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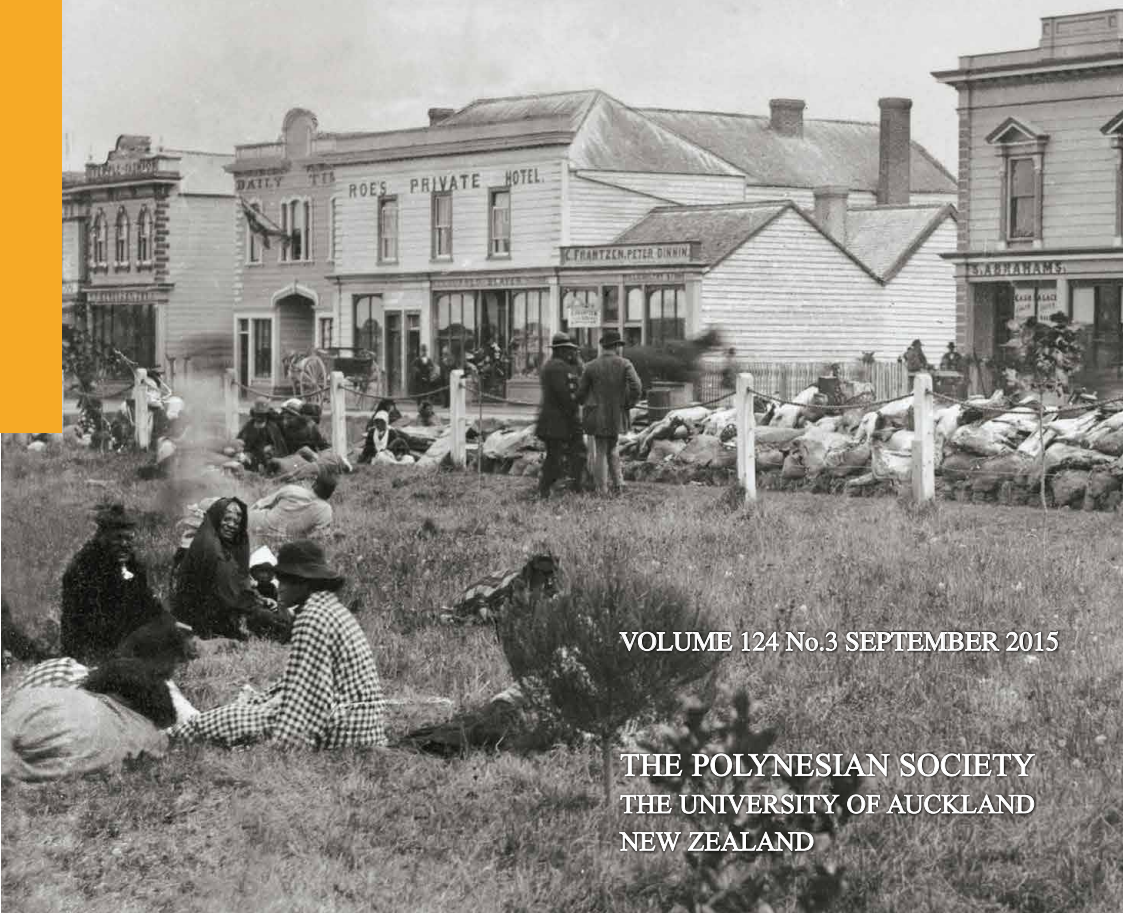

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THE LORE OF THE JUDGES: NATIVE LAND COURT JUDGES' INTERPRETATIONS OF MĀORI CUSTOM LAW

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This paper explores what I call the "lore of the judges": the collective wisdom of the Native Land Court judges on Māori custom law, especially in relation to land. I start with the first Chief Judge, Francis Dart Fenton, and end with Norman Smith, whose scholarly works of the 1940s consolidated the collective wisdom of the judges and remained essential texts on Māori custom law until recently—when another Chief Judge of the Court, E.T.J. Durie (1994), wrote a Māori-centric version of custom law.[1] The judges, in the best traditions of English law, were developing a Māori custom law, as judges before them had developed English common law, from their understandings of Anglo-Saxon custom. Custom was made into law, judge-made law. In time, those judicial decisions "became the source of the [English] common law" (McHugh 1991: 67), as common law judges assumed the power to "remould law" (Williams 2014: 150). As Fenton explained in his early epoch-making *Orakei* judgment: "This Court has no common law to direct its steps by; in fact it has by its own operations to make its common law, and to establish 'year-books' which may in the course of time afford a code of law … for guidance in deciding all questions which may come before it" (Fenton 1879: 59, Smith 1948: 60). Fenton's Year Books were meant to emulate the records of the early decisions of the English courts of Common Law. And the judges, led by Fenton, supported their interpretation of Māori custom by way of analogy. As Fenton put it in his 1870 *Kauaeranga Mud Flats* judgment, "if an analogy must be had, the nearest resemblance to the characteristics of native land might, perhaps be found in the focland as distinguished from bocland of our Saxon ancestors" (quoted in Boast 2013: 649). It is the purpose of this paper to examine how far Fenton and other Native Land Court judges, in interpreting and remoulding Māori custom law, managed, like English common law judges, to make a local common law. The whole exercise was undertaken within a regime that, under the Native Lands Act from 1862, required the judges to use Māori custom law to ascertain ownership of land and then eliminate such customary ownership in favour of Crown granted statutory titles to land; at "which point", as Richard Boast has put it, "the feudalisation of customary tenure was complete" (Boast 2013: 59).

