By whose Custom? The Operation of the Native Land Court in the Chatham Islands

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The Native (now Maori) Land Court has been one of the most influential institutions in New Zealand race relations. It based its decisions on a certain understanding of Maori customs of land tenure, but these understandings have been challenged, never more strongly than when they were applied to the claims of the Moriori people of Rekohu, the Chatham Islands. This article explicates the principles guiding the Court and uses the hearing of the claims for title in the Chatham Islands as a window into the ways in which the Native Land Court reached its decisions.

I INTRODUCTION

In June 1870, Judge John Rogan held sittings of the Native Land Court in a small building in Waitangi to determine the ownership of land comprising nearly the total area of the Chatham Islands. The claimants and counterclaimants before him were a relatively unusual group. The claimants were Maori, members of Ngati Tama and Ngati Mutunga hapu, segments of Te Atiawa and originally from northern Taranaki between the Mokau and Waitara Rivers. In the 1820s and 1830s, they had been driven from their ancestral lands by raids from Waikato. Fleeing first to the Wellington region, in 1834-36 some 900 continued on to the Chathams. There they found a different indigenous group of inhabitants, the Moriori, whom they conquered, decimated and enslaved. The Maori based their Land Court claims to the islands on the rights of ownership conferred by this conquest and subsequent domination of the land.[1]

At the Native Land Court hearings, the counterclaimants were the surviving remnant of Moriori. Their case rested on their original ancestral occupation of the islands over several hundred years and the assertion that they had, in fact, never lost their mana whenua, their authority over and right to the land, because of that conquest. They said that whatever Maori custom might be, Moriori custom was that fighting, especially to the death, was forbidden. Consequently, when Moriori had refrained from armed resistance to the Maori invasion they had retained, not lost, their mana and rights. They openly brought forward their grievances in the Court, seeking redress for them and expecting that the Court would right the wrongs and injustices to which they had been subjected over thirty-five years.

But the Court decided that the Moriori claim counted for little. The land was awarded almost entirely to the Maori claimants, only a handful of small reserves being

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1 The best account of the entire history of the Chathams is M King *Moriori: A People Rediscovered* (Viking, Auckland, 1989).

allocated to the Moriori. Later Court hearings conducted by Judge Samuel Deighton merely took the earlier determinations for granted and assumed without question that what had been adjudged to apply to Chatham Island itself likewise applied directly to the outlying islands. Moriori were shut out from any rights there too.

Scant attention has been paid to the Native (now Maori) Land Court as a major institution affecting New Zealand's race relations and as a body generating its own legal principles and corpus of unreported case law.[2] These particular cases provide an interesting and (because of the cultural issues involved) unique window into its methods of operation, the highly-charged political context in which it worked, influences upon its deliberations and the problems it has faced in arriving at its decisions.

II BACKGROUND TO NATIVE LAND COURT OPERATIONS

The Native Land Court (and its successor the Maori Land Court) was entirely a creature of statute, able to exercise only those powers given to it by statute and having no right to adjudicate anything beyond them: "a history of the Court is a history of land legislation since European settlement...."[3]

The establishing statute, the Native Lands Act 1865 - which was the primary statute governing the Court at the time of its major operations in the Chatham Islands from 1870 - spelled out that the Court was to have four interlocking purposes:

> to amend and consolidate the laws relating to lands in the Colony which are still subject to Maori proprietary customs and to provide for the ascertainment of the persons who according to such customs are the owners thereof and to encourage the extinction of such proprietary rights and to provide for the conversion of such modes of ownership into titles derived from the Crown and to provide for the regulation of the descent of such lands....

The first purpose was necessitated by the rapid multiplication, even at that time, of legislation relating to dealings with Maori land since the Treaty of Waitangi had guaranteed their continued possession and use of it. The second was the essential precursor to any move to anglicise Maori land ownership and permit purchasing - the proper owners under Maori custom had to be determined. Third, having determined those traditional owners, it was deemed desirable to extinguish those rights and convert them to a type of title which could be recognised and dealt with by the British-style

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2 See various references below. Also J Binney "The Native Land Court and the Maori Communities, 1865-1890" in J Binney, J Bassett & E Olssen *The People and the Land. Te Tangata me Te Whenua. An Illustrated History of New Zealand 1820-1920* (Allen & Unwin/Port Nicholson, Wellington, 1990) 143-164; A Parsonson "The Challenge to Mana Maori" in G W Rice (ed) *The Oxford History of New Zealand* (2 ed Oxford, Auckland, 1992) 167-198; M P K Sorrenson "Land Purchase Methods and Their Effect on Maori Population, 1865-1901" [1956] Journal of the Polynesian Society 183-199.

