Judge Brookfield says above, 'I learned that the Natives had parted with nearly all their land and had not sufficient for their support.' If this be true then alienation cannot be permitted.³²

One of the interesting points to emerge from this survey is the number of occasions when Bryce, as Native Minister from October 1879 to January 1881, and again from October 1881 to August 1884, held the line on restrictions against Maori and Pakeha alike. The more pressure Bryce was put under from Europeans, who had already convinced themselves they owned the land and only required an unimpeded title, the tougher he became.

The disquieting thing is that while the Government had the final word in this period over the removal of restrictions, it was the Native Land Court which had the duty to impose conditions of restricted alienability upon titles. While the Native Office's resources were limited, it had something of a tradition of checking applications. The court, on the other hand, had no extra staff to take on this role. Also, concern for the wider consequences of land alienation was limited by its preoccupation with the interpretation of the law. The political current was moving in the direction of having responsibility for recommending the removal of restrictions taken away from the administration, that is the Native Minister and the Native Office, and shifted into the sphere of the Native Land Court. And by the end of the 1880s, although safeguards in principle remained in place, changes in the law made the removal of restrictions easier.

5.4 THE LIMITS OF THE CROWN'S RESTRICTIONS POLICY – TAURANGA

Political difficulties arose in the later 1870s over where the line was to be drawn between Government land purchasing and the activities of private speculators – many of whom were themselves politicians. A Government headed by Sir George Grey was replaced in 1879 by one that was made up of an alliance of conservatives and Auckland speculators in Maori land. This was the background to the apparent inconsistency in the Crown's handling of lands returned to Maori in the Tauranga district. Discussion of the restrictions applied to land transactions in Tauranga will help to define the purposes and limitations of the Crown's policy.

The Native Land Court had not sat in Tauranga. Legally the whole district had been under the same sort of arrangements which had been made in other confiscated areas by the New Zealand Settlements Act 1863. In 1878 the Government instructed the Commissioner of Tauranga Lands that grants should be issued to Maori with the limitation that 'the said land hereby granted shall be inalienable by sale or by mortgage or by lease except with the consent of the Governor'.

32. Bryce, 6 January 1883, MA 13/23, NO 82/3343

Though aware of the restrictions, Europeans had entered into negotiations for these lands, spent money, and obtained deeds signed by some of the grantees. Their next step was to get the consent of the Governor to the conveyance.

Vincent O'Malley has provided a clear account of the sequence of land alienation in the Tauranga district in this period.³³ As he points out, between 1 April 1880 and 31 March 1885 restrictions were removed in respect of 33,033 acres of Maori land there.³⁴ The record of successive governments in recommending the Governor's consent to the removal of restrictions led him to conclude that:

the Crown, after purporting to make all the lands returned to the Tauranga tribes inalienable, subsequently failed to enforce this policy for a number of years.³⁵

The imposition of restrictions over lands in the Tauranga district, and their removal, took place at the same time as a political struggle between the Grey government and its opponents. This coloured the question at the time and has made it difficult to assess it solely as a test of the restrictions policy. Grey's determination that the Government should be the purchaser on behalf of the small settler was opposed by a group of wealthy Auckland speculators in Maori land. As Russell Stone has explained, this latter group allied itself with Atkinson and other conservatives, who were alarmed both by Grey's radicalism and by what they regarded as Government extravagance. The new Government's policy of retrenchment was basically responsible for its decision to withdraw from proclaimed blocks and to surrender the field to private buyers.³⁶ Although inalienable lands were in a different category from Government proclaimed lands, among the private buyers who benefited from the removal of restrictions in Tauranga were Frederick Whitaker and Thomas Russell, notable Auckland speculators and opponents of Grey.

Although the political struggle about the role of the state in land purchasing provided the wider background, Tauranga was something of a special case. Grey had been concerned that too much land was being alienated and that measures should be taken in Tauranga to ensure that individual Maori kept sufficient land for their own support. It must be pointed out, though, that the way in which a blanket restriction had been placed over lands in Tauranga was unlike the standard procedures for placing restrictions on titles through the Native Land Court. It appears that the Native Ministers were readier to leave matters to the judgement of the local commissioner than they were in cases where restrictions had been imposed in the Native Land Court.

O'Malley, with a focus on Tauranga, criticised the Crown's consent to these transactions as failure to protect Maori interests, thus falling short of its own stated principles on restricting the alienation of land. The question, however, needs to be

33. *The Aftermath of the Tauranga Raupatu, 1864–1981*, an overview report commissioned by the Crown Forestry Rental Trust, 1995

34. *Ibid.*, pp 221–222

35. *Ibid.*, p 90. In fact, Tauranga applications went through the Native Office in the usual manner in the late 1870s and early 1880s. Their records are throughout the MA 13/22 to 13/28 files.

