

New Zealand Journal of Public and International Law



VOLUME 12 ■ NUMBER 1 ■ SEPTEMBER 2014

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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Shaunnagh Dorsett	Sir Geoffrey Palmer
David Hackett Fischer	Andrew Sharp
Benjamin F Gussen	David V Williams
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NEW ZEALAND JOURNAL OF
PUBLIC AND INTERNATIONAL LAW

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Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

September 2014

The mode of citation of this journal is: (2014) 12 NZJPIL (page)

The previous issue of this journal was volume 11 number 3, December 2013

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

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The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship. It is available in hard copy by subscription and is also available on the HeinOnline, Westlaw, Informat and EBSCO electronic databases.

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The Unearthing New Zealand's Constitutional Traditions Conference at which preliminary versions of these articles were originally presented was hosted by the New Zealand Centre for Public Law and was made possible with the generous support of the New Zealand Law Foundation.



THE LOST JURISPRUDENCE OF THE NATIVE LAND COURT: THE LIBERAL ERA 1891–1912

*RP Boast**

This article focuses on the Native Land Court in the Liberal era (roughly from 1890 to 1910). The article concentrates not on the case law of the Court or on the statutory framework but rather on the institution of the Court itself, its judges, and the public persona and reputation of the Court at this time. It is suggested that the judges of the Court were a more interesting and diverse group than is often supposed, and that the debate on land tenure in late-colonial New Zealand was comparatively wide-ranging and sophisticated. More broadly, the Native Land Court, like any important institution, needs to be seen in the political context of its day.

I INTRODUCTION

The title to this paper is something of a misnomer, as the jurisprudence of the Native Land Court has not so much been "lost" as "buried" – buried, that is, in its own manuscript records, these being the Native Land Court's minute books. The Native Land Court was established by statute in 1862 and 1865 and is a well-known institution in New Zealand legal history. It was originally set up to investigate titles to land in Māori customary ownership and to provide a mechanism by which such land could be converted to Crown-granted freeholds. The Court, today the Māori Land Court, is still a busy institution and the category of land it administers, styled "Māori freehold land", is an important one, making up about 12 per cent of the North Island.¹ In this paper, I will consider the Court in what is

* Professor, Law, Victoria University of Wellington. This article is based on research carried out for two different projects, one relating to the Native Land Court from 1887 to 1909 and the other a study of tenurial change on the Pacific rim in the 19th century funded by the Marsden Fund administered by the Royal Society of New Zealand. My thanks to both institutions, to my research assistant Ryan O'Leary and to the conference organisers.

1 The current statute, Te Ture Whenua Māori/Māori Land Act 1993, is the most recent of a long sequence of Native/Māori Lands Acts that derive ultimately from the originating 1862 and 1865 Native Land Acts. On the earlier history of the Native Land Court see Richard Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008). For an edited selection of judgments of the Court see Richard Boast *The Native Land Court 1862–1887: A Historical Study, Cases and Commentary* (Brookers, Auckland, 2013). For an overview of the history of the Court see David V Williams *"Te Kooti Tango Whenua": The Native Land Court 1864–1909* (Huia Publishers, Wellington, 1999).

perhaps its most neglected period, the Liberal era from 1891 to 1912, with the aspiration not so much of uncovering the history of the Native Land Court itself, but rather of providing a window into the world of legal and political debate in late Victorian and Edwardian New Zealand, a world which is much more complicated and interesting than might be thought.

By the 1890s, New Zealand no longer saw itself as a frontier society. It saw itself, rather, as a relatively sophisticated, innovative and modern country possessed of democratic institutions and with an exciting future.² The country's growth and development had indeed been astonishing. Auckland, Wellington, Christchurch and Dunedin were now substantial modern cities. The Education Act of 1877 had established a system of free and compulsory state schools. Literacy rates were among the highest in the world. Modern scientific ideas – Darwinism, for instance – were quickly accepted with remarkably little of the religious controversy they provoked in other parts of the world. A university had been established, with colleges in the four main centres. By 1900 the whole of the national territory was more or less occupied and under the effective sovereignty of the State. Writing in 1904, Edward Tregear observed that "[e]xcept among a few villages of 'the King Country' or among the Urewera tribe (at the East Cape of the North Island) no corner of New Zealand can be found into which the ideas and manufactures of the European have not entered."³ In the Waikato and Taranaki, former frontier zones, the modern landscape of dairy farms and prosperous country towns was emerging. Blockhouses and redoubts had fallen into disrepair or had become overgrown and were now historical curiosities. The battles of Rangiriri and Orakau were a remote memory and Māori resistance to the British army in the Waikato could now be rather admired in a somewhat romanticised way as a cornerstone of a growing national identity. The defiant cry of "Ake, ake ake" from the parapets at Orakau had now been adopted by the national rugby team. By 1900, Hamilton, the main town of the Waikato, a former military settlement, now had hotels, draper's shops, book and stationery businesses, chemists, banks, a brewery, a town hall, a public library, a number of schools, a hospital and a cathedral. Surrounding Hamilton was a landscape of dairy farms and small "creameries" (dairy factories).⁴ All this had happened within 30 years of the Waikato war.⁵ These changes had grown up around Māori people, who still remained in their communities and continued to be a very visible presence in the Waikato. It should not be thought that everyone in the "settler" community was necessarily antithetical to Māori aspirations and political institutions. William Australia Graham, Mayor of Hamilton from 1884 to 1887, was

2 See generally Ron Palenski *The Making of New Zealanders* (Auckland University Press, Auckland, 2012).

3 Edward Tregear *The Māori Race* (AD Willis, Wanganui, 1904) at 3.

4 See Winifred Petch "Hamilton in the 1900s" (1980) 37 *Auckland-Waikato Historical Journal* 27.

5 The battle of Orakau, the final engagement of the conflict of the Waikato, was in 1864.

friendly with King Mahuta, acted as his interpreter at times, and in 1911 published *The Land of the Moa*, a booklet calling for fuller equality between Māori and Pakeha.⁶

