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‘An Appeal from Fenton to Fenton’

THE RIGHT OF APPEAL AND THE ORIGINS OF THE NATIVE APPELLATE COURT

AS A RESULT of the Treaty claims process, the Native Land Court is now one of the most intensively studied topics in New Zealand history. In 1997, Professor Alan Ward ranked its operations among the worst Treaty breaches in this country’s past.[1] Although a great deal of research has taken place into particular districts, blocks and tribal experiences of the court, it is generally agreed that the court as an institution has been under-researched.[2] This article addresses two gaps in the historiography: the tangled processes by which rehearings were obtained; and the related question of the origins of the Native Appellate Court. There have been brief and helpful attempts to grapple in a general sense with the complex, oft-amended regime for obtaining a rehearing,[3] but it is still not widely understood. As a result, there is much confusion in the historical literature. Also, while there has been in-depth treatment of the origins of the Native Land Court,[4] there has been almost no consideration of how or why the Appellate Court was created in 1894.

Historians and lawyers have developed various approaches to these issues, often employed simultaneously. One approach is to address them in a legal paradigm: given that there was a court, did it operate according to the principles and processes considered proper for a court?[5] For the Crown’s lawyers, the issue is often process, not outcomes. Did the Crown provide a legal remedy for those aggrieved by the decisions of the court? If so, and if there were no systemic failings in that remedy, then the Crown met its responsibilities to Māori, whatever the outcome of particular appeals.[6] The Crown’s lawyers also argue that the court should be judged by the standards of its own time and not those of today.[7] Even so, nineteenth-century norms of due process or procedural fairness are often taken as relatively close to today’s, although the laws being enforced were particular to the time.[8] But the ‘standards of the time’ must not become ‘a “euphemism” for suppressing — yet again — the voices, memories and understandings that had been marginalised in their own times’.[9]

This leads us to approaches described as ethnohistorical and postcolonial. These rely on oral as well as documentary sources to write Māori back into history and to critique colonial institutions.[10] By these means, postcolonial historians ‘destabilise ... colonial narratives’.[11] They would ask, for example: were Māori content to be objectors and applicants for a rehearing in the Native Land Court? What was the Māori view, collectively expressed through their leaders, of how their customary entitlements should be decided? In Native Land Court historiography, these approaches focus on the interchanges between Māori leaders and settler authorities, uncovering and analysing the debates between them and also the policy alternatives put forward by Māori or

from within the colonial establishment.[12] The Crown, based on the historical methodology of Professor Bill Oliver, accepts that it can justly be criticised if it had viable options at the time and chose ones more 'penal' to Māori.[13]

In my view, all these approaches intersect because Māori values and aspirations — as articulated to settler authorities — were part of the 'standards of the time'.[14] To say otherwise is to write Māori out of history, or to treat them as just victims or beneficiaries of a court process. It is possible to assess the settler-created court within a paradigm of legal processes while also identifying Māori aspirations and demands for change, and to bring the two together by examining how settler authorities quite deliberately decided to act in response to two streams of ideas and expectations. That is the approach taken in this article.

While much of the factual material relating to these matters will seem dry and even pedantic, anyone who has attended a Waitangi Tribunal hearing will know that this is not an 'academic' issue for Māori: 'If the Land Court got it wrong, there was little redress save for the uncertainties of an appeal for a rehearing or a petition to Parliament.'[15] The fate of whole communities could depend on whether or not they got a rehearing. The reverberations of nineteenth-century court decisions are still felt today.

From 1865 to 1894, the right of appeal in the Native Land Court consisted of a right to apply for a rehearing. The 1862 version of the court was a commission of local chiefs chaired by a magistrate.[16] The opportunity to protest its decisions to the governor, who would make the final award, obviated the need for appeals.[17] When the court became a full court of record in 1865, the new Native Lands Act included a section headed 'Appeals'. Yet what this section of the Act provided was not a right of appeal but rather a power for the Governor in Council to order a rehearing within six months of the title decision.[18] The government retained this decision-making power for 15 years.[19]

This brings us to our first process issue for the period 1865 to 1880: the nature and extent of the government's power over this aspect of the court's work. One point is readily disposed of: although the legislation gave the government power to choose the judges and assessors for the rehearing,[20] in practice this was left to the chief judge.[21] A second point is that the Act did not specify a class or classes of appellants, which was unusual. The court's view was that anyone involved in its business could apply to the governor for a rehearing.[22] Not all of the Māori involved necessarily knew or understood this.[23] Practice was formalised in the Native Lands Act 1873, which conferred a right on 'any person interested', Māori or Pākehā.[24]

As a general principle, however, the question of whether appellants should get a rehearing was treated as an executive, not a judicial, decision. Sir William Martin, New Zealand's first chief justice, was not uncomfortable with this.[25] According to Francis Fenton, the first chief judge and one of the architects of the 1865 Act, the real purpose of the 'appeals' section was never to allow appeals 'from erroneous decisions', but to enable the government to intervene if something unavoidable like flooding prevented Māori from attending the court.[26] If so, it was not used in that way. There was, of course, a political

dimension to the granting or denial of rehearings. It was a safety valve for when court decisions posed a risk of armed conflict, although this was equally a consideration for the chief judge as it was for the government.[27]

The situation became more complicated in the 1870s, when the Crown resumed purchasing Māori land on a large scale. Its pre-title dealings gave it a vested interest in who won in court.[28] It could even be an applicant to have title investigated and its interests determined.[29] Government purchase agents began advising their political masters as to whether rehearings should be granted.[30]

What rescued the system from this conflict of interest, however, was the government's practice of consulting the chief judge. According to an official report from Premier John Hall for the governor in 1881, the government followed the advice of the chief judge in all except two cases for the entire 15-year period in which it made these decisions.[31] While purchase agents' and other officials' recommendations may also have been influential, the deciding factor was evidently the opinion of the chief judge. Given the haphazard survival of relevant records, and a great deal of informality as to what actually constituted an 'application', it is not possible to say whether Hall's claim was strictly accurate.

One of the exceptions was Waingaromia 2, a 30,000-acre block in the Turanga district, for which title was awarded in 1877. The court (Judge Rogan and Assessor Hone Peeti) did not award the block to the Te Aitanga a Hauiti hapū who had accepted the Crown's advances. Captain Wilson, the government's purchase agent, accused Rogan of bias and other improprieties, and the Crown placed a caveat on the provisional title to protect its interests. A royal commission was appointed to investigate Wilson's allegations. In the meantime, the chief judge (on Rogan's advice) recommended against a rehearing. Petitions followed because the Crown had still not made a decision 18 months later. Ultimately, a rehearing was granted on the recommendation of the Native Affairs Committee.[32]

During the committee's 1878 investigation into a petition about Waingaromia 2, it asked Richard Gill of the Native Department if the Crown had ever rejected another recommendation from the chief judge against a rehearing. Gill was unable to answer the question on the spot.[33] He reported back later that it had only happened once before, in 1873.[34] Gill was probably referring to a Hauraki block, Hihi-Piraunui, where the Crown went against Fenton's recommendation in 1873, even though it had favoured the government's purchase interests. Ultimately, however, no rehearing took place within the prescribed time, and the matter was deliberately allowed to lapse on Chief Judge Macdonald's advice, so as to protect the Crown's purchase.[35]

The cases of Waingaromia 2 and Hihi-Piraunui reveal the potential for abuse in the system, where the Crown had a vested interest in the outcome, but also (since they were exceptions) the extent to which the Native Land Court judges actually dominated the decisions about rehearings. A critical issue then becomes the process followed by the chief judge, which can be ascertained from Māori Land Court block files and other sources. Typically, no inquiry was held other than to consider the contents of the letters requesting a rehearing, and to seek the opinion of the judge (or judges) who had heard

the case. (Sometimes, the chief judge met with Māori applicants informally.[36]) In the case of the Waiohau block in Te Urewera, for example, Judge Halse advised: 'This case was very carefully considered by the Court, and I cannot see any reason for recommending a rehearing.'[37] The rehearing applications were turned down by the government on the basis of this recommendation from the judge, as endorsed by the chief judge. No other inquiry seems to have been carried out.[38] For cases heard by the chief judge, he was still the one to make the recommendation as to whether they should be reheard.[39]

Court of Appeal judges did hear appeals against their own decisions, but in a public process and as one of a panel.[40] For applications for rehearing in the Native Land Court, the executive in effect decided whether to accept or reject an application based on the confidential opinion of the person whose decision was being criticised, with no public inquiry. This left 'considerable scope for the caprices of Chief Judges Fenton and MacDonald and eccentric personalities like Judge Maning'.[41] The judges did not always oppose rehearings, of course, and the chief judge did not always accept their opinions, but both appear to have been the norm.[42] Factors that influenced the chief judge to recommend rehearings included the threat of trouble over a block, evidence that a decision was 'manifestly wrong', technical or procedural mistakes, and glaring inconsistencies in the court's decisions.[43]

Historians have debated whether the chief judge and judges were pressured (or considered it their duty) to assist the Crown's purchase of Māori land, and whether their decisions were influenced by this consideration.[44] Thus, even if purchase agents were not the main direct influence on the government's decisions about rehearings, was their agenda promoted anyway by the judges? A detailed study would be necessary to uncover whether the chief judge's advice on rehearings was indeed influenced by such considerations.[45]

Another issue for this period is that there was virtually no Māori involvement in the decision-making. At least if there had been some kind of Native Land Court process, there would have been an opportunity to supply evidence, to advance or refute arguments, and to have input from a Māori assessor to the decision.

