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WAI 64

PRELIMINARY REPORT

TO THE WAITANGI TRIBUNAL

ON

MATTERS ARISING FROM THE

CHATHAM ISLANDS HEARING OF

16 - 19 MAY 1994

BY

DR GRANT PHILLIPSON

SEPTEMBER 1994

3.b

WAITANGI TRIBUNAL Wai 64 and 308

CONCERNING the Treaty of Waitangi Act 1975

AND the Chatham Islands claims

DIRECTION COMMISSIONING RESEARCH

1. Pursuant to clause 5A (1) (a) (i) of the second schedule of the Treaty of Waitangi Act 1975, Dr. Grant Phillipson of Wellington, historian, is commissioned to prepare a brief report on the following matters arising from the Chatham Islands hearing of May 1994:

(i) An examination of how the Native Land Court in 1870 applied the 1840 Rule to the rights of Ngati Tama vis-a-vis Ngati Mutunga, and to the conquest of Pitt Island.

(ii) The basis of James Coffee's title: was it awarded before the Native Land Court held its inquiries in 1868-70; was it based on the recognition of the rights of a Moriori wife?

(iii) An account of the 'Elizabeth' affair from secondary sources, and an assessment of its relevance to the claims.

2. This commission commences on 1 July 1994 and ends on 31 August 1994 at which time a draft of the work completed (in word perfect format) will be filed.

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

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

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

Dated at Wellington this 21st day of ~~July~~ June 1994.

Chief Judge ETJ Durie
Chairperson

INTRODUCTION

This report was commissioned on 27 June 1994, in order to provide the Tribunal with additional information on three matters arising from the hearing of 16-19 May 1994. The report is based on about six weeks of research and is a preliminary analysis of the matters contained therein, with the expectation that the Tribunal will seek further information from the cross-examinees where necessary to complete the record.

THE AUTHOR

My name is Grant Phillipson and I completed a Ph. D. in New Zealand history at the University of Otago in February 1992. My thesis included aspects of race relations history, which I expanded as a Research Fellow at the Macmillan Brown Centre for Pacific Studies in 1992. In 1993 I worked as an historical researcher for the Crown Congress Joint Working Party, and prepared reports on the traditional history of the Marlborough region and on the operations of the Native Land Court in Hawkes Bay. I became a commissioned researcher for the Waitangi Tribunal in July 1993 and have been working on the Rangahaua Whanui project since that date. In January 1994 I joined the permanent staff of the Waitangi Tribunal Division. I have prepared one research report for the Tribunal on the Chathams claims (A-16) and contributed to another (C-6), and have prepared two document collections for the claim (A-16A and C-38).

PART ONE

THE LAND CLAIM OF JAMES COFFEE

The land claim of James Coffee has raised a number of issues for the consideration of the Tribunal. During the cross-examination of Dr. Gilling, the Tribunal inquired whether the Native Land Court investigated Coffee's claim, and speculated as to the significance of such an investigation for the decisions of the Court in 1870. The principal evidence was submitted by Dr. Gilling and Dr. King, both of whom were cross-examined by the Tribunal on this matter. Dr. King suggested that the Native Land Court heard Coffee's claim in a preliminary sitting in 1868, and granted him title to 3,000 acres of land. He also argued that Coffee 'tried to make a claim through his Moriori wife but this was disallowed so he then lodged a subsequent claim through his Maori wife, which was allowed'.[1] Dr. Gilling, however, suggested that Coffee's case was heard through the Old Land Claims Commission, and that his title was 'recorded in the Secretary for Crown Lands Office'.[2] Gilling assumed that this represented an actual granting of title rather than the registration of a claim, although he noted that the registration took place four months before the Land Claims inquiry of Captain Thomas.[3]

On the basis of this evidence, the Tribunal raised a number of issues during the cross-examination of Dr. Gilling. The Chairperson suggested:

> It's rather important because it looks as though he got his title from Moriori. And if he did and

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[1]Transcript of Cross-Examination of Witnesses: Chatham Islands Hearing, 16-19 May 1994, Wai 64 5.1, p. 22. See extract from Transcript, Appendix One. See also M. King, *Moriori: a People Rediscovered*, Auckland, 1989, pp. 57, 122.

[2]B. Gilling, 'The Native Land Court in the Chatham Islands: a Report to Te Iwi Moriori Trust Board', September 1993, Wai 64 A-10, p. 64.

[3]Transcript of Cross-Examination, pp. 21-22. (Appendix One)

> this was done by ... as an executive act, then the Government had already acknowledged the title of Moriori.[4]

The Chairperson also asked whether Old Land Claims had been investigated on the Chathams, and what the effect of such inquiries had been on the subsequent hearings of the Native Land Court. This issue was related to the specific example of Coffee: 'So when the Native Land Court sat in the Chathams, did it make decisions for the whole of the land of the Chathams or was Coffee's land excluded?'[5] At this point Dr. King offered to clarify the matter, but his evidence contradicted that of Dr. Gilling.[6] The Tribunal was left uncertain as to the exact nature of the inquiry into Coffee's land claim, the basis of the claim, and its implications for the Native Land Court's subsequent decision between Moriori and Maori rights in 1870.

The Old Land Claims Commission was established in the early 1840s to investigate pre-Treaty purchases of Maori land. The Commissioners were supposed to inquire into the title of the vendors, the details of the purchase, and the willingness of Maori to accept the presence of the purchaser on the land. The Land Claims Ordinance empowered the Commissioners to make grants of up to 2,560 acres per claim, with the surplus land reverting to the Crown rather than the vendors. The Commissioners received claims from all over New Zealand but were unable to visit some districts, such as the Chatham Islands, the northern South Island and Poverty Bay, where claims were left uninvestigated in the 1840s and 1850s.[7]

The General Assembly moved to remedy this situation in 1856 and passed the Land Claims Settlement Act, which established a Court of Commissioners to hear outstanding pre-Treaty claims, as well as claims arising from FitzRoy's waiver of pre-emption. The

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[4]ibid., p. 22.

[5]ibid., p. 21.

[6]ibid., pp. 22-23.

[7]Report of the Land Claims Commissioner, 8 July 1862, AJHR 1862 D-10.

only Old Land Claim received from the Chatham Islands was submitted by C.K. Murray but it was never investigated, and Commissioner Bell reported in 1863 that the claim had been abandoned back in 1858.[8] Nor was the New Zealand Company's purchase of land on the Chathams investigated by Commissioner Spain, since the Colonial Office simply declared the purchase invalid in 1841. The British Government asserted that the Chathams were not part of the colony of New Zealand in 1840, and that the Company had no legal power to purchase land outside the limits of the colony.[9] The Old Land Claims Commission, therefore, had held no investigation into Chathams land and had made no grants to Chathams residents when Coffee's claim was received in 1867.

On 6 June 1867 James Coffee, a former sealer resident on the Chatham Islands, sent a land claim to the Chief Judge of the Native Land Court.[10] He argued that the 'aboriginal inhabitants' of the Chathams had 'granted' him land in 1833, before the Maori invasion of the islands. This transaction was 'subsequently confirmed by the maoris[;] in fact they are quite willing that I should now substantiate my claim and make application for a legal right and title'. Coffee gave no details about the original transaction, and he made no mention of a Moriori wife or children. He did, however, mention that he had married a Maori woman in about 1842, 'by whom I have a numerous family who are almost all residing upon the island'. He did not draw a direct connection between this fact and his entitlement, or advance it as grounds for applying to the Native Land Court. Coffee made it clear that he derived his title from both the Moriori, with whom the original (undefined) bargain was made, and the Maori, who had subsequently confirmed the arrangement and refrained from

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[8]Appendix to the Report of the Land Claims Commissioner, AJHR 1863 D-14, p. 97.

[9]G.W. Hope to J. Somes, 28 October 1841, CO209/12.

[10]J. Coffee to Chief Judge Fenton, 6 June 1867, Moriori Document Bank, Wai 64 C-3 8.3. The original of this letter and much of the following correspondence may be consulted in the Old Land Claims files, OLC 1/5A, National Archives.

disputing his title. The claimant felt obliged, however, to mention that he was not living on the land any more, but that he had done so 'for some years both before and after the arrival of the maoris'. He estimated that the land was about 3,000 acres in extent, and it was situated in the Ocean Bay district, which became part of the Wharekauri Block when the Native Land Court investigated title in 1870.[11]

Coffee's claim was probably inspired by the visit of Henry Halse to the Chathams in April 1867. Halse encouraged a request from Maori that land titles should be formalised on the islands by a hearing of the Native Land Court.[12] Faced with moves to establish a new system of land titles on the Chathams, Coffee must have thought it necessary to secure his own interests by obtaining a Crown Grant. The Old Land Claims Commission had made no impact on the islands in the 1840s, since it was empowered to hear claims made at a time when the New Zealand Government and its laws were barely heard of in the Chathams. As a result, Coffee and his whaler/sealer compatriots had not bothered to lodge Old Land Claims with the Commission before the expiry date in the early 1840s. It seemed logical, therefore, for Coffee to appeal to the Native Land Court, as the institution which he knew was about to investigate titles on the Chathams.

The Native Land Court was not sure what to do with Coffee's claim in July 1867, although it seemed clear that the Court itself could not hear the claim of a European. Although Coffee had mentioned his Maori wife and children, the claim had not been lodged in their names, and it was based on a transaction which took place before the marriage and the birth of children referred to in Coffee's letter. 'This looks like an old land claim', commented Chief Judge Fenton, and he forwarded Coffee's application to the Land Claims Commissioners. Fenton acted on the presumption that Coffee had registered an old land claim in the appropriate manner, otherwise the only alternative was for the local Maori to get a title through the Native Land Court and

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[11]ibid. See map, Appendix Three.

[12]H. Halse, Report on the Chatham Islands, AJHR 1867 A-4.

'then convey to Mr. Coffee'.[13] The Land Claims Commission checked its files and discovered that Coffee had not lodged a claim with the Commission.[14] As a result, the Secretary for Crown Lands wrote that the best course was to settle the Maori title in the Native Land Court and 'let the Native grantees fulfil their engagements with Europeans themselves'.[15]

Fenton agreed to adopt this course of action, but the intervention of a senior Native Department official caused a change of heart at the Land Claims Commission. Under-Secretary William Rolleston, who visited the Chathams in January 1868, met Coffee and promised 'to see Mr. Domett about his claim, in case it can be dealt with by the Land Purchase Commissioner'.[16] Rolleston wrote to Domett on 29 January 1868 and his intervention seems to have been decisive.[17] The Secretary for Crown Lands informed the Native Land Court in February that Coffee's claim would be settled under the Land Claims Settlements Acts.[18] The official justification for this change of stance was the redefinition of the claim as a Half-Caste one, instead of an Old Land Claim. Under Section 13 of the Land Claims Settlement Extension Act, 1858, the Commissioners could investigate and grant title to land set aside by Maori for the maintenance of 'Half-caste' children. The Commissioner wrote to Coffee: 'The land it is presumed was given or transferred to you by the Moriori as a means of maintaining yourself your Wife and Children'.[19] Coffee

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[13]Chief Judge Fenton, Minute, 16 July 1867, on Coffee to Fenton, 6 June 1867, Wai 64 C-3 8.3.

[14]Clerk's minute on Coffee to Fenton, 6 June 1867, illegible in C-3 8.3, but legible in OLC 1/5A.

[15]Fenton to Secretary of Crown Lands, 31 July 1867, C-3 8.3.

[16]W. Rolleston, Minute to Native Secretary, 6 February 1868, C-3 8.3.

[17]Rolleston to Land Claims Commissioner, 29 January 1868, C-3 8.3.

[18]Fenton to Secretary for Crown Lands, 5 March 1868, C-3 8.3.

[19]W. Grey to Coffee, 20 February 1868, C-3 8.3.

had not mentioned a Moriori wife and children in his application, and had only referred to a Maori woman whom he married nine years after the transaction with the Moriori. Unless the information came from Rolleston, therefore, who did not include it in his letter to Domett but may have mentioned it in conversation, the Commission was acting on an assumption unsupported by any evidence.

