

The Native Land Court and the Writing of New Zealand History

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New Zealand's Native Land Court (today the Māori Land Court) was first established under the Native Lands Acts of 1862 and 1865. The court has been the subject of a large body of literature, little of it favourable. It has also frequently been the subject of inquiries by the Waitangi Tribunal, set up under the Treaty of Waitangi Act 1975 to hear Māori claims against the Crown. This article considers the Native Land Court from a new direction, exploring its cultural and intellectual significance for the writing of New Zealand history. The Native Land Court operated on the assumption that Māori traditional history was intelligible and that detailed written narratives could be created based on oral testimony. The same assumption remains pervasive in anthropological and historical writing in New Zealand. The article concludes that the influence of the Native Land Court on New Zealand historiography, while diffuse, was of real significance. The court acted on the assumption that Māori oral history and genealogies were historically reliable, using these sources to construct complex historical narratives. This willingness has in turn influenced the emergence of a distinctive style of historical writing in New Zealand: the literary tribal history.

New Zealand's Native Land Court, today the Māori Land Court, was first set up by the *Native Lands Acts* of 1862–1865.¹ Legislation enacted in 1894

* This article is part of a project on tenurial change around the Pacific rim in the nineteenth century, supported by the Royal Society of New Zealand's Marsden Fund. I would like to thank the reviewers from *law&history* for their helpful and constructive suggestions.

¹ *Native Lands Act 1862* (NZ); *Native Lands Act 1865* (NZ). On the original statutes, see R. P. Boast, *The Native Court 1862–1887: A Historical Study, Cases and Commentary* (Wellington: Thomson Reuters, 2013), 45–60. The Native Land Court became the Māori Land Court by s. 2 of the *Maori Purposes Act 1947* (NZ), which changed all references to 'Native' in New Zealand legislation to 'Māori'. The current statute relating to Māori land

created its appellate body, the Native Appellate Court.² The Native Land Court has been an important institution throughout its long history and remains so today.³ It has generated a rich historiography, much of it critical of the court itself, of the legislation that established it and of its judges.⁴ This literature is by now sufficiently well known for some other aspects of the court's legacy to be considered. So far, there has been little discussion of the intellectual and cultural impacts of the court, whether on Māori society particularly or on the development of New Zealand scholarly styles more generally.⁵ The focus here is on the connections between the court and the ways in which New Zealanders understand their past (or pasts, perhaps).

These connections are many and deep but somewhat diverse. First, there is the fundamental question of the significance of the court records as a primary source for ethnohistory. Second, there is the issue of perceptions of Māori and Pacific history, especially of the intelligibility of that history. Polynesian history (in, for example, Samoa, Tonga, Hawai'i, Tahiti and

and the Māori Land Court is *Te Ture Whenua Maori/Maori Land Act 1993* (NZ). There is a new *Te Ture Whenua Maori* Bill currently before parliament.

² *Native Land Court Act 1894* (NZ) s. 79. The Native Appellate Court is now the Māori Appellate Court, which hears appeals from the Māori Land Court.

³ Section 6(1) of *Te Ture Whenua Maori/Maori Land Act 1993* provides that '[t]here shall continue to be a court of record called the Maori Land Court, which shall be the same court as that existing under the same name immediately before the commencement of this Act'. The court has a complex jurisdiction under a number of statutes, of which *Te Ture Whenua Maori/Maori Land Act 1993* is the principal one.

⁴ Sir Hugh Kawharu observed in his classic study of Māori land tenure that the *Native Lands Act* of 1865 was an 'engine of destruction for any tribe's tenure of land, anywhere': Hugh Kawharu, *Maori Land Tenure: Studies of a Changing Institution* (Oxford: Oxford University Press, 1977), 15.

⁵ On other aspects, see Richard Boast, *Buying the Land, Selling the Land: Governments and Maori Land in the North Island of New Zealand 1865–1921* (Wellington: Victoria University Press, 2008), 41–199; Boast, *The Native Court 1862–1887*, 3–218; Richard Boast, *The Native Land Court: Volume 2, 1888–1909: A Historical Study, Cases and Commentary* (Wellington: Thomson Reuters, 2015), 3–265; David Williams, 'Te Kooti Tango Whenua': *The Native Land Court 1864–1909* (Wellington: Huia Publishers, 1999). Most claims in New Zealand's Waitangi Tribunal touch on the effects of the Native Land Court to some extent; some which deal with the Native Land Court at length are *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814), 2 vols (Wellington: Legislation Direct, 2004), 395–538; *He Maunga Rongo: Report on the Central North Island Claims* (Wai 1200), 4 vols (Wellington: Legislation Direct, 2008), 446–551.

Aotearoa) came to be perceived as profoundly intelligible and possessing the foundations for a full historiography in its own right. Polynesians were seen to resemble the Nahuas and Incas of Mexico and Peru, peoples believed to possess intelligible pre-European histories which could be assembled and written as historical narratives.⁶ In New Zealand, judges and scholars believed that pre-European Māori history was no less intelligible, and from this starting point the Native Land Court confidently created complex historical narratives as a foundation that enabled legal rights to be defined and given effect. A third point for discussion is the extent to which the court's processes were primarily historical in nature and to what degree the court's judgments were essentially works of history (most were not, but some undoubtedly were). Fourth, there is the extent to which judges and others involved in the Native Land Court and its kindred bodies, such as the Urewera Commission⁷ or the Validation Court,⁸ themselves contributed to the writing of history and ethnography. A fifth question, first broached by the art historian Roger Neich, is whether the court process contributed to the historicisation of Māori culture among Māori themselves. Finally, there is the question of whether the Native Land Court itself may have led to the development of particularly New Zealand styles of history writing. If the court's judgments were sometimes historical narratives, reflecting the intelligibility of Māori history, to what extent did the court reinforce that intelligibility — and, in this way, have an impact on New Zealand historical writing?

⁶ On indigenous writing traditions and historiographies in Mesoamerica, see especially Miguel León-Portilla, *Literaturas Indígenas de México* (Mexico City: Editorial Mapfre and Fondo de Cultura Económica, 1992); on indigenous documents and land rights, see Ethelia Ruiz Medrano, Claudio Barrera Gutiérrez and Florencio Barrera Gutiérrez, *La Lucha por la Tierra: Los Títulos Primordiales y los Pueblos Indios en México, siglos XIX y XX* (Mexico City: Fondo de Cultura Económica, 2012).

⁷ Established under the *Urewera District Native Reserve Act 1896* (NZ) to create an alternative title investigation process (i.e. an alternative to the Native Land Court) for the Te Urewera region in the North Island interior. See Boast, *The Native Land Court: Volume 2, 1888–1909*, 221–47.

⁸ Established under the *Native Land (Validation of Titles) Act 1893* (NZ) to 'validate' disputed land titles. See Boast, *The Native Land Court: Volume 2, 1888–1909*, 37–47, 143–53.

The Records of the Court and Māori Ethnohistory

The Native Land Court was established to hear cases relating to customary title to land.⁹ Māori could apply to the court to have a surveyed parcel of customary land ‘investigated’, requiring the court to inquire into and record the block’s owners according to Māori customary law. Once the court had carried out this function, the identified owners could obtain a Crown grant (or, subsequently, a title under the *Land Transfer Act 1952*). As a result, New Zealand now has a particular category or class of land, styled ‘Māori freehold land’, comprising about five per cent of the country, nearly all of it located in the North Island. The legislation of 1862 and 1865 set New Zealand law on a very distinctive course with respect to indigenous land rights, compared with the Australian and British North American colonies. Both the Native Land Court and the Supreme Court accepted the exclusive jurisdiction of the former as a matter of course, with one result being that the common law of native title was for long of little practical importance in New Zealand. The main legal battles that have been fought in New Zealand over Māori land rights have tended to relate to the territorial extent of the Native Land Court’s jurisdiction, rather than invoking the doctrines of native title law in the ordinary courts.

