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The Nineteenth-Century Native Land Court Judges: An Introductory Report

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Commissioned by the Waitangi Tribunal

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CONTENTS

PREFATORY COMMENTS

This report is prepared in response to a direction from the Chairperson of the Waitangi Tribunal, WAI 64 Document 3.8, dated 18 November 1994.

As directed, the report addresses four main issues with specific reference to the nineteenth-century judges of the Native Land Court:

- their professional qualifications and the extent to which they had legal training;
- their relationship to the civil service of the day; whether they had been recruited from the civil service and whether they returned to it after serving on the Native Land Court bench;
- the terms of their appointments as Native Land Court judges;
- the circumstances of the dismissals in 1891 of Judges Mair, Puckey and Wilson.

The time frame of 40 hours allowed in the commission did not permit an extensive biography of each judge, nor an examination of the details of the political and social climate in New Zealand as it developed throughout the last third of the nineteenth century, so the discussion will necessarily be closely circumscribed and lacking in contextual information.

I have, though, not restricted this survey to the nineteenth century exactly, but have continued it to 1909, in which year the major Native Land Act was passed which provided a substantial break from the Native Land Court's early years and has set the tone for most of the Maori Land Court's operation during this century.

I would also like to acknowledge here that some of the research written up in this report was funded by Te Iwi Moriori Trust Board when they commissioned me to work on a separate matter. Na reira, tenei te mihi, ki a koutou, mo ta koutou awhi i a au. Kia ora koutou.

INTRODUCTION

It is my understanding that conventionally the Courts are not regarded as part of the Crown, nor as agents of the Crown. The doctrine of judicial impartiality and independence has been fiercely defended in common law courts over centuries. In New Zealand, the Supreme/High Court has been considered to have inherited the complete independence of the British Courts.

However, other New Zealand Courts, including the Court of Appeal and the District Courts, have been largely created and circumscribed in their operations by statute in similar manner to the creation and circumscription of the Native/Maori Land Court. These other courts are still substantially different, though, in that they appeal to the ancient common law tradition and apply the precedents set in judicial hearings over centuries. The independence of their judiciary is defended in much the same way as has been the norm for the English courts which are their counterparts.

As we shall see, though, the Native Land Court of the nineteenth century, by contrast with these other statute-created courts, operated and was viewed differently:

- It had no body of precedent to which it could refer back for support or guidance;
- It had no principles or practices made venerable by centuries of tradition;
- It had from its inception exercised over it a unique degree of ministerial control;
- It was set up for a very clear single purpose, in its singlemindedness more like a tribunal perhaps than a regular court;
- Its bench was not recruited from the ranks of distinguished legal practitioners, but usually from officialdom, principally those who had practical experience in dealing with Maori.

The Native/Maori Land Court has *never* existed as a judicial authority completely independent of the legislative and executive wings of Government in the way in which general Courts, following and applying the common law, have been. The Court was brought into being by legislation; it has been directed and channelled at every turn by legislation; its powers and methods of operation have been circumscribed and shaped by legislation and executive superintendence. Only in the power of the Chief Judge to make procedural rules was it envisaged as having a degree of independence.

In contrast to the colonial Supreme Court and district courts, the inability of the Native Land Court to derive its methods and precedents from traditional British common law courts is obvious. It was beginning work in a completely

novel field, to which little of that tradition applied. In its determination of title to land, it was specifically directed to be guided above all by Maori custom, not the body of case and statute law built up over centuries in countries of common law jurisdiction.

Chief Judge Fenton acknowledged some of the differences from the ordinary courts of justice and the need for the Native Land Court to generate its own unique body of case-law. He stated that

> the less you have to do with the Supreme Court the better. All the principles which guide the one tribunal [the Native 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 ....

The Native Land Court, on the other hand, had to operate, he thought, from first principles

> 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.[1]

The Native Land Court, therefore, was both attempting to emulate the process of the common law courts while in practice being divorced from them.

Native Land Court Judges as Civil Servants

In addition to the material reported below at greater length, there are many indications that the Native Land Court's judiciary have been for most of the Court's life considered little different from run-of-the-mill civil servants, an attitude which would outrage the general judiciary were it ever to be applied to them. We now note several pointers revealing this attitude.

In 1893, the Validation Court was created by the Native Land (Validation of Titles) Act in a demonstration that even the government of the day did not regard the Native Land Court as effective or independent. Section 3 provided that the judges were to be appointed for a fixed term of three years and removable only 'for such causes and in such manner as a Judge of Supreme Court is removable'. Salaries were to be fixed for the term of appointment at a maximum of £1,000. The Validation Court's powers were extended (s 6) to make it more inquisitorial, having the power to call anyone interested in the land, and require the appearance of any witnesses and production of any documents germane to the case. It could admit 'any evidence that seems to the Judge to be pertinent to the matters in issue, whether such evidence would be admissible in the Supreme

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1 AJHR, 1891, G1, 55.

Court or not' and judges had all the 'jurisdictions, powers, and authorities' normally vested in both the Supreme Court and the Native Land Court (s 9), including those punishing contempt and non-appearance (s 23).

The Attorney-General and Colonial Secretary at the time (and noted barrister), Sir Patrick Buckley, declared that the legislation intended to give the Validation Court judges 'some status by which their independence may be secured', which, by implication, was lacking in the Native Land Court.[2] Another MLC was more forthright, declaring,

> The position which these Judges [of the Native Land Court] have occupied has been simply unendurable. They are the mere creatures of the Ministers of the day, without tenure of office and without proper status.... For the first time in the history of these Native transactions you clothe the Judge with reasonable powers; you give him a reasonable position, reasonable authority, so that he can carry out his duties in a rational manner, taking evidence after a reasonable method.... you have given them decent salaries....[3]

These benefits of course did not apply to and were again by implication not already enjoyed by existing judges of the Native Land Court *per se*.

Other legislation which fudged the independence of the Native Land Court in this period was the Maori land administration legislation. Section 6 of the Maori Land Administration Act 1900 provided for the creation of Maori Land Councils. This was amended by s 5 of the Native and Maori Land Laws Amendment Act 1902, which added to the definition of a council's president's role the words

> and if so authorised by the Governor shall by virtue of such office, without further authority or appointment, possess and may exercise all the powers and authorities of a judge of the Native Land Court or of the Native Appellate Court.

Notwithstanding this virtual carte blanche, it was felt necessary for the next few years to at least gazette any such authorisation. Within days of the 1902 Act's passsage, William Pattison James, president of Te Ikaroa District Maori Land Council and Edward Clare Blomfield of Tokerau were given such powers. Six months later, George Thomas Wilkinson of Waikato-Maniapoto and Gilbert Mair of Te Ikaroa also received them.[4] Wilkinson's role as Government Native Agent and Land Purchase Officer in the Auckland/Hauraki/Waikato/King Country regions and Gilbert Mair's in the various wars and Maori affairs, are well-known.

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2 NZPD, vol. 82, 1893, 311.

3 Dr M.S. Grace. NZPD, vol. 82, 1893, 312.

4 NZG, 7 September 1882, 1227; 30 October 1902, 2401; 19 March 1903, 811.

In this connection, an interesting appointment was that in February 1905 of James Wakelin Browne. He was at this time still Registrar of the Native Land Court in Auckland, but was simultaneously appointed President of the Tokerau District Maori Land Council to replace Judge Edger and given the additional judges' powers.[5] He was therefore, although registrar and thus a civil servant, equivalent in his district to a judge and remained in this position for nearly 1.5 years - a clear obfuscation of appropriate lines of demarcation. All of these presidents, plus Thomas William Porter in Tairawhiti and Thomas William Fisher in Aotea, were confirmed in their presidencies, including the additional powers, in August 1905.[6] W.S. Kensington, the Under-Secretary for Lands and Survey was appointed president of Te Ikaroa in July 1903, but apparently without the powers; nevertheless his appointment to such a Board raises some serious questions of conflicts of interest and of the extent to which these councils were viewed as segments of the civil service. Other non-judges appointed before 1909 without the powers were A. Keefer replacing Porter and C.D. Pitt replacing Browne, both in July 1908, although it is not clear whether authorisation was simply not gazetted and they were just assumed by then to have the powers *ex officio*.[7] I am unaware at this time of when these powers ceased to be available to non-judges.

More recently, in the body of its Te Roroa Report, the Waitangi Tribunal gave specific instances of ways in which they found the Court's actions unsatisfactory.[8] Much of the Tribunal's criticism of the Court in this report was centred on the lack of legal qualifications and expertise of the judges employed. However, it also commented on how the judges of the Court were clearly viewed by the Government itself not as members of an independent judiciary, but rather as ordinary public servants.

This view of Land Court judges as public servants was confirmed by the wording of the Land Titles Protection Act 1902.[9] This Act was passed in response to the growing public alarm at the number of 'frivolous' challenges in the Supreme Court and Court of Appeal to decisions and actions by the Native Land Court and by other public officials and moved to make these decisions beyond such challenge. The Act spoke in its preamble of 'Judges of the Native Land Court and other responsible officers of the public service' - a clear identification of the judges as public servants.

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5 NZG, 7 February 1905, 317.

6 NZG, 17 August 1905, 1993.

7 NZG, 2 July 1908, 1787.

8 For example at 5 WTR, pp. 163-166. Waitangi Tribunal, *Te Roroa Report* (Wellington: Brooker and Friend, 1992) [= 5 WTR].

9 I assume this is the Act meant by the Tribunal in the Te Roroa Report when it speaks at pp. 154 and 168 of the Land Titles Protection Act 1908 - there does not seem to have been such an Act in 1908.

By 1980, the judges were apparently not seen as public servants in the way in which they had been in the Court's early days. The 1980 McCarthy Commission investigating the modern Maori Land Court specifically noted that although the general staff of the Court were indeed public servants like any other members of the Maori Affairs Department, the judges were not. They commented,

> Although a judge of the Maori Land Court is an independent officer of the State and not a public servant answerable to the secretary of a department or to the State Services Commission, the nature of his duties is somewhat different from that of judges in other courts. Through historical evolution of the Maori Land Court, the judge has in the past concerned himself with administrative problems which normally could be considered as falling within the work of the department.[10]

They continued by pondering the potential for conflict if the respective jurisdictions of the department and the Court were not clearly demarcated. They noted, too, existing problems of communication and of 'divided control, departmental resentment, and... interference by departmental staff in judicial arrangements.... [leading to] Attempts at control by both the Court and the department in affairs of the other....[11] Granted that this referred to the relatively recent past and the exact issues in dispute were not stated, this state of affairs reveals yet again the extent to which the Land Court's very identity has been tied up with the governmental department - a state which has existed since its inception. Had there been a clear demarcation established between the respective tasks of the Court and the department - not achieved after 115 years - the difficulties described would presumably not have occurred.[12]

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10 AJHR, 1980, H3, 50.

11 AJHR, 1980, H3, 51.

12 It is probably impossible to state this definitively without knowing to what problems exactly the Commission was referring.

THE BACKGROUND OF THE NINETEENTH-CENTURY JUDGES

This section addresses the first two matters contained in the research direction concerning the Native Land Court judges:

- What were their professional qualifications? How many had legal training?
- How many were civil servants prior to becoming judges? How many continued to serve as civil servants after their appointment as judges?

The answers to those questions will become apparent as each judge's biography is encountered; the overall situation is summarised at the end of the section.

The background of the judges of the Maori Land Court has varied over time. As not even an accurate or complete list of them seems to exist, let alone any material on the judges as a body, I have here given as much of a potted biography of each judge appointed between the 1865 and 1909 Acts as I could find in the time available, while according special consideration to the matters of legal or other expertise germane to their specialist work as judges working on Maori land issues.