On 20 February 1868 the Commission informed Coffee that his claim could be settled by Commissioner Domett so long as he produced evidence of the original transaction, which would be heard by the Resident Magistrate on the Chathams. The magistrate would also hear the evidence of anyone who disputed Coffee's title, or who disputed the title of 'the Natives who transferred the land to you'.[20] The Commission expected Captain Thomas, therefore, to hear evidence on customary tenure and make some sort of finding on the respective rights of Moriori and Maori. This would certainly have pre-empted the anticipated sitting of the Native Land Court, although it would not have been the first time that a government official had made such judgements on the islands. Resident Magistrates had rented buildings and land from certain hapu, which involved informal decisions about who were the correct right-holders for particular pieces of land. They had also held formal inquiries into right-holding, such as Captain Thomas' investigation of a boundary dispute between Ngati Tama and Kekerewai in 1863.[21] He heard evidence and made a formal finding that the chief Meremere was the 'superior owner' of a particular district, and that he was 'allowed by both sides to have had the "mana" of the land'. Having made this decision, Thomas went on to define the boundary between the two hapu.[22] The Resident Magistrate's inquiry into the Coffee claim, therefore, would merely be the latest of a haphazard series of formal and informal investigations into customary tenure, all of

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[20]ibid.

[21]Minutes & Decision of Captain Thomas, Kaingaroa, 10-12 October 1863, Burt Chatham Islands Collection, MS Papers 434/4A.

[22]ibid.

which took place before the first sitting of the Native Land Court in 1870.

Captain Thomas opened his inquiry on 30 April 1868. Coffee's witnesses were not very helpful in supporting his claim, as Pamariki Raumoa announced that the whole of the block had been included in his own claim to the Native Land Court.[23] The first Moriori witness, Paroa Nganunanga, had been five years old at the time of the events he was describing, and did not know what arrangements his relatives had made with Coffee. He asserted that Kairakau and other chiefs 'had taken Coffee to be their pakeha' and had 'given' him some land at Ocean Bay, but he did not know any other details.[24] The only other Moriori witness was Hirawanu Tapu, who knew nothing about the transaction at all except to state that relationships between sealers and Moriori usually involved some gifting of land for the maintenance of the sealers.[25]

Coffee gave his evidence on 2 May, after Pamariki Raumoa and Paroa Nganunanga. He claimed that six Moriori 'head men' gave him land at Ocean Bay, and that he had paid them three months later with six sealing knives, six tomahawks, and two cotton shirts. He made no mention of a marriage alliance or the need to maintain a Moriori family. Nor did he suggest that the transaction had been accompanied by a written deed. Coffee himself was illiterate and could not have drafted a deed of purchase, although one of the other sealers on the island might have been able to do so. The only other witnesses to the transaction were a European and several Moriori. The European witness had returned to New Zealand and Coffee gave no details to enable the Commission to contact him and obtain his evidence. The Moriori witnesses were all dead, leaving Coffee as the only eyewitness to the transaction. After asserting the grounds for his claim, Coffee described his occupation of the land after the arrival of the Kekerewai, who lived with him in the area under the chieftainship of Pamariki

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[23]Evidence of Pamariki Raumoa, 30 April 1868, C-3 8.3.

[24]Evidence of Paroa Nganunanga, 30 April 1868, C-3 8.3.

[25]Evidence of Hirawanu Tapu, 2 May 1868, C-3 8.3.

Raumoa. The district was disputed between Raumoa's people and another section of Ngati Mutunga under Wiremu Pomare and his father. The Kekerewai seem to have departed for Waitangi some time before 1840, accompanied by Coffee and his new wife, a prominent woman of the Kekerewai named Wikitoria. Coffee did not actually mention his new marriage at this point, and admitted that he could not maintain even a token presence at Ocean Bay after the departure of Raumoa.[26]

Thomas heard the evidence of objectors on 4-5 May. Most of these were Maori who had lived at Ocean Bay since the departure of Coffee and the Kekerewai. They argued that the former sealer had not lived on the land or made any claim to it for a long time. They also produced a witness who had been a contemporary of Coffee's during the sealing era, and who claimed that there had never been any transaction between Coffee and the Moriori. Rihari, a Ngati Tama man who had settled on the Chathams in the 1830s, mentioned Coffee's Moriori wife for the first time in the proceedings, suggesting that she was one of his own wives and that she had been given to the sealer by himself and not her Moriori relatives. He claimed that the Moriori never gave Coffee any land, and that the sealer never had any spare goods to offer as payment even if they had wished to do so.[27] The Pakeha lessee of part of the block, the missionary Johann Engst, also gave evidence that Coffee lived at Matarakau and had never lived on the land at Ocean Bay for as long as the missionaries had been on the Chathams, and had not been a party to the lease or a recipient of the rent.[28]

Captain Thomas offered Coffee a right of reply to the evidence of the objectors, but the claimant had no further evidence to offer. Thomas asked a series of questions to elicit further information, and Coffee stated that he had lived with the Maori 'as one of their pakeha' at all his residences. He added that he had been married to one Moriori woman and two Maori

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[26]Evidence of James Coffee, 2 May 1868, C-3 8.3.

[27]Evidence of Rihari, 4 May 1868, C-3 8.3.

[28]Evidence of J. Engst, 5 May 1868, C-3 8.3.

women, but without offering any details or connecting them with his right to the land. He also admitted that he had not thought of returning to Ocean Bay until around 1859, when he quarrelled with his brother-in-law at Matarakau, the chief Ihakara, who told him to go back to Tupuangi. Coffee asked his Kekerewai friends and relatives (by marriage) to endorse his removal 'to get what I considered my own land back again'. His friends agreed but the quarrel with Ihakara was settled and Coffee did not attempt to return to Ocean Bay.[29]

Captain Thomas wrote his opinion of the evidence on 9 June, as requested by the Land Claims Commissioner, on whose behalf he had held the inquiry. He found that the evidence 'shews but faintly that he [Coffee] had any bona fide transfer or gift made to him of the land he now claims by the Aborigines'. This meant that the Resident Magistrate did not have to judge between Maori and Moriori take after all, because the claimant had no substantial evidence that a transaction with Moriori had actually taken place. Furthermore, the Maori witnesses made it clear that they objected to the claim and had lodged their own claim with the Native Land Court. In light of the recent nature of the claim and the lack of evidence to support Coffee's position, Thomas suggested that he should be recommended to obtain the land from the Maori grantees after the Land Court hearing. Pamariki Raumoa had lodged the claim and seemed willing to 'convey the land *or a portion of it* [my emphasis]' to Coffee after the Court made its award. The magistrate thought that Coffee should get some sort of written promise to this effect. He did not point out that Raumoa and his fellow claimants were not the people living on the land or controlling the lease, and that they had left the area at the same time as Coffee in the 1830s, and were therefore unlikely to be judged the owners by the Native Land Court.[30]

Thomas' report was not brought to the attention of the Land Claims Commissioner until January 1869. Commissioner Domett decided that since the Maori 'owners' did not acknowledge

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[29]Cross-examination of James Coffee, 5 May 1868, C-3 8.3.

[30]Opinion of the Resident Magistrate, 9 June 1868, C-3 8.3.

Coffee's claim and had lodged their own with the Native Land Court, he could not make any award in favour of the claimant, no matter what the strength or weakness of the case. He adopted Thomas' suggestion that Coffee should be advised to obtain the land from the Maori grantees after the block had passed through the Court.[31] A letter to this effect was sent to Coffee on 8 October 1869, nine months after Domett had made his decision.[32]

In the meantime the land in question had been surveyed by Percy Smith's team, which surveyed the islands in preparation for the Native Land Court hearings of 1870. The Ocean Bay/Tupuangi area was included in the Wharekauri Block, which came before Judge Rogan on 24 June 1870. There was no mention of James Coffee or his claim during the hearing of this block, or in the entire proceedings of the court in 1870, and the title issued by the court was not encumbered by any prior decision on the rights of Coffee.[33] Nevertheless, in 1872 Coffee's claim came to the attention of John Curnin, a clerk in both the Lands Department and the Land Claims Commission. Curnin wrote to the Commissioner that he had met a Chathams resident in Christchurch, who told him that the Native Land Court 'at its sittings there, had adjudicated upon the claim of Coffee (*a half caste* [my emphasis]) there, and had made an award in his favour of some four or five thousand acres'.[34] Curnin was alarmed that a claim rejected by the Land Claims Commission should have been granted by the Court. He advocated immediate steps to clarify their respective jurisdictions, 'inasmuch as they at present appear to be so much in conflict, when acting so independently one of the other, especially in matters affecting Half Castes'.[35]

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[31]A. Domett, minute on Thomas' Opinion, 7 January 1869, C-3 8.3.

[32]H. Jeaday, Court of Land Claims, to Coffee, 8 October 1869, C-3 8.3.

[33]Chatham Islands Minute Book 1, ff. 2-70.

[34]Curnin to Commissioner, Christchurch, 6 March 1872, C-3 8.3.

[35]ibid.

Curnin advised the Commission to prepare a schedule of its half-caste claims for the Court, so that the two institutions could share information and avoid making conflicting awards.[36] Chief Judge Fenton passed the list of half-caste claims to Judge Maning to comment on those in his district, and the Coffee claim was included in this list.[37] Maning commented: 'No claim made before me', but it is not clear whether this was the court's only response to a claim which was clearly outside Maning's district. The Old Land Claims file on Coffee has no other documents on the matter.[38]

There is a clear discrepancy between the records of the Native Land Court and the information relayed to Curnin by his unnamed Chatham Islands informant. There are two possible explanations for this discrepancy. The first is that *some* grantees of the Wharekauri Block agreed to sell or give land at Ocean Bay (or possibly at Matarakau) to Coffee, as Thomas indicated that they might in 1868. There is no evidence of a partial alienation to Coffee, however, in the later partition hearings of the court, when such informal deals usually came to light.[39]

The more likely explanation is that confusion arose because the Court awarded land to Epiha Kawhe in 1870, eldest son of James Coffee and his second Maori wife, Wikitoria. Epiha was the tamaiti whangai or adopted child of Te Rakatau, an important Kekerewai rangatira, and he was also the uncle of Pamariki Raumoa through the marriage of his half-sister, Katerina, to Raumoa's father.[40] Epiha was very well connected, therefore, and he became a grantee in both the Wharekauri and Te Matarae Blocks. His interest in the 55,000-acre Wharekauri Block would have

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[36]ibid.

[37]Fenton to Land Claims Commissioner, 15 May 1872, C-3 8.3.

[38]F.E. Maning, Memoranda, 1 May 1872, C-3 8.3. See also OLC 1/5A.

[39]See Chatham Islands Minute Books 1-2.

[40]Chatham Islands Minute Book 1, ff. 25, 192-196, 228, 252-254, 260; & Minute Book 2, f. 26.

amounted to at least 5,000 acres, which might explain the total reported to Curnin, which was much greater than that of the Ocean Bay block claimed by James Coffee, Epiha's father. Epiha obtained this land through his Maori take and whakapapa, and his father's claims were never mentioned in any of the hearings which concerned the initial award or the later succession and partition orders.[41] He also succeeded to the share of his mother's sister (Mere Ihakara) in the Otonga Block, all of which made him one of the most powerful right-holders on the Chathams.[42] James Coffee and other members of the family probably continued to live and cultivate at Matarakau on the strength of Epiha's title, although many of the family joined their relatives in the migration to Taranaki.[43]

It seems clear, therefore, that if James Coffee ever obtained a Crown Grant for land in the Chathams, it was not from either the Native Land Court or the Land Claims Commission. The Commission accepted jurisdiction over Coffee's claim, on the grounds that it was a 'Half-caste' claim on behalf of a Moriori wife and children, even though the claimant himself made no assertion to this effect in his application. Coffee's later evidence based his claim on a transaction with Moriori involving an exchange of goods, and made no mention of either a Moriori or Maori wife as a factor affecting his entitlement.

The Land Claims Commission asked the Resident Magistrate to hear the evidence for the claim and to form an opinion on its veracity, with the express request that he should also hear any objectors who disputed the title of the Moriori who had given Coffee the land in 1833. Captain Thomas, however, found it unnecessary to make a judgement between Moriori and Maori take in this case, although he had made such judgements earlier by the way in which he decided a boundary dispute between Ngati Tama and Kekerewai in 1863. He found that there was no evidence to support Coffee's account of the 1833 transaction, and that the Maori

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[41]ibid., & passim.

[42]Minute Book 1, ff. 88-90.

[43]eg. Minute Book 2, f. 29.

occupants (both past and present) disputed the claim and had lodged their own with the Native Land Court. Thomas recommended that the claimant should obtain the land from the grantees after the hearing of the Court.

Commissioner Domett accepted Thomas' recommendations and advised Coffee accordingly, and the land in question became part of the Wharekauri Block, which passed through the Native Land Court in 1870. Coffee's son, Epiha Kawhe, was made one of the ten grantees for this block, as well as receiving a share of the Te Matarae Block, and later inheriting part of the Otonga Block. Epiha obtained his shares through his Maori relationships and his position in the Kekerewai hapu. His father's claim and interests were not investigated by the Court in their own right, and were not a factor in the decisions of the Court with regard to Epiha himself, whose name was put forward by more senior rangatira without the Court considering his individual take.

