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Folkland to Bookland

F.D. FENTON AND THE ENCLOSURE OF THE MĀORI 'COMMONS'*

MY 1955 MASTERS THESIS and several more recent studies of the early years of the Native Land Court in New Zealand concentrated on the role of the court as an engine behind the alienation of Māori land. Sir Hugh Kawharu called the court an 'Engine of Destruction', as did David Williams, who named his book *Te Kooti Tango Whenua* ('The Land Taking Court').[1] This essay does not further examine that conclusion but returns to a precedent that I briefly noticed in my thesis: that the native land legislation and court had followed the precedent of the English enclosures of common land. I suggested that the English enclosure movement 'had completed the long transition from communal to individual property' and that the native land legislation and court had attempted to perform a similar task in New Zealand: 'Individual Maori property was expected to emerge from the application of "Enclosure laws", not altogether unlike those which had caused so much distress in England.'[2] This essay further examines that precedent and the role of its main exponent, F.D. Fenton, the first chief judge of the Native Land Court, in promoting it.

Since the completion of my thesis and particularly since 1985 there has been much research and publication on the legislation and the court, mainly in reports prepared for or published by the Waitangi Tribunal. In 1985 the Tribunal was given retrospective jurisdiction to examine claims by Māori of Crown breaches of the principles of the Treaty of Waitangi since the Treaty was signed in 1840. That extension of jurisdiction encouraged a flood of historical claims, many of which have been reported on in the Tribunal's published district reports. Several of these and the research reports commissioned by the Tribunal, claimants and the Crown for various enquiries are used for this essay.[3] All of the reports have, in turn, been heavily reliant on the work of Alan Ward, also referred to frequently below.[4]

Francis Dart Fenton belonged to a prominent Yorkshire legal family and received his legal training in his uncle's law firm in Huddersfield. He came to New Zealand in 1850, disembarked in Auckland and soon afterwards travelled to Waikato where he intended to buy Māori land with his cousin, James Armitage. Fenton described this journey in a letter to his mother, noting that his party had travelled some 200 miles 'to see the country & make a choice of our land'. He commented on missionary stations and Māori settlements along the lower Waikato River and added that: 'these natives wanted us very much to buy land there and settle amongst them but their character is no inducement for one to go and settle amongst them, they are very covetous and try to get all they can out of you.'[5] In this letter Fenton treated the purchase of Māori land as a perfectly normal, legal procedure even though private purchases were prohibited under

the 1846 Crown Land Ordinance which reasserted the Treaty of Waitangi-based Crown right of pre-emption. Fenton and Armitage became squatters on Māori land at Paetai, near the mouth of the river and near the station of the Church Missionary Society missionary, Robert Maunsell. However, their situation was fraught with danger since there were numerous disputes with Māori, soon to come to the attention of Fenton when he became a magistrate in Waikato, as wandering Pākehā-owned cattle destroyed Māori cultivations. Fenton had a ready solution, discussed more fully below: to fence off individual holdings, an integral requirement of enclosure. Though the two men ran sheep and cattle on the holding, Fenton himself was not much involved and left the day-to-day operations to Armitage, who remained there until he was killed by a party of Ngāti Maniapoto in September 1863 while he was organising supplies for the British military forces after the invasion of Waikato.[6]

Because of his legal qualifications Fenton soon gained several official positions. Governor Grey appointed him as clerk in the Registry of Deeds office in 1851. He was successively resident magistrate at Kaipara (1854–1856); temporary native secretary in 1856; resident magistrate at Waipa and Waikato (1857–1858); civil commissioner in Waikato (1861); assistant law officer at Auckland (1859–1862); Crown law officer (1862–1865); and finally, from January 1865, chief judge of the Native Land Court until his retirement in 1882.[7]

Fenton's private and official experiences in Waikato were particularly important in the development of his ideas about the transformation of Māori customary land tenure into officially recognised land titles. In 1859 he published *Observations on the State of the Aboriginal Inhabitants of New Zealand*, a paper that ably summed up existing knowledge on the causes of Māori depopulation. This essay is not concerned with that analysis but rather with Fenton's remedy for the depopulation. He recommended that Māori be given 'security and permanence to the occupation and possession of land [which] will be achieved by the grand requisite of civilization, fixity of residence'. This would 'wean the Maoris from their present desultory plan of agriculture …. Permanent fences and cultivated grasses would give them income from sheep and cattle whose milk will supply nutritious food for children.'[8] Fenton appended to his *Observations* a 'Scheme for the Partition and Enfranchisement of Lands held under Native Tenure'. He described this as a 'simple scheme for settling the Native title to land somewhat analogous to the system pursued by our Anglo-Saxon forefathers'; a process 'of separating common titles and apportioning lands [that] is not yet completed even in England'.[9]

Though he had no official sanction to do so, Fenton was already trying to carry out an enclosure scheme with Māori land in the Waikato while he was supposed to be attending to his duties as resident magistrate. His activities were outlined in his journals of that magistracy, which were printed in parliamentary papers. As I noted in an essay on the King movement, Fenton's attempts to interfere with Māori tenure and occupation of land, combined with his and Armitage's squatting on land at Paetai and their direct links with the 'Free Trade' in Māori lands movement in Auckland, heightened Kingite fears of land loss. Those activities contributed directly to their decision to elevate Potatau te Wherowhero to the kingship in 1858.[10]

Fenton's 'Scheme for the Partition and Enfranchisement' of Māori land envisaged a formal enquiry into ownership, prior to the Crown issuing a certificate of ownership and eventually a Crown grant. Fenton considered that Māori and the Crown should be jointly involved in this enquiry, a principle that had been recognised recently with the Native District Circuit Courts Act and the Native Districts Regulation Act. He was aware that it was 'very questionable whether the suspicions of the people will allow them to permit the adjudication of their lands in purely European Courts, or otherwise by purely European machinery'. Though Fenton did not mention it, this procedure was also envisaged in a third measure: the Native Territorial Rights Bill.

According to Ward, Native Minister C.W. Richmond was 'the framer' of this legislation,[11] but it is so infused with Fenton's ideas that it is likely that Richmond, who had close links with Fenton,[12] took his recommendations into consideration. However, rather than promoting the idea of Māori self-rule, Fenton recommended using the machinery that had been employed in the English enclosure movement: 'No machinery can be invented more admirably adapted to the performance of the duty of investigation of the ownership and partition of the common lands of the country, than the species of Court Leet and Great Court Baron recently created by the Native [District] Circuit Courts Act 1858.'