3 *The Maori Land Courts. Report of the Royal Commission of Inquiry 1980.* 1980 Appendices to the Journals of the House of Representatives [AJHR] H3 at 7.

legal system, ie a conversion to titles held by individuals from the Crown by virtue of a Crown grant. This would serve two purposes: the first would be that all ownership of land would derive from the Crown, an assertion of the Crown's ultimate sovereignty, and then it would permit land to be purchased more readily by either the Government or private settlers who could deal with individual proprietors instead of a relatively amorphous and undifferentiated group of tribal owners. The fourth purpose, the regulation of descent, allowed for ownership, once having been determined, to be clearly retained for ease of subsequent dealings.

In the Native Lands Acts, the Court was clearly directed to arrive at its decisions on the basis of Maori custom. The original Native Lands Act of 1862 had specified that the Court would be constituted "... for the purpose of ascertaining and declaring who *according to Native Custom* are the proprietors of any Native Lands and the estate or interest held by them therein...."[4]

The 1865 Act likewise specified that certificates of title were to be issued to the persons or tribe "who *according to Native custom* own or are interested in the land...."[5] Its definitional section (2) declared

> "Native" shall mean an aboriginal Native of the Colony of New Zealand and shall include all half-castes and their descendants by Natives.
> "Native Land" shall mean lands in the Colony which are owned by Natives under their customs and usages.

It is clear that the only "aboriginal Natives" ever envisaged as coming under the operation of these Acts were Maori and that it would be Maori customs which determined land ownership. This, of course, was a sensible and desirable principle - throughout mainland New Zealand. I do not believe that anyone ever considered that there might have been an alternative version of aboriginal customary land ownership to be taken account of. This is not surprising, given the numerical smallness of the Moriori people relative to Maori tribes on the mainland and their comparatively obscure location. This was probably the case right up until the time when Judge Rogan heard the first Moriori testimony in his courtroom at Waitangi, at which point, after several pieces of legislation and five years of Court procedural development and experience, it was virtually inevitable that he would have had ears only for standard types of Maori claims made under the usual conventions of Maori custom.

Judge John Rogan was experienced in dealing with Maori land, and with Te Atiawa.[6] He had begun surveying and land purchasing in the early 1850s under Donald McLean in Taranaki. During the 1860s he had been a Land Purchase Commissioner and Resident Magistrate for some years at Kaipara and was one of the first appointments to the bench of the Native Land Court, apparently being the only person to hold Court hearings

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4 Section 4. My emphasis. In later legislation, especially through the twentieth century, the word "Native" has been replaced by "Maori".

5 Section 23. My emphasis.

6 1891 AJHR, G1 at 55-57.

under the 1862 Act.[7] In 1863, the Compensation Court was created under the New Zealand Settlements Act to recompense those "loyal" Maori who resided in areas which were taken from them in the blanket confiscations resulting from the New Zealand Wars. Like most of the early Native Land Court Judges, Rogan was a Judge of this Court, too, and sat in several of the Taranaki cases which were formative of the case law to be applied generally in the Native Land Court's adjudications upon Maori land. He thus was not only experienced in dealing with Maori land - and Te Atiawa land at that - but had been instrumental in the determination of principles guiding the decisions. This meant he would have been unlikely to admit evidence which contradicted the principles thus formulated.

III NATIVE LAND COURT GUIDING PRINCIPLES

Several principles developed in the Compensation Court, and which became central to the Native Land Court's operations, were applied in the Chathams claims: the 1840 Rule, and the rights conferred by conquest, ancestry and occupation.

The 1840 Rule was generated in the Compensation Court hearings in Taranaki in 1866. Claims to the Oakura Block were decided on 12 July 1866 when Chief Judge F D Fenton spoke on behalf of himself, Rogan, and Judge H A H Monro. As they were "compelled by absolute necessity to lay down a rule for our guidance as to the time and circumstances when the ownership or title of expelled owners could rightly be regarded as having terminated," they decided[8]

> We do not think that it can reasonably be maintained that the British Government came to this Colony to improve Maori titles or to reinstate persons in possessions from which they had been expelled before 1840, or which they had voluntarily abandoned previously to that time. Having found it absolutely necessary to fix some point of time at which the titles as far as this Court is concerned must be regarded as settled, we have decided that that point of time must be the establishment of the British Government in 1840, and all persons who are proved to have been the actual owners or possessors of land at that time must be regarded as the owners or possessors of those lands now, except in cases where changes of ownership or possession have subsequently taken place with the consent, expressed or tacit, of the Government, or without its actual interference to prevent these changes.