PART TWO

THE APPLICATION OF THE 1840 RULE BY THE NATIVE LAND COURT IN 1870

The details of the Native Land Court's application of the 1840 Rule became an important issue of debate before the Tribunal on 16 May 1994. The Chairperson posed a series of questions to Dr. Gilling and Dr. King about the Court's determination of rights between the principal Te Atiawa hapu of Ngati Mutunga and Ngati Tama. He asked whether the Court awarded land to individuals or to tribal groups, and Dr. King replied that the affiliations of grantees meant that Kekerione was in effect awarded to Ngati Mutunga, 'whereas the claimants for Wharekauri and Te Awapatiki were Ngati Tama'.[44] The Chairperson then raised the problem of the war between Ngati Mutunga and Ngati Tama, and the expulsion of the latter from the Waitangi district. Having determined that this event took place in 1840 itself, the Chairperson asked: 'did the Court even inquire on that matter?'[45]

Dr. King replied that the Court did not look into the timing of the war because Ngati Tama did not cross-claim for the Kekerione Block, in which the district of Waitangi was situated. According to King, Ngati Tama 'restricted their claim to where they settled after being pushed out'.[46] The Chairperson inquired whether the Court 'may have been determining things on the basis of things that happened post-1840'. He suggested that the Court 'may not have been applying the 1840 rule properly'. Dr. King replied that the Court had applied the Rule 'for Maori/Moriori, but not for Maori/Maori'.[47] Dr. Gilling expanded on this point and suggested that the particular date of the expulsion of Ngati

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[44]Transcript of Cross-Examination of Witnesses: Chatham Islands Hearing, 16-19 May 1994, Wai 64 5.1, p. 25. See extract, Appendix Two.

[45]ibid., pp. 25-26.

[46]ibid., p. 26.

[47]ibid.

Tama in 1840 should also have been considered, as the 1840 Rule was variously dated from 14 January, 6 February, and 21 May 1840. Neither of the witnesses was sure of the exact date of the removal of Ngati Tama to Kaingaroa in 1840.[48]

The Chairperson also inquired about the application of the 1840 Rule to the conquest of the outlying islands, using Pitt Island (Rangiauria) as an example. He asked if the Court inquired about the date of conquest, whether it happened before or after 1840, and Dr. Gilling replied that the Court did not take evidence on this point. The Chairperson suggested: 'So the essential thing to prove in terms of the Court's law, was that it happened before 1840 but there is no evidence to show that it did happen before 1840?'[49] Dr. Gilling agreed that there was nothing in the court minutes to have enabled a decision on the date of conquest, but could not offer any information on what the actual date might have been. He offered an excerpt from the evidence of Wiremu Wharepa to the Court, which suggested that the conquest of Pitt Island *might* have taken place in the late 1840s.[50]

A detailed analysis of what the court was told, and the questions asked by the Judge and Assessor, is clearly necessary to determine how much information was available to Judge Rogan when he made his decision about the entitlement of Ngati Mutunga vis-a-vis Ngati Tama in 1840, and about the entitlement of Maori vis-a-vis Moriori to the outlying islands in 1840. Before undertaking such an analysis, however, it is important to establish some of the details of the conflict between Ngati Mutunga and Ngati Tama in the late 1830s and early 1840s.

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[48]ibid. See also B. Gilling, '"The Queen's Sovereignty Must be Vindicated": the Development and Use of the 1840 Rule in the Native Land Court', March 1994, Wai 64 A-14, pp. 32-36.

[49]Transcript, p. 27.

[50]ibid., p. 28.

I THE CONFLICT OF NGATI MUTUNGA, NGATI TAMA, AND KEKEREWAI

The first point to note is that there was never a straight fight between two monolithic groups. One section of Ngati Mutunga, led by Wiremu Naera Pomare and his father, had been involved in conflict with other branches of Mutunga in various parts of the Chathams. The conflict between Pomare's people and Te Kekerewai at Ocean Bay and Tupuangi, for example, was one of the precursors to the 1840 Waitangi war.[51] The position of Kekerewai was very important and particularly ambivalent. Alexander Shand claimed that Kekerewai were a 'branch of Ngatitama' but other authorities said that they were a section of Ngati Mutunga.[52] Some Kekerewai were closely allied to Tama in the 1830s, but the evidence suggests that all the hapu were so inter-related that affiliation and alliances were constantly shifting. Shand gave evidence to the Native Land Court that Te Rakatau, for example, 'belonged to many hapu's but Te Kekerewai was his principal hapu'.[53] Hamuera Koteriki, however, an important rangatira of Pomare's section, said: 'Dont know why Rakatau elected to call himself a member of the Kekerewai hapu in 1870'.[54] Te Rakatau himself stated that he belonged to Kekerewai but later differentiated himself from them: 'We the Ngatitama lived on these and the other places [when] From the Wangaroa the Kekerewai Tribe came here'.[55]

The evidence also suggests that choices of allegiance were neither easy nor straightforward, and that these close relatives were uncomfortable with the memory of the war. The number of

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[51]See Captain Thomas' investigation of Coffee claim, April-May 1868, C-3 8.3.

[52]A. Shand, 'The Occupation of the Chatham Islands by the Maoris in 1835', part IV, p. 75; cf. Thomas' marginal note on the evidence at the Coffee inquiry, C-3 8.3; & the evidence of Pikau, 23 January 1888, & Matene Te Karamu, 21 February 1893, Chatham Island Minute Book 1, ff. 190, 231.

[53]Chatham Island Minute Book 1, f. 236.

[54]ibid., f. 195.

[55]ibid., ff. 23-24.

actual casualties was negligible, and the very rare fatalities could produce strange reactions. The leading rangatira of Kekerewai, Raumoa, was very upset by the killing of a Mutunga relative on the opposing side, and 'much annoyed that matters should have put on such a serious aspect'. He grieved for his 'son' and sent some of his own people under Te Rakatau to join the enemy against himself, exhorting them 'to be strong to fight against him'.[56] Shand's account of the conflict stressed the ambivalence of Kekerewai and their Mutunga relatives. He recorded that when Pomare met Wiremu Kingi Te Rangitake at Wellington in 1843, 'the latter reproached him severely (they were close relations) for allowing war between Ngatimutunga and Ngatitama - all being kinsmen'. Pomare 'bent his head in silence, feeling he had done wrong, and said nothing'.[57] This may have been one of the reasons why Maori witnesses on both sides tried to avoid mentioning the war in 1870, and therefore downplayed its significance for the patterns of land and occupation rights on the Chathams.

Tension between the hapu had been strong before the migration to the Chathams, and they had lived separately at Whanganui a Tara in the early 1830s. Some members of Ngati Mutunga tried to stop Ngati Tama from joining the expedition to the Chathams, but Te Wharepa, Patukawenga, and others who were closely related to both sides, persuaded them to change their minds.[58] According to Shand's informants, the leaders of all parties agreed that nobody from the first expedition would take possession of any land until 'the matter had been duly arranged'. This was ignored by all groups and a period of jockeying ensued in which they 'in many instances obliterated one anothers "possession" (takahi) by living on the land, ignoring the footprints (waewae) of their predecessor, who in such cases generally found it convenient not to interfere, through not

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[56]Shand, Part IV, p. 75.

[57]ibid., p. 74.

[58]ibid., Part II, pp. 154-155, 157.

having sufficient force to repel the aggressor'.[59] Different accounts gave precedence to different rangatira, although there was a clear sense that the second shipload 'had no claim to the island, nor any rights of their own, but lived among their relatives on sufferance; or with those who, as *rangatiras*, claimed the land'.[60] Engst's account stressed the activities of Raumoa, for example, who left Whangaroa and 'went almost over the rest of the Island, and named places here and there where he had walked over and slept'.[61] Other rangatira were not happy with the spread of Kekerewai's influence, and Pomare's section of Mutunga drove them out of the Ocean Bay/Tupuangi area in the late 1830s.[62]

It is important to note, however, that the actual act of "conquest", in which some Moriori were killed and others enslaved, happened in 1836 under the chiefs dominant in the early part of the settlement process. Areas later claimed by sections of Ngati Mutunga, therefore, were conquered from Moriori by Kekerewai and Ngati Tama, such as the Waitangi and Matarae districts.[63] Pomare's people seem to have been largely confined to the Whangaroa district at first, under the chieftainship of Patukawenga, who wanted to avoid conflict with his Tama and Kekerewai relations. Patukawenga died in late 1836 or 1837, after which leadership passed to Wi Pomare and Toenga Te Poki, who were not prepared to remain at Whangaroa while Ngati Tama enjoyed a better harbour at Waitangi and a near-monopoly of trade.[64] Their section of Mutunga also moved to drive Kekerewai out of the Ocean Bay district, and Raumoa's people retreated to reinforce Ngati

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[59]ibid., pp. 158-159.

[60]ibid., p. 161.

[61]J. Engst, 'Early History of the Chatham Islands and its Inhabitants', Part I, Florance MS, C-3 6.3, pp. 24-25.

[62]See evidence presented to Captain Thomas in the Coffee inquiry, April-May 1868, C-3 8.3.

[63]Shand, Part II, pp. 158-159.

[64]ibid., Part IV, pp. 74-75.

Tama at Waitangi.[65]

The situation became very tense and both sides seem to have contemplated a further migration, having found the land at the Chathams not as good as they had been led to expect. While events were in this unsettled state, the *Jean Bart* incident took place in 1839, which involved the sacking of a French ship and a retaliatory attack from a French warship. Shand argued that some of Ngati Tama's best leaders were killed during these incidents, and that this weakened them to the point where Mutunga were prepared to risk a full-scale assault. The death of important rangatira had also created a power struggle within Ngati Tama, which divided the remaining leaders and precipitated the Mutunga invasion. Te Koea went to a leading Mutunga rangatira, probably Hamuera Koteriki, and made him a gift of the land at Waitangi with the words: 'To oneone ko Waitangi'.[66] Encouraged by Te Koea's defection and enraged by reports of kanga against themselves, Ngati Mutunga marched around the coast to take Waitangi in early 1840. They besieged Ngati Tama and Kekerewai in their pa Kaimataotao near the mouth of the Waitangi River.[67]

Kaimataotao had successfully withstood a siege for about four months when the balance of power was suddenly altered by the arrival of the *Cuba* in June, carrying a New Zealand Company expedition to buy land at the Chathams. Dieffenbach's account suggests that Ngati Tama may not have suffered much from the siege. They were able to get fresh water from behind the pa, although their food was being rationed. The besieging party outnumbered the inhabitants, but there were two large parties of Ngati Tama on the east coast which had still not committed themselves to any action. There were also a large number of neutral people who seemed to pass freely between the pa and the

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[65]See evidence presented to Captain Thomas in the Coffee inquiry, April-May 1868, C-3 8.3.

[66]Shand, Part III, pp. 202-209.

[67]ibid., Part IV, pp. 74-75.

besiegers.[68] Dieffenbach tried to negotiate a peace since only three people had been killed so far, but found it impossible because one of the fatalities was a son of the chief Pomare.[69]

According to Engst, however, the Company party was more interested in using the conflict to obtain land sales than in negotiating peace. Ngati Mutunga agreed to sell Whangaroa and the lands which they had left behind in return for a payment of guns, ammunition, and provisions. Engst suggested that this tipped the balance of power against Ngati Tama and Kekerewai, and that the Company was aware of this and arranged to evacuate the pa as a result. Although this involved a risk of enraging their erstwhile Mutunga allies, the Company officials did not want to be responsible for significant loss of life.[70] After treating with Pomare they visited the Ngati Tama non-combatants on the east coast and consulted them about their intentions, which may have forestalled their intervention and certainly led to the agreement to give their relatives shelter in their own district. The pay-off came for the Company when the relocated Tama and Kekerewai agreed to sell the land which they in their turn had now left behind.[71]

The siege had not been improved by the death of Te Ahipaura, which had led Raumoa to ask Te Rakatau to lead some of the Kekerewai out of the pa to join the besiegers. In fact Te Rakatau's party became a neutral force which prevented any assault during the eventual evacuation of the pa.[72] Te Rakatau and his people continued to live nearby at Te Matarae, and did

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[68]E. Dieffenbach, 'An Account of the Chatham Islands: Communicated by Dr. Ernest Dieffenbach, M.D., Naturalist to the New Zealand Company, and printed with its concurrence', pp. 211-212, C-3 6.4.

[69]ibid., p. 213. The young man who was killed, Te Ahipaura, was a close relative of both Raumoa and Pomare, but not actually a 'son' of either in the way in which Europeans used the word.

[70]Engst, Part I, p. 30, C-3 6.3.