36. R C J Stone, 'The Maori Lands Question and the Fall of the Grey Government, 1879', NZJH, vol 1, no 1, 1967, p 72

seen in terms of the policy itself. As an issue it was quite distinct from other aspects of the Crown's responsibilities in the Tauranga district – for example, failure to control the illegal activities of Government and private land agents. As far as the specific issue of the removal of restrictions is concerned, the Crown's approach was not inconsistent with its broad policy. There had never, since 1840, been a policy which undertook to preserve Maori ownership of large areas of land. On the contrary, the very notion of entail, tying up land in an utterly inalienable estate, was regarded with horror by those who had come from Britain. These ideas are basic to an understanding of the restrictions policy, and help to explain its limitations.

When the commissioner, H W Brabant, supported applications for the removal of restrictions from blocks of land which were to his mind used only for sporting purposes, and too rough and bush-covered for Maori to be able to develop, these points were in line with the standard criteria for removing restrictions (though hunting pigs and catching birds were an important part of the Maori economy). Also, the Crown would not prevent alienation unless it was clear that individuals would be left landless. The figure of 50 acres as a minimum for each individual had been quoted as a guideline. But in general, little attempt was made to assess individual holdings when owners were numerous. The Commissioner at Tauranga reported of the groups of vendors that they had ample other land.

As long as the Government accepted advice from its agents in the field that owners could not use the lands 'productively' themselves, and that they had other property, and provided all agreed and the price was fair, then restrictions would be taken off. This is the point at which the Crown's practice should be assessed by those who are doing detailed studies of particular regions: how seriously did it take the responsibility of ensuring that Maori held on to sufficient land, when the owners were numerous? With large blocks, such as those at Tauranga, owners were undifferentiated in reports from the local officers, and the Native Office accepted blanket assurances that 'owners had other lands'. This contrasted with the approach towards applications from individuals to alienate small pieces of land, which were often refused.³⁷ This was a weakness in both principles and procedure, giving an impression of a policy that strained at gnats and swallowed camels.

Where governments were sensitive to criticism was not over the policy itself, that is, the degree of protection given to Maori landownership, but whether or not the law was operating fairly. Reviewing certain Tauranga cases some years later, the chief judge of the Native Land Court, E R Macdonald, wrote:

jealousies arose some declaring that restrictions ought to be removed in every case others in none – while whether restrictions were or were not removed the moving cause was set down as favor or spite in someone.³⁸

37. There are parallels with the approach of the Commissioner for Crown Lands in Taranaki at the same period, who wrote ' . . . though I think it would be detrimental to the interests of settlement and civilization if large tracts of country were to be vested in aboriginal natives tribally, yet, in cases of small and medium holdings individualized, every well-wisher of the Maori race must, I think, recognize the desirability of absolutely vesting the land comprised in the grant in the aboriginal grantee and his descendants.' Whitcombe, 3 May 1880, West Coast Commission, AJHR, 1880, G-2, app B.

38. Memorandum, 13 March 1888, MA 11/3, NO 88/487, NA Wellington

Steps were taken to make the whole process more open to scrutiny. 'I think these cases had better perhaps stand over pending legislation on the subject of removal of restrictions'.³⁹ Lewis's minute was followed a few weeks later by the passage of the Native Land Laws Amendment Act 1883. From now on, 60 days' notice of the removal of any restrictions in the *New Zealand Gazette* was required, but the process otherwise remained the same. Yet, in spite of the penalties in other provisions of that Act against dealing in Maori land before it had gone through the land court, the system as a whole was not preventing Europeans from gaining land in everything but title. Bryce, as Native Minister, minuted one such case from the Tauranga district:

Withhold action for further enquiry. I don't like the way this purchase has been pushed to near completion without ascertaining whether the restriction would be removed. Moreover application should be made through the owner direct and not through the purchaser.⁴⁰

John Ballance, the Native Minister in 1884, described the problem as more general:

I have found, during my short experience of the Native Department, that there are reserves all over the country, some of which have restrictions upon them, and some of which have no restrictions upon them. In my opinion these reserves are in process of being alienated from the Native people. Day after day applications come in to the Native Department from people who desire to have the restrictions removed from the Maori lands, and they come in with the strongest recommendations from officers of the department in the various districts, to the effect that the restrictions ought to be removed because the Natives have sufficient land otherwise to live upon. I say that the removal of the restrictions is an improper use of power, and ought to be stopped at once; and with the exception of carrying out previous engagements, I have determined . . . not to consent to the removal of any more restrictions until the Legislature has laid down some definite policy on the subject.⁴¹