Moving the discussion out of a paradigm of colonial courts, it should be noted that Māori soon began to raise serious concerns about the Native Land Court and its processes and decisions, including whether there should be a court at all. In response, Native Minister Donald McLean proposed Māori councils in which elected local leaders would decide titles. There was huge Māori support for this proposal.[46] The Native Land Court would become in effect a court of appeal, still acting as a court of first instance if Māori chose not to submit their claims to a council.[47] But McLean's 1872 and 1873 Native Councils Bills were withdrawn without being put to a vote, and a Bill promised for 1874 never eventuated. There has not yet been a satisfactory explanation of why McLean abandoned these measures.[48]

With the native councils initiative having failed, Māori were stuck with the Native Land Court. A wide variety of circumstances compelled them to use the court, whether they opposed it politically or not.[49] Some of its decisions caused great distress to iwi and hapū, as did refusals of rehearings. By the mid-1870s,

the practice of petitioning Parliament was catching on among aggrieved Māori. While the government had the authority to decide whether rehearings could be granted, Parliament was the only recourse from its decision. The House's Native Affairs Committee, to which such petitions began to be referred, soon found itself in the position of a virtual court of appeal for the Native Land Court;[50] a role it was to play for the rest of the nineteenth century. This — and the sheer volume of complaints — dismayed the committee, which could not take the kind of evidence or spend the time necessary for full inquiry into such matters.[51] From 1876 to 1879, it called for the establishment of an appellate court.[52]

In the period before 1894, the government came closest to setting up such a court in 1876. McLean planned to add a third tier to the current system, allowing appeals from rehearings. As with the New Zealand Court of Appeal, which was drawn from the Supreme Court judges, he proposed to create an appellate court consisting of the chief judge and a judge of the Native Land Court, assisted by an assessor.[53] This was condemned as an 'appeal from Fenton to Fenton' and drew hot criticism.[54] Most Native Land Court judges were not legally trained, and it was feared that they were not fit for a higher court or capable of judicial impartiality.[55] Much responsibility would lie with the chief judge, who was to sit on all appeals and was touted as the guarantor of proper process.[56] He was also given power to dismiss 'frivolous' appeals without hearing.[57]

Colonel George Stoddart Whitmore put what he understood to be the Māori case against the proposal: questions of custom needed to be decided by Māori, who understood them best.[58] Parliament had to get 'out of the false principle we have got into of disregarding the opinion of the Natives in these matters'.[59] In the proposed court, the assessor, whose concurrence was not required, could be outvoted by the two judges. Whitmore suggested instead a Supreme Court judge, bound to accept a jury of chiefs' verdict on custom and fact.[60] Within the colonial courts paradigm, this became a common proposal designed to appeal to settlers and the legal establishment; if Māori had to be given power, it could be done safely in that kind of court.

McLean's Native Appeal Court Bill was probably a casualty of his ill health and resignation;[61] had it been introduced in 1876, when the House had voted to accept an appellate court in principle, it may well have been enacted.[62] As it was, the Bill was not introduced until 1877, when the government had to abandon all its 'native' Bills.[63] The new Grey ministry (1877 to 1879) preferred 'appeals' to remain rehearings in the Native Land Court.[64]

In late 1879, John Bryce became native minister in the Hall government. The question arose: would he create an appellate court, which he had advocated in 1876, and which the Native Affairs Committee had continued to advocate under his chairmanship?[65] The answer came in the Native Land Court Bill of 1880. One of its cardinal principles was to separate the court and the executive, putting 'the Native Land Court, in respect of the Government, on pretty much the same footing as other Courts of law in the colony'.[66] The only exception was supposed to be that the government would still have power to suspend the court if its operations posed a threat to 'the peace of the country'.[67]

Two parties were given the right to apply for a rehearing: the governor and 'any Native who feels himself aggrieved by the decision of the Court'.[68] Pākehā thus lost their right to apply,[69] although purchasers continued to back rehearing applications behind the scenes.[70] In order to meet Bryce's view that the court and government must be disentangled, and — it seems — to allow the government itself to seek rehearings, the power of decision-making was transferred to the chief judge. According to the Premier, this was a cosmetic change, putting 'responsibility ... where the real power had long rested'.[71] Nonetheless, the replacement of the government by a judicial officer, independent of that government, was an important step in terms of law and of (potentially) a fairer, more transparent process.[72]

The Act specified nothing about how the chief judge was to make his decision, either in terms of a process to be followed or criteria to be applied.[73] This gave applicants a lot of leeway; they could advance any grounds, whether of law or fact, process or substance. Now, however, the original title was not annulled: the rehearing court had power to 'affirm the original decision, or reverse, vary, or alter the same, or to give such other judgment and make such orders as it may think the justice of the case requires'.[74] This created 'something approaching a standard appeal in that the rehearing Court was reviewing the decision of the earlier Court'.[75] In another change from the 1873 regime, which had reduced the rehearing court to a single judge and assessor, the rehearing court now consisted of two judges and one or two assessors, as the chief judge saw fit.[76] This, too, made it look more like an appeal court.

Even so, Bryce's failure to create a higher court was criticised in the Legislative Council. John Wilson maintained that it was unconstitutional to deprive Māori of a right of appeal to a higher tribunal (and ultimately to the Privy Council), which he said was allowed for in native title matters in other parts of the empire, such as India.[77] Five members of the council, including its two Māori members, H.K. Taiaroa and Mōkena Kōhere, made a formal protest to the Queen. They objected to the 1880 Act as unjust for a number of reasons, including that all the Māori members had objected to it and 'no efficient appeal to a superior Court is provided'.[78]

Nothing concrete happened as a result of this protest.[79] The regime set up by Bryce remained the system for 'appeals' for the next eight years, with three significant amendments. From 1881, the chief judge could order tailored rehearings for part of a case or block.[80] In 1886, he was debarred from deciding whether his own cases should be reheard.[81] And, finally, Pākehā regained the right to appeal partition decisions in 1886.[82]

The Māori political struggle for autonomy gained momentum in the 1880s.[83] As far as appeals were concerned, the question became whether a political compromise was possible between Māori leaders and the settler government, in the shape of Māori committees as a court of first instance, with the Native Land Court as a court of appeal. Although Grey and Native Minister John Sheehan had referred to the possibility of a greater Māori role in deciding their own titles, no concrete measure had made it off the drawing board since McLean's Native Council Bills in the early 1870s.[84] Once back in Opposition, Grey supported Māori members in their fruitless attempts to insert Māori

committees into Bryce's 1880 Bill.[85] Māori members introduced their own committee Bills in 1881 and 1882, and Bryce finally brought in a government measure in 1883.[86] The Native Committees Act of that year set up elected district committees which could hear claims in anticipation of the Native Land Court and report for its information.[87]

It was soon obvious that the 1883 committees had been given no real powers.[88] With Bryce out of office in 1884, there was a chance for Māori to get concessions from the Stout government. John Ballance (the new native minister) told Parliament that native committees would understand custom better than the court, and would be more likely to arrive at correct decisions. Nonetheless, local committees would always have members who were interested in the land in question, or who were related to those who had interests. Minorities might find it hard to get their position represented on (or accepted by) such committees. Hence, an independent, impartial court should still hear appeals.[89]

Ballance discussed these and other views at a series of hui around the North Island in 1885.[90] At the concluding, national hui at Waipatu in 1886, tribal leaders preferred to replace the court with committees but seemed willing to agree to Ballance's compromise.[91] In response to a request for a definite undertaking, the minister replied: 'Mr. Harris asks whether I approve of the district Committees having power to investigate titles, with an appeal to the Native Land Court. Yes, I am in favour of that; and I hope to be able to introduce some measure which will give larger powers to the district Committees.'[92]