[71]Dieffenbach, pp. 214-215, C-3 6.4.

[72]Shand, Part IV, pp. 75-76.

not accompany their friends and relatives to Kaingaroa.[73] According to Shand's informants, the inhabitants of the pa had already been planning to evacuate it before the arrival of the *Cuba* in June, although this did not necessarily mean that they intended a permanent withdrawal from the area.[74] On 17 June the *Cuba* took Ngati Tama and Kekerewai to Okawa and Kaingaroa, with barely a shot fired by the Ngati Mutunga forces during the evacuation, partly because a senior Kekerewai rangatira placed himself in the firing line between the two parties.[75]

The evacuation of Waitangi was not the end of the war. A Ngati Mutunga taua moved on around the coast through the territory of the later Te Awapatiki Block, killing a Moriori slave and capturing an important Tama chief out hunting, whom they also killed. After this expedition there was a second Mutunga taua which took the same route and attacked a party of Ngati Tama, but this time there were two Mutunga deaths and none on the Tama side.[76] Relatives on both sides met to arrange a temporary peace after this battle, but Shand and Native Land Court witnesses both asserted that the war did not end until late 1842 or 1843, after Maori Anglican and Wesleyan missionaries had brought Christianity to the Chathams. Ngati Tama had held its own in the later battles, the casualties on both sides had been fairly even, and pockets of Kekerewai had remained behind in occupation. The question of Waitangi was not really settled until the establishment of a general peace in the wake of Christianity and of Pomare's visit to his relatives at Wellington.[77]

The question remains, however, as to how much of this information was relayed to the Native Land Court in 1870. In theory the Court was supposed to be determining the state of

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[73]ibid., & Chatham Island Minute Book 1, ff. 23-36.

[74]Shand, part IV, p. 76.

[75]ibid.

[76]ibid., pp. 76-77.

[77]ibid., p. 77. For the Native Land Court evidence, see below, & also the evidence of Piripi Niho in 1885, Chatham Islands Minute Book 1, f. 95.

"ownership" as at 1840, and it was not supposed to take into account any change which took place as a result of violence after the establishment of British sovereignty in New Zealand.[78] According to Engst, this point was made very clearly to Moriori by the Crown:

> Moriori were not satisfied with these [their reserves] but charged Government with injustice in not returning to them the whole Island but Government answered to their complaint that they had justice done to them, in considering them in these Reserves and pointed out to them that their jurisdiction was limited to the period in which government had assumed to rule in N.Z. Whom they found there as possessors of the land those they had to consider as owners thereof but in their [Moriori] case they had considered and done as much as laid in their power.[79]

The Native Land Court opened with a hearing of the Kekerione Block in June 1870. The Whangaroa district made up part of this block and it also included most of the Waitangi district, taken from Ngati Tama and Kekerewai by Ngati Mutunga in 1840. Wi Naera Pomare headed the claim on behalf of the Ngati Mutunga tribe, although some of his 1840 "enemies" were included in the list of claimants, such as Te Rakatau and Ihakara Ngapuke, 'all of whom belong to the Tribe Ngatimutunga'.[80] Pomare claimed 'on account of my long residence on it [the Kekerione Block], and having taken possession of the Island [ie. the whole of Chatham Island]'. The Court asked him how he had taken possession and Pomare replied: 'By the power of my arm I took possession. I believe it was in the year 1836 we took possession of the island'. He stressed that his claim rested on the conquest of the Moriori inhabitants: 'when we took it we took their mana from them and from that time to this I have occupied the land, this is the basis of my claim'.[81] Pomare's evidence gave the

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[78]eg. *The Ngai Tahu Report 1991*, Waitangi Tribunal Report: 3/4 WTR, 1991, p. 1126.

[79]Engst, Part II, p. 18, C-3 6.3.

[80]Chatham Islands Minute Book 1, ff. 1-4.

[81]ibid., ff. 4-6.

impression that a single group took the whole island from Moriori and established a uniform take, not that separate and independent groups took various districts from distinct groups of Moriori. Otherwise, Pomare would have had to have based his title to Waitangi on the conquest of Ngati Tama, and not of the Moriori, as *Ngati Tama* had conquered the Moriori of the district.

Toenga Te Poki reinforced Pomare's picture for the Court:

> I took possession according to ancient custom and I retained possession of the land for myself[.] I took possession of the land & also the people [Moriori]. Some of those we had taken ran away. Some of those who ran away into the Forest we killed according to the ancient customs[;] from this I knew the land was ours.[82]

Te Rakatau, one of the main players in the Waitangi war, followed Te Poki and supported the version of conquest asserted by the two previous witnesses.[83] Te Rakatau had a foot in both camps, as a Kekerewai who had left Kaimataotao before its fall, and he had continued to live in the Te Matarae district with his friends and relatives. These witnesses set up a scenario in which a single Maori group had taken possession of the Kekerione Block (and indeed the whole island) in 1836, against whom the only claim could come from the Moriori.

It was not until Ngamunanga Karaka opened the Moriori counter-claim, therefore, that the Court was made aware of the distinctions among 'the New Zealanders', and of their warfare over land and resources. Karaka told the Court that Ngati Tama occupied Waitangi and Ngati Mutunga lived at Whangaroa, and that they had conducted campaigns against Moriori in their respective districts. The judge asked him where Ngati Tama had lived and whether they had remained 'for any length of time on this land'. Karaka replied that they had lived at Waitangi but that he was uncertain of the exact length of time for which they had occupied the district. He described the seizure of the *Jean Bart*, the retaliation of the French and the kidnapping of the Tama rangatira Ngatuna, and finally the Mutunga invasion and the

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[82]ibid., f. 6.

[83]ibid., f. 7.

evacuation of Ngati Tama to Kaingaroa, but without mentioning that it was done by a New Zealand Company ship.[84]

The second Moriori witness, Hirawanu Tapu, supported Karaka's evidence about the separate rohe of Tama and Mutunga, but he made a crucial mistake when describing the Mutunga seizure of Waitangi. He told the Court that Pomare took Waitangi from Ngati Tama in 1839, a year before the events actually took place.[85] The Court did not question Tapu about Tama's residence at Waitangi or his reason for dating the Mutunga conquest in 1839. In fact the Court asked no more questions about Ngati Tama, since they were not the counter-claimants whose rights had to be evaluated in the Kekerione Block.[86]

On 18 June Te Rakatau opened his claim to the Te Matarae Block on behalf of Kekerewai, although some of the claimants would have seen themselves as Ngati Tama, such as Ropata Te Uruoto. Te Rakatau himself did not always maintain a distinction, and at one point described himself as Ngati Tama.[87] The cross-claim for this block came from Apitia Punga, his sister Ngahiwi, and some other members of their section of Ngati Mutunga, including Hamuera Koteriki. This was the only case of a cross-claim between Maori groups during the 1870 hearing, and it brought the events of 1836 and 1840 into sharper focus than any other claim before the Court. In firm contrast to his earlier evidence in the Kekerione Block, Te Rakatau stressed the fact that different groups had conquered and taken possession of distinct districts: 'we each had our respective Blocks of land at which time we caught the Moriori's'. Having made this point, Te Rakatau claimed that he had lived with his people in the Te Matarae district until 1859, when he returned to Taranaki. He made no mention of the Mutunga conquest of Waitangi, and asserted that his occupation had been uninterrupted until 1859, and that

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[84]ibid., ff. 11-13.

[85]ibid., f. 15.

[86]ibid., ff. 16-22.

[87]ibid., ff. 23-24.

he had made intermittent return visits since leaving for Taranaki.[88]

Apitia Punga made a counter-claim on behalf of several Ngati Mutunga people, alleging that he lived in the boundaries of the block and had cultivations there. Apitia returned to the earlier Mutunga position that the island had been conquered as a whole, and suggested that it was not divided into distinct districts until the surveys of the late 1860s:

> I am not aware of any agreement being made by the older chiefs as to the sub-division of the lands at the Chatham Islands. This Block was taken when the whole Island of Wharekauri was taken and these sub-divisions took place when the late surveys was [sic] made.[89]

Te Rakatau and Apitia each denied that the other had any rights in the block.

Te Rakatau's most important witness, Pamariki Raumoa, gave evidence which brought forward the conflict between Tama and Mutunga as a turning-point in the occupation of the area. Raumoa was the leading chief of Kekerewai but identified himself as Ngati Mutunga. He informed the Court that he had been living at Te Matarae as a child in 1839 but that in 1840 all the people had gone to live at Waitangi. There was a 'quarrel' between Te Rakatau and the Ngati Mutunga, and some people were forced to leave, although Te Rakatau was able to remain on his land. Raumoa himself was taken from Waitangi to Kaingaroa in 1840.[90] Although he did not say explicitly that this was part of the evacuation of Waitangi, the point was sufficiently obvious for the Court to have questioned Tapu's mention of the year 1839, and to have made some attempt to get to the bottom of the discrepancy between the evidence of the two witnesses.

Apitia's main witness, Hamuera Koteriki, also brought up the war and contradicted the evidence of Apitia about the uniform entitlement given by a supposed island-wide conquest of Moriori.

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[88]ibid.

[89]ibid., f. 27.

[90]ibid., f. 25.

Apitia suggested that his father had assumed 'the mana of the land' from the moment he landed on the island, and that this shaped his own entitlement in Te Matarae.[91] Koteriki asserted, however, that Te Rakatau claimed 'by right of discovery but our claim is by right of conquest over the Ngatitama from whom we took it[,] we the Ngatimutunga took it'. Hamuera described the war over the district and claimed that only the introduction of Christianity 'prevented me from driving the Ngatitama and Kekerewai Tribes out of the Chatham Islands altogether'. He added that Te Rakatau had married his sister, and that this marriage caused Koteriki's grandfather to let Te Rakatau live at Te Matarae.[92]

The Assessor asked Koteriki: 'From what date do you really take possession of this land?' Koteriki replied: 'From the time that Christianity was introduced into this Island we held quiet possession of this land'. The Assessor then asked if Mutunga had taken all of Tama's land during the war, to which Koteriki replied that they had taken 'Waitangi and the Block of land now under investigation'. The Court made no attempt to fix these events in terms of 1840, to get a date for the introduction of Christianity, or for the final settlement of 'quiet possession' after the conversion of the majority on both sides to the new religion.[93] Koteriki was the first non-Moriori witness to make such an open avowal that the war had happened and that land had been taken as a result. As this had a direct bearing on the entitlement of the claimants and cross-claimants to the Te Matarae Block, it seems extraordinary that the Court made no attempt to assess these factors in terms of the 1840 Rule.

Toenga Te Poki gave evidence after Koteriki and confirmed the central role of the war in determining rights in the area, although he stated during cross-examination that Te Rakatau had been neutral during the conflict. The Assessor asked: 'It is clear to your mind that the land belonged to the Ngatitama & you

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[91]ibid., ff. 27-28.

[92]ibid., ff. 29-31.

[93]ibid.

took it from them?' Toenga stated clearly: 'Yes. I took it from them by force of arms'. Neither Rogan nor the Assessor attempted to obtain a date from Te Poki for this conquest.[94] There was even a suggestion that force was still being used to regulate land rights in the area, when Apitia's sister, Ngahiwi, told the Court that 'lately I have been partially driven off by him [Hamuera Koteriki]'. The judge did not pursue this allegation or ask any questions about it.[95]

The Te Matarae Block was followed by Te Awapatiki, which was heard on 20 June. After the conflict between Mutunga, Tama, and Kekerewai had become the turning-point of the previous block, Hamuera Koteriki introduced this claim in a different way. He referred to the war in his opening statement for the first time but did his best to direct the Court's attention to other matters. He called the war 'family quarrels' and emphasized that his relatives had been the first to discover the place and take it from Moriori, rather than from Ngati Tama. He also suggested that the evidence given for the Kekerione Block, where the Maori had not referred to the Mutunga-Tama war, should stand for Te Awapatiki:

> I am not aware of any New Zealanders who will dispute our claim to this block. I claim this land on the first instance by right of discovery and secondly by force of arms. A portion of the block on the western side was taken by us in our family quarrels it was taken from the Ngatitama the remainder of the block we took from the Moriori's on our first landing. Our claim to this last mentioned land is the same as that of Naera whose claim is Kekerione...I am willing that the evidence given in the claim of Kekerione should stand for this.[96]

Once again the Court asked no questions about the timing of the Mutunga-Tama war, which formed the basis of Koteriki's claim to the western part of Te Awapatiki. The Maori parties made no opposition to the claim and the Court clearly felt it unnecessary

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[94]ibid., ff. 31-32.

[95]ibid., ff. 35-36.

