



Richard Boast

The Native Land Court

Volume 2 A Historical Study, Cases and Commentary 1888-1909



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AUTHOR'S PREFACE

This is the second volume in a series of edited judgments of the Native Land Court and its associated bodies. Volume 1 covered the origins of the Court and its development to 1887. This volume continues the story of the Court down to 1909, the date of the enactment of the Native Land Act of that year, which reformed and re-arranged the complex statute law relating to the Court and Maori land administration.

The format of the book is the same as volume 1. The first part of the book is a survey of the history of the Court and related bodies; the second is comprised of a sample of fully annotated cases, each with an introductory essay explaining the context of the decision. The period covered by this book witnessed some important new developments, including the establishment of the Validation Court in 1893 and of the Native Appellate Court in 1894.

The research for this book was supported by a generous grant from the New Zealand Law Foundation. Once again I must thank the Trustees and Linda Hagen and Dianne Gallagher for their support and assistance. I must also record my thanks to the administrators of the Marsden Fund, administered by the Royal Society of New Zealand. Chapter 10 of Part 1, which places New Zealand's tenurial revolution in a wider international context, draws on new research carried out for my current project on land tenure around the Pacific rim in the 19th century. This chapter aside, this book is very much a New Zealand Law Foundation project, and is a further development of the original Lost Cases project also generously funded by the Foundation some years ago. Legal scholarship in New Zealand is very fortunate to have this wonderful resource to draw upon.

Further thanks are due to Ryan O'Leary, my research assistant, for all his work in locating cases and assisting with the completion of this book. At Thomson Reuters thanks are due, once again, to Renay Taylor for her support and commitment to this ongoing project. Clare Barrett was an outstanding copy-editor with an eye for detail, stylistic infelicities, and — the bane of research on the records of the Native Land Court — inconsistent spellings of the names of people and places. Thanks are due also to Mitch Marks for help with the maps. Alex Boast helped with the transcriptions. My wife, Deborah Edmunds, was, as always, an endless source of encouragement, expertise, and sound advice. This book would have been immensely poorer without her input, and indeed perhaps might never have seen the light of day at all.

There are some institutions to be thanked. Most of the work for this book was done at National Archives Wellington and in the Law Library at Victoria University of Wellington, both of which have extensive hard-copy holdings of the Court minute books. I must also thank staff of the Waitangi Tribunal and of the Crown Forestry Rental Trust for giving permission to reproduce maps from Waitangi Tribunal reports and from the Crown Forestry Rental Trust map-books. I have discussed this project at

seminars convened by the Waitangi Tribunal and by the Department of Justice, and I must thank the organisers and those who attended. I must also thank the Attorney-General, the Hon Christopher Finlayson, for the Foreword.

There are many other people (in academia, in the Maori world, and in the communities of working public historians and of the Waitangi Tribunal bar) whose work has been drawn on here. They are too numerous to list by name. Some particular persons are acknowledged separately in various parts of the book. This book, like its predecessor, could not even have been contemplated without the work of those historians who have prepared reports and given evidence in various Waitangi Tribunal inquiries. One fine historian I would particularly like to mention, however, is the late Dr Don Loveridge, who died unexpectedly in May 2015. His work on the origins of the Court, on the King Country, and on Maori land boards has been of enormous value to this project.

All mistakes and shortcomings, as it is customary to say, are solely my responsibility.

Richard Boast QC

Pukerua Bay

24 July 2015

CONTENTS

<i>Foreword</i>	<i>v</i>
<i>Author's Preface</i>	<i>vii</i>
<i>Errata and Corrigenda for Volume 1</i>	<i>ix</i>
<i>List of Illustrations</i>	<i>xiii</i>

Part One Introduction: The Native Land Court and Associated Courts 1887–1909

Chapter 1	The Legal Structure in 1887.....	3
Chapter 2	Political and Legal Developments 1887–1900.....	15
Chapter 3	Political and Legal Developments 1900–1909.....	53
Chapter 4	The Native Land Court as an Institution 1887–1909.....	73
Chapter 5	The Development of Procedure and Doctrine 1865–1900.....	109
Chapter 6	The Validation Court in Operation.....	143
Chapter 7	The Native Land Court and the King Country 1886–1909.....	155
Chapter 8	“A Perfect Bombardment of Writs”: The Native Land Court and the Validation Court in the Gisborne and East Coast Region 1887–1909.....	199
Chapter 9	Te Urewera and the Urewera Commissions.....	221
Chapter 10	A Return to Collectivism?.....	249

Part Two Selected Decisions of the Native Land Court and Associated Courts

Introduction to Part Two.....	269
Chronological List of Judgments and Original Citations.....	273
Selected Decisions.....	283
<i>Bibliography</i>	1093
<i>Subject Index</i>	1121

Chapter 10

A RETURN TO COLLECTIVISM?

10.1 An international phenomenon

New Zealand's tenurial revolution, as exemplified by the Native Lands Acts, the establishment of the Native Land Court, Crown purchase and confiscation of Maori land and granting it to settlers, was not at all an isolated phenomenon.¹ Strikingly similar policies can be found all around the Pacific rim at more or less the same time. The Native Lands Acts were driven by a particular ideology, one that arose from that array of ideas, ideals, and rhetoric which, for convenience, we call "liberalism". One important component of the liberal brew was a belief in the social and economic benefits of individual — rather than corporate, or collective — ownership of land. This basic idea underpins land reform statutes across the world in the 19th century. One well-known example is Prussia under the leadership of (as Suzanne Marchand calls them), "two enlightened administrator-nobles", Karl von Hardenberg and Karl Freiherr vom Stein, who freed the Prussian serfs, granted citizenship to Jews, and reformed the country's land tenure system.²

There are some very striking parallels between tenurial changes in New Zealand and similar processes that took place at roughly the same time in other jurisdictions. The newly independent Latin American republics are one example.³ The same is true of important changes that took place in the Kingdom of Hawai'i. There are also some similarities with general allotment in the United States. Yet another parallel is the Ottoman Land Code of 1858, which set in train tenurial transformations which continue to reverberate in Israel and Palestine to this day.⁴ Hostility to lands that were perceived as "entailed" or "dead" is a particularly important strand in European and Latin American liberalism. The central notion has never been better conveyed than by Eric Hobsbawm:⁵

"The great frozen ice-cap of the world's traditional agrarian systems and rural social relations lay above the fertile soil of economic growth. It had at

¹ Research for this chapter was supported by a grant from the Marsden Fund, administered by the Royal Society of New Zealand for a project on changes to land tenure around the Pacific rim in the 19th century. This chapter is, therefore, somewhat distinct from the rest of this book, and is aimed at setting the New Zealand experience in a comparative legal and historical context. The underlying thesis of the project is that New Zealand's Native Lands Acts have much in common, ideologically and conceptually, with changes to land tenure in many parts of the Pacific in the 19th century.

