WAI 785: A42

(Wai 648, A1)(Wai 102, A41)



# "And his children ... will become the proprietors"

## The George Hori Thoms and Colonial Laws of Succession Claim

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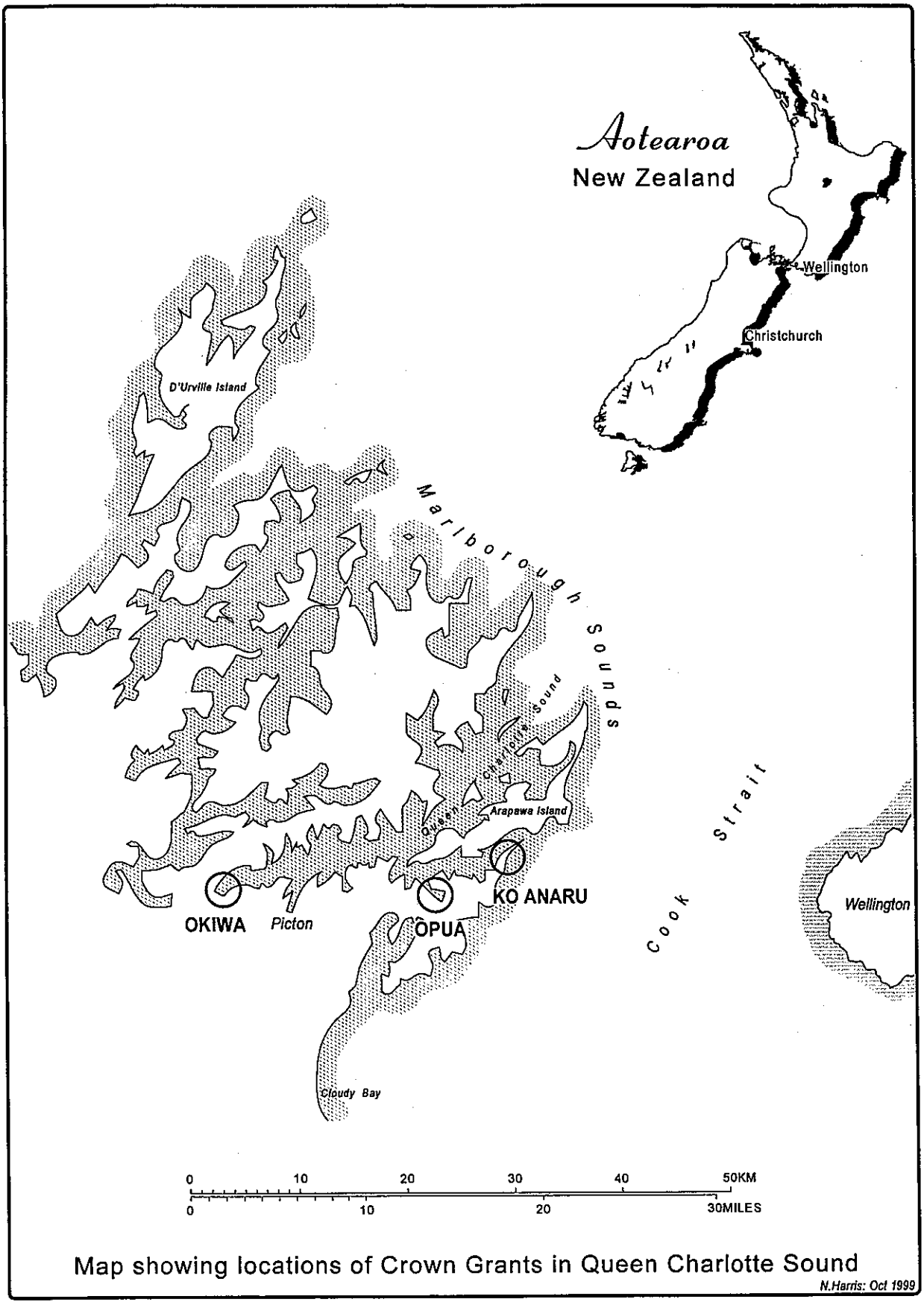


Map showing locations of Crown Grants in Queen Charlotte Sound

N.Harris: Oct 1999

# The George Hori Thoms and Colonial Laws of Succession Claim (Wai 648)

## The Claim

This claim was received on 25 October 1996. It was lodged by Grace Saxton on behalf of the Kotua Whanau. The claimant alleges that English law deemed her great great grandfather, George Toms,[1] illegitimate and that he consequently lost his mana and his rights to inherit his share in his parents' land. It is alleged that this loss of inheritance has prejudicially affected the descendants of George Toms.

## Joseph Toms

George Toms was the son of Joseph Toms and Te Ua. Joseph Toms was believed to have been born in Liverpool on 20 April 1798.[2] He came to New Zealand around 1829–1830 from Sydney, New South Wales, on board the schooner *Waterloo*, under the command of Captain John (Jacky) Guard.[3] Toms' arrival coincided with the time when New Zealand had its largest influx of traders. Bentley estimates that between 1829 – 1832, the years of the flax boom, approximately 130 traders arrived and settled in New Zealand, motivated by the prospect of adventure and status as much as by commercial profit.[4] While the flax trade continued to provide a livelihood for some during the 1830s, and flax was still a useful article of trade, the biggest industry, in terms of employees and earnings, was shore whaling.[5]

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[1] The surname at various times is spelt 'Toms' or 'Thoms'. The earliest references seem to use 'Toms', for example, in Toms' will in 1840, and in the Spain Commission in 1843, so 'Toms' will be used in this report, unless it is a direct quote.

[2] MS Papers 3550, Joseph Toms, family bible, ATL

[3] LS-N 45/1a, NA, in 1843, he told the Old Land Claims Commission that he had arrived in the Queen Charlotte Sounds, 13 years ago, Evidence of Joseph Toms, 11 May 1843; Don Grady, 'Jackson, James Hayter', DNZB, vol 1, 1769-1869, p 210

[4] Trevor Bentley, *Pakeha Maori*, Penguin Books, 1999, p 142-143

[5] Peter Adams, *Fatal Necessity: British Intervention in New Zealand 1830-1847*, Auckland University Press, Auckland, 1977, pp 28-29

John Guard is credited with setting up New Zealand's first shore-based whaling station at Te Awaiti, on the south-east coast of Arapawa Island, in 1827.[6] This area is in what is now called Tory Channel but which, until the arrival of the New Zealand Company ship, the *Tory*, had not been differentiated from the rest of Queen Charlotte Sound by a separate English place name. In 1839, he told agents of the New Zealand Company that he had been blown into the channel in 1827 by a gale of wind.