[96]ibid., ff. 37-38.

to inquire further. There were no Maori counter-claims to the remaining large blocks, so that Otonga passed to Mutunga and Wharekauri to a mixed group (mainly Tama) without any further reference to the war.[97]

On 23 June the Judge delivered his decision on the Kekerione, Te Matarae, and Te Awapatiki Blocks. In the case of Kekerione, Rogan found that in 1836 a 'number of New Zealanders...took possession of Wharekauri [the whole island] capturing the original inhabitants reducing them to a state of subjection and killing those who attempted to escape to the bush'. He described the claimants as Wi Naera Pomare 'and others of the Ngatimutunga Tribe', who 'simply urge their right to this land by conquest permanent and undisturbed occupation from that period [1836] up to the present time'. Having dated the Mutunga occupation of the whole block from 1836, the judge went on to state that Pomare and his 'co-claimants have clearly shown that the original inhabitants of these Islands were conquered *by them* [my emphasis] and the lands were taken possession of by force of arms and the Moriori people were made subject to their rule'. He concluded that 'Wi Naera Pomare and the Ngatimutunga Tribe are the rightful owners of this Block according to Native Custom'. He completely ignored the evidence about Ngati Tama conquest and occupation of Waitangi in 1836 and their later dispossession by Ngati Mutunga. Instead Rogan accepted Pomare's evidence that the claimants had been the people who had "conquered" the Moriori and taken possession of them and their land throughout the whole of the Kekerione Block in 1836.[98]

In the Te Matarae case, where the conflict between Mutunga and Tama/Kekerewai had been the lynchpin of the argument, the judge concluded: 'The evidence given by the persons interested in this case is so contradictory that it is difficult to arrive at a conclusion as to the real owners'. He made no effort to sift this evidence but instead reached a decision based on two points about occupation alone, ignoring the issues of conquest. The

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[97]ibid., ff. 39-48.

[98]ibid., ff. 63-64.

first point was Te Rakatau's claim that 'In the year 1836 the claimant came from New Zealand and took possession of the Block of land include[d] in this claim and held undisputed possession and occupation'. Rogan inquired no further as to the basis of his right to occupy the land, and ignored the Mutunga contention that they had conquered the land but had allowed Te Rakatau to continue living on part of it because of a marriage alliance. He grounded his decision solely on the fact of Te Rakatau's occupation of the land.[99]

Rogan then applied the same sole criterion to Apitia Punga's claim, and decided that Apitia had 'failed to prove his title' without saying why this was so. He also said, however, that Apitia had proved occupation and cultivation on the boundary of the block, and that this was sufficient to admit Apitia and his sister to the title of the Te Matarae Block. The judge made no comment on any issues of time, such as the date at which Apitia began to cultivate the land, the length of time that his occupation had lasted, or anything of this nature.[100] Judge Rogan, therefore, found in favour of both claimants and counter-claimants without considering any of the substantive issues raised in the hearing, or any of the usual criteria applied by the Court.

The Te Awapatiki Judgement also ignored the whole issue of the Mutunga-Tama war. Rogan announced that since 'The New Zealanders' and Moriori had no further evidence than they had presented in the Kekerione Block, the Court had to award the title to Koteriki and the Ngati Mutunga claimants. This judgement took notice of only half of Koteriki's deposition, as he had asked that the Kekerione evidence be carried over for that part of the block conquered from Moriori, not the part conquered from Ngati Tama.[101] As a result, the judge ignored the entire issue of the Mutunga/Tama/Kekerewai war in all three of the blocks for which it was raised in evidence, and of the application of the

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[99]ibid., ff. 65-67.

[100]ibid.

[101]ibid., f. 67.

1840 Rule to situations involving conflict between Maori groups, and the question of which Maori groups had actually conquered districts from Moriori in 1836.

II THE OUTLYING ISLANDS

On 24 June the Court went on to hear claims to two of the outlying islands, Rangatira and Rangiauria (Pitt). The only earlier reference to the islands had occurred during the evidence of Ngamunangapaoa Karaka. This Moriori witness had mentioned the conquest of Pitt Island in passing, during his evidence on the Kekerione Block:

> They landed at Wangaroa & took possession of all the land from thence to Waitangi. The Ngati tama took possession of Waitangi and the Ngatimutunga took possession of Wangaora. at this time they commenced to Kill the Moriori's[,] they ran away and those who went to a settlement were Killed[.] this is the way we were treated[.] the Maoris followed us as far as Rangiauria and Killed us. Some of the inhabitants of Rangiauria were taken prisoners & brought to this Island[.] From the time the New Zealanders arrived in this Island to the time when the Prisoners were taken at Rangiauria some 300 of us had been Killed.[102]

There was nothing in Karaka's statement that might have allowed the Court to affix a definite date to the events on Pitt, in order to satisfy the requirements of its 1840 Rule. The issue was not one in which the judge was interested at the time, of course, as it had no bearing on the actual block before the Court.

On 24 June, Maiui Te Teira of the Moriori people opened his claim to Rangatira island. He told the Court that he had lived there with his wife and their respective parents before the arrival of the Maori on the main island. His evidence was unclear after this point, however, as to the time at which his family left the island. He stated that his wife remained on Rangatira until her parents died, after which some Europeans brought her over to the main island, but he did not specify whether this happened before or after the Maori invasion of Chatham Island,

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[102]ibid., f. 11.

or its relationship to that event. He also failed to explain when and why he himself had left Rangatira, or whether the Maori ever landed on the island.[103]

Te Teira was followed by the counter-claimant, Toenga Te Poki of Ngati Mutunga. Te Poki's evidence was also vague on most of the key issues. He claimed that Moriori had not lived on Rangatira for a long time and that they no longer had cultivations or houses there. He claimed Rangatira by right of conquest, and added:

> We conquered the people on this Island [Chatham] and immediately went to Pitts Island and conquered them, brought prisoners back...and they the Morioris have never cultivated there from that day to this...[104]

Te Poki did not actually say that the Maori landed on Rangatira, however, and he admitted that he had no houses or cultivations there. He then claimed that neither Moriori nor Maori had ever cultivated on Rangatira, although cultivation was possible because the European settler Hunt had farmed on the island. At this point, however, it emerged that nobody had had Rangatira surveyed, and the Court dismissed the case without hearing any more evidence.[105]

Some of the evidence presented about Rangatira, however, was clearly relevant to the following case, which was the claim of Te Teira's wife, Ihapera, to Rangiauria (Pitt Island). The Moriori claim was based on the fact that their ancestors had lived and cultivated on the island, as had their parents and themselves as children. As part of their new strategy, however, in the wake of the Kekerione, Te Matarae, and Te Awapatiki decisions, the Moriori conceded the rights of the Maori counter-claimant and asked for a share in the land.[106] Wiremu Wharepa, who headed the counter-claim, asserted that Ihapera had never

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[103]ibid., f. 49.

[104]ibid.

[105]ibid., ff. 49-50.

[106]ibid., ff. 52-53.

lived on the island, and 'that when she did live there she lived in bondage'.[107] Toenga Te Poki also claimed that Moriori had never lived on Rangiauria. Wiremu's evidence was somewhat contradictory:

> My father took possession of it by force of arms in accordance with that which they had previously done on this Island [Chatham] and I have held that land in my hand from that time to this and there is not any Moriori's living there at all. I hold the mana of this land. Moriori's have not lived there for 20 years or more.[108]

Toenga agreed that 'We and our younger relatives went and took it as he has stated'.[109]

The judge accepted this evidence and asked no questions to try to locate the "conquest" of Rangiauria in time, nor did he ask what this "conquest" actually consisted of in terms of fighting or subsequent occupation. The Mutunga claimants did not assert that they were living on the island or cultivating there, and confined themselves to denying that Moriori had ever done so. At the same time, they claimed to have taken possession of Rangiauria in the same way that they had taken the main island, which implied conquest of resident Moriori followed by permanent occupation. The Court could not have known on the strength of the information before it, whether the Maori had actually conquered the island (as they denied that Moriori lived there but contradicted themselves on that point), or whether the conquest had been followed by any sort of occupation, periodic visits for resource-use, or any kind of presence at all. The judge simply accepted the blanket assertion that Wiremu Wharepa and his allies had "taken possession" of the island, without establishing what that possession actually meant.[110]

The only statement which could have defined the timing of the conquest in terms of the 1840 Rule, was the evidence of

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[107]ibid., f. 54.

[108]ibid.

[109]ibid., f. 55.

[110]ibid., ff. 52-55.

Toenga Te Poki during the hearing of Rangatira Island that the conquest of Pitt took place 'immediately' after the conquest of the main island. He was not asked to expand on that point, which might or might not have conflicted with Wiremu Wharepa's assertion that Moriori had been in occupation until about twenty years before the 1870 hearing. The details of what actually happened on Rangiauria, and whether a Moriori population persisted alongside a Mutunga occupation, were not submitted to the Court in 1870. Nevertheless, the judge dismissed the Moriori claim and awarded title to Wiremu Wharepa and his co-claimants. He gave no reasons for his decision.[111]

It is clear, therefore, that the Court did not try to apply the 1840 Rule to the conquest of the outlying islands, or to the situation with regard to Ngati Mutunga, Ngati Tama, and Kekerewai in three of the Chathams blocks (Kekerione, Te Matarae, and Te Awapatiki).

III THE 1791 RULE?

One further point must be made about the 1840 Rule, concerning the date at which the Rule should have commenced on the Chatham Islands. As Dr. Gilling pointed out, the Rule was based on Britain's acquisition of sovereignty over New Zealand. The Court declared that the Crown had to recognise the proprietary rights of those whom it found "in possession" at the time of its assumption of sovereignty.[112] There was some uncertainty, however, as to the exact date of this event. Gilling suggested that the Court sometimes used 14 January 1840, the date at which the Crown made a unilateral declaration of its sovereignty over New Zealand, and that it sometimes used 6 February, as the date at which the Crown obtained sovereignty by Maori cession.[113]

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[111]ibid., & f. 49.

[112]Gilling, 'The Queen's Sovereignty Must be Vindicated', pp. 1-3, & passim.

[113]ibid., pp. 32-36. See also Transcript, p. 26.

The question arises, therefore, as to the date at which the Crown obtained sovereignty over the Chatham Islands. This is a tangled issue and one which became a political question in 1841 as a result of the activities of the New Zealand Company. The Chathams came to the attention of the Colonial Office in that year when the Company's secretary, Joseph Somes, wrote to inform the government that its agents had purchased the islands from their 'native' inhabitants. The Company had also entered into negotiations with the Free Cities of Germany to sell them the Chatham Islands. Somes argued that 'no claim to the Sovereignty of the Islands in question has ever been advanced on the part of the British Crown, and that the Islands are to all intents and purposes, a Foreign State, ruled by Native Chiefs who have the undoubted right to cede their Sovereignty to any Foreign Power they may think proper'. The Chathams were not included in the limits of Governor Philips' commission for New South Wales 'and its Dependencies' in 1707. Instead they were a 'Foreign Country' not subject to the Queen or any other European power.[114]

The Colonial Office responded with great speed and vigour to the Company's challenge. Their main object was to prevent the formation of a German colony so close to New Zealand:

> I must think that they [the Company] are a very singular Body. Having compelled the Govt. to form a British Colony in New Zealand, they are now about to try whether they cannot compel the Govt. to further acquiesce in the formation of a German Colony in the South Seas. It seems to me that they have no right whatever to interfere in any such matters.[115]

The Parliamentary Under-Secretary, G.W. Hope, wrote to Somes on 28 October that the Company's letter 'proceed[ed] to shew that they [the Chathams] are not within Her Majesty's Dominions'. The Company's Charter gave them no authority to 'purchase Lands in a Country which they themselves describe as Foreign', nor did it authorise them to usurp the Queen's prerogative and negotiate

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[114]J. Somes to Stanley, 15 October 1841, CO209/12 ff. 166-168.

[115]J. Stephen, Minute, on Somes to Stanley, 15 October 1841, CO209/11, f. 321.

with a 'Foreign State', the German Free Cities. Hope warned Somes that he intended to refer the question to the Law Officers to determine whether the Company had such powers under its current Charter.[116]

It is important to note, however, that Hope carefully avoided the issue of whether the Company was correct in its view that the Chathams were not subject to the sovereignty of the Queen. Stephen's original draft of the letter stated that the Company 'proceed to argue that they [the Chathams] are not within Her Majesty's Dominions'.[117] Hope omitted the words 'to argue' and wrote that the Company 'proceed *to shew* [my emphasis] that they are not within Her Majesty's Dominions'. The government's whole criticism of the Company rested on the assumption that the Chathams were not subject to the sovereignty of the Crown, and were therefore outside the terms of the Company's charter to buy land in the Colony of New Zealand. Hope avoided challenging this premise in his letter to Somes, and allowed the Law Officers to decide the question within the parameters set out in the New Zealand Company's original letter.[118]

In the meantime, however, the Colonial Office took action to prevent any other European power from making territorial claims on the Chathams. Stephen asked the Admiralty for any information about the discovery of the islands, 'or any other information tending to throw light on the question whether the Sovereignty of these Islands has ever been, or could lawfully be claimed for the British Crown'.[119] The Admiralty replied that His Majesty's Brig Chatham discovered the islands in 1791, under the command of Lieutenant Broughton:

> By the report of the Lieutenant he displayed the Union Flag, turned a turf, and took possession of the Island in the Name of His Majesty George the Third, in the presumption of his being the first

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[116]G.W. Hope to Somes, 28 October 1841, CO209/12 ff. 170-172.