The initial judges of the Court were men selected less for their legal expertise than for their recognised experience as 'native men', men who had had much to do with Maori especially with regard to land dealings, and who were thought to have been successful in those dealings. Judges with legal training were not introduced into the Court in any numbers until at least the 1880s, after the Court had been operating for some twenty years.

This section does not deal with the judges appointed under the 1862 Native Land Act, since their work, if any was done, was extremely limited, and the consitution of the Court was so different under the 1865 Act as to make the institution virtually unrecognisable.

Chief Judge Fenton was the only man amongst the first generation of judges to have a legal background, having been the son of a London-based solicitor and admitted as a solicitor in his uncle's practice in Huddersfield, Yorkshire, before travelling to New Zealand in 1850, gaining about a decade's practical experience. Prior to joining the Native Land Court, he had extensive legal experience in New Zealand. By 1854, aged 34 at most, he was Resident Magistrate at Kaipara for two years and followed that with another two years at Waipa and Waikato. His legal ability was sufficiently highly regarded that from 1858 to 1862 he was the assistant law officer of the Crown and from 1862 he was Crown Law Officer, the equivalent of Solicitor-General. In addition to those qualifications, he had been involved

with Maori since his first arrival in 1850, squatting near Maraetai mission station, his resident magistracies and civil commissionership in 1861 had been in 'frontline' positions and he had produced several influential assessments of race relations and the means of assimilating Maori. He was, therefore, uniquely qualified for the task of heading the new Court to which he was appointed as Chief Judge on January 1865 and reappointed in November 1865 under the new Act. He added the Deputy District Judgeship for Auckland to his workload in 1880. He retired from the Native Land Court chief judgeship in 1882.[13]

Of the puisne judges appointed under the 1865 Native Land Act, the first was John Rogan. Arriving in the country in 1841 as a nineteen-year old surveyor for the New Zealand Company at New Plymouth, he had become a protege of Donald McLean in his earliest land purchasing in Taranaki. He became the Government Land Purchase Commissioner for Taranaki in 1854, transferred to Waikato in 1857 and Kaipara in 1859. He remained based there while succeeding McLean as head of the Land Purchase Department, conducting several perilous diplomatic missions during the Taranaki and Waikato wars. In 1864, he was appointed Resident Magistrate for Kaipara and took advantage of the 1862 Act to conduct some hearings under it before becoming officially its first judge when the Court was founded. He was made Civil Commissioner for Kaipara in May 1865, but soon resigned that position when it was thought to be incompatible with a judgeship of the restructured Native Land Court under the 1865 Act.[14]

A third original judge, Frederick Maning, had been one of the earliest settlers, arriving at Hokianga in 1833, marrying a Maori wife and becoming a major trading figure of the North. He actively lobbied for his seat on the Land Court bench in 1865, perhaps to satisfy his social aspirations as he appears increasingly to have rejected his links with Maori. Also appointed to the Compensation Court bench in January 1866, he not only had no legal qualification, but no professional background and little qualification of any sort other than fluency in Maori and long experience of dealing with them. He retired from the Native Land Court in 1876.[15]

A fourth founding judge, Thomas Henry Smith was another New Zealand Company surveyor, arriving at Port Nicholson in 1842 where he worked for three years. In 1845, he became an official of the Native Department increasingly

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13 *Dictionary of New Zealand Biography*, vol. 1, 121-123; NZG, January 1865, 13; 6 November 1865, 325; 21 October 1880, 1519.

14 C.A. Lawn, 'Pioneer Land Surveyors of New Zealand' (unpublished typescript, 1977), Part 2, 227-229. The judges under the 1862 Act included Rogan and Fenton. NZG, January 1866, 13. After the 1865 Act, they had all to be reappointed and the first batch of puisne judges were done together, including several new appointees. Rogan, Monro, Smith, White and Maning were all reappointed on 15 November 1865. Ward, *Show, passim*; NZG, 18 November 1865, 342.

15 *Dictionary of New Zealand Biography*, vol. 1, 265-266; Scholefield, *DNZB*, vol. 2, 51; Ward, *Show, passim*; NZG, 26 January 1866, 45.

experienced in dealing with Maori. Beginning with a brief protectorship of Aborigines at Maketu in 1845-46, he became Resident Magistrate at Rotorua in 1852 and Assistant Native Secretary in Auckland in 1857, in which position he implemented the Waitara negotiations. As part of his programme to disperse McLean men, Governor Grey made Smith Civil Commissioner for the Bay of Plenty and Taupo in 1862 where he intervened to avert government attack on non-rebels west of Tauranga. He resigned that civil commissionership to take up his Native Land Court judgeship in 1865, retiring in 1876, aged 52. He was also a judge of the Compensation Court from November 1866.[16]

The last of the original judges, Henry Alfred Home Monro, was born in Tasmania, but came with his family as very early settlers in the Hokianga in 1835. Educated mostly by his father, who became an Auckland businessman after the Northern Wars, he was trained as a clerk. When his brief attempt at farming at Tamaki failed, he joined the Native Department as an interpreter and translator in 1857, beginning as a clerk in the Court in 1864 and rising rapidly within two years to a judgeship in the Compensation Court, and then to one in the Native Land Court, which he held until he retired, being reappointed in 1880. He and Rogan were the two commissioners appointed in the late 1860s to settle old land claims in Poverty Bay and the East Coast.[17]

Judge Smith recognised in 1870 that these founding judges of the Court, though presumably able to perform the task of ascertaining title, subdividing and determining succession of Maori lands, could go no further to deal with other aspects of the law which might follow on from that, particularly with reference to the administration of Maori reserve lands held in trust. When asked whether the Court might be competent to deal with such matters of 'equitable law', he replied,

> The Judges of the Native Land Court, as you are aware, with one exception, are not lawyers .... I do not think that the Native Land Court, as at present constituted, is a tribunal competent to adjudicate upon questions involving points of law and equity, the determination of which requires a knowledge of the English law relating to real property.[18]

He went on to describe the Native Land Court as 'the proper tribunal to decide points where Native customs are involved', and to opine that Maori would themselves manage distribution of proceeds from reserves 'better than we can do it for them'. He later qualified that opinion by observing that although

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16 *Cyclopedia of New Zealand* (Christchurch: Cyclopedia Co, 1902), vol. 2, 275; Ward, *Show, passim*; NZG, 27 December 1866, 448.

17 *Cyclopedia*, vol. 2, 275; NZG, 14 October 1880, 1475.

18 Report of the Select Committee on the Native Reserves Bill. AJLC, 1870, 11.

competent Maori might be found, their usefulness would be attenuated by 'tribal and personal jealousy'.

These five judges were the formative bench of the Court remaining *in situ* for a decade. It was they who created the rules, precedents, principles and case law upon which the operation of the Court ever since has built.

Judge Theophilus Heale was appointed to the bench on 3 April 1877 at the age of 61. He had emigrated to New Zealand as captain of the New Zealand Company ship *Aurora* bringing settlers to Wellington in January 1840. He was involved in several business ventures, including sawmilling in Auckland, establishing for the Manukau Land Company the township of Cornwallis, and coppermining with Frederick Whitaker at Kawau Island. He was also a partner with Whitaker in purchasing lands on Great Barrier Island and in the Piako district. This in itself may not be sinister for a Native Land Court judge, but then Whitaker's dealings, especially those in Piako, were often controversial, leading to extensive litigation.

After holding several Auckland political offices briefly, he was appointed Chief Surveyor and Provincial Engineer of Southland Province in late 1861 and briefly Deputy-Superintendent. From late 1864, he was a contract surveyor in the Bay of Plenty until January 1867 when he was appointed Chief Surveyor for Auckland Province and Inspector of Surveys for the General Government. He held these posts until his Native Land Court appointment in 1877 which he gained for having not only an experience of land dealings but because he was 'a good Maori linguist'. He remained on the Native Land Court bench (retiring briefly in 1880-82, reappointed 4 November 1880 and 18 April 1882) until his final retirement at age 67 in 1883, upon which he left the country returning to spend his last two years in Kent. 'He was a man of unusual attainments and experience, but lacked the assertiveness of character necessary for advancement in public life.'[19]

Heale is described as 'a scholar of repute, especially in Greek, Latin,. Freench and Italian', as well as being an astronomer and mathematician, and was a member of the first senate of the University of New Zealand. He wrote a highly regarded textbook on 'The Principles and Practice of Surveying' in 1871.[20] His acquaintance with the law, therefore, was only as a layperson active in business and surveying, and with Maori from his early business ventures and surveying work. The land dealings may raise a questionmark. His position of responsibility with regard to surveys made him ultimately responsible for those survey maps upon which Native Land Court judgments were required to be based.

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19 Scholefield, *DNZB*, vol. 1, 372; NZG, 4 November 1880, 1572; 20 April 1882, 608.

20 Lawn, 'Pioneer Land Surveyors ', Part 2, 121-123; *Cyclopedia*, vol. 2, 103.

Captain John Jermyn Symonds was first appointed to the bench of the Native Land Court in February 1875. This was a busy year for him, as he was made Resident Magistrate for Kaipara (presumably replacing John Rogan), then Auditor of the Courts of Law Trust Accounts for Kaipara *vice* Rogan, and Chairman of the Licensing Court for the Matakohe, Mangawai, Port Albert, Mahurangi, Tokatoka and Kaipara licensing districts, *vice* H.T. Kemp.[21] He had come to New Zealand in 1841 where he was briefly a Protector of Aborigines, before helping Tuckett to purchase the Otago Block. He fought in the 99th Regiment in Heke's war, receiving a commission and becoming Grey's private secretary before serving overseas with the Ceylon Rifles. Returning in charge of a detachment of Fencibles at Onehunga, he was appointed a JP in 1853, then briefly Native Secretary in March 1855 and in 1856 Resident Magistrate at Onehunga. He resigned his magistracy to represent the Pensioner Settlements in the House of Representatives 1858-60, but took it up again in 1861. Reappointed to the Native Land Court bench in 1880, he retired in 1882, dying several months later.[22] He therefore had experience with the law as a Resident Magistrate, though no training in it, and of dealing with Maori, though mostly in a military sense and two decades before his appointment to the Court.

Samuel Deighton came to New Zealand in 1840 aged 18, rapidly acquired a knowledge of Maori and became the clerk and interpreter of the Resident Magistrate's court in Wanganui by 1846. He enlisted in the first Wanganui company of volunteers in 1860, being elected captain, then as an inspector in the Colonial Defence Force and captain in the New Zealand Militia seeing service on both coasts. A McLean protege, he was an officer of the Native Land Purchase Department in Wanganui in the 1850s and Resident Magistrate at Wairoa in the late 1860s, moving to the Chatham Islands in 1873 after a brief period of unemployment, having demonstrated incompetence in the face of Te Kooti's threat. His judgeship, conferred in 1875,[23] seems to have been solely to deal with subdivision and succession cases on the Chathams. One of the settlers, a JP, described him in 1883, after at least 16 years as a Resident Magistrate, as 'quite ignorant of all law' leading to 'a want of justice to the public'.[24]

Henry Halse was trained in England as a doctor, but upon arrival in New Plymouth in 1846 was obliged by lack of employment to become a sergeant in the Armed Police Force there (under the then Inspector Donald McLean, then Inspector G.S. Cooper). He rose in rank in the police to Inspector in charge of

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21 NZG, 1875: 14 January, 55; 18 February, 141; 22 April, 267; 8 July, 456.

22 Scholefield, *DNZB*, vol. 2, 355-56; NZG, 14 October 1880, 1475.

23 Ward, *Show*, 227; NZG, 18 February 1875, 141. His appointment was regazetted in NZG, 19 May 1881, 639. Presumably this was because he was only appointed for specific occasions when hearings were required on the Chathams.