Guard carried on sealing and whaling for a couple of years with no profit to himself. The Cook Strait whaling industry did not really begin until 1830, around the time Toms arrived. The first cargo of whale oil, which was identified as coming from the South Island, reached Sydney on 3 February 1830, in the *Waterloo*.[7] Toms claimed to be one of the first Europeans, along with Guard, to arrive at Te Awaiti, on the *Waterloo*, and to establish a shore-based whaling station there.[8] In September 1839, when the *Tory* visited the settlement, the New Zealand Company found three Te Awaiti whaling stations being run by Richard (Dicky) Barrett, Toms, and James Jackson in his own bay.[9] Toms also had a whaling station at Paremata.[10]

Like many other whalers, Toms entered into a form of marriage with a Maori woman. Trevor Bentley in his book *Pakeha Maori* has examined the relationships between Maori women and these early traders and whalers. He demonstrates how these relationships not only gave Pakeha males entry into the culture and communities of Maori, but also brought them the protection of the tribe.[11] He cites Edward Markham, who observed: 'In fact it is not safe to live in the Country without a Chief's daughter as a protection as they are always backed by their Tribe and you are not robbed or molested in that case'.[12] George Angus, who met Toms in 1844, commented that

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[6] Edward Jerningham Wakefield, *Adventure in New Zealand*, Whitcombe & Tombs, 1908, p 34; Don Grady, 'Guard, Elizabeth', DNZB, vol 1, 1769-1869, p 164

[7] Robert McNab, *The Old Whaling Days*, Golden Press, Auckland, 1975, pp 2-3

[8] see LS-N 45/1a, evidence of Joseph Toms, 11 May 1843. Later, in 1844, he claimed to George Angas that he had been the first European to discover and enter Port Nicholson, G F Angas, *Savage Life and Scenes in Australia and New Zealand*, (1847) facsimile copy, A H & A W Reed, Wellington, vol 1, p 276

[9] Edward Jerningham Wakefield, *Adventure in New Zealand*, Whitcombe & Tombs, 1908, pp 32-33

[10] see Angas, p 247; Brad Patterson, 'Thomas, Joseph', DNZB, vol 1, p 534; Wards, p 261

[11] Bentley, pp 192, 195

[12] ibid, p 195

Toms 'allied, by marriage, to the powerful Rauparaha, [had] nothing to fear from the possessors of the soil'.[13]

In return, the value of a Pakeha to the tribe was enormous. In the contestable period of the musket wars, between 1819–1838, rival and enemy chiefs strove to acquire their own Pakeha traders as a source of guns and general trade goods. 'Every inducement was held out to white men to settle in the country,' including building houses for them, giving them land to use and bestowing chiefs' daughters on them as wives.[14] In May 1843, before Spain's Old Land Claims Commission, Toms described how he acquired his wife. On arriving in the 'Queen Charlottes' Sound':

> [Nohorua] came across to us in a canoe with his Family I asked him & his wife if they would let me have their daughter as a partner – to which they consented immediately – and delivered her to me – being his only daughter and I lived with her for eight years until her death. I had 2 children (male) by her – during the whole of this time I lived with her alone.[15]

Nohorua was a Ngati Toa chief and his daughter was Te Ua. Toms and Te Ua were never formally married, according to English law. There were no missionaries in that part of the Island who could perform the ceremony for the whole time that they were living together. In fact, as Toms later pointed out, no missionaries arrived in those parts until two years after her death.[16] Nevertheless, Toms was quite adamant that the 'delivering up of the daughter to me I considered a marriage according to the custom of the Natives and so did the Father and Mother'.[17]

Biggs has argued that although there was no sacrament or other ritual ceremony to mark marriages in Maori society, there was a clear social distinction between liaisons and the acceptance of a couple as husband and wife. The essential element in the marriage contract was public knowledge and recognition that the couple was setting up in a permanent partnership. 'In the absence of a binding ritual or legal contract the

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[13] Angas, vol 1, p 276
[14] Bentley, p 146
[15] LS-N 45/1a
[16] McNab records that the Reverend H Williams arrived at Cloudy Bay on 8 November 1839 where he held a service on 10 November, pp 339-40
[17] LS-N 45/1a

full status of marriage ... was dependent upon public recognition of the union'.[18] Ideally, marriage was preceded by inter-family discussion culminating in the handing over of the bride to the husband.

> The discussion accompanying the arrangement must be regarded as part of the marriage customs, which were finally completed either when the couple took up residence together, or when the formal ceding of the bride to her husband was completed.[19]

Thus Toms' emphasis on 'the delivering up of the daughter to me', their living together for about eight years until her death, and living with her alone. He was making the clear distinction between a brief encounter and a marriage. He believed that his relationship with Te Ua was a marriage. The last factor, living with her alone, was another social custom carefully observed. Even amongst a society where polygamy was sometimes practised there was still an expectation of sexual exclusiveness within marriage, especially for the women, adultery was strongly condemned.[20] Of course, this could also be Toms' way of saying that he had an exclusive arrangement with one person, on the model of a Christian marriage.

Public recognition of a union was also essential if children were to be regarded as fully legitimate. Once again, children born within the marriage contract were clearly distinguished from those born out of wedlock. Non-recognition of the marriage would affect the inheritance and succession rights of the children.[21] This was another reason for Toms to stress the formality of their relationship. He and Te Ua had two sons, George, born 28 April 1833, and Thomas, born 20 April 1835.[22] And as Angas, who met Toms in 1844, noted, this alliance secured for him, 'the friendship of the powerful Ngati Toa tribe and also several fine tracts of land for his children'.[23]

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[18] Bruce Biggs, *Maori Marriages: An Essay in Reconstruction*, The Polynesian Society Incorporated, Wellington, 1960, pp 51-52

[19] ibid, p 42

[20] Raymond Firth, *Economics of the New Zealand Maori*, Government Printer, Wellington, 1959, p 120

[21] Biggs, pp 42, 51-52

[22] MS Papers 3550, family bible, both sons took their father's surname.

[23] Angas, vol 1, p 248; Angas further noted that Toms' children, 'on the death of their native relatives', would 'become the proprietors of large tracts of land appertaining to the Ngati Toa tribe', ibid, p 276

Because of Toms' relationship with Te Ua, and because of their children, Nohorua executed a deed in Toms' favour, on 20 September 1838. By this time Te Ua had died and been buried at Te Awaiti, where Toms had a house and his whaling station.[24] Nevertheless, Nohorua obviously still had a commitment to Toms and the two boys.