This, the Judges thought, applied especially where a Court was trying to make determinations under the New Zealand Settlements Act, where the questions at issue were matters purely between the Crown and Maori. Even then, though, they recognised that the rule could not be applied so strictly in the Native Land Court, where the issues

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7 A Ward *A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand* (Reprinted Auckland University Press/Oxford University Press, 1974) 180.

8 1866 AJHR A13 at 3. The Oakura judgment is also included in F D Fenton *Important Judgments Delivered in the Compensation Court and Native Land Court 1866-1879* (Native Land Court, Auckland, 1879) 9-12.

were rights between Maori themselves, although even in that Court the rule was to be adhered to "except in rare instances".[9]

In the original setting this rule dispossessed of their ancestral territory all those of the Taranaki tribes who had fled to Kapiti, Wellington, the South Island and the Chathams in the 1820s and 1830s in the face of devastating raids from the Waikato.[10] The Government decided, however, that in Taranaki at least the rule was too arbitrary and harsh and made some concessions, offering the absentees an allowance, but much reduced from what the few residents received.[11] This arrangement was thrashed out during a series of meetings with Native Minister J C Richmond in Wellington and Civil Commissioner Robert Parris in Taranaki.

The Compensation Court itself soon came to override the rule in practice also, perhaps an example of the accommodation of Court-made principle to political exigencies. In December 1866, Judge T H Smith, sitting on the Ngati Ruanui claim in south Taranaki devised a formula awarding a resident 400 acres, but an absentee only 16 acres.[12] However, this (slight) change of policy did not hinder the transfer of the 1840 Rule from the Compensation Court to the Native Land Court. In 1869, for example, Chief Judge Fenton declared that the Court "would recognise no titles to land acquired by intertribal violence since 1840", and that "It would be a very dangerous doctrine for this Court to sanction that a title to native lands can be created by occupation since the establishment of English sovereignty, and professedly of English law...."[13]

Ownership of land by right of conquest, take raupatu, has also consistently been one of the central bases upon which the Native Land Court has determined ownership. In the Oakura judgment quoted above, Fenton also made plain that,[14]

> The conclusion at which we have arrived after our experience in the Compensation Court, and as members also of the Native Land Court, is, that before the establishment of the British Government in 1840, the great rule which governed Maori rights to land, was force, - ie, that a tribe or association or persons held possession of a certain tract of country until expelled from it by superior power, and that on such expulsion, the invaders settled upon the evacuated territory, it remained theirs until they in their turn had to yield it to others....

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9 1866 AJHR A13 at 3.

10 See for example S P Smith *History and Traditions of the Taranaki Coast* (Polynesian Society, New Plymouth, 1910).

11 For example, explained in principle in W Rolleston to Resident Magistrate Chatham Islands, 18 October 1866. MA 4/61/773. National Archives, Wellington [NA].

12 1867 NZ Gazette 190. This was based on the proportion of the resident members of a tribe who had remained "loyal" compared with those who were "rebels". The distinction was described by a later Commission of Inquiry as "a fantastic scheme," resulting in "grotesque" injustice. 1880 AJHR G2 at xxxv.

13 Fenton, above n 8, 86, 94.

14 1866 AJHR A13 at 3.

This attitude was common amongst the Native Land Court Judges. Frederick Maning, an early settler in Northland and experienced Judge of the Court, confessed, "I am obliged to acknowledge that I do not at all know what the nature of Maori title is if it be not of the same nature as the good old plan of 'Let them take who have the power, and let them keep who can'."[15] The principle has continued to guide the Court's decisions to the present day.[16]

Rights conferred through descent, take tupuna, were also recognised as important by the Court. If one's ancestors occupied and used the land, this gave a very strong basis to one's own claim. In his 1869 Orakei judgment, for example, Chief Judge Fenton stated that "no modern occupation can avail in establishing a title that has not for its foundation or authority either conquest or descent from previous owners, except of course in the case of gifts or voluntary concessions by the existing owners."[17] Ancestral rights could have been acquired through ancient conquest or discovery.[18] This was how Moriori acquired their rights and they had remained in continual and undisturbed occupation of the Chathams from their arrival at some time between the ninth and sixteenth centuries until 1835. As ancestral connections were usually regarded as so important, the Court's minutebooks have become a goldmine of information for modern Maori researching their own heritage as they contain the accounts of innumerable claimants who recited whakapapa to establish their familial links with the land. In fact, these records are now sometimes the only source Maori have to turn to for such information.