24 Quoted Michael King, *Moriori* (Auckland: Viking, 1989), 141.

New Plymouth, then moved into the public service, as Commissioner of Native Reserves in Taranaki Province in 1858, JP and Resident Magistrate in 1859,[25] and by the early 1860s Assistant Native Under-Secretary. He was shifted from New Plymouth to Auckland where he also carried out some assignments in the Waikato, becoming a renowned Maori scholar and Judge of the Native Land Court in July 1875.[26] Ward describes him as 'ineffectual' and 'a mere clerk to the Native Minister' in the early 1860s when Fox cleared other McLean appointees out of positions of influence in the Native Department.[27] However, his career suggests that he was regarded positively by many. King describes him as 'an outstandingly able civil servant with a flair for Maori language and for solving complex "native problems"'.[28] He had much experience of negotiating with Maori, especially in Taranaki, and these links seem to have been generally positive. He was repeatedly passed over for promotion to the top position, Under-Secretary Rolleston being replaced by G.S. Cooper. He retired from the Court in 1880, becoming a Licensed Native Interpreter in 1882 and dying in 1888.[29] Halse, therefore had no legal experience, but had much experience with Maori and was presumably involved to some degree with the creation of all of the early Native Land Court legislation, so he should have had a good idea of how it was to work. He may have been given the judgeship as a way of easing him out of the Department, or his other former superior, Donald McLean, may have had him appointed as another supporter against Fenton.

Captain John Alexander Wilson was a son of an early CMS missionary and educated at the Waimate mission school, St John's College and in Sydney. He settled in Opotiki, where his father had been missionary from 1840, moving to Tamaki in 1852 as a farmer. In 1857, he was elected a member of the Auckland Provincial Council. He served in Nixon's Royal Cavalry Volunteers during the Waikato war, fighting at Paterangi, Hairini and Rangiaowhia, rising to the rank of captain commanding a company of the 3rd Waikato Militia Regiment which he raised at his own expense, and later re-enlisted as captain in the 3rd Battalion Auckland Militia from which he was formally retired only in 1907. In 1866, he joined the civil service, adminstering the confiscated lands in the Bay of Plenty block (Whakatane and Opotiki) as Crown Agent and was Land Purchase Officer for the Bay of Plenty and East Coast from 1873 to 1876, from which post his published criticisms of Judge Rogan's Native Land Court operations on the East

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25 NZG, 13 April 1858, 56; 24 November 1859, 260.

26 Richard S. Hill, *Policing the Colonial Frontier*, (Wellington: Government Printer, 1986), *passim*; Ward, *Show*, *passim*; NZG, 20 July 1875, 503.

27 Ward, *Show*, 130.

28 King, *Moriori*, 120.

29 G.H. Scholefield, *Dictionary of New Zealand Biography* (Wellington: Department of Internal Affairs, 1940), vol. 1, 348; NZG, 20 April 1882, 608.

Coast earned his dismissal.[30] First appointed to the Land Court bench in 1878, he claimed to have adjudicated on some 2,000,000 acres of Maori land. He wrote several works on Maori history and customs, including *The Story of Te Waharoa*.[31]

During his land purchasing career, he developed other business interests, including the first sulphuric acid works in the North Island, using White Island, which he bought in 1874. Although the purchase was from George Simpkin, it might bear closer investigation, as the Island had only recently passed through the Maketu Native Land Court, being awarded, strangely, to a prominent kupapa Arawa, Retireti Tapsell.[32] 'In Tauranga he is known as the father of the sulphur trade' from the works he built there in 1878, which began exporting to Australia in 1880. But his business came to an acrimonious end when it collapsed in 1886 and he was burned in effigy in the town.

His career in the Court was tempestuous. After only two years, he was dismissed in 1880, due, he claimed, to Fenton's personal animosity, although Fenton claimed it was because he had had no legal training - which had been no barrier to most other appointments.[33] There had already been conflict over Wilson's continuing to devote too much time to other (unspecified) government positions. Reinstated in 1886, he was again dismissed from the Court together with Mair and Puckey in 1891. Becoming Registrar of the Auckland Native Land Court in May 1894, he was reinstated to the bench after Mair in April 1895, continuing until 1899 or 1901. His qualifications for the Land Court judgeship appear to have been centred on his lifelong experience of Maori and their language and his expertise in land dealings as an adjudicator and purchaser.[34]

Major Charles Heaphy VC was appointed a Native Land Court judge in September 1878.[35] Trained as a draughtsman, artist and surveyor in England, he came to the New Zealand Company settlement at Wellington in 1839. During the 1840s he participated in many of the exploratory journeys around the upper South Island, then joined the Survey Department in 1848, becoming the first Goldfields Commissioner for Coromandel in 1852 and District Surveyor for Mahurangi in 1854 and Auckland in 1858, participating in Hochstetter's geological surveys of the Auckland Province. As war in Taranaki threatened, he was 'an

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30 J.A. Wilson, *How the Native Land Court and Land Purchase Department Behave on the East Coast* (Auckland: William Atkin, 1877); R. Cooper, *Land Purchases on the East Coast* (Wellington: Evening Argus, 1877).

31 *Cyclopedia*, vol. 1, 141-142.

32 See R.P. Boast, 'Whakaari (White Island) and Motuhora (Whale Island). A Report to the Waitangi Tribunal' (unpublished typescript, 1993), 23-39.

33 J.A. Wilson, *The Modus Operandi or Judgment without Trial, or How I Lost My Judgeship* (Auckland: Freeman's Journal, 1884).

34 *Dictionary of New Zealand Biography*, vol. 2, 586-587; Scholefield, *DNZB*, vol. 2, 522; NZG, 3 May 1894, 668; 11 April 1905, 650.

35 NZG, 19 September 1878, 1283.

enthusiastic propagandist' for the war and backed his words by immediately enlisting in the Parnell Volunteers, as captain commanding a company of 100. He built the St John's redoubt at Papatoetoe and served as 'Military Surveyor and Guide to the Forces' in the campaigns of Cameron, Chute and Carey, especially as guide for flying columns. This was a combatant role; he won the VC near Te Awamutu in 1864, the only member of the Colonial Forces to do so, and was promoted to major. In the same year, he was appointed Chief Surveyor to the General Government, being principally in charge of the surveys of the Waikato confiscated districts (condemned in a report 10 years later by Major H.S. Palmer), and became first chairman of the Surveyors' Association. Resigning through ill health, he instead served a term as a MHR for Parnell. After an undistinguished two years, he resigned upon being appointed in 1870 the inaugural Commissioner of Native Reserves as a reward from Donald McLean for political support.[36] In this role he was exclusively part of McLean's department and 'an efficient administrator and collector of income due to their beneficiaries'. His service on the Court's bench was brief as in 1880, crippled with rheumatism, he was forced by the Hall administration's retrenchment policies to resign and move to Brisbane, where he soon died.[37]

Thomas Edward Young was appointed a judge of the Native Land Court in March 1879.[38]

Judge Laughlin [or Loughlin] O'Brien had been briefly a politician as senior MHR for Auckland in 1853-55. Serving his articles to the law in Auckland, he was one of the first two solicitors to be admitted after so qualifying in 1851. He was then Sheriff and Registrar of the Supreme Court in Auckland and Registration, Returning Officer and from 1866 Revising Officer for all the electoral districts north of Raglan and Franklin. Made a judge of the Native Land Court in 1880, he presumably resigned because he was reappointed in 1888. He retired to Waiheke Island where he died in 1901.[39]

Frederick Morris Preston Brookfield studied law in Melbourne before being admitted to practise in New Zealand in 1855. For some years he was provincial solicitor for Auckland Province, then Crown Prosecutor. Closer involvement with provincial politics followed as he represented first Onehunga 1861-63, then Pensioner Settlements 1870-73, in the Provincial Council, being a member of the executive 1862 and 1869-70. He became a judge of the Native Land Court in April 1881, but resigned to resume private practice with his son.[40] Brookfield therefore

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36 NZG, 20 April 1870, 183.

37 Lawn, 'Pioneer Surveyors', Part 2, 123-125; *Dictionary of New Zealand Biography*, vol. 1, 181-183; Ward, *Show*, 252-253.

38 NZG, 6 March 1879, 328.

39 *Cyclopedia*, vol. 2, 100; Scholefield, *DNZB*, vol. 2, 131; *NZ Parliamentary Record 1840-1925*, 122; NZG, 17 April 1866, 146; 21 October 1880, 1519; 22 November 1888, 1285.

40 NZG, 5 May 1881, 505; Scholefield, *DNZB*, vol. 1, 97.

was qualified and experienced in the law, but on the face of it had little experience in dealing with Maori and their land.

Judge Edward Marsh Williams was the eldest son of Archdeacon Henry Williams and his assistant in translating the Treaty of Waitangi in 1840. Partially trained as a doctor, he returned to New Zealand because of ill health, helped his father with the Treaty translation and then accompanied Major Bunbury as assistant and intepreter. As a reward he was made Government Interpreter, Clerk of the Court and first postmaster of Auckland, but resigned in 1842 to return to farming at Pakaraka. From 1861 to 1880 he was Resident Magistrate for the Bay of Islands and Northern District, 'one of the most able of the new officials', being made judge of the Native Land Court from 29 April 1881 until his final retirement in 1891.[41] His experience was therefore as an occasional civil servant, a Resident Magistrate and as a 'expert' in matters Maori.

Edward Walter Puckey was the son of an early CMS missionary. He had been Native Officer at Thames from 1863 to at least 1871 and included an interpretership in the Native Department in his career before being made a judge of the Court in 1881.[42]

Major William Gilbert Mair had been born in the Bay of Islands in 1832 as a son of one of the earliest CMS missionaries and was educated at mission schools. He spent some time farming and on the Australian goldfields before entering the public service in 1863 as interpreter to Colonel Nixon of the Colonial Defence Force cavalry in the Waikato. Distinguished initially at Rangiaowhia, Hairini and Orakau, he served as one of the most successful colonial officers throughout the Waikato, Tauranga, Bay of Plenty, East Coast and Urewera campaigns, becoming a Major in the New Zealand Militia in 1866. He and his brother, Gilbert, frequently commanded units of Arawa especially. In 1864, he was appointed Resident Magistrate at Taupo, but shifted to Opotiki in 1866 at the conclusion of the Bay of Plenty campaign. Also in June 1866, he was made a judge of the Compensation Court. In 1871, his patron Donald McLean moved him to Waikato as Native Officer to try to bring the King Movement to heel and he worked diligently and effectively at this task until Tawhiao's submission in July 1881. He was appointed to the Land Court in 1882.[43] Because of the standing he had won amongst Tainui, he and Paratene Ngata were given the task of holding the hearings from 1883 which opened up the Pohe Potae. Dismissed from the Court in 1891 in controversial circumstances, he was reinstated in 1894 and remained on the bench until his final retirement in 1909, three years before

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41 *Cyclopedia*, vol. 2, 275-76; Scholefield, *DNZB*, vol. 2, 510; Ward, *Show*, 140; NZG, 5 May 1881, 505.

42 NZG, 4 November 1880, 1572; 19 May 1881, 638.

43 *Cyclopedia*, vol. 1, 141; Scholefield, *DNZB*, vol. 2, 46-47; Ward, *Show, passim*; NZG, 29 June 1866, 272; 23 March 1882, 478.

his death. In an extension of his New Zealand work, in 1899 he spent a short term as Consul in Samoa settling claims for compensation from British residents affected by political disturbances. 'The Maoris, friendly and rebel alike, had great respect for him and confidence in his sense of justice, and this, more than any other factor, made possible the successful outcome of his patient and tactful negotiations with the Maori King, resulting in the opening of the King Country to European settlement.'[44]

James Edwin MacDonald replaced Fenton as Chief Judge on 14 November 1882. I have so far found no information on his background, except that he had been a barrister and a judge of the Court since October 1880. Ward describes him as 'equally careless of Maori interests [as Fenton] and duller witted into the bargain'.[45] He recommended that so long as Maori vendors could show they had other land, there should be no restrictions on the alienation of any Maori land.