The deed, in the nature of a certificate, said that Nohorua 'had that day given and made over to the said Joseph Toms all the Lands and Bays belonging to him in Queen Charlottes' Sound for his good and the good of his Children, they being his Grandchildren'.[25] Toms described what took place between him and Nohorua:

> I said to him "You are getting old do you not mean to give me some land for me and the children". "Yes" said he "I will give you & the children all the places that belong to me". He mentioned Titai. The head of the Sound - where I live, Teawaiti, Onipua, and a small portion on the south end of Kapiti called Wariko - and a place on the shore opposite to where I was living.[26]

On 14 October 1839, a further deed, in explanation and confirmation of the earlier certificate, was executed by Nohorua describing his land on Kapiti, at Titahi Bay and, in particular, at Queen Charlotte Sound. That was, 'a large portion of land situate at the Head of Queen Charlottes' Sound - named Anikiwa ... a portion of land named Onepua' and thirdly, 'a small Bay situate opposite to the European Settlement in Q C Sound'.[27] The deed cautioned all persons 'not to trespass on any part or parts of the above mentioned Land, either to build or form a settlement, without the permission of the above mentioned Joseph Toms, as he had received an equivalent from him in various Articles of Merchandise in payment for the same'.[28]

In 1843, Toms listed the amount he claimed to have paid for the land. These were, 4 kegs of tobacco, 30 pairs of blankets, 30 muskets, 3 double barrelled guns, 2 fowling pieces, 3 dozen axes, 20 iron pots, 1 case of pipes. This had been paid previous to the signing of the October deed. Subsequent to that deed, Toms paid, 1½ kegs of tobacco,

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[24] ibid, p 248
[25] LS-N 45/1b
[26] LS-N 45/1a
[27] ibid.
[28] LS-N 45/1b

8 muskets, 10 pairs of blankets, 1 double barrelled gun, 10 coats. To Muriwhenua, a relative of Nohorua's, he also gave, 1 double barrelled gun, 6 pairs of blankets, ½ keg of tobacco. Toms put the total value of this merchandise at £372.12.[29]

In November 1840, Toms made a will.[30] By this time Toms had married Maria Boulton in Sydney on 26 February 1838.[31] The will detailed his possessions. They were: a house in Queen Charlotte Sound; whale boats and a large schooner; land at 'Sawyer's Bay', Queen Charlotte Sound, 'adjoining the European Settlement' there; also Entry Island, (Kapiti), Teti (Titahi Bay), Perrirua (Porirua), other land at Queen Charlotte Sound and Cloudy Bay; and goods and chattels at various whaling establishments.

The house at Te Awaiti he bequeathed to his wife, Maria,[32] the whaling boats to his sons George and Thomas as well as the large schooner to George. The land at 'Sawyer's Bay' he bequeathed to his brother-in-law.[33] The rest of his land, including Titahi Bay, it was his desire that it be 'equally and equitably divided between' his wife Maria Toms and 'all and every my children [sic] now born or hereafter to be born that may be living at the time' of his death.[34]

The question is, though, whether the land was his to bequeath freely or if the original intention of both Nohorua and Toms had been that the land was for his two sons by Te Ua. The status of his will is also at question because it was later claimed that he had died intestate.[35]

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[29] LS-N 45/1a

[30] MS Papers-32-0799, McLean Papers. A copy has been included in the document bank. A transcript copy has also been included as Appendix 1.

[31] *New Zealand Biographies* 1977, v 2, p 148, Alexander Turnbull Library, which contains a copy of an article printed in the *Kapi-Mana News*, 7 June 1977 by Joseph Boulton. Boulton was the grandson of Joseph Toms junior; Affidavit of Maria Toms & Edward Boulton, 7 August 1856, AAAR W3558 783/121

[32] In 1846, Angas described it as a 'substantial and comfortable looking house', p 272

[33] In the will the brother-in-law is identified as Thomas Bolton but elsewhere it is Edward Boulton

[34] MS Papers-32-0799, McLean Papers

[35] OLC 1/986-7-8, NA; see also AAAR W3558 783/121, Intestate files, NA

**The Spain Commission**

In May 1842, William Spain began his inquiry into what land had been sold by Maori to Europeans before 1840. Joseph Toms' case came before the commission on 11 May 1843.[36] Toms began by producing the two certificates conveying land from Nohorua to himself. Toms related how he was married, according to Maori custom, to Nohorua's daughter Te Ua. The land was given to him for himself and his children, Nohorua's grandchildren, although Toms explained that he had also made a considerable payment to Nohorua and his relations for the land. In return for this payment, Toms considered he had the absolute right to the land and he would be justified in selling any portion of it, except Titahi Bay. That land was his only during his lifetime. On his death it was to go to his sons.

Q. Did you consider Nohorua had given up all claim to the Land described in the memorandum.
A. Yes.
Q. Would you consider yourself justified in selling any portion of it during his lifetime.
A. Yes, all except Titai which they told me to return for my Children.
Q. Do you consider you could sell any portion of Titai without the consent of Rauparaha and Rangihaeata?
A. No.
Q. Then do you mean that Nohorua conveyed a portion of Land at Titai only for you during your lifetime - and afterwards to descend to your Children?
A. Yes.[37]

Toms claimed that the first certificate had been read over and interpreted to Nohorua by a person by the name of Bosworth, and Nohorua had signed it in the presence of Lieutenant Chetwood. Nohorua later confirmed that it had been signed on board a man-of-war. The second certificate had been read over and interpreted to Nohorua, before he signed it, by Richard Barrett and Joseph Davis. Barrett was also one of the witnesses to Toms' will. It was also Barrett who had acted as interpreter for the New

[36] LS-N 45/1a
[37] ibid, examined by the Protector of Aborigines, 11 May 1843

Zealand Company in their Port Nicholson purchase. His ability to understand, let alone translate, the company's deed has been roundly criticised by most historians.[38]

Toms was adamant that the payments he had made were in part payment for the land and were not intended as just presents for his father-in-law, although some had been for presents. The first payment for the land had been made in about 1836, before the deed was signed. Another payment had been made at the time the deed was signed and the last, about 1841. He also had given presents to Nohorua since he had first become acquainted with him.