It was not enough simply to have conquered or discovered the area at some time and then gone home, nor to have once had an ancestral link with a place. To accompany and shore up any such claims the principle of ahi kaa, right through occupation, was a virtually essential concomitant. In 1891, Chief Judge Seth-Smith declared,[19]

> The persons now in possession are prima facie the owners. Possession of recent origin raises only a slight presumption, while possession extending continuously over a considerable period raises a strong presumption in favour of ownership. Possession commenced before 1840, and continued without interruption to the present time, raises a presumption of so strong a character that it will require the clearest evidence to rebut it.

It was not enough just to be in occupation, without some other right to the land, but those rights were greatly diminished unless one's fires had been kept burning. Again, in Taranaki, this was a major ground for the Compensation Court's decisions against the absentees; although there were ancestral rights many had been away from the region for well over thirty years.[20]

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15 F E Maning to F D Fenton, 26 November 1877. 1890 AJHR G1 at 20.

16 Thus Judge Norman Smith in *Maori Land Law* (AH & AW Reed, Wellington, 1960) 102.

17 Fenton, above n 8, 87.

18 Above n 16, 98-100.

19 Chief Judge Seth-Smith, 1891 Chief Judge's MB 2 at 71. Quoted in above n 16, 90.

20 Above n 14, 3-6, 15-16.

It remains unclear today just how these principles, and several others also applied by the Court, were arrived at by Fenton et al; supposedly they were derived from traditional Maori custom as required by the 1865 Act. Judge Norman Smith, normally cited as an authority, does little more than say that these things were so, and refers back to opinions of the Court which enunciate them.[21] Even leading Maori scholar Professor Sir Hugh Kawharu, listing the same practices of land acquisition, notes no evidence for them more "traditional" than the opinions of various Pakeha regarded by contemporaries as authorities, collected in the mid-late nineteenth century.[22]

IV PRIOR MORIORI ASSERTION OF DIFFERENT CUSTOMARY LAW

Years before the Native Land Court actually sat in the Chathams, Moriori had made attempts to have their grievances recognised and rectified by the Pakeha authorities. Several letters and petitions were sent to Sir George Grey.[23] Presumably they had become familiar with him and his reputation for being able to rectify "native" problems during his first New Zealand governorship between 1845 and 1853. The first letter was sent to Grey in 1859 while he was still Governor of Cape Colony and is comprised of Moriori genealogical material, seemingly to make transparent the cultural differences between themselves and Maori and the specific links between Moriori and their land. When he returned to New Zealand as Governor in 1861, Moriori renewed their correspondence with him. In 1861, Resident Magistrate Archibald Shand forwarded their pleas to him that "they depend on the Governor's high consideration and sense of justice to grant them a share of any advantage he may be pleased to bestow on the dominant tribe of Maoris" and in their "soliciting a certain apportionment of land for their special behoof - more effectively to establish their general freedom." They reiterated their grievance that "they have not got a bit of land of their own... and can only hear the wailing spirits of their murdered Ancestors in the leafless Karaka trees on what was once their own undisturbed grounds."[24]

In 1862, a series of gatherings of Moriori elders sent further communications to Grey rehearsing the account of the Maori invasion, the atrocities to which they had been subjected and their subsequent enslavement. They also set out plainly their cultural rejection of violence, that "it was very evil to cause the death of another, or to take a man from his own land," the present situation being "quite opposed to their customs." They rejected the Maori claim based on conquest because "they are stealing the rights to our land.... the rights of our islands are with us. We are the original inhabitants...." Beyond that, they put their faith in the justice of "the law of England and the law which comes from the Scriptures... [since] a cannibal people cannot rise above nor refute the

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21 Above n 16, 81-114.

22 *Maori Land Tenure: Studies of a Changing Institution* (Clarendon Press, Oxford, 1977) 55-58. These opinions were collected in 1860 AJHR E1 and expanded in 1890 AJHR G1.

23 These are reproduced and reviewed in above n 1, 114-120. The originals are in GNZMS 16 and GNZMS 144. Grey Collection, Auckland Public Library.