The Native Land Court’s jurisdiction has been expanded and contracted by the legislature on many occasions, but investigating titles remained its core function until about 1920. By then, very little land held on customary title remained to be investigated. As such, the court’s functions now no longer relate to title investigation, with the focus more on the supervision of statutory land-owning trusts and such matters as subdivision of Māori freehold land and successions. Investigations of title were often lengthy and complex cases, lasting for months, generating large quantities of evidence and subject to equally complex rehearings and appeals. Sometimes Māori retained solicitors or even senior barristers to present their cases in the Native Land Court, although there were periods when the statutes prohibited legal practitioners from appearing in the court. The process also led to the development of Māori paralegals, known as *kaiwhakahaere* (managers or conductors), who were expert in presenting cases in the court and in managing evidence and compiling ownership lists behind the scenes. The cases generated significant amounts of recorded evidence deriving from Māori testimony dealing with traditional history,

⁹ On the first years of the court, see Boast, *The Native Court 1862–1887*, 61–96.

genealogy (*whakapapa*), boundaries and many other matters. There would typically be numerous parties and criss-crossing claims, resulting in substantial amounts of not only direct evidence but also testimony that was elicited in cross-examination.¹⁰

The testimony, both evidence in chief and in cross-examination, was translated into English and recorded in the court's minute books, along with the judgments of the court and other ancillary matters such as notes of court hearing fees and survey expenses. How many minute books there are is hard to say, but there are many thousands of them in continuous sequences running back to 1865, probably forming one of the largest records of a judicial encounter between an indigenous people and a European-style court anywhere in the world. The importance and scale of this record is undeniable, although it must be conceded that it is not always easy to use (or decipher, given that until about 1910 it is all handwritten). Furthermore, as historian Keith Pickens has noted, there are limitations to relying on evidence that was given in Māori and taken down in English, the accuracy of which is unknown.¹¹

The minute books are accessible in both hard-copy reproductions and on microfilm in several libraries and archives, as well as in the various registries of the Māori Land Court around the country. The court minute books were an official record, kept by the court clerk, and were the court's property. The Native Land Court was a mobile court, mostly sitting in the 'court towns' (such as Cambridge, Otorohanga, Hastings and Marton) close to the main areas of Māori population and areas of uninvestigated land, but also at times sitting at much more isolated places. It was a peripatetic court in the nineteenth century, with no permanent courtrooms, and had to sit where it could — normally using resident magistrates' courtrooms, but sometimes local halls, taverns and Māori *marae* (ceremonial centres). There were periods of particularly intense activity at various places as the court moved into previously uninvestigated areas, as at Cambridge from 1879 to 1886 or Otorohanga from 1886 to 1893. The judges had personal

¹⁰ See, for example, the court's decisions relating to the Pukeroa-Hangatiki and Kakepuku-Pokuru Blocks, (1889) 8 Otorohanga MB 227; (1889) 6 Otorohanga MB 317 (Boast, *The Native Land Court: Volume 2, 1888–1909*, 471–87; 437–50).

¹¹ Keith Pickens, *Operation of the Native Land Court in the National Park* [Waitangi Tribunal] *Inquiry District*, unpublished report commissioned by the Crown Law Office for the Waitangi Tribunal Wai 1130 National Park Inquiry, 2005 (Wai 1130, National Park Inquiry, Document No. A50), 4.

minute books, which were their own property and have sometimes survived, and the chief judges maintained separate minute books of their own to deal with rehearing applications and other matters of judicial administration. Some of the judges' minute books have been added to the public collections, meaning that for some cases there is a double or even triple record that can be consulted (i.e. the judge's or judges' minute books, as well as the official court volumes). The court sat with Māori assessors, who also kept minute books, some of which have survived and been added to the public record. This means that some cases, such as the Omaha block rehearings in 1892, are particularly well recorded.¹² There are also examples of manuscripts kept by Māori people who were sitting in the courtroom and recording verbatim the evidence as given in Māori.

The extent to which traditional history is recorded in the court's minute books varies greatly from region to region. Some regions, such as Otaki, Whanganui, Rotorua, Hawke's Bay, the south-eastern Waikato, the King Country and the Bay of Plenty, are richly documented. For other areas, there is much less material. The variation is explained by the differing tenurial histories of New Zealand's regions. The South Island was acquired principally by means of large pre-emptive purchases before the Native Land Court became fully operative in early 1865, so the South Island material is generally limited in quantity and quality.¹³ This is also true of Taranaki and much of the Waikato, as these regions were confiscated by the Crown under the *New Zealand Settlements Act* of 1863, and the court had a restricted role there.¹⁴ Different again is Northland, which has a particularly rich and complex tenurial history, of which the Native Land

¹² The Omaha block is Hawke's Bay, near the city of Napier. The principal Omaha judgments are at (1890) 20 Napier MB 131-4 (investigation of title), (1890) 20 Napier MB 353 (Kawera partition) and (1892) 26 Napier MB 7-8 (rehearing); for full texts and commentary, see Boast, *The Native Land Court: Volume 2, 1888-1909*, 492-506, 510-3, 692-701. For a full study of the Omaha cases, see Boast, 'The Omaha Affair, the Law of Succession, and the Native Land Court,' *Victoria University of Wellington Law Review* 46 (2015): 841.

¹³ On pre-Native Land Court Crown purchasing in the South Island, see Boast, *The Native Court 1862-1887*, 47-50; Harry C. Evison, *Te Wai Pounamu: The Greenstone Island: A History of the Southern Maori during the European Colonization of New Zealand* (Wellington and Christchurch: Aoraki Press, 1993).

¹⁴ On the legal history of confiscation, see Boast, *The Native Court 1862-1887*, 19-44; see generally *Raupatu: The Confiscation of Maori Land*, ed. R. P. Boast and R. Hill (Wellington: Victoria University Press, 1999). The *New Zealand Settlements Act* set up a specialist court, the Compensation Court; see generally Boast, *The Native Court 1862-1887*, 29-41.

Court was but one aspect. Rotorua and the King Country, by contrast, are examples of regions where there was no means of tenurial change other than title investigation by the court, followed by government or private land buying; thus, their recorded volume of evidence is substantial. It is also important to understand that blocks of land were not investigated only once. In many instances, there were rehearings or — after the establishment of the Native Appellate Court in 1894 — appeals. Many blocks were repeatedly partitioned, and the partition hearings could also generate substantial amounts of evidence and complex and lengthy judgments, supplementing the material given at the investigation of the parent block at the beginning of the sequence of alienations and partitions.