Then, in terms reminiscent of the English enclosures, Fenton set out how the 'process of legalizing tenure' would follow with Māori land. A 'book of Record' for registering the names of recognised owners and the boundaries of their land was to be kept in each magistrate's court house. Once a request for an enquiry was received, a notice was to be registered in the court roll and posted on the door of the court. If any adverse claims were received that were likely to create a 'political difficulty' the matter was to be adjourned 'for the present'. Otherwise, at the appointed time, the court was to proceed with a hearing before a jury (provided for under the criminal jury in the Native District Circuit Courts Act). The magistrate and jury were to take evidence from claimants and any opponents, 'as an enquiry before the Commissioners under an Act for inclosing [*sic*] lands of common would be conducted in England'. At the end of the hearing the jury, guided if necessary by the magistrate, would decide who was entitled to the land, or whether it should be subdivided between various claimants, when a partition would be carried out and boundary markers established. Finally, the verdict was to be entered on the court roll as evidence of native title. This was to serve as the title deed. Subsequent changes of ownership were likewise to be registered and entered on the rolls, with a fresh title being issued. 'Thus', Fenton continued, 'will be established a very tractable tenure resembling the copyhold or base tenure of England, each District of a Court representing a Manor.' Finally, Fenton provided for the alienation of the land to 'a pakeha' merely by the transfer of the court's certificate of title to 'the purchasing pakeha', who would then receive a Crown grant.[13] As Fenton noted, local juries, assisted by commissioners, played a large part in the management and enclosure of land during the English enclosures.[14] But it was a moot point whether Māori juries, under the guidance of magistrates like Fenton, could do likewise in New Zealand.

Although most discussions on the British enclosures refer to those in England, there were analogous developments in Ireland and Scotland that also had some influence in New Zealand. The Irish suffered confiscation of land for rebellion — as did Māori with the confiscations under the New Zealand Settlements Acts. In Scotland, the crofters lost their customary rights to land through the clearances of the highland estates for sheep-walks.[15]

Nevertheless, it was the English enclosures that were mainly in Fenton's mind. These started with the Norman invasion, when Saxon lands were reallocated in feudal titles to Norman barons, though these overlaid Saxon customary rights of occupation. Subsequent enclosures transformed most of those remaining customary rights into private ownership, usually with the sanction of Acts of Parliament. Two kinds of land were enclosed: dispersed strips of cultivated land which were consolidated; and the fallow and forested land, or commons, beyond that which was used for grazing livestock and gathering wild produce or wood. With consolidation of the cultivated land and the commons the landholders, including richer tenants, gained titles to individual holdings and the lesser tenants and cottagers were dispossessed of their customary rights.

After the Norman occupation, enclosures were resumed periodically. Statutes of 1235 and 1285 permitted landlords to enclose 'wastelands' on condition that they left sufficient land for their free tenants. Then, with the expansion of the Flemish wool trade in the fifteenth century, landlords found it profitable to turn cultivated land and unenclosed commons into pastures — a very early precedent for the pastoral occupation in New Zealand. Enclosures reached a peak in the late seventeenth century, tailed off in the early eighteenth century but were resumed dramatically in the second half of that century and in the early nineteenth century. Those enclosures and an accompanying rise in rents forced many smallholding tenants to migrate to the American colonies.[16] Much of the enclosure took place by agreement or was enrolled in Chancery Decrees and recorded in court rolls. But where agreement was not possible enclosures were validated by private Acts of Parliament, providing for enclosures on a parish-by-parish basis. The first such Act was passed in 1710,[17] and by the later eighteenth century some 100 private enclosure Acts a year were being passed. Then a General Enclosure Act of 1801 standardised the process and an Act of 1845 provided for the incorporation of all enclosures in a single Act for each year. By this time the movement towards general enclosure was largely completed and most common fields had been enclosed.[18] Common communal rights with reciprocal obligations had been replaced by the notion of private property by which, as E.P. Thompson put it, 'rights are assigned away from users and in which ancient feudal title is richly compensated in its translation into capitalist property-right'.[19] Those rights were reinforced by the requirement that the owners fence or hedge their individual properties. Landless cottagers and labourers who tried to continue their customary practices of hunting, gathering and gleaning on once common land were now trespassers on private property and, in the extreme cases, were transported to the convict settlements of Australia.

The enclosures in England and the highland clearances in Scotland facilitated an agrarian revolution whereby land became a commodity rather than a bundle of use-rights. In the process small-holders and landless labourers were removed and funnelled into industrial cities or migrated, mainly to North America and later to Australia. A trickle of immigrants came to New Zealand, where they hoped to acquire land in place of that they had lost in Britain. Everywhere they were motivated by the 'growing pervasiveness of private property'.[20] This quotation refers to the migrants who became small landowners in North America, but it applies equally to New Zealand, where there was a determination to acquire land in freehold title. In England land rights were based on a three-tier structure: manorial rights based on freehold; copyhold titles or tenancies and sub-tenancies based on various kinds of leasehold; and commonages, based on customary rights to cottages, cultivated strips and grazing and gathering from the commons.[21] Though the feudal theory of English land law was transplanted to the colonies, few of the appertaining rights were accepted. Settlers were reluctant to accept restrictions of freeholds, and revaluation of rentals on leaseholds was unpopular. As for the commonage, pastoralists in New Zealand, as in Australia, were notorious for squatting on and taking resources from Crown land, but it was the Māori who retained rights to the 'commonage' on land that remained in their ownership.

Notions of property rights, developed during the enclosure movement, were easily translated to the colonies. Just as English law that facilitated enclosures would take no cognisance of a communal personality, so in the colonies it would not recognise the rights of hunter-gatherer peoples. Locke, in his discussion of property, lamented that 'the wild Indian' knew 'no enclosure' and was still 'a tenant in common'.[22] As Thompson observed, the American Indian 'served as a paradigm for an original state before property became individuated and secure', and he quoted Locke's famous aphorism: 'In the beginning all the world was America.'[23] Locke's Indian was poor 'for want of improving' the land by his labour, which, for Locke, constituted the right to property, and thereby justified the taking of uncultivated Indian land by colonists. The same notions, Thompson continued, were used to justify the taking of Aboriginal land in Australia, but could not be so easily applied in New Zealand where there was ample evidence of Māori occupation and cultivation of land which was recognised in the Treaty of Waitangi. And that led Thompson to contemplate how Māori rights in land 'came to be cashed in law' and the communal rights of Māori hapū might be 'loosed for the market'. In support he used Henry Sewell's much-quoted dictum of the need to bring about the 'detribalisation of the Natives' and to destroy 'the principle of communism which ran through the whole of their institutions' and which stood in the way of amalgamation with the European social and political system.[24] It was this background that Fenton and fellow colonists, steeped in the history of enclosures, used as a precedent in their attempts to transform Māori customary tenure in New Zealand; a transformation that was necessary if, in the terminology of the time, the two races were to be amalgamated.

Behind the advocacy of enclosure lay a broader evolutionary philosophy, stemming from the late-eighteenth-century Scottish enlightenment

philosophers such as Robert Chambers, but recently reinforced by Darwin. It was also implicit in the standard texts of mid-nineteenth-century legal authorities such as Palgrave and Hallam, who were quoted by Fenton,[25] and another advocate for Māori advancement, Sir William Martin, the first chief justice in New Zealand.