The question of whether Ballance tried to give effect to his various 1885–1886 undertakings is contested.[93] He certainly created a corporate land management structure to restore some power to Māori communities.[94] Ballance may have exhausted his political capital in getting that much through Parliament.[95] His intention of turning the Native Land Court into an appellate court probably did not survive past 1885, since it did not appear in his Native Land Court Bill of that year.[96] This Bill was not even debated in the House when it was re-introduced and passed in 1886. Ballance explained that everything that needed to had been approved the year before.[97] This was despite his statements at Waipatu (see above). Ballance's 1886 Native Land Court Act 'followed generally on the old lines'.[98]

The second major issue for the 1880s was the process followed by the chief judge in deciding whether to grant rehearings. In essence, Fenton (and his successor, James Macdonald) simply followed the pre-1880 practice of making a decision based on the contents of the application(s) and a report from the judge who had heard the case.[99] The example of Kuhawaea, a 22,309-acre block in the Rangitaiki valley, was typical. Tūhoe's application for rehearing — on the basis of non-notification — was turned down because Judges Puckey and O'Brien advised that one of the applicants (and others of the tribe) were in Whakatane at the time of the hearing there. Tūhoe were offered no opportunity to make arguments or offer evidence on this point.[100] Less commonly, the chief judge went against a judge's recommendation, as with the Wairakei block in the Taupo district, which involved obvious procedural irregularities and serious injustice.[101] Before 1886, the chief judge also decided whether to grant

a rehearing of his own decisions. For Runanga 2 in the central North Island, for example, he 'simply marked the letter [of application], "refuse a rehearing"'.[102]

Rarely, the chief judge held a hearing on applications. The vast Tauponuiatia block (one and a half million acres) was an example. A large number of applications were dismissed out of hand for a variety of reasons.[103] Chief Judge Macdonald then held a hearing in January 1888 on the 20 surviving applications. It was something less than a full hearing.[104] Costs were considered inappropriate 'as the present inquiry was only for the convenience of the natives'.[105] Bruce Stirling commented that Macdonald still relied mainly on reports from Judge Scannell (who had heard the Tauponuiatia claims) in making his decisions.[106] All but one of the applications were rejected. For the application that was accepted, Macdonald noted that he was influenced by what he had heard in court.[107]

In 1891, the Court of Appeal ruled in *Mangaohane* that the practice of deciding applications without a hearing was unlawful.[108] In Fenton's view, the task was an administrative one before and after the law change in 1880. He was only acting as a judge when he was sitting in court. At all other times, he was performing duties as an 'administrative officer' or 'executive officer' of the government.[109] Under this heading, he included the following tasks: 'consider applications for rehearing on reference from Governor [under the pre-1880 legislation] .... To determine applications for rehearing (and sometimes hold Court for the purpose) [under the 1880 Act]...'[110] Given this approach, it is not surprising that the rare hearings on applications were not treated as part of the judicial business of the court — thus, the chief judge did not sit with an assessor. According to an 1894 decision of the Court of Appeal, this part of the pre-1888 practice was not illegal because the legislation clearly intended the chief judge to make the decision on his own.[111] There was, therefore, no Māori input to the decision, other than as applicants.

In the *Mangaohane* case, all three judges based their decision on section 2 of the Native Land Acts Amendment Act 1881, which referred in passing to the chief judge 'hearing' applications for rehearing. The court decided from the wording of the section that the legislature had clearly intended a hearing to be held.[112] Two of the judges also found that it would have been 'manifestly improper' or 'unreasonable' to determine these applications on the papers alone, even had the law allowed it (which it did not).[113] Within the legal paradigm, this 'standard of the time' was relevant to pre-1880 practice as well.

It cannot be doubted that the chief judge's practice of not hearing applicants resulted in very real cases of injustice. One of the most infamous was the eviction of Ngāti Haka Patuheuheu from their ancestral home in 1907. They had lost legal ownership of Te Houhi in 1886 as a result of fraud and a mistaken decision of the Native Land Court.[114] According to the Supreme Court in 1905, the mistake would have been uncovered and corrected in time if the chief judge had heard the applicants for a rehearing.[115] Instead, as usual, he relied on a confidential report from the judge who had made the original (mistaken) decision.[116] The Land Transfer Act 1885 did not protect Māori from this kind of fraud because — as Crown counsel put it — Parliament was entitled to believe that such frauds would be exposed upon appeal.[117] But Māori did not have the

protection of an automatic right of appeal, nor even a right to be heard on their applications for rehearing.[118]

In the case of Kuhawaea, discussed above, an 1897 petition met with the response that although Chief Judge Macdonald had acted illegally, the land had been sold in the interim. Ultimately, there was no remedy.[119] At the height of the scare over *Mangaohane*, however, in 1892, Parliament was almost persuaded to provide a remedy for all the Māori who might have suffered harm.[120] The Native Affairs Committee proposed that all Māori who had had their applications dismissed illegally should have 12 months to reapply. The chief judge would hear these applications with an assessor. Regardless of subsequent transactions and sales, rehearings could be granted and Māori individuals or groups readmitted into the titles.[121]

At first sponsored by the Opposition, this proposal was picked up by James Carroll, a prominent Māori politician and cabinet minister.[122] He wanted to widen its scope and give the Native Land Court discretion to include others if they could show 'good cause', not just those whose applications had been dismissed illegally.[123] Carroll's efforts were blocked by Richard Seddon, who was in charge during Ballance's illness, and by Native Minister Alfred Cadman.[124] The 1892 session was almost over, and Cadman promised that the matter would be picked up the following year.[125] This did not happen.[126] It appears that October 1892 was the last time a remedy for all the affected Māori groups was contemplated.

In the mid-1880s, however, *Mangaohane* lay in the future. Could it have been anticipated within the parameters of how colonial courts operated? The issue was raised in Parliament by Lawrence Grace in 1886, well before it became the subject of litigation. He asked the government to get the court's rules amended, to give parties the option of appearing in court or chambers to argue in support of (or against) a rehearing.[127] As he put it, a remedy was needed for a 'want which had been felt for some time past'.[128] It might lead to fewer rehearings in practice, yet give much more satisfaction to Māori. Ballance replied that the question had already been considered but had met with opposition: 'the opinion of the Chief Judge was not altogether favourable, though it went somewhat in the same direction'.[129] The minister promised that the issue would be discussed further in any amendment of the rules, but nothing had changed by the time the Atkinson government (known as the Scarecrow Ministry) took office in 1888, with Edwin Mitchelson as native minister.

The new Native Affairs Committee in 1888 recommended the creation of an appeal court.[130] Discontent with the chief judge's refusal of rehearings had been building since at least 1884, when the committee had written a general report on the subject, again recommending an appeal court.[131] In particular, a widely signed petition was presented in August 1888.[132]

At first, the government did not intend to make any changes, but the Native Bills Committee amended the Native Land Court Bill, taking the decision away from the chief judge.[133] A war of amendments followed, which all shared a common theme: that the decision had to be made in open court from now on, and with the involvement of an assessor.[134] The Legislative Council's amendment

gave two assessors the power to make the decision if they disagreed with the judge; if Māori could not have their committees, it was felt, they should have greater control of the court.[135] Atkinson asked the House to revise the Bill, giving the decision back to the chief judge, though now sitting in open court with an assessor.[136] In the end, the Council did not insist on its amendment. The Premier rejected Carroll's call for a new tribunal with retrospective power to grant rehearings to those who had been unfairly denied them.[137] Any remedy from the new system, therefore, was to be prospective only.

This major change to the appeals regime was something of a political accident. Nonetheless, the chief judge would have had to start hearing applicants anyway in 1891, after the ruling in *Mangaohane*. Without the law change, however, he would not have had to sit with an assessor.[138] Importantly, the assessor's concurrence was not required.[139] Carroll wanted the chief judge and assessor to have equal power but Atkinson preferred the 'chief authority' to rest with the judge, not the assessor.[140] Also, Ballance's 1886 reform, requiring other judges to decide whether the chief judge's cases should be reheard, was rescinded.

Mitchelson then made further reforms to the system in 1889, suggested by the new chief judge, Seth Smith.[141] Now that the chief judge would be hearing applications with an assessor, they were given the power to deal with some matters at once, rather than sending them for rehearing. They could investigate and amend any error or omission in the decision that was complained of, and order any amendments they saw fit.[142] A perception soon arose that the chief judge's hearing of applications was so full and detailed that it was virtually a rehearing itself.[143]

Nonetheless, the chief judge continued to get confidential reports from the judges of first instance. In Te Urewera, for example, the chief judge seldom went against the judges' recommendations in this period.[144] Some judges, such as Alexander Mackay in the Nelson Tenths case, wrote lengthy, erudite memoranda, explaining why their cases should not be reheard.[145] Others took the position that rehearing applications were usually a pack of lies.[146] It may be possible, from Māori Land Court files and minute books, to get a fuller picture of how far the recommendations of the original judges were followed by the chief judge and assessor from 1889 to 1894. Also, a study of the minute books could determine how often orders were amended directly at this kind of hearing, rather than sent for rehearing.