This vast record has now become a primary source for scholars working in the field of Māori ethnohistory. The court records have long been the principal foundation for the writing of literary tribal histories (discussed below). More recently, commissioned historians preparing expert evidence for the Waitangi Tribunal have also relied on the court's minute books to prepare ethnohistories and other historical studies. Outside the tribunal process, archaeologists and ethnohistorians are becoming increasingly proficient at using the minute books to supplement archaeological material and other types of records, as 'an invaluable source of information on Maori activities in general'.¹⁵ Using evidence given in Native Land Court cases relating to the Te Pirau, Te Komata and Nga Hinapouri land blocks, Caroline Phillips was able to map the locations of pre-European resource-gathering places, cultivations and settlements along the course of the Waihou River.¹⁶ There is enormous potential for similar studies to be done in areas which possess a similarly rich combination of archaeological sites and Native Land Court evidence, including the Rotorua lakes region, the eastern Bay of Plenty, inland Hawke's Bay and the Kapiti–Horowhenua region around Otaki and Levin. There is also the opportunity for such studies to extend to the

¹⁵ Paul Monin, *This is My Place: Hauraki Contested 1769–1875* (Wellington: Bridget Williams Books, 2001), 5; Angela Ballara, *Iwi: The Dynamics of Māori Tribal Organisation from c. 1769 to c. 1945* (Wellington: Victoria University Press, 1998); Angela Ballara, *Taua: 'Musket Wars,' Land Wars' or Tikanga? Warfare in Māori Society in the Early Nineteenth Century* (Wellington: Penguin Books, 2003).

¹⁶ Caroline Phillips, *Waihou Journeys: The Archaeology of 400 Years of Maori Settlement* (Auckland: Auckland University Press, 2000); see also Louise Furey, *Oruarangi: The Archaeology and Material Culture of a Hauraki Pa* (Auckland: Auckland Institute and Museum, 1996), 16–7.

reconstruction of pre-1840 environments and Māori conservation and resource management systems.

There has been some debate about whether evidence given in the Native Land Court can be entirely trusted as a source for historical research because (obviously) it was given in a courtroom and was being given to support a claim to a parcel of land.¹⁷ Despite a degree of hesitation, it nevertheless continues to be used for this purpose. Other types of evidence, however, such as the location of resource-gathering places, fishing grounds and villages, would appear to be less capable of manipulation and more objective in a general sense. The court regularly conducted site visits to check on the reliability of testimony of this kind. The Native Land Court record is of such a scale and depth that it is used routinely for both academic works of ethnohistory and research reports for the Waitangi Tribunal investigation and inquiry process. It is just too big to ignore.

Thus, one aspect of the importance of the Native/Māori Land Court for New Zealand historiography is simply its record, often mined and analysed by historians and anthropologists, and by Māori people interested in researching family or tribal history or the tenurial history of parcels of land. The potential of this vast source for historical and scientific inquiry appears virtually limitless and has hardly begun to be tapped. What seems more interesting, however, are the relationships between the court's inquiries and investigations and broader historical and historiographical questions, including the intelligibility of oral history, the effects of the court processes on Māori historical conceptions, the court's judgments *as* works of history, the judges as historians and the impacts of the court process on New Zealand historiographical styles.

The Native Land Court and the Intelligibility of Māori History

The Native Land Court could never have functioned if those participating in it had not believed that Māori history was intelligible: that there was such a thing as Māori history and that it was susceptible to investigation and proof in a judicial forum. The court operated on the assumption that historical narratives could be crafted from oral traditions. It had to be further assumed that the narratives so fashioned were sufficiently robust

¹⁷ See Angela Ballara, 'The Origins of Ngati Kahungunu' (PhD diss., Victoria University of Wellington, 1991), 504; David Simmons, *The Great New Zealand Myth: A Study of the Discovery and Origin Traditions of Maori* (Wellington: A. H. and A. W. Reed, 1976), 9.

to create a foundation for property rights in the present. This can only be the case in cultures which possess a strong historical self-awareness. Māori, of course, originated from eastern Polynesia — the Māori language is closely related to the languages of the Cook Islands, Tahiti and the Marquesas Islands. In contrast to some other indigenous societies, Polynesian cultures tend to exist in a strong relationship with a known and much discussed past. In the case of New Zealand, this historicity was simply assumed at the beginning of the court's history, with surprisingly little debate and reflection. Why that was so is not clear. To educated Englishmen steeped in the Bible and the classics, perhaps the historicity of traditional narrative was easy to assume. If Agamemnon, Aeneas and King David were real people, why not Polynesian ancestors such as Toi or Ngatoro-i-rangi? Both the Old and New Testaments are rich in genealogies, which European scholars had long treated as historical (at least until the development of modern forms of Biblical textual criticism in the nineteenth century), and which no doubt had an appeal of their own to Māori, Hawaiian, Tongan and Samoan readers once the Bible was translated into these languages — and others of the Polynesian family — in the nineteenth century.

New Zealand had its own nineteenth century indigenous scholars, including Te Matorohanga and Nepia Pohuhu of Ngati Kahungunu, and Tamihana Te Rauparaha of Ngati Toa, who wrote a long biography of his father, the great Ngati Toa chief Te Rauparaha, a full edition of which has never been published. These indigenous scholars are the Polynesian equivalents of the post-Conquest indigenous or mestizo aristocrats in Mexico and Peru who wrote chronicles of their own indigenous nations and polities in Spanish or indigenous languages.¹⁸ Transplanted Europeans resident in Hawai'i and Aotearoa who were curious about Polynesian antiquity also published works of history based on indigenous sources. An example is Swedish-born Abraham Fornander, author of a monumental account of Polynesian history published in 1878. In his voluminous writings, Fornander placed a great deal of reliance on Hawaiian genealogies, especially those from the islands of Hawai'i and Maui, in constructing a vast narrative of Polynesian and Hawaiian history. Fornander's work was certainly well known and widely read in New

¹⁸ A well known example is Fernando de Alva Ixtlilxochitl, author of *Historia de la Nación Chichimeca*, in Spanish, probably written circa 1615 (for a modern edition, see *Fernando de Alva Ixtlilxochitl: Historia de la Nación Chichimeca*, ed. Germán Vázquez Chamorro [Madrid: Crónicas de América, Dastin, 2000]).

Zealand, although not uncritically, no doubt reinforcing the general conviction that Māori history could be reconstructed with a reasonable level of reliability and certainty based on *whakapapa* and oral evidence. Again, there are parallels with Mexico and Peru, where Europeans, typically missionaries, composed lengthy works of literary history relying on the historicity of the narratives provided by native informants or written in manuscripts in indigenous languages.

This early reliance on traditional narrative has never been abandoned in Polynesian scholarship. The importance of genealogy continues to be emphasised in many modern studies of Māori ethnography, as well as in Polynesia generally. As Patrick Kirch puts it, '[i]n all Austronesian societies, claims to rank and power depended on being able to demonstrate, through recitation, an unbroken genealogical chain back to high-ranking ancestors'.¹⁹ Other modern archaeologists and anthropologists who accept the historicity of Polynesian traditions include Raymond Firth, Marshall Sahlins and Atholl Anderson. One of Firth's massive monographs on Tikopia is devoted to an exploration of the island's history as recounted in oral narratives and genealogies.²⁰ In the 1990s, Sahlins and Kirch collaborated on an ambitious interdisciplinary project integrating history and archaeology in the Anahulu Valley on Oahu, and among the historical sources taken into account were indigenous Hawaiian traditions recorded in manuscripts and official land commission documents.²¹ Kirch has recounted elsewhere how the results of his archaeological fieldwork on Tikopia fitted well with contemporary oral narratives describing resource conflicts between the island's existing sociopolitical groups.²² More recently, Kirch — who is notably resistant to the arguments of structuralist anthropologists, such as Claude Lévi-Strauss and Edmund Leach, that indigenous historical narratives should be seen as myth rather than history — has integrated traditional Hawaiian accounts (*mo'olelo*) and genealogies (*mo'okū'auhau*) with archaeology as

¹⁹ Patrick Kirch, *How Chiefs Became Kings: Divine Kingship and the Rise of Archaic States in Ancient Hawai'i* (Berkeley and Los Angeles: University of California Press, 2010), 79.