In Martin's view of Māori land tenure the absence of '*an individual claim, clear and independent of the tribal right*' was in accord with 'the natural and normal condition of a primitive Society'.[26] He used Palgrave's *English Commonwealth* for an example from ancient Germany and Hallam's *Constitutional History* for his claim that 'the tribal right was even more strongly recognised than it is now amongst the New Zealanders'. Martin believed that Māori needed to follow the example of 'our Anglo-Saxon Fathers' and the example of the Irish in 'the transition from the earlier to the more advanced state of things — from Clanship to Nationality' (a transition that was taking place before his very eyes with the recent selection of a Māori king). He explained in summary and somewhat simplified terms how the transition had applied to land. Anglo-Saxon land was 'either *folkland* or *bookland*'. Folkland was held by customary title and might be occupied in common or possessed in severalty but could not be alienated in perpetuity; bookland was land that had been severed by act of the government from the folkland and was held by book or charter. It had been converted into an estate of perpetual inheritance and could be alienated. Martin then applied the analogy to New Zealand: 'Folkland … corresponded to the Native Tenure; Bookland to the tenure under a Crown Grant.' Though he accepted that Māori customary rights had been guaranteed by the Treaty of Waitangi, a guarantee that had since been 'solemnly and repeatedly recognised by successive Governors', Martin did not comment on how that 'folkland' title might be transformed into a 'bookland' title.

Fenton used the same approach, suggesting that the 'character attached by the English authorities to the wild lands of the colony … seems to resemble very much that of the folcland [*sic*] or public land of the Saxons'. Any transfer of Māori 'wild lands' would not be valid unless by way of grant from the Crown; a process that Fenton likened to the conversion in England of 'folcland into bocland [*sic*] or land of inheritance'.[27] A customary title was thereby transformed into a certificate of title. Fenton and Martin shared the common belief that if Māori were to progress in civilisation and adopt a settled, efficient form of agriculture (that would also make room for European colonists) they too would have to go through an enclosure movement. Another who shared that view was F.E. Maning, an early Native Land Court judge, and a pioneer settler whose *Old New Zealand* (1863) was to become a classic. He claimed that the court was bringing about 'a revolution … which must of necessity displace barbarism and bring civilization in its stead, for the difference between a people holding their country as a commonage and holding it as individualized real property is, in effect, the difference between civilization and barbarism'. He claimed that Māori in the north who had received titles from the court were enclosing and cultivating their land — as well they might since, as Maning admitted, there was little pressure from the Crown or Europeans to purchase their land.[28] As in the United Kingdom, enclosure was promoted as being in the

public interest. When these notions were translated into law with the Native Lands Act 1862, the Christchurch *Press* compared the process set out by the Act with those described in Maine's *Ancient Law*.

It is evident from the quotes from Fenton, Martin and others that the original Saxon communal tenures and systems of farming that were transformed by the process of enclosure were regarded as being similar to the Māori customary arrangements that settlers found in New Zealand, whereby land was cultivated in scattered plots and then fallowed, and the bush beyond was used for hunting and gathering. It is not surprising therefore that Fenton advocated the 'enclosure' of individual holdings that would be permanently occupied and fenced. During his circuits in 1857–1858 Fenton was confronted with acres of abandoned cultivations in the Waikato, following the collapse of agricultural exports to Australia, and proposed that the Māori there sow grass, pasture sheep and erect fences. But he did not see this as inhibiting the sale of land to Europeans since the Māori 'enclosures' would free surplus land for settlement by European farmers. He wanted the Māori population to be gathered 'in a few well defined central positions' — he mentioned Rangioawhia, Whatawhata, Kirikiriroa, Rangiriri and Tuakau — after which, he assumed, the remaining land would be 'abandoned' to the Europeans.[29] In stressing the need for fixity of tenure and residence on fenced farms, Fenton was in line not only with the English enclosures but also with other colonial situations; for instance, in New England where fences were of pivotal importance in the taking and retaining of Indian land and in separating wandering stock from cultivations.[30]

It is necessary to return to Fenton's involvement with the native lands legislation. The Native Lands Act 1862 was the culmination of several previous attempts to abolish Crown pre-emption and allow direct settler purchase of Māori land. Governor FitzRoy did this with his 10/- and 1d per acre proclamations in 1844, though they were in breach of the Treaty of Waitangi, and Grey resumed pre-emption with his Native Land Purchase Ordinance in 1846. The 1858 Native Territorial Rights Bill was another attempt to provide for settler purchase of Māori land. It was part of a package of legislation that, according to Ward, was framed by Native Minister C.W. Richmond,[31] though it clearly incorporated ideas advanced by Fenton. Overall, as Donald Loveridge puts it, the Bills gave 'legislative form' to Fenton's proposals.[32] These were part of a larger scheme that was later called indirect rule whereby European officials, assisted by native assessors and juries, applied English law that was modified to include acceptable local customs. Thus a Native District Regulations Act authorised local councils, chaired by a Pākehā official, to make local by-laws. A Native District Circuit Courts Act provided for circuit court judges to sit with Māori assessors and juries to enforce such local by-laws and common law. The third measure, the Native Territorial Rights Bill, also envisaged using the circuit court judges and Māori juries to determine boundaries of land and award Crown grants of up to 50,000 acres a year in individual title. Such land could be alienated directly to settlers, on payment of a 10/- per acre tax. This use of circuit court judges and Māori juries resembled the arrangement whereby commissioners and local juries managed the enclosure of land in English parishes. The Bill breached the Crown pre-

emptive clause of the Treaty of Waitangi, was referred to the colonial secretary and disallowed. Nevertheless, the central idea behind it, of a European official presiding over a Māori committee for the individualisation of titles prior to alienation, was to survive in the Native Lands Act 1862.

In 1859, while the legislature was awaiting royal assent for the Native Territorial Rights Bill, four new Bills were drafted. These included a Native Land Partition Bill, which Loveridge described as 'simply Fenton's "Scheme for the Partition and Enfranchisement of Native Lands"… converted into a statutory format' and which was apparently drafted by Fenton himself. The scheme was to be administered by a tribunal or court, with a Māori jury or council presided over by a European magistrate or judge, again along the lines that Fenton had proposed in 1858.[33] Although the governor asked Sewell to prepare a Bill along these lines in 1861, the proposal did not survive a change of Ministry later in the year.

With the outbreak of the Taranaki war in 1860, following the Crown's bungled Waitara purchase, there was a change of opinion in Britain in favour of direct settler purchase of Māori land. In a despatch of 5 June 1861, the Duke of Newcastle, secretary of state for the colonies, indicated that he would approve 'any prudent plan for the individualisation of native title' and for direct purchase by settlers under proper safeguards that the New Zealand Parliament may wish to adopt.[34] The proposal received further impetus with the return of Grey as governor late in 1861. Grey came armed with Newcastle's instruction. When a new session of Parliament opened in July 1862 the Fox Ministry brought forward a Native Lands Bill that Sewell had been asked to draft. But when Fox's Ministry was replaced in August by a Domett Ministry, the new minister for native affairs, F.D. Bell, replaced Sewell's Bill with a new draft.