² Suzanne L Marchand *Down from Olympus: Archaeology and Philhellenism in Germany, 1750-1970* (Princeton University Press, Princeton, 1996) at 27. Marchand links these changes to the educational reforms of Wilhelm von Humboldt, who designed the University of Berlin (established in 1810), all part of a state-driven project of enlightened reform and modernisation. The agrarian reforms were principally given effect to in the great *Allgemeines Landrecht* (General Land Law) (1807). For brief overviews of the reforms in Prussia see James J Sheehan *German History 1770-1866* (Clarendon Press, Oxford, 1989) at 291–310; Christopher M Clark *Iron Kingdom: The Rise and Downfall of Prussia* (Allen Lane, London, 2006) at 327–330.

all costs to be melted, so that that soil could be ploughed by the forces of profit-producing private enterprise.”

Land, writes Hobsbawm, should be made “free” — that is, turned into a commodity — and “it had to pass into the ownership of a class of men willing to develop its productive resources for the market and impelled by reason, i.e. enlightened self-interest and profit”.⁶

Land tenure was a core component of the liberal vision in Latin America, as it was everywhere. Immediately after the achievement of Mexican independence:⁷

“... a debate emerged for the first time concerning the best method for putting into place liberal policies for the disentanglement of lay properties in the particular social and cultural context of rural Mexico”.

The main Mexican statute was the *Ley Lerdo* or *Ley de Desamortización*⁸ of 25 June 1856, based in turn on earlier repartitional laws in the Mexican states of Michoacan, Zacatecas, and Guanajuato. The Preamble to the statute sets out the liberal position with great clarity:⁹

“Whereas one of the principal obstacles to the prosperity and growth of the nation is the lack of movement or free circulation of a great part of real property, the fundamental basis of public prosperity”.

The legislation required that all those who were renting land from corporate bodies were entitled to convert such leases into legal titles, the rents becoming in effect mortgage payments with one year’s rental being treated as the equivalent of seven per cent of the

3 In Spain the principal target of the privatisation or individualisation statutes (an aspect of a policy known as *desamortización*, as in Spanish America), were Church lands and common lands. The principal Spanish statute was the *Ley Madoz* (1855), named after a prominent radical Progressive politician from Catalonia. See Josep Fontana *La época del liberalismo* (Crítica, Barcelona, 2007) *Historia de España*, vol 6 at 277–282. According to CJ Esdaile the legislation did nothing to benefit poorer farmers: in fact “[i]n social terms, in fact, the whole exercise was a disaster”: Charles J Esdaile *Spain in the Liberal Age: From Constitution to Civil War, 1808-1939* (Blackwell, Oxford, 2000). The classic account of the impact of Spanish liberalism in Central America is Mario Rodríguez *The Cádiz Experiment in Central America, 1808 to 1826* (University of California Press, Berkeley 1978). For a useful collection of essays on liberalism and tenurial change in Spanish America see Robert H Jackson (ed) *Liberals, the Church, and Indian Peasants* (University of New Mexico Press, Albuquerque, 1997). For the general context of these developments, see the various essays in Leslie Bethell (ed) *The Cambridge History of Latin America: Vol III: From Independence to c. 1870* (Cambridge University Press, Cambridge, 1985).

4 The Ottoman Land Code of 1858 and certain other laws promulgated in 1858 and 1859 were a product of the Tanzimat or “reorganisation” period in the empire from 1839 to 1876 (other reforms included the adoption of French-style civil and criminal codes in 1840, the establishment of a modern system of courts, and provision for religious freedom and civic equality). The land legislation of 1858–1859 provided for a system of land registration and created a number of tenurial categories, some of which survived into Mandate Palestine and which were directly taken over by the Israeli government in 1948. The literature on land and land tenure in contemporary Israel, Palestine, Jordan, and Lebanon is too vast to cite here; for a recent historical treatment see Aida Asim Essaid *Zionism and Land Tenure in Mandate Palestine* (Routledge, London, 2013).

5 EJ Hobsbawm *The Age of Revolution* (World Publishing Co, Cleveland, 1962) at 149.

6 Ibid.

7 Aurora Gómez Galvarriato and Emilio Kouri “La reforma económica: Finanzas Públicas, Mercados y Tierras” in Erika Pani (ed) *Nación, Constitución y Reforma, 1821-1908* (Fondo de Cultura Económica, México DF, 2010) at 101 (my translation).

value of the land. The Act was probably mainly aimed at the vast landholdings of the Catholic Church in Mexico, but it applied on its face to all corporate bodies, including municipalities and indigenous towns.

The *Ley Lerdo* was supplemented by a number of additional statutes which reflected the views of a group of highly placed technocrats within the Diaz regime after 1876, the so-called *Científicos*, followers of Comptean positivism and strong believers in economic liberalism.¹⁰ The statutes shared a common vision with the Mexican Constitution of 1857, a liberal and anti-clerical statement which employed a discourse of individual rights and the sovereignty of the people which in turn drew its inspiration from the French Revolutions of 1789 and 1830, the French Civil Code of 1804, the Cortes of Cadiz of 1812, and the French Constitution of 1848.¹¹