Unfortunately the Native Land Court minute books (Fenton's Year Books), while eventually recording enormous screeds of often conflicting evidence

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relating to Māori occupation of land up to 1840, and sometimes judges' lengthy assessments of it,[2] do not say much about the making of a Māori common law. Norman Smith admitted that Māori custom, or "at least as much of it as could be reduced to a cognisable and applicable form to the social conditions of a modern civilisation", was defined and recorded in the minute books, "and was retained in the recollection of judges [their 'lore'], since no system of publication of judgments was ever introduced" (Smith 1948: 60). There may have been no official system of publication, but Fenton himself did publish a small collection, *Important Judgments ... in the Compensation Court and Native Land Court…*, in 1879. As Smith admitted, the judges did not make that common law merely from evidence of ancient custom presented in court by Māori witnesses, but also on the basis of "divergence" from that custom from "its introduction to the conditions of advanced civilisation", along with "the rules of equity and good conscience". Smith added that those modifications included the imposition of individual ownership of land that was "practically unknown to the ancient Māori" (Smith 1948: 60). Nor were the judges—from Fenton to Smith—content with allowing Māori custom to be tainted by the conditions and needs of "advanced civilisation"; they also interpreted it by analogies of how societies evolved from the primitive to the civilised in Britain and elsewhere; and even by asserting at times through theories of Māori origins a direct descent of those customs from the ancient societies of India and the Middle East. Primitive law was set at the bottom of an evolutionary ladder, though Māori, who had passed beyond wandering and gathering to sedentary agriculture, were already moving up the steps (Benton *et al*. 2013: 16-17). We should not assume that the judges came to their task with open and empty minds, ready to view the Māori customary scene objectively and on Māori terms. On the contrary, they were usually educated men (though only Fenton of the first five judges appointed to the Court was a lawyer), familiar with the prevailing racial and historical theories of their day. Some of them, including Fenton, wrote articles or books on Māori subjects, including the vexed question of Māori origins (see Sorrenson 1979). Smith's writings, which represent the end of a tradition of evolutionary scholarship, are littered with references to the long prevailing texts of lawyers, especially Maine's *Ancient Law,* and Blackstone's *Commentaries*.[3]

Above all, the judges were men with a mission, not merely to interpret and record Māori custom but to free it from the constraints of time and set it on the path of evolution. Māori land was to be converted from the communal or, as it was sometimes described, "communistic" ownership of the tribe, and individualised. Fresh from the still incomplete enclosures of England, the judges used the Native Lands Act from 1862, to promote the "enclosure" (and individualisation) of Māori land, a topic I discussed in a fairly recent essay (Sorrenson 2011: 149-69). Not only were they in tune with history but

they were making it as well. In this respect the role of Fenton was of crucial importance. He had some involvement in drafting the Native Lands Act of 1862 that had, in addition to repealing the Crown's Treaty-based right of pre-emption, allowed Māori committees presided over by a magistrate to ascertain ownership. And he drafted the very different act of 1865 that created a court of record, presided over by a judge (for more than 100 years, a Pākehā judge), the Māori Land Court that we know today. It required the judge to determine, according to Māori custom, which claimants had customary rights to land and then, contrary to that custom, award title to individuals who could alienate it. But under the land legislation "a modified custom was fossilised and made rigid", as Judge Durie put it (1994: 10). I am not going to discuss the numerous complications and successive legislation that followed—a task I began many years ago and others such as the late Alan Ward and David Williams have since continued (Sorrenson 1955, Ward 1973, Williams 1999). Since Fenton was appointed Chief Judge of the Court under the 1862 Act, and retained his position under the succeeding legislation until his retirement in 1885, he was in a key position to lead the Court and his fellow judges in the making of a Māori common law.

FENTON'S *IMPORTANT JUDGMENTS*...

Richard Boast has suggested that Fenton's selection of "important judgments" in the Native Land Court was designed "to suit those with an interest in Māori traditional history rather than the needs of judges or the legal profession" (Boast 2013: v). However Fenton had a larger purpose since, as he noted in his Preface, the Court, in delivering judgments on titles to land, had frequently to take "a short retrospective view" of the history of claimants "inasmuch as Native title is founded upon either long-continued occupation from ancestral tribes, or upon conquest".

This was illustrated in the *Oakura* judgment of June 1866 when Fenton and his fellow judges laid down what has become known as the 1840 rule. It had the effect of freezing Māori customary land tenure at 1840 when New Zealand became a British colony and subject to English law, including common law. As the Fenton put it:

> Having found it absolutely necessary to fix some point of time at which the titles, as far as this Court is concerned, must be regarded as settled, we have decided that that point of time must be the establishment of the British Government in 1840, and all persons who are proved to have been the actual owners or possessors of land at that time, must (with their successors) be regarded as the owners or possessors of those lands now, except in cases where changes of ownership or possession have subsequently taken place with the consent, expressed or tacit, of the Government, or without its actual interference to prevent these changes. (Fenton 1879: 10)[4]

Here Fenton was following an ancient precedent in English common law, whereby a custom that had been practised since "time immemorial" was dated from the first year of the reign of Richard I (New Zealand Law Commission 2001: 9). Nevertheless Fenton's application of the 1840 rule was not entirely new; William Spain had applied it in Taranaki in 1844 when reporting on pre-1840 land claims, including those of the New Zealand Company (Waitangi Tribunal 2001: 135).

Since Fenton (and many others) saw Māori title to land as having been established primarily by conquest and maintained by occupation, the decision gave considerable advantage to those tribes who were the victors in the musket wars before 1840. However, Fenton himself did not rigidly and consistently apply the rule. Although he applied the rule in denying titles to land in Taranaki to people who had migrated to the Chathams or elsewhere and had not returned *by* 1840, he did award titles to others, taken prisoner by Waikato but who had returned to Taranaki *after* 1840 "with the tacit, if not with the express approval by the Government" and retaken possession of their ancestral lands (Waitangi Tribunal 2001: 13). In the *Waitara South* judgment Fenton recognised the rights of some absentees who had not returned because the government had already paid them for rights in the land, and to two other absentees who had obtained "civilized employments"—one in the church, the other in government (Waitangi Tribunal 2001: 14-15). Such decisions suggest that Fenton and his Court, while usually independent of government, sometimes made politically correct judgments, a point I shall illustrate with further examples below.