24 Above n 23, 115.

law of England because God is the source of Pakeha law." They concluded, "This is our word... the law says that land taken unjustly must be returned to those whose it was before. Enough, come to set this island right... the doings here are not in accord with the law." Another letter urged Grey, "You must bring us the law of England." The Moriori clearly had strong expectations that British justice would restore to them land which had been taken from them in defiance of their own custom and would set them free from the slavery in which they were still held. Grey's responses cannot be discovered, but he did reply in terms which encouraged the Moriori further, as they acknowledged receipt of "your documents... hence our request to you to come and save us."[25]

Moriori efforts were partially rewarded in 1863 when a new Resident Magistrate, Captain W E Thomas, formally announced an end to slavery and the prospect of punishment to any who tried to perpetuate it. Nothing was done about the land problem.

With the creation in late 1865 of the Native Land Court, there appeared what seemed a grand new opportunity arose for resolution of the Moriori grievances. When the Compensation Court had generated its strict application of the 1840 Rule noted above, many of those absentees affected were Ngati Tama and Ngati Mutunga in the Chathams. They sought to return to Taranaki but the Government discouraged them for fear of exacerbating the already tense situation there. Increasingly, Maori there and elsewhere were turning in large numbers to the civil disobedience teachings of the the Parihaka prophets, Te Whiti O Rongomai and Tohu, inheritors from 1865 of the mantle of the Hauhau leader, Te Ua.[26] Furthermore, in southern Taranaki and Wanganui, the war chief Titokowaru generated ongoing military resistance through the late 1860s.

Officials wrote to the Chathams with explanatory material about the Native Land Court and saying that nothing could be gained by being present in Taranaki as, despite the Court ruling, all absentees' claims would be considered by the Government as a matter of course.[27] The strategy seems to have worked partially as Resident Magistrate Thomas then forwarded Maori applications for a Land Court hearing in the Chathams. But the vague promises of slender compensation in Taranaki did little to reduce Maori desire to return to their ancestral lands to establish a claim there by their physical presence.[28] Despite repeated Government insistence that they should remain where they were, three Maori groups returned there in 1867 and 1868, a total of approximately 356 people, leaving a mere twenty or so on the Chathams, compared with a Moriori

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25 Above n 23 at 117-118.

26 K Sinclair *Kinds of Peace* (Auckland University Press, Auckland, 1991) 61-85; Dick Scott *Ask That Mountain* (Reprinted Reed/Southern Cross, Auckland, 1991).

27 W Rolleston to Resident Magistrate Chatham Islands, MA 4/61/772 and 773. NA.

28 Their determination is reflected clearly in the correspondence between the Government and the Resident Magistrate on the Chathams and with Robert Parris, the Civil Commissioner in Taranaki whose task it was to settle them upon arrival. See eg Parris's account in 1880 AJHR G2 at 24-26.

population at the time of around 110.[29] On one of the five Chathams blocks, Te Awapatiki, only one Maori remained resident.[30] A question which remains unresolved is the extent to which the Government may have offered inducements, explicit or otherwise, for them to remain in the Chathams. There is strong circumstantial evidence that a succession of politicians and officials at least hinted broadly that they would be provided for there once the Court sat.

In March 1867, Henry Halse, the Assistant Under-Secretary of the Native Department, was ordered to the Chathams to provide a general reconnaissance for the Government, but also to inform the Natives "as to the working of the Native Lands Act, and recommend them to consent to a joint survey of their claims... representing to them the advantage which would accrue from such a course.... The sitting of the Court would also be expedited by this arrangement."[31] He was additionally instructed to meet with the Maori who were rumoured to be about to return to Taranaki "and explain to them that they will gain nothing by adopting this course." He addressed meetings of Maori and some Moriori and spoke with various individuals around the island and concluded that while Maori claimed by right of conquest, Moriori still claimed as the original occupants.[32] To the extent that they spoke up to Halse at all, it was already apparent that the Moriori did not understand the operation of the Native Land Court. It was also apparent that the Maori demonstrated no real commitment to the Chathams, one commenting, for example, that "our wish to go back is because Taranaki is the land of our forefathers."[33] However, for various reasons all agreed that they wanted a sitting of the Land Court to determine the ownership issue properly. Halse duly required Captain Thomas to forward formal applications for surveying. In February 1868 the surveyors, led by Percy Smith, arrived to begin a year's work, accompanied initially by Native Under-Secretary William Rolleston, another senior official working to encourage enthusiasm for the Court and to discourage further repatriation to Taranaki.