The right of Nohorua to grant land to Toms was admitted by Te Rauparaha and by Rangihaeata to the Spain Commission. They also confirmed that their consent was necessary in the transaction between Nohorua and Toms. Te Rauparaha affirmed the special relationship between Toms and the tribe. This relationship extended further than just to his immediate father-in-law, Nohorua. The rest of the tribe looked upon him as family. The land at Titahi Bay had been given to him because of the children, 'our Grandchildren', the rest because, 'he was our Son-in-law we gave him all those places'.[39]

When it came time for Nohorua to be examined, he also acknowledged that the consent of Te Rauparaha and Rangihaeata was necessary, which they had given 'for their Grandchildren'. When he was asked what his object had been in disposing of lands to Toms, he replied 'Because he was a relation of ours - and [on] account of our Grandchildren'. He was then asked:

> Q. Did you at the time absolutely dispose of the land to Mr Toms
> A. Yes
> Q. What passed between you and Mr Toms at the time
> A. When the Children were born I said to Toms "There is the Land for you".[40]

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[38] see for example Rosemarie Tonk, 'A Difficult and Complicated Question: The New Zealand Company's Wellington, Port Nicholson, Claim' in Hamer, David and Nicholls, Roberta (ed) *The Making of Wellington 1800-1914*, Victoria University Press, Wellington, 1990, p 52

[39] ibid, evidence of Te Rauparaha and Rangihaeata, 12 May 1843

[40] ibid, evidence of Nohorua, 27 May 1843

It is clear, both in terms of the certificates and the evidence of Nohorua and Te Rauparaha to the commission, that Toms' ability to 'buy' the land was dependent upon his relationship to Ngati Toa through Te Ua and the two children. But perhaps 'buy' is not the right word. It cannot be assumed that because Nohorua replied 'yes' to the term 'absolutely dispose of', that he understood the transaction as a permanent alienation. There is more than enough evidence in Waitangi Tribunal reports to show that Maori did not necessarily understand these pre-Treaty transactions as an absolute alienation of property in perpetuity, with the original purchaser having the right to on sell.[41] This is not to imply that Nohorua did not understand what he was doing, but that his words and his actions must be considered in his own context. As the Tribunal has pointed out, although Maori were used to dealing with Pakeha in the 1830s, and had made rapid adjustments, this was still fundamentally a Maori world.[42] They were still used to doing things in their own way. The German naturalist Ernst Dieffenbach was one of the first Europeans to recognise this at the time. In 1843 he wrote that Maori entered into these pre-Treaty transactions:

> with the implied understanding that they should continue to cultivate the ground which they and their forefathers had occupied from time immemorial; it never entered into their minds that they could be compelled to leave it and to retire to the mountains ... In transferring land to Europeans the natives had no further idea of the nature of the transaction than that they gave the purchaser permission to make use of a certain district. They wanted Europeans amongst them.[43]

The anthropologist, Joan Metge, argues that these transactions (also called 'gifts') should be seen more in the way of an 'exchange'.[44] This reflects that the Maori practice of gift-giving involved reciprocity: 'a gift imposed an implicit obligation to enter into a continuing exchange relationship'.[45] This relationship is also perhaps demonstrated by Nohorua insisting that Toms witness his signing of the Treaty of Waitangi, 'saying that in the event of his grandchildren being deprived of their

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[41] see for example, Waitangi Tribunal, *The Muriwhenua Land Report*, Wellington, GP Publications, 1997, pp 53-77, 106-108
[42] ibid, p 74
[43] Dieffenbach, vol 2, pp 143-144
[44] Joan Metge, 'Cross Cultural Communication and Land Transfer in Western Muriwhenua 1832-1840', 1992, Wai 45 record of documents, doc F13, pp 72-73
[45] ibid, p 78

inheritance, Toms would be held responsible'.[46] Toms also conveyed Te Rauparaha and Te Rangihaeata, with about 25 armed warriors, across the Cook Strait, in his schooner *Three Brothers*, on 28 May 1843, just days after giving evidence at the Spain inquiry.[47] Te Rauparaha and Te Rangihaeata were going to protest the New Zealand Company's survey of the disputed Wairau lands. The schooner was named after Toms' sons. By this stage, another son, Joseph, had been born to Joseph senior and Maria, on 4 March 1842.[48]

Toms' relationship to Nohorua and Te Rauparaha would suggest, then, that the Ngati Toa chiefs intended more than just a simple transaction in land, absolutely disposing of it to Toms. Instead they may have believed that they were giving land to the sons of Toms and Te Ua who were, of course, Ngati Toa, so therefore the land would remain in Ngati Toa hands. It also would seem that more than just the land at Titahi Bay was intended for the two sons of Te Ua. Ngati Toa may have intended that the rights to all the land gifted to Toms pass to the sons of Toms and Te Ua.

Spain's report was written on 31 March 1845. He has been described as 'an honest, straightforward man, methodical and efficient in his work, and sincere in his convictions' with 'a somewhat pedantic and solid, tenacious nature'.[49] These characteristics, however, hardly qualified him to judge on Maori customs and title. He decided that, with the exception of Titahi Bay, Nohorua had sold the various tracts of land claimed by Toms absolutely to him, with the knowledge and consent of Te Rauparaha and Rangihaeata and the Ngati Toa tribe generally. The land at Titahi Bay, he judged, had been made over to Toms, 'solely on account of his marriage ... and to have been intended only for his use during his lifetime, without any power of alienation'.[50] On his death it was to go to the sons of Te Ua.

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[46] Joseph Boulton, *Kapi-Mana News*, 7 June 1977, reproduced in *New Zealand Biographies*, 1977, vol 2, p 148

[47] and only one day after Nohorua had given his evidence, see LS-N 45/1a; Wakefield, p 617

[48] MS Papers 3550, Joseph Toms, family bible; Angas, vol 1, p 272

[49] Tonk, p 36

[50] LS-N 45/1b

Spain therefore determined that a grant for 1356a 3r 24p should be issued to Toms. This consisted of:

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|---|---|
| Okiwa (Anakiwa) QCS | 1110 acres |
| Opua, QCS | 55 acres |
| Te Awaiti, QCS | 110a 3r 24p |
| Ko Anaru (or Anaru) QCS | 91 acres |

Spain further determined that a grant for 247a 0r 16p, at Porirua, should be issued to the trustees of Native Reserves in trust for Toms during his lifetime and, after his death, in trust for the two sons, George and Thomas.[51] From this it is quite clear that, as far as Spain was concerned, only the land at Titahi Bay was intended to go exclusively to George and Thomas as the sons of Te Ua. The rest of the land, Toms was now legally free to dispose of, as he saw fit.