²⁰ Firth, *History and Traditions of Tikopia* (Wellington: Polynesian Society, 1981).

²¹ See Marshall Sahlins, *Anahulu: The Anthropology of History in the Kingdom of Hawaii: Vol 1: Historical Ethnography* (Chicago and London: University of Chicago Press, 1992), 17-35.

²² See Patrick Kirch, *Unearthing the Polynesian Past* (Honolulu: University of Hawai'i Press, 2015), 138-40.

part of his reconsideration of ancient Hawaiian society.²³ Drawing these two different kinds of source material together, Kirch has demonstrated that late pre-contact Hawai'i should be seen as an 'archaic state' rather than a 'complex chiefdom'.²⁴ Given this continued reliance on Polynesian narratives by contemporary anthropologists and archaeologists, it was not quixotic or naïve for the judges of the Native Land Court to act on the assumption that it was possible to construct sound historical narratives based on Māori historical testimony, including but not limited to *whakapapa*. Māori culture, as modern scholars insist, was richly *historicised*: Māori certainly did not see themselves as existing in an eternal present. On the contrary, Māori located themselves in historical time and connected to a complex and contested, but intelligible, past. As Anderson puts it, '[h]istory mattered for Māori and Moriori, both philosophically as a duty towards the ancestors and pragmatically as a means of contemporary advantage in gaining and holding status and property'.²⁵

For its part, the Native Land Court was never in any doubt about the intelligibility of Māori traditional history, even if that history could be complicated and difficult to disentangle from a welter of partial and self-interested testimony. A reliable history could nevertheless be found and narrated. Near the very beginning of the court's history, in the Orakei decision of 1868, Chief Judge Fenton made a point of emphasising the general reliability of Māori 'pedigrees' (*whakapapa*). Although some of the counsel in the Orakei case expressed doubts about their evidentiary value, Chief Judge Fenton disagreed, observing that:

It is ... almost beyond the powers of members of a civilised race, who, possessing written documents, are not required and are little accustomed to trust facts of importance to their memories, to believe that any person can remember from

²³ Kirch, *Unearthing the Polynesian Past*, 138.

²⁴ Kirch, *Unearthing the Polynesian Past*, 322; Kirch develops this argument further in *How Chiefs Became Kings*. Kirch notes his indebtedness to other scholars interested in creating this kind of integrated history, including the Mesoamericanist Kent V. Flannery; see *The Cloud People: Divergent Evolution of the Zapotec and Mixtec Civilizations*, ed. Kent Flannery and Joyce Marcus (New York: Academic Press, 1983).

²⁵ Atholl Anderson, 'Speaking of Migration: AD 1150–1450,' in *Tangata Whenua: A History*, Atholl Anderson, Judith Binney and Aroha Harris (Wellington: Bridget Williams Books, 2015), 33.

tradition a whole family, with all its branches, for twenty or even ten generations back; but, in my experience as Judge of this Court, I have received pedigrees which I have compared with pedigrees given sometimes by the same witness, sometimes by others, at other Courts, at distant periods of time, and have found the general concord perfectly astonishing.²⁶

Fenton's views must have been shared by his colleagues on the bench, the use of *whakapapa* being standard practice. His views about *whakapapa* also accorded with those of some of his contemporaries who had written books and scholarly papers about Māori society. Edward Shortland, who was employed as a Native Protector by the colonial government, was a notably well-educated and intelligent observer, who spoke Māori well. He was perhaps 'the first anthropologist of the Maori'.²⁷ Like Fenton, he regarded *whakapapa*-based narratives as reliable, a position he came to by comparing genealogies given in different parts of the country. He was struck by 'the remarkable manner in which they coincided with each other, often when least expected', so felt satisfied he could depend on 'their general accuracy'.²⁸ Shortland understood that *whakapapa* was only a framework on which much else was draped. He observed that 'my informants did not content themselves with a bare recollection of names; but related the most remarkable actions connected with the lives of their distant ancestors'. Elaborate histories 'seemed to be preserved in their retentive memories, handed down from father to son nearly in the same words as originally delivered'. He added that '[w]e, who have so long trusted to the authority of books, are, I am persuaded, too suspicious of the credibility of the traditionary history of a people who have not yet weakened their memories by trusting to a written language'. To Shortland, these narratives were 'within the limits of probability; and I do not know

²⁶ (1868) 2 Orakei MB 355; *Important Judgments Delivered in the Compensation Court and Native Land Court, 1866–1879* (hereafter *Important Judgments*), ed. F. D. Fenton (Auckland: Henry Brett Printers, 1879), 60.

²⁷ Atholl Anderson, 'Shortland, Edward,' *Dictionary of New Zealand Biography*, Vol 1 (Wellington, 1990), 397.

²⁸ Edward Shortland, *The Southern Districts of New Zealand; A Journal with passing notices of the customs of the Aborigines* (London: Longman, Brown, Green and Longmans, 1851 [Christchurch: Capper Press Reprint, 1974]), 95.

but that they may rest on authority as worthy of credit as that of much of the early histories of European nations'.²⁹

Shortland also believed that Māori had a kind of aristocratic scholarly elite comprised of specialists in traditional history, *tikanga* and religion.³⁰ But perhaps the most fascinating observations that Shortland makes relate to traditional Ngai Tahu forensic inquiries into land claims that he had the good fortune to observe more than once, and which he describes using carefully chosen legal terminology ('counsel for the plaintiff', 'defendants', etc.).³¹

Shortland's book shows that the historicity of Māori traditional narrative had become widely accepted by the time the Native Land Court was set up. In fact, it is possible that without this belief the Native Land Court would never have been established in the first place. Shortland's analysis perhaps indicates not so much that land claims were supported by *whakapapa* as the opposite — that *whakapapa* was important because it was the foundation of rights in land. This was why it was so pivotal for *whakapapa* to be remembered, but also why it could often be contested. It was a kind of legal language that allowed claims to land to be debated, analysed and resolved (or not). It also provided a framework for the recording and recollection of history, again because rights to land rested on historical foundations and precise events: actual battles, victories and defeats, gifts and peacemakings, invasions and migrations.³² Shortland's description perhaps also indicates that the forensic style of the Native Land Court, which in many respects was not dissimilar to the processes he observed in the South Island, may not have been as foreign to Māori as is sometimes supposed.

²⁹ Shortland, *The Southern Districts of New Zealand*, 97-8. Following this observation, Shortland goes on to give an account of the traditional history of Ngai Tahu based 'on the authority of Tuhawaiki, and other natives belonging to the same tribe'.

³⁰ Shortland, *The Southern Districts of New Zealand*, 97-8.

³¹ Shortland, *The Southern Districts of New Zealand*, 96.

³² For further discussion and examples, see Richard Benton, Alex Frame and Paul Meredith, *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Wellington: Victoria University Press, 2013), 504-515 (entry on *whakapapa*).