II THE JUDGES OF THE NATIVE LAND COURT IN THE LIBERAL ERA

The judges of the Native Land Court had always been a diverse and somewhat idiosyncratic group. This did not change in the Liberal era, as the 1891 bench shows. Judge Mackay, who was to retire from the bench in 1892, was a former Native Department official who had negotiated the Arahura purchase in 1859 and had worked as a Commissioner for Native Reserves in Nelson before becoming Commissioner of Native Reserves for the whole country in 1882. He had an expert knowledge of reserves and Māori lands in the South Island. Judge Gudgeon was a former army officer who had arrested Tohu and Te Whiti at Parihaka, but who, perhaps paradoxically, had a long-standing interest in Polynesian anthropology and comparative linguistics and was a founding member of the Polynesian Society in 1892. (He was Elsdon Best's brother-in-law.) Gudgeon was later to become New Zealand's Principal Administrator in the Cook Islands. Judge Von Sturmer was a former resident magistrate in the Hokianga. Judge Scannell, like Gudgeon, had a background in the army and policing and for a time had been the Resident Magistrate at Taupo. Judge Barton could hardly have been more different: he was a former barrister, known for his aggressive courtroom style, who had represented Wi Parata in the famous case of that name. Laughlin O'Brien, made a judge in 1880, had been a successful solicitor in Auckland. Judge Seth-Smith, who became Chief Judge in 1893, was very well-educated: he had an MA from Trinity College, Cambridge, joined the Middle Temple and was admitted to the English bar in 1871. He moved to New Zealand and was admitted as a barrister and solicitor in 1881.⁷ Judge Ward came from a missionary family and joined the Native Department in 1868 and had also served as a resident magistrate. Three of the eight were legally qualified (Seth-Smith, Barton, and O'Brien.) The others were either from a military background, were former members of the Native Department, or were formerly resident magistrates, or a combination of all these.

The full list of the judges appointed between 1880 and 1904 (that is, the period between the appointments of JE McDonald and Jackson Palmer as Chief Judges) is as follows:⁸

6 See Michael Graham-Stewart and John Gow *Out of Time: Maori and the Photographer 1860–1940: The Ngawini Cooper Trust Collection* (John Leech Gallery, Auckland, 2006). At 84 there is a fine portrait photograph of Graham, King Mahuta Tawhiao, and Te Tahuna Herangi (Searancke), father of Te Puea Herangi, taken in 1890, all three dressed in the very height of late-Victorian respectability.

7 "The New District and Resident Magistrate" *Auckland Star* (Auckland, 8 December 1882) at 3.

8 This table is based on a research report by Bryan Gilling: Bryan Gilling *The Nineteenth-Century Native Land Court Judges: An Introductory Report* (research report commissioned by the Waitangi Tribunal, 1994) Wai 814 [*Gisborne Inquiry*] Doc#A78. I have supplemented this by my own research based on the Papers Past website and other sources.

Name (Chief Judges in bold) VC=also appointed to Validation Court	Date Appointed	Whether legally qualified (that is, as solicitor or admitted to the Bar)	Background
James Edwin McDonald	18 Oct 1880 14 Nov 1882 (Chief Judge)	Yes	Former resident magistrate in Auckland; retires for health reasons
Laughlin O'Brien [VC]	18 October 1880	Yes	Former Member of the House of Representatives (MHR) for Auckland 1853–1855; solicitor in private practice in Auckland; also appointed to VC 17 January 1895
Frederick Maurice Preston Brookfield	22 April 1881	Yes	Qualified as a solicitor in England; sets up law practice in Auckland in 1856; active in Auckland District Law Society; retired from the bench in 1886 part-way through hearing of Taupouiatia case; later advises Hitiri Te Paerata and other Māori leaders who object to the Taupouiatia decisions
Edward Marsh Williams	29 April 1881	Unknown	Unknown
Edward Walter Puckey	18 May 1881	No	Born in NZ; grows up in Thames; Native Department official; joins Department as an interpreter in 1863; later based at Thames
William Gilbert Mair [VC]	22 March 1882	No	Born in NZ (Te Wahapu, Bay of Islands) in a settler family in Northland; joins Colonial Defence force and is at Battle of Orakau (1864); Commander of Arawa units in campaigns against Te Kooti; attains rank of Major; becomes Native Agent and Resident Magistrate (RM) for the Waikato based at Alexandra (Pirongia); becomes friendly with King Tawhiao
Henry Tacy Clarke	12 March 1883	No	Former Government official
Alexander Mackay [VC]	20 March 1884	No	Arrives in NZ in 1845 aged 12; farms at Nelson; becomes Resident Magistrate for Nelson and Commissioner of Native Reserves, 1864; Commissioner of Native Reserves for the whole country in 1882; publishes a detailed compendium of documents relating to Māori land issues in the South Island

Richard John Gill	8 Jan 1885	No	Long-standing civil servant with the Native Department; accompanies Sheehan to meet Titokowaru in 1878; becomes Under-Secretary of the Native Land Purchase Department; appointed Judge 1885 following closure of the Department; retires from the bench 1886; becomes active in Bay of Plenty politics and contests Tauranga seat in 1887; but later returns to the bench
David Scannell [VC]	5 Dec 1885	No	Armed Constabulary and NZ Militia; attains rank of Major; RM at Taupo
Robert Ward [VC]	25 May 1886	No	From missionary family in Taranaki; joins Native Department in 1868; Native Agent and RM for Rangitikei and Manawatu
Herbert William Brabant	27 Dec 1886	Unknown	1867, Government interpreter, Raglan; 1871, Resident magistrate, Opotiki; 1880, Native Land Purchase Officer
George Eliot Barton [VC]	19 Nov 1888	Yes	Born in Ireland; barrister in Dublin and Melbourne; practises as a barrister in Wellington; MHR for Wellington City 1878-79; acts for Wi Parata Kahuhura in <i>Wi Parata v Bishop of Wellington</i> .
Spencer William Von Sturmer	21 Feb 1889	No	RM in Hokianga, then Wairarapa, Napier and Waipukurau
Robert Trimble	15 Nov 1889	Unknown	Judge from 1889 to 1891; referred to in sources as "Colonel" Trimble, so presumably from a military background
James Stephenson Clendon	10 Oct 1890	No	Born in England; moves to NZ at age of 4; RM at the Bay of Islands and well-known in Northland; appointed temporary Judge for East Coast; becomes stipendiary Magistrate in Northland