[117]J. Stephen, draft of Hope to Somes, CO209/11 ff. 321-327.

[118]G.W. Hope to Somes, 28 October 1841, CO209/12 ff. 170-172.

[119]Stephen to Sir John Barren, 26 October 1841, CO209/11 ff. 326-327.

> discoverer...Their Lordships are not aware of any prior discovery of Chatham Island or of any other subsequent occupation, unless perhaps by British Subjects, that should interfere with Great Britain claiming the Right of Sovereignty over that Island.[120]

Stephen commented: 'It does not seem necessary or convenient to tell the Company in so many words that the Queen does or does not claim the Sovereignty. They have no right to any explanation on the subject'.[121] As a result, the letter which was sent to the Company was quite different from the information forwarded to the Foreign Office and the Solicitor and Attorney Generals.[122] Stephen informed the Foreign Office of the Company's attempt to place the Chathams 'under the Sovereignty of the Hanse Towns, or of some other State or States of the Germanic Confederation', and of the Admiralty's findings 'shewing the claims of the British Crown to those Islands by Discovery & Occupation'.[123] Without any further information as to what the actual nationality of any Europeans on the Chathams might be, apart from the vague Admiralty statement that there might be British subjects in occupation, the Colonial Office concluded that 'the Chatham Islands are a British Territory'.[124] Stephen informed the Company that 'no European State could be allowed to establish a Colony, or assert the right of Dominion there, without derogating from the prior claims of the British Crown', which was a less extreme position than his statement to the Foreign Office and the Attorney General, that Britain already had sovereignty over the Chathams.[125]

The Governor of New Zealand reached the same conclusion

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[120]Board of Admiralty to Stephen, 27 October 1841, CO209/12 ff. 59-60.

[121]J. Stephen, Minute 27 october 1841, CO209/12 f. 61.

[122]ibid.

[123]Stephen to S. Blackhouse, 6 November 1841, CO209/12 f. 63.

[124]J. Stephen, Minute, 18 November 1841, CO209/12 f. 165.

[125]ibid., & Stephen to Somes, 4 November 1841, f. 62.

independently of the Colonial Office, and tried to exercise the Queen's sovereignty over the islands. In December 1841 Governor Hobson had heard of the murder of a European on the Chathams by a gang of European 'ruffians'. He tried to send two naval ships to visit the Chathams so that 'some act denoting Her Majesty's right to those Islands in virtue of their first discovery by Lieut. Broughton commanding the Chatham cutter and forming one of Van Couvers squadron should be exercised'.[126] One vessel was too busy with a voyage of discovery although the captain expressed a 'remote intention' of visiting the Chathams, while the other ship returned to Australia before Hobson could give him 'official instruction as to Chatham Island'.[127] Nevertheless, both the Colonial Office and the New Zealand Government advanced a claim in 1841 that the Chathams were under the sovereignty of the Queen as a result of their discovery by Broughton in 1791. In 1842 the Colonial Office took action to bring the islands under a Governor by adding them to the Colony of New Zealand.[128]

It was convenient for the government to assume that Broughton had established the sovereignty of George III in 1791, which they now chose to take up as an incontestable reality after the passage of fifty years. This meant, however, in terms of the 1840 Rule, that the British Government was supposed to recognise the proprietary rights of whoever it found "in possession" when it obtained the sovereignty of the Chatham Islands. In 1791 Lieutenant Broughton found the Moriori people in sole possession of the islands when he claimed the sovereignty on behalf of his King. The Colonial Office and the New Zealand Government both looked back in 1841 to this event as an assumption of sovereignty, although this was deliberately downplayed in correspondence with the New Zealand Company as the existence of a 'prior right'.[129] It would seem, therefore, that the Native

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[126]Hobson to Stanley, 28 February 1842, CO209/14 ff. 63-65.

[127]ibid.

[128]Stanley to Hobson, 21 April 1842, CO209/9 ff. 107-108.

[129]See above, p. 35.

Land Court ought to have followed a 1791 Rule for the Chatham Islands. The judge should certainly have considered the circumstances of the islands' acquisition by the Crown before settling on 1840 as the date at which entitlement should be determined. It could also be argued, perhaps, that the official assumption of sovereignty took place when the Crown included the Chathams in the Letters Patent for the Colony of New Zealand in April 1842. In either case, the special circumstances of the acquisition of sovereignty at the Chathams could not justify the use of the year 1840 as a baseline for the determination of title.[130]

[130]Dr. Ann Parsonson has suggested that the fact that the Chatham Islands became part of the Colony of New Zealand in 1842 does not affect the applicability of the Treaty of Waitangi to the islands. See C-3 4.36.

PART THREE

THE SIGNIFICANCE OF THE ELIZABETH AFFAIR

The Elizabeth Affair has been mentioned in passing during the Chathams hearings, and has some significance for the Moriori claims because of its implications for the "Rodney Affair" of 1836.[131] The Elizabeth was a British trading vessel under the command of Captain Stewart, which called in at Kapiti in 1830 to trade for flax. Te Rauparaha chartered the vessel to transport himself and a taua to Akaroa in the South Island. He planned to avenge himself on the Ngai Tahu ariki, Tamaiharanui, who had killed the Ngati Toa ariki (Te Pehi Kupe) in the late 1820s. In return for the promise of a full load of flax, Stewart agreed to take Te Rauparaha and his party to Akaroa in November 1830. The taua remained hidden in the ship when the Ngai Tahu came out to greet the traders, and the sailors assured them that there were no Maori on board the ship. As a result, the Akaroa party came on board and were captured by the large Ngati Toa taua. The ship's interpreter, John Cowell, went ashore to entice Tamaiharanui to come out to the Elizabeth by offering trade in guns and ammunition. Cowell was successful in luring the Ngai Tahu ariki on board, where he was captured and held prisoner by Te Hiko, the son of Te Pehi Kupe.[132]

The other Ngai Tahu people who had gone out to the Elizabeth were killed at this point, and the taua then went ashore to surprise the pa and complete their revenge. According to one account, the sailors accompanied the taua and assisted in the capture of the pa. After this the Elizabeth returned to Kapiti with Te Rauparaha's prisoners and the bodies of some of the dead chiefs for the celebration feast. Tamaiharanui was killed by Te

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[131]eg. Dr. King mentioned it in his evidence on 18 May 1994.

[132]P. Burns has a synthesis of the different accounts of the Elizabeth affair: P. Burns, *Te Rauparaha: a New Perspective*, Wellington, 1980, pp. 158-160.

Pehi's widow shortly after the Elizabeth arrived at Kapiti.[133]

The news of this affair caused shockwaves among government circles in New South Wales. In 1830 the Governor, Sir Ralph Darling, had already complained to the Colonial Office about the 'outrageous conduct' of British ships and crews during their visits to New Zealand. Darling was horrified to learn of a new and 'premeditated atrocity', carried out merely to 'obtain a common article of Merchandise'.[134] A European reported the events to him in February 1831 and he acted at once, as the Elizabeth happened to be in port at the time, and had Captain Stewart arrested and the case referred to the Crown Solicitor for an opinion. The magistrates took depositions but the Crown Solicitor decided that the evidence was insufficient to warrant a trial, especially since there might not have been a specific crime 'cognizable by the Criminal Law of England'. The Law Officer was clear, however, that if a crime *had* been committed, then the existing legislation was sufficient to give the New South Wales courts jurisdiction to hear it.[135] The Governor ordered the courts to proceed with a trial despite the Crown Solicitor's opinion, 'considering it a case in which the character of the Nation was implicated and that every possible exertion should be used to bring the Offenders to justice'.[136]

It was at this point that the Ngai Tahu people took a hand in affairs at Sydney, as their defeat had not been on a scale sufficient to prevent them from making their own representation to the British Government (unlike the Moriori in the late 1830s). A Maori chief arrived at Government House to 'tell the Governor all that happened, that the White People might be punished'.[137] He was accompanied by a young nephew of Tamaiharanui, who had

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[133]ibid. See also the evidence of J.B. Montefiore to Select Committee on New Zealand, 1838, GBPP vol. 1, p. 55.

[134]Darling to Goderich, 13 April 1831, CO209/1, ff. 28-29.

[135]Opinion of W.H. Moore, Crown Solicitor, 7 February 1831, CO209/1, f. 51.

[136]Darling to Goderich, 13 April 1831, CO209/1, f. 31.

[137]ibid., f. 29.

witnessed some of the events of the previous November. Various delays in the legal system, however, permitted the crew of the Elizabeth and other witnesses to leave Sydney, making it impossible for the courts to proceed with Stewart's trial. Darling was furious, and felt that the Maori representation required some action from the government to avoid any appearance of tolerating such activities as those of Captain Stewart and his crew. The Maori appeal 'appears to me to render it necessary that this Government should not by any supineness on the part of its Officers which it may have the power of counteracting, allow it to be supposed that these proceedings are countenanced or viewed with indifference'.[138]

Darling felt that two aspects of the affair called for special notice. Firstly, he stressed that the Ngati Toa raid could not have taken place without the agency of Captain Stewart, who provided both the transportation and the secrecy necessary to take the Ngai Tahu by surprise. He also pointed out that while Te Rauparaha must be judged according to his own values, Captain Stewart could not be excused on that account: 'Rauparaha may, according to his notions, have supposed that he had sufficient cause for acting as he did - Captain Stewart became instrumental to the massacre (which could not have taken place but for his agency) in order to obtain a supply of flax!'[139] Secondly, Darling emphasized the Maori appeal and the need for effective redress, without which the Maori would themselves act against the next European to pass through their area. As Maori were in a position to exact their own retribution in 1830, Darling argued that the government needed to forestall them, and to protect its subjects living in New Zealand.[140]

According to Darling, therefore, Maori needed protection from the crimes of ship's crews and other British subjects, and these subjects in their turn required protection from Maori retaliation for the crimes of earlier visitors. In order to meet

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[138]ibid., ff. 30-31.

[139]ibid., f. 30.

[140]ibid., f. 31.

both of these requirements, Darling decided to appoint a British Resident to represent the Crown in New Zealand, whose duties would include the prevention of 'outrages' like the Elizabeth affair, or the extradition of culprits to New South Wales for trial in cases where prevention proved impossible. The appointment of James Busby as Resident was a direct response to the Elizabeth affair, and it symbolised a growing sense of responsibility on the part of the Crown, or at least a declared sense of responsibility on the part of the Crown's representatives. Darling wanted to support the Resident with a warship and a small military force, for example, but the Colonial Office would not go that far in support of an agreed responsibility.[141]

Lord Goderich, Secretary of State for the Colonies, replied to Darling's despatch on 31 January 1832. His letter abounded with statements of official concern and moral outrage:

> It is impossible to read without shame and indignation, the details which these Documents [about the Elizabeth affair] disclose. The unfortunate Natives of New Zealand, unless some decisive measures of prevention be adopted, will I fear, be shortly added to the number of those barbarous Tribes, who in different parts of the Globe, have fallen a sacrifice to their intercourse with Civilized Men, who bear and disgrace the name of Christians - when, for mercenary purposes, the Natives of Europe minister to the passions by which these Savages are inflamed against each other...the inevitable consequence is a rapid decline of population preceded by every variety of suffering.[142]

Goderich claimed that the activities of British ships meant that this process was already underway in New Zealand, and depopulation was 'already proceeding fast'. He explained the duty of the British Government with regard to specific incidents like the Elizabeth affair: 'There can be no more sacred duty than that of using every possible method to rescue the Natives of those extensive Islands from the further evils which impend over them,

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[141]ibid., ff. 28-32; Goderich to Bourke, 31 January 1832, f. 67.