V COURT HEARINGS

Judge John Rogan opened the Court hearings on 14 June 1870. To argue their claims, some fifteen Maori returned on the ship carrying the judicial party, meaning that there were still only some 35 Maori present, less than a third of the number of Moriori.[34]

Chatham Island itself was subdivided into five blocks. The hearing of the first, Kekerione (or Mangatukarewa), set the pattern for all the subsequent cases. The Maori claim was led by Wiremu Naera Pomare of Ngati Mutunga. He based his claim upon long occupation (since the invasion in 1835-36) and right of conquest, asserting openly

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29 These calculations are kindly supplied by Dr Michael King.
30 1 Chatham Islands Minute Book 40.
31 W Rolleston to H Halse, 22 March 1867. MA 4/9/157. NA.
32 His report was published in 1867 AJHR A4.
33 Above n 32, 6.
34 A Maori claimant gave the number of returnees as 15 at 1 Chatham Islands Minute Book 46.

> By the power of my [meaning his adoptive father's] arm I took possession.... We came and found this place inhabited and took possession, when we took it we took their mana from them and from that time to this I have occupied the land, this is the basis of my claim.

Regarding the Moriori, "We caught them and made them subservient to our will."[35]

Other Maori elders made the same point even more brazenly. Toenga Te Poki claimed,

> I took possession of the land and also the people. Some of those we had taken ran away. Some of those who ran away into the Forest we killed according to the ancient Customs; from this I knew the land was ours. We kept the people for ourselves. The original inhabitants did not dispute or in any way oppose our having sole possession of the land.

Likewise, Rakatau reinforced the basis for the claim in terms of Maori custom:[36]

> ...having arrived in Wangaroa we took possession of the lands in accordance with our customs and we caught the people. We caught all the people, not one escaped. Some ran away from us. Those we killed and others were killed, but what of that? It was in accordance with our custom.

Such statements were, of course, exactly calculated to fit with the Court's principles for determination of title, the take raupatu and occupation we have already mentioned. Furthermore, this all happened before 1840, meaning that the 1840 Rule forestalled any real questioning of these actions, such as would have occurred if the conquest, slaughter and enslavement had taken place subsequent to that time.

From their first testimony, the Moriori counter-argument revealed their ignorance of the Court's procedures and played straight into Maori hands. Ngamunangapaoa Te Karaka explained at length the state of "servile bondage" in which Moriori had been kept and the depth of degradation and dependence forced upon them, not even small portions of land being allowed them by their masters. Te Wetini confirmed that Moriori had played no part in having the lands surveyed in preparation for the Court nor in opposing the survey - a potentially important step in assertion of ownership. Hirawanu Tapu, the leading Moriori speaker in these hearings, also admitted under cross-examination that the Maori had attacked and beaten them, taking both the people and the land. Continual and sometimes graphic descriptions of what they saw as immense injustices punctuated the whole of Moriori testimony.[37]

However, the Moriori witnesses, especially Hirawanu, did also make clear to the Court the conflict in custom which was involved in this case. He testified,[38]

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35 Above n 34, 5-6.
36 Above n 34, 6-7.
37 Above n 34, 11, 17, 20.
38 Above n 34, 14.

> [Soon] after... they commenced to kill us, our chiefs of the Moriori held a meeting at a place called the Awapatiki. At this meeting it was suggested that we should attack the New Zealanders and fight them because it was said in history that they were cannibals. This proposition was rejected because our ancestor Pakehou had put an end to war and cannibalism. There was also subsequently a chief called Nunuku who had confirmed the law and put an end to the war and cannibalism.... Altogether there were about 1,000 men... the decision of the meeting was that they should be friendly to the New Zealanders.

Te Wetini confirmed that "Tapata and Torea at that meeting overruled that they should not ignore the law of Nunuku."[39]

Under Moriori custom, those who shed blood lost their rights, thus Hirawanu could say, "they have no grounds for claiming the land as against us the Morioris. I repudiate their right altogether because the blood of the Moriori as shed by them has never been revenged and therefore they have no right to the Islands...."[40] He later stated that he had never wished to drive the Maori off the islands, presumably for the same reason.