Walter Edward Gudgeon ⁹ [VC]	1 July 1890	No	Born in England; grew up in New Plymouth; no formal education; works as shepherd and drover; enlists in Wanganui Bushrangers; joins Armed Constabulary; RM for Wairoa and Waiapu; leads company that arrests Te Whiti and Tohu at Parihaka in 1881; promoted to Major in 1885; Under-Secretary for Defence; Police Commissioner 1887; founding member of Polynesian society; becomes British Resident in the Cook Islands, 1898; after the Cook Islands are annexed by New Zealand Gudgeon becomes Resident Commissioner, Chief Justice, and Chief Judge of the Cook and other Islands Land Titles Court
Hugh Garden Seth-Smith	Feb 1889 (CJ) May 1904 (CJ)	Yes	College, London, and Trinity College, Cambridge (BA 1871; MA 1874); called to Bar in 1873 (Inner Temple); admitted to NZ Bar in 1881; becomes District Judge and Resident Magistrate in Auckland, 1882 (replacing James Edwin McDonald); appointed Chief Judge in 1889 but resigns and travels to England in 1893; returns to practice law in Auckland and is active in Anglican diocesan affairs in Auckland; reappointed as Chief Judge in 1904
George Boufflower Davy [VC]	15 Nov 1892 (CJ) 1894	Yes	Born in Jamaica, 1836; qualifies as a solicitor in England; practises law in Whangarei and Auckland; becomes Registrar-General of Lands in 1875; District Court Judge
William James Butler [VC]	14 June 1893	No	Born in NZ; surveyor; Native Department official; Private Secretary to Bryce, Rolleston and Ballance; Land Purchase Officer at Wanganui; instrumental in Crown purchase of Waimarino and other blocks
Herbert Frank Edger [VC]	13 March 1894	Yes	Born in England; came to New Zealand at the age of 8 with his family as part of the Albertland group; the family later became part of a highly cultured and freethinking circle in Auckland; joins the Native Department in 1879 and admitted to the Bar in 1889; becomes Registrar of the Native Land Court in 1891

⁹ See David Green "Gudgeon, Walter Edward" in Claudia Orange (ed) *Dictionary of New Zealand Biography* (Bridget Williams Books, Department of Internal Affairs, Wellington, 1993) vol 2 at 181–183.

Henry Dunbar Johnson	April 1896	No	Born in England; emigrates to NZ at the age of 19; early settler in the Paeroa region; joins Civil Service in 1879; Government Native Agent for Thermal Springs District in 1885; becomes Registrar of the Native Land Court in 1894 (replacing Edger); member of Auckland Institute and the Polynesian Society
James Meacham Batham	1 April 1897	No	Born in England; arrives in NZ in 1864; holds numerous official positions, including that of District Land Registrar in Westland, Napier, and Wellington; combines these positions with his Judgeship
Robert Noble Jones (NVC)	1 July 1903 14 Aug 1919 (CJ)	Yes	Admitted in 1890; practices law in Gisborne; Gisborne Borough Councillor; becomes Under-Secretary of the Native Department in 1921 while continuing to work as a judge of the NLC
Jackson Palmer	8 June 1904 27 Aug 1906 (CJ)	Yes	Articled clerk to John Sheehan, Native Minister and barrister; admitted to New Zealand and Samoan bars; Liberal MHR for Waitemata (1890–1894) and then for Ohinemuri

III A NEW KIND OF JUDGE: THE LIFE AND TIMES OF JUDGE HERBERT EDGER

Judge Edger, judge from 1894 to 1909, belongs to a completely different world than the judges of the 1870s and 1880s such as Judges Rogan or Mair, the one a former surveyor and the other an army officer who had led Māori units in the New Zealand wars. Edger, in contrast, was a trained lawyer and came from a highly intellectual and cultured family in Auckland. Sweeping judgments about the Native Land Court bench often fail to take into account not only the extent to which the institution was changing but also the growing political and intellectual sophistication of the country. Judge Edger is a case in point. Herbert Frank Edger was born in England in 1854, and migrated to New Zealand with his parents and his sisters in 1862, settling at Albertland near Auckland. (The "Albertlanders" were a group of high-minded Dissenters, who chartered their own ships and migrated to New Zealand under a special arrangement with the Auckland Provincial Government.) Herbert's father, Samuel, was a Baptist minister and a university graduate, and a man of independent mind and of politically and theologically liberal leanings, who finally found Albertland not sufficiently progressive for his taste and who proceeded to set up his own congregation in Auckland instead. The Reverend Samuel Edger was extremely well-read in contemporary theology and became a religious freethinker and a nondenominational minister who gave popular lectures on theology and spiritualism to appreciative audiences. He was active in the acclimatisation movement

and in many liberal causes and was a well-known figure around the city.¹⁰ Samuel Edger was part of a circle of well-educated and idealistic Aucklanders with advanced views on Christian theology who were either Unitarians or close to the Unitarian position. He also headed a very gifted and musical family. His daughter, Kate, following an excellent education at home and then at Auckland Grammar School, was the first woman in the British Empire to obtain the degree of Bachelor of Arts (in 1877, from Auckland University College).¹¹ Kate went on to gain an MA from Canterbury University College, as did another sister, Lillian (Lillie). Kate became the founding Principal of Nelson College for Girls. Taking after her father, Lillian became interested in theosophy and went to India to learn about Indian religious thought, and later gave popular public lectures on theosophy to large audiences in Auckland and elsewhere. A contemporary newspaper described Lillian as "a brilliant platform speaker" and admiring newspaper reporters interviewed her and published articles on her views about the political and religious life of India.¹²

Herbert, for his part, joined the staff of the Native Land Court in 1879 and was admitted as a barrister and solicitor in 1889. Edger became Registrar of the Court in 1891 and a judge in 1894.¹³ In 1903 he became chairman of the Waiariki District Māori Land Council.¹⁴ He married Augusta Anne Langford, who was active in charitable organisations and the Auckland Choral Society and who travelled with the Judge to Court hearings in Whangarei, Te Aroha, Paeroa and elsewhere. The Judge, an accomplished cellist, also performed in concerts and recitals in Auckland – and indeed before his admission to the bar he composed songs for his sisters to perform in public while he accompanied them on the cello: an appreciative member of the audience on one occasion was none other than Chief Judge Fenton, also active in the city's thriving musical scene.¹⁵ Edger continued to play in concerts and recitals after he became a judge and also chaired the Auckland Orchestral Society.

As a judge, Edger presided over numerous significant cases: some of those regarded as important enough to be reported in the newspapers included the pivotal Rotomahana 6A case

10 See Peter Lineham "Edger, Samuel" in Claudia Orange (ed) *Dictionary of New Zealand Biography* (Bridget Williams Books, Department of Internal Affairs, Wellington, 1993) vol 2 at 128–129.

11 On Kate Edger see Beryl Hughes "Edger, Kate Milligan" in Claudia Orange (ed) *Dictionary of New Zealand Biography* (Bridget Williams Books, Department of Internal Affairs, Wellington, 1993) vol 2 at 127–128. There is no entry on Judge Edger. A full study of this remarkable family and of its contributions to national life would be very worthwhile.

12 "Native Land Court" *Bush Advocate* (Dannevirke, 30 April 1909) at 3.

13 "Obituary" *Dominion* (Wellington, 29 April 1909) at 5.

14 *Manawatu Standard* (Palmerston North, 26 February 1903) at 8.