Ballance gave the impression that the law was being stretched in favour of land purchasers employing underhand methods:

Those who are desirous of acquiring these reserves are not always content to wait until the restrictions are removed before commencing negotiations for obtaining them. In the great majority of instances the work is done, the purchase is completed, before the removal of restrictions, and even the money has been paid: and the purchasers wait until a favourable moment comes when they can bring sufficient influence or pressure to bear upon the Government, so as to have the restrictions removed.⁴²

It was the Native Trust Commissioner whom he identified as responsible for giving an official stamp to gross abuses. In fact, the trust commissioner had no direct role

39. T W Lewis to Native Minister, 17 August 1883, MA 11/3, 83/2421, NA Wellington

40. 18 April 1884, MA 11/3, 84/1158, NA Wellington

41. 1 November 1884, NZPD, vol 50, p 314

42. Ibid

in the process of the removal of restrictions. He was, however, occasionally invoked by Pakeha applicants pressing for the removal of restrictions. They claimed that since their plans would still have to pass the trust commissioner, they could safely be allowed to go ahead.

Ballance said that he was not reflecting on previous Native Ministers. Nor did he single out the Native Office for criticism. But he was not prepared to continue with the system as it was. He appointed a commissioner as an attempt to take the removal of restrictions out of the political arena.

5.5 THE BARTON COMMISSION ON THE REMOVAL OF RESTRICTIONS ON THE SALE OF NATIVE LANDS, 1885 TO 1886

Ballance appointed as special commissioner G E Barton, a lawyer who had been a member of the House of Representatives for Wellington City from 1878 to 1879. Barton held the commission for just over a year, from 30 November 1885 until the end of 1886. This commission was limited to investigating cases where negotiations had already been entered into by Europeans for the sale or lease of restricted lands, pending further policy decisions by the Government. Barton was to take evidence and report on applications which had been made for the consent of the Governor to the alienation of these lands, as 'it was desirable that such consent should only be given after due and formal enquiry'.⁴³ The backlog amounted to 83 blocks of land, from Southland to North Auckland.

The inquiry was held at various places in the North Island. Barton went to great efforts to have all the parties appear before him to give evidence. The evidence of Maori witnesses was recorded by an interpreter and signed, with the translation, given at the time, written down by the commissioner. Even so, he found it difficult to establish whether negotiations for land had been carried out in good faith. He himself described his inquiries at Tauranga as 'one-sided'. This was partly because a number of Maori with interests in land had left for the gumfields, and partly, he suspected, because of intimidation:

The Natives whom I examined seemed to be actuated by a vague fear that they might lay themselves open to criminal proceedings, ending in imprisonment and loss of character. I have been informed that threats of such proceedings have been actually made, but cannot vouch for the truth of the statement, not having judicially enquired into it. Such being the attitude of the natives, the only chance I had of reaching the facts where misconduct had taken place was through the quarrels of rival purchasers or from the intrinsic evidence afforded by the accounts kept and receipts taken during the negotiations of purchasers, and upon the documents of transfer.⁴⁴

43. The terms of the commission are described in the 'Report by Mr Commissioner Barton on the Removal of Restrictions on Sale of Native Lands', AJHR, 1886, G-11, p 1.

44. 'Report . . . on Removal of Restrictions on Sale of Native Lands', AJHR, 1886, G-11, p 2

Cases were dismissed if Europeans did not appear or have their agents at the hearings. A number of cases were withdrawn, presumably because they would not have stood up to inquiry.

Barton was prepared to take sworn evidence from people who had embarked on purchases in Tauranga in 1878, 1879, and 1880, and who claimed that they were behaving no differently from others whose transactions had been approved by the Crown. The commissioner did not investigate these earlier cases himself, and where his criticism of the Crown's record is based on these statements it should be treated with caution. Records of interviews with Native Ministers or other members of the Government, in the general files on applications, show that this was a fairly common line to take. Claims to be following common practice, rather than the law, and statements that everybody else had 'got away with it', carried no weight with officials or ministers. The importance of the commission does not rest on how far Barton's comments about previous governments were justified. Its usefulness comes from his own investigations on the cases before him, and from the files of background material assembled for the commission. As well as providing evidence about the working of the restrictions policy, this material records a great range of Maori economic circumstances in the late-nineteenth century.