Henry Tacy Clarke, son of the early CMS missionary and Chief Protector of Aborigines George Clarke, acted as an interpreter to the British forces during Heke's war in the far North in 1845, being wounded at Ohaeawai. He was appointed Resident Magistrate at Tauranga in 1860 and Civil Commissioner for the Bay of Plenty in 1864. This area was the focus of his activities for the next decade as he was simultaneously appointed Compensation Commissioner (March 1868), Commissioner to inquire into Native Reserves (July 1868) and Paymaster for Native Services (August 1868) for Tauranga. The commissionership for the reserves was passed to W.G. Mair (January 1870), back to Clarke (January 1871 - July 1876), to Brabant, back to Clarke again (January 1878) and to Brabant again (April 1878). He was promoted to be Under-Secretary of the Native Department in 1873, presiding over the 'miniature government built by [Donald] McLean to manage Maori affairs' until his retirement to successful farming at Waimate in February 1879. His appointment to the Native Land Court on 12 March 1883, was the last step in a lengthy and influential career in Native affairs.[46]

Another 'expert' on Maori was Judge Alexander Mackay. Nephew of James Mackay, he came to New Zealand aged 12 in 1845. Although he entered farming at Nelson, he became proficient in the Maori language. Appointed Resident Magistrate for Nelson and Commissioner of Native Reserves in 1864, he was transferred to Wellington in 1882 as Commissioner of Native Reserves for the whole colony and a Trust Commissioner under the Native Land Fraud Prevention provisions, then raised to the Land Court bench in May 1884. He

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44 *Encyclopedia of New Zealand*, vol. 2, 379; NZG, 3 May 1894, 668.

45 Ward, *Show*, 289; NZG, 21 October 1880, 1519; .16 November 1882, 1715.

46 *Encyclopedia*, vol. 1, 355; Butterwith and Young, *Maori Affairs*, 45; NZG, 14 November 1864, 404; 9 March 1868; 11 July 1868, 354; 25 August 1868, 420; 17 January 1870, 28; 13 July 1871; 13 July 1876, 487; 24 January 1878, 91; 18 April 1878, 454; 16 October 1873, 581; 15 March 1883, 320.

compiled in 1870 a two-volume compendium of documents relating to Maori land dealings in the South Island, which included reports of the Native Land Court sittings in the late 1860s as well as the earlier purchase records.[47] He himself was present at these hearings in an ambiguous role, as a government official, but with the reponsibility of safeguarding Maori interests. He remained a judge until 1904.

Judge Richard John Gill, having served an apprenticeship as H.T. Clarke's clerk, had been appointed Chief Clerk and Accountant in the Native Department in 1871. From there, he was promoted to be Under-Secretary for the new Land Purchase Department when it was separated from the Native Department in 1879 and of which he had already been the *de facto* head since 1873. He was appointed to the Court's bench in July 1885.[48]

Judge David Scannell was another soldier, having fought under McDonnell in southern Taranaki and being the first man enrolled in the Armed Constabulary in 1867. Through the campaigns against Titokowaru and then Te Kooti, he came to command No. 2 Constabulary as a Sub-Inspector. Moved to Taupo in 1870, he became Inspector and then Major in the New Zealand Militia. He held dual roles as military commander and Resident Magistrate at Taupo until 1888, apart from 1876-1878 spent at Tauranga. He became a member of the Native Land Court bench in late 1885, holding the judgeship in conjunction with his military and Resident Magistrate positions until the abolition of the Armed Constabulary in 1888 and then on its own until 1904.[49]

Judge Robert Ward was the son of a Primitive Methodist missionary in Taranaki and Auckland. In 1868, aged 28, he joined the Native Department, but by 1871 was clerk to the bench, interpreter, clerk of petty sessions and Registrar of Births, Deaths and Marriages for the Rangitikei District. Appointed Government Native Agent for the Rangitikei and Manawatu districts, he became Resident Magistrate as well in 1876 and had first Wanganui, then Napier and Waipukurau, added to his region in 1881 and 1887. Made a judge of the Native Land Court in 1886, he maintained his magisterial duties, although it is not clear about those as Native Agent. In 1888, his resident magistracy was shifted east to Napier, but he continued to operate the Native Land Court for the west coast, from the Mokau to the Rangitikei Rivers. He remained a judge until 1901.[50]

Judge Herbert William Brabant came to New Zealand in 1859 and worked mostly as a farmer until entering the civil service as clerk to the bench in Raglan in 1867. In 1871 he became a captain in the New Zealand Militia and by the end of

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47 *Cyclopedia*, vol. 1, 140; Ward, *Show*, 208; NZG, 22 May 1884, 844.

48 Ward, *Show*, 260, 279; NZG, 19 August 1871; 6 March 1879, 328; 9 July 1885, 847.

49 *Cyclopedia*, vol. 1, 140. I have derived otherwise unattributed information about public offices 1893-1909 from the relevant volume of the *New Zealand Official Yearbooks*.

50 *Cyclopedia*, vol. 1, 140; NZG, 27 May 1886, 683; 1 December 1887, 1479.

the same year was appointed Resident Magistrate at Opotiki. Remaining there until 1876, he was transferred to Tauranga, where he stayed until 1888. During this time, he was in charge of Native Affairs in the Bay of Plenty as District Officer and worked as crown agent to sort out confiscated lands in the eastern Bay of Plenty and as commissioner under the Tauranga District Lands Act to subdivide the confiscated lands there. Appointed to the Native Land Court in 1886, while still engaged in this work, he was shifted to be Resident Magistrate in Wanganui in 1889, becoming Stipendiary Magistrate for the greater Wanganui region to Marton and Hawera in 1893. He must have left the Court for a time because he was reappointed in 1895. In 1897 he went to Auckland as Stipendiary Magistrate, becoming also chairman of the Auckland Licensing Committee. In 1904 he shifted to Hawke's Bay, becoming not only the Stipendiary Magistrate, but Sheriff, Coroner and Registrar of the Supreme Court in Napier. He left the bench in 1907.[51]

George Elliott Barton was admitted to the bar and practised for perhaps twenty years in Dublin and Melbourne. From his arrival in Dunedin in 1862, he practised until moving to Wellington in 1876. In Wellington he formed a partnership with H.S. Fitzherbert, being elected MHR for Wellington City for 1878-79. He later went to San Francisco before returning to New Zealand when he was appointed to the Native Land Court in 1888 and to the Validation Court in 1892. He remained until 1894, but reappeared briefly on the Validation Court alone in 1896. His elevation to the bench seems rather odd considering that he had a reputation for 'an impulsive and highly excitable temperament and was frequently at loggerheads with bench and bar', even being imprisoned by Richmond J for contempt in 1878.[52] Perhaps his appointment to the Court was a means to remove the annoyance to practitioners and judiciary in the general courts! He can have had little experience in Maori land law or in dealing with Maori unless he had been Ballance's commissioner.

Chief Judge Hugh Garden Seth-Smith was a Cambridge and Inner Temple trained barrister and solicitor. Arriving in New Zealand in 1881 after eight years in practice, he was made JP, District Judge and Resident Magistrate in Auckland in 1882. On the basis of his legal and judicial expertise, he was appointed Chief Judge of the Native Land Court from February 1889 to 1893. After resigning from this post, he returned to private legal practice, maintaining community interests in being one of the first councillors of Auckland University College and the first

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51 *Cyclopedia*, vol. 1, 1401-02; vol. 2, 274; NZG, 18 April 1878, 454; 7 November 1878, 1549.

52 Scholefield, *DNZB*, vol. 1, 46; vol. 2, 538; NZG, 22 November 1888, 1285. He may be the G. Barton referred to by Ward as a special commissioner under Ballance in 1886 to advise on removal of restrictions on alienation of reserves and who withstood pressure from speculators. Ward, *Show*, 296.

president of the Polynesian Society.[53] He was briefly reappointed Chief Judge from 11 October 1893 upon his successor Davy's resignation, but Davy resumed the position on 14 April 1894. He was raised to Deputy Chief Judge, seemingly the first to hold that position, in June 1904, perhaps due to some illness or other incapacity on Davy's part, because Davy retired in August 1904. Seth-Smith was then reappointed Chief Judge, where he must have remained until Palmer's appointment as on 28 August 1906, the same day Palmer became Chief Judge, Seth-Smith became again a puisne judge and judge of the Native Appellate Court.[54]

Spencer von Sturmer was appointed judge of the Native Land Court and Trust Commissioner in February 1889. He had previously been made Resident Magistrate for Hokianga in the 1870s, then Wairarapa, Napier and Waipukurau in 1886, losing Napier and Waipukurau to Robert Ward in 1887.[55] He revealed his attitude to Maori retaining land in declaring in 1890, 'I have determined never to place restrictions on Native Land where it is unoccupied.'[56]

Judge Robert Trimble had been a businessman in Manchester, Liverpool and New York, receiving a silver medal in recognition of his service to Afro-Americans liberated during the American Civil War. He was a volunteer officer of artillery in Lancashire reaching the rank of colonel. Emigrating to New Zealand in 1875, he was one of the initial settlers on the Moa block near Inglewood and rapidly became a community leader. The first chairman of the Taranaki County Council, he was elected MHR for Grey and Bell 1879-81, then Taranaki 1881-87. He trained the Inglewood volunteers at the time of the unrest over Parihaka. He was appointed to the Native Land Court bench in November 1889, but had left the Court by 1893.[57]

Judge James Stephenson Clendon had extensive experience of the courts from within before his appointment to the Native Land Court bench in October 1890. In 1875 he was made Registrar of Births, Deaths and Marriages and Vaccination Inspector for Helensville, Clerk of the Licensing Courts for the Kaipara licensing districts under J.J. Symonds, and Clerk of the Kaipara Resident Magistrate's court and then a Resident Magistrate himself by the mid-1880s.[58] His tenure must have been brief as he was not on the bench in mid-1893.

Lieutenant-Colonel Walter Edward Gudgeon was raised in New Plymouth and became a farmer. He had an active and lengthy service career. When

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53 *Cyclopedia*, vol. 2, 281; NZG, 14.December 1882, 1862.