The 1840 rule was being haphazardly applied elsewhere. For instance in Hawkes Bay, where valuable pastoral land already occupied by squatters on the strength of "grass lease" titles was coming before the Court, Judge T.H. Smith applied the rule, without explanation, in the *Heretaunga* decision of March 1866. But usually he and Judge H.A.H. Monro continued to award titles to ten or fewer claimants purely on the basis of witnesses' claims—or, if there was disagreement, by blessing out of court arrangements.[5] Elsewhere, the judges gradually applied the 1840 rule. Native Land Court hearings became contests between rival claimants to establish their occupation from time immemorial to 1840 and beyond. Judgments, where they were written out at all, were essentially attempts to arrange and referee between these competing narratives. The winner in 1840 usually took all. In the process there was an excessive emphasis on the role of warfare—something that was encouraged by the formation of the Native Land Court in the midst of the New Zealand wars—with insufficient consideration being given to peaceable arrangements between different groups during and after warfare, and the importance of *whakapapa* in determining ownership. Recent Waitangi

Tribunal reports (such as *Rekohu*, discussed below) have extensively reviewed the 1840 rule and the rights of ostensibly "conquered" peoples.

The *Oakura* judgment set a precedent whereby the judges, if they wrote judgments at all rather than merely announcing awards, constructed long historical narratives. These summarised the contests for and occupation of land up to 1840 that were played out in evidence before the Court. These histories have been mined time and again by their descendants or advocates in subsequent appearances before the Court and, in recent years, before the Waitangi Tribunal. The evidence for constructing narratives came from Māori witnesses before the Court, some of whom were claimants, others counter-claimants who invariably told a different story. Fenton himself set a classic example of the analysis of competing narratives in his *Orakei* judgment, "the longest and most detailed judgment the Court ever wrote" (Boast 2013: 9).[6] He also encouraged the procedure in the rules he set for the operation of the Court in which, as David Williams put it, he "brought a keen sense of the importance of the English common law's adversarial modes of trial... (Williams 1999:140). But both sides told of apparently unceasing battles in their endeavours to establish title by *take raupatu* (conquest) which, as Williams also pointed out, was "incorrectly elevated … to the status of being the primary source of Maori customary title" (Williams 1999: 22). Since the judges of the early Native Land Court were operating during the course of another war, this time an Anglo-Māori war, it is perhaps not surprising that they were inclined to exaggerate Māori warlike inclinations. Fenton was not immune from this tendency. As he said in his *Waitara South* judgment: "the true foundation of all Maori title is force" (Fenton 1879: 13). But he also accepted that in constructing his "Year Books" he needed to consider evidence based on "pedigrees" (*whakapapa*) recounted by witnesses, "giving them such weight as they seemed entitled to from their intrinsic merits in each case" and according to a principle laid down in a previous (unspecified) case, that "They must be received, not for the purpose of deciding tribal estates, but for the purpose of determining members of tribes." Nevertheless Fenton was cautious on how far "pedigrees" could be stretched to determine ownership especially with those who had married into other tribes: otherwise, he said, "there will be no such thing as even a tribal right in New Zealand. The whole of the tribes are related by blood in a more or less remote degree; and if any such proposal were sanctioned … New Zealand would become one vast inheritance, of which all the Maories [*sic*] in the island would be the joint owners" (Fenton 1879: 61-62, 82). But Fenton did not stick with this decision.

Fenton's other important judgment, so far as this paper is concerned, was *Papakura—Claim to Succession* in 1867 (Fenton 1879: 19-20). This case related to succession of 1,120 acres of land near Papakura that was in the

sole ownership of Ihaka Takaanini. On his death, succession was disputed by his widow, a daughter and two sons on one side; and a cousin, Heta Te Tihi, and other members of their *hapū* 'sub-tribe' on the other side. Although Fenton in his judgment said that he was bound by statute (his Native Lands Act 1865) to follow the English law of succession (based on primogeniture), he decided to allow an exception where "a strict adherence to English rules of law would be very repugnant to native ideas and customs…." He decided, "The Court does not think the descent of the whole estate upon the heir-at-law could be reconciled with native ideas of justice or Maori custom; and in this respect only the operation of the law will be interfered with. The Court determines in favour of all the children equally." This confused judgment has caused much harm because equal inheritance for all children is not Māori custom, anyway. Though it may have applied to male off-spring, it did not apply to females who had, on marriage, taken residence with their husbands' kin (McHugh 1991: 75, Williams 1999: 143, 178-82). Applied consistently by the Court for many years, equal succession for males and females has been the source of fragmentation of titles that has blighted Māori land ownership ever since. Though we cannot know what was passing through Fenton's mind when he wrote this strange judgment, it could be that he was thinking as an equity lawyer, a common procedure according to Michael Belgrave, though equity in 19th century terms rather than today's (Belgrave 2005: 30), even if that meant the unusual practice of disobeying a statute. It portrays Fenton as an untypical democrat, especially as he usually had little sympathy for rank and file of Māori, displayed most notably in his determination to award titles to ten or fewer chiefs under the Native Lands Act 1865 and subsequent resistance to legislation that attempted to ensure that all individuals who had customary rights were included. "It is not part of our job," Fenton proclaimed, "to stop eminently good processes because certain bad and unpreventable results may collaterally flow from them …nor… is [it] the duty of the Legislature to make people careful of their property by Act of Parliament, so long as their profligacy injures no one but themselves."[7]

OTHER IMPORTANT JUDGMENTS

As Richard Boast pointed out his historical study of Native Land Court cases to 1887, there had been no further publication of Court decisions after Fenton's *Judgments* in a proper law report format that would allow lawyers and judges to cite and build a body of precedent and doctrine "which is the essence of Common Law technique…". In Boast's view, most judges were content to rely on personal knowledge, were "overwhelmingly concerned with the facts [presented in evidence] and their interpretation," and the Court

"never developed an especially comprehensive or sophisticated understanding of Maori customary tenure …" (Boast 2013: 181-82, 187, 215). Nevertheless subsequent judgments did continue to apply basic assumptions, such as the 1840 rule, sometimes in highly politically charged circumstances, though there were also continuing exceptions (Belgrave 2005: 308). Important judgments that asserted the 1840 rule included several that were politically convenient in paving the way for Crown or private acquisition of land and European settlement, a point I shall return to later.