**The Crown Grants**

Spain's award to Toms was approved by Governor Grey on 12 July 1852,[52] barely a month before Toms died on 2 August 1852. He was buried at Te Awaiti with his first wife, Te Ua.[53] Despite Grey's approval of the grants, however, they do not appear to have been issued in direct accordance with Spain's determination. The grants for Okiwa, Ko Anaru and Opua were entered in the New Munster Register, dated 5 August 1852 but it appears that no grant for Te Awaiti was made at the time.[54] Grey made a grant the following year to George and Thomas for Titahi Bay but only for 160 acres instead of the 247 acres recommended by Spain.[55] The grant for Okiwa was delivered and registered at Nelson, presumably at the Register of Deeds office. Part of the land at Okiwa was then conveyed to Robert Richmond who, apparently, had

[51] ibid.
[52] LS-N 45/1b
[53] *New Zealand Biographies* 1977, v 2, p 148
[54] New Munster Crown grants numbers 37, 38, 39, New Munster Register 1, folio 40,41,42, LINZ Wellington
[55] New Munster Crown grant no. 63, Register 1 folio 67, dated 15 July 1853

purchased 50 acres from Toms in 1847. The remainder was sold to pay the debts of Toms.[56]

It appears that the grants for Opua and Ko Anaru were not delivered at this time. In April 1866, Joseph junior (the son of Maria) and his uncle called into the Land Claims Office, Wellington to try and obtain the grants. They were informed that under the Deeds and Titles Registration Amendment Act 1865 every Crown grant had to be registered in the Province in which the land was situated before it could be delivered to the grantee. The grants for Opua and Ko Anaru had been returned to the Secretary for Crown Lands for transmission to the Marlborough Crown Land Commissioner before delivery to the person entitled to receive them.[57]

In August 1867, George Toms wrote to A Domett, Secretary for Crown Lands, requesting advice on what to do to obtain grants to land at Porirua and in the Queen Charlotte Sound. George was concerned that grants had been prepared and issued to his half brother, Joseph junior. George was under the impression that all of the land had come to his father through his mother so he believed that only he and his brother Thomas were entitled to it. He did not think it right that they 'should lose our mother's property from the fact that my father's second marriage with a European woman was contracted according to Europeans' instead of according to Maori custom'.[58] The grants had not been issued to Joseph junior but Domett replied that Joseph senior had died intestate and, as he was never legally married to Te Ua, Joseph was his heir. In fact, Joseph, the senior, had left a will,[59] a copy of which has turned up in the McLean papers, but there is no information, at this stage, to say how it ended up there.

Cases like this were supposedly covered by section 39 of the Native Lands Act 1867. This stated that where lands had been legally granted to a man who had had children with a Maori woman and then married (either her or another woman), had more

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[56] OLC 1/986-7-8, LC 71/12, 9 February 1871; see also AAAR W3558 783/121, Order for sale of the Grove [Okiwa], 27 February 1855 & Order for Payment, 28 June 1855

[57] David Lewis, Commissioner to Edward Boulton, 30 April 1866, OLC 1/986-7-8

[58] ibid, LC 67/51

children, and died without having first disposed of his land or without leaving a will and without providing for the first lot of children, the Native Land Court may, upon application, determine whether those children were entitled to any of the land and make an order to that effect pursuant to the Native Land Act 1865. Domett's advice was that an application should be made to Judge Fenton, Chief Judge of the Native Land Court, to make such an order and a draft was prepared for George to sign.[60]

Although George was enquiring about all the land in Queen Charlotte Sound and at Porirua, the memorandum only identified two pieces of land, one of 55 acres and one of 91 acres, both in Queen Charlotte Sound. These were Opua and Ko Anaru, respectively.[61] In April 1869, Joseph junior telegraphed the Crown Land Commission in Wellington, asking where the grants for these two blocks of land were. The reply telegram stated that the grants must await the result of an application to the Native Land Court, under section 39 of the Native Lands Act 1867, made by George Toms.[62]

Over the years, both George and Joseph junior made several enquiries concerning the grants but the question of who was legally entitled to them meant that the government felt powerless to act. It does not appear that the issue of who had the right to the land ever went to the Native Land Court. Instead it was taken to the Supreme Court in 1870.[63] It is not clear why proceedings were taken in the Supreme Court instead of the Native Land Court. It may be because the Native Land Court had decided that section 39 of the 1867 Act only applied to the Titahi Bay lands. Section 39 stated that it applied to lands which 'had been acquired either wholly or partly in consideration of the grantees having had issue by women of the Native race'. The Court may have decided that this section did not apply to the land which Toms' had supposedly purchased outright from Nohorua, that is, all the land in the Queen Charlotte Sounds.

The Supreme Court action may also have been in response to earlier proceedings in the Supreme Court in 1856 where Toms had been declared intestate. During the

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[59] see above
[60] OLC 1/986-7-8, LC 67/53
[61] ibid.
[62] ibid, LC 68/46A, 14 April 1869

course of those proceedings Maria Toms had filed an affidavit in which she swore that Toms had died intestate leaving her and 'one son and only child Joseph Toms, an Infant his heir at law'.[64] This was despite the fact that Maria was fully aware of the existence of George and Thomas,[65] and despite the fact that Toms had left a will acknowledging George as his eldest son. The law firm, Travers and Oliver represented the two elder brothers.

**The Supreme Court**

The case to the Supreme Court rested on the claim that Toms and Te Ua had been legally married according to the ceremonies of the Church of England. It was claimed that Archdeacon Williams had married them in May 1840 and that after the marriage Thomas Toms was born, making him the legitimate heir.[66] Neither George nor Thomas appear to have given evidence before the Supreme Court but it does appear that the case went ahead with the consent of both brothers. This was despite the fact that Toms, himself, had claimed before the Spain commission in 1843 that he had never married Te Ua, 'according to the Religious Forms of the Church of England' and that no missionary had 'arrived in those parts until 2 years after her Death'.[67] Also, the family bible records the birth date of Thomas as 20 April 1835.[68] The evidence of Toms to Spain also appears to corroborate that Thomas was born well before 1840. The land was given, or bought by him, in 1838 and 1839, *after* the birth of his two sons.[69] However, one witness, Ohaia Hokita, a cousin of Te Ua's claimed to have been present at the marriage of 'George a Whaler'[70] and Te Ua:

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[63] ibid, LC 69/67

[64] Affidavit of Maria Toms and Edward Boulton, 7 August 1856, AAAR W3558 783/121, Intestate files

[65] see for example Angas, p 272

[66] OLC 1/986-7-8, LC 71/8, *Toms* v *Toms*, Judges Notes

[67] see LS-N 45/1a, evidence of Joseph Toms, 12 May 1843

[68] see MS Papers 3550, Joseph Toms, family bible

[69] see again evidence of Joseph Toms, LS-N 45/1a

[70] Joseph was also known as George, Georgie or Geordie Bolts. The last name on account of the fact that having on one occasion had a misadventure with a whale, he never could be induced to face another, T L Buick, *Old Marlborough, The Story of a Province*, Capper Press Reprint, Christchurch 1976, p 219

> A marriage took place. The ceremony was performed as it is now performed by English Clergymen. We saw the ring put on. We understood it meant a binding contract. Although we did not know of what nature. There was a feast and I took some portions of it to Cloudy Bay.