54 NZG, 12 October 1893, 1449; 19 April 1894, 585; 16 June 1904, 1543; 1 September 1904, 2124; 30 August, 1906, 2303.

55 NZG, 21 November 1886, 1363; 1 December 1887, 1479; 28 February 1889, 245.

56 Ward, *Show*, 304.

57 Scholefield, *DNZB*, vol. 2, 396; 21 November 1889, 1186.

58 NZG, 1975: 11 February, 123; 22 April, 267; 24 June, 421; 16 October 1890, 1113.

fighting broke out near Wanganui in 1865, he enlisted in the Wanganui Bushrangers, becoming within three months second in command of the Native Contingent under Thomas McDonnell. He served in Opotiki and Chute's southern Taranaki campaigns and against Te Kooti and Titokowaru, when he was made a Sub-Inspector of the Armed Constabulary, remaining near Taupo until 1874. Placed in charge of the Poverty Bay District where he bought 1,000 acres, and then at Opunake, he became Resident Magistrate for Wairoa and Waiapu until 1880, becoming involved in bitter land disputes. Transferred again to Taranaki, he led the company that arrested Te Whiti and Tohu at Parihaka. In 1885, he was promoted to major and placed in charge of Wellington's harbour defences during the Russian scare, soon becoming Under-Secretary for Defence. In 1887 he replaced Sir George Whitmore as Commissioner in charge of the New Zealand Police Force. Appointment to the Native Land Court bench in 1890 and as Native Lands Frauds Trust Commissioner enabled him to pursue a longstanding interest in Maori language and history and in 1892 he was a founding member of the Polynesian Society. In 1898, he was appointed British Resident in the Cook Islands with the object of annexing them to New Zealand, soon adding the Chief Judgeship of the Land Titles Court, based on his New Zealand experience. His legal experience before arriving on the Native Land Court was limited to his private reading (he had scant formal education) and police matters picked up during his Armed Constabulary career. His involvement with Maori land or Maori was slight, except, again, from a policing viewpoint.[59]

Chief Judge George Boutflower Davy arrived in New Zealand in 1862 as an English qualified lawyer. He was admitted as a solicitor in Whangarei in 1863, practising there and in Auckland, being briefly a member of the Auckland Provincial Council, then entering government service in 1869 as Warden and Resident Magistrate at Thames. In 1871, he became District Land Registrar in Auckland to inaugurate the land transfer system for the province, spent two years in Christchurch and became Registrar-General of Lands in 1875, a position he did not relinquish upon becoming the Chief Judge of the Native Land Court on 15 November 1892. He was District Judge at Wellington until the position was abolished in 1880. He resigned his Chief Judgeship after less than a year, being replaced for some months by his predecessor, Seth-Smith, and was reappointed Chief Judge on 14 April 1893. Another swap occurred with Seth-Smith in 1904 - see above re Seth-Smith. He had no prior experience on the Court's bench and seems to have lacked any background in dealing with Maori land, except as it made its way into the Torrens system. His qualifications appear to have been his

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59 *Dictionary of New Zealand Biography*, vol. 2, 181-183; Scholefield, *DNZB*, vol. 1, 335; NZG, 3 July 1890, 764.

legal training, his short time as District Court Judge in Wellington (at most five years), and his extensive knowledge of the European land system.[60]

Judge William James Butler was born in Mangonui in 1848 and educated in Auckland, trained as a surveyor, but spent three years in the flax-milling industry and two more on the Thames goldfield. Having acquired a knowledge of the Maori language, he was appointed in 1878 to be Government Native Agent in the Wairarapa, but soon traded it for an interpretership in the Native Department in Wellington. He then became Private Secretary to a succession of Native Ministers, John Bryce, William Rolleston and John Ballance. Made Land Purchase Officer at Wanganui in 1885 and reappointed in 1892, he was successful in acquiring over 1,000,000 acres for the Crown up the west coast (especially the Waimarino Block) and dealt with Te Whiti and Tohu. He was raised to the Native Land Court bench in 1893 and apparently died in ofice in April 1904.[61] Butler's chief qualifications appear to have been his ability to speak Maori and his familiarity with Maori land dealings through having successfully conducted them himself for the government.

Judge Herbert Frank Edger was educated by his father, who was the minister of the Albertland settlement on the Kaipara, and became a farmer. In 1879, aged 25, he entered the Native Department as a clerk, becoming senior clerk. While in these positions, he studied law and in 1889 was admitted as a solicitor. In 1891, he became Registrar of the Court in Auckland and in 1893 transferred to Wellington. He was appointed to a judgeship in the Court in March 1894.[62] He therefore had legal training, but no experience of its practice outside the operations of the Court itself. He was also a civil servant, although from within the Court rather than the Native Department. Appointed simultaneously president of the Waiariki and Tokerau District Maori Land Councils, he resigned from these posts in February 1905, to be replaced by Registrar J.W. Browne in Tokerau and by Judge Palmer in Waiariki. When the Native Department was resurrected by Carroll in mid-1906, Judge Edger was selected to be the head of that department as Under-Secretary, simultaneously with the judgeship he retained. However, he found his ideas of expanding the Department's role in Maori health and farming and of involving tribal leaders in the process of the disposal of lands were in conflict with those of the Government, and he resigned on 15 January 1907, to die soon after.[63] Judge Edger's appointment as simultaneously a judge of the Native Land Court and Under-Secretary of the Native Affairs Department seems a clear

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60 *Cyclopedia*, vol. 1, 139-140; Scholefield, *DNZB*, vol. 1, 197; NZG, 18 November 1892, 1539; 19 April 1893, 585.

61 *Cyclopedia*, vol. 1, 141; Scholefield, vol. 1, 128, NZG, 6 March 1879, 328; 27 October 1892, 1425; 15 June 1893, 893.

62 *Cyclopedia*, vol. 1, 141; Scholefield, vol. 1, 227; NZG, 15 March 1894, 412.

63 Butterworth, *Maori Affairs*, 64; NZG, 7 February 1905, 317; 7 February 1907, 460.

conflict of interest. It is an indication that the Court was still regarded as an administrative adjunct in the grand scheme of Maori land acquisition and cultural assimilation.

Henry Dunbar Johnson was a clerk in England before emigrating aged 19 in 1863. Going to the Coromandel, he worked for most of the next 16 years in storekeeping and mining, being the first white resident of Paeroa and the first prospector of the Golden Knob claim at Karangahake. He obtained his licence as a Native Interpreter in 1872 and acted as local correspondent for the *New Zealand Herald* for some years, covering such events as Grey's meeting with Tawhiao at Te Kopua. Because of this experience, he joined the civil service as a clerk and interpreter in the Native Department in Wellington in 1879. In January 1885, he was transferred to Rotorua as the Government Native Agent for the Thermal Springs district, becoming also the chairman of the Rotorua Town Board and a Justice of the Peace. A 'victim of the great retrenchments' in 1888, he retired to his property at Te Aroha, where he received occasional employment in the Native Land Court, presumably as an interpreter. In 1892, he was permanently appointed as clerk and interpreter for the Waikato district and in 1894 succeeded H.F. Edger as the Registrar of the Native Land Court for Wellington (which covered all of the country south of and including Taranaki and Hawke's Bay). He was himself raised to a judgeship of the Court in May 1896.[64] A member of the Auckland Institute and Polynesian Society, his qualifications for judgeship appear to have been (a) his previous acquaintance with the Court from having worked in it at an administrative level, and (b) his personal experience with Maori as a landowner, storekeeper, prospector and miner, leading to his acquisition of their language and presumably some appreciation of their culture.

James Meacham Batham was described in the *Cyclopedia of New Zealand* in 1897 as 'an old Government officer'. Receiving some legal training in England, he arrived in New Zealand in 1864, soon becoming Examiner of Titles, Registrar of the Supreme Court and District Land Registrar for Westland. Transferred to Auckland in 1875, then to Napier in 1876, he was District Land Registrar and Deputy Commissioner of Stamps. He held the same offices in Christchurch from 1881 and then in 1896 arrived in Wellington as Justice of the Peace, District Land Registrar, Registrar of Deeds for Wellington and Examiner of Titles for Wellington and Marlborough. He was appointed to the Native Land Court bench in April 1897 while retaining those offices, but in Gisborne, until replaced as District Land Registrar by R.N. Jones in 1904. By 1905, still a judge, he had replaced Davy as Registrar-General of Land and Deeds, District Land Registrar,

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64 *Cyclopedia*, vol. 1, 142-143; NZG, 3 May 1894, 668.

Registrar of Deeds and Examiner of Titles for Wellington, and so he remained until relinquishing his judgeship in 1907.[65]

Judge Robert Noble Jones was admitted as a solicitor in August 1890 and then practised in Gisborne, becoming a Gisborne Borough councillor.[66] When he became a Land Court judge in 1907, he was Deputy Commissioner of Stamps, District Land Registrar, Registrar of Deeds, Examiner of Titles, Registrar of Building Societies and Assistant Registrar of Companies for the Gisborne. He retained all of these positions until 1912, when he replaced them with presidency of the Tairawhiti Maori Land Board.

Chief Judge Jackson Palmer was educated in New Zealand and articled to Minister of Justice and Native Minister John Sheehan for four years before being himself admitted to the bar. He was also admitted to the bar in Samoa and practised there. From 1890 to 1896 he was MHR for Waitemata, lōsing it to W.F. Massey, and from 1899-1903 for Ohinemuri. He became judge of the Native Land Court on 8 June 1904 (with a separate though immediate appointment to the Native Appellate Court on 10 June) and rose rapidly to the chief judgeship in August 1906. He 'tried many intricate appellate cases, for which his knowlege of law and Maori custom markedly qualified him'. He died in 1919.[67]

A number of judges were appointed to the Native Land Court bench on 27 August 1906, indicating either a cleaning out of the old guard, or an expansion of the Court and its activities. James Wakelin Browne had been Registrar of the Court in Auckland. Robert Campbell Sim had been the Registrar in Wellington. Walter Edward Rawson had been a barrister and solicitor in Wellington, as had Charles Edward MacCormick.[68] MacCormick alone was raised separately to the Native Appellate Court a fortnight later.[69]

Judges Thomas William Fisher of New Plymouth and Michael Gilfedder of Invercargill were appointed to the bench together in February 1907. On the same day, Browne, Fisher, Gilfedder, Rawson and Sim were all also appointed to the Native Appellate Court.[70] Prior to attaining his judgeship, Fisher had been president of the Aotea District Maori Land Council for less than two years. Within three months of his elevation to the bench, Fisher had replaced Edger, who had resigned, as Under-Secretary of the Native Department, without

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65 *Cyclopedia*, vol. 1, 1502.
66 *Cyclopedia*, vol. 2, 961. 980.
67 Scholefield, *DNZB*, vol. 2, 146; *Cyclopedia*, vol. 2, 839; NZG, 16 June 1904, 1544; 30 August 1906, 2303
68 NZG, 6 September 1906, 2331.
69 NZG, 13 September 1906, 2418.
70 NZG, 7 February 1907, 459, 460.

relinquishing his judgeship or the presidency.[71] Judge Eliot Roscoe Reeve, a barrister and solicitor, was appointed to the bench in July 1908.[72]

Conclusion

The nineteenth century puisne judges of the Native Land Court were largely appointed from within the ranks of those civil servants who had had apparently extensive and successful dealings with Maori, usually spending some time at least within the Native Department first. Many had had some judicial experience as a Justice of the Peace, Resident Magistrate or District Judge, but they had usually gained those posts on the basis of being capable individuals, rather than from being legal authorities.

The statistics for the judges appointed between the 1865 and 1909 Native Land Acts are:

- there were 44 Native Land Court judges in this period;
- 13 were trained lawyers: Fenton, O'Brien, Brookfield, MacDonald, Barton, Seth-Smith, Davy, Edger, Jones, Palmer, Rawson, MacCormick, Reeve.
- 13 had been or remained civil servants without any prior judicial experience: Monro, Heale, Wilson, Heaphy, O'Brien, Gill, Butler, Edger, Johnson, Batham, Jones, Browne, Sim.
- 18 had been or remained civil servants with some judicial experience, usually as Resident Magistrate, although Davy was a District Judge: Fenton, Rogan, Smith, Symonds, Deighton, Halse, Williams, Puckey (probably), Mair, Clarke, Mackay, Scannell, Ward, Brabant, von Sturmer, Clendon, Gudgeon, Davy.
- 9 had been soldiers, all except Trimble involved in fighting against Maori: Symonds, Deighton, Wilson, Heaphy, Mair, Scannell, Brabant, Trimble, Gudgeon.
- 6 appear to have been independent of government service before being made Land Court judges: Maning, Brookfield, Barton, Seth-Smith, Trimble, Palmer.
- 7 have too little presently known about them to make a full assessment of their prior government service, if any.

The appointments of those with legal training came largely towards the end of this period. Fenton was the only appointee of the first generation of judges to be a lawyer. MacDonald and O'Brien were the next, 15 years later in 1880. It was nearly a decade more until 1888-9 when Barton and Seth-Smith were appointed.

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71 NZG, 2 May 1907, 1373.

72 NZG, 2 July 1908, 1787.

Only Davy and Edger were appointed during the 1890s and the last 5 of the 13 were appointed after 1903.