I begin with the 1870 Chatham Islands decisions which Boast says were "quintessential illustrations of the Native Land Court's '1840 rule' and of its doctrine of *take raupatu*" (Boast 2013: v, 581). The judgments were also the subject of close examination by the Waitangi Tribunal in its *Rekohu* report of 2001. The Court, under Judge John Rogan, fulsomely applied the 1840 rule and awarded most of the Chathams to Ngāti Mutanga, who had conquered and killed or enslaved many of the Moriori in 1837. Surviving Moriori were awarded several small reserves which comprised a mere 2.7% of the available land (Belgrave 2005: 300). That decision was politically convenient, since it compensated Ngāti Mutunga for being refused land in Taranaki (as noted above) when many of them returned there between 1864 and 1868 to defend their interests in land that had been confiscated under the New Zealand Settlements Act 1863. As I noted, they were denied title to land there by the Compensation Court in its *Oakura* judgment (Waitangi Tribunal 2001: 103-4, 131-34, 138-39, 144).

Then there was Judge Mair's politically charged *Rohepotae* judgment of 23 October 1886, which he regarded as "one of the most important of all 19th-century decisions of the Court" (Boast 2013: 1171). Mair applied the 1840 rule with a vengeance to uphold the claims of Ngāti Maniapoto and related *iwi* 'tribes' to the King Country. Mair's was but one of a series of decisions dealing with the outer fringes of the King Country, from Mokau in the southwest, through Tauponuiatia on the western edge of Lake Taupo, to Patetere on the east, whereby the court awarded titles to the resident tribes, while denying any rights to Waikato Kīngitanga who, under Tawhiao te Wherowhero, had taken refuge in the King Country following their defeat at Orakau in 1864 (Boast 2013: 1092-101, 1110-116, 1168-190).[8] The decisions were an integral part of the government's campaign to open the King Country to the Main Trunk railway, land purchase and Pākehā settlement, a policy promoted by a succession of Native Ministers through direct negotiations with King Tawhiao but which always foundered on his insistence on the prior return of the confiscated lands of Waikato. Eventually in 1883 Native Minister John Bryce decided to negotiate directly with the Ngāti Maniapoto chiefs and ignore Tawhiao. As the *New Zealand Herald* put it;

> Mr Bryce intends to proceed in what may be termed the natural way of encouraging and enabling certain natives to put their land through the Court …. All the attempts made to conclude negotiations with Tawhiao and the Kingites en bloc, have been miserable failures …. The government influence will simply be exerted to enable certain sections of the Kingites to take advantage of the law, and the Land Court will do the rest. (*New Zealand Herald* 13 November 1883, p. 5; see also Sorrenson 1955: 98-113)[9]

Indeed it did.

Though Boast stoutly defends the independence and integrity of the Native Land Court judges (2013: 189-91), I believe that they were burdened by their intellectual environment, influenced often by previous employment in the front line of the of the government's native administration and, above all, they were committed to the advancement of Pākehā settlement. Though theoretically Māori claimants initiated court proceedings by applying for a hearing, they were often, as I pointed out in my Master thesis many years ago (Sorrenson 1955), already committed to the sale or lease of their land to private Pākehā or Crown purchase agents, and often as well indebted to local publicans or store-keepers. It was these interests that drove the court proceedings and frequently, if they did not get their way, expensive appeals to higher courts. Governments of the day were perpetually badgered by Pākehā interests, especially local newspapers, to "open up" more and more Māori country and the Court, as seen in some of the examples noted above, became a willing and essential participant in that process (Sorrenson 1955: Chapters 1-5). Whether they liked it or not, the judges were part of that process because their decisions enabled the legal validation of purchases that were already underway. Also, most of the early judges, including even Fenton himself, had served in one capacity or another in the Native Department or as Crown land purchase officers. Rogan, who sat with Fenton on the *Oakura* hearing, presided over the Chatham Islands hearings, and applied the 1840 rule in both instances, was a former Crown land purchase commissioner. The Waitangi Tribunal in its *Rekohu* report questioned his impartiality and noted how Fenton and other judges had, on occasions, advised government on land purchases to avoid litigation and how government had sometimes modified Court decisions by executive action (Waitangi Tribunal 2001: 108, 147). One could also question the impartiality of Gilbert Mair, also a prime government agent in the opening of the King Country, in the *Rohepotae* decision. No matter how jealously the judges asserted the independence of the Native Land Court, it became not merely an "engine of destruction" of Māori culture, as Hugh Kawharu (1977: 15) and David Williams (1999: 133-99) have put it, but a mechanism for opening up of the country, fuelled always by advances of credit by surveyors, storekeepers, publicans—and, yes, lawyers as well—

and the follow-up killings of private and Crown purchasers. Williams details numerous instances where the judges collaborated with government officials and ministers to facilitate hearings and, ultimately, purchases of land. He quotes historian Robyn Anderson who examined the purchase of Hauraki land and concluded that the "Native Land Court thus acted as an obliging instrument of Government policy" (Williams 1999: 46). The notion of an independent court is more lore than law. After all, the prime purpose of the settler *cum* legislators who set up the Native Land Court under the Native Lands Acts was to facilitate the private purchase of Māori land—what was then described as "free trade" in Māori lands. Today, we would call it the operation of market forces.