The Court's Judgments as Historical Narratives

One of the core doctrines of the Native Land Court, albeit one which was never pursued strictly, was by definition historical: the '1840 rule'.³³ The first detailed exposition of this 'rule' appears to be the long judgment in the Oakura decision of the Compensation Court given by F. D. Fenton in 1866.³⁴ The essential concept was that the starting point for the investigation of customary titles was the acquisition of British sovereignty in 1840. Fenton remarked that it could not 'reasonably be maintained that the British Government came to this Colony to improve Māori titles, or to reinstate persons in possessions from which they had been expelled before 1840'.³⁵ The year 1840 was necessary as a starting point and as a cut-off date.³⁶ The precise issue in the Oakura case was whether persons who had moved away from their ancestral lands in Taranaki before 1840 and had never since returned to their home region could advance a claim to their lands in the Compensation Court at the time of the title investigation. Fenton held that they could not be permitted to do so (although they could advance claims in the areas to which they had moved). The rule did not prevent persons who had moved back to Taranaki after 1840 from making a claim. Fenton subsequently explained the rationale, or one of the rationales, for this rule in the Orakei decision of the Native Land Court in 1868. To allow claims to be made on the basis of settlements after 1840, Fenton argued, would penalise other Māori groups who had failed to take action to expel the intruders: it would be 'very dangerous' to accept that 'a title to native lands can be created ... since the establishment of English sovereignty, and professedly of English law, for we should then be declaring that those tribes who had not broken the law by using force in expelling squatters on their lands, must be deprived "pro tanto" of their rights'.³⁷

The 1840 rule was never applied in a hard and fast way and was not relevant in most cases because the groups in possession at the time of the hearing and in 1840 were the same. The court developed numerous

³³ See Boast, *The Native Land Court: Volume 2, 1888–1909*, 126–37.

³⁴ *Important Judgments*, 9–12; Boast, *The Native Court 1862–1887*, 281–312.

³⁵ *Narrative of the Events of the Sittings of the Compensation Courts at New Plymouth* [1866] AJHR A13, 4; Vol 1, 291–2.

³⁶ *Narrative of the Events of the Sittings of the Compensation Courts at New Plymouth* [1866].

³⁷ *Important Judgments*, 94; Boast, *The Native Court 1862–1887*, 536.

exceptions to the rule, so much so that it can fairly be said that there were more exceptions than rule. The court, for example, unhesitatingly accepted post-1840 gifts of land by one descent group to another as valid and unproblematic. The 1840 rule, however, shows the essentially historical nature of the process of legal inquiry in the Native Land Court. The underlying issue was that of who was in possession in the past, not at the present.

Most cases in the Native Land Court resulted in only brief judgments, but some were quite lengthy and included detailed narratives of the political and tenurial history of the descent groups of the region in the decades, or even centuries, before the establishment of the colonial state in 1840. The hallmark of these narratives is *confidence*. While modern ethnohistorians would probably demonstrate hesitation, the Native Land Court judges did not see the reconstruction of traditional history based on *whakapapa* and oral testimony as in any sense problematic. This did not mean that the history was not contestable, rather that the historical and genealogical testimony was not different in kind from any other kind of evidence and was a proper foundation for historical reconstruction.

An astonishing example of this confidence is Fenton's judgment in the Orakei case in 1868.³⁸ Taking up forty-three printed pages in Fenton's edition of *Important Judgments Delivered in the Compensation Court and Native Land Court, 1866–1879*, this is one of the longest judgments the Native Land Court ever produced. Mostly, it is a lengthy narrative of the Māori history of the Auckland isthmus, reaching back into the seventeenth century.

Judges as Historians and Ethnographers

It took many years for the disciplines of anthropology and Māori studies (in particular, the teaching of the Māori language) to gain standing in the University of New Zealand. For many years, examinations for degrees at the university were set and marked in England, which had stifling effects on curricular development in the university's constituent colleges. Academics interested in Māori issues, such as John Macmillan Brown (1845–1935) and Ivan Sutherland (1897–1952), had to teach in other fields, and New Zealand anthropologists like Sir Peter Buck (Te Rangi Hiroa), Felix Keesing and Raymond Firth were forced to pursue their

³⁸ (1868) 2 Orakei MB 355; *Important Judgments*, 53–96.

careers overseas. No chair of anthropology was established in New Zealand until 1949, Auckland University College being the first to take this step. The absence of courses in Māori and Polynesian languages, archaeology and anthropology at the University of New Zealand did not, however, mean that these subjects attracted no interest; it meant only that these fields were largely pursued outside the university. A strong tradition of ‘amateur’ — or, at least, non-university — scholarship emerged in the nineteenth century. This tradition was continued into the twentieth century by such scholars as Elsdon Best and Edward Tregear and through the Polynesian Society, founded by Tregear and Percy Smith (both civil servants) in 1892. The *Journal of the Polynesian Society* published material on linguistics, Polynesian origins, mythology and material culture, but also to some extent on cultural anthropology and sociology.³⁹ The dominant tone in Māori studies in New Zealand up until about 1925 was a preoccupation with material culture, traditional history, mythology and Polynesian origins, perhaps reaching its highpoint with Best’s massive and extraordinary ethnohistory of Tuhoe, published by the Polynesian Society in 1925.⁴⁰

This highly creative and fertile amateur-scholarly tradition is an important component of New Zealand’s cultural and intellectual history.⁴¹ Māori themselves were participants in this cultural venture, and some joined the Polynesian Society and wrote articles for its journal. This remarkable flowering of ethnographic writing outside the university has not received the attention from historians that it deserves. Indeed, the term ‘amateur’ is not always appropriate. In the early decades of the twentieth century, anthropology, especially cultural anthropology, was a new discipline that had to struggle for academic recognition even in Britain, Germany and the United States.⁴² Amateur ethnography

³⁹ On the Polynesian Society, see M. P. K. Sorrenson, *Manifest Duty: The Polynesian Society over 100 Years* (Auckland: Polynesian Society, 1992).

⁴⁰ Elsdon Best, *Tuhoe: The Children of the Mist: A Sketch of the Origin, History, Myths and Beliefs of the Tuhoe Tribe of the Maori of New Zealand; with some Account of other early Tribes of the Bay of Plenty District*, *Memoirs of the Polynesian Society* (Wellington: Polynesian Society, 1925), Vol 5. Tuhoe was an important Māori *iwi* (tribe) of the Urewera region in the central North Island.

⁴¹ The best guide to the peculiarly hothouse world of amateur Polynesian scholarship in New Zealand is K. R. Howe’s biography of Edward Tregear, *Singer in a Songless Land: A Life of Edward Tregear, 1846–1931* (Auckland: Auckland University Press, 1991).

⁴² As George Stocking points out, even by Malinowski’s time anthropology was a ‘still

‘paralleled efforts of amateur European scholars scattered throughout the world to relate distant and alien communities to the various linguistic and cultural constructs devised by contemporary scholarship’.⁴³ One of the more prolific and important members of the New Zealand group was Elsdon Best, author of numerous books on pre-European Māori life, material culture, religion and mythology. Best’s books are still widely read today. Whether it is correct to regard Best as an ‘amateur’ because he did not teach in a university is highly questionable. Best was a professional in the sense that he worked at the Dominion Museum in Wellington for much of his career. Although he did not have a university degree, Best was reasonably well read in anthropology and should not be seen as an isolated colonial amateur working out of sight in the Dominion Museum basement.⁴⁴ His works were read and appreciated by cultural anthropologists overseas, who referred to them in their own books, in this way feeding New Zealand ethnography into the anthropological mainstream. One of the best known British cultural anthropologists, George Pitt-Rivers, was friendly with Best, and the two had toured the Urewera region of the central North Island during Pitt-Rivers’ trip to New Zealand in the 1920s.⁴⁵ When a special issue of the *Journal of the Polynesian Society* was published in 1932 to pay tribute to Best, contributors included A. C. Haddon and George Pitt-Rivers, as well as local luminaries such as Peter Buck (Te Rangi Hiroa), Judge Acheson of the Native Land Court, W. H. Skinner, Johannes Andersen, Tutere Wi Repa and the rising star, Raymond Firth.⁴⁶

marginally institutionalized discipline’, even in Britain: George Stocking, *Victorian Anthropology* (New York: Free Press, 1991), 291.