The Chief Judges alone have consistently had legal training. Chief Judge Fenton had both an acute legal mind and experience in living amongst and dealing with Maori on a practical level. He was apparently the only chief judge to have this experience. Chief Judge MacDonald was a puisne judge for two years before being raised to the top position, but unless he had represented claimants before the Court, he had no prior experience with Maori land. Chief Judge Seth-Smith had extensive legal and judicial experience, but before he assumed the chief judgeship he had not even been a puisne judge and thus had no experience at all in adjudicating over Maori land. A second chief judge who had not been a puisne judge in the Court, Chief Judge Davy had instead extensive experience in dealing with land from the European side in the land registry; this did not, though, mean that he had full competence in the intricacies and complexities of Maori land or Maori custom, nor in running a court. Chief Judge Palmer must have practised to some extent in the Maori land field under Sheehan and perhaps later and had two years first as a puisne judge.

The problem in staffing the Native Land Court in this period would always have been that of finding men who were competent in dealing with both the law and with Maori in their language and customs. Perhaps inevitably, weight was given to one of those attributes over the other and the 'native men' were preferred to lawyers experienced only in English law. This preference had implications, though, for the way in which early judges of the Court approached their task, and in the decisions they made. It can probably be argued that some of their decisions reflected more the sort of peace-keeping deal a civil commissioner or native agent might have made than a rigorously judicial judgment. Certainly this was so in the often haphazard and scanty way in which they recorded those decisions compared with formal Supreme Court judgments. Whether trained lawyers with a better eye for legal detail would have done as well in dealing with Maori land is a very moot point.

The change from 'native men' to lawyers relatively inexperienced in matters Maori may have reflected the fact that as the dangers of military or political disturbances receded, so Maori were perceived as needing less to be 'managed' by skilled 'old hands'. By 1900, too, perhaps the need for dealing directly with Maori custom had diminished as the supply of papatipu land was almost exhausted. It then mattered less in practice that the Land Court bench were not as au fait with Maori language and custom as they had had to be in the 1860s and 1870s. This is a matter of speculation; it certainly does not apply with regard to the ongoing need for the Court to be sympathetic to Maori culture in its broader administration of Maori lands.

TERMS OF APPOINTMENT

This section deals with the third matter raised in the research direction, viz:

- What were the terms of the nineteenth century judges' appointments?

The extent to which the Native Land Court may have been identified with the regular courts was demonstrated in part through the similarities and differences between the conditions of appointment and security of tenure of its judges and theirs and between other key aspects of structure and organisation. To establish this level of equivalence, a comparison of the Acts governing the Native Land Court and those governing other courts is necessary.

The Native/Maori Land Court

The Native Land Act 1862 allowed courts to be set up 'from time to time' by a commission from the Governor, and they would be presided over by a European Magistrate. There was no further description of precisely what conditions of employment those magistrates enjoyed, but presumably they were those of the regular Resident Magistrates, who would most likely have staffed these positions.

The Compensation Court set up under the New Zealand Settlements Act 1863 had judges appointed by letters patent, who could be removed 'at any time by warrant', i.e. they enjoyed no security of tenure and were totally subject for their lasting employment to the whims of the Government. Some never heard a case, such as Robert Parris in Taranaki, who was replaced within weeks of appointment as he was considered too valuable to the Government in his role of Civil Commissioner. The lack of permanence was probably principally due to the intention that the Compensation Court would have a very limited life, dealing in a few years with a finite group of claims.

The seminal Native Land Act 1865 at s 6 had all the Native Land Court judges appointed by letters patent under the public seal of the Colony. They held their offices 'during good behaviour', in contrast to the Native Assessors who held theirs 'during pleasure'. These judges' salaries were fixed by statute at £800 for the Chief Judge and no more than £600 for puisne judges. The Chief Judge was empowered to make the procedural rules for the Court, which would then be approved by the Governor. The Court was allowed the same powers of summoning witnesses and punishing non-attenders and those in contempt as had the Supreme Court.

The Native Land Act 1867 made no comment on or changes to these matters.

The next major piece of legislation affecting the Native Land Court, the Native Land Act 1873, made the judges' positions rather more tenuous. At s 8 it made the constitution of the Court of such judges 'as the Governor in Council may from time to time appoint'. Furthermore, 'the Governor may from time to time remove any such Chief Judge, Judges, or Assessors or any of them, and appoint another or others in his or their place and stead'. This effectively made all of the Court's appointments at the Governor's pleasure - note that while the appointment was by the Governor in Council the removal was simply by the Governor alone. This may mean nothing, or it may represent some attempt to limit the influence of the politicians who made up the Exective Council. The salaries were now to be set periodically by Parliament instead of being fixed by statute.

The process of undermining the judges' standing was completed seven years later. In 1880, the Native Land Court Act permitted the appointment of such Chief Judge, Judges and Assessors 'as the Governor may from time to time determine'. It declared firmly at s 6, 'Every person appointed under this Act shall hold office during the Governor's pleasure' - which, of course, included the judges, making their tenure no different from the 'interpreters, clerks and other officers' also employed to conduct the Court's business. No longer were the appointments made by the Governor in Council, but by the Governor alone, and their holding office was explicitly at the Governor's pleasure. Several of the existing judges ceased to be so at this time, presumably because they had been appointed under the 1873 Act, which was now superseded, and the current Hall ministry preferred not to reappoint them. Not only that, but s 38 provided that the Governor could prohibit the Court from proceeding with any particular case and remove it from the Court's jurisdiction. The possibility of a judge's removal at the government's whim or of other interference was pointed out at the time and compared unfavourably with the 'good behaviour' provision of the 1865 Act.[73]

The Native Land Court Act 1886 stated that 'a Chief Judge, Judges, Assessors, and also... Registrars, Clerks, Interpreters, and other officers' were to be appointed to the Court as required. Then, at s 7 it stated baldly, 'Every person appointed or holding office under this Act shall hold office during the Governor's pleasure'. Again, the appointments of the judges were apparently regarded as little different in quality from those of the administrative officers of the Court and they held office under the same conditions as did the office staff. It is hard to see them here as having the full weight accorded the general judiciary and which they had enjoyed under the 1865 Act twenty years previously.

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73 NZPD, vol. 37, 1880, 52.

The Native Land Act 1909 at s 4 required that the judges and other officers of the Court should be such 'as the Governor from time to time determines'. Only the Chief Judge was required to be a barrister or solicitor of at least seven years' standing. However, at s 8 it was declared that 'all Judges and other officers... shall hold office during the pleasure of the Governor'. Here, in their terms of appointment, the judges are reduced to the same level as the other officers of the Court, including not only the Assessors, but also the Registrar (a 'person holding a permanent office in the Public Service') and 'other officers as may be required for the conduct of the business of the Court' - in other words the normal public servants. At this time, their salaries were only set in the statute at what was appropriated by Parliament for the purpose, so it would be a long business to discover them. The Court could still receive whatever evidence it thought helpful, even if not otherwise legally admissible. By 1909, too, the Governor by Order in Council, rather than the Chief Judge, made and changed the procedural rules of the Court.

In 1953, the Maori Affairs Act continued the appointment of judges to the Court by the Governor-General's warrant. By now, all of the judges had to be barristers and solicitors of seven years' standing, and all judges and commissioners held office 'during the pleasure of the Governor-General'. However, with the formation of the Maori Affairs Department, it was felt necessary to make an express declaration in the statute that 'The Judges of the Maori Land Court shall not be deemed to be officers of the Department'. This appears to have been the only time such a statement was made, and it makes one wonder why it was thought desirable to do so. Perhaps it was because until then the judges had indeed been so regarded by reputation in the community, and it was important to clarify their true standing. Or perhaps it was that until that time they had been operating, in fact if not formally, as officers of the Native Affairs Department and were only now - 118 years after the formation of the Court - being cut loose as fully independent judicial officers.

In the most recent legislation, Te Ture Whenua Maori Act 1993, the judges are to be 'fit and proper persons', barristers and solicitors of no less than seven years' standing, appointed by the Governor-General's warrant, and they can only be removed for 'inability or misbehaviour', or at retirement, finally restoring a proper judicial tenure after 120 years. This compares with identical provisions governing the tenure of judges of the Planning Tribunal under the Resource Management Act 1991 at s 258.

The General Courts

By way of comparison, we now survey the conditions for appointment for the appointment of judges in general courts.

The 1844 Ordinance for Establishing a Supreme Court had judges appointed from time to time who would hold office 'during Her Majesty's pleasure'.

Under the Resident Magistrates Courts Ordinance 1846 each Resident Magistrate was appointed and held office 'during Her Majesty's pleasure' only. Their judicial powers were only such as were ordinarily accorded to Justices of the Peace.

Justices of the Peace were appointed under a commission and could be removed by the Governor 'as he thinks fit' and for bankruptcy, as provided, for example, in the Justices of the Peace Act 1908.

The Native Circuit Courts set up in 1858 were to be controlled by specially-appointed Resident Magistrates, not new judges commissioned for the purpose. In the same year, the Supreme Court Judges Act at s 3 allowed the judges to hold their commission 'in full force during their good behaviour... any law usage or practice to the contrary notwithstanding'. However, temporary judges of the Supreme Court held their appointments only during pleasure.

District Courts were also created in 1858 with their own bench. These judges were to be 'fit and proper persons', who had been admitted as barristers or solicitors. They, unlike the Supreme Court bench, held their office only 'during the pleasure of the Governor'. The same provisions were carried through in the District Courts Act of 1908.

Supreme Court judges's commissions 'shall be and continue in full force during their Good Behaviour' and they could only be removed by the Governor 'upon the address of both Houses of the General Assembly' (Supreme Court Judges Acts, 1858, ss 3-4). This was changed slightly in the Supreme Court Act Amendment Act 1862 at s 4 so that the Governor could suspend a judge upon such an address but only the Sovereign could remove them after such an address. The Supreme Court Act 1882 had judges appointed 'in the name and on behalf of Her Majesty'. They had to be barristers or solicitors of the United Kingdom of at least seven years' standing, and they held office 'during good behaviour'. In the Judicature Act 1908 the same provisions were retained, with the addition that while a judge held office during good behaviour, he could be removed upon an address of both Houses to the Governor.

Salaries

Salaries paid to judges of the different courts and to other civil servants may also be compared here. Despite Fenton's apparent desire to have the Land Court judges given an equivalent status to that of Supreme Court judges, it was not

reflected in what they were paid. In 1871, Sir George Arney, the Chief Justice, was paid £1,700 salary and the puisne justices £1,500. The Attorney-General was paid at £1,200.[74]

However, Chief Judge Fenton received only £800, while the puisne judges of the Native Land Court received £600 each. While Maning, Monro and Smith received that for being judges only, Rogan's salary was made up of £480 for his judgeship and £120 for being Resident Magistrate in Kaipara.

The pay given to Resident Magistrates varied between the £300 to Robert Barstow in the Bay of Islands and the £350 paid to W.G. Mair at Opotiki and the £600 paid to C.C. Bowen at Christchurch, or the £550 together with £200 for being a District Court judge paid to Thomas Beckham in Auckland. Most RMs' salaries were, though, lower at around the £400 W.N. Searancke received in Waikato and the £500 paid Samuel Locke at Taupo. Most RMs also received some additional payment and/or fees for being returning officers, coroners etc. District judges' salaries varied hugely, from the £425 H.E. Kenny received in New Plymouth where he was also Registrar of the Supreme Court and Resident Magistrate, to Wilson Gray's £800 in the Otago goldfields and the £900 for C.D.R. Ward in Timaru and Westland.