- 8 Named after the Mexican Liberal politician Miguel Lerdo de Tejada. Presumably this enactment reflected in some respects the legislation enacted in Spain in 1855. The principal target of the *Ley Lerdo* was the vast endowed lands held by the Church in Mexico. Much of this land was worked by peasant tenant farmers. One consequence of the law was that many of the endowed Church lands came into the hands of wealthy ranchers and owners of haciendas, leading in turn to far worse conditions for the rural peasantry. For a useful introduction to Mexican legal history in English, see Stephen Zamora and others *Mexican Law* (Oxford University Press, Oxford, 2004) at 1–42; for full accounts see Guillermo Floris Margadant *Introducción a la Historia del Derecho Mexicano* (8th ed, Editorial Esfiage, Mexico DF, 1988); Óscar Cruz Barney *Historia del Derecho Mexicano* (Oxford University Press, Mexico DF, 1999). The great historian of Mexican liberalism is Jesús Reyes Heróles. See, for example, Jesús Reyes Heróles *El liberalismo mexicano: Los Orígenes* (2nd ed, Fondo de Cultura Económica, México DF, 1974). On the period of “the Reform” (la Reforma), see, for example, Jan Bazant and Michael P Costeloe *Alienation of Church Wealth in Mexico: Social and Economic Aspects of the Liberal Revolution, 1856-1875* (Cambridge University Press, Cambridge, 1971); Richard N Sinkin *The Mexican Reform, 1855-1876: A Study in Liberal Nation Building* (University of Texas Press, Austin, 1979); François-Xavier Guerra *Le Mexique: De l’Ancien Régime à la Révolution* (L’Harmattan, Paris, 1985) (and in Spanish: *México: del Antiguo Régimen a la Revolución* (2nd ed, Fondo de Cultura Económica, México DF, 1991); Jennie Purnell “With All Due Respect: Popular Resistance to the Privatization of Communal Lands in Nineteenth-Century Michoacán” (1999) 34(1) *Latin American Research Review* 85; Emilio H Kouri “Interpreting the Expropriation of Indian Pueblo Lands in Porfirian Mexico: The Unexamined Legacies of Andrés Molina Enriquez” (2002) 82 *Hispanic American Historical Review* 69. There is a substantial literature on the indigenous peoples of Mexico in the 19th century. On the Yucatec Maya, for instance, in this period see Sergio Quezada *Breve historia de Yucatán* (Colegio de México, México DF, 2001); Nelson Reed *The Caste War of Yucatan* (Stanford University Press, Stanford, 1964); Terry Rugeley *Yucatán’s Maya Peasantry and the Origins of the Caste War* (University of Texas Press, Austin, 1996); Terry Rugeley *Rebellion Now and Forever: Mayas, Hispanics and Caste War Violence in Yucatán, 1800-1880* (Stanford University Press, Stanford, 2009); on Chiapas in the 19th century see Jan de Vos *Oro verde: La conquista de la Selva Lacandona por los madereros tabasqueños, 1822-1949* (Instituto de cultura de Tabasco, México DF, 1988); Juan Pedro Viqueira *Encrucijadas Chiapanecas: Historia, Economía, religión e identidades* (Tusquets Editores México, México DF, 2002). The effects of the liberal *Reforma* on indigenous communities are now being studied by means of case studies that focus on the experiences of particular groups: see, for example, J Édgar Mendoza García *Municipios, cofradías y tierras comunales: Los pueblos chocholtecos de Oaxaca en el siglo XIX* (Universidad Autónoma “Benito Juárez” de Oaxaca, Oaxaca, 2011) (Chochotelco people, Oaxaca); Gabriel Fajardo Peña “La privatización de la tierra y problemas agrarios en la Huasteca potosina, 1870-1920” in Antonio Escobar Ohmstede and Ana María Graciela Gutiérrez Rivas (eds) *Entretejiendo el mundo rural en el “oriente” de San Luis Potosí, Siglos XIX y XX* (Colegio de San Luis, San Luis Potosí, 2009) (Huasteca region, San Luis Potosí).
- 9 *Ley Lerdo*, 25 June 1856, Preamble, in Luis G Labastida (ed) *Colección de Leyes, Decretos, Reglamentos, Circulares, Ordenes y Acuerdos relativos a la Desamortización de los Bienes de Corporaciones Civiles y Religiosas y a la Nacionalización de los que Administraron las Últimas* (Tipografía de la Oficina Impresora de Estampillas, Palacio Nacional, México D F, 1893) at 1 (my translation).

Church lands and communal Indian lands were seen as archaic relics of the Spanish colonial empire and as obstacles to modernisation, and the period of the liberal reforms, associated with the governments of Benito Juárez and Porfirio Díaz, saw significant losses of Indian lands to private ownership during a period of rapid economic expansion. The process was, however, both complex and incomplete. Recent Mexican scholarship is now cautious about overstating the effects of the liberal *Reforma* on the corporate lands of the Church and the Indian *pueblos*. Historians have emphasised the need for further research on the many obstacles that the liberals faced in putting their plans into effect and the limitations in liberal theory itself, which tended to regard private property rights as sacred. Liberalism left the properties of the existing landed elite untouched, contributing to the problem of unequal land distribution, a problem which was one of the causes of the great Mexican revolution which broke out in 1910.¹² A further problem was the weakness and constant indebtedness of the Mexican state: enacting statutes is one thing, putting them into effect is quite another — this being equally true of much statute law relating to Maori land in 19th-century New Zealand, much of which was just so much boilerplate. Mexico, moreover, is a vast and complex country, and the effects of the *Reforma* on the indigenous towns varied considerably, as is now becoming increasingly clear as the result of a proliferation of new regional and local studies of 19th-century Mexico.¹³ Notwithstanding all these caveats, however, it is certain that an important, if regionally varied, transformation took place.