15 "Piano Recital To-night" *Auckland Star* (Auckland, 23 May 1901) at 5; and "Judge Edger and Dr Cox will assist in the several concerted items" *New Zealand Herald* (Auckland, 29 April 1884) at 5.

(1894),¹⁶ Poututu rehearing (1895),¹⁷ Ngarua (1896),¹⁸ Rotokohu (1898),¹⁹ Owharua partition (1899),²⁰ Okauia (1900),²¹ Rawhiti, a key block in the Bay of Islands (1905),²² and a case in 1908 relating to the Kaihau estate in which Henare Kaihau, Member of Parliament for Western Māori, was one of the legatees.²³ He mainly dealt with cases in Northland, Auckland, and in Hauraki. He also sat on the Native Appellate Court²⁴ on many occasions. Notwithstanding his workload, the Judge was active in policy and economic debate, and in 1901 was part of a group of distinguished New Zealanders who contributed to a symposium on "The Money Question" published in *The New Zealand Illustrated Magazine*.²⁵ And life on circuit could have its compensations: in August 1898 Judge Edger and his wife both starred in a concert held at the Criterion Theatre in the town of Paeroa where he was sitting at the time.²⁶ While he was in Paeroa the Judge also spoke in a public debate on a subject dear to the hearts of radical liberals, "The Single Tax".²⁷ The Judge was, in short, a cultured and well-educated man and a product of a morally earnest and intellectual milieu in his home city.

Edger was a capable judge. One of the more difficult cases he had to deal with was Rotomahana 6A, a block of about 94,000 acres which had had a troubled history. The case was concerned with the difficult issue of the allocation of interests in the block among the 12 hapū of Tuhourangi. In June 1894, the *Auckland Star* reported that:²⁸

16 "Native Land Courts" *Auckland Star* (Auckland, 9 June 1894) at 2. The judgment is at (1894) 31 Rotorua MB 64–65 (12 July 1894).

17 "Native Land Court: Poututu Rehearing" *Poverty Bay Herald* (Gisborne, 6 May 1895) at 3.

18 "Native Land Court" *Thames Star* (Thames, 26 May 1896) at 4.

19 "Native Land Court" *Ohinemuri Gazette* (Paeroa, 3 September 1899) at 3.

20 "Native Land Court" *Ohinemuri Gazette* (Paeroa, 24 June 1899) at 2.

21 "Native Lands Court" *Auckland Star* (Auckland, 31 August 1900) at 5.

22 "Native Appellate Court: An Interesting Case" *Auckland Star* (Auckland, 31 July 1905) at 5. The case was heard by Judge Edger in January 1905 and the Native Appellate Court in July.

23 "Native Land Court: A Will Case" *Wanganui Herald*, (Wanganui, 7 May 1908) at 2.

24 The Native Appellate Court was established in 1894 to hear appeals from the Native Land Court, and is still in existence today as the Māori Appellate Court. Before 1894 appeals from the Native Land Court were dealt with as full rehearings: see Boast *Native Land Court 1862–1887*, above n 1, at 160–163.

25 "The Money Question" *New Zealand Illustrated Magazine* (Auckland, 1 July 1901) at 812. One of the other contributors was a Mr Sievwright, who I assume must be Basil Sievwright, Sir Robert Stout's law partner in Dunedin.

26 "Paeroa Orchestral Society" *Ohinemuri Gazette* (Paeroa, 31 August 1898) at 3.

27 "Paeroa Literary and Debating Society" *Ohinemuri Gazette* (Paeroa, 5 October 1898) at 3.

28 "Native Lands Court" *Auckland Star* (Auckland, 9 June 1894) at 2.

Judge Edger and Assessor J Barton seem to give great satisfaction to the natives by the manner in which the business of the Court is carried on, and they (the natives) are pleased to see that at last this important matter is likely to be finally and definitely settled.

In 1898 the *Ohinemuri Gazette* reported that "Judge Edger's decisions were received well by both parties during recent litigations."²⁹ Edger also won widespread support for his insistence that Māori customary marriages were no less valid than marriages according to European law, and that this was a basic principle when determining successions in the Native Land Court.³⁰

In 1906 Edger was appointed Under-Secretary of the recently re-established Native Department and was thus removed from the bench. His appointment to the new agency seems to have been regarded positively:³¹

The Government has decided that the office of Under-Secretary for Native Affairs shall be revived, and the post is to be filled by Judge Edger, of the Native Land Court, an officer in every way qualified by character and equipment for it.

However the same newspaper article was revealing of what many in the Pakeha community thought the proper task of the Native Department to be:³²

At the best, it may be expected that new life may be put into the policy of land settlement; that the court work, surveys, roading, and settlement may be expected to proceed simultaneously and at a greatly accelerated pace.

Looking after Māori aspirations, apparently, did not come into it. Edger's tenure as Under-Secretary was, however, very brief. He arrived in Wellington to take up his new position in May 1906, but in January 1907 Edger requested that he be allowed to return to the bench, and he was duly reinstated as a judge of the Native Land Court and Native Appellate Court at that time.³³ (At the same time TW Fisher and Michael Gilfedder were appointed to the bench.) Quite what happened during Edger's brief tenure as Under-Secretary of the Native Department needs to be researched from archival sources. His resignation and return to the Court was widely reported in the colonial press, but no information is given about the reasons for this. But it seems that there must have been a serious disagreement with the Government over Māori land policy.

29 "On Dit" *Ohinemuri Gazette* (Paeroa, 24 September 1898) at 2.

30 "Native Marriages" *Thames Advertiser* (Thames, 29 June 1898) at 4.

31 "Reform of the Native Department" *Evening Post* (Wellington, 16 May 1906) at 6.

32 At 6.

33 *Auckland Star* (Auckland, 12 January 1907) at 6.

Edger died in 1909 at the early age of 56.³⁴ He seems to have been greatly esteemed. His death "came as a painful surprise to his many friends": he was said to be "very popular with all who had pleasure of his acquaintance."³⁵ Among the many people present at his funeral were representatives of the Māori community, including the rangatira Rememena Mutana, Mita Karaka, Tara Hamioha and Tamaho Maika. Those sending their condolences included the Native Minister (James Carroll) and AT Ngata, and "one floral emblem represented Judge Gilfedder and the Natives attending the Land Court at Kaikohe."³⁶ Judge Edger had wished to be cremated, at that time an extremely controversial and freethinking position to take, but this could not be done because there was no crematorium in Auckland.³⁷ Augusta survived him until 1941, dying at Auckland at the age of 86.³⁸

IV THE NATIVE LAND COURT AND THE POLITICAL RHETORIC OF THE LIBERAL ERA

There can be no doubt that by the 1890s the public reputation of the Native Land Court had fallen to rock-bottom. It was denounced by Māori, lawyers, judges (including some judges of the Land Court itself, to say nothing of the judges of the superior courts) and politicians, including Premiers and Attornies-General, and in newspaper editorials. It had few friends and defenders. Many of the opinions expressed today about the Court by historians simply repeat a standard critique of the Court which became a dominant political discourse in the 1890s. Why did this critique emerge at this time? Part of the reason for this was that New Zealand itself had changed. The façade of mid-Victorian individualist liberalism had already begun to crack.