Historians are not agreed on Fenton's role in drafting the new Bill. According to W.L. Renwick, who wrote the entry on Fenton in the *Dictionary of New Zealand Biography*, 'Fenton's skills as a law draftsman were called on by Governor Grey, particularly for the drafting of the Native Lands Act 1862'.[35] Renwick does not source these statements. Alan Ward, David Williams, Donald Loveridge and Richard Boast, who have written at length on Fenton and the Native Lands Acts, do not describe him as the draftsman, though Ward says that the 1862 Act was 'in accordance with principles first suggested by Fenton himself in 1858–60'.[36] Boast suggests that, although Fenton was one of the law officers in 1862, he 'had not been involved in the design of the 1862 Act'.[37] Loveridge describes Bell as 'definitely the principal author of the Bill', though he adds that Fenton's influence was 'obvious', particularly in the composition of the court (a European magistrate presiding over a Māori 'jury'), and in the granting of certificates of title which could be in the names of a tribe or individuals with powers of alienation.[38] Finally, I note that Alexander Brown, who has written a thesis on the subject, also concludes that Fenton did not draft the Bill. He quotes Fenton's own denial in 1885 that 'the Act was not mine'.[39] I accept this as conclusive. We can regard Bell as 'the principal author' of the Bill.

Discussion over the Native Lands Bill in Parliament was framed by the war and the assumption that it had been caused by Crown purchase methods,

especially at Waitara. In introducing the second reading, Bell claimed that individualising titles through a Native Land Court and allowing Māori to sell their land directly to settlers would 'dispell [*sic*] the jealousy and distrust in the native mind' and strike 'at the root of the agitation by which many of the tribes had been seduced from their allegiance to the Queen'. It was not merely a matter of sentiment for Māori to owe allegiance to the Crown and submit to British law but 'a matter of material interest to them to do it [and] … they will infallibly become wealthy men'.[40] Bell's Bill had overwhelming support in Parliament, where many of the representatives from pastoral districts in the northern provinces were already squatting on Māori land and wanted to legalise their titles. The only opposition came from the superintendants of Auckland and Wellington, who feared the loss of land funds derived from the sale of Crown land.[41] Parliamentarians, obsessed with the need to obtain Māori land, paid little heed to how individualisation of titles might help Māori to develop land that they retained. If they were aware of Fenton's plan for enclosure, following individualisation, they said nothing about it.

The 1862 Act retained the arrangement from the 1858 Bill of using a European magistrate as presiding official and a Māori panel of leading chiefs. On the application of 'any Tribe Community or Individual' a court was to be convened to determine the interests of the applicants and other claimants, to define tribal rights and boundaries in a district, and to compile a register (or 'Doomsday Book') of tribal lands — as had often been proposed. If the tribes wanted partition into individual titles the court could be reconvened to do this. Once the title was endorsed by the governor and the land was surveyed, the court could issue a certificate of title and the land could be alienated, whereupon the purchaser would receive a Crown grant. Loveridge demonstrates that the draft Bill was considerably amended in the House and to a lesser extent in the Legislative Council and by Grey before it was submitted for imperial approval.[42]

The Bill did not receive Colonial Office approval until March 1863, and this was notified by proclamation on 6 June 1863. Contrary to the opinion of most historians, Loveridge argues that the Act was brought into operation reasonably quickly: even before the end of 1863 at Kaipara, where J. Rogan was resident magistrate and soon to be appointed a Native Land Court judge. In 1864 there were several hearings around the Kaipara harbour, at Whangarei and the Bay of Islands, at Port Waikato and at Coromandel, mainly presided over by Rogan.[43] George Clarke Jnr and W.B. White were appointed in addition to Rogan as judges, along with several chiefs who were named as assessors or jurors. Loveridge, who consulted Rogan's journals, noted that Rogan was familiar with Fenton's thoughts on the use of juries during the English enclosures. Although Ngāti Whātua at Kaipara were said to be enthusiastic about the new system, their participation was prompted by previous dealings in land, as, for instance, with the 396-acre Otamatenui block at Henderson which had already been sold to John and Isaac McLeod. It was conveniently awarded to one person, Te Otene, who then legalised the sale to the McLeods. That was a portent of things to come.

On 24 November 1864 the Whitaker–Fox Ministry was replaced by the

Weld 'Self-Reliant Ministry'. According to Weld, on that first day in office he asked Fenton to become chief judge of the Native Land Court.[44] Ward says that Fenton was reluctant to accept the position but he assumed that it would not be arduous and that he could continue with private practice, but he accepted because he 'wanted to show that the land of New Zealand could be judicially dealt with'.[45] In another statement Fenton said he had accepted the appointment because the Native Land Court could be 'founded upon my own principles'.[46] Fenton began work even before his appointment was announced on 9 January 1865. On 29 and 31 December 1864 proclamations were issued abolishing the five districts that had been established under the 1862 Act and declaring the whole country a single district — even though there was no provision for this in the Act.[47] Over the next few months Fenton continued to reshape the court along the lines that were to be validated when the replacement Native Lands Act came into force on 30 October 1865.[48]

Despite the doubts over Fenton's involvement with drafting the 1862 Native Lands Act, historians usually conclude that he drafted the 1865 Bill. According to Renwick, Fenton was responsible for 'drafting and administering' the Act.[49] Ward says that Fenton, on his appointment as chief judge of the Native Land Court, 'promptly drafted a new Native Lands Act'.[50] Boast concludes that the Act 'was not merely drafted but was designed by' Fenton.[51] Loveridge, however, qualifies the prevailing view, saying that 'the Native Land Court as it existed at the end of 1865 was not the product of Fenton's mind alone, as some writers seem to think'. He adds that Sewell, Bell and Rogan had done more than Fenton, or anyone else, to bring the court as far as it was by the end of 1865. Loveridge saw the 1865 Act and the court as the end products of an intense debate that had been going on for a decade.[52] As for Fenton himself, he said in September 1885 that he was 'the author, to a large extent, of the Act'.[53] He dropped the 'large extent' qualification in 1891, when he said that 'the Act of 1865 … was my Act'.[54]

Like the Native Lands Act 1862, the Act of 1865 was introduced as the third leg of a tripod of Bills intended to combat the spreading Māori rebellion, now fuelled by the Paimarire creed. In this respect the most important of the three Bills was the draconian Outlying Districts Police Bill, which Ward said 'added a new and sweeping ground for confiscation'.[55] Native Minister J.E. Fitzgerald feared that Māori might regard the Bill as an aggressive assault on their land, so he stressed that the other two Bills were designed to protect Māori and their lands under the law. Thus the Native Rights Bill reasserted the Treaty of Waitangi's promise in article three that Māori would have the rights and privileges of British subjects. And the new Native Lands Bill, which had been framed 'with great care and labour, with the assistance of the Chief Judge of the Native Land Court', provided that native land 'shall be dealt with by our law'.[56] At least the members of Parliament must have been reassured since there was little further discussion of the Bills in either the House or the Legislative Council.