By the end of the 19th century, the Native Land Court had nearly finished its primary task of ascertaining ownership according to custom and awarding title to individuals under the various Native Lands Acts (Boast 2013: 154). Thereafter, it was mainly concerned with sub-divisions, often to cut out land purchased by the Crown or Pākehā individuals, and successions. Accordingly, I leave the examination of "important judgments" in favour of the codification of Māori customary tenure, particularly through the work of the latter-day judge and long-time authority on Māori customary tenure, Norman Smith.

Before doing so, however, I want to acknowledge the contribution of one intermediary figure, Judge F.O.V. Acheson. Like many of his predecessors, he had served in the Native Department before he was appointed to the bench of the Native Land Court in 1919. He had also written an LL.M. thesis in 1913 on "The Ancient Maori System of Land Tenures" in which he closely examined Māori customary land tenure, with numerous references to leading authorities such as Sir William Martin and those who had been officially involved in the controversy over the outbreak of the Waitara war (Acheson 1913). Acheson regarded Māori custom in relation to land as having legal force, though he did not use the term "custom law"—a later invention. In 1918 Acheson was promoted to the position of land purchase officer and the following year was appointed a judge in the Native Land Court. He worked originally in the lower North Island but in 1924 he was shifted to Tai Tokerau where he subsequently became heavily involved in land development schemes, and made several controversial judgments. These included taking "judicial notice" of the Treaty of Waitangi and recognising Māori customary title to the foreshore and lake beds. Such views, as his biographers put it, were ahead of his time and in tune with modern, post-Waitangi Tribunal views on the Treaty and Māori customary rights (Acheson and Boast 1998: 2-3). Acheson was a transitional figure in another way. Under his leadership, the Court, instead of being an agent of Pākehā colonisation, began to adopt its modern function of helping Māori to retain and develop their much reduced remaining land.

NORMAN SMITH AND THE "CODIFICATION" OF MĀORI LAND TENURE

Norman Smith was another lawyer who had been a long-serving Research Officer in the Native and Maori Affairs Department before he became a Maori Land Court judge in 1952. However, it is not for his work as a judge but as a mentor of judges that Smith is important for this article. Even more so than Acheson, he came to the bench with an established reputation as a scholar of Māori custom. During his time in the department Smith wrote two books—*Native Custom and Law Affecting Native Land* (1942) and *The Maori People and Us* (1948). Subsequently, when he had been appointed to the bench of the Court, he published *Maori Land Law* (1960), and *Maori Land Incorporations* (1962). These, as I noted above, remained the essential texts on Māori custom and law until recently.[10] Despite his undoubted importance as a scholar of Māori land law and custom, Smith has not been the subject of academic study, apart from some recent work by Dr Grant Young. His essay, "Judge Norman Smith: A Tale of Four 'Take'" (Young 2004: 309-30), is mainly concerned with Smith's role in establishing four *take* or root causes—discovery, ancestry, conquest and gift, with each needing to be validated by continuous occupation—as the basis for claims to land. In this respect Smith was building on a long tradition whereby judges of the Court, and other authorities such as Sir William Martin, "codified" Māori customary law, especially in relation to land. In noting Smith's association with the Native Department when he published *Native Custom*..., Young wrote "The book was a direct response to the imperatives of the Native Department." Smith was identifying the rules of custom to assist those concerned with the administration of Māori land, gathering together "rules" that had been buried, unpublished, in the minute books of the Court. But, as Young added, Smith did not make a "comprehensive and systematic assessment of the decisions of the Court", though he did use Fenton's *Judgments* ... and an 1890 collection of "Opinions … on Native Land Tenure" (Young 2004: 315). Young then examines the contributions of several early 20th-century judges, including Acheson, particularly in the more sophisticated interpretation of the four *take*, before outlining the findings of his own sample analysis of the Court's use of the *take* in judgments. In that final analysis he concludes that, though the judges drew on earlier decisions of the Court, "they did so selectively and there was no attempt to create a body of precedent" (Young 2004: 330). Yet in summarising his essay Young concluded "Smith codified the practice of the Court by imposing twentieth century order retrospectively on nineteenth century chaos." Though the 19th century judges had been ambivalent about customary rules that would govern all judgments, they were required by statute to define ownership according to custom and usage. But these concepts were so elusive that judges were unwilling to define their practices clearly and they

relied on their own discretion in interpreting the requirements of statutes, with several of them (Young lists Mackay, Maning and MacCormick, but I would add Fenton whom I quoted above in relation to the *Orakei* judgment) attempting "to dress that discretion in legally acceptable terms by referring to that elusive concept of 'equity' " (Young 2004: 330).

My interest in Smith's *Native Custom...* (1942) is somewhat different from Young's. I am concerned with Smith's intellectual approach—more specifically his evolutionary approach—to the analysis of Māori custom and the transformation of customary ownership of land into legally recognised individual freehold titles. Smith soon reveals that evolutionary approach when he acknowledges his intellectual indebtedness to some of the founding fathers of New Zealand jurisprudence. He quotes at length an 1861 paper by Sir William Martin, with its analogies to Anglo-Saxon tenures, and the interpretation of them by Palgrave and Hallam who were clearly still respected authorities for lawyers in Smith's time as they had been for Martin. Smith also refers to some anonymous "Notes on Maori Matters, 1860", possibly also written by Martin. The "Notes" conclude that:

> There was no general government or general intertribal polity among the Maori tribes of New Zealand. They had no common head, no common tribunal, no common interests. The government of tribes—if their customs can be called by such a name—corresponded with no known type among civilized peoples. There are some features of monarchy, more of aristocracy, and many of republicanism; but the combination was not definite nor capable of assimilation to any known constitution of civilized society; nor was government merely patriarchal. Their notions of property of any kind were the vaguest; nothing approaching regular commerce existed. The origin of the interest of tribes and individuals in land was communistic, and the enjoyment of it in some degree communistic…. There was no practice of alienation of land by individuals at all, except … for … the usufruct of … land belonging to a woman who married into another tribe, [and] slaves and others were allowed to hold lands by sufferance of conquerors who retained in themselves the *mana* of the land…. (Smith 1942: 38)

The extract concluded with an admission that the "customs and practices" were "by no means uniform or definitely settled" and that there were no customs "such as the ordinary modes of alienation of property in civilized communities, before the Europeans came to the country" (Smith 1942: 38).