The points he had to decide on were in line with current policy, and had the same limits. The commission did not ask whether Maori should be encouraged to use their land themselves, nor where the line should be drawn so that Maori retained 'sufficient' land for the future. Barton took evidence only on the following questions: Had the natives sufficient other lands for their own use and that of their children? Was the bargain with the natives a proper one to be carried to completion, and was the price a sufficient price? Did any objection exist as to the legality of the bargain, or arising out of special legislation prohibiting transactions in native lands before the ownership and area were fully settled? Had the native vendors been treated fairly throughout the transactions?⁴⁵

Within the limits of the commission, Barton was conscientious. In his approach to Maori rights, he seems himself to be motivated not by a sense that Maori should keep land, but that they should have a fair deal. Accordingly, he was rigorous about questions which could be reasonably clearly established, such as fair prices. He showed exceptional energy in criticising practices which he saw as illegal or harmful. Barton drew attention to weaknesses in the system, such as the trust commission, but he did not question the system itself. Nor was he out of sympathy with the object of the whole exercise which was, by and large, to confirm the alienation of lands which had been restricted from leases longer than 21 years or from sale, provided that arrangements met the criteria set down.

Bona fide Pakeha settlers, who had put time or money into land, were looked on favourably. Some sales were validated, but extended leases, too, were investigated. As a consequence some informal leasing arrangements were regularised in the interest of the Maori owners. He commented particularly on a case in Whakatane where he advised consent to a lease of 33 years. The lessee had improved 15,000 acres and was employing Maori workers.⁴⁶ But elsewhere he questioned the

45. *Ibid*, p 3

value to Maori of leasing. He wrote in a set of notes headed 'Memorandum for my own guidance':

I have noticed throughout the course of my enquiries into native land purchases that the course is usually first to lease then to buy at a very low price and then to urge before me that the price is low because of the existence of the existing lease to the purchaser himself.⁴⁷

He was able to insist on proper valuations. Barton trusted some of the purchasers so little that he required payments to be made in front of reliable authorities as a condition of consent. But his brief was a limited one, reflecting current policy. It did not extend to suggesting that owners lease rather than sell.

Problems with leases and sales emerge from a Wellington case. The Taranaki-based owners of Pakuao 1, 1 acre and 19 perches on Tinakori Road, in Wellington, had negotiated the sale of their land in 1877 for a price well under its market value. The transaction was certified by Robert Parris, the resident magistrate in Taranaki, as satisfying the requirements of the trust commission. The Government, however, refused to lift restrictions, on the grounds that the procedure was unsatisfactory, but also because the tenant had already offered to buy the land and would have paid much more than the owners had received.

In his defence the purchaser, William Halse, had given an account of the circumstances in which he had paid for the land. It had come to his notice through the principal owner, Raniera te Poka, offering it around for sale in Taranaki. Raniera was known to hold a large amount of land locally, as well as other interests in Wellington, and his fellow-owners also had property elsewhere. The land was on a 14-year lease at £8 per year and Halse wrote that he had advised them to invest the sum of £150, and receive £15 per year. He added that they were intent on selling, 'one of the reasons being that they would be dead before the lease expired'.⁴⁸

Although the Crown steadily refused to remove the restrictions, the owners equally steadily refused to accept any rent from that point on. A letter in 1881 stated that they wished to carry out the word of their chief, Raniera, and the rent would be paid to Halse. Rather inconsistently, in 1885, they granted a new lease for another 21 years to the tenant, who was still anxious to purchase the property.

The two parties who contended the case before Barton were the lawyers for the two European sides, who reached a compromise. The arrangement which the Maori owners had insisted on was confirmed, in spite of the inadequate price, because the land had been burdened with a new lease. Barton commented, recommending with some reluctance that restrictions be removed:

The Maori owners notwithstanding the opposition of the Government, insisted upon the sale to Halse and Humphries being treated as a proper sale, and although by granting the new lease they have exercised an act of ownership they have not

46. Ibid

47. 16 October 1886, MA 13/29a, NO 87/721, NA Wellington

48. Halse to Samuel, 21 December 1880, with MA 13/29b, NO 87/397, NA Wellington

communicated with the Hon the Native Minister or in any way claimed that the property shall be retained for their benefit.⁴⁹

The owners did not appear at the hearing. Given the opportunity, they refused to repudiate arrangements which the Crown considered illegal and which Barton thought were not in their best interests. Pakuoa had initially been a McLeverty grant. A neighbouring block had been sold more than 10 years earlier on much the same grounds, that the rent was so low that investing money from a sale would bring in a better annual return. The owners in this case exercised their right to lease for up to 21 years, though the arrangement they made was not a good one. Though any deal involving a lawyer and a merchant (Halse and Humphries) raises questions, the owners seemed equally determined to exercise the right to sell on terms of their own arrangement.