The new Bill embodied a change of mind by Fenton on the essential elements of the previous system. Ward attributes the change partly to Fenton's 'own ambition and vanity' and partly to 'the belief, now advanced most strongly

by Fenton but also widely held among the settler community, that only a solemn legal tribunal would be respected by contending Maori claimants'. Ward adds that there was 'some justification for an authoritative tribunal' since demarcation of territory between two or more iwi or hapū was seldom clear-cut and uncontested.[57] Though Ward does not say so, the experience of the previous few years, following the eruption of the dispute over the Waitara into war, may have led Fenton to conclude that Māori could not settle their interminable disputes over title to land without an over-arching official authority.

As Ward noted, on his appointment as chief judge of the Native Land Court, Fenton 'was given virtually a free hand in reorganising the Court and making appointments, and promptly used it'.[58] But it was not so much in the terms of the new Act, which Fenton regarded as an 'amendment' of the 1862 Act with 'no new principle', but in his operation of it that there was an abrupt change. In place of a Māori-focused court, dominated by Māori jurors, a new tribunal emerged, 'organised along the lines of the Supreme Court, whereby a roving Judge could sit in any centre, summon witnesses, hear evidence and hand down a judgment with due pomp and formality'.[59] The new court became a formal court of record, and Fenton, in drafting the Bill, was careful to ensure that his own considerable salary as chief judge of £800 a year was protected by the law. The role of Māori in the court process was reduced to that of assessors who were to advise the judges on Māori custom, but they held office 'during pleasure', while the judges were appointed to hold office 'during good behaviour' (s.6). A quorum for all judicial matters in the court was to be one judge and two assessors, and all had to concur in a judgment (s.120). This seemed to give assessors considerable authority, though Williams and others conclude that this was not so and that assessors who dissented were invariably ignored by presiding judges.[60]

It is necessary to discuss the main provisions of the Act. The preamble stated that its purpose was to ascertain the persons who, according to Māori proprietary customs, were the owners of land; to provide for the extinction of those customs and their conversion into titles derived from the Crown; and to provide for the regulation of descent for such land. The purposes were given effect by sections 21, 23 and 30. Section 21 allowed 'any Native' to apply to the court for ascertainment of title and a certificate of title. Section 23 allowed the court, after hearing evidence from the applicant and other claimants, to issue a certificate of title to those found to be entitled according to native custom. However, there was an important proviso to section 23: 'that no certificate shall be ordered to more than 10 persons; provided further that if the piece of land adjudicated upon shall not exceed 5,000 acres such certificate may not be in favour of a tribe by name.'

The interpretation of this proviso, particularly by Fenton, caused much controversy, led to the dispossession of many Māori of their legitimate interests in land, and prompted important amendments to and eventually the replacement of the 1865 Act. Although section 23 clearly allowed blocks over 5,000 acres to be awarded to tribes, Fenton and other judges seldom applied this provision. Fenton admitted in 1891 that there had been only two instances where the court had issued such titles. He was aware that the legislation required the

court 'to refuse titles until the estates were reduced by division to ten', but admitted that the ten names were selected out of court 'by arrangement' with the Māori claimants and the European purchaser. They were then 'described to the Court as the owners, the object being to avoid the expense of divisional surveys'. Though Māori were required to have land surveyed before the court awarded title, the surveys were arranged and paid for by European purchasers, with those costs deducted from final payments when titles were awarded and alienation was completed. Clearly, it was in the interest of the European purchasers to avoid the cost of sub-divisional surveys, which they did by purchasing the interests of the ten 'owners' of undivided land. Fenton assumed that the purchase money was then paid and 'divided amongst all interested', but he admitted he had no official knowledge of this. He further claimed that 'The Natives fell rapidly into this system'.[61] In all of this Fenton seems to have been affecting a judicial amnesia, since it was notorious that in the very transactions he was discussing, particularly the alienation of the Heretaunga and other blocks in Hawke's Bay, the system the court had blessed defrauded many legitimate claimants.

Fenton was unapologetic about this, writing in a comment on the working of the 1865 Act in 1867 that:

> The ultimate result of the operations of the Court will be the conversion of the Maori nation into two classes — one composed of well-to-do farmers and the other intemperate landlords. The intemperance and waste so noticeable amongst the Maori landlords of Hawkes Bay are … much to be regretted; but … it is not part of our duty 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.[62]

This acceptance of what would now be called 'market forces' was echoed by the two European commissioners, Richmond and Judge Maning, in their report on the transactions for the Hawke's Bay Native Lands Alienation Commission.[63]

In 1871 Fenton assured Donald McLean that the Hawke's Bay transactions 'were perfectly fair and honourable on the part of the European purchasers'.[64] Fenton was unconcerned that the land was being awarded to one or two chiefs, with the rest of the right-holders dispossessed, since he considered that the chiefs 'should have sufficient land secured to them to render certain their status as gentlemen'.[65] Gentlemen, I might add, who would profit from this enclosure of communal Māori land provided they did not squander the proceeds on extravagant living. When the Act came into force the chiefs were already heavily in debt to Hawke's Bay store-keepers and publicans. Runholders, squatting on Māori land on the basis of extra-legal leases, were able to use the Act to validate their titles, and within a few years little land remained in Māori ownership.[66]

The other main object of the 1865 Act was to provide for succession where an owner died intestate. In such a case, section 30 of the Act required the Native Land Court to decide who, as nearly as could be reconciled with native custom, were entitled to succeed. This led not so much to controversy as to confusion, since the court, having been instructed to convert customary titles into individual

titles derived from the Crown, was required to allocate the hereditaments of intestate owners according to customary rules. The question was dealt with by Fenton in his judgment on *Papakura — Claim of Succession*. This concerned succession to Ihaka Takaanini's estate of 1,120 acres of land near Papakura. In a convoluted judgment, Fenton began by saying that the Native Lands Act 1865 required the court to 'ascertain who, according to law, as nearly as it can be reconciled with native custom, ought … to succeed to the hereditaments the subject of the investigation'. Though Fenton thought that the legislature intended that English law should regulate succession to Māori land, he allowed exceptions 'where a strict adherence to English rules of law would be very repugnant to native ideas and customs'. And, though he thought it would be 'highly prejudicial to allow tribal tenure to grow up and affect land that has once been clothed with a lawful title', he proceeded to do just that by declaring:

> 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 …. Erina Takaanini, Te Wirihana Takaanini and Ihaka Takaanini ought to succeed to the hereditaments above mentioned in equal shares as tenants in common.[67]

This interpretation — or perhaps I should say misinterpretation — of customary rules of succession was to remain in vogue for many years. It created a form of tenure that was in accord neither with Māori custom nor with English law and was greatly to exacerbate the fractionation of Māori land. Instead of applying the English law of primogeniture for succession of intestate estates, the court, under Fenton, assumed that Māori custom required succession to be applied equally to all off-spring, male and female.[68] Ironically, by providing for that form of equal succession, all off-spring were entered on titles, thereby defeating Fenton's original plan to enclose land in the private ownership of a minority of chiefs. Moreover, equal succession was applied whether or not the heirs lived on the land, thus infringing the Māori custom that hereditary rights to land needed to be reinforced by occupation.