The Moriori reliance on the portrayal to them of the principles of justice in English law was also apparent in the presentation of their claims. Hirawanu had heard from English sailors of the British law with respect to land and had consequently written to Governors Gore Browne and Grey seeking redress, "on account of my wishing to have our lands investigated according to English law."[41]

The same accounts and responses were repeated with the other blocks over the following days. Moriori began to make a slightly greater play of their ancestral connections, but still failed to give such rights their due attention, continuing to concentrate on the injustices they had suffered. Even when ownership of a couple of the neighbouring islands was being adjudicated, the Maori argument was, "My father took possession of it by force of Arms in accordance with that which they had previously done on this Island...." and in the face of that a Moriori request to have even a small portion reserved was summarily dismissed.[42]

In his judgments on these claims, Judge Rogan was very clearly guided by Maori custom alone, as interpreted by the Native Land Court. As in the presentation of evidence, the judgment in the Kekerione case set the trend for the others. The Judge rehearsed in some detail the events of the 1835 invasion and consequent enslavement of the Moriori, noting, "The claimants simply urge their right to this land by conquest [and] permanent and undisturbed occupation up to the present time". He had observed that the Moriori did not dispute the facts of the conquest. He considered that the Maori claimants had therefore[43]

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39 Above n 34, 19.
40 Above n 34, 16.
41 Above n 34, 15.
42 Above n 34, 54-55.
43 Above n 34, 64-65.

> clearly shown that the original inhabitants of these Islands were conquered by them and the lands were taken possession of by force of arms and the Moriori People were made subject to their rule and also that they maintained their conquest by actual occupation without having subsequently given up any part of the estate to the original owners they (the New Zealanders) only having given sufficient land to the Morioris to cultivate for their support.
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> The Court therefore is of opinion that Wi Naera Pomare and the Ngatimutunga Tribe are the rightful owners of the Block according to Native custom.

The other blocks were disposed of in similar fashion. Judge Rogan took note of the "permissive right" by which the Maori allowed the Moriori to cultivate a little land and therefore awarded them a handful of tiny reserves scattered around the main island. A total of 60,156 hectares had been under consideration on the Chathams. The 35 Maori remaining had been awarded 58,516 (97.3%), the 110 Moriori received 1,640 hectares (2.7%). Even that meagre area was comprised of the leftovers, mostly wetland or forest, largely without agricultural value and with little potential for leasing, while Maori were confirmed in the lucrative leasing arrangments already arrived at with European farmers.

VI LATER HEARINGS

Subsequent hearings of the Native Land Court concerning the Chathams followed on unquestioningly from Rogan's decisions. Resident Magistrate Samuel Deighton was constituted a Judge of the Native Land Court for the purposes of holding Chathams hearings, although, as a European J P on the island commented, "He is quite ignorant of all law and as he is a paid officer there is a want of justice to the public."[44] If he was so weak in British law there was scant chance of his producing perceptive or daring interpretations in the field of Maori land law. Furthermore, Deighton was hardly openminded, nor did he accept the Moriori version of events anyway. Some time previous to his employment as a Native Land Court Judge, he had already written that Moriori were "a very inferior race" and that[45]

> I can't say that I have much of a liking for the Morioris although I feel sorry for their miserable fate. They are a lazy race, very deceitful in a small petty way, extremely dirty and very untruthful. They have some good qualities as for instance they are hospitable and polite, and very harmless. It is a great mistake to think that they were butchered in the quantities we have been led to believe.

Deighton's first hearing was notable for his use of an interested party, Wiremu Naera Pomare, the Ngati Mutunga chief, as his Assessor. In the severely circumscribed social and cultural situation of the Chathams, this made impossible not only unbiassed determinations with regard to Moriori, but also between Maori and Maori, and the hearing was cut short, considering only a handful of succession claims.

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44 Above n 1, 141.

45 S Deighton to D McLean, 19 October 1875. MS Papers 32/243. Alexander Turnbull Library.

Deighton's second hearing was held in 1885 (with a Ngati Kahungunu Assessor this time) and considered the outlying Motuhara Island. Hirawanu Tapu's claim this time was based on ancestry and continuing use rights, supported by the fact that Maori had never conquered these outer islands, and nor had Rogan's decision covered them. Hirawanu's claim was thrown out, the learned Judge Deighton simply agreeing with Pomare for Ngati Mutunga that "Hirawanu Tapu on the part of the Morioris having no claim as the Chatham Islands were adjudged to the Maoris in 1870... the Court is of opinion that the adjacent islands were included in that Judgment."[46] This was patent nonsense; Rogan's judgments were made on clearly defined and surveyed blocks on Chatham, Rangatira and Pitt Islands, these other islands never being mentioned. If this logic were to have been more widely applied by the Court all areas adjacent to a surveyed block would be bound by the one judgment, which is absurd. Perhaps the same principles guiding Rogan should have been applied again in 1885 - although probably not - but Judge Deighton did not bother to think this through himself. After this judgment, no unawarded land remaining, the Chathams cases heard by the Native Land Court were entirely for partition or succession.