For much of the 19th century the creation of the unitary liberal regime remained an aspiration, rather than a reality (this is just as true of New Zealand, where parts of the North Island remained autonomous and under de facto Maori control until the 1890s).¹⁴ Even in a powerful metropolitan country like France, parts of the national territory were still more or less autonomous in 1800, and were only brought under centralised authority

10 The “positivist” philosophy of Auguste Comte, not to be confused with the jurisprudential theory of legal positivism, was never very influential in the Anglo-Saxon world, but was enormously significant in key Latin American countries such as Mexico and Brazil in the 19th and early 20th centuries. Positivism, which sees humanity as progressing away from religious superstition towards rationalism and modernity, was not necessarily antithetical to indigenous interests. Many Brazilian supporters of Indian rights in the early 20th century, such as the famous explorer and ethnographer Cândido Rondon, and political intellectuals such as Silvio de Almeida and Luis Horta Barboza were dedicated positivists. See generally John Hemming *Die if You Must: Brazilian Indians in the Twentieth Century* (Pan Books, London, 2004) at 1–23. The positivist slogan, “order and progress” (*ordem e progresso*) is on the Brazilian flag. On positivism in Brazil see also Todd A Diacon *Stringing together a Nation: Cândido Mariano da Silva Rondon and the Construction of Modern Brazil, 1906-1930* (Duke University Press, Durham, 2004). Positivism was not entirely without influence in Britain (and perhaps, therefore, in British colonies): the reformer Charles Booth regarded himself as a positivist and it was an important strand in Fabian socialism: see Gertrude Himmelfarb *Poverty and Compassion: The Moral Imagination of the Late Victorians* (Knopf, New York, 1991) at 82–85 and 356–358. Its formal impact in New Zealand seems to have been slight but probably many key architects of Maori land policy such as Donald McLean, Francis Dart Fenton, and John Ballance would have shared similar ideas.

11 See François-Xavier Guerra *Le Mexique: De l’Ancien Régime à la Révolution* (L’Harmattan, Paris, 1985) at 37.

12 See Aurora Gómez Galvarriato and Emilio Kouri “La reforma económica: Finanzas Públicas, Mercados y Tierras” in Erika Pani (ed) *Nación, Constitución y Reforma, 1821-1908* (Fondo de Cultura Económica, México DF, 2010).

13 See, for example, J Édgar Mendoza García *Municipios, cofradías y tierras comunales: Los pueblos chocholtecos de Oaxaca en el siglo XIX* (Universidad Autónoma “Benito Juárez” de Oaxaca, Oaxaca, 2011).

14 Te Urewera is an example. See ch 9 above.

with some difficulty during the course of the 19th century.¹⁵ The same is true of many of the countries of Latin America, and the effective control of the state remains incomplete in some countries even today.¹⁶ In some regions, such as northern Mexico, the collapse of Spanish authority and its replacement by a weakened and unstable federal republic led to a power vacuum in what is now the American Southwest and an enhanced vulnerability of the settled areas to the south from destructive attacks from the Comanches in the northeast and the Apaches to the northwest.¹⁷ The process of securing control over the national territory was slow and costly. As late as 1879, even a modern and economically expanding country like the Republic of Argentina was still engaged in a military conquest of its own national territory, the so-called Conquest of the Desert: “[s]ubduing and killing Indians, [the army] ‘cleansed’ the southern and western pampa to Patagonia”; those who survived:¹⁸

“... endured a program of forced acculturation, euphemistically called regeneration, which included the dissolution of tribal governments, prohibition of native languages, and forced labor at menial work or obligatory service in the national guard or the navy.”

Some Argentinian essayists, notably Vicente Fidel López, theorised that the Argentinian state had taken over the responsibility of the supposedly “Aryan” Inca state to conquer and rule the “barbarians” of the desert.¹⁹ The Mapuche people of southern Chile had maintained their independence against Spain for centuries, but were finally crushed by the Chilean army during a long and grim campaign which lasted from 1867 to 1883. Similarly the Yaqui people of northwestern Mexico, who, like the Mapuches, had held their own against the Spanish, were defeated by the Mexican army in a bitter campaign in 1885–1886, which ended with the execution of the Yaqui leader, Cajeme, by firing squad in 1887.²⁰ Campaigns of this kind also allowed for the expansion of rural settlement and thus economic growth. The expansion of the frontier in Argentina during the late 19th century allowed the state to add some 30 million hectares of land to the national economy.²¹ There are, therefore, obvious connections between statutory authority and

15 Most famously in the case of Corsica, although Corsica is something of a special case as it was only ceded to France by Genoa in 1768. Nineteenth-century Corsica was still dominated by the blood feud as the principal means of social organisation. See generally Stephen Wilson *Feuding, Conflict and Banditry in Nineteenth-Century Corsica* (Cambridge University Press, Cambridge, 1998).

16 Parts of Colombia, Peru, and the Caribbean coast of Nicaragua spring to mind.

17 David J Weber *The Mexican Frontier, 1821-1846* (University of New Mexico Press, Albuquerque, 1982) at 83–93.

18 David J Weber *Barbaros: Spaniards and Their Savages in the Age of Enlightenment* (Yale University Press, New Haven, 2005) at 273. See also Vanni Blengino, Ruggiero Romano and Liliana Huberman *La zanja de la Patagonia: Los nuevos conquistadores, militares, sacerdotes y escritores* (Fondo de Cultura y Económica de Argentina, Buenos Aires, 2005) (reflections on a proposal to build a massive fortified ditch more than 600 kilometres long from the Andes to the Atlantic to separate the settled regions of Argentina from the Indian peoples of the far south). For a very different interpretation of Argentine history, however, see Abelardo Levaggi *Paz en la Frontera: Historia de la relaciones diplomáticas con las comunidades indígenas en la Argentina (Siglos XVI-XIX)* (Universidad del Museo Social Argentino, Buenos Aires, 2000). For a comparative study of developments in Mexico and Argentina, see Carmen Bernard *Les Indiens face à construction de l'État-nation: Mexique-Argentine 1810-1917* (Atlande, Paris, 2013).

19 See Carmen Bernard *Un Inca platonicien: Garcilaso de la Vega 1539-1616* (Fayard, Paris, 2006) at 324.

20 On the campaigns against the Yaqui nation, see Evelyn Hu-Dellart “Yaqui Resistance to Mexican Expansion” in John E Kicza (ed) *The Indian in Latin American History: Resistance, Resilience, and Acculturation* (revised ed, SR Books, Lanham, MD, 2000) 213.

effective military and policing control over a country. This was a project that countries as diverse as New Zealand, Chile, Argentina, Mexico, Brazil, and the United States were actively engaged in during the 19th century and which had been more or less achieved by around 1900, although even by then there were still some areas that remained outside the effective control of the national states. The advent of the state as Leviathan may have been inevitable and even beneficial in the long term — who could mourn the departure of the Corsican blood feud or intertribal violence? But it came at a price.