Comparable civil services salaries were the £600 paid to H.T. Clarke and Robert Parris, Civil Commissioners in Auckland and Taranaki respectively, and to Charles Heaphy, Native Reserves Trustee. It may not be entirely coincidental that these important Native Department officials were paid at the same rate as the Land Court judges. Others paid £600 included the Christchurch District Engineer, the Clerk of Parliament, the Under-Secretary of the Public Works Department and the Registrar-General of Lands (who received another £200 as Registrar of Deeds).

Those who received more included the Registrars of Deeds and District Lands Registrars, the Colonial Architect, G.S. Cooper the Under-Secretary for the both the Colonial Secretary's and Defence departments, all at £700. Alfred Domett earned £1,000 as Secretary of Crown Lands and Land Claims Commissioner and Isaac Featherston £1,500 as Agent-General in London.

Pluralism in Appointments

Another relevant issue is that of the variety of additional roles and offices which the judges of the Native/Maori Land Court were allowed to hold simultaneously with their appointments on the Land Court's bench. In the earliest days of the Court, several of the judges, Rogan, Mackay and Clarke also held positions such as Civil Commissioner and Resident Magistrate, offices

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74 The 1871 figures are set out in NZG, 28 May 1872, 305-345.

which were those of Crown agents directly implementing Crown Native policy. Although it was soon determined that one person could not simultaneously be both a Civil Commissioner and a judge of the Court (and Clarke and Mackay both decided to retain their commissions rather than remain on the Court's bench), it was possible still to be a judge and a Resident Magistrate, as John Rogan, for example, continued to be in the Kaipara district for years after his Land Court judgeship.[75]

In 1875, Chief Judge Fenton wrote to Native Minister Sir Donald McLean, complaining of his inadequate salary, which had remained fixed at its original level although others had all been raised so that 'one of them (the junior of all, Maning) has salary equal to myself'. He described his total income in 1864 when he accepted the Chief Judgeship as being £1,700 from official salary and private practice. It was clearly expected that he would continue in private practice while occupying the judgeship: 'I, however, made with the Government (Weld's) a compact assuring my right to practise my profession.' Indeed, he was only convinced to accept the job by this understanding and 'prompted by the advantages of the Civil Service Act, and the pension in case of a breakdown'. But the extra burdens of the Compensation Court, ('For this work I never received anything') destroyed that private practice, which he was obliged to give up. Now he was '10 years older and a step down the ladder as far as income is concerned'.[76] It would seem quite out of keeping with general judicial ethics for a lawyer to continue to practise at the bar after he has been raised to the bench. This suggests that from the first, neither the government who set up the Native Land Court, nor its first and most influential chief judicial officer, regarded the Court as quite a 'real' court, in which the same judicial standards of clearly visible independence needed to be observed as in other courts. Not that the Court was to be without status and prestige, but that it was seen to be more within the civil service than being a fully independent judicial body.

The Civil Service Act in force in 1864, to which Fenton must have been referring, was the Civil Service Superannuation Act 1858, slightly amended by the Civil Service Amendment Act 1861. These Acts applied to 'Officers, Clerks, and others employed in the Civil Service of the Colony of New Zealand' and related to superannuation provisions. They were replaced, soon after the formation of the Native Land Court, by the Civil Service Act 1866. In this Act, judges of the Native Land Court were specifically listed as civil service officers of the first class; Supreme Court judges were not, but District Court judges also were (s 4).[77] Those included in this class were perhaps the equivalent of today's Chief

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75 He was still Resident Magistrate in Kaipara in 1872. NZG, 28 May 1872, 329.

76 F.D. Fenton to D. McLean, 27 May 1875. Alexander Turnbull Library, MS Papers 32/267.

77 Others included in this category were the Permanent Law Officer, the Registrar-General of Lands, Secretary for Crown Lands, Inspector of Customs, Secretary of the Postal Department,

Executive Officers of the various government departments, but they were all civil servants, not independent judicial figures. The distinguishing feature of the first class appears to have been that their salaries were set annually in the Parliamentary estimates and not paid at fixed points on a set scale as were those of the lower-classes (ss 5-6). The direct independence of the judiciary seems to have been maintained only in the separation of the Supreme Court judges with their own legislation.

Fenton was called to the Legislative Council in 1869, where he endeavoured to use his position to enhance the Native Land Court's (and thereby his own) role and prestige. He remained there only a term, the reason for his exclusion being the conflict between holding political and judicial offices, but probably having more to do with personal rivalry with Native Minister, Donald McLean. In any case, the political office he held was not necessarily held to be incompatible with his judicial role per se, it was the conflict with his being an 'official' that was apparently the problem.[78]

The state of affairs in which Native Land Court judges could hold other positions concurrently with their judgeship was not challenged or resolved by the Government, which seems thereby to have given at least tacit approval to such a situation and thus to have recognised that Native Land Court judges were not to be considered in the same way and having the same independent status as judges in the ordinary European courts - perhaps even that they were not regarded as 'real' judges. The potential conflicts of interest are revealed in the biographies of the judges given in Section I above and they seem, if anything, to have got worse later in the century, when the Court was fdrifting more towards an administrative function over Maori land, than being at the cutting edge of often fraught race relations.

In 1893, three of the Native Land Frauds Prevention Trust Commissioners, performing some judicial functions under the Native Land Court's umbrella were also District Court Judges and/or Resident Magistrates, but several others of them were also District Land Registrars.

There are many other examples of apparent formal irregularities to be given. In 1895, H.W. Brabant was created a Land Court judge, retaining his Stipendiary Magistracy at Hawera, then adding a Coroner's appointment when he moved to Auckland. When Judge J.M Batham was appointed to the bench in 1897, he was also Deputy Commissioner of Stamps, District Land Registrar, Registrar of Deeds and Examiner of Titles at Gisborne, offices which he retained until replaced in

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Assistant Treasurer, Geological Surveyor, Superintendent of Telegraphs, Auditor of Public Accounts, Under-Secretary for Colonial Defence, Under Secretary for Native Affairs and Comptroller, as well as 'Under Secretary' (of Colonial Secretary's Office?) and 'Registrar-General'.

78 Butterworth, *Maori Trustee*, 15.

them by R.N. Jones in 1904. Batham moved to Wellington, becoming, in addition to his Land Court judgeship, Registrar-General of Lands, District Land Registrar, Registrar of Deeds and Examiner of Titles, replacing Chief Judge Davy in these roles. He retained his dual allegiance until 1907, when he ceased to be a judge.

There continued to be an unchallenged and perhaps increased intermingling of judges' roles and public offices into the twentieth century.

From 1894 until 1904, Chief Judge George B. Davy of the Native Land Court was simultaneously Registrar-General of Land and District Land Registrar at Wellington and Examiner of Titles from Wellington and Marlborough, posts which he had held for years prior to his appointment to the Land Court bench. On at least one occasion, his confusion of this multiplicity of roles contributed to his wrongly rehearing and altering previous orders of the Court (although this was not from any political motivation), attracting critical Supreme Court attention.[79]

The 1913 Native Land Amendment Act later defined the Native Land Boards such that each Board was to be comprised of the Land Court judge in that district and his Registrar. This was another blending of judicial and public Service functions as the Boards had to be concerned not only with the administration of land as such, but also even with development projects, especially in agriculture.[80] The Boards have been called 'the administrative arm of the Maori Land Court';[81] not until 1952 was this 'administrative arm' amputated.

The 1980 Royal Commission on the Maori Land Courts noted that because of the overlap between the Native Land Court and the Native Department 'all officers of the Native Department were then [1900-1934] in fact officers of the Court as we know it today. The Court was the department.'[82] Only in 1979 was the Maori Land Court administratively separated from the Maori Affairs Department with the appointment of its own Chief Registrar; previously the

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79 *In re Mangatainoka 1BC No.2* 33 NZLR (1914), esp. 53. There does not seem to be, in this long judgment, specific comment on how Davy related his roles, but having just noted the different roles and Davy's actions Edwards J commented, 'It does not appear how Mr. Davy came to be moved to do these acts', implying that his actions as Chief Judge were informed by his Land Registrar's role. Earlier in the judgment at 41 Williams J had felt it necessary to comment at length upon the proper separation between the roles and that Davy could not take into account what he knew from one role when exercising the other. He then made no comment on whether there had been a cross-over, but the comment and sudden silence is also suggestive. Whether or not Davy erred in this way, the possibility was there and his apparently anomalous situation seems to have been accepted unquestioningly.

80 Butterworth, *Maori Trustee*, 26.

81 Butterworth, *Maori Trustee*, 67-68.

82 *The Maori Land Courts. Report of the Royal Commission of Inquiry.* AJHR, 1980,H3, 47.

court and titles sections had been under the control of the Assistant Maori Trustee.[83]

Conclusion

A comparison of the conditions of appointment of the bench of the Native/Maori Land Court and the general courts thus reveals that there are some inconsistencies in their treatment, which supports the contention that the Court was subject to greater political control than were the general courts.

Originally the Native Land Court judges were appointed on the same terms as judges of the Supreme Court, not District Court judges or Resident Magistrates, indicating that they were thought of superior standing. This is probably a concrete example of Alan Ward's contention that Fenton in his attempts at self-aggrandisement tried to create a tribunal which was of comparable status to the Supreme Court.[84] This aspiration affected other aspects of the Court's operations, as in, for example, having the judges travel to different centres to conduct hearings, instead of remaining settled in individual districts after the manner of the more lowly District Courts and as originally envisaged in the 1862 Native Land Act. Fenton's alleged rivalry with Donald McLean may also, then, be reflected in the apparent downgrading to appointments held at pleasure in the 1873 Native Land Act, where the then Native Minister McLean, by now in the ascendant, would have been able to score a point over his rival. If such a scenario were true - and it seems quite likely - it would also reinforce the case for the recognition of the Native Land Court as being regarded at the time as an agent of Crown policy to be brought to heel when it became too independent or self-important.

The judges' salaries were comparable to the upper end of the scale for Resident Magistrates and the second-tier civil servants. Not until the new arrangements were made for the Validation Court was there provision to lift them higher and then not for ordinary judges. That the Native Land Court judges were paid less than many District Judges may indicate that they were thought to be of lesser standing.

The impression created by the legislation, at least, is that the low point in the Court's status as an independent judicial body was the late nineteenth and early-twentieth century. Then, the judges did not have the job security of holding office during good behaviour, nor did they enjoy the formal protection from political interference afforded by such security. They appear on the face of it to have been regarded simply as ordinary Crown officials and many of them

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83 AJHR, 1980, H3, 49.

84 Ward, *Show* , 180-181.

simultaneously held posts in which they clearly were. This could have been significant in the influence which it would have been possible to exert over the Court's bench. There are a number of cases from the late nineteenth century where 'undesirable' judges were dismissed, in several cases being reinstated with changes in ministry e.g. J.A. Wilson and W.G. Mair. There is a difficulty in determining the right of the Government to do this and the reasons for individual dismissals; should competence, for example, have been monitored to such extent as it may have been? Was the rapid turnover of personnel due to political intereference, or to competence issues, or simply to the fact that most appointees were middle-aged or elderly men in an era when life expectancy was shorter than at the present? Or were there examples of all these factors?

Only in the mid-twentieth century do we finally have in the relevant legislation a clear statement of the independence of the Maori Land Court judges from the Maori Affairs Department. Its very inclusion is suggestive of an earlier attitude that the judges were indeed at least de facto public servants in some way. However, it is not until the most recent legislation that the status of the Maori Land Court judges seems finally to have be upgraded to be similar to that of other senior members of the judiciary in a way which they have not enjoyed formally since 1873.

The statutory status of the judges of the Native Land Court therefore suggests that for most of the Court's life the Court has indeed been seen by the Government as in some degree an institution subsidiary to the Government. Such a situation reinforces claims that the Native Land Court was for much of its life a *de facto* agent of the Crown.