⁴³ Howe, *Singer in a Songless Land*, 51.

⁴⁴ In the opening chapter of his two-volume *Maori Religion and Mythology* (Wellington: Dominion Museum Bulletin No 10, 1924), Best cites Max Muller, John Lubbock, R. R. Marett, F. B. Jevons, Andrew Lang, E. O. James and E. B. Tylor, albeit in a somewhat indiscriminate way. His discussion cannot be called especially up-to-date as at 1924 (e.g. there is no mention of Franz Boas); his authorities are those of the 1880s and 1890s.

⁴⁵ On Pitt-Rivers, see George Stocking, *After Tylor: British Social Anthropology, 1888–1951* (Madison: University of Wisconsin Press, 1998), 393–4. Pitt-Rivers, who was interested in psychoanalysis and eugenics as well as functionalist anthropology, later became a Mosleyite fascist. One wonders what kinds of conversations he and Best had as they toured the Urewera region.

⁴⁶ Jeffrey Paparoa Sullivan, *Best of Both Worlds: The Story of Elsdon Best and Tutakangahau* (Auckland: Penguin Books, 2010), 259. Best’s work continues to be widely read and cited (see Sullivan, *Best of Both Worlds*, 264–8), including by anthropologists of the stature of

Many of the Native Land Court judges, professionally engaged with Māori culture and traditional history, were also participants from the beginning. The chief judges aside, most of the judges were not legally qualified. Drawn from all walks of life, they formed a highly idiosyncratic group of former military officers, magistrates, surveyors and so on, comprising a much more diverse bench than that of the ordinary courts. Perhaps this is part of the explanation for the tendency of many of the judges to immerse themselves in Māori cultural studies: it was the Māori world which interested them, rather than the law, which many of them did not know much about in any event. Mostly the judges were appointed to the bench not for any legal acumen but because they had had prolonged engagement with the Māori world, although in what capacity did not appear to matter much. Many of them spoke Māori fluently, well enough to question witnesses from the bench and deliver oral judgments in that language. Chief Judge Fenton not only spoke but also wrote Māori well, at least well enough to draft documents in the language. Knowledge of the language generated interests in Māori cosmogony and mythology and comparative Polynesian linguistics.

One of the first forays of the Native Land Court judges into the world of scholarship was made by Chief Judge Fenton himself, when, in 1879, he published the first edition of Native Land Court judgments: the aforementioned *Important Judgments Delivered in the Compensation Court and Native Land Court, 1866–1879*.⁴⁷ This volume, now rare, was comprised of only nineteen judgments in total: four from the Compensation Court and fifteen from the Native Land Court. Nearly one-third of the entire book is comprised of a single judgment (Orakei, as noted above). Fenton's collection is only a small sample of the output of the Native Land Court by 1879, and an obvious question arises as to who the intended audience may have been. It might seem obvious that, as Fenton was one of the legally qualified judges, he intended this volume to be a law report of some kind, published for the benefit of practitioners in the Native Land Court. It is clear, however, that this was not its sole purpose. His introduction shows he also saw it 'as a record of some of the more interesting events in Native history'.⁴⁸ The judgments, Fenton thought, 'will prove of great assistance to anyone who may hereafter compile a complete history of the Native race'. The judgments

Marshall Sahlins and Marcel Mauss.

⁴⁷ *Important Judgments*.

⁴⁸ *Important Judgments*, Preface (not paginated).

were therefore worthy of publication because they were *historically*, not legally, important; a contribution to what we would today probably call Māori ethnohistory.

Other early judges of the Native Land Court had scholarly or literary leanings. In 1873, Judge Mackay published a huge two-volume compendium of official documents and papers relating to the extinguishment of Māori customary title in the South Island, including a lengthy and detailed narrative introduction that he wrote himself.⁴⁹ Mackay's work remains a standard source for South Island Māori history to this day. The best known of the literary judges is Judge Maning, author of *History of the War in the North of New Zealand* (1862) and *Old New Zealand* (1863), both of which continue to be widely read. Both books were published before Maning became a Native Land Court judge.⁵⁰ Another early judge, Judge Monro, had a national reputation, at least among non-Māori, as an expert on Māori custom and tribal history. Judge T. H. Smith, like Chief Judge Fenton, was interested in Māori religion and mythology. Judge Wilson contributed a series of articles dealing with pre-European Māori life to the *Auckland Star*, which were then published as a standalone volume in 1894. This work was republished in 1907, along with Wilson's biography of Te Waharoa, a great early nineteenth century chief of the Ngati Haua people of the south-eastern Waikato.⁵¹ Some of the judges played a role in the establishment of the Polynesian Society. Judge Gudgeon, who later became the New Zealand Resident Commissioner in the Cook Islands, was one of the founding members and chaired the first meeting of the society in Wellington in 1892. Gudgeon also contributed many articles to the society's journal. Chief Judge Seth Smith, one of the best educated of the judges (he was admitted to the Bar in England and had a Master of Arts from Trinity College Cambridge) was elected president.

⁴⁹ Alexander Mackay, *Compendium of Official Documents Relative to Native Affairs in the South Island* (Wellington: G. Didsbury, Government Printer, 1873).

⁵⁰ On F. E. Maning as a writer, see Peter Gibbons, 'Non Fiction,' in *The Oxford History of New Zealand Literature in English*, ed. Terry Sturm (Auckland: Oxford University Press, 1998), 45-6.

⁵¹ John Alexander Wilson, *A Chapter in Early New Zealand History together with Sketches of Ancient Maori Life and History* (Christchurch: Whitcombe and Tombs, 1907); Jinty Rorke, 'Wilson, John Alexander,' *Dictionary of New Zealand Biography*, Vol 2 (Wellington: Bridget Williams Books and Department of Internal Affairs, 1993), 587.

With the decline of the old amateur-scholarly tradition, as epitomised by Tregear and Gudgeon, and the rise in the professionalisation of anthropology and Māori studies, the judges of the Native Land Court came to play a less active role in ethnographic scholarship. Knowledge of the Māori language on the Native Land Court bench declined (today, of course, it has revived, and most of the judges are themselves Māori).

In the twentieth century, judges continued to write and publish in the field of Māori ethnography. One of the most interesting of the twentieth century judges is F. O. V. Acheson, who obtained his Master of Laws from Victoria University College in 1913. Acheson was a serious scholar of Māori customary law. He wrote his Master of Laws thesis on this subject, based on a close study of the court's minute books, and challenged the dominant legal positivism of the day by arguing that Māori possessed a complex system of tenurial rules.⁵² Acheson became a judge in 1919 and the Tai Tokerau (Northland) judge in 1924. It was while he was the Northland judge that Acheson wrote some highly innovative judgments in which he declared he was able to take 'judicial notice' of the Treaty of Waitangi: a very unorthodox position, even today. Many of Acheson's judicial statements on native title law are remarkably close to present-day understandings. They are also very scholarly. In one judgment, on Lake Omapere, Acheson invoked and relied on his own thesis, written years before.⁵³ Acheson also wrote scholarly articles on Māori law and custom, one of which was published in the *Journal of Comparative Legislation and International Law* in 1922.⁵⁴ A historical work of a different sort was his novel *Plume of the Arawas* (1938), a somewhat turgid tale of Māori conflict set many centuries ago and rather over-burdened with ethnographic detail — and more or less unreadable today. Judge Acheson was one of a group of Māori studies intellectuals (some of them Māori) who contributed to the special issue of the *Journal of the Polynesian Society* published in 1932 to pay tribute to Elsdon Best.