There appear to have been two separate processes which fused and interacted in the 19th century, these being a more specifically English, or Common Law tradition deriving from parliamentary enclosure and the eradication of customary tenures in Ireland and Scotland, fortified to some extent by the ideas of a number of writers and theorists (including Locke), and a continental version of the same ideas, given effect to in the French revolution, and which became an important component of liberal theory and practice not only in France, but also in Italy and Spain and thus in Spanish America. Common to both is the view that a free and enlightened society was one which respected and encouraged private property. There is also a connection between this thinking and a historiographical debate that emerged in the 18th century about the supposed inferiority of the “New” World as compared with the “Old”: how, it was asked, could reports and Spanish histories describing the wealth, splendour and great populations of the Aztec and Inca states written in the 16th and early 17th centuries possibly be trusted given that these societies had no clear conception of private property rights in land?²² That a society lacking a conception of private property rights could be great and powerful was literally unthinkable.

In England it had long been standard discourse to equate freehold tenures with liberty and progress, and customary tenures with despotism and poverty. This is doubtless a defensible view, but I am not concerned here about whether these ideas are true but rather to emphasise their pervasiveness. Schooled in their own distinctive historical traditions and the philosophy and historiography of Harrington, Locke, Hume, Robertson, and Adam Smith, English and Scottish thinkers were convinced that (as JGA Pocock puts it) “it was the mark of a true ‘oriental despotism’ that the subject possessed no free tenure, no property in his goods, and no law to protect either”.²³ Or as the distinguished authors of a classic account of the early American republic have written, the English-speaking world’s vision of the civic humanism that derived originally from Renaissance Italy came to rest on two main foundations, the right of citizens to bear arms and “freehold property as the fundamental safeguard and guarantee of the citizen’s independence of judgment, action, and choice.”²⁴ It can be seen that secure private property in land was valued not so much because it guaranteed economic efficiency but rather as the hallmark of a free commonwealth. Nevertheless the two certainly went together.

New Zealand liberals in the early days of the colony’s history belonged to the same tradition, fortified by trends in 19th-century economics deriving from Bentham and Ricardo that favoured free trade, freedom of contract, and free markets, including a free

21 Jorge Álvarez “The Evolution of Inequality in Australasia and the River Plate, 1870-1914” (paper presented at the 16th World Economic History Conference Stellenbosch University, South Africa, July 2012) at 17.

land market. Some of the better-read colonists (like Chief Judge Fenton of the Native Land Court) had an educated understanding of this tradition; all were influenced by it. Rightly or wrongly, the drafters of the Native Lands Acts believed that Maori customary tenure had no future, perceiving it not only as a pointless and inefficient relic but as actually pernicious.

10.2 The debate on land tenure in colonial New Zealand

There were, however, tensions and opposing currents within this overarching mindset which equated progress with private property and agrarian stagnation with common lands. In a liberal settler colony such as New Zealand the counter-currents were very powerful, and were reflected in much of the legislation of the Liberal era. In England the ideal of the independent yeoman freeholder was an ancient one, an ideal which in the minds of some thinkers connected to the classical republicanism that emerged in the 17th century and remained important in the 18th and 19th centuries. Freeholds and clear titles were not by themselves enough. It was no less important to ensure that rural land did not fall into the hands of a rural ruling class. Enclosure posed the risk of land monopoly. As the wise legislators of the early Roman republic had done, so it was argued, the state should take action to prevent undue land aggregation. Literary opponents of parliamentary enclosure in the 18th century, such as Stephen Addington

- 22 Those contending for this inferiority included the Dutch and French *philosophes* Cornelius de Pauw (1739–1799) (see de Pauw's *Recherches philosophiques sur les américains*, published originally in Berlin in 1768–1769) and Guillaume Thomas François Raynal (1713–1796) (his principal work is his *Histoire philosophique et politique, des établissements et du commerce des Européens dans les deux Indes*, in three, somewhat different, editions: 1770, 1774, and 1781). Also important was the Edinburgh philosopher and historian William Robertson, rector of the University of Edinburgh (*The History of America*, 1777). These works provoked angry responses from, for example, the exiled Mexican Jesuit historian Francisco Javier Clavijero (1731–1787) (*Historia antigua de México*, first published in Italian as *Storia antica del Messico*, Cesena, 1780–1781). Clavijero's writings in turn served as an inspiration for writers of the revolutionary era such as Fray Servando Teresa de Mier (1763–1827): see Rolena Adorno *Colonial Latin American Literature: A Very Short Introduction* (Oxford University Press, Oxford, 2011) at 117–120. This many-sided intellectual debate came to include wider discussions about climatic determinism, the stages of human progress, and the nature of historical evidence, and has resulted in a large modern literature: see Antonello Gerbi *La Disputa del Nuovo Mondo: storia de una polemica, 1750-1900* (R Ricciardi, Milan, 1955) (English translation University of Pittsburgh Press, Pittsburgh, 1978); Benjamin Keen *The Aztec Image In Western Thought* (Rutgers University Press, New Brunswick, 1971) especially at 217–309; DA Brading *The First America; The Spanish Monarchy, Creole patriots, and the Liberal state 1492-1867* (Cambridge University Press, Cambridge, 1991) especially at 422–464; Jorge Cañizares-Esguerra *How to Write the History of the New World* (Stanford University Press, Stanford, 2001); JGA Pocock *Barbarism and Religion: Volume Four: Barbarians, Savages and Empires* (Cambridge University Press, Cambridge, 2005); David Weber *Barbaros: Spaniards and Their Savages in the Age of Enlightenment* (Yale University Press, New Haven, 2005). The debate subsided in the later 18th and early 19th centuries once accounts of the great archaeological sites of the Americas became widely available in Europe and the United States, notably those of Alexander von Humboldt, John Lloyd Stephens and Frederick Catherwood, and Desiré Charnay. On aspects of this debate concerned specifically with land and land tenure, see Cañizares-Esguerra *How to Write the History of the New World* (Stanford University Press, Stanford, California, 2001) at 39 (contains Raynal's views on whether the Inca state could have maintained agricultural prosperity with no system of private property rights).
- 23 JGA Pocock *Barbarism and Religion: Volume Two: Narratives of Civil Government* (Cambridge University Press, Cambridge, 1999) at 239. These words capture fairly accurately how Maori customary tenures were perceived by 19th-century liberals.
- 24 Stanley Elkins and Eric McKittrick *The Age of Federalism: The early American Republic, 1788-1800* (Oxford University Press, New York, 1993) at 9.