In 1867 a new Native Lands Act was passed to deal with some of the problems that had arisen from the 1865 Act. But it was not drafted by Fenton, who said that it was 'Mr Justice Richmond's Act, drawn up with Judge Prendergast's assistance'. Prendergast, the chief justice, had 'put in legal form what Mr James Richmond told him he wanted'.[69] The Act attempted to deal with the problem created by Fenton's interpretation of the 'ten owner rule' by laying down (s.17) that the court was to ascertain the right and title not merely of the applicant but of every other person or tribe interested in the land under claim. Though certificates of title were still to be issued to no more than ten persons, all others with interests were to be listed in the court records and a recital to this effect was to be entered on the certificate. However, section 17 did not automatically apply to all titles subsequently issued, and Fenton chose not to apply it since he believed that 'the true remedy was to compel the tribe to sub-divide … until each ten of the tribe had got his share', irrespective of the costs to the owners of surveying those subdivisions.[70] But, as Fenton well

knew, that had not occurred because of the expense of sub-divisional surveys. Fenton made further comment on the Act in the Native Land Court at Auckland on 7 April 1868, when he said that the effect of the clause 'would be to make perpetual the Communal holdings of the Natives', since listing other names in the records of the court would create 'a system of concealed equities … even if all the equitable interests could always be ascertained, which is a question open to grave doubts'. For this reason Fenton believed that the court had 'discretion' whether or not to apply the clause and, as Ward points out, 'he continued to issue Certificates of Title to ten owners as if they were the only claimants'.[71] Some other judges such as Rogan attempted to apply the provision, but they were usually defeated by the lack of 'satisfactory evidence', since Māori claimants had conveniently declined to name more than ten owners.[72]

If Fenton did not like the 1867 Act, he got his revenge when he drafted an amendment and, while temporarily a member, introduced it in the Legislative Council in 1869. He said that it was designed to correct 'several defects' in the Native Lands Acts, especially that of 1867. He did not explain the defects but assured the council that they were 'of a formal character, involving no principle'.[73] Subsequently Fenton said that he had drafted the Bill to overcome the problem of getting the assent of all listed owners required by the 1867 Act: 'Under the Act of 1869, which was mine, provision was made requiring the assent to a sale of the majority in value.' Fenton added that 'the Court in administering that [1867] Act found it practically impossible to discriminate between the values of individual Natives; and the shares of the owners were practically treated as equal, not because it was right, but because the Court could do nothing else'.[74] The 1869 amendment Act appears not to have been widely used and is not discussed by either Ward or Boast, though it is discussed briefly in the Tribunal's *Hauraki Report*.[75]

It was replaced by the Native Lands Act 1873, the most influential and enduring Māori land Act ever passed. Despite numerous amendments, it was to remain at the core of that legislation until Te Ture Whenua Maori Act 1993. The 1873 Act was largely a response to the report of the Hawke's Bay Native Lands Alienation Commission. This led some to assume, as Fenton put it, that the Act was 'the work of Mr Justice Richmond', who chaired the commission, but he had told Fenton he had 'nothing to do with it'. Fenton then said that the Act 'was Mr [H.T.] Clarke's', though he admitted that John Curnin had drafted it.[76] The role of Clarke is unknown. Though Martin and Fenton had previously written drafts of the Act, the one finally presented to the House was undoubtedly the work of Curnin. He was then in the Crown Law Office, and admitted that he had drafted the Act 'for Sir Donald McLean', who had given him 'definite instruction … to ascertain all the titles and have them passed by the Native Land Court', with the court listing all owners in a memorial of ownership. McLean, who was now native minister, hoped to overcome the difficulty of having all owners assent to an alienation by partitioning the land into individual lots, but Curnin admitted that this did not happen. However, Boast adds that the Bill was not based solely on McLean's instructions to Curnin and that it did incorporate some recommendations of the chairman of the Hawke's Bay commission, Justice Richmond.[77]

Unsurprisingly, Fenton did not agree with many of the provisions of the 1873 Act. Ward notes that he 'produced a long document claiming to show that many of the clauses of the Act were contradictory and unworkable, and he made no effort to make them work'.[78] Fenton was particularly opposed to the requirement that all with customary rights in a block of land be named in a memorial of ownership. He described the Act as an attempt 'to do celestial justice which I always believe to be impossible in this wicked world', and he thought requiring all named owners of a block to consent to alienations was going too far, since 'no one recusant should have power to lock up land'.[79]

The Act represented a final defeat for Fenton's ideal of awarding Māori land to an elite who would emerge from the enclosure of Māori land as a landowning gentry, like those who had succeeded in the English enclosures. It could be said to represent an alternative ideal favoured by McLean that all with customary rights must be included in the ownership, though McLean hoped to overcome the difficulty of getting the assent of all owners to an alienation by having the land subdivided into individually or family owned lots.[80] That was never achieved, and the court continued to take the easy way out by simply listing all who had customary rights of ownership in a single memorial of ownership.

It is tempting to regard the 1873 Act as a victory for McLean in his long-running battle with Fenton, and even to portray McLean, who was familiar with the fate of the Scottish crofters, as the champion of the small men, including Māori; as against Fenton, who was determined to create a landowning Māori gentry at the expense of all other right-holders. But such a scenario is simplistic. McLean, who hailed from the Outer Hebrides, was the son of a wealthy tacksman, or leaseholder, who, like many Scots migrants to New Zealand, improved his lot immensely by becoming a substantial landowner on land he had purchased from Māori.[81] Fenton, on his retirement from the bench, also settled on land, at Kaipara, that he had purchased from Māori, though this was soon transferred to his sons. He also busied himself with *Suggestions for a History of the Origins and Migrations of the Maori People*, published in 1885. That took Māori history well back from the narratives he had heard in court to an origin in the Biblical lands of Arabia.[82] And, despite his persistent attempts to promote a Māori gentry, Fenton himself applied English equity rules to divide Māori land on inheritance equally amongst all heirs, male and female, even though that contributed to endless division of inherited landholdings.