Māori were no longer a strategic and military threat, and race relations no longer the foundation of politics. Judges Fenton and Rogan now seemed to belong to an earlier world. Nor was their High Victorian liberalism the "New Liberalism" of the 1890s. Rather than emphasising self-help and individualism, the emphases were now on protective tariffs, building railways and ports, industrial conciliation and arbitration, and enlightened legislation designed to protect women and children and improve public health. It was accepted that the State should play a role in achieving these goals. The ultra-Darwinist liberalism of Herbert Spencer never seemed to have much appeal in New Zealand. In the climate of the new Liberalism, the Native Land Court, a product of the different world of the 1860s, was increasingly seen as anachronistic, amateurish, old-fashioned and even as something of a national embarrassment. Lawyers and the judges of the superior Courts regarded its processes and judges with disdain, its judges with condescension, and its decisions as untrustworthy and

34 "Death of Judge Edger" *Poverty Bay Herald* (Gisborne, 28 April 1909) at 6.

35 "Native Land Court" *Bush Advocate* (Dannevirke, 30 April 1909) at 3.

36 "Funeral of Judge Edger: Numerous Expressions of Esteem and Sympathy" *Auckland Star* (Auckland, 1 May 1909) at 6.

37 "Ceremony at Timaru: Anglican Church Completed" *Otago Witness* (Dunedin, 12 May 1909) at 10.

38 "Obituary: Mrs AA Edger" *Auckland Star* (Auckland, 27 December 1941) at 4.

amateurish. This was not mere prejudice. The seemingly endless cases in the ordinary courts, not excluding the Privy Council, arising from the complexities of Native Land Court titles and jurisdictional mistakes by its judges did nothing for the Court's reputation. At the same time there was growing pressure for a remodelling of the Native Land Laws, widely denounced as a confusing mess, for full equality between the races, and for remedial legislation which would clarify the rights of those who had purchased Māori land in good faith but who now found that their land titles were uncertain and vulnerable to attack in the courts.

Paul McHugh has written that the Native Land Court operated in an obscure space of its own, a "site of forgetfulness", remote from the public gaze, but while this may have been true in the 1860s and 1870s (and perhaps today, come to that), it was decidedly not true of the Liberal era.³⁹ On the contrary, the Court was entangled in one highly public controversy after another. In 1886, for instance, the Court and its judges were at the centre of a national political drama over the Owhaoko block, a large area of land located in one of the most inaccessible and least-visited parts of the North Island today, the wild tangle of mountain and forest and tussock-covered hill country lying between Hawke's Bay and Taihape. Some of those with interests in the block had repeatedly requested a rehearing of the block, and when these were declined no less a person than the Premier, Sir Robert Stout, took up their cause. Stout believed, or at least claimed, that Chief Judge Fenton's decision to decline a rehearing arose out of a conflict of interest between himself and the petitioners. Fenton, it was said, was linked to those who had been awarded the block and their Pakeha business allies and friends, including Walter Buller and John Studholme, Renata Kawepo's business partner and the lessee of the block. In pressing for a rehearing of Owhaoko, Stout denounced the Court in ringing tones:⁴⁰

If this case is a sample of what has been done under our Native Land Court administration, I am not surprised that many Natives decline to bring their land before the Courts. A more gross travesty of justice it has never been my misfortune to consider.

As Martin Fisher and Bruce Stirling, who have studied this episode, have found, not only were these remarks "quoted in newspapers across New Zealand", but they were in fact widely supported: the Native Land Court was not much esteemed by the general public.⁴¹ There was some dissent, however, notably from the *Poverty Bay Herald*, well-informed on Māori land issues, which believed, not unjustifiably, that Stout was only playing politics. And in fact Stout was anything but a detached observer of the Native Land Court. He had links of his own to other players in the

39 PG McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, Oxford, 2011) at 20.

40 Honourable Robert Stout "Owhaoko and Kaimanawa Native Lands" [1886] III AJHR G9 at 23.

41 See Martin Fisher and Bruce Stirling "Technical Research Programme, Sub-District Block Study – Northern Aspect" (research report commissioned by the Crown Forestry Rental Trust, 2012) Wai 2180 [*Taihape Inquiry*] Doc#A6 at 42–43.

Owhaoko affair, including Airini Donnelly, herself trying to claim large interests in Owhaoko. Airini was a wealthy and powerful Māori woman, a pillar of the Hawke's Bay landed gentry, and something of a professional litigant. Stout was counsel for Airini in the Land Court in the protracted Omaha case, a *cause célèbre* of its day. The justice of the cases that Airini Donnelly was engaged in was not always obvious: Omaha being one example, and her case in the Privy Council against the customary owners of the Kaiwaka block in Hawke's Bay – where she was also supported by Stout – another. Airini, advised and supported by Stout, defeated claims to Kaiwaka by its customary owners, ensuring that the title to the block remained in her own hands and those of her immediate family.

Stout pressed successfully for the establishment of a special select committee to examine the Owhaoko and Oruamatua-Kaimanawa cases. Fenton, by now retired from the bench, had to appear before the committee for questioning, and was cross-examined closely by Stout about the practices of the Court, including notification of hearings. The most extraordinary feature of this drama was Fenton's *own* repudiation of the Native Lands Acts and of the Native Land Court over which he had presided for many long years as Chief Judge:⁴²

Being to a certain extent a philo-Maori, if I had seen in 1865 what the result of our Acts would have been, I do not think I should have assisted in their introduction. I should have said, "Let colonization go to the wall." ... It [the Native Land Court] has destroyed the race.

Fisher and Stirling see this as an example of mere "crocodile tears".⁴³ As well as being a bit harsh – in my opinion, at least – this is to obscure the historical significance of Fenton's admission. That at the end of his career Fenton could have concluded that the Native Lands Acts were a disaster and the Court had "destroyed" the Māori people is obviously important. Fenton himself turned out to be a critic of the Court in the end.