and Richard Price, drew on this rhetorical tradition to fortify their anxieties about a possible decline in rural population and a loss of yeoman independence, although by the end of the 18th century this tradition was being countered by other theorists who emphasised the benefits of increased wealth and profits that enclosure of the common lands could generate.²⁵ This tension between an emergent liberalism emphasising property rights and laissez faire coexisted with a declining but still quite pervasive distrust of large estates and an emphasis on the independent sturdy yeoman farmer. This tension was certainly reflected in colonial New Zealand politics, and it is undoubtedly the case that many of the policies of the Liberal government after 1891 were strongly influenced by an earlier yeoman ideal, an ideal which coincided with Liberal claims to represent “the people” and the pursuit of “close settlement”. The intensity of debate in New Zealand over such pivotal issues as the restoration of Crown pre-emption in 1894, and whether land purchased from Maori by the state should be Crown-granted in freehold or leasehold, needs to be understood against a longer and complex process of debate about land, wealth, and national well-being which reaches far back into the history of the British Isles, and indeed into the classical world.²⁶

A particular context for the debate on tenure in New Zealand was the enclosure of the commons in England. Enclosure meant, essentially, tenurial *conversion*: the principal objective was to convert common lands and the strip-based open fields of the old manorial system into compact surveyed holdings “enclosed” by hedgerows. It is generally seen as a fundamental component of the “agricultural revolution” in England.²⁷ The process was one of slow transformation, beginning in the 16th century, but which gained rapid momentum from 1790 to 1820. Enclosure in England is linked to a long tradition of agricultural improvement and the writings of 17th- and 18th-century theorists, notably Walter Blith (1605–1654), author of *The English Improver*, who regarded the new enclosed landscape as more beautiful and picturesque than the great open arable fields of the old manorial system.²⁸ In fact the traditional “English” landscape as displayed in postcards and coffee table books is actually of quite recent origin. Until the late 18th century, vast tracts of England were still landscapes of open fields stretching to the horizon, heathland (such as Hounslow Heath, Blackheath, Mousehold Heath, Hampstead Heath etc), and common woodlands. Fields could be as large as 1,500 acres. As the art historian Ian

25 See SJ Thompson “Parliamentary Enclosure, Property, Population, and the Decline of Classical Republicanism in Eighteenth-Century Britain” (2008) 51(3) *The Historical Journal* 621. This exceptionally illuminating article connects classical republican theory to the debate over parliamentary enclosure in the 18th century. Thompson notes that “[a] major part of the case against enclosure rested on the claim that the destruction of the yeoman would lead to wider political and moral decay in the commonwealth” (at 626). In making this argument opponents drew on classical precedent and on policies pursued in contemporary enlightened republics such as the canton of Bern in Switzerland (at 629).

26 On the classical context of the debate, see Eric Nelson *The Greek Tradition in Republican Thought* (Cambridge University Press, Cambridge, 2004); SJ Thompson “Parliamentary Enclosure, Property, Population, and the Decline of Classical Republicanism in Eighteenth-Century Britain” (2008) 51(3) *The Historical Journal* 621.

27 Leading texts are Jonathan David Chambers and GE Mingay *The Agricultural Revolution 1750-1880* (BT Batsford, London, 1966); Michael Overton *Agricultural Revolution in England: The Transformation of the Agrarian Economy 1500-1850* (Cambridge University Press, Cambridge, 1996). Both of these standard texts see enclosure as, on the whole, beneficial and necessary.

28 Anne Janowitz “Land” in Iain McCalman (ed) *An Oxford Companion to the Romantic Age: British Culture, 1776-1832* (Oxford University Press, Oxford, 1999) 152 at 152.

Waites has shown, this older landscape, already under pressure from enclosure, can still be seen in the paintings of famous artists such as Stubbs, Gainsborough, and Constable, as well as in the works of lesser-known landscape painters such as Paul Sandby, John Varley, William Turner of Oxford, and many others.²⁹ Enclosure and its effects reverberated through English literature in the 19th century, most of all perhaps in the poetry of John Clare (1793–1864). Clare, the “peasant poet”, who came from a rural family in Northamptonshire, detested enclosure and regarded its effects on English people as little less than catastrophic.³⁰

Whether this vast process was beneficial, and, if so, to whom, is the subject of one of the most prolonged debates in English historiography. Here the historiographical pendulum has seesawed somewhat in 20th-century scholarship, ranging from a highly critical assessment by social historians such as RH Tawney, the Hammonds, Christopher Hill, and EP Thompson to a more positive assessment of the benefits of enclosure by economic historians, reverting again more recently still to a critical or at least unenthusiastic assessment by some contemporary scholars.³¹ It can certainly be said that the benefits of enclosure were not as great as its proponents claimed. Enclosure was controversial at the time, and was widely resented by those sectors of English and Scottish rural society that had most to lose from it,³² and these controversies were familiar to the Victorian settlers of New Zealand.³³ It is noteworthy, however, that no attempt was made to recreate English copyhold tenures in the Australasian colonies or to re-establish the customary tenures of Ireland or the Scottish highlands. Settlers evidently had no nostalgia for Old World tenures of that sort. Land titles in New Zealand were freeholds, deriving from Crown grants. Yet this does not mean that English settlers in New Zealand were uncritical admirers of enclosure in Britain. On the whole New Zealanders saw enclosure as having made most people in England and Scotland landless, the very antithesis of the kind of society migrants wanted to create in the Antipodes.³⁴

In the later 19th century a new mood began to take hold all around the world regarding the relationship between the state and private property rights. It became an article of faith amongst British agrarian historians that small holdings were preferable to large estates.³⁵ There was a shift in direction away from emphasising the virtues of private

29 See Ian Waites *Common Land in English Painting, 1700-1850* (Boydell Press, Woodbridge, 2012).

30 On Clare see Jonathan Bate *John Clare: A Biography* (Farrar, Straus and Giroux, New York, 2003); John Goodridge *John Clare and Community* (Cambridge University Press, Cambridge, 2013).