As for the Native Land Court, under the 1873 Act it remained 'an engine for destruction', though the alienation of Māori land was hindered by the need to get the signatures of all who were listed in the court's memorial of ownership, and, where this was impossible, by the requirement that a subdivision be arranged to cut out the interests of the sellers from those of the non-sellers. Nevertheless, the acquisition of Māori land was accelerated by the return of the Crown to purchasing under the Vogel immigration and public works policy. By 1882, when Fenton retired as chief judge, the court was beginning to intrude into the last bastions of Māori resistance to land alienation: the King Country and the Urewera. Tribes with lands on the fringes of those territories

were gradually being drawn into the orbit of the court, as individuals or small groups of sellers negotiated with the Crown or private purchasers and sought the court's endorsement of their claims.[83]

Under the Native Lands Acts from 1865 to 1873 judges of the Native Land Court were required to ascertain Māori rights to land according to native custom but then to transform those rights into certificates of title analogous to English freehold titles. The first Act to attempt that, the Native Lands Act 1862, was not given a proper trial. It was replaced by the Fenton-drafted Native Lands Act of 1865. Because of the misinterpretation of the 'ten owner' rule (s.23), whereby all other right-holders were dispossessed, a change was required. The first attempt, in 1867, specified that all with customary rights were to be listed in the court record, with a recital to this effect on the certificate of title. But Fenton also refused to apply this. Fenton's riposte of 1869 was ineffectual. Finally the Native Lands Act of 1873 required the rights of all owners to be entered on a memorial of title. Fenton and his fellow judges did at least apply this, though the consequences were hardly satisfactory to Māori. It was now easier for the Crown and private purchasers to initiate purchases of Māori land, but more difficult to complete them since they were required to get the assent of all listed owners or, failing that, to get the court to divide the land of the sellers from that of the non-sellers. That too was an enclosure of a kind, at least for the European purchasers if not for the Māori owners of the remaining land.

In ascertaining ownership of Māori land according to Māori custom, the Native Land Court judges behaved like common law judges in England: Māori customary law became judge-made law. As Fenton explained in his 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 then establish 'year books' which may in the course of time afford a code of law to which appeal may be made for guidance in deciding all questions which may come before it.[84]

The hundreds of Native Land Court minute books subsequently kept by the judges did indeed become the equivalent of the English Year Books that recorded common law judgments for several centuries until they were replaced by the law reports. The Native Land Court minute books are an invaluable source for Māori whakapapa and history where there were contending claims. Frequently the judges simply announced their decisions and listed the names of those to go into the certificates of title. But occasionally they put the evidence into narrative form as, for instance, with Fenton's Orakei judgment. The minute books are a mine of valuable but problematic evidence. They also contain what can be described for the purposes of this essay as some occasional pearls of wisdom which, like the quotes from Fenton and Rogan, reveal the sources of their thinking and procedures.

In their making of Māori customary law, Fenton and other judges drew as much from their training in English law and analogies based on that law as they did on original Māori custom. And even that custom did not come to them raw and uncontaminated from the mouths of claimant witnesses in the Native

Land Court. There was already a received body of opinion on Māori customary law that had been built up since the colony was founded and more specifically from official enquiries, such as the 1856 enquiry established by Governor Gore Browne, and from the great debates that erupted with the Waitara purchase and war in 1860. By the time Fenton opened his first Native Land Court there was already an agreed body of opinion on Māori land tenure — and Fenton himself had contributed to that opinion.

Norman Smith, a later judge of the court, maintained that by c.1895 — following yet another collecting of opinions in association with the Native Land Laws Commission of 1891 — 'claims for *papatipu* [customary] land had become codified to a very great extent by the judgments of the Native Land Court'. By this time the 'inconsistent nature' of earlier decisions had disappeared and 'the rules of Native custom, with proper regard to any exceptions prevalent in different parts of the country, became more or less clearly defined'. Nevertheless Smith admitted that 'what may be termed the generally recognised customs, more or less common to all tribes in New Zealand, were subjected to gradual changes brought about principally by the influence of conditions and demands of advancing civilization and pakeha ideas'.[85]

Although Fenton, like any good black letter lawyer, pretended to follow the intention of the legislature, when he could find it in the relevant Acts, he did not always do so and did not always admit that he had not. The classic cases are his misinterpretation of section 23 of the Native Lands Act 1865 and his refusal to apply the Native Lands Act 1867, designed to correct his failure over the 1865 Act, though in this instance he claimed that the intentions of the legislature were not made clear. Though Fenton could not be blamed for the Act of 1873 that was imposed on him, he was for another nine years to preside over a Native Land Court that was promoting an extreme form of individualisation of land titles and succession to them; a blight that has burdened Māori land to this day.

In the confusion over the native land legislation neither the legislature nor the Native Land Court under Fenton's direction paid proper respect to Māori custom or to the essential requirements of English land law, and a dangerous compound was created. Neither Fenton nor any of his colleagues could see their way out, and it was not until Ngata and others promoted the twin remedies of consolidation (a kind of enclosure) and incorporation of fragmented titles that a solution was found, though even that was not applied everywhere.

It is evident that the procedures of the English enclosures were not followed in New Zealand for Māori land, primarily because the legislators were not interested in enclosing land for Māori per se and in helping them to develop it. That would have involved creating consolidated individual holdings on the ground and helping Māori farmers to develop those holdings, as Fenton seemed to envisage in his 1859 'Scheme for the Partition and Enfranchisement of [Maori] Lands' things that were not attempted until Ngata's land reforms of the twentieth century. The trouble was that the framers of the nineteenth-century Native Lands Acts were merely intent on requiring the Native Land Court to create lists of owners — 'transferable paper', as Sewell aptly

described it[86] — who could alienate their land to Pākehā settlers or to the Crown. By contrast, consolidation of scattered rights to land was a preliminary and integral part of the enclosure process in England, albeit one that favoured the manorial freeholders and their larger lessees who could afford to pay the costs of surveying and fencing their holdings. In New Zealand it was Māori who had to pay the costs of surveys of land taken to the Native Land Court and of gaining title through often lengthy court proceedings. These costs merely facilitated alienation. Since their interests were simply listed in certificates and not consolidated into individual holdings on the ground, their land remained largely undeveloped and unfenced, often to the annoyance of Pākehā farmers who owned adjoining land.

But there was one similar long-term effect in both countries in that 'enclosure' turned English[87] and Māori 'commoners' into labourers. So long as Māori retained a significant area of land, and the ability to scratch a living from it, they could remain independent of permanent waged labour and opt to be rural dwellers rather than becoming an urbanised working class. They could not do that very long into the twentieth century.

Though Fenton (and others) could see similarities in the customary management of land in England and by Māori in New Zealand, it was naïve to assume that the procedures for enclosure in England could be applied to Māori land. Prior to enclosure the English had a sophisticated system for local management of land, one that involved the co-operation of the lord of the manor, tenants and commoners, and local regulations, all modulated by juries. Likewise, Māori had customary rules for the occupation and management of land, operating on a whānau or hapū level. But the one could not easily be transformed into the other, more especially when there was divided and contested authority, with Pākehā officials such as Fenton in control, and transfer of much of the land to Pākehā an ever-present objective. It was Pākehā colonists who became the new lords of the manor through the primitive attempts by Fenton's Native Land Court to enclose the Māori 'commons'.

M.P.K. SORRENSON

The University of Auckland

NOTES

* I am grateful to Alan Ward and Paul Hamer who read a draft of this essay and made many valuable suggestions, which I have adopted.