One minor success was eventually permitted the Moriori in the Court. Through the nineteenth century, those Chathams inhabitants of mixed Moriori-Maori blood had been denied a right available to other people with a similar Maori ancestry; they had been unable to lodge or sustain claims in the Court to land on the strength of that Maori ancestry. This was not a policy of the Court and seems to have resulted from the contempt in which the half-castes were held by their Maori relatives and their consequent omission from the lists of grantees and heirs. Not until 1900 did Judge Edger decide that "the present Court can see no good reason for excluding such a half-caste from lands which belonged to his or her Maori parents.... there is no reason why he should be debarred from inheriting through either parent such lands as that parent had a right to."[47] Since by that time the large majority of those who identified themselves as Moriori had some Maori blood, this was an important step forward, according them the same rights as those whose Maori lineage was mingled with that of any other race.

VII CONCLUSION

The Native Land Court's judgments on the Chathams were clearly such as to call into question its interpretation and application of Maori custom. The 1840 Rule generated in Taranaki in 1866 was applied here despite the recognition enunciated in the Oakura judgment that, devised in the Compensation Court, there would be "rare instances" when the rule would not be applied in the Native Land Court. It is difficult to imagine a more appropriate situation to be one of those instances than the Chathams case; the counter claimants had their own customs which differed markedly from those of mainland Maori tribes. Judge Rogan seems to have failed to grasp the uniqueness of this situation and to have applied only the standard Court policy regarding slaves, making merely a small provision and disallowing extensive rights to ancestral lands.

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46 1 Chatham Islands Minute Book 97-98.

47 3 Chatham Islands Minute Book 322.

The adequacy of accepting in the Chathams milieu the concept of take raupatu was not addressed by the Court either. Here there was a clear case of cultural conflict, the Moriori rejection of such a concept expressed over a number of years and explained again, though not as forcefully as it might have been, in the Court sittings. To fight the invaders would, in Moriori eyes, have lost them the mana over their land. In keeping with the mainland Maori customary base developed for the Court's operations, the Chathams judgments reveal that on the islands only conquest and violence were taken as valid means of acquiring and retaining mana whenua.

This decision therefore provides a clear example of Chief Judge Seth-Smith's dictum that "possession commenced before 1840, and continued without interruption to the present time, raises a presumption of so strong a character that it will require the clearest evidence to rebut it." Requiring such "clear evidence," the Moriori case was poorly presented in terms of what was expected of a Native Land Court argument. They had failed to stress a number of key aspects such as their own original occupancy, their retention of mana whenua by observance of their own cultural mores, their maintenance of continual occupancy even if some of that were in conditions of slavery, and especially, following Seth-Smith's words about continuing possession, the breaking of continual occupancy by the Maori, who had nearly all returned to Taranaki at least two years previously. The take tupuna (their right through ancestral connections), combined with their unextinguished occupancy, should have weighed heavily with the Court - but it did not. The Maori presenters had several years of arguing their cases before the Compensation Court in Taranaki. To the extent that any Government or Court official thought the Moriori unprepared, their attitude was probably just that it was bad luck, since all Maori groups had to learn the ropes at some stage.

Given, too, the succession of official encouragements given to Ngati Tama and Ngati Mutunga to remain in the Chathams, combined with the repeated attempts to gain support for a Land Court hearing, it may be wondered about the extent to which the Court was in some way induced to assist Government policy by producing a favourable decision. At the very least it must have been assumed that the known principles of the Court would produce an effectively predetermined result. What is certain is that at no time after the first moves were made in 1866 did any official, either in Wellington or the Chathams, expect Moriori to regain significant control of the Chathams by means of the Court.

As Michael King notes, the Moriori faith in British justice was shown to have been completely misplaced, resulting in what they could only regard as gross injustice - "not only was [sic] the Maori not to be punished for their treatment of the Moriori, they were to be rewarded for it."[48].

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48 Above n 1, 132.