Another witness, Hohepa Tamaihangia, claimed to have partaken of the marriage feast, brought to him by Ohaia and 'George'. Riria, the wife of Hohepa, said that Toms had told them about the marriage when he had brought the food and four bottles of wine. It is possible the witnesses confused the event with Toms' second marriage to Maria Boulton but it is unlikely, especially if that marriage took place in Sydney in 1838. No mention of Toms' second marriage or Joseph junior was made in the Judge's notes of the case. On the evidence before them, the jury found that a marriage had taken place between Toms and Te Ua in May 1840.[71] It appears that neither side was above putting the best construct forward for their own case: Maria for saying that Toms had only one son, and the brothers for claiming that their parents were legally married in 1840 when quite clearly Te Ua had died around 1837–1838 and Toms had remarried in 1838. The fact of the matter is though that the two brothers would not have had to couch their case in this way before the Supreme Court, or perhaps go to that court at all, if the authorities at the time had recognised customary marriages between Maori and Pakeha, in a more effective manner than that provided for by section 39 of the Native Lands Act 1867.

The solicitor acting for George and Thomas forwarded a copy of the Supreme Court Judge's notes to the Secretary of Crown Lands and requested that the Crown grants be delivered to Thomas Toms. On 9 February 1871 the Clerk for the Land Claims Commissioner wrote to Thomas, informing him that the Crown grants for Opua and Ko Anaru had been delivered to his lawyer, W T L Travers, for him.[72] A receipt from Travers acknowledged receiving the two grants on 13 February 1871. It also noted that Thomas had conveyed the two grants to George, on 14 April 1870.[73]

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[71] OLC 1, 986-7-8, LC 71/8, *Toms* v *Toms*, Judge's notes
[72] ibid, LC 71/13
[73] ibid, LC 71/14, although beside it, in brackets, it said the conveyance had been 'stamped, not registered'

Despite this, it still appears that George did not receive the grants. In 1883 he applied to the Native Land Court to succeed Te Ua to lands at Onihiwa Anapua and to succeed Joseph for Anaru and Opua. The Court stated that the lands appeared to have been Crown granted to Toms and it had no jurisdiction over European land. The case was withdrawn.[74]

**Petition of George Toms, 1887**

In 1887 George petitioned Parliament regarding land in Queen Charlotte Sound and at Porirua.[75] He identified the land as Te Awaiti, Anaru, Opua, Anakiwa (in the Queen Charlotte Sound) and Paremata and Titahi Bay (Porirua). It was George's understanding that Spain had recommended that all the land, not just the land at Porirua, should be put in trust for the children of Joseph senior and Te Ua. It appears that George did acquire at least some land at Titahi Bay in 1870. A plan of land at Titai (Titahi) Bay shows the 'Property of Geo. Thoms, 1870,' of 19a.2r.6p.[76]

George acknowledged that 'after a searching inquiry' the grants for Opua and Ko Anaru had been found, 'which your petitioner gave to Mr Stafford, Solicitor'. The latter part of this sentence is unclear to me as, according to the record, the grants were delivered to W T L Travers, of the firm of Travers and Oliver, on behalf of Thomas, who then conveyed them to George.[77] George further claimed in his petition that 'owing to difficulties raised by Joseph Thomas'[sic] European wife and child matters have never been settled to this day' with regards to Opua and Ko Anaru.[78] This may explain why in 1873 Travers, the lawyer, requested a copy of the evidence to the Spain commission and Spain's awards from the Land Claims Commissioner. At the time the office could find no trace of them.

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[74] Nelson Minute Book 1, p 33, 21 November 1883
[75] J1, 1895/869, petition no. 164/1887, NA; AJHR 1888 I-3, p 17
[76] Robert McLean, 'Power/Knowledge and Space: The Creation and Alienation of the "Reserve" at Porirua', MPhil, Massey University, 1996, pp 115-6
[77] see above
[78] J1, 1895/869

Travers' request could also have been in response to a grant to Joseph junior dated 11 September 1871 for 9 acres and 2 roods in the village of Te Awaiti where Joseph claimed to reside.[79] George's petition reminded the House that Te Awaiti was where Te Ua had been buried; meaning that Te Awaiti would have been a place of special importance to him. George asked that the government give favourable consideration to his petition.[80]

George's petition was not dealt with until the following year at which time the Native Affairs Committee recommended that his petition be referred to the government for consideration.[81] The government did consider it but it is not clear if any response was made to George. In August 1888 he wrote asking what the government intended to do about his petition.[82] It may have been in response to his letter that the Native Department Under Secretary, T Lewis, wrote asking the Crown Lands Under Secretary for information. The reply was that there were three grants at Queen Charoltte Sounds and one grant for land at Paremata.[83]

**Land at Paremata**

As well as the land given, or sold, to him by Nohorua, Joseph Toms senior also claimed 'a portion of Land situated at the entrance of Purrie Rua ... commonly called by Europeans Parramatta in virtue of a Deed in my favor by A Ki a native Chief dated 1st May 1838'.[84] The area of land involved was estimated at approximately three acres and was situated at the entrance of Porirua harbour. Toms claimed that three Maori and two Europeans had witnessed the deed.

Although Toms' evidence regarding this piece of land is not in the material I have seen, apparently Spain made a recommendation, dated 31 March 1845, that a Crown

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[79] CT vol. 5 folio 175, 20 April 1888. The CT claimed that the land had been 'originally granted the 11th September 1871' by the governor Sir George Ferguson; Declaration of Joseph Toms, 17 June 1893, LINZ, Blenheim

[80] J1, 1895/869

[81] AJHR 1888 I-3, p 17, 10 July 1888

[82] J1, 1895/869, Hori Tame to Native Minister, 17 August 1888

[83] ibid, see memoranda on NO 88/1325, dated 30 & 31 October 1888

[84] OLC 1/986-7-8, LC 71/34, dated 27 November 1840, incidentally, two days after he made his will

grant for 4a.3r.8p be issued in favour of Toms. This was in addition to the 247 acres Spain had recommended by issued in trust for the sons. Governor Grey approved the grant on 12 July 1852.[85]

This grant was probably for Toms' whaling establishment at Paremata. In 1871, Alfred Domett, the Land Claims Commissioner, determined that Toms had sold the land to Newton Lewyn, a whaler of Cloudy Bay, around 1845. Domett accordingly recommended that the grant of 4a.3r.8p for lands at Paremata be issued to Lewyn.[86] This was done on 25 April 1873.[87]

This information must have been conveyed to George in response to his letter of August 1888. In August 1889, George and his solicitor, W T L Travers, called in at the Native Office and requested to see the authority for issuing the title to Lewyn. A few days later, Travers was shown the original of Domett's report of 8 March 1871 and the evidence given by Joseph Toms before the Spain commission. Travers, if not George Toms, was 'satisfied that the land was bought by Toms from the Natives' and that Toms conveyed it to Newton Lewyn.[88] However, no mention was made of the land in Queen Charlotte Sound and the grants to Opua and Ko Anaru do appear to have gone to Joseph junior.