Newly-appointed judges of the Court itself could be amazingly scathing about their own colleagues and about the reputation of the Court generally. Judge Barton led a longstanding campaign to remedy the problems caused by the chaotic state of Court-derived titles. Barton was something of a new broom, a reformer and a moderniser who thought it was time for the uncertainty over land titles deriving from transfers from land held under memorial to be put to an end. One gets the impression that he saw the mostly unqualified judges of the Court as an inferior species, himself being a former leading barrister in the ordinary courts with a national reputation for his aggressive courtroom style, and that he joined the Court in order to change it. He took a dim view of the ability

42 Report of the Owhaoko and Kaimanawa Native Lands Committee, Together with Minutes of Proceedings and Evidence and Appendix" [1886] IV AJHR 18 at 55–65.

43 See Fisher and Stirling, above n 41, at 44.

of his colleagues to deal with the complexity of statutory Māori land law. In a judgment he gave in 1893 he had this to say:⁴⁴

I cannot deny the force of Mr Rees's argument from inference, that, inasmuch as the repealed section 27 was to have been carried out by a Judge with Supreme Court status, salary, and protection, whereas the provisions of this statute are committed to untrained and unprotected Judges, the Legislature could not have intended to intrust duties that ought only to be performed by a highly trained Judge to men who, to the timidity engendered by the want of legal training, add the fear of incurring the hostility of powerful suitors with fortunes at stake. I quite admit the impropriety of allowing Judges, selected for their skill in Maori language rather than for any other qualification, to be taken as guides through the difficult channels of English law, and that, too, without any appeal from them to those who are the skilled pilots in that law.

In short – according to Barton – the judges of the Court, excluding himself that is, had no legal training, could not understand statutes, knew nothing about the common law, were afraid to offend powerful private parties, and had been appointed more because of their ability to understand Māori than for any other reason. Barton, on the other hand, probably had a very poor command of Māori but was certainly an experienced and eloquent lawyer, and was someone who was never deferential to politicians or officials.

Barton's remarks were made in a very public manner. His judgment was printed in full in the *Poverty Bay Herald*, always pleased to expose the shortcomings of the Native Land Court, as well as in a parliamentary paper. How Judge Barton's characterisation of his colleagues on the Māori Land Court bench was received by them is unknown, although it can be guessed at. Judge Barton was not a lone voice by any means. Here one confronts a paradox of the Land Court's history. If it served the interests of the Colonial State and "settlers" as well as many historians seem to think, one would expect the Court to be esteemed and supported by a grateful Pakeha public. This was simply not the case, at least not by the 1890s.

In 1893 an organisation calling itself the Native Land Reform League attracted a certain amount of newspaper attention (it has attracted none from historians, however). The organisation became prominent in early 1893 and was presided over by Josiah Clifton Firth, formerly a prominent runholder in the southeastern Waikato (he was sometimes referred to as the "Duke of Matamata").⁴⁵ The League pressed for a reform of Māori land law. It professed to have the interests of Māori and

44 Judgment of Judge Barton in the *Puhatikotiko Case*, Gisborne Validation Court, 20 April 1893, reproduced in "Reports of Inquiries held under The Native Land (Validation of Titles) Act, 1892" [1893] I AJHR G3 at 6.

45 On Firth see Duncan Waterson "Firth, Josiah Clifton" in WH Oliver (ed) *The Dictionary of New Zealand Biography* (Allen & Unwin, Wellington, 1990) vol 1 at 124–125. This article, however, somewhat gives the impression that Firth believed that the alienation of Māori land was an inevitability. Firth's role in the Native Land Reform League indicates at the very least that things were more complicated than that.

Pakeha equally at heart, and to be politically bipartisan. The establishment of the organisation was widely reported. According to the *Poverty Bay Herald*:⁴⁶

A Native Land Laws Reform League has been established in Auckland, Mr J.C. Firth being Chairman, with the following objects: To secure the passage of laws; to provide for the management of tribal lands by owners acting in a co-operative capacity; the speedy ascertainment of titles to land owned by Natives; the throwing open of the surplus lands of the Maoris for settlement; to aid the Maoris to improve the conditions of the people; and to bring the Maoris into the same position as fellow subjects of other races. A great Native meeting re the Native land laws will be held next month.

The goals of the association may today seem to be contradictory. Providing for "the management of tribal lands by owners acting in a co-operative capacity" might seem eminently laudable, and even somewhat ahead of its time. However "throwing open of the surplus lands of the Maoris for settlement" seems rather less meritorious, even something of a giveaway. Contemporaries may not have seen things quite in this light, however. Given the seemingly obvious and inexorable decline of the Māori population, it will have seemed simply sensible to do away with the complexities of the Māori land system, restore collective tenures to some degree, provide for full racial equality and facilitate safe and rapid alienation of unwanted lands to settlers.

The Association began well, and began to campaign actively for bipartisan legislation to remedy what its supporters saw as the Māori land mess. The *Auckland Star* reported progress to date on 28 March:⁴⁷

It is gratifying to find that the hon secretary of the Native Land Law Reform League was able to report at the meeting of the Committee yesterday that he was still receiving replies from County and Borough Councils and Town Boards in favour of a thorough and effective system of native land law reform in the next session of Parliament. There has not been a single case of objection in either the North or the South Island. In some cases councils have, in addition to passing a resolution on the subject forwarded it to the M.H.R. of their district, requesting him to support the movement for reform in Parliament. It is evident, therefore, that there is a consensus of opinion of local governing bodies in favour of the much needed effective reform of the native land laws, irrespective of party.

The Association seems to have been short-lived, and it is difficult to assess its effectiveness or importance. There may be connections between the Association's campaign and the enactment of the Native Land Court Act 1894, which – as has already been noted above – established the Native Appellate Court and restored Crown pre-emption to the whole country, both important steps but hardly radical innovations. There may also be connections between this pressure campaign and the

46 "Native Land Laws: Reform League in Auckland" *Poverty Bay Herald* (Gisborne, 18 January 1893) at 2.

47 "Native Land Reform: Operations of the League" *Auckland Star* (Auckland, 28 March 1893) at 2.

establishment of the Native Validation Court, but more research is needed on the Liberal era before these links can be definitely established.

It is important to separate out the various shades of opinion amongst those who were critical of the Court. Māori had their own reasons for concern about the Native Land Court, of course – although they also continued to bring cases before it, for whatever reason. There were those who criticised the Court not for acting against Māori interests but (so it was said) for being much too indulgent towards Māori. Some people complained, for instance, that the Court let Māori speak before it at unnecessary length. EH Williams, a lawyer from Napier, told the Rees-Carroll Commission in 1891 that the judges were "not quick enough in stopping evidence when it has nothing to do with the point at issue, fearing, I suppose, that if any evidence is rejected a rehearing will be applied for".⁴⁸ Sometimes, denouncing the Court, which seemed to have few friends and defenders, was part of a political or even of a courtroom strategy. Often factional linkages between Māori chiefly leaders and Pakeha politicians were played out in the Court and in parliamentary inquiries. Politics was much more confrontational, argumentative and rhetorical than the sanitised and managed variety that we have had to become acclimatised to: rhetorical outbursts about the Native Land Court were often simply that.