[142]Goderich to Bourke, 31 January 1832, CO209/1, f. 66.

and to deliver our own Country from the disgrace and crime of having either occasioned or tolerated such enormities'. Darling's actions 'both for the punishment and prevention of these atrocities, merits my warmest acknowledgement'.[143]

The Colonial Secretary was more forceful about Darling's measures for the punishment of Stewart, than he was about the details of the Residency scheme. He argued that the captain and crew were definitely liable for trial as accessories to murder, no matter whether or not the principals could have been found guilty if they were merely 'engaged in what must be regarded as legitimate warfare, according to the usages of their own country'. Even if Maori could not be charged 'with justice or propriety' in such affairs, the crew of a British ship certainly could have been, and he instructed that those who had bungled the prosecution should be censured by the Governor. Even if there had been some doubt about the technical liability of the captain and crew, the government should have found some other way to prosecute them, such as under the Foreign Enlistment Act.[144]

Goderich was less aggressive, however, in his proposals for action in New Zealand. He approved the appointment of a Resident, and authorised him to use reasonable measures of 'coercion and restraint' in seizing and confining British subjects in the 'commission of outrages'. Goderich was not prepared to pay for the stationing of a military force, however, and would only suggest the possibility of frequent naval visits in support of the Resident. The Colonial Secretary recognised a 'sacred duty' but was more interested in how that duty could be performed from New South Wales. The trade in preserved heads, for example, which was encouraging the murder of slaves in New Zealand, would be dealt with by a New South Wales Act to make the trade punishable by transportation for seven or fourteen years. The Colonial Secretary was adamant that *something* must be done to control or punish British subjects whose actions led, however indirectly, to murder. Even so, he neatly sidestepped the question of how

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[143]ibid., f. 67.

[144]ibid., ff. 67-69.

effective a Resident could be against British subjects in New Zealand, if unsupported by any means for the reasonable coercion that he was authorised to undertake.[145]

In June 1832 the Colonial Secretary wrote to the New Zealand chiefs to announce the appointment of a Resident:

> The King is sorry for the injuries which you inform him that the People of New Zealand have suffered from some of His Subjects. But he will do all in his power to prevent the recurrence of such outrages, and to punish the perpetrators of them according to the Laws of their Country, whenever they can be apprehended and brought to trial.[146]

The King entrusted the execution of this task to the Resident, who received written instructions from Sir R. Bourke, Governor of New South Wales, in April 1833. Bourke ordered Busby to prevent outrages like the Elizabeth affair, or to send the offenders to Sydney for trial and punishment.[147] The Governor also made it clear that there was an element of redress involved in Busby's appointment as Resident. Britain's efforts to ease the situation in New Zealand were not only designed to prevent or punish 'outrages', but were also at least partially intended as compensation for the infliction of acknowledged injuries in the past:

> If, in addition to the benefits which the British Missionaries are conferring on those Islanders by imparting the inestimable blessing of christian knowledge, and a pure system of morals; the Zealanders should obtain through the means of a British Functionary the institution of Courts of Justice established upon a simple and comprehensive basis, some sufficient compensation would seem to be rendered for the injuries heretofore inflicted by our delinquent Countrymen.[148]

Some clear points had emerged by the end of 1833, therefore,

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[145]ibid.

[146]Lord Goderich to the Chiefs of New Zealand, 14 June 1832, CO209/1, f. 104.

[147]Bourke to Busby, Sydney, 13 April 1833, CO209/1 ff. 107-116.

[148]ibid., f. 116.

in the official policy of the Colonial Office and its representatives in New South Wales. The Government acknowledged its responsibility to prevent British ships and crews from using their technology to aid combatants to perform acts of violence which they would not otherwise have been able to perform. The Governor of New South Wales appointed a British Resident to carry out this task, and to send criminals to Sydney for trial if he was unable to perform his assigned duty of preventing such 'outrages'. The New South Wales Government (and the Colonial Office) decided that it had a duty to punish these criminals through any law which could be fitted to the circumstances, and to pass laws to control the actions of British subjects at the Australian end of the New Zealand-Australia trade. The appointment of a Resident was also partly an act of reparation, as some form of reparation was considered necessary both to prevent indiscriminate Maori retaliation against British subjects, and for the satisfaction of the national honour.

This type of humanitarian thinking influenced Colonial Office policy and pronouncements over the following decade, although Orange and Adams have pointed out the importance of other factors in shaping the British Government's actions in New Zealand.[149] Nevertheless, the King's promises to Maori in letters like that quoted above, created a fiduciary relationship between Crown and Maori which both preceded the Treaty of Waitangi, and helped to shape its eventual provisions. This fiduciary relationship was partly brought about by the Crown's response to the Elizabeth affair and was in existence by the time of the Rodney incident in 1835.

There are three main sources of information for the Rodney's part in the invasion of the Chathams in 1835. The German missionary Engst included an account written by Captain Harewood himself, although Engst did not say when or where this account was published. The New Zealand Company naturalist, Ernest Dieffenbach, gave a near contemporary account of the affair in

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[149]See P. Adams, *Fatal Necessity: British Intervention in New Zealand 1830-1847*, Auckland, 1977, pp. 51-153; & C. Orange, *The Treaty of Waitangi*, Wellington, 1987, pp. 8-31.

his article on the Chatham Islands. The Maori version of events was taken down by Alexander Shand and published by him in the 1890s.[150]

The brig Lord Rodney arrived at Wellington from Sydney in October 1835. It was owned by a firm of Sydney merchants and commanded by Captain Harewood. The first mate, a man named Ferguson, was already known to Ngati Mutunga and Ngati Tama. According to Wiremu Te Wharepa's account, his people persuaded Harewood to go with them to Somes Island for a cargo of flax and pigs. When they arrived on the island they seized the crew and negotiated with the captain to take them to the Chathams in return for an offer of flax, pigs, or even guns.[151] Shand wrote: 'The captain demurred for some time, and said "that the Chatham Islands were owned by King George, and that the natives [Moriori] were his subjects; therefore he might be called to account if he took the Maoris thither'.[152]

Harewood's account emphasized that he eventually agreed to the Maori request for fear of violence, but Shand's informants gave another reason for Harewood's reluctance. Te Wharepa had to injure Ferguson before he would agree, because Ferguson actually wanted 'to take "his tribe" - the Ngatitoa - to Chatham Islands'.[153] It would seem, therefore, that Ngati Toa had also received word of the Chathams' resources, and may have wished to forestall their current rivals (Te Atiawa) from extending their power and base of operations. The Rodney had already visited Kapiti and Cloudy Bay before calling in at Wellington. It should also be noted that Ferguson visited the Chathams to trade frequently with the Maori after 1835. Shand commented:

> If the story is correct, it would give color to the rumor, subsequently current in Sydney, that the Captain was a consenting party to taking the

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[150]These documents have already been cited in this report, and may be consulted in the Moriori Document Bank C-3, as Documents 6.3 (Engst), 6.4 (Dieffenbach), & 3.16 (Shand).

[151]Shand, Part II, pp. 155-156.

[152]ibid., p. 156.

[153]ibid.

> Maoris to the Chathams. Against this, however, is the fact that at the time when he was compelled to agree on Somes's island - according to Maori testimony - he was certainly unwilling to do as they desired, whatever he may have done afterwards.[154]

The Rodney sailed for the Chathams on 14 November, with about 500 people on board. The Maori kept the second mate in Wellington as a hostage to make sure that the captain returned for the second party. According to Harewood, he only went back because his trading master assured him that the sailor would be killed if he did not do so, although he also received his promised payment when he returned in late November 1835.[155] Dieffenbach told a different story after his visit to the islands in 1840, which declared the expedition to be a simple commercial venture with no element of compulsion involved in it. Dieffenbach was told that the mate remained at Wellington to salt the pork, which had been given in payment for passage to the Chathams:

> A brig, named the "Lord Rodney," which soon afterwards arrived at Port Nicholson, was hired by them for pigs, flax, mats and potatoes, amounting in value to a considerable sum. The mate remained at Port Nicholson to salt the pork; and in two trips, the whole of the tribes...[156]

The Rodney called in at the Bay of Islands in January 1836 on its way back to Sydney, and the British Resident discovered what had happened with regard to the Chathams. The Resident's inability to carry out his tasks without more support from Maori and the government had become painfully obvious to Governor Bourke by this time. Isolated in the Bay of Islands with only one assistant (in the same district) and no ship, staff, or troops, Busby was in no position to have prevented the sailing of the Rodney from Port Nicholson to the Chathams.[157] Nevertheless, he had no doubt as to the ultimate result of the invasion for the

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[154]ibid.

[155]Engst, Part I, pp. 17-22.

[156]Dieffenbach, p. 211.

[157]Adams, pp.64-71.

Moriori. He was not as forceful in expression, however, as he might have been had he known that officials would shortly claim that the Chathams had been British territory since 1791.[158] He reported to the New South Wales Government (and sent a copy to the Colonial Office), that the Rodney

> has been employed in conveying a large number of the Natives of this Country (said to be from 1000 to 1500) to the Chatham Islands, situated within a few days sail of the South Eastern extremity of this Island.
>
> From the inoffensive character of the Inhabitants of the Chatham Islands, and their being unprovided with arms capable of defending them against the people of this Country, it is to be feared that the result of this expedition will be the extermination or enslavement of the former: and I submit for the consideration of the Governor whether the motives and conduct of the Master of the Lord Rodney in this transaction are not a proper subject of further enquiry.
>
> It is stated that the vessel was seized by the Natives and the Master and crew compelled to proceed in the first of the two voyages which she made, but that the second voyage was a voluntary transaction on the part of the Master for which he was remunerated by the Natives.[159]

The government of New South Wales took no action against Captain Harewood or the crew of the Rodney, which was wrecked later in 1836. Neither the Governor nor the Colonial Office responded to Busby's despatch about the Chathams, or wrote any minutes about its contents.[160] I have not been able to find any evidence that Captain Harewood was ever brought to trial, despite the advice of the Resident and the rumours in Sydney about the nature of his transaction with Ngati Mutunga and Ngati Tama. If he had been prosecuted by the New South Wales Government, it would have been mentioned in the early Colonial Office

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[158]See above, pp. 33-38.

[159]Busby to NSW Colonial Secretary (copy to Colonial Office), 6 January 1836, CO209/2 f. 136.

[160]ibid., & passim.

correspondence on New Zealand.[161]

Unlike the Elizabeth affair, therefore, the Rodney incident was allowed to fade quietly into obscurity. The Resident had failed to carry out the government's intention of preventing British ships from abetting Maori invasions, and the New South Wales Government failed to act on his information by bringing the Rodney's crew to trial. The Moriori were not able to follow the Ngai Tahu example of making their own appeal to the Governor of New South Wales, and nor did they pose a threat of retaliation to subsequent European visitors. This may explain the government's failure to act over the Rodney incident, despite the Colonial Office's promise that the Crown's 'sacred duty' would be performed in such cases.

The Colonial Secretary remained convinced that something must be done to bring the activities of ships like the Elizabeth under government control. Glenelg informed Governor Bourke in August 1836 that he was determined to make 'some effectual provision for the protection of the Inhabitants of New Zealand against the misconduct of British subjects'.[162] His efforts bore little fruit in the Chathams, where the Rodney was one of many ships which disturbed the affairs of the indigenous inhabitants. Shand records the visit of a British whaler who took Maori on as crew with a promise that he would return them, and then failed to take them back to the islands.[163] Earlier visits by sealing ships had involved an incident where the crew executed twelve Moriori for breaking a pot.[164]

Some of the worst incidents involved ships of other nationalities. A French whaling ship, the Jean Bart, became involved in a dispute with the Maori in 1839, in which the ship was seized and both its crew and a number of Chathams people were killed. A French warship called the Heroine retaliated later in

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[161]The early files of CO209 have an excellent index: L. Hamilton, 'CO209/1-16: an index', National Archives.

[162]Glenelg to Bourke, 26 August 1836, CO209/2 ff. 20-21.

[163]Shand, Part III, p. 208.

[164]Dieffenbach, p. 210.

the year, with the aid of an American whaling ship whose captain was known to (and trusted by) the local Maori. Some Ngati Tama chiefs were trapped on board the Heroine and taken to France for trial, and various pa and kainga were destroyed by the French sailors, without any inquiry as to the actual fate of the Jean Bart or the specific hapu involved in the incident.[165] This attack was followed by the visit of the Cuba in 1840, in which the New Zealand Company party supplied arms and ammunition to one side of a war (Ngati Mutunga), and then evacuated the other side (Ngati Tama and Kekerewai) after the balance of power had shifted in favour of the former.[166] Incidents like these ones became the subject of investigation by various Parliamentary committees, and influenced British policy towards Maori and the eventual annexation of New Zealand.[167]

The Rodney affair, therefore, took place in 1835 after the appointment of a British Resident, whose position had been created in response to a similar incident in 1830. The King had promised in 1832 to do 'all in his power to prevent the recurrence of such outrages, and to punish the perpetrators of them according to the Laws of their Country, whenever they can be apprehended and brought to trial'.[168] It is for the Tribunal to determine how far it can consider the pre-Treaty period, and assess the performance of the Resident and his superiors in respect of responsibilities which they had acknowledged towards the Maori people, and promises which had placed them in a fiduciary relationship with Maori.