**Joseph Toms junior, 1893 - 1911**

As well as obtaining a grant to land at Awaiti, Joseph junior also appears to have obtained the grants to Opua and Ko Anaru. In 1893 he applied for the two blocks to be brought under the provisions of the Land Transfer Act 1885 and its amendments.[89] The covering letter to his application, by his lawyer, forwarded the two Crown grants to the District Land Registrar. In his application, Joseph claimed that the land was in his occupation and possession. Ko Anaru was described as being 107 acres instead of

[85] Mackay, *Compendium*, vol 1, Return of Land Claims in the Southern Island, p 92; OLC 1/986-7-8, LC 71/37, Report of Alfred Domett, Land Claims Commissioner, 8 March 1871
[86] OLC 1/986-7-8, LC 71/37
[87] J1, 1895/869, NO 88/1619
[88] ibid, minute dated 29 August 1889 & file note, 2 September 1889
[89] Application to bring Land under the Provisions of the Act, 27 May 1893, LINZ, Blenheim

91, and Opua as 46 acres instead of 55 (which for some reason was calculated as a total of 157 acres). A letter from the chief surveyor, Lands and Survey, explained the discrepancy in acreage for Ko Anaru was due to a revision survey. This survey 'fixed' some of the more prominent points on Cook Strait by convergent bearings observed from trig stations. According to the surveyor this gave a more accurate survey than the one done at the time the land was originally granted.[90]

The application stated:

> And I do further declare that I am not aware of any mortgage, encumbrance, or claim affecting the said land, or that any person hath any claim, estate, or interest in the said land, at law or in equity, in possession or in expectancy

It was signed with Joseph's mark rather than his signature, as he did not appear to be able to read or write, the contents of the application 'having been previously read over to him' in the presence of a JP.

The schedule attached to the application made reference to three declarations. One by Joseph, as the applicant, another by W T L Travers (the lawyer of Thomas and George) as to the legitimacy of the applicant, and the last by Edward Boulton (his uncle) for identification. Joseph's declaration was attached but not that of Travers or the uncle's. His declaration made no mention of his two half-brothers, just that he was the 'eldest son and only surviving child of the late Joseph Toms and Maria his wife'. He claimed that his father had occupied the said lands during his lifetime and on his father's death, he had 'succeeded to the said lands as heir at law ... and have been and still remain in undisturbed occupation thereof'.[91] Once again Joseph's mark was affixed in the presence of a JP after the declaration had been read over to him 'and he appearing to understand the same'.

A Land Transfer Act notice was published in the *New Zealand Gazette* giving notice that Ko Auara [Anaru] and Opua were to be brought under the Land Transfer Act

[90] Chief Surveyor to District Land Registrar, Blenheim, 25 September 1893, LINZ, Blenheim, although this survey now put the acreage at 111 acres not 107.
[91] Declaration of Joseph Toms, 17 June 1893, LINZ, Blenheim

unless a caveat was lodged within one month from the notice. The notice was dated 4 November 1893.[92] Presumably, no caveat was lodged as Certificates of titles were issued to Joseph for Ko Anaru on 30 December 1893 and Opua on 4 January 1894.[93]

What happened to the two grants between 1871, when the Crown grants were supposedly delivered to Thomas's lawyer, and 1893, when Joseph applied for the two blocks to be brought under the Land Transfer Act, is unclear, but Joseph junior was now the legal owner of Ko Anaru and Opua. The same day that Joseph received the certificate of title for Opua, now Section 154 Block IX Arapawa Survey District, he sold the land to Joshua Johnson.[94]

In 1911, following the death of Joseph junior on 11 June 1909, Charles James Radcliffe of Seddon applied to have Joseph's remaining land transmitted to him. He was the executor of Joseph's will and had been granted probate on 3 November 1909.[95] As the executor he applied to be registered as proprietor of Te Awaiti and Ko Anaru, now Section 153 Block V Arapawa Survey District.[96] These were both transmitted to him on 14 January 1911.[97]

**Summary**

Of the grants that Joseph Toms senior had received from the Spain Commission, Paremata had been sold to Newton Lewyn, part of Okiwa had been sold to Robert Richmond and the rest to pay off Toms' debts. Joseph junior had sold Opua to Joshua Johnson after receiving the Certificate of Title for it. Ko Anaru was transmitted to Charles Radcliffe, the executor of Joseph junior, along with the nine acres at Te Awaiti.

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[92] NZG 1893, no. 84, p 1616
[93] CT vol. 6 folio 227; CT vol. 6 folio 228
[94] Application to bring Land under the Provisions of the Act, 27 May 1893, LINZ, Blenheim; CT vol. 6 folio 228
[95] Probate records, Blenheim High Court
[96] In the estate of Joseph Toms deceased, Application of Transmission, number 514, 4 January 1911, LINZ, Blenheim
[97] CT vol. 5 folio 175; CT vol. 6 folio 227

**Petition of Sarah Toms, 1896**

The issue of these lands has become a long-standing family grievance. On 6 August 1895, Thomas Pratt, MHR, Wellington, presumably on behalf of George's family, wrote to the under secretary, Justice Department, asking what had been done with regard to George's petition. By now, of course, Joseph junior had obtained the Certificates of Titles to Te Awaiti, Ko Anaru and Opua, and had alienated Opua. Mr Pratt was informed that, 'Mr Travers who called at the Native Office on behalf of Hori Tame [George Toms] was satisfied from documents that Tame's father, who owned the land in question, conveyed it to Newton Lewin [sic]'.[98] This was referring, of course, only to the land at Paremata.