Someone whose criticisms of the Court and of the legislation need to be taken with an especially large grain of salt is William L Rees.⁴⁹ His remarks in the Rees-Carroll Commission Report of 1891 were much more a Liberal *parti pris* than an objective assessment of the Court and of the law. If any lawyer was personally entangled in every aspect of Māori land practice, that person was Rees. He was involved in practically every Supreme Court and Court of Appeal Māori land case from the East Coast region of any importance (of which there were many), where he constantly pressed every conceivable argument that he could, and he was also engaged in endless cases in the Native Land Court, Native Appellate Court, and Native Validation Court.⁵⁰ He too was connected with an

48 "Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws" [1891] II AJHR G1 at 117.

49 Here I note (and strongly agree with) the observations of WH Oliver and Jane Thomson, and also of Robert Hayes. See WH Oliver and Jane M Thompson *Challenge and Response: A Study of the Development of the Gisborne East Coast Region*, (East Coast Development Research Association, Gisborne, 1971) at 125–126 and 158–159; and Robert Hayes "A Study of the Uses and Misuses of the 1891 Native Land Laws Commission" (research report commissioned for the Crown Law Office, April 2008) at 17. Rees is a fascinating character, but nothing he says should be taken at face value.

50 Perhaps the most important case Rees was involved in was the Privy Council decision in *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC), which was concerned with the Waingaromia 2 and 3 and Rangatira 2 blocks north of Gisborne. Rees was solicitor on the record for the plaintiffs/respondents, and travelled to London to participate in the case in May 1904. (The *Feilding Star* reported Rees' departure under the ironic headline of "A Pleasure Trip": see *Feilding Star* (Feilding, 14 May 1904) at 2.) On the intricate background to this case and the earlier decisions of the New Zealand Courts (including the Native Land Court) see Boast, *Native Land Court 1862–1887*, above n 1, at 756–781. The Assets Company was set up by a UK statute, the City of Glasgow Bank Liquidation Act 1882, which transferred the assets of the failed City of

important Māori leader, in his case the East Coast Chief and Member of Parliament, Wi Pere, with whom he was linked in the disastrous fiasco of the East Coast trusts affair. To salvage the foundering trust scheme, which was burdened with a huge mountain of debt – a good part of it deriving from Rees' own legal fees – Rees and Wi Pere made every effort they could to defeat the interests of European purchasers or transferees in order to ensure that more blocks could be added into the Trust estate to prevent the whole project from sinking. This is not to say that some of the criticisms that Rees advanced in his 1891 Report were wholly lacking in foundation. When Rees complained that the law was increasingly complex, he was right. But it can also be said that one important source of this complexity was Rees himself and his propensity to bring complex appeal and review proceedings in the ordinary courts: these decisions created confusion in their own right which then necessitated further legislative tinkering which added to the very complexities that Rees complained about.

People will have supported an organisation such as the Native Land Reform League for a variety of reasons. There were those who believed that a simplification of the law and a revival of collective tenures would be to the advantage of both races, as the Native Land Reform League shows. Nevertheless, it is also true that many people who opposed the Court and harped on the intricacies and confusions of the law were less motivated by concerns about Māori, who were widely perceived to have more land than they knew what to do with in any case, than about the risky and confused land titles that derived from the Court's decisions and from the legislative morass. The judges were not unaware of the fact that much of the criticism of the Court was anything but altruistic. The ever-lucid, if perhaps somewhat obsessive, Judge Barton made this point in his own inimitable way in one of his wordy judgments on the Puhatikotiko block in 1893:⁵¹

The Supreme Court Judges, who deal with interests far inferior in value to those dealt with in the Native Land Court, are by special statute absolutely protected against attack from any quarter. The Judges of the Native Land Court have no protection whatever, and if any swindling transaction is laid bare and public indignation demands a victim, the very rascal who is decamping with booty raises the cry of "Stop thief!" against the Judge, so that attention may be diverted from himself.

Historians need to be careful about deploying late nineteenth century rhetorical outbursts about the Court to support their own, typically hostile, interpretation of the Court. It is certainly risky to assume that critics of the Court were necessarily philo-Māori, or that the Court's defenders were indifferent to Māori well-being. Mostly, Pakeha wanted to see a continuous flow of land moving

Glasgow Bank from the liquidators to the Assets Company. Before its spectacular crash in 1878, the Bank had speculated, no doubt very unwisely, in Māori lands in the East Coast region. Rees was involved in many of the cases that arose from this affair. He was a constant presence in the Validation Court after the latter was set up in 1893.

51 "Reports of Inquiries Held under the Native Land (Validation of Titles) Act, 1892" [1893] II AJHR G3 at 19–20.

from Māori on to the land market for them to buy. The Native Land Court could sometimes seem to be a very inefficient means of achieving this goal, and this was why it was often criticised. Having bought former Māori land, purchasers wanted secure titles, something which the system did not necessarily deliver, as for instance the endless litigation over the Waingaromia 2 and 3 blocks at Gisborne, which eventually reached the Privy Council, appeared to demonstrate.⁵² This too was a reason for much of the criticism. Yet the fact that the Court was so consistently attacked by many well-informed people is obviously important, an indication that whatever perceived value it might have had in the 1860s and 1870s was now rapidly evaporating.

While the Court has been cast by historians as either the handmaiden of the Government or, on the other hand, as a powerful vested interest in its own right, pursuing its own agendas, the judges of the Court tended to see themselves as the victims of powerful private sector interests and believed that politicians and officials, themselves anything but disinterested, were actively engaged in thwarting the Court at every turn. Judge Barton can be quoted again:⁵³

No one who has not made the endeavour can appreciate how difficult it is for a Native Land Court Judge, without status, without even the protection which publicity of the Court proceedings gives to other judges – to resist the influences brought to bear upon him. He is harassed with applications to the Supreme Court; prohibitions, mandamuses, even actions are showered upon him by those against whose interests he has given judgment, and, while his work is thereby stopped or delayed, he is accused in Parliament and elsewhere (as happened to myself regarding Poututu) of being guilty of these very delays. My Court orders in that litigation were obstructed even in the other Government departments, and in one instance obedience to an order of my Court had to be enforced by a protracted and costly proceeding in the Supreme Court. A Judge subjected to such obstacles and to such influences, not to mention others not alluded to here, must at last in sheer despair let things slide rather than court his own destruction by futile resistance to the frauds and wrongs of powerful persons.