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[165]Shand, Part III, pp. 202-211.

[166]See above, pp. 19-21.

[167]eg. Adams, p. 91.

[168]Goderich to the Chiefs of New Zealand, 14 June 1832, CO209/1, ff. 104-105.

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Appendix One

Extract from the Cross-Examination of Dr. Bryan Gilling, 17 May 1994:

The James Coffee Land Claim

CJ: I would like you to refer to page 64. At page 64 ... I can't pick it up, I thought it was at page 64, ... oh yes, yes, here it is. There is reference to a person by the name of Coffee being awarded 3,000 acres as a result of a purchase. I'm not sure whether it was an award ... oh, here it is, it's about the middle of page 64. Where Undersecretary Rolleston says he discussed the matter with Domett ... suggested that Coffee's claim to having purchased land

would be dealt with the Land Claims Settlements Act and then Coffee's title was then recorded in the Crown Lands Office, so it looks as though he got a title for this land.

BG: Yes, it's an Old Land Claim.

CJ: Yes. Have you any record that the Old Land Claim Commissioners actually sat in the Chathams to determine that question?

BG: No.

CJ: No, no record? So when the Native Land Court sat in the Chathams, did it make decisions for the whole of the land of the Chathams or was Coffee's land excluded?

BG: It's a point I hadn't considered before, I'm afraid. There's no mention of him in the ...

CJ: [Direction to Grant] Grant, could you take a note to check that out whether they ... the Native Land Court covered the whole of the island or whether old land claims were not included.

But the point I'm making here is that it may be that the matter was not dealt with by the old land claims process ...

BG: Yes.

CJ: ... and it may be that this title for 3,000 acres is none-the-less issued by the Government.

BG: Yes. That ... I found that material as you will see from the footnotes, actually in the Auckland National Archives dealing with the Native Land Court, so at some stage it must have come to their attention ...

CJ: It's rather important because it looks as though he got his title from Moriori. And if he did and this was done by ... as an executive act, then the Government had already acknowledged the title of Moriori.

King: I could clear up that point if you would like me to?

CJ: Oh yes, yes please.

King: Coffee's claim was dealt with in a prior sitting in 1868 and he tried to make a claim through his Moriori wife but this was disallowed so he then lodged a subsequent claim through his Maori wife, which was allowed. That's all dealt with [ ], prior to 1870.

CJ: So he didn't get a title for it outside of the Native Land Court process?

King: No.

CJ: He didn't.

King: No.

CJ: Oh, that's good, that clarifies that.

BG: Well, except that as you'll see there where note 151 is on page 64, that I got that information - his title was recorded in the Crown Lands Office and such, actually from correspondence from the Crown ... what's Domett's title, Land Claims Commissioner? - to the Chief Judge, Native Land Court. And somehow it seems to have been recorded ... the title recorded in the Crown Lands Office in February 1868, which is four months before Thomas holds his enquiry - I don't understand quite .... I must say I didn't exercise my mind adequately over that, but quite why if the title had already been recorded in February, there should be an investigation still going on in June, I'm not sure.

CJ: Perhaps we should just check the reference being given there and whether he actually got a title. Then you refer to the surveys of land for the Native Land Court process; who do

Appendix Two

Extract from the Cross-Examination of Dr. Bryan Gilling, 17 May 1994:

The Application of the 1840 Rule

CJ: Now another matter that's not clear to me from your report is: which tribal group is getting the land? Like the historical records suggest that Ngati Mutunga had come to acquire a dominance perhaps even after 1840, I can't quite recall, in the Waitangi area as a result of force and Ngati Tama was mainly up in the North. Is that your understanding?

BG: I understand that was the case. Yes.

CJ: Now do the Court minutes indicate whether in awarding say, the Wharekauri block, whether it was awarding it to Ngati Tama?

BG: It's only awarded to individuals.

CJ: It's only awarded to individuals, isn't it?

BG: Yes.

CJ: So we don't really know ...

BG: Without knowing who ... specifically which tribe those individuals belong to.

CJ: Hard to say then if the Court is determining manawhenua, isn't it, so that what it is actually saying is - who they were.

King: If you want the facts, Kekerione was awarded to Ngati Mutunga, all those claimants of Kekerione were Ngati Mutunga whereas the claimants for Wharekauri and Te Awapatiki were Ngati Tama. It's not noted in record but if you know the individual names and the Tribes to which they belonged, that's it, they disappeared very quickly from ??? scene, because those Wharekauri successful claimants and Te Awapatiki successful claimants lease their land very quickly and shell out. It's only Ngati Mutunga that keeps the presence.

CJ: Yes, yes I see, so in that north part it's Ngati Tama, southern area is Ngati Mutunga. Now did you know whether the ... as I understand it Ngati Tama were there at Waitangi originally and sort of got pushed out a bit, pushed up north....

BG: I understood that there was conflict ... but Dr King's ...

King: Yes that's correct.

CJ: Well do you know whether they did that before or after 1840?

King: In 1840. When the New Zealand Company's ship was here.

CJ: In 1840. Right did the Court even inquire on that matter?

King: No, because Ngati Tama didn't cross-claim for the Kekerione block, they restricted their claim to where they settled after being pushed out.

CJ: Yes, but the Court may have been determining things on the basis of things that happened post-1840?

King: Certainly post-Treaty of Waitangi, yes.

CJ: Yes.

BG: It was after the 6th of February.

CJ: So the dates do become important. The Court may not have been applying the 1840 rule properly.

King: They were for Maori/Moriori, but not for Maori/Maori.

CJ: Yes, exactly! No consistency there.

BG: What about the 21st of May as the third date - I'm sorry I don't know what day when the New Zealand Company ship was actually there.

CJ: It doesn't seem to have much to have done as evidence, really, but then Rogen was not a lawyer, was he?

BG: Rogen was not a lawyer, no.

[General laughter].

BG: I assume he got the boundaries in the blocks right.

CJ: Yes. Now the other thing that's not clear to me is was there evidence as to when Pitt Island was conquered?

BG: No, it was ... the statements were just made - it happened.

CJ: It happened. But there was no enquiry made as to ... whether it was done before or after 1840?

BG: As to precisely when. No.

CJ: So the essential thing to prove in terms of the Court's law, was that it happened before 1840 but there is no evidence to show that it did happen before 1840?

BG: That's correct.

CJ: Did your enquiries lead you to give you any indication of whether it happened before or after 1840? Did you find anything to indicate it?

BG: Dr King is better equipped than I to talk about the general record but I'm quite clear that there was nothing which I saw in the actual court records, court minutes and such.

CJ: You see in your statement here you do mention the fact that ...

BG: I'm sorry, where are we?

CJ: Page 87.

BG: Are you referring to Wharepa's statement?

CJ: No, I'm just trying to pick it up if this is the right place, I should have noted it better. I read somewhere, I thought in your report, correct me if I'm wrong, that some of the Moriori taken from Pitt Island were actually put into bondage to pakeha? Did you recall ...?

BG: That's not in my evidence.

CJ: That's not in your one, I must have read it somewhere else.

BG: With reference to the point that you were making about Pitt Island though, Wharepa's statement there is that "... *my father took possession of it by force of arms in accordance with that which they had previously done on this island.*" so it happened some time after the Chathams ... that was the invasion of Chatham Island itself and Morioris have not lived there for 20 years or more, this is 20 years back from 1870, which takes one only back to the late 1840's.

CJ: You see, the picture that I get which may be wrong is that the conquest didn't happen in 1835, if it happened at all, but a little bit after that - it's getting very close now to 1840. That is to say, they moved in there, there was a meeting at Te Awapatiki about whether they should respond, now I don't know how long afterwards that meeting at Te Awapatiki was, and then it was after that that the killing started. So that it could be a little bit after 1835 that we actually have the thing happening.

BG: Yes, there's certainly the sequence there, it doesn't all happen on the first day they come ashore.

CJ: Right, it doesn't all happen on the first day they come ashore. It could have happened perhaps a year or so afterwards maybe ...

BG: Maybe, I don't know.

CJ: It's getting pretty perilously close to this magnificent date of 1840 and then ..

BG: Particularly if it was the 14th of January.

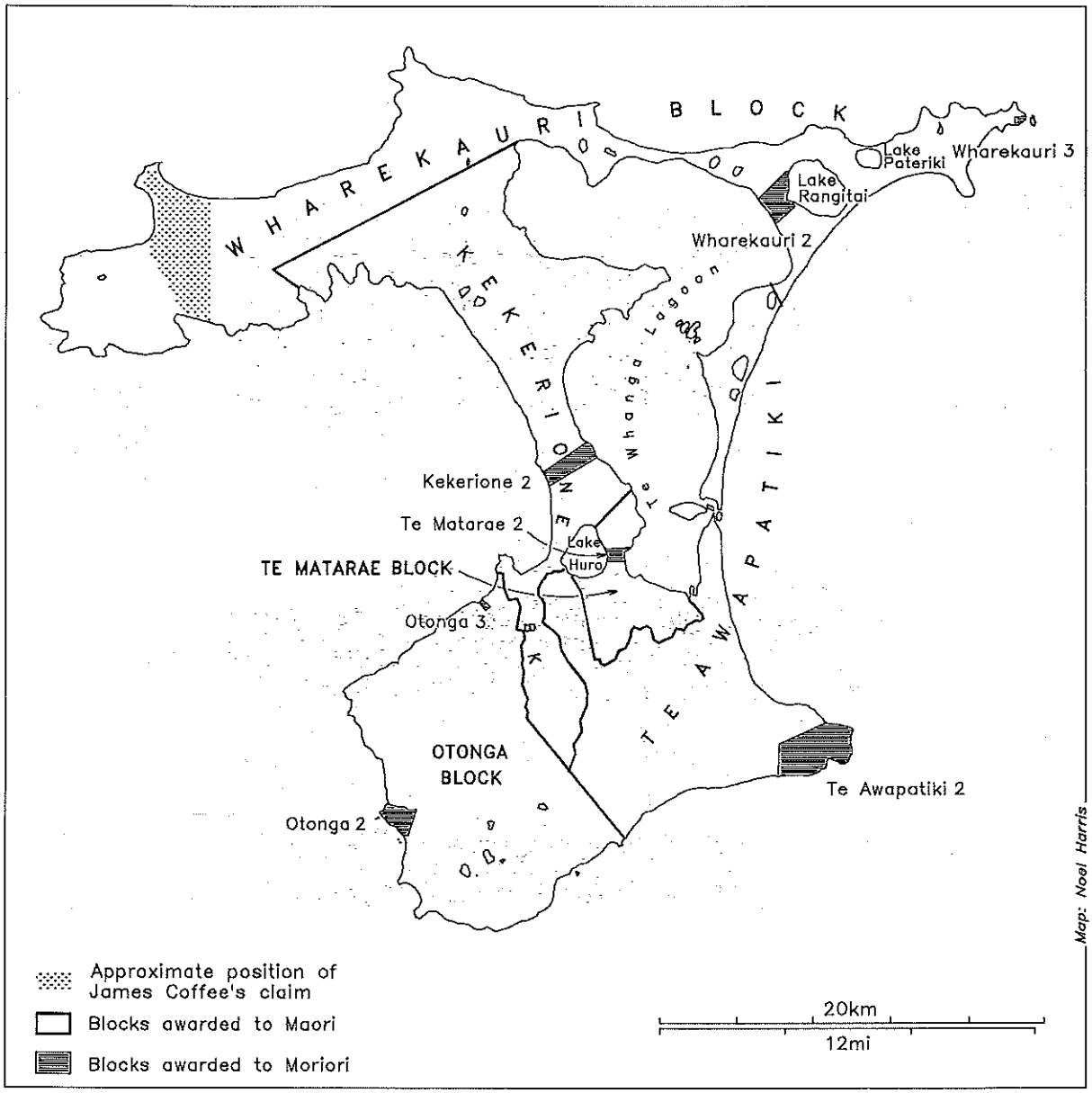
CJ: Yes, and then we have Pitt Island coming, we need to know whether it happened before or after if you apply the court rule? but we don't have any evidence to that effect.

BG: That's right.

CJ: Well your report is extremely helpful, I thank you very much for the work, time and trouble that you've taken. That's ... I have no further questions.

Adjourn for morning tea

Appendix Three



James Coffee's claim in relation to blocks