⁵² See R. P. Boast, 'F. O. V. Acheson and Maori Customary Law,' *Victoria University of Wellington Law Review* 30 (1999): 661.

⁵³ (1929) 11 Bay of Islands MB 260.

⁵⁴ F. O. V. Acheson, 'Adoption among the Maoris of New Zealand,' *Journal of Comparative Legislation and International Law* 4 (1922): 60.

The Court and the Historicisation of Māori Culture

One of the most profound and interesting discussions of the impacts of the Native Land Court is that provided by Roger Neich in his magnificently illustrated study of the history of Māori painting, published in 1993.⁵⁵ This is one of the few works to consider the intellectual, conceptual and historiographical impacts of the Native Land Court. Neich duly notes and endorses the standard views about the social and economic effects of the court, but goes on to develop an argument that ‘the Land Court also had a special effect on the nature and function of the Maori view of history’.⁵⁶ Partly this change was brought about, Neich believes, because Māori historical understanding was subverted by its being forced into the unfamiliar context of the courtroom.⁵⁷

Undoubtedly, the courtroom was a new and unfamiliar context (although forensic inquiry into titles, as Shortland’s account tends to show, may not have been). Neich does not deny that Māori had a concept of history, but is suggesting that presenting that history in the courtroom as opposed to the *marae* changed its meaning. It is difficult to see, however, quite where Neich’s observations lead, without a closer examination of particular cases and histories. It is also possible that Neich is overstating the universality of the land court experience for Māori people. For example, the Native Land Court was simply not an important institution in Taranaki, where it sat very infrequently up to the late 1880s — for the simple reason that most land in Taranaki had already been confiscated by the colonial regime in the 1860s. Yet there does not seem to be any reason to believe that any shift in historical understanding, if shift there was, was less characteristic of Taranaki than elsewhere. The Tuhoe people of Te Urewera did not experience any kind of land court-like experience until the first Urewera Commission was established at the turn of the century, although some Urewera chiefs did participate in Native Land Court hearings before that time. Again, there is no reason to think that people in Te Urewera had a distinct and more traditionally ‘Māori’ conception of history until 1900 than people in other areas; or, at least, it has not been shown that they did. Finally, as has been suggested above, before the Native Land Court was set up, a kind of public forensic process of investigation into land titles did

⁵⁵ Roger Neich, *Painted Histories: Early Maori Figurative Painting* (Auckland: Auckland University Press, 1993).

⁵⁶ Neich, *Painted Histories*, 156.

⁵⁷ Neich, *Painted Histories*, 156.

exist in some areas, and defending and explaining rights to land based on *whakapapa* and history was a recognised attribute of chiefly leadership and aristocratic learning. Maybe, then, the court was not quite as contextually transformative as Neich suggests.

Neich goes on to argue that the court process forced Māori to reimagine their history in a completely new way, 'to define their identity in European historical terms', and that thereby 'the need to learn it by memory diminished'.⁵⁸ In assessing Neich's thesis, it is important to emphasise that he is pressing the case for significant intellectual and cultural change across the whole of Māori society, a change that was expressed in literature and visual art.⁵⁹ Part of Neich's argument relates to literacy and the writing down of tribal history as a result of the land court process. Presumably Neich has in mind the minute books of the court, but of course these were written down in English, and it is not clear how generally accessible they were. However, Māori literacy (i.e. in Māori) was certainly widespread, and the effects of writing, paper and written documents on Māori knowledge are the subject of a growing body of literature.⁶⁰ It seems very likely that the court process expanded the extent and scope of Māori literacy not so much because of the writing down of history in the court's minute books but because of the massive documentation that the court process demanded, ranging from applications for investigations of title or for appeals and rehearings to petitions and vast amounts of correspondence with the judges and court staff. In addition, Māori-language newspapers, which proliferated in the nineteenth century, contained a vast amount of commentary on the court and its cases, which researchers have hardly begun to explore. Courts such as the Native Land Court are massive producers and consumers of documents, another classic example being the Waitangi Tribunal of today. However, in the case

⁵⁸ Neich, *Painted Histories*, 156.

⁵⁹ Neich, *Painted Histories*, 157.

⁶⁰ See, for example, Bradford Haami, *Pūtea Whakairo: Māori and the Written Word* (Wellington: Huia, 2004); Tony Ballantyne, 'Paper, Pen, and Print: The Transformation of the Kai Tahu Knowledge Order,' *Comparative Studies in Society and History* 53 (2011): 232; on the connections between writing and tenurial change, see also Boast, *Buying the Land, Selling the Land*, 10-3. The influence of the Māori Bible is pivotal in this respect, arguably of no less cultural importance than the importance of the English text of the Bible on early modern English popular culture; on the latter, see, for example, Christopher Hill, *The English Bible and the Seventeenth-Century Revolution* (London: Allen Lane, 1992).

of the Native Land Court, the documents were, above all, *legal* documents, perhaps not really capable of effecting a transformation of historical consciousness, although certainly operating to tie Māori people to the state and its legal and administrative systems.

That such a culturally aware and sophisticated scholar as Neich perceives that the Native Land Court was responsible for a significant cultural and intellectual shift is nevertheless important. Neich has raised the possibility that Māori historical awareness itself possesses a historiography. If that can be granted, so must its alternative, which is that Māori narratives have influenced non-Māori perceptions. It could also be that the construction of historical narratives in the Native Land Court has not been without impact in New Zealand's cultural and intellectual history.

The Native Land Court and New Zealand Historiography

This final section pursues the connections between the Native Land Court and a distinctive form of New Zealand historiography, which, for lack of a better term, can be styled the scholarly tribal history. This historiographical tradition has resulted in the publication of some of the most widely read and cherished — one is tempted to say beloved — works of historical literature published in this country. It is safe to say that these sometimes massive and rather old-fashioned works will continue to be bought and read long after most of today's works of academic New Zealand history have faded into oblivion. These authors include Elsdon Best, J. H. Mitchell, John Te H. Grace, J. M. McEwen, Pei Te Hurinui Jones and Hugh Carrington.⁶¹ Most of these writers are themselves Māori. Their works form a distinctive genre of their own. They are works which use oral tradition and, often, testimony given in court to create a literary tribal

⁶¹ Best, *Tuhoe: The Children of the Mist*, Memoirs of the Polynesian Society (Wellington: Polynesian Society, 1925), Vol VI; J. H. Mitchell (Tiaki Hikawera Mitira), *Takitimu: A History of the Ngati Kahungunu People* (place and date of original publication uncertain, probably privately published, Wairoa, 1943; reprinted by Southern Reprints, n.d.); John Te H. Grace, *Tuwharetoa: The History of the Maori People of the Taupo District* (Wellington: A. H. & A. W. Reed, 1959); Don Stafford, *Te Arawa: A History of the Arawa People* (Auckland: Reed, 1967); J. M. McEwen, *Rangitāne: A Tribal History* (Auckland: Heinemann Reed, 1986); Pei Te Hurinui Jones, *Nga Iwi o Tainui: The Traditional History of the Tainui People*, ed. Bruce Biggs (Auckland: Auckland University Press, 1995); *Ngāi Tahu: A Migration History: The Carrington Text*, ed. Te Maire Tau and Atholl Anderson (Wellington and Christchurch: Bridget Williams Books in association with Te Rūnanga o Ngāi Tahu, 2008) (originally written in the 1930s).

history. These books are histories, not works of cultural anthropology. They are written as narratives running from ancient times to the modern day and which treat the *iwi* (tribe) as a distinct entity more than capable of forming the subject of a historiography.