Although some historians have asserted the contrary, there is no reason to believe that Judge Barton was deferential to the State: rather he was a somewhat obsessive individual who regarded officials and his fellow judges with scorn and who saw himself as a lonely crusader on behalf of those who were unable to perfect their titles to land because of legal complexities. He was, however, not a supporter of private purchasers come what may. Nor was he beholden to powerful vested interests. It is unlikely that the "powerful persons" that Judge Barton was concerned about were Māori: they were more likely to be the private commercial and landed interests that often stood behind parties in the Court. Cases were often not what they seemed, as the judges were well aware. The monotonous style of Waitangi Tribunal reports, inflexibly focused as they must be on the

52 *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC).

53 "Reports of Inquiries Held under the Native Land (Validation of Titles) Act, 1892" [1893] II AJHR G3 at 19.

misdeeds of "the Crown", can obscure the complexities and contentiousness of the process, and tends to let the private sector off the hook, as it were.

Pakeha had a useful rhetorical model to hand when it came to criticising the Native Land Court. This was the Court of Chancery, widely perceived by Victorian Radicals as an intolerable evil. Dickens' great novel *Bleak House* was an attack on the Court, and land tenure reformers such as Robert Richard Torrens, who pioneered the Torrens system of title registration in South Australia, were equally critical. (It is a marked feature of most Torrens registration systems that they do not record equitable interests.) The link between the two Courts was made explicit in an editorial in the *Auckland Star* in 1893:⁵⁴

The old Chancery Court in England was a terror to suitors for its interminable delay and ruinous cost. Dickens in his great case of Jarndyce v Jarndyce well illustrates a thousand other cases, where the costs swallowed up the entire estate.

New Zealand Native Land Courts could give long odds to the London Chancery Court and beat it in many ways. Though these sham Land Courts have been in practice on the "individualising" basis not more than twenty years, yet they have to-day more than 13,000 undetermined cases on hand. Is it any wonder that the Maoris hate the Native Land Courts and want to see them abolished?

It is safe to assume that Dickens was widely read in nineteenth century New Zealand and that readers of the *Star* would have had no trouble in picking up on the allusions here. New Zealand, it seemed, had managed to fashion a new version of the hated Court of Chancery, with its lunatics in every madhouse and its blasted lands in every shire.

The Court, to conclude, undoubtedly had a poor reputation, but it was also used as a political football and not everything said about it was either fair or disinterested. Much of the Pakeha criticism was of the Court's inefficiencies and of the risky titles that it created. That Māori should be parted from most of their supposedly unwanted land for the general good was not in doubt. Critics like Rees and Stout were themselves players in the Court process, and themselves linked to political and kin-based factions within the Māori community. Perhaps the dominant feeling about the Court was that it had become an anachronism in a fast-modernising society.

As seen, it was widely asserted that the legislation had become incomprehensible, something for which the Court itself was hardly to blame. Some historians working today have argued that the Native Lands Acts were not really all that complicated and unfathomable,⁵⁵ and that much of the criticism was self-serving, but certainly the legislation was perceived to be a morass. Even the

54 "The Evening Star with which are Incorporated the Evening News, Morning News and Echo" *Auckland Star* (Auckland, 31 January 1893) at 4.

55 Hayes, above n 49.

Attorney-General (Patrick Buckley) and the Chief Justice (Stout) said as much. The ever-eloquent and prolific Judge Barton thought so too:

My object all along in these judgments, and in the Poututu judgments, has been to "reveal the whole thing to daylight," and strip from Native-land proceedings the veil of mystery in which unscrupulous persons have shrouded them for their own purposes. Many members of Parliament, unable to pierce that veil, look so suspiciously on all Native Bills, and are so convinced that the Native Land Court is a tool for improper uses, that they refuse their confidence to every measure introduced, lest some innocent-looking clause should conceal the sinister provisions perpetuating instead of preventing the continuance of past evils. It is with regret I admit the justice of their fears, and the truth of the words of the Attorney-General when he said that the condition of the Native-land code is disgraceful – there is no finality – that no one, however clever he may be, can understand it; and that our Courts are scenes of gross fraud, where justice is done to neither European or Māori.

Others argued that the endless proliferation of statutes and the Court's erratic interpretation of them created legal uncertainty. Such was the opinion of Lieutenant-Colonel Porter, a very upright person, married to a Māori woman, who addressed the Rees-Carroll Commission in 1891:⁵⁶

I think the laws are thoroughly incomprehensible. It was understood [that] when a new Native-land law or Bill was brought into force it was intended to repeal those that were incomprehensible, but it appears that every new Act creates an immense amount of confusion, ... but, from my own experience with various Judges, the Courts themselves never seem to comprehend the different Acts they have to work under. Quite a diversity of practice will be found in different Courts, as well as diversity of opinion among the Judges. If the attention of the Court or Judges is called to what has occurred on the same point in a previous Court they will say they are not guided by other Judges but by their own experience. There is no uniformity of practice in the Native Land Court.

And yet, paradoxically, cases continued to be brought to the Court, and capable and qualified people such as Edger and Barton were willing to become judges of it. Throughout the 1890s, when the criticism was at its height, the Court continued to be very busy.

New Zealand was changing, and this was reflected in the law and the legal profession. If the archetypical lawyer of the 1870s was Francis Dart Fenton, Chief Judge of the Native Land Court, former frontier official, and High Victorian liberal, his equivalent for the period covered by this article could be said to be Sir John Salmond, Professor of Law at Victoria University College and then Solicitor-General, who went on to become a judge of the Supreme Court and Court of Appeal and the author of an internationally-recognised textbook on jurisprudence. Salmond believed in the enlightened and progressive state, not in mid-Victorian laissez-faire liberalism. Law was a science; the Native Lands Acts and their endless amendments an embarrassing and unprincipled mess left

56 "Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws" [1891] II AJHR G1 at 12.

from an earlier era. Fenton, notwithstanding what historians say about him, regarded himself as a philo-Māori. Salmond was a technocrat who had little contact with the Māori world and no interest in the amateur ethnography practised by Fenton and his generation. He played an important role in drafting the Native Lands Act 1909, which finally reduced the statutory labyrinth to some kind of rational order. In this great reform Salmond, admittedly, was but a technician, albeit an important one.⁵⁷ The real architects of the 1909 statute were Sir Robert Stout, James Carroll and the young Apirana Ngata. By their combined efforts the statutory chaos was reduced to a principled code. Modernity was to catch up with Māori land law at last.

57 On Salmond's role in the drafting of the 1909 Act see RP Boast "Sir John Salmond and Maori Land Tenure" (2007) 38 VUWLR 831.