31 For a more critical study of parliamentary enclosure in the United Kingdom see JM Neeson *Commoners: Common Right, Enclosure and Social Change in England* (Cambridge University Press, Cambridge, 1993).

32 My mother, whose family were originally rural people from Bedfordshire, taught me the well-known rhyme:

“The law will hang the man or woman

“Who steals the goose from off the Common,

“But lets the larger villain loose

“Who steals the Common from the goose.”

33 On the links between rural dissent and protest in England and migration to New Zealand, see especially Rollo Arnold *The Farthest Promised Land* (Victoria University Press/Price Milburn, Wellington, 1981). This is the first volume in a trilogy dealing with the frontiers of settlement in New Zealand from circa 1865 to 1914. See also his *New Zealand's Burning: The Settlers' World in the Mid 1880s* (Victoria University Press, Wellington, 1994) and (with Betty Arnold) *Settler Kaponga 1881-1914: A Frontier Fragment of the Western World* (Victoria University Press, Wellington, 1997).

property and clear titles, and a growing emphasis instead on the “social function” of property.³⁶ This concept is particularly associated with the French jurist Leon Duguit, who argued that the state’s primary purpose was to provide for social needs, and it thus followed that the state’s protection of private property rights was conditional on property performing its “social function”. In the early 20th century this concept was incorporated into a number of important constitutional documents, including art 153 of the Constitution of the Weimar Republic and the famous art 27 of the Mexican Constitution of 1917:³⁷

“The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible of appropriation, in order to conserve them and to ensure a more equitable distribution of public wealth. With this end in view, necessary measures shall be taken to divide up large estates; to develop small landed holdings in operation; to create new agricultural centers, with necessary lands and waters; to encourage agriculture in general and to prevent the destruction of natural resources, and to protect property from damage to the detriment of society. Centers of population which at present have no lands or water or which do not possess them in sufficient guarantees for the needs of their inhabitants, shall be entitled to grants thereof, which shall be taken from adjacent properties, the rights of small landed holdings in operation being respected at all times.”

34 Acts of protest against enclosure were still continuing in Britain in the 1880s and 1890s, and these protests were reported in detail in the colonial press: see, for example, “Asserting ‘Common Rights’” *Timaru Herald* (Vol LVII, Issue 1624, 5 December 1894) at 4 (referring to protests in Flintshire). On other occasions newspapers commented on the risks of landlessness and land monopolisation that enclosure had aggravated: see, for example, “Land Nationalization” *The Colonist* (Vol XXVI, Issue 3595, 18 October 1882) at 4; “Warning to the Colonies” *Timaru Herald* (Vol XC, Issue 13318, 21 June 1907) at 2 (reporting views of the English Land Nationalisation Society). Newspapers in New Zealand were generally supportive of Lloyd George’s budget in 1910 and dismissive of attacks on it by the House of Lords, sometimes pointing out that some of the leading opponents of the new land tax had unjustly profited from enclosure in England: see “Our Ruined Peers” *Auckland Star* (Vol LXI, Issue 25, 29 January 1910) at 13 (referring to the Duke of Portland). Radical newspapers such as the *Maoriland Worker* naturally strongly disapproved of parliamentary enclosure in England, thus reflecting longstanding English radical tradition: see, for example, “Landlordry in the 16th Century” *Maoriland Worker* (Vol 12, Issue 298, 15 November 1922) at 15. These examples were rapidly collected from the *Papers Past* database by searching under the heading “parliamentary enclosure”. There is scope for further research on attitudes to enclosure in New Zealand and her sister colonies of Victoria and South Australia.

35 See Joan Thirsk “The Content and Sources of English Agrarian History after 1500” (1955) 3 *The Agricultural History Review* 66 at 67. In the first decade of the 20th century, historical writing on enclosure in Britain was marked by a feeling that the way to restore prosperity to the English countryside was to reverse the trend towards large estates and encourage small holdings: “[t]he tide of opinion, among historians at least, was running in favour of small holdings, because these had withstood the rigours of economic depression better than the large farms” (at 67).

36 See generally Thomas T Ankersen and Thomas Ruppert “Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America” (2006) 19 *Tulane Environmental Law Journal* 69.

37 As cited in Thomas T Ankersen and Thomas Ruppert “Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America” (2006) 19 *Tulane Environmental Law Journal* 69 at 100–101. They observe that “[a]lthough the 1917 Mexican Constitution did not use the phrase ‘social function’ the concept is clearly implicit” (at 101).

Similar provisions are found in the constitutions of many Latin American countries.

The concept of the “social function” of property was influential in New Zealand. Many of the policies of the Liberal government were quite explicitly based on the idea that property indeed had a social function. This is seen most clearly with the Liberal project of breaking up the great estates, given statutory form with the Land for Settlements Act 1894. John Ballance, as well as many other people, was familiar with the works of Henry George, and debates about the unearned increment and whether Crown grants should be in freehold or leasehold dominated politics from 1891 to 1910. The Liberals also enacted legislation to protect rights of public access to the countryside (“the Queen’s chain”), to vest navigable river beds in the Crown, and to reserve to the state rights to generate hydro-electric power. New Zealand was definitely not a conservative country in these respects. However, this new emphasis on the responsibility of the state to ensure that the social function of property was properly given effect to meant also that pressure for the state to acquire Maori land was actually reinforced. Land in Maori ownership did not seem to be fulfilling its social function either. Many policy-makers drew analogies between the underused great estates of the rural gentry of Canterbury and Otago and the still extensive properties held by Maori in the North Island. The Maori population was apparently declining; Maori still had plenty of land — therefore the enlightened and progressive thing to do was to acquire most of it from them and transfer it on clear titles to people who could use it.