Barton was faced with a dilemma which he felt unable to resolve satisfactorily. He commented:

It is one of those cases, unfortunately too numerous, in which the natives themselves throw obstacles in the way of protecting them without doing injustice to those who have dealt with them, and they thus compel the Government to make a choice between evils.⁵⁰

What were his options? It was not contemporary policy to look for more imaginative solutions that would have kept the land in Maori ownership against the apparent wishes of its current owners. The most he could have done would have been to insist on their receiving a better price. Once the land came before the commissioner whose business it was to settle outstanding cases, the criteria under which Barton was working made it difficult for him to reach any other decision.

Where it is possible to get a glimpse of what was behind the pressure to sell, debt was often involved. Europeans often turned out to be in financial difficulties as well, which added urgency to their representations, but for some Maori there was the added difficulty of meeting traditional obligations in a cash economy. An applicant from Hauraki, heir to the property of an important relative, had incurred such heavy liabilities for the tangi that after two years he was £187 1s 7d in debt to Europeans. To raise this sum, he needed to sell the land he had been left.⁵¹ Barton, who was not inclined to let this go without investigation, intended to find out who the Europeans were at the back of this application. He was furious to learn that the Government had stepped in and purchased the land after he had gone to Thames for the hearing.⁵² The Governor's consent had been obtained 'on account of the Government having entered into negotiation' for the purchase.

This draws attention to a whole area which time has prevented me from entering into, that is, cases where the Crown itself was involved. The Crown's own patterns of purchase left almost no trace in the departmental records which I have consulted.⁵³ Nor did cases where restrictions were removed for the alienation of

49. Report, 23 December 1886, MA 13/29b, NO 87/397, NA Wellington

50. Ibid

51. Hohepa Hikairo to Native Office, 6 February 1885, MA 13/27, NO 86/2817

52. Barton to Native Office, 21 August 1886, MA 13/27, NO 86/2817

land to the Crown appear in the printed Parliamentary returns. If an answer is to be found it will presumably be in the records of the Native Land Purchase Office. This aspect of the subject requires further research.

The debt described above had arisen as a consequence of meeting traditional obligations, in an area where cash was needed. A final illustration of how inalienable land might be used as a source of income concerns an elderly woman Mere Pawa (also known as Mere Parata) living in a predominantly Pakeha environment. Her land, Pipitea reserve, lot 4, had been the subject of an application earlier in the 1880s and turned down by the Native Office on the grounds of the extravagant habits of her daughter, Ani. But Ani was now dead, and Mere, with her son who was unmarried and also described as elderly, had run up an account, month after month, with a Lower Hutt storekeeper. His record shows that their tastes were modest; common items were bread, sugar, and candles, and occasionally lollies or buns, a hat, or a pair of boots. The most costly purchases were coats. She had spent £148 in two years and two months.⁵⁴ Mere was regarded as the principal operator of the account, and she was not buying for others on any scale nor for any sort of display.

Mere appeared at Barton's hearing, with a cousin who was her spokesman. He stated that she had other property and listed shares in a number of properties all over the lower part of the North Island from which she was receiving small amounts of rent, and the sale of Pipitea, from which she was receiving only her third of £9 annually would make little difference. Her son and her daughter's niece had similar scattered shares, and supported Mere's wishes. The price that she had arranged was £268. Her spokesman explained that when Mere got goods she always asked what the balance was, and the storekeeper told her, so she knew how much was still due to her and how much she had spent.⁵⁵

The only objection was raised by the tenant, who was running a boarding house on the site. Neither Barton nor Alexander Mackay, who later handled the matter seem to have been impressed by his claim that he would have paid more than the sum that was accepted. Both the valuers consulted gave very negative reports of the Pipitea property; 'very objectionable neighbourhood', wrote one, and 'poor prospect of better class', wrote the other. There was no sign of recognition by any Pakeha that this was a site that might be valuable in the future. As for Maori, Mere had disregarded restrictions, and proceeded to make her own arrangements. The land provided her with the cash required to live in modest comfort as an elderly woman in an urban environment, but the consequence was further loss of Maori patrimony. She continued to make use of land in this way. That this was a dilemma was not apparent to any of the parties at the time.

53. Papers relating to the purchase of Moehau 4 block, at Hauraki, are filed with the general applications for removal of restrictions, though the issue of restrictions was not raised specifically. The documents certainly show the Crown behaving as shabbily as many private buyers. The Government's lease of the goldfields, which had existed since 1862, was unilaterally terminated in the mid-1880s; the warden of the goldfield held on to money belonging to the owners to induce them to sell; and requests to have lands reserved were ignored. Freehold passed to the Crown in 1889. MA 13/29b, NO 89/853.