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2 M.P.K. Sorrenson, 'The Purchase of Maori Lands, 1865–1892', MA thesis, Auckland University College, 1955, p.24.

3 Two Tribunal reports in particular have lengthy discussions: *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2004, vol. II, pp.395–494; and *The Hauraki Report*, 2006, vol. II, pp.657–777. Both make extensive use of the published work of Alan Ward and a Crown-commissioned report by Donald Loveridge that I also use and cite frequently below. Two overviews prepared for the Tribunal's Rangahau Whanui National Themes are also relevant: Hazel Riseborough and John Hutton, 'The Crown's Engagement with Customary Tenure in the Nineteenth Century', Theme C, 1997; and Tom Bennion and Judi Boyd, 'Succession to Maori Land, 1900–52', Theme P, 1997.

4 Particularly his *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, 1995 reprint.

5 F.D. Fenton to Mother, 14 November 1850, Fenton Papers, Alexander Turnbull Library (ATL), micro 708. Subsequent letters refer merely to Fenton's domestic affairs and make no reference to his later career as chief judge of the Native Land Court.

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8 F.D. Fenton, *Observations on the State of the Aboriginal Inhabitants of New Zealand*, Auckland, 1859, p.41.

9 ibid., p.42.

10 M.P.K. Sorrenson, 'The Maori King Movement, 1858–1885', in Robert Chapman and Keith Sinclair, eds, *Studies in a Small Democracy: Essays in Honour of Willis Airey*, Auckland, 1963, pp.38–44. For Fenton's Waikato journals see *Appendices to the Journals of the House of Representatives* (AJHR), 1860, E-1c, pp.14–35.

11 Ward, p.107.

12 D.M. Loveridge, 'The Origins of the Native Lands Acts and the Native Land Court in New Zealand', October 2000, p.88.

13 Fenton, *Observations*, pp.43–44.

14 For discussion of the role of juries in the management of enclosures in England, see J.M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700–1820*, Cambridge, 1993, pp.2, 9, 124–26, 134, 144, 319, 324–25.

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16 Allan Kulikoff, *From British Peasants to Colonial American Farmers*, Chapel Hill, 2000, pp.17–18.

17 E.P. Thompson, *Customs in Common*, London, 1991, p.109.

18 ibid., p.121.

19 ibid., p.137.

20 Kulikoff, p.75.

21 Neeson, p.107.

22 Quoted by Thompson, p.164.

23 ibid.

24 Sewell, *New Zealand Parliamentary Debates* (NZPD), 1870, 9, p.361.

25 Fenton, *Observations*, pp.41, 76.

26 Sir William Martin, *The Taranaki Question,* reprinted in AJHR, 1861, E-2, pp.2–3.

27 Kaitorete judgment, in F.D. Fenton, *Important Judgments delivered in the Compensation Court and the Native Land Court 1866–1879,* Auckland, 1879, p.34.

28 F.E. Maning to Fenton, 24 June 1867, in AJHR, 1867, A-10, pp.7–8.

29 'Report … as to Native Affairs in the Waikato District,' AJHR, 1860, E-1c, pp.18–36.

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31 Ward, p.107.

32 Loveridge, p.89.
33 ibid., pp.156–69.
34 Ward, p.51.
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36 Ward, p.80.
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38 Loveridge, pp.202–204.
39 Alexander F.G. Brown, 'A Humanitarian Institution? Francis Dart Fenton and the Origins of the Native Land Court, 1850–1865', BA (Hons) thesis, University of Otago, 1998.
40 NZPD, 1862, pp.608–15.
41 Sorrenson, 'The Purchase of Maori Lands', pp.15–18.
42 Loveridge, pp.208–38, 268.
43 ibid., pp.268–74. The hearings are recorded in the Native Land Court Hauraki Minute Books, vols 2–6, and the Kaipara Minute Book, vol. 2 (reprints in The University of Auckland Library); see also the Waitangi Tribunal's *Hauraki Report*, vol. II, pp.681–83.
44 Quoted by Loveridge, p.277.
45 Fenton to W. Mantell, 1 December 1879, quoted by Ward, p.180.
46 AJHR, 1885, I-2B, p.31.
47 Williams, pp.36–37.
48 ibid., p.39.
49 *Dictionary of New Zealand Biography*, vol. I, p.122.
50 Alan Ward, *An Unsettled History: Treaty Claims in New Zealand Today*, Wellington, 1999, p.132; *Hauraki Report*, vol. II, pp.668–69.
51 Boast, p.66.
52 Loveridge, p.288.
53 AJHR, 1885, I-2B, p.31.
54 F. D. Fenton, evidence, Native Land Laws Commission, 18 March 1891, AJHR, 1891, G-1, p.45.
55 Ward, *A Show of Justice*, p.188.
56 NZPD, 1865, pp.321–25.
57 Ward, *A Show of Justice*, p.180.
58 ibid., p.155.
59 ibid., p.180.
60 Williams, pp.150–52. Williams cites Ward and Vincent O'Malley in support.
61 Enclosure in Fenton to Native Land Laws Commissioner, 6 April 1891, AJHR, 1891, G-1, p.86.
62 Fenton to Native Minister (J. C. Richmond), 11 July 1867, AJHR, 1867, A-10, p.4.
63 AJHR, 1873, G-7. The two Maori commissioners wrote an alternative report that was far more critical of the transactions.
64 Fenton to D. McLean, 28 August 1871, AJHR, 1871, A-2A, p.10.
65 ibid.
66 The consequences are discussed at greater length in my thesis, 'The Purchase of Maori Lands', pp.44–60.
67 Fenton, *Important Judgments*, pp.19–20; Waitangi Tribunal, *Hauraki Report*, vol. II, pp.688–93.
68 Primogeniture was not universally applied in England and it was common for small-holders to divide their property among heirs, who frequently made arrangements to consolidate the land in the hands of one of them. See G.E. Mingay, *Enclosure and the Small Farmer in the Age of the Industrial Revolution*, London, 1968, p.27.
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70 ibid.
71 Ward, *A Show of Justice*, p.216; Native Land Court Auckland Minute Book No. 2, pp.8–9.
72 For instance, Native Land Court Kaipara Minute Book No. 2, p.40.
73 NZPD, vol. VI, 1869, p.180.
74 AJHR, 1891, G-7, p.47.
75 Vol II, pp.702–703.
76 AJHR, 1891, G-1, p.170. The Act is discussed at length in the Tribunal's *Gisborne Report*, vol. II, pp.426–46 and *Hauraki Report*, vol. II, pp.713–49.

77 Boast, p.140.
78 Ward, *A Show of Justice*, p.255.
79 AJHR, 1890, G-1, p.170.
80 Ward, *A Show of Justice*, p.255.
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83 For the King Country see my thesis, 'The Purchase of Maori Lands', pp.98–113; for Te Urewera, see Judith Binney, *Encircled Lands: Te Urewera, 1820–1921*, Wellington, 2009.
84 *Important Judgments,* p.59.
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87 Neeson, pp.18, 25, 177, 204–208.