Ironically, however, it was Atkinson's 1888 reform that doomed the system of rehearings. The very fact of requiring the chief judge to hear applications in open court made the expense and delay of a subsequent rehearing seem like an unnecessary luxury. This was a major influence on the establishment of an appellate court.

In 1891, the new Liberal government, with Ballance as Premier and Cadman as native minister, proposed to overhaul the Native Land Court system. The main architect of its Bill — outside the government — was Chief Judge Seth Smith.[147] He was probably the source of Cadman's belief that the hearing of applications usually covered 'the whole field of the matter before the Court,

and, substantially, the case is reheard, so that under the present procedure there are, in fact, if a rehearing is ordered, three investigations of the matter'.[148] The solution was simple (and cheaper): to add a second judge to the intermediate hearing and turn it into an appellate court. The second judge would provide 'all the security which is now supposed to be obtained by rehearing before two Judges'.[149]

Cadman's proposals were embodied in his 1891 Native Land Bill. They were very different from the recommendations of the Liberals' royal commission on the native land laws. The 1891 commission recommended that Māori committees should decide titles, with two layers of appeal. The first appeal would be heard by a district Native Land Court judge, sitting with two assessors ('one for each side'). An appeal from the decision of this 'district court' could then be made to a Native Land Board, which was to be a national body for the administration of Māori land. Half its members were to be elected by Māori, and half appointed by the government. If the board felt that the appeal should be heard, then it could order a rehearing, which would be held by the chief judge, a district judge and two assessors.[150]

Cadman was opposed to using Māori committees as the court of first instance. He refused to incorporate this proposal into his Bill, and resisted it for the remainder of his tenure as native minister.[151] When his Bill was debated, the member for Western Maori, Hoani Taipua, called for the resolutions of a great East Coast hui in April 1891 to be embodied in the Bill.[152] The tribes gathered at Wairoa had allowed for aggrieved parties to apply to the chief judge for a rehearing (by the committee). The chief judge would sit with two assessors to decide these applications.[153] Clearly, this proposal influenced the recommendations of the 1891 commission but had little influence on Cadman.

A special joint committee of both Houses was appointed to consider Cadman's Bill. A delegation of chiefs offered strong opposition, insisting that Māori committees replace the court, and the joint committee was deeply divided. Carroll's compromise suggestion of a Supreme Court model, in which native committees would act as juries, was not adopted. It was soon clear that the Bill would have to be postponed until 1892.[154] Thus, the Liberals' first proposal for an appellate court was stopped in its tracks. It did not come back before the House until 1894, after a second general election and in the circumstances of a more disciplined party and a steadier majority.[155]

During the interval, Māori established the Kotahitanga parliament with massive tribal support and enacted their own legislation, which they then sent to Wellington for re-enactment by the New Zealand parliament. In terms of the necessity to provide a right of appeal or rehearing, there were two main schools of thought among Māori leaders. The first was that Māori bodies, as the true experts in custom, would get things right.[156] Such bodies could follow a Māori process that allowed for latecomers to make claims, and for working through disagreement, instead of closing things off too soon with a single, final decision.[157] Other Māori leaders, as Bob Hayes has pointed out, were uneasy about giving absolute and untrammelled power to elected committees.[158] The resolutions of the 1891 Wairoa hui show that there were concerns about possible bribery and bias.[159] Ngāpuhi also raised the possibility of irreconcilable local

differences.[160] Formal appeals were one potential safeguard.[161] Both schools of thought were reflected in the Māori parliament's legislation.

Between 1892 and 1894, Kotahitanga developed its main platform, which included its full control of all Māori land, the abolition of the Native Land Court and the investigation of titles by Māori committees.[162] It rejected compromise proposals: one from Carroll, that a Māori circuit council sit with the Native Land Court to ensure that it applied custom correctly; and one from Sir George Grey, that each Māori district devise its own title-investigation system, to be approved by the New Zealand government.[163] Under Carroll's scheme, rehearings were considered unnecessary (because the court would now get it right).[164] Grey's scheme would have allowed district variations on the desirability and form of appeals, but had no place for the Māori parliament.[165]

Kotahitanga produced two major land measures of its own in this period.[166] In 1893, it enacted H.K. Taiaroa's Federated Maori Assembly Empowering Bill.[167] This Bill allowed parties three months to lodge 'objections or calls for a second sitting'[168] ('nga tono whakahe, whakawa tuarua ranei')[169] with the premier of the assembly, stating the reasons for their 'objections'.[170] This indicates that the Māori parliament was thinking in terms of the system at the time: applications for rehearing rather than appeals to an appellate court; and petitions to Parliament seeking specially authorised rehearings. Presumably, the 'second sitting' referred to a sitting of the committee that had made the original decision.

In 1894, Wi Pere's Native Lands Administration Bill[171] planned to use committees already sanctioned by the government — the 1883 district committees — to decide titles. There was no specific provision for appeals or rehearings.[172] Pere favoured a process that would not 'close the door in a formal way' to parties with claims. Speaking in 1895 of how such a process might work with a commissioner in Te Urewera, he suggested assembling the local people and conferring with them. After 'giving a temporary interim judgement[,] further notice will be given to others who may be grieved by that decision to bring their cases forward and ... every care will be taken that no injustice is done'. Pere's Bill was presumably designed with this idea that appeals would still be dealt with but informally as part of a single process adapted to 'the Maori character'.[173]

Kotahitanga continued to gain momentum in these years. In 1893, it claimed to speak for 21,900 signatories.[174] By 1895, that number had grown to 34,000.[175] In 1894, the new native minister — Premier Seddon — toured Māori districts of the North Island, trying to win people away from Kotahitanga and back to the Native Land Court and to the idea of prosperity through selling or leasing 'surplus' lands. His views on the court, and what kind of appeal process it should have, were strongly influenced by this tour. He became convinced that Māori had a powerful grievance in terms of excessive costs, and that these were proving a practical deterrent to their use of the court. This reinforced the Liberals' original intention to make the appellate system cheaper by cutting out the middle stage and having a simple, two-stage process.[176]

By 1894, there was another important policy driver for establishing a specialist appellate court. Cadman's Bills of 1891 and 1892 had provided for an appeal on matters of law from the Native Appellate Court to the Court

of Appeal.[177] This was dropped from Seddon's Bill. Common law gave the Supreme Court jurisdiction to review the proceedings and quash the decisions of lower courts. For many Māori communities, resort to the Supreme Court was an avenue of 'appeal' that was simply beyond their ability to afford.[178] But some individuals or groups — and also some settlers — were able to pay for that kind of litigation.[179] While the superior courts were 'reluctant to get involved', even in questions of law and procedure, they nonetheless reviewed Native Land Court decisions from time to time.[180] This had exposed fundamental problems and created havoc in the native titles system.[181]

The government now moved to take away the 'privilege, if you may call it so, of going to the Supreme Court'.[182] Doing this was made easier by the separation of the Validation Court from the Native Land Court in 1893. Settlers would still have an appeal from the Validation Court, which dealt with the most contentious Māori–settler title disputes, to the Court of Appeal.[183] On the other hand, Seddon's 1894 Bill abolished the Trust Commissioners' court, which had certified private sales or leases of Māori land. Aggrieved parties had always had a right of appeal from the trust commissioners to the Supreme Court.[184] The Legislative Council reinserted that right into Seddon's Bill.[185]

This was a direct challenge to what Seddon was trying to achieve.[186] It was not as serious as it seemed, however, because the Bill also provided for the restoration of Crown pre-emption, so there would be few new private transactions capable of being appealed.[187] In any case, a conference of the two Houses reached a compromise: the right of appeal was dropped and the Appellate Court would be able to state a case to the Supreme Court if it needed guidance on a question of law.[188] While this was a valuable aid for the court, it was not in fact a substitute for a right of appeal.[189]

In another key difference from the 1891 Bill — and diametrically opposed to what Māori wanted — the Māori role in decision-making was downgraded. On Seddon's initiative, the 1894 Bill specified that the Appellate Court need not include an assessor, and that the assessor's concurrence was not required if one was used.[190] This must have been a bitter pill for Carroll to swallow. Even so, there was little debate about these provisions. Almost everyone was focused on the proposal to restore pre-emption. Ropata Te Ao was an exception, pleading with the House to pass the Kotahitanga Bills instead, as requested by 10,000 Māori petitioners.[191] His pleas fell on deaf ears; the government was not yet ready to consider an accommodation with Kotahitanga.