Smith assumed that by about 1895 "the rules of Native custom, with proper regard to any exceptions prevalent in different parts of the country, became more or less clearly defined" (Smith 1942: 48). But he admitted that there had been other exceptions, besides any regional variations, where there was a need for "grafting upon it of such subsidiaries that were necessary to meet

the equities of each case as well as the demands of a changing society" (Smith 1942: 48). This was reminiscent of Fenton's *Papakura* judgment where he invented the "custom" of equal rights for all children in successions (Smith 1942: 94). As Smith put it, though the statutes required that

> every title to, and interest in customary land shall be determined according to the ancient custom and usage of the Māori people so far as can be ascertained … no known custom existed to aid the Court in defining the relative shares of the owners of *papatipu* 'customary ancestral' land, except that they were not always entitled equally. Ancient Māori custom did not contemplate or provide for an individual title to land, or the conversion of ownership of tribal lands to a share or monetary value in the manner practised according to British law. (Smith 1942: 75)

Neither Smith nor the legislators who had been designing the Māori land acts for a hundred years could square the circle of Māori land customs with English law.

Smith's *Native Custom and Law Affecting Native Land* remained the main legal text on Māori law until Smith replaced it with the considerably expanded and up-dated *Maori Land Law* in 1960. That remained the essential text for Maori Land Court judges and lawyers for another 30 years when, as I observed at the beginning, Chief Judge Durie wrote a Māori-centric interpretation of Māori customary law.

In the meantime, Smith had published *The Maori People and Us* in 1948. It was more of an historical than a legal text, and is more relevant to this essay because it demonstrates more of Smith's evolutionary mode of writing Māori custom and history. He begins with the then classic chronology and narrative of the Māori occupation of New Zealand first established by S. Percy Smith and reiterated by Sir Peter Buck, before providing a brief outline of Māori culture. But it is not long before Smith falls back on Maine's *Ancient Law* for the assumption that "the organisation of Maori society was comparable with that of ancient European society" (Smith 1948: 17). He also uses Maine for the notion that "early commonwealths" had been founded on the basis of a common lineage, with the family evolving firstly into a House, next into a tribe and lastly to a state. Later, Smith described the evolutionary process as "distinguished by the slow but steady substitution of the individual for the family as the unit of which the law could take cognisance", a process Smith said had been seen in "the progress of Maori society [that] began to make itself felt a century ago [in 1840] when active colonisation of the country was introduced, and law and order, according to the notions of a civilised society, brought to the notice and obedience of the Maori" (Smith 1948: 20). In a footnote reference to Maine's description of ancient society, Smith added:

"The description also fits the Maori tribal system." Then, in more general terms, he said that "the organisation of Maori society was comparable with that of an ancient European society", noting in particular the strength of the "blood tie and heredity" (Smith 1948: 17).

Though Smith may not have designated the Māori as Semites, he did accept the still common view that they were Aryan in origin. He referred with approval to "anthropologists, or some of them", who said that the origin of the Polynesian could be "traced to and through, India". He added: "it is a rather remarkable feature of the Maori social system, and his customs in regard to the proprietorship of land, that there is a distinct resemblance to the incidence of the Indian Village Community." And who was the source on that community? None other than Sir Henry Sumner Maine, who is quoted at length. Smith does not name the book, though it is probably Maine's *Village Communities* (1871). In one of Smith's long quotes from Maine we find that, in contrast to Roman law, where "co-ownership is an exceptional and momentary condition of the rights of property … in India this order of ideas is reversed, and it may be said that separate proprietorship is always on its way to become proprietorship in common" (Smith 1948: 58). Smith saw Māori land tenure as proceeding in the same fashion: from the individual rights claimed by the original occupants of New Zealand, to the communal tenure that had evolved by the time of European contact. Later on in the quote from Maine, we are told that "… the Village landholders are all descended from one or more individuals who settled in the Village", apart from outsiders who derived their rights by purchase or otherwise from the original members of the village or their families. Maine stressed that for a landowner to sell or mortgage his rights, he needed the consent of the Village. But if the family became extinct, its land reverted to "the common stock". Likewise for Māori, particularly with gifts of land when there was no issue, "the land usually … reverted to the source from which it came, thereby following a similar custom of the Indian Village Community." Smith added that with the coming of the Pākehā a different system of alienation was introduced but the failure to completely understand Māori customs in relation to land had resulted in bitterness and strife between the races.