54. MA 13/28, NO 86/4091

55. Ibid

Circumstances differed so widely, that any single generalisation about the reasons why Maori applied to have restrictions removed from land in this period would be misleading. People who were managing well wanted to sell restricted land so they could invest money in developing other properties. People who were trapped in debt and threatened by creditors saw the sale of restricted land as a way out of their difficulties (and financial traps were sometimes set to bring about this result). Less dramatic than accounts of success or failure were the lives of people with moderate resources, like Mere Pawa, who saw no reason why they should not use land to pay for ordinary everyday expenses. If the Crown was persuaded that certain conditions were met, the cumulative effect of choices, as well as pressures, was that land was alienated.

My survey has tended to focus on individual applicants because they were the ones who argued their cases with the Native Office. The process was aimed at assessing needs and resources at the individual level. Where there were many owners and large blocks of land, decisions were often made in effect outside the office, and there is not the same background material in these files. When the law changed in 1888, applications for the removal of restrictions increasingly went through the Native Land Court. The detailed documentation which has made this discussion possible was no longer required.

5.6 NEW ROLES FOR THE NATIVE LAND COURT IN THE 1880s – THE NATIVE LAND DIVISION ACT 1882 AND THE NATIVE RESERVES ACT 1882

From 1882 on, there were parallel paths for the removal of restrictions. The Native Land Court was empowered to remove restrictions when partitioning inalienable land, and restrictions might be removed from reserves by the court, without reference to the Governor in Council. The judges of the Native Land Court also took over the trust commissioner's role in the course of the 1880s.

These two measures – the Native Land Division Act 1882 and the Native Reserves Act 1882 – facilitated the removal of restrictions. They arose in part from a distrust in the power of Native Ministers and a conviction that land questions would be settled more openly by decisions made in the Native Land Court alone. The point is made clearly in the following exchange:

Colonel Trimble: Are you aware that in the provisions of these Acts great care was taken to place the taking off restrictions in the hands of the Court only, and that no power was given to the Governor in Council in regard to taking off restrictions or interfering with the judgement of the Court?

Ballance [Native Minister]: I am aware that that is one way of removing restrictions – by subdivision.

Trimble: But the point of my question was this: Not that it was one way of getting rid of restrictions, but did not the Court deal with the matter absolutely without referring its decision to the Governor in Council?

The Removal of Restrictions

Ballance: Yes; the Act of subdivision removes restrictions.

Trimble: Are you not aware that the policy of Parliament for some years past has been to take power from the Governor in Council and place that power in the Courts of law?⁵⁶

Ballance denied that this was the general tendency of policy, but nevertheless, it applied to the two Acts under consideration. The Native Land Division Act 1882 empowered the Native Land Court to impose or remove any conditions, restrictions or limitations on the new grant issued with the division of land. Europeans who wanted free trade in Maori land supported the idea of subdividing as far as possible, to allow the individual owners to dispose of land as they pleased. If an owner or the majority of owners applied to the court for the division of land, the court could order a division and issue new grants. The court might indeed impose conditions, restrictions or limitations on this grant where none had been on the original, but there was nothing novel about the court having power to place restrictions.

The significant development was that new grants could now be issued by the court without any conditions, restrictions, or limitations, although they might have been on the original grant. This measure has the character of being a deliberate loophole, as it offered an indirect and relatively easy way of having restrictions removed without further scrutiny. As responsibility for maintaining restrictions passed from the administration to the court, the function of restrictions was undermined.

The second of these two measures, the Native Reserves Act 1882, widened the definition of reserves to include all lands excepted or reserved by Maori in sales, cession, or surrender to the Crown, and all lands excepted or reserved for the Maori by the Crown. Although only those already vested in the Governor, or a commissioner, or any public officer, would automatically go under the management of the Public Trustee, there was a sense in the debates that this was a radical measure.

The policy on restrictions was a new departure. It applied to all reserves, whether or not they were controlled by the Public Trustee:

Where any Native reserve vested in the Public Trustee, or under his control, or held by any natives under Crown grant, memorial of ownership, or certificate of title, is subject to any restrictions, limitations, or conditions, such Trustee or Natives respectively may apply to the Court to have the same or any of them annulled and removed.⁵⁷

The Native Land Court would make the decision about an application, rather than the Native Department. The court, too, was now charged with an additional, extremely important duty:

Before altering or removing any restrictions, limitations, or conditions attached to any Native reserve, the Court shall be satisfied that a final reservation has been made,

56. 'The Native Land Disposition Bill, 1885; Minutes of Evidence', AJHR, 1885, I-2b, p 4

57. Section 22, Native Reserves Act 1882

or is about to be made, amply sufficient for the future wants and maintenance of the tribe, hapu, or persons to whom the reserve wholly or in part belongs.⁵⁸

It only needed a judge to sign and seal an order removing restrictions, wholly or partly, to make the land alienable.⁵⁹ The approval of the Governor in council was no longer required for freeing up reserves.