The 1894 Bill gave aggrieved parties the broadest kind of appeal rights.[192] No leave was required to file an appeal. So long as it was lodged within 30 days and a deposit was paid, the appeal could be based on any points of law or fact, process or substance, and it would be heard automatically.[193] According to Sir Robert Stout, usually Seddon's critic, the new arrangements represented equal treatment for Māori, who would now get their very own court of appeal.[194] Dillon Bell, however, was sceptical. Seddon would 'no doubt point to the provisions relating to appeal, and say, "Here is something new"'. But 'the Appellate Court is neither more nor less than the old Court of rehearing, consisting of the same number of Judges and having exactly the same constitution'.[195] Apparently, Bell did not notice the downgrading of the assessors.

What was really new, in Bell's opinion, was that the chief judge could no longer vet or decline applications. Bell objected to the automatic right of appeal, claiming it would result in a massive increase in litigation.[196] The question of whether Bell was correct on that point is not one for the present essay. Suffice to say that the new right was an important safeguard for Māori, and is generally considered an improvement (process-wise) on the previous state of affairs.[197]

Assessed from within a legal paradigm, the Appellate Court was an improvement on what had gone before it. Historians agree on that point.[198] Appeals would now be heard automatically — an important safeguard for Māori. Also, arguing from within this same paradigm, the Crown accepts that it can justly be criticised if there were systemic flaws in its legal remedies for Māori. For the period 1865 to 1888, it seems to me the process for deciding whether rehearings should be granted was neither fair nor transparent. Nor was there any Māori involvement in making the decisions. For part of this period (1880–1888), the Court of Appeal ruled that the chief judge had acted illegally in not allowing applicants a chance to be heard and to present arguments in support of their applications. The 'want' of this had already 'been felt for some time past' by 1886.[199] So when the Court of Appeal said in 1891 that the chief judge's practice had been 'manifestly improper' and 'unreasonable',[200] it asserted a 'standard of the time' that has implications for the pre-1880 period as well, since these comments were not tied to the wording of the 1881 statute. Also, the chief judge relied mostly on the confidential advice of the judges whose decisions were being appealed. This was manifestly unfair in the absence of a public inquiry or a right of reply. No general remedy was ever supplied for those Māori who lost rights as a result of the chief judge acting illegally from 1880 to 1888. One was contemplated but rejected in 1892 in the wake of the *Mangaohane* decision.

There were calls for change from within the colonial establishment. From 1876 to 1879, the Native Affairs Committee proposed an appeal as of right to an appellate court. This was also sought in a formal protest by members of the Legislative Council in 1880, and by the Native Affairs Committee in 1884 and 1888. (Even Fenton, once he was no longer chief judge, said the lack of an appellate court was a flaw in the system.[201]) Māori protests did finally win a significant change in 1888. From then on, applicants still had to convince the chief judge that they had a good case for a rehearing, but they now got to make their case in court and in the presence of an assessor. Even so, the chief judge continued to rely heavily on confidential reports from the judge of first instance, and the assessor's concurrence was not required. Ironically, this reform doomed the system of rehearings, because it seemed that Māori now had to endure the expense and delay of three hearings instead of two. This, along with a determination to free the system from the supervision of the superior courts, finally led to the creation of a Native Appellate Court in 1894.

Even though historians agree that the Appellate Court was an improvement (from a process perspective), Māori were dissatisfied with its creation. It could not have been more in contrast to Kotahitanga's 1893 Bill, which would have given them a right to apply from the decision of a Māori committee

to the Kotahitanga parliament for a 'second sitting' of the committee. With the assessors stripped of their power, and the court apparently freed from the supervision of the superior courts, absolute power now rested with the Native Appellate Court judges. As the Urewera Tribunal observed: 'Sending aggrieved Maori back to the Court simply resulted in a rerun of the same defective process.'[202] In that broad sense, the new Native Appellate Court was still 'an appeal from Fenton to Fenton'. Nothing could have been further from what Māori — as represented in their Kotahitanga parliament — wanted in 1894.

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Waitangi Tribunal, Wellington

NOTES

1 Alan Ward, *National Overview*, 3 vols, Waitangi Tribunal Rangahaua Whanui Research Series, Wellington, 1997, I, pp.12–36.

2 Robyn Anderson, Richard Boast, Bob Hayes, Don Loveridge, Bruce Stirling, Tony Walzl, ‘Agreed Historian Position Statement on Native Land Court Issues — March, April and May 2009’, Whanganui record of inquiry (Wai 903), paper 6.2.5, pp.73–74.

3 See, for example, Grant Young, Michael Belgrave and Tom Bennion, *Native and Maori Land Legislation in the Superior Courts, 1840–1980*, Auckland, 2005, pp.7–11; Keith Pickens, ‘Introduction and Operation of the Native Land Court in the Whanganui Inquiry District 1866–1899’, 2006, Wai 903, pp.120–27; Keith Pickens, ‘Operation of the Native Land Court in the National Park Inquiry District in the Nineteenth Century’, 2005, National Park record of inquiry (Wai 1130), document A50, pp.38–42.

4 See, for example, David V. Williams, *‘Te Kooti Tango Whenua’: the Native Land Court 1864–1909*, Wellington, 1999; Donald Loveridge, ‘The Origins of the Native Land Acts and the Native Land Court in New Zealand’, 2000, Hauraki record of inquiry (Wai 686), document P1.

5 See, for example, Pickens, ‘National Park’, pp.395–404.

6 Annsley Kerr and Libby Shaw, closing submissions on behalf of the Crown, June 2005, Te Urewera record of inquiry (Wai 894), document N20, topics 8–12, pp.39, 77–83, 85–88, 92–95.

7 ibid., p.22.

8 See, for example, Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, Wellington, 2 vols, 2004, I, pp.339–94; Waitangi Tribunal, *The Ngati Awa Raupatu Report*, Wellington, 1999, pp.71–76.

9 Judith Binney, ‘History and Memory: The Wood of the Whau Tree, 1766–2005’, in Giselle Byrnes, ed., *The New Oxford History of New Zealand*, Melbourne, 2009, p.83.

10 For an example of these two approaches, see ibid, pp.73–98.

11 G. Byrnes, ‘Past the Last Post? Time, Causation and Treaty Claims History’, *Law Text Culture*, 7, 2 (2003), p.253. Byrnes defines postcolonialism as a ‘critical engagement with the aftermath of colonisation’ which ‘critiques, and in a political sense, seeks to undermine the structures, ideologies and institutions that gave colonisation meaning’ (p.253). See also pp.251–70.

12 See, for example, Robyn Anderson, ‘Whanganui Iwi and the Crown, 1865–1880’, Wai 903, document A70, pp.58–110, 153–210.

13 Virginia Hardy, Sally McKechnie, Damen Ward and Peter Andrew, closing submissions on behalf of the Crown, 14 October 2005, Central North Island record of inquiry (Wai 1200), paper 3.3.111, part 2, pp.7, 170–71.

14 For a full discussion of this issue, see Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, 4 vols, Wellington, 2008, I, pp.166–72, 178–92.

15 Angela Ballara, ‘Tribal Landscape Overview, c.1800–1900, in the Taupo, Rotorua, Kaingaroa, and National Park Inquiry Districts’, 2004, Wai 1200, document A65, pp.273–74.

16 Waitangi Tribunal, *Turanga*, II, pp.412–13.

17 Native Lands Act 1862, ss.7–9, 12. In the Turanga inquiry, Crown counsel submitted that when a body made recommendations rather than final awards, there was no formal right of appeal (Craig Linkhorn, closing submissions on behalf of the Crown (issue 9), June 2002, Turanga record of inquiry (Wai 814), document H14(9), pp.15, 42). Broadly speaking, this does appear to have been the principle that New Zealand legislators followed, although there were notable exceptions, including the Validation Court (1893) and the Urewera Commission (1896).

18 Native Lands Act 1865, s.81.

19 In 1871, the Fox government introduced a Bill drafted by Fenton, in which the chief judge was given the power to order rehearings, and to recommend rehearings to the government for six months after the deadline for ordering a rehearing. This Bill was withdrawn, however, and McLean retained the status quo in his Act of 1873. (See *New Zealand Parliamentary Debates* (NZPD), 1871, 11, p.33; Native Land Court Bill 1871, clauses 74–75, *Bills Rejected*, 1871–1872; Native Lands Act 1873, s.58.)

20 Native Lands Act 1865, s.81. Under this section of the Act, the Governor in Council could order a rehearing before ‘one or more Judges of the Court and two or more Assessors as may be specified in the Order in Council’. The Order in Council annulled the proceedings of the court ‘and the case shall commence *de novo*’.