Smith then discussed the role of the Native Land Court in defining "what is accepted as Maori land custom today". He quoted Fenton's influential comment in his *Orakei* judgment that I also quoted at the beginning of this essay. It was this court made custom, or, as Smith put it, "as much of it as could be reduced to a cognisable and applicable form to the social conditions of a modern civilisation", that was recorded in the minute books of the Native Land Court. By Smith's time Māori customary law had been established on the basis of rules that had been "accepted for too many

years now to be contradicted". Yet he then admitted that it was difficult to ascertain "what custom really was" and, as a result there was inconsistency in the judges' early decisions—until around 1895 "when the rules of custom became more or less clearly defined" (Smith 1948: 60). As a result it was now accepted that Māori rights to land were founded on four *take* (those discussed by Young)—discovery, conquest, gift or any combination of these—but they always had to be confirmed by occupation. Though Smith described the various forms of activity that Māori used to demonstrate their occupation—fishing, hunting, bird-snaring and cultivation—he could not resist going to Maine's *Ancient Law* for further definition of occupancy and adding that "in broad essentials" Māori "ideas were not far removed from our ancient conceptions". And from Maine he went to another legal authority, Blackstone, for the notion that "by the law of nature and of reason, he who first began to use it acquired therein a kind of transient property that lasted so long as he was using it … but the instant he quitted the use or occupation of it, another might seize it without injustice …." (Smith 1948: 62).[11] Applying this notion to the Native Land Court, Smith noted that it had decided that occupation in 1840 was to be the basic rule by which Māori title would be decided. Smith attributed this rule to Fenton's 1869 *Orakei* judgment though, as noted above, the rule had been developed and used earlier (Smith 1948: 63-64). Smith went on to describe how the Court had attempted to sift and decide between often conflicting claims of occupation to 1840 and concluded that each case had to be decided by its own circumstances, "and by the weight of evidence, which as Lord Blackburn has pointed out, depends on the rules of common sense" (Smith 1948: 64-66). Then Smith refined the ways in which the Court interpreted competing claims to title by virtue of various forms of occupation. In doing so, he sometimes admitted that there was no customary basis for some of the rules that the Court was obliged [by legislation] to apply. For instance, there was no customary law defining the relative shares in customary land. But "British law … required a measurement of the interests of owners holding land in common; and in the application of legal principles of a modern society to the extinguishment of the Native title, the Court was faced with the necessity of reducing ownership to a share value upon the basis of the estimated extent of occupationary rights." In the early days of the Court, Smith admitted, "the distribution of rights was often settled by the Maori themselves without much dispute". Later, however, the Court had tried to arrange distribution by various means: by the relative strength of occupation or by allocation to heads of families irrespective of the numbers of their children, though this was abandoned when, under the 1867 and 1873 Native Lands Acts, the Court generally allocated land in equal shares, irrespective of rank.

As I noted above, this principle was also applied to succession of land. As Smith put it, if Māori died intestate, the Court applied the artificial rule of equal succession "in accordance with what is called Māori custom, but which is, in truth, a custom that has been more or less artificially created by analogy, in order to make the usages of the Māori people fit into the social and legal system of a modern society." Though Smith does not say so, we go back to Fenton's judgment in the *Papakura* case where on grounds of the English principle of equity, he decided in favour of equal succession for all children.

We can conclude that Smith was, with his evolutionary and comparative notions on land tenure, a latter-day Sir William Martin and very nearly the last of his line. But in his optimistic views on the progress of contemporary Māori, he was in tune with other authorities of his day, including Professor Ivan Sutherland and Sir Apirana Ngata.

THE MAKING OF MĀORI COMMON LAW

Judge Durie's paper, "Custom Law" (1994), though unpublished, has been extremely influential, not merely in recognising Māori custom as a living, evolving body of law, but also in placing it firmly in the realm of New Zealand common law. This point was reiterated time and again in the Law Commission's Study Paper, *Maori Custom and Values in New Zealand Law* (2001). Before writing its report the Commission asked three academics—anthropologist, Dame Joan Metge; historian, Dr Michael Belgrave; and political scientist, Dr Richard Mulgan—to comment on Judge Durie's paper. Additional commentary was provided by lawyers: Maori Land Court Chief Judge Joe Williams, Richard Boast, Whaimutu Dewes, and Dr David Williams; and by the distinguished members of the Commission's Maori Committee. The Commission's Study Paper described an evolving New Zealand jurisprudence "which draws on both British law and Maori custom law, and which has the potential to incorporate solutions based on Maori world views" (New Zealand Law Commission 2001: 52). It went on to provide examples in resource management law, land law and family law, and concluded from these that "the courts and the legislature are attempting to ensure that Māori custom law is respected in the law" (New Zealand Law Commission 2001: 59). This was a world away from the earlier situation described in this essay whereby Māori custom law was progressively replaced by English inspired statutory law, especially in relation to land.

There is now no doubt in the minds of academic lawyers and judges that Māori customary law, where it has not been modified or eliminated by statute, has survived in New Zealand common law—as an addition to the English common law that was automatically applied in New Zealand on the Crown's acquisition of sovereignty (Brookfield 1999: 49, 163, McHugh 1991: 85-86,

94-95, 110-12). Indeed, for many years after New Zealand became a British colony in 1840 what were generally referred to as "native laws, customs, or usages" were allowed to prevail in Māori districts, provided they were not "repugnant to the general principles of humanity". Section 71 of the New Zealand Constitution Act 1852 allowed such districts to be set aside but, although it remained in operation until 1986, no such districts were ever proclaimed (McHugh 1991: 116-19). The Native Circuit Courts Act and the Native Districts Regulation Act, both of 1858, allowed tribal *runanga* to administer customary law (McHugh 1991: 200). Nevertheless, as Mark Hickford noted, "native districts in which native title and customary laws prevailed were in existence—there was no need to invoke the Constitution Act to declare them to exist" (Hickford 2012: 405). In existence, perhaps, but in a legal lumber, awaiting elimination by legislation.

Likewise, what is now referred to as common law aboriginal title (Williams 2011: 229), applied to Māori land before that title was transformed into Māori freehold land under the Native Lands Acts. That task was so thoroughly carried out that, these days, only tiny specs of land remain in original customary title, though the Te Ture Whenua Act of 1993 reversed some 130 years of legislation by requiring that the Maori Land Court adopt as its "primary objective" to "promote and assist in … [t]he retention of Maori land and General land owned by Maori …"[12] and making better provisions for the administration of land through trusts and incorporations. Māori customary law rights survived legislative extinguishment in some other areas, most notably as the 1989 *Te Weehi* judgment of Mr Justice Williamson demonstrated, in the customary Māori fishing rights.