During the debates Bryce, as Native Minister, spoke about the two sorts of objections which this provision in the Native Reserves Bill had raised, which were two of the most commonly expressed positions when Maori land was discussed. First, the Maori members argued that Maori themselves should be managing their own property. Tairaroa wanted to be in complete control of his own land, and emerged the following year with a special Act by which he became legally a European in respect of land. Te Wheoro thought the law should make reserves completely and absolutely inalienable. Tawhai objected to giving the Public Trustee control over Maori land, observing that the owners should manage the restrictions on reserves. European sympathisers gave qualified support, by proposing Maori representation on boards of management.⁶⁰ Bryce agreed that a Maori board member might give valuable advice on the management of reserves, though he was very firm that this would not be an official post, nor would it be salaried.⁶¹

He then moved on to the second major objection, that this Bill might bring a large amount of land under it, ‘to the injury of the productive power of the colony’:

However, ample provision has been made in regard to this matter of unlocking land which has been locked up, except with regard to final reserves – reserves which the Court has determined are absolutely necessary for the maintenance of the Maoris.⁶²

There was an apparent confusion of goals. While making it easier for Maori to sell land and Pakeha to buy it, the Government still apparently believed that it was capable of protecting Maori land better than the owners could. Bryce went on in his speech to connect the freeing up of Maori land with views about the future of the Maori population. While he did not share the belief that the race was dying out, he also rejected the recent estimate as exaggerated:

We are told that the Maori population is about forty-four thousand. I believe there is nothing like that number in the colony. I do not believe there are more than thirty thousand . . . I believe the Maori population in this Island is not as great as has been supposed from the census.⁶³

He did not explain why he thought the census figures were wrong, though he stated that his opinion was based on recent experiences. Bryce’s view was that the

58. Ibid

59. Section 23, Native Reserves Act 1882

60. The Bill was debated at considerable length. NZPD, 1882, vol 41, pp 306–315, 518–529; vol 42, pp 650–662; vol 43, pp 503–512.

61. 28 July 1882, NZPD, vol 42, p 651

62. Ibid

63. Ibid, p 652

rapid decrease had been halted, and that the Maori population could well take a turn and increase. This theme was relevant to the policy of restricting land from alienation:

Now if honourable gentleman were in my position, or knew the number of applications I have received from Natives who wish to sell their property, they would know there is a considerable desire at times amongst the Natives to denude themselves of their lands, and it is not always from the Maoris who have the most land that these applications come. On the contrary, it seems to me that those having little land are not less eager to sell than those who are more plentifully supplied.⁶⁴

He then spoke about the importance of maintaining an inheritance for the race, which he believed was the object of the Native Reserves Act. If by this Bryce meant something more than the passing on of enough land to support one's immediate family, it was not an intention that Pakeha ministers often stated.

A native reserve commissioner was appointed under the Act to carry out the duties of the Public Trustee relating to Maori reserves. The commissioner, or his agent, was to apply to the Native Land Court to have restrictions placed on land going before it, 'so as to prevent Natives from so far divesting themselves of their land as to retain insufficient for their support and maintenance'. Alexander Mackay was appointed as commissioner, but when he became a judge of the Native Land Court, in 1884, the post was not again filled.

5.7 CHIEF JUDGE J E MACDONALD AND 'A VERY DANGEROUS POWER'

At the same time as the Native Office and the Native Minister were giving reasonably serious consideration to requests for the removal of restrictions, and Barton, as commissioner, was hearing witnesses and sifting through documents, the judges of the Native Land Court also had the power to remove restrictions.