21 *Appendices to the Journals of the House of Representatives* (AJHR), 1868, A-19, p.1.

22 In 1870, for example, Chief Judge Fenton told disputing European purchasers that he would not issue an amended certificate of title for Kauaeranga 14 until they had 'an opportunity of sending in their application to the Governor in Council for a re-hearing', *Daily Southern Cross*, 10 February 1870, p.4.

23 See, for example, Grant Phillipson, 'Report to the Waitangi Tribunal on Matters of Relevance to the Chatham Islands Claims', 1994, Chatham Islands record of inquiry (Wai 64), pp.21–35.

24 Native Lands Act 1873, s.58. Applicants had to apply for a rehearing within six months of the decision.

25 Martin did not change these aspects of the provision for rehearings when he drafted a Bill for McLean to consider adopting in 1871. See 'Draft Proposed Bill by Sir Wm. Martin: The Native Land Court Act', clause 46, AJHR, 1871, A-2, p.13.

26 AJHR, 1885, I-2B, p.50; Native Land Laws Commission, Minutes of Evidence, AJHR, 1891, Sess. II, G-1, p.46; Pickens, 'National Park', p.39.

27 Ward, II, p.242.

28 Waitangi Tribunal, *Te Urewera, pre-publication, Part 2*, 2 vols, Wellington, 2010, II, pp.533–37, 540–47.

29 Williams, pp.331–32; Native Lands Act 1873, s.107; Native Land Act Amendment Act 1877, s.6.

30 See, for example, Ballara, p.732; Keith Pickens, 'Introduction and Operation of the Native Land Court in the Central North Island', 2004, Wai 1200, document A78, pp.116–18; David Armstrong and Evald Subasic, 'Northern Land and Politics: 1860–1910', 2007, Te Paparaki o Te Rahi (Northland) record of inquiry (Wai 1040), document A12, pp.752–53; David Alexander, *The Hauraki Tribal Lands, Part 3: Ohinemuri District, Te Aroha and Paeroa District, Wairoa and Orere District*, Paeroa, 1997, pp.7–8, 249–50.

31 Hall to Gordon, 5 May 1881, and transmitted by Gordon to Lord Kimberley, 16 May 1881, *Wanganui Chronicle*, 23 September 1881, p.3. These documents were laid on the table of the House and then published in the *Wanganui Chronicle*.

32 'Land Purchases in Poverty Bay', AJHR, 1877, G-5; 'Report on petition of Robert Cooper, together with minutes of evidence', AJHR, 1878, I-3A, p.1; Kathryn Rose, 'Te Aitanga-a-Mahaki Land and Autonomy, 1873–1890', 1999, Wai 814, document A17, pp.370–77, 402–404.

33 AJHR, 1878, I-3A, p.6.

34 Rose, p.373.

35 David Alexander, *The Hauraki Tribal Lands, Part 2: Mercury Bay District, Tairua and Whangamata District, Thames and Hikutaia District*, Paeroa, 1997, pp.152–58.

36 Armstrong and Subasic, pp.752–55.

37 Judge Halse, minute, 24 September 1878 (Gwenda Paul, comp., supporting documents to 'Te Houhi and Waiohau 1B', Eastern Bay of Plenty record of inquiry (Wai 46), document H4(f), p.35).

38 Paul, supporting documents, Wai 46, document H4(f), pp.22–46.

39 See, for example, Alexander, *The Hauraki Tribal Lands, Part 2*, p.156.

40 See, for example, *Winiata Te Wharo v Davy* (1894) 12 *New Zealand Law Reports* (NZLR) 502, 512.

41 Ward, II, p.242.

42 See, for example, Armstrong and Subasic, p.864.

43 Ward, II, p.242; Nicola Bright, 'The Alienation History of the Kuhawaea No.1, No.2A, and No.2B Blocks', 1998, Wai 894, document A62, p.52, citing Judge O'Brien to Chief Judge Fenton, 11 December 1882; Pickens, 'Central North Island', pp.111–32; Waitangi Tribunal, *He Maunga Rongo*, II, pp.498–501.

44 See, for example, Williams, pp.44–46, 78–81; Ballara, pp.596–97, 614–20; Pickens, 'National Park', pp.186–87, 391; Robyn Anderson and Keith Pickens, *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangitikei, and Manawatu*, Waitangi Tribunal Rangahaua Whanui Research Series, Wellington, 1996, pp.135–37; Armstrong and Subasic, p.864.

45 See, for example, Pickens, 'National Park', p.391.

46 Vincent O'Malley, *Agents of Autonomy: Maori Committees in the Nineteenth Century*, Wellington, 1998, pp.41–57.

47 Native Councils Bill 1873, no.4, clauses 40–42, *Bills Rejected*, 1873.

48 Waitangi Tribunal, *He Maunga Rongo*, I, pp.306–12; Ray Fargher, *The Best Man Who Ever Served the Crown? A Life of Donald McLean*, Wellington, 2007, pp.315–16.

49 Waitangi Tribunal, *Turanga*, II, pp.424–25; Waitangi Tribunal, *Te Urewera Part 2*, II, pp.529–78; Williams, pp.84–85.
50 AJHR, 1876, I-4, p.9.
51 ibid.
52 ibid., pp.9, 10, 11; AJHR, 1877, I-3, p.12; AJHR, 1879, Sess.II, I-2, p.2.
53 Native Appeal Court Bill 1877, no.68, *Bills Rejected*, 1877; NZPD, 1877, 25, p.507.
54 NZPD, 1877, 25, pp.503, 507.
55 ibid., pp.503–506.
56 ibid., p.507.
57 Native Appeal Court Bill 1877, no.68, clause 15, *Bills Rejected*, 1877.
58 NZPD, 1877, 25, pp.503–504.
59 ibid., p.504.
60 ibid.
61 For McLean’s ill health and withdrawal from parliamentary business before his formal resignation at the end of the 1876 session, see Fargher, pp.324, 346–47.
62 NZPD, 1876, 21, pp.582–83.
63 NZPD, 1877, 25, pp.506, 509. The Native Appeal Court Bill was deferred until 1878 by a vote of 13 to 10 in the Legislative Council. The native land laws enacted in 1877 were the work of the new Grey government.
64 NZPD, 1877, 27, p.237.
65 NZPD, 1876, 21, p.582; see also AJHR, 1876, I-4, pp.9, 10, 11; AJHR, 1877, I-3, p.12.
66 NZPD, 1880, 37, p.49.
67 ibid.
68 Native Land Court Act 1880, s.47.
69 ibid.
70 Pickens, ‘National Park’, p.21.
71 Hall to Gordon, 5 May 1881, *Wanganui Chronicle*, 23 September 1881, p.3.
72 Pickens, ‘National Park’, pp.39–40.
73 Native Land Court Act 1880, s.47.
74 ibid.
75 Young, Belgrave and Bennion, p.8.
76 Native Land Court Act 1880, s.47.
77 NZPD, 1880, 36, pp.3, 46.
78 Henry Scotland, T. Fraser, J.N. Wilson, H.K. Taiaroa, Mokena Kohere, ‘Protest against Native Land Court Bill’, 7 July 1880, *Journals of the Legislative Council* (JLC), 1880, p.58.
79 The secretary of state for the colonies sought an explanation from Governor Gordon, who provided him with the 1881 memorandum of Premier Hall cited above.
80 Native Land Acts Amendment Act 1881, s.2; Native Land Court Act 1886, s.76.
81 Native Land Court Act 1886, s.76. The responsibility was transferred to two other judges, chosen by the chief judge.
82 Native Land Court Act 1886, s.75.
83 O’Malley, pp.137–206.
84 Waitangi Tribunal, *Turanga*, II, pp.422–23; NZPD, 1877, 27, p.237; NZPD, 1878, 30, p.895.
85 *Timaru Herald*, 13 August 1880, p.3.
86 O’Malley, pp.138–55.
87 Native Committees Act 1883.
88 Waitangi Tribunal, *He Maunga Rongo*, I, pp.316–19, 340.
89 NZPD, 1884, 50, pp.315–16.
90 See ‘Notes of Native Meetings’, AJHR, 1885, G-1; Waitangi Tribunal, *He Maunga Rongo*, I, pp.341–44.
91 ibid., pp.349–53; ‘Native Meeting at Hastings, Notes of’, AJHR, 1886, G-2, pp.10–20.
92 ibid., p.17.
93 O’Malley, pp.202–204; Donald Loveridge, ‘The Development of Crown Policy on the Purchase of Maori Lands, 1865–1910: a Preliminary Survey’, 2004, Wai 1200, document A77, pp.138–54; Waitangi Tribunal, *He Maunga Rongo*, I, pp.341–56; Cathy Marr, ‘The Waimarino Purchase Report: the investigation, purchase and creation of reserves in the Waimarino block, and associated issues’, 2004, Wai 1200, document E4, pp.237–48; 317–42.
94 The Native Land Administration Act 1886 provided for elected block committees to manage land: see Waitangi Tribunal, *He Maunga Rongo*, I, pp.347–56.