* * *

Recently Matthew Palmer wrote that "our law upholds for Maori the existence of special rights to possess and use land…. This is the nature of the law of aboriginal title and customary rights…. As common law, made by judges, the law of aboriginal title has existed for at least 200 years" (Palmer 2008: 230, 358). This is an intriguing suggestion but it is not clear whether Palmer is saying that he regards this aboriginal title as part of New Zealand common law, or whether it exists as a distinct Māori common law. This was a law that was made by the Native Land Court judges in their judgments in court, recorded periodically in the Court's minute books (or Fenton's Year Books) and selectively in his *Important Judgments…*, and particularly a common law that included Fenton's 1840 rule and his equal rights on succession. There is a tantalising suggestion in a 2005 essay by Alex Frame and Paul Meredith that "there is sufficient compatibility and identity between the concepts and

values of Maori customary law and those of the English common-law system, which arrived in Aotearoa/New Zealand with the Treaty of Waitangi in 1840, for these concepts and values to function together or in association, or even to contribute to the evolution of a third and new 'hybrid' system" (Frame and Meredith 2005: 135). Unfortunately, they do not develop the concept of that new "hybrid" system in the remainder of their essay or, indeed, in the important compendium on Māori customary law that they (with Richard Benton) published in 2013 (Benton *et al*. 2013). Another legal scholar, Mark Hickford, in a quote attributed to Robert FitzRoy, uses the term "the '*ritenga* Maori' '*tikanga* Maori', or native 'common law' ...." (Hickford 2012: 180-181). He does not explain what he means by "native common law". However, he did add, in a footnote: "The intersection between common law and customary notions of law and tenure remains an issue, including the extent to which the common law is able or prepared to accommodate customary concepts." Hickford then refers to the seabed issue as one example and quotes Australian scholar Noel Pearson's statement, that "native title is not a common law title but is a title recognised by the common law" (Hickford 2012: 15). A similar position was taken by the Court of Appeal in the Ngāti Apa decision in 2003. In this Chief Justice Sian Elias, in reversing previous court judgments, stated that "The common law as received in New Zealand was modified by recognised Māori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different" (quoted in Williams 2011: 205). It is different in that it has assimilated some Māori custom law.

But that still does not mean the existence of a *Māori* common law. I note, however, that my plea for its possible existence is supported by Michael Belgrave. In his paper prepared for the Law Commission, he suggested that the 19th-century Native Land Court had attempted to "turn Maori custom into a kind of Maori common law" (Belgrave 1996: 4). Richard Boast also discusses the Fenton quote and his hope that the Native Land Court records would become "the basic raw material for a new body of doctrine, created in much the same way as the Common Law was created, but peculiar and distinctive to New Zealand." However, Boast merely concluded: "Whether a body of doctrine ever did emerge from the mass of detail—and, if so, what it amounts to substantively—are perhaps the most important historical and legal questions that need to be resolved with respect to the Native Land Court" (Boast 2013: 489-90). And he left it at that.

So where have we got to? That two historians have barged in where lawyers fear to tread. Perhaps it is time for academic lawyers to examine just what has been going on in the making of common law in New Zealand.

NOTES

1. In his unpublished but widely distributed paper, "Custom Law", January 1994.
2. See Native Land Court Napier Minute Book, Vol. I. University of Auckland Library Microfilm reel 201, *passim.*
3. See Smith 1948, pp. 15-17, 59, 61-63 for references to Maine's *Ancient Law*, and pp. 62-63 for reference to Blackstone.
4. *Oakura* was heard in the Compensation Court, not the Native Land Court.
5. Several of Fenton's fellow judges were slow to apply the rule in Hawkes Bay where they were content, after cursory examinations, to award title to ten or fewer individuals who were identified in Court as occupants and named in certificates of title under the Native Lands Act 1865. This allowed pastoralists, who were already in occupation of most of the land on the strength of "grass money" leases, to validate their titles. For details see Native Land Court Napier Minute Book, Vol. I. University of Auckland Library Microfilm reel 201.
6. However, as Boast points out (2013: 284), the decision printed in Fenton's *Important Judgments* (1879) was only a small part of the actual judgment.
7. See in particular the discussion of this by Alan Ward 1973, pp. 216-17. The quotation from Fenton is in Fenton to Native Minister, 11 July 1867, AJHR 1867, A-10, pp. 3-5.
8. However Boast is incorrect in his claim (p. 1182) that "until very recently there has not been a great deal of writing about the case." He ignores the discussion of it in my (1963) essay on the King movement, originally published in Robert Chapman and Keith Sinclair (eds), 1963. *Studies in a Small Democracy*: *Essays in Honour of Willis Airey,* pp. 33-55.
9. There is a much fuller discussion of the opening of the King Country in my MA thesis (Sorrenson 1955, pp. 98-113).
10. Smith (1960) *Maori Land Law* was a substantial rewrite and expansion of *Native Custom and Law Native Affecting Land* (Smith 1942).
11. Once again Smith failed to provide the source of his Blackstone quotation.
12. S. 17(1) (a); quoted and discussed by Brookfield (1999: 132).

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ABSTRACT

The essay explores what I call the 'lore of the judges': the collective wisdom of the Native Land Court judges on Māori custom law, especially in relation to land. It is led by a comment by F.D. Fenton, the first Chief Judge, in his *Orakei* judgment, that the judges' decisions should emulate those of English Common Law judges, and create a body of precedents recorded in 'Year Books' (or Minute Books). The paper examines how the judges' interpretations and remoulding of Māori custom were eventually incorporated in New Zealand common law. It concludes by asking whether the judge-made law could be considered a Māori common law.

Keywords: Māori customary law, New Zealand common law, Native Land Court judges, indigenous land rights, New Zealand land tenure judgments, historical legal practices

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