The tradition of scholarly tribal history is a living one in New Zealand, shown by impressive new books by Judith Binney, Hilary and John Mitchell, Vincent O'Malley and David Armstrong.⁶² These more recent *iwi* histories are somewhat different from their predecessors, however, in that they derive from evidence prepared for the inquiries of the Waitangi Tribunal and are primarily works of documentary history, rather than deriving from *whakapapa*, Native Land Court evidence and oral traditions — although the latter sources continue to be used. There is also a somewhat separate tradition of reference works published by Māori scholars based on their own studies of *whakapapa* but relying on land court material to some degree.⁶³ Different again are modern works by contemporary scholars who are primarily archaeologists but who accept the historicity of Māori traditional narratives, at least to some extent.⁶⁴

The literary tribal history in the strict sense forms a distinctive sub-genre of non-fiction writing in New Zealand, and it is strange that this type of scholarly endeavour has not (to date) generated either a historiography or a tradition of academic criticism. Nevertheless, the writing of tribal history certainly forms a part of New Zealand historical literature. These books are not primarily about 'race relations' or Crown–Māori engagement, although these subjects are not ignored. Essentially, they are *tribal histories*, narrating the histories of polities — if that is the right word — that are in fact much older than the New Zealand state. Don Stafford's *Te Arawa* begins with the departure of the *Te Arawa* canoe from Hawaiki many centuries ago, and for its first two hundred pages the book is a detailed political narrative of migration, settlement and conflict, before

⁶² Hilary and John Mitchell, *Te Tau Ihu o Te Waka: A History of Maori of Nelson and Marlborough: Vol 1: Te Tangata me te Whenua – The People and the Land* (Wellington: Huia Publishers in association with Wakatu Incorporation, 2004); Vincent O'Malley and David Armstrong, *The Beating Heart: A Political and Socio-economic History of Te Arawa* (Wellington: Huia, 2008); Tony Sole, *Ngāti Ruanui: A History* (Wellington: Huia, 2005).

⁶³ Rongowhakaata (R. W.) Halbert, *Horouta: The History of the Horouta Canoe, Gisborne and East Coast*, prepared for publication by Te Nonoikura Haronga, Peter Gordon and the Rongo Halbert whanau (Auckland: Reed, 1999); Taimoana Tūroa, *Te Takoto o te Whenua o Hauraki: Hauraki Landmarks*, ed. Charles Royal (Auckland: Reed, 2000).

⁶⁴ See Anderson, 'Speaking of Migration,' 33.

any Europeans even make an appearance. Even then, the European presence is solidly located within an essentially Māori political world for the rest of the book's 573 pages, which carries the story of the Arawa tribes up to about 1880. John Te H. Grace's *Tuwharetoa* (1959) also begins with the departure of *Te Arawa* from the central Pacific in ancient times (the *Te Arawa* and *Tuwharetoa* tribes are related groups that originate from the same *waka* [canoe]). Again, the book is written as a continuous narrative from the first settlement to more recent times, with the arrival of Europeans occurring around the middle of the story. The pre-European history is narrated, as in *Te Arawa*, in considerable detail.

What is distinctive about these books is that the European presence is fitted into a complex pre-existing political framework. In *Te Arawa* and *Tuwharetoa*, Europeans arrive into a world that has already had a long political history, which has been narrated in amazing detail and depth for hundreds of pages. This pre-European history, moreover, is not presented as conjectural but as knowable. The narratives are carried along no less confidently than in Chief Judge Fenton's Orakei judgment. There is no sense in *Te Arawa* or *Tuwharetoa* that 'New Zealand' history, even its political history, begins at 1840. The histories are not presented in vague terms of tribes and clans but are richly studded with the details of the lives of individual men and women. The index to *Te Arawa* lists the names of hundreds of people, many of whom died centuries before Europeans arrived in Aotearoa. Moreover, the historical events are set in a landscape familiar to all New Zealanders today, with the same placenames: Lake Rotorua, Lake Taupo, Mt Tongariro, the Waikato River.

These books are popular books in the sense that they are not written for ethnographers, archaeologists or Māori studies professionals. They are written for ordinary New Zealanders to read. They have often been reprinted and can be found in practically any public library. New Zealanders, whether they think about it much or not, grow up in a country which has a richly documented and much narrated pre-European political history. Maybe the psychological and cultural implications of this fact are worthy of further thought.

These works are indebted to the records of the Native Land Court. The footnotes in Stafford's *Te Arawa* cite manuscripts in New Zealand public collections and the works of nineteenth century visitors and ethnographers. But one often sees references such as 'Te Tumu Mak. 1:145', 'Kapuaiwaho Tau. 4:205' and 'Patuki Mak. 8:213'. These are minute book references. Patuki was a witness in the court, and the reference is to

part of his oral narrative in volume 8 of the Maketu minute books. Even where references are keyed to earlier manuscripts or articles in the *Journal of the Polynesian Society*, many of these will themselves be based on material given in the court. The existence of the Native Land Court records is a principal reason why a book such as *Te Arawa* can exist. And who would want to be without this literature?

Whether the narrative style of a book such as *Tuwharetoa* is a product of the Native Land Court process in some sense is a more difficult question, but this is certainly a possibility. Perhaps the real origin of the literary tribal history is Chief Judge Fenton's long disquisition on the pre-European history of Auckland in his Orakei judgment. Orakei and *Tuwharetoa* are alike in the assumption that tribal histories relate to real histories, that *whakapapa* can be cross-checked and relied upon, and that Māori political history can be written with real confidence. If it can be written with sufficient confidence to create a foundation for property rights in the present, it can be written with no less confidence simply as history. Whether these assumptions are true is another question entirely.

Conclusion

The Native Land Court has been the subject of a large body of literature in New Zealand, focusing principally on its legal and social effects. This article has taken a different approach, focusing on the court's cultural and historiographical legacies. I believe that these have been, and continue to be, important. The court's records form a unique body of material which historians and ethnographers have long mined and no doubt will continue to do so. In fact, it can be put more strongly: without the court's records, many standard works of New Zealand history could hardly be imagined. Moreover, the Waitangi Tribunal inquiries of the present day, while tending to focus on the destructive effects of the court and the *Native Lands Acts*, depend to a significant degree on the records of the court as a foundation for its own investigations and reports. This article has also suggested that the court's historical importance is not, however, solely a matter of its records. The court both facilitated and was actively engaged in the development of a type of historical literature which is of considerable cultural and intellectual importance: the literary tribal history. Such works could not exist but for the vast amount of Māori historical testimony found in the minute books. The court also contributed to this historical style directly by the way it crafted many of its own judgments, the most important of which were long narratives written on

the confident assumption that a reliable written history could be assembled from oral testimony given in the court. That same confidence underpins the historical writing of authors such as Elsdon Best and John Te H. Grace. Arguably, the court's judgments helped to create and to reinforce a kind of historical style. Moreover, at least some of the court's judges were active participants in history writing outside the courtroom, publishing books and papers on Māori history and ethnography from a reasonably detached and even sympathetic standpoint. In these ways, the court has perhaps had some positive effects on New Zealand intellectual culture.

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