95 Ward, II, p.245.
96 Native Land Court Consolidation Bill 1885, no.61, *Bills Rejected*, 1885.
97 NZPD, 1886, 54, p.331.
98 Native Land Laws Commission, Minutes of Evidence, AJHR, 1891, Sess.II, G-1, p.148.
99 Fenton retired as chief judge in 1882, when he was replaced by James Macdonald.
100 Bright, 'Kuhawaea', pp.51–52; Judge Puckey, minute for Chief Judge, 25 November 1882 (Bright, comp., supporting documents, document A62(a), p.C13).
101 Evelyn Stokes, *Wairakei Geothermal Area: Some Historical Perspectives*, Hamilton, 1991, pp.40–49; Waitangi Tribunal, *He Maunga Rongo*, II, pp.474–75. The judge who recommended against a rehearing of his Wairakei decision was J.E. Macdonald, soon after to be chief judge. In the Wairakei case, the interpreter had been bribed by the Pākehā purchaser, Judge Macdonald cut short the hearing of the counter-claimants because he had to leave, delivering a judgment instead of adjourning the case, and only five of many owners were put onto the certificate (but the list was not read out in open court).
102 Bruce Stirling, 'Taupo-Kaingaroa Nineteenth Century Overview', 2 vols, 2004, I, Wai 1200, document A71, pp.422–23.
103 ibid., II, pp.994–1003; Waitangi Tribunal, *He Maunga Rongo*, II, p.479.
104 Stirling, II, pp.1007–1010.
105 ibid., p.1010.
106 ibid.
107 ibid., p.1018.
108 *In re The Mangaohane Block* (1891) 9 NZLR 731.
109 AJHR 1886, I-8, pp.15–16.
110 ibid.
111 *Winiata Te Wharo v Davy* (1894) 12 NZLR 502, 502–505, 513, 519–20. (This includes the 1893 Supreme Court judgment, as well as the 1894 judgment in the Court of Appeal.)
112 *In re The Mangaohane Block* (1891) 9 NZLR 731–32, 750, 753, 757–58. Section 2 of the Native Land Acts Amendment Act 1881 states: 'The Chief Judge, in the exercise of his duty of hearing applications for rehearing may, if he thinks it just, order that part of the case, or title to part of the land, be reheard.'
113 *In re The Mangaohane Block* (1891) 9 NZLR 731, 752–53, 757.
114 Waitangi Tribunal, *Te Urewera, Part 2*, II, pp.843–98; Judith Binney, *Encircled Lands: Te Urewera, 1820–1921*, Wellington, 2009, pp.279–94, 471–95.
115 *Beale v Tihema Te Hau and Others and the Attorney General* (1905) 24 NZLR 883, 887–88.
116 ibid.; Waitangi Tribunal, *Te Urewera, Part 2*, II, pp.859–61.
117 Kerr and Shaw, closing submissions, topics 8–12, pp.82–83.
118 Waitangi Tribunal, *Te Urewera, Part 2*, II, pp.851, 861–62, 885.
119 Davy to Chairman, Native Affairs Committee, 10 August 1898 (Bright, comp., supporting documents, p.B7); Waitangi Tribunal, *Te Urewera, Part 2*, II, pp.594–96.
120 For the 1892 scare over *Mangaohane*, see NZPD, 1892, 78, pp.509–10, 629, 656–61; *Otago Witness*, 20 October 1892, p.17.
121 NZPD, 1892, 78, pp.656, 660–61.
122 Carroll was member for Eastern Maori and also the Member of the Executive Council representing the Native Race. In the next election, he stood in a general seat and was thereafter native minister in Seddon's Cabinet.
123 NZPD, 1892, 78, pp.656–57.
124 ibid., pp.656–61, 732–33; *Poverty Bay Herald* (PBH), 1 October 1892, p.3; PBH, 5 October 1892, p.2; *Evening Post* (EP), 27 June 1893, p.3.
125 EP, 27 June 1893, p.3.
126 The obvious opportunity was the new Native Land (Validation of Titles) Act 1893, but this was introduced and passed without the clauses Carroll had tried to insert in the Native Land (Validation of Titles) Act 1892. See Native Land (Validation of Titles) Bill 1893, no.109-1; Native Land (Validation of Titles) Bill 1893, as reported from the Native Affairs Committee, 12 September 1893, no.109-2; Native Land (Validation of Titles) Bill 1893, as passed by the House of Representatives and transmitted to the Legislative Council, 14 September 1893, no.109-3; Native Land (Validation of Titles) Act 1893.
127 NZPD, 1886, 56, pp.604–605.
128 ibid., p.605.
129 ibid.

130 AJHR, 1888, I-3, p.12.

131 ‘Claims for rehearing refused by the Chief Judge, Native Land Court’, 17 October 1884, AJHR, 1884, I-2, p.1.

132 *Nelson Evening Mail*, 10 August 1888, p.3; *Te Aroha News*, 15 August 1888, p.3. This petition sought, among other things, the removal of Chief Judge Macdonald, a right of appeal from the chief judge’s decisions about rehearings to the Supreme Court or to Parliament, and the removal of the power of granting rehearings from the chief judge altogether.

133 Native Land Court Act 1886 Amendment Bill 1888, as reported from the Native Bills Committee, no.51-2.

134 The sequence of events in this ‘war of amendments’ was as follows. When the Bill was introduced to the House, it said nothing about applications for rehearing. The Native Bills Committee amended it to give a minimum of two Native Land Court judges the power to decide whether rehearings should take place, sitting in open court but without an assessor. When the Bill returned to the House, Atkinson obtained an amendment giving the power back to the chief judge but now sitting in open court with an assessor. The Legislative Council amended this clause to vest the decision in a court consisting of a single judge and two assessors. The council’s amendment specified that the majority decision would be the decision of the court. Atkinson asked the House not to accept the council’s amendment. Despite support for it from the Māori members, the House struck out the amendment and sent the Bill back to the council, which agreed not to insist on it.

135 JLC, 1888, p.192; Native Land Court Act 1886 Amendment Bill 1888, as amended by the Legislative Council, no.51-5; NZPD, 1888, 63, p.216.

136 *Te Aroha News*, 18 August 1888, p.5; NZPD, 1888, 63, p.457; *Journals of the House of Representatives* (JHR), 1888, p.355; Native Land Court Act 1886 Amendment Act 1888, s.24.

137 NZPD, 1888, 63, pp.457–58.

138 *Winiata Te Wharo v Davy* (1894) 12 NZLR 502, 513, 519–20.

139 Native Land Court Act 1886 Amendment Act 1888, s.24. As far as I can tell from reading this section together with the principal 1886 Act, the assessor’s concurrence was not required. I have not seen this issue discussed anywhere, nor am I aware of it having been tested in the courts. The 1889 Amendment Act (s.12) required that if the chief judge decided to correct errors or omissions while in the process of hearing applications for rehearing, then the assessor’s concurrence was required for the corrections. The wording of this section seems to me to confirm that the assessor’s concurrence was not required for the decision to grant or decline a rehearing.

140 NZPD, 1888, 63, p.457.

141 NZPD, 1889, 65, p.382.

142 Native Land Court Acts Amendment Act 1889, s.12. For an example of how this worked in practice, see Grant Young and Michael Belgrave, ‘The Urewera Inquiry District and Ngati Kahungunu: Customary Rights and the Waikaremoana Lands’, 2003, Wai 894, document A129, pp.72–73.

143 Native Land Laws Commission, Minutes of Evidence, AJHR, 1891, Sess.II, G-1, pp.43, 117; A.J. Cadman, Memorandum accompanying Native Land Bill, 1891, no.104, *Bills Thrown Out*, 1891, p.8.

144 Peter Boston and Steven Oliver, ‘Tahora’, 2002, Wai 894, document A22, pp.88–96; Tracy Tulloch, ‘Whirinaki’, 2002, Wai 894, document A9, pp.30–31; Tracy Tulloch, ‘Heruiwi 1-4’, 2000, Wai 894, document A1, pp.62–66, 68–69.

145 David Armstrong, ‘“The Right of Deciding”: Rangitane ki Wairau and the Crown, 1840–1900’, Te Tau Ihu record of inquiry (Wai 785), document A80, not dated, pp.170–73.