The following year, Sarah Toms, the daughter of George, petitioned Parliament, praying for:

> the restitution of certain lands set apart by the Ngatitoa Tribe for the benefit of her grandmother, Te Ua (the first wife of Joseph Thoms), and her descendants, the said lands having wrongfully passed into possession of the family of Joseph Thoms by a second (European) wife.[99]

The committee recommended that the petition be referred to the government in order that the South Island Landless Natives Commission could deal with the case.[100] Sarah eventually appeared before the commission in 1914. It is not clear, though, whether she brought the issue up before them. The minutebook merely records her saying:

> I live at the Croixelles. I came from Waiwera. I am an owner in the Waiau. My family own 189 acres there. I am unable to go there to occupy the land as I am married here. I desire the commission to suggest some means of helping me either by exchanging or leasing.[101]

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[98] J1, 1895/869, memoranda dated 10 August 1895
[99] AJHR 1896 I-3, p 16
[100] ibid.
[101] MA 81/1, Commission on Landless Natives Reserves 1914, minutebook of proceedings and evidence, evidence of Hera Te Ua, 16 July 1914, p 27

There is no indication of whether the land her family owned came through her father or her mother. No specific mention of Sarah Toms' claim was made in the Commissioner's report.[102] In the event, apart from vesting the control of the Croixelles reserves in the Nelson Land Board, no further action was taken over the commissioners' recommendations.[103]

[102] AJHR 1914 G-2
[103] Joy Hippolite, Croisilles Harbour, p 21

## Conclusion

This claim is about the English marriage law. This law, which governed marriages in New Zealand, only recognised marriages solemnised by an ordained Christian minister. The law, apparently, could not recognise a marriage conducted according to Maori custom. Certainly the colonial authorities at the time did not. Thus George, and initially Thomas, the sons of Joseph Toms and Te Ua, were deemed to be illegitimate by the authorities. However, the marriage, and thus the legitimacy of the two sons, was fully recognised by her family and the chiefs of Ngati Toa. It was this recognition that facilitated the exchange of land to Toms.

It has become a long-standing family understanding, by the descendants of George, that Joseph Toms senior acquired all his interest in land through his marriage to Te Ua. Toms himself did not see it that way, or at least that is what he claimed to the Spain commission. In his evidence to the commission, he was adamant that only Titahi Bay had been given to him for his sons. The rest he had purchased himself and was free to dispose of. Te Rauparaha, Nohorua and Te Rangihaeata all took a very different view to Toms. In their evidence to Spain, Nohorua and Te Rauparaha were quite clear that they gave land to Toms either because of Toms' relationship to them or because of the two sons, who were, after all, Ngati Toa. Even George Angus, writing in 1846, understood the land to be for the children because of Toms' relationship to Ngati Toa through marriage.[104] And, as the anthropologist Joan Metge has argued, these transactions should be seen more in the way of an exchange that imposed implicit obligations on the recipient. They were not absolute alienation of property. In any case, by giving land to the sons of Toms and Te Ua, the chiefs would have seen it as the land remaining in Ngati Toa control.

This does not appear to have been understood by Spain who, in 1845, determined that only Titahi Bay was intended for the children of Joseph and Te Ua, the rest had been 'absolutely sold' to Toms. But the nature of these pre-Treaty transactions was

[104] Angas, vol 1, p 248

recognised by Dieffenbach as early as 1839-1840. It was Spain who did not fully understand the situation.

Toms always recognised his children by Te Ua as legitimate. This was not always the case with Pakeha–Maori marriages. Another settler who had children by his Maori wife referred to them in his will as his 'four illegitimate children by my late housekeeper Kate'.[105] Toms made provision for his children in his will, in which he acknowledged George as his eldest son, but, for whatever reason, his will was never produced. It was claimed that he died intestate. It may have been for this reason that the two sons of Te Ua went to the Supreme Court. There was provision within the Native Lands Act 1867 for cases such as theirs but this does not appear to have been utilised. After many unsuccessful attempts to obtain the grants, the two brothers proceeded to the Supreme Court to have Thomas declared legitimate so that he could pass the grants on to George. But, in the event, George never received the grants for Opua and Ko Anaru. Instead, this land was vested in Joseph Toms junior via the Land Transfer Act in the 1890s.

The English laws do appear to be at fault here for not recognising the legitimacy of the marriage and the two sons. There appears to have been no provision to take marriages, according to Maori custom, into consideration. According to the claimants, this has resulted in a loss to George's mana and his right of inheritance.

Neither George nor Thomas appears to have benefited from Joseph Toms' grants to land in the Queen Charlotte Sounds, despite their mother being buried at Te Awaiti. They may have received some land at Titahi Bay.

[105] Bentley, p 204

APPENDIX 1

MS Paper-32-0799, McLean Papers

**In the Name of God Amen I Joseph Toms** late of Sydney in the colony of New South Wales but now residing in Queen Charlotte's Sound New Zealand Mariner do make and publish this as and for my last Will and Testament. I desire that all my just debts funeral and other expenses be paid by my Executors herein after named out of my personal estate. I give and bequeath to my beloved wife Maria Toms all the money Bills Notes and Securities for money that may be in my possession at the time of my decease. I also five and bequeath to her the said Maria Toms the Dwelling House in Queen Charlotte's Sound aforesaid together with the furniture and Fixtures therein. I give to each of my Sons George and Thomas Toms one whale Boat with their appurtenances. I also give to my eldest son the said George Toms the large Schooner Boat formerly purchased by me of[f] the late Edward Ferraly Esquire. I give and devise unto my Brother in Law Thomas Bolton all my right title and interest in and to all that Bay known by the name of "Sawyer's Bay" situate lying and being in Queen Charlotte's Sound aforesaid and adjoining the European Settlement at that place. And as to all my other land in New Zealand that is to say Entry Island Teti Perrirua Queen Charlotte's Sound aforesaid and Cloudy Bay it is my Will and desire that it may be equally and equitably divided between my Wife Maria Toms and all and every my children now born or hereafter to be born that may be living at the time of my decease. And as to ally the rest and residue of my goods and chattels at my various whaling Establishments I direct that they be sold and the money paid to my said wife Maria Toms. And lastly I nominate constitute and appoint James Smith Esquire of the Firm of Waters and Smith Merchants of Port Nicholson sole Executor of this my will hereby revoking all other and former will by me at any time heretofore made. In witness whereof I have to this my last will and testament contained in two sheets of paper set my hand and seal in manner following that is to say to the first sheet my hand and to the second and last sheet my hand and seal this twenty fifth day of November 1840.

Signed sealed published and declared by the within named Testator as and for his last Will and Testament in the presence of us who in his presence at his request and in the presence of each other have hereunto subscribed our names as witnesses hereto

Joseph Toms

[Names of Witnesses]

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