Did it make any difference which path was taken? There is some indication of the court's approach in a set of papers arising from the repercussions of Barton's decisions in Tauranga. The chief judge of the Native Land Court, Judge J E Macdonald, was asked for advice about cases where there had been petitions against the decisions.⁶⁵ His reply outlines some of the principles involved. It also indicates the danger that a shift in responsibility for the removal of restrictions from the department to the court would result in a very limited view of the Crown's duty. In this case, although the chief judge's advice had been sought with the express intention of following his recommendations, the Government did not find his opinion on the incomplete transactions acceptable, and upheld Barton.⁶⁶

Macdonald showed from his review of the cases that he was aware that serious irregularities had occurred in the transactions. It was these that had caused Barton to turn them down, rather than any of the other criteria, that is, whether owners had

64. Ibid

65. Macdonald, memorandum, 13 March 1888, MA 11/3

sufficient other land, whether the bargain was of a class sanctioned by the Governor, and whether the bargain itself was not illegal (that is, neither alcohol nor weapons had been offered as payment).⁶⁷

Barton had given a qualified approval in one of the cases, though he excepted the interests of three owners who had not transferred their title to the land. Without inquiring any further, Macdonald could see no grounds why those three owners 'should be precluded from the measure of emancipation accorded to their fellows'. He then adopted 'the apparently obvious view': if the three had ample interests in other lands, any restriction on their right to sell should be removed and that to do otherwise 'certainly seems hard on the purchase' who had acquired all the other shares in inalienable land.

But this was the least questionable case on which to propose to reverse Barton's judgment. The others all involved gross dishonesty: money put on account by an agent which was never paid to the owners, the altering of the name in a deed from one block to another, and the purchase of land which had been made an absolutely inalienable reserve at the owners' request in an open court.

Macdonald noted that these circumstances rather weighed against recommendations. On the other hand, he pointed out that it was not the buyer who had committed fraud, only his agent, and that 'the natives seemed to be satisfied with the transaction'. In the case of the reserve, the words 'absolutely inalienable' had not appeared on the Crown Grant. Since that was the case, Macdonald explained that the restrictions were merely conditional. The land was alienable with the consent of the Governor. He made no reference to Barton's evidence that the majority of owners wished to retain it.

Macdonald agreed that these transactions had not been conducted in good faith. But he believed Barton had missed the point. In his opinion, the conduct of would-be purchasers was irrelevant. The object to be attained was the removal of restrictions:

Making lands inalienable in the hands of natives has exactly the effect of entails which have had practically to be abolished because against the public welfare. Indeed such restriction is only to be justified on the plea that it prevents natives denuding themselves of all land before they have learned to maintain themselves by work and, some would add, so becoming a burthen on the state . . .⁶⁸

He recommended removal of restrictions in all cases. This was qualified by the words 'inasmuch as the proposed native vendors have ample other estates' (a point which was generally difficult to establish when numbers of owners were involved, but this was not a subject into which he was called on to inquire). The only point which he believed was relevant was the one outlined above: 'the state in which

66. Hislop wrote in this document that he had come to a conclusion, having perused a number of papers including Judge Macdonald's statement. Memorandum re Commr Barton's report on Native Lands at Tauranga, 9 March 1888. Macdonald's lengthy statement was dated 13 March 1888, apparently post-dating Hislop's conclusion. The discrepancy is more likely to be explained by an error in dating than by the existence of a further set of opinions.

67. Macdonald, memorandum, 13 March 1888, MA 11/3

68. *Ibid*

The Removal of Restrictions

natives would, as to their possessions, be left after alienation'.⁶⁹ As for the deeds previously executed, he felt this was not a question which needed discussion here, and nor was it one where ministers would incur responsibility. At this point, the Colonial Secretary, T W Hislop, wrote in the margin: 'I don't understand this style of argument. It looks to me morally unhealthy.'⁷⁰

The chief judge added in conclusion that the proposed Native Land Court Bill continued a clause by which the court would be empowered to remove restrictions. The responsibility of dealing with the matter under discussion might, therefore, be left with the court if the Bill became law. As Hislop noted, 'If this is an indication of the p[ri]nciples upon which the court will act I think this will be a very dangerous power.'⁷¹

After 1888, a series of Acts made it increasingly easy to apply to the court for recommendations to get rid of restrictions on any inalienable land. Many applications went through the court as a consequence. Those imposed in earlier years still required the Governor's assent, but the recommendation came from the court.

Macdonald was to retire later that year. His successors, Seth-Smith and Davy, had a more serious approach to the law. Nevertheless, the court was not under obligation to go outside the narrow question of whether the owner had sufficient other land. The Native Office had on occasion shown a grasp of personal circumstances, and sometimes had sensed when either of the parties to a transaction had something to hide. The Native Land Court was not obliged to ask any question beyond sufficiency of land, for the removal of restrictions. It was also supposed to sift out invidious purchases, having inherited the trust commissioner's role. The court could hear sworn evidence but it was not equipped to carry out extensive inquiries. In principle, the law would give protection; the Native Office had exercised a degree of paternalism that was not always welcomed but in some cases acted to keep land in Maori ownership.

69. Ibid

70. Note initialled T W H, on Macdonald, memorandum, 13 March 1888, MA 11/3

71. Ibid