10.3 Revival of tenurial collectivism

The Jacobin legacy of the French revolution, with its deification of the enlightened state comprised of free (male) citizens governed rationally by a centralised republic, coexisted with another, equally French, cultural legacy: that of Rousseau, of European romanticism, and the romantic cult of the *bon sauvage*. If the former, and its English Lockean and Benthamite equivalents, were the dominant trends in the 19th century, the counter-tendency was still there, lurking beneath the liberal culture of individualism, rationalism, and republican virtue. Romanticism and relativism were especially influential in Germany. Towards the end of the 19th century, born in part from the failures of the liberal dream, the counter-trend started to increasingly make its presence felt.

In the late 19th and early 20th centuries this led in some countries to a tendency to idealise the mores and values of indigenous cultures and even towards a re-assessment of traditional varieties of tenure. Prophets of this new mood included Tolstoy and Mahatma Gandhi, as is well-known. Even in a metropolitan country such as Britain there was also a growing belief in the virtues of peasant proprietorship and a critique of parliamentary enclosure, evidenced by the influential historical studies of English rural history by Gilbert Slater, RH Tawney, and the Hammonds, who have in turn influenced Marxist historians of the post-war era such as Christopher Hill and EP Thompson.³⁸ British policy-making was affected as well. In 1883, for example, Gladstone’s Liberal government, largely in response to crofter protest in Skye and other areas, set up the Napier Commission (Royal Commission on the Crofters and Cottars of Scotland) to review the circumstances of the impoverished crofters of the Scottish Highlands and Islands. The Commission was chaired by Lord Napier, formerly of the Indian Administrative Service; other members included Professor Donald MacKinnon of Edinburgh University. Also influential in the process of review and debate was the

Highland Land Law Reform Association. The result was the Crofters' Holdings (Scotland) Act of 1886, which protected crofters by granting security of tenure, provided for rights of compensation in the event of removal, recognised the distinctive nature of Gaelic customary tenures, and which provided for arbitration by a Crofters Commission.³⁹ The legislation was modelled on the Irish Land Act of 1881. The Act only went some way to redressing the grievances of the crofters and Scottish historians have debated its effectiveness and objectives. But the legislation does show that *laissez-faire* and property rights were now no longer in vogue in quite the same way that they had been at mid-century. The political agitation in the Scottish highlands, the grievances of the crofters, the work of the Crofters Commission, the legislation of 1886 and, more generally, the bitter memories of the Highland clearances were well-traversed subjects in New Zealand and were the subject of a great deal of newspaper comment. Given the amount of Scottish settlement in the country this is hardly surprising. John McKenzie, Liberal Minister of Lands, himself from Ross and Cromarty, one of the seven crofter counties, was intensely aware of the dramatic events in Scotland.⁴⁰ The newspapers also reported plans to assist the crofters with migration to Canada and to New Zealand.⁴¹ In fact none other than WL Rees was active in promoting some kind of scheme to bring crofters to settle in New Zealand.⁴²

38 See Gilbert Slater *The English Peasantry and the Enclosure of the Common Fields* (Archibald Constable and Co, London, 1907); RH Tawney *The Agrarian Problem in the Sixteenth Century* (Longmans, London, 1912); JL and Barbara Hammond *The Village Labourer, 1760-1832: A Study in the Government of England before the Reform Bill* (Longmans, London, 1919); Christopher Hill *Puritanism and Revolution* (Martin Secker and Warburg, London, 1958); Christopher Hill *Society and Puritanism in Pre-Revolutionary England* (Martin Secker and Warburg, London, 1964); Christopher Hill *Liberty against the Law: Some Seventeenth-Century Controversies* (Penguin Books, London, 1996); EP Thompson *The Making of the English Working Class* (Vintage, New York, 1966), especially ch 7 ("The Field Labourers") at 213-233; EP Thompson *Whigs and Hunters: The Origins of the Black Act* (Penguin Books, Harmondsworth, 1977).

39 Crofters could not be removed except for breaching conditions set out in the statute (including failure to pay the rent, assignment of the lease, damaging the buildings, or sub-letting the property without the permission of the landlord: see Crofters' Holdings (Scotland) Act 1886, s 1. Section 8 provided for compensation for permanent improvements. Part VI of the Act set up the Crofters Commission. The legislation did not apply to all of Scotland but only to the "crofting counties": Shetland, Orkney, Caithness, Sutherland, Ross and Cromarty, Inverness, and Argyll. See generally K Theodore Hoppen *The Mid-Victorian Generation, 1846-1886* (Clarendon Press, Oxford, 1998) at 545 and 549 (the Act "granted crofters not only substantial reductions in rent but virtually inalienable rights to hereditary occupation as well" → "an unusual departure for Victorian governments": at 549). The Commission was replaced by the Scottish Land Court, established originally by the Small Landholders (Scotland) Act 1911 and which applied to all of Scotland. The Court is still in operation under the Scottish Land Court Act 1993, the Crofters (Scotland) Act 1993, and related legislation. The Scottish government has been operating a comprehensive land reform programme since 2007. As well as the crofts, in the strict sense, there are also nearly 500,000 hectares of crofters' common grazing areas still extant in the Scottish Isles and Highlands.

40 See Tom Brooking *Lands for the People?* (University of Otago Press, Dunedin) at 271-272.

41 See, for example, "The Hebrides Crofters" *Marlborough Express* (Vol XXIV, Issue 11, 14 January 1888) at 2 ("Lady Matheson, who owns large estates in Lewes, has refused the demand of the Crofters' Land League, that the Crofters shall have their old holdings restored to them at reduced rentals, and suggests that the crofters should emigrate."); "Crofter Immigration" *Ashburton Guardian* (vol VII, Issue 1930, 28 August 1888) at 2 (reporting that "Dr McDonald, hon treasurer of the Crofters Aid Society, is organising a deputation of crofters to visit Australia and New Zealand for the purpose of raising funds for immigration purposes."); "Settlement of Crofters" *Nelson Evening Mail* (Vol XXV, Issue 193, 15 August 1891) at 2 ("England will settle 6,000 crofters, all Naval Reserve Men, at Vancouver, as the nucleus of a force in the Pacific").

The new mood was also important in Latin America. Although Latin America shares with the United States and New Zealand a tradition of hostility to indigenous collective tenures, nevertheless the counter-movement has also been influential, especially in the period from around 1910 to around 1980. This counter-current has been especially important, politically and culturally, in Mexico, where the spectacular artistic and cultural legacy