THE DISMISSALS OF JUDGES MAIR, PUCKEY AND WILSON

This section deals with the fourth matter raised in the research direction, viz:

- What were the circumstances of the 1891 dismissals of Mair, Puckey, and Wilson?

There are a number of examples which clearly indicate that the Native Land Court was different from general courts in the ways in which its judicial officers, the judges, were treated by the politicians of the day and in the ways in which many of those judges combined their judgeships with non-judicial offices in the public service. The rapid turnover of judges has been noted above, although it has not been possible to explore the reasons for that turnover in the compass of this report.

One case made public notice. Judges Puckey, Mair and Wilson, probably the most experienced members of the Native Land Court bench at the time, were dismissed summarily, probably together with Trimble and Clendon.

Mair received his notice on 2 July 1891, having just begun a new set of hearings into the Rohe Potae, over which he had received enthusiastic appreciation from both Maori and the Government. The reason made public was the necessity of reducing the number of Native Land Court judges, but there were more junior and less experienced appointees, particularly Trimble and Clendon, who should have been let go first if qualifications were considered and others such as Gudgeon, Ward, Brabant, Scannell and Barton if length of service on the bench were the criterion. The *Wanganui Chronicle*, following in part the *New Zealand Herald*, commented that Mair, Wilson and Puckey were 'the only men who were thoroughly acquainted with the subject with which they had to deal'.[85] If this were so, then the reasons for their dismissals must lie elsewhere than in simple economising.

As the contemporary newspapers could find no legitimate reasons for the dismissal of Mair, they aired speculation, supported by Mair's recent biographers, that the judge was removed due to political interference. The *New Zealand Herald* suggested that he had failed to facilitate the Native policy of Grey's ministry, which was an irrelevance in 1891. It also publicised the rumour, which Andersen and Petersen confirm, that a friend of Premier Ballance's, married to a disgruntled claimant, wielded his personal influence against the judge who had given the unfavourable ruling. Judge Mair's brother, Gilbert, later claimed that

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85 J.C. Andersen and G.C. Petersen, *The Mair Family* (Wellington: A.H. & A.W. Reed, 1956), 253. Unfortunately, this book gives some detail, but never provides references, so it is hard to track the story without redoing the original research.

the dismissal had come because Mair had defended the policies of the by then unpopular Sir Donald McLean, against accusations from subsequent Liberal politicians of having been soft towards the 'murdering' Waikato Maori.[86]

Some Maori also sent to the Native Minister 'a logical and moderately expressed petition' which expressed concern about the weeding out of judges according to their political persuasion and of the appointment of others with legal training, but without a thorough knowledge of Maori language and custom. A large meeting of Maori was held at Gisborne on 20 April 1891 [sic] 'to consider the dismissal of judges in whom they had the greatest confidence', at which Paratene Ngata, who had been Mair's Assessor on the Rohe Potae case, spoke strongly in support of Mair.[87]

Mair petitioned Parliament twice. The first of 7 August pointed out his service since 1863 which made him only 16 months (21 according to the Committee) away from eligibility for a pension and prayed for relief. The Public Petitions Committee made no recommendation to the House, but a substantial debate ensued on the recent retirement of an unduly large number of civil servants having been retired just short of qualifying for pensions. Native Minister Cadman objected to the Committee considering the matter further on the grounds of the undesirability of dealing piecemeal with a number of men who had been 'retrenched' during the parliamentary recess. Another member objected to 'members of the Civil Service [having] got an idea into their heads that having once entered the Government service they had no right to be dispensed with until such time as they could claim a pension', another to the 'monstrous' appeals from men who had been drawing large salaries' for 'twenty or thirty years' for further assistance. Mair was already entitled to £1,300 compensation for the loss of his job. On Sir John Hall's motion it was referred back to the Committee for a legal opinion on his pension rights.[88]

Mair's second attempt, of 18 August, repeated the same petition and the Committee reported a legal opinion, apparently from the Law Officers of the Crown, that as he had not served the full 30 years he had no pension entitlement, although it did recommend the Government re-employ him in other suitable work, should there be any, as had happened several years previously with other former officers. There appears to have been no further debate and the petition was referred to the Government with no recommendation for any other action.[89] 'Mair received £1,200 as compensation for loss of office, and a pension of £131 per

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86 *Weekly News*, 11 September 1912. Quoted in Andersen and Petersen, 255.
87 Andersen and Petersen, 255.
88 NZPD, vol. 73, 233ff.
89 Journals HR, 1891, 147, 183.

annum, while others who had done far less for their country were receiving £600 and £700.'[90]

With the change in ministry in 1893 after Ballance's death and A.J. Cadman's replacement, Mair was reinstated as a Native Land Court judge by the new Native Minister, Richard Seddon (although at a salary of only £450 rising to £550), and remained on the bench for another fifteen years until 1909, being over 65. This suggests that it was not the Liberals as such who had a problem with him so much as Ballance, and/or Native Minister Cadman.

Commenting on Mair's problems with political interference (although not referring to his judgeship alone), his biographers observe,

> Mair had been greatly harassed and embarrassed in his work of pacification by the uncertain political atmosphere and the unscrupulousness of inimical ministers. He had never learned to trim his sails to the inconstant winds of an unstable political era, and had suffered much from those who found unswerving rectitude of conduct embarrassing.[91]

This obviously refers also to Mair's work in general and may sound uncritically favourable to Mair, but it is located in the discussion about his dismissal from the judgeship and is unequivocal about the effects of political interference in aspects of the operation of the Native Land Court.

Judge J.A. Wilson also petitioned twice to the Naval and Military Claims Committee over his dismissal.[92] They were referred to the Public Petitions Committee. He was more direct than Mair had been, but to even less effect. His first request was for a pension, but the Committee reported that as a civil servant since 1875 only he was not entitled to a pension, which means they did not count his period as commissioner in charge of dealing with the confiscated lands in the Bay of Plenty, nor his work as Land Purchase Officer before his dismissal in the spat with Rogan. Perhaps that dismissal had cancelled any rights pre-dating that time.

The second petition was 'that his services as a Judge of the Native Land Court were dispensed with, while officers of a less length of service were retained'. The Committee refused to make a recommendation and there appears to have been no debate in the House on the matter.[93]

The scant parliamentary discussion of the judges' dismissals reveals nothing beyond their being a few victims amongst many of the Government's financial retrenchment. If there were more to it, should not the Opposition members have more more of that? Any criticism of the Government was solely in terms of their

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90 Andersen and Petersen, 256.
91 Andersen and Petersen, 256.
92 AJHR, 1891, Sess. 2, I2, 6-7.
93 Journals HR, 1891, 80, 139.

hardheartedness towards faithful, effective and valiant servants of the country, disregarding the possibility of more sinister motivation.

If politics were really involved here, it remains unclear the extent to which Wilson and Puckey were 'McLean men' in the way Mair might have been.

If the main considerations were indeed financial, the question is, why were these three judges those selected for enforced retirement? Was it just to save money on having to pay them pensions? Surely because they were not entitled to pensions the amount of compensation which had to be found immediately from hard-pressed Government coffers was much greater.

On the evidence here, and lack of contrary material found thus far, the implications for the Native Land Court seem to be concentrated mostly on the treatment of judges of the Court as identical with any other civil servants. They are consistently spoken of as such and never is the possibility raised of their having a superior, special or protected status. The dismissals and debate are therefore further evidence of the Court's standing as an arm of Crown Native policy, not a totally independent judicial body, rather than of direct political management of the Court's decisionmaking process by the removal of dissenters. The extent to which such 'civil servanthood' could indirectly influence the individual judges' specific decisions is, though, another and rather more obscure issue about which there is presently not enough evidence to make a general statement.

SOME ISSUES FOR FURTHER RESEARCH

(A) More needs to be done on the background of the individual nineteenth-century judges to find out (a) about all of them and (b) about their personal attitudes and their real experience with and ability to understand and deal with Maori.

(B) More needs to be discovered about some, even most, of the judges' backgrounds. This can be done in detail only by examining the *Gazette* from cover to cover and the exhaustive civil service lists kept at National Archives. Then, going beyond mere employment details, there are more subtle questions to be answered, about the individual judges' competence, attitudes, diligence etc, all matters which joined to affect the quality of the decisions they made on Maori land. Such a study, requiring lengthy and minute examination of many disparate sources, would be a major undertaking.

(C) With regard to the 1891 dismissals of judges, more extensive research is necessary into the newspaper accounts and private papers of the individuals concerned to progress further in ascertaining the Government's motivation. An analysis of the judgments made by these three, and perhaps Trimble and Clendon, would be necessary to see if they were somehow offensive to the Government of the day. The Archives might contain official correspondence shedding light on their selection.

(D) The role of the Trust Commissioners under the Native Land Frauds Prevention Acts remains particularly obscure. Many of the commissioners were the Land Court judges themselves; does this suggest a conflict of interest? Others were civil servants or Resident Magistrates; does this raise questions about their ability to deal adequately with Maori land?

(E) The constitution, composition and operation of the Validation Court remains unexplored. Were all of its members Native Land Court judges? How did it differ from the Native Appellate Court? Did its operations and judgments actually achieve the Supreme Court-like independence intended by its creators?

(F) The relationships between these judges and political figures remains obscure. Did, for example, the friendship of some judges such as Rogan with Donald McLean have any bearing on their Land Court work? Or did apparent enmity, such as that reportedly between Fenton and McLean?

(G) Nothing is said here about the degree, if any, of political direction in the operations of the Court, or political interference with its decisionmaking process.

This could have taken the form of either influencing the judges to a particular decision in the first place, or of undermining or overthrowing a decision once made. That would require extensive historical analysis of individual cases and the histories of specific blocks of land.

(H) This survey stops at 1909. Many issues either continue or are raised in the twentieth century. Work on the twentieth century would include:

- the political independence or otherwise of the Court throughout the twentieth century;
- the continued blurring of roles of the Native/Maori Land Court judges as civil servants, in terms of both their recruitment and their ongoing roles in dealing with Maori land and other governmental tasks;
- their terms of appointment and how they have fluctuated;
- the dismissals of several judges which have been controversial, especially that of F.O.V. Acheson. Was there political interference or unduly close oversight?
- the role of the Maori Land Boards and their apparent de facto equivalence in many ways to the Court;
- how did the judges' purely judicial work in the Native Land Court sit with their administrative involvement in the Maori Land Boards?

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WAITANGI TRIBUNAL

CONCERNING the Treaty of Waitangi Act 1975

AND The Chatham Islands claims

DIRECTION COMMISSIONING RESEARCH

1. Pursuant to clause 5A(1) of the second schedule of the Treaty of Waitangi Act 1975, Brian Gilling of Wellington is commissioned to prepare a brief research report on 19th century Native Land Court judges. This commission has arisen as a result of proceedings before the Waitangi Tribunal in respect of the Chatham Island claim. The report should cover the following matters:

   - What were their professional qualifications? How many had legal training?
   - How many were civil servants prior to becoming judges? How many continued to serve as civil servants after their appointment as judges?
   - What were the terms of their appointments as judges?
   - What were the circumstances of the 1891 dismissals of Mair, Puckey and Wilson?

2. This commission will consist of 40 hours work and will commence on receipt by the Registrar of a written confirmation from Dr Gilling that the terms of this direction are acceptable to him.

3. In any event, the report must be completed by 31 December 1994 at which time two copies of the report (one unbound) will be filed.

3. The report may be received as evidence and the commissionee may be cross examined on it.

 cont. p2:...4. The Registrar is etc...

4. The Registrar is to send copies of this direction to

Claimants & counsel
Crown Law Office
Grant Phillipson
Treaty of Waitangi Policy Unit
National Maori Congress
NZ Maori Council

Dated at Wellington this 18th day of November 1994

Chief Judge ETJ Durie
Chairperson
WAITANGI TRIBUNAL