146 Gudgeon to Chief Judge, 7 July 1891 (Gwenda Paul, comp., supporting papers to ‘Heruiwi No.4’, Ika Whenua Rivers record of inquiry (Wai 212), document E6(d), section 2, p.82).

147 NZPD, 1891, 74, p.425.

148 A.J. Cadman, Memorandum, *Bills Thrown Out*, 1891, p.8.

149 ibid.

150 Native Land Laws Commission, Report, AJHR, 1891, Sess.II, G-1, pp.xix, xxiii–xxiv.

151 Bob Hayes, ‘A Study of the Uses and Misuses of the 1891 Native Land Laws Commission’, 2008, Wai 903, document A155, pp.251–52, 265–66, 279–80.

152 NZPD, 1891, 73, pp.577–78.

153 Native Land Laws Commission, Minutes of Meetings, AJHR 1891, Sess.II, G-1, pp.67–69.

154 NZPD, 1891, 74, pp.423–34; Hayes, pp.252–58.

155 A slightly revised Bill was given a first reading in 1892 but then lapsed without any discussion.

156 See, for example, NZPD, 1892, 78, pp.516–17; AJHR, 1891, Sess.II, G-1, Minutes of Evidence, p.61, Minutes of Meetings, pp.21–22.

157 'Urewera Deputation, Notes of Evidence', 7 September 1895, pp.52–53 (Cathy Marr, supporting documents to 'The Urewera District Native Reserve Act 1896 and Amendments, 1896–1922', Wai 894, document A21(b), pp.216–17).

158 Hayes, pp.156–58, 160, 165, 183.

159 Native Land Laws Commission, Minutes of Meetings, AJHR 1891, Sess.II, G-1, p.68.

160 ibid., pp.26–27.

161 ibid., pp.26–27, 67–69, 72.

162 For recent discussions of Kotahitanga, see Armstrong and Subasic, pp.1275–325; Bruce Stirling, 'Wairarapa Maori and the Crown, volume three, Whakautu: The Response', 2002, Wairarapa ki Tararua record of inquiry (Wai 863), document A50, pp.211–91.

163 'Maori Parliament of New Zealand: First Sitting: Held at Te Waipatu, June 14, 1892', translation of proceedings, pp.13–14, 48–52; 'Parliament at Te Waipatu, 1893', translation of proceedings, pp.iii, 102–16 (Kathryn Rose, supporting papers, Wai 1200, document H13(c)); Native Empowering Bill 1892 (Sir George Grey), no.147, *Bills Rejected*, 1892.

164 'Maori Parliament of New Zealand: First Sitting: Held at Waipatu, June 14, 1892', p.13.

165 Native Empowering Bill 1892 (Sir George Grey), no.147, *Bills Rejected*, 1892.

166 'Parliament at Te Waipatu, 1893', pp.136–38; PBH, 6 June 1894, p.2.

167 'Parliament at Te Waipatu, 1893', pp.136–38. 'Federated Maori Assembly Empowering Bill' is the title that was used for this piece of legislation when it was introduced as a Bill in the New Zealand Parliament.

168 'Parliament at Te Waipatu, 1893', p.138. The Native Department translated this at the time as 'appeals'. (AJHR, 1893, J-1, p.3.)

169 'Ture Huinga Whakamana Kotahitanga Maori', clause 7, AJHR, 1893, J-1, p.5.

170 'Parliament at Te Waipatu, 1893', p.138.

171 For this Bill, as with the Federated Maori Assembly Empowering Bill, I have used the title under which it was introduced to the New Zealand Parliament.

172 Native Lands Administration Bill 1894 (Wi Pere), no.100, clauses 32, 54, 55, 57, *Bills Rejected*, 1894.

173 'Urewera Deputation, Notes of Evidence', pp.52–53 (Marr, supporting documents, pp.216–17).

174 'Parliament at Te Waipatu, 1893', pp.97, 137; AJHR, 1893, J-1, p.2.

175 'Fourth Sitting of the Kotahitanga Parliament of the Maori People in New Zealand, 7 March, 1895, Rotorua-nui-a-kahu', translation of proceedings, p.31. (Kathryn Rose, supporting papers, Wai 1200, document H13(c).)

176 NZPD, 1894, 86, p.373; PBH, 9 October 1894, p.3; see also 'Pakeha and Maori: A Narrative of the Premier's Trip Through the Native Districts of the North Island', AJHR, 1895, G-1.

177 Native Land Bill (Cadman), no.104, *Bills Thrown Out*, 1891; Native Land Court Bill 1892 (Cadman), no.109, *Bills Rejected*, 1892.

178 Waitangi Tribunal, *Te Urewera, Part 2*, II, pp.869–79, 882, 887.

179 See, for example, Stirling, II, p.1024–27.

180 Young, Belgrave and Bennion, p.37.

181 ibid., pp.12–39; Waitangi Tribunal, *Turanga*, II, pp.460–69.

182 NZPD, 1894, 86, p.373; see also p.919.

183 Native Land (Validation of Titles) Act 1893, ss.21–22.

184 Native Lands Frauds Prevention Act 1870, s.7; Native Lands Frauds Prevention Act 1881, s.16.

185 Native Land Court Bill 1894, as amended by the Legislative Council, no.91-6, clause 92.

186 NZPD, 1894, 86, p.919.

187 Crown transactions were already exempt from the trust commissioners' scrutiny, and remained so in the Native Land Court. (See Native Lands Frauds Prevention Act 1881 Amendment Act 1888, s.8; Native Land Court Act 1894, s.76; and Waitangi Tribunal, *Te Urewera, Part 2*, II, p.790.)

188 JHR, 1894, pp.477–78; JLC, 1894, pp.243–44.

189 Despite the government's intention, the Native Land Court Act 1894 did not go far enough to free the new appellate court from the possibility of review by the superior courts. The chief judge recommended further law changes to bring this about in 1895. (See Richard Boast, *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865–1921*,

Wellington, 2008, p.195; NZPD, 1895, 91, pp.454–55; Native Land Laws Amendment Act 1895, ss.57–61.)

190 The assessor's role was downgraded in the Native Land Court as well. The sequence of amendments was as follows. The original Bill (no.91-1) required an assessor to form part of the Appellate Court for an appeal against any decision involving an assessor in the lower court. The Bill was silent as to whether an assessor's concurrence was required in either court. The Native Affairs Committee amended the Bill (no.91-2) to allow the Appellate Court itself to decide whether an assessor would sit with it, and specifying that the assessor's concurrence was not required in the Appellate Court's decisions. The Bill was then amended in the House (91-4), on Seddon's motion, to specify that the assessor's concurrence was not required in the lower court either. (Native Land Court Bill 1894, as reported from the Native Affairs Committee, 21 September 1894, no.91-2, clause 113A; JHR, 1894, pp.366, 384; Native Land Court Bill 1894, as transmitted from the House of Representatives to the Legislative Council, 9 October 1894, no.91-4, clause 18.)

191 NZPD, 1894, 86, p.478. The Bills referred to by Mr Te Ao were Heke's Native Rights Bill and Pere's Native Land Administration Bill. These Bills had replaced the 1893 Federated Maori Assembly Empowering Bill.

192 NZPD, 1894, 86, p.387.

193 Native Land Court Act 1894, ss.82–87. The appellant(s) had to file a statement of the grounds for the appeal, which the chief judge had discretion to allow to be amended. Having filed this statement, no new grounds for appeal could be admitted later without the agreement of the court. Within these restrictions, the Appellate Court would hear the case, with jurisdiction to affirm the original decision or make any other decision 'as to the Appellate Court may seem just' (s.90). Its decisions were to be 'final and conclusive' (s.93).

194 NZPD, 1894, 86, pp.386–87. Stout thought that evidence should be limited to that taken in the lower court, but otherwise expressed himself satisfied with a right of appeal that had, as he put it, 'no limits'.

195 ibid., p.466.

196 ibid.

197 Waitangi Tribunal, *Turanga*, II, pp.450–52; Waitangi Tribunal, *Te Urewera, Part 2*, II, pp.851, 861–62, 885; Waitangi Tribunal, *The Hauraki Report*, 3 vols, Wellington, 2006, II, p.781.

198 Pickens, 'National Park', pp.40–41, 402; Ward, II, p.242; Boast, p.195; Williams, p.96; Bryan Gilling, 'Engine of Destruction? An Introduction to the History of the Maori Land Court', *Victoria University of Wellington Law Review*, 25 (1994), pp.135–36.

199 NZPD, 1886, 56, p.605.

200 *In re The Mangaohane Block* (1891) 9 NZLR 731, 752–53, 757.

201 Pickens, 'National Park', p.39.

202 Waitangi Tribunal, *Te Urewera, Part 2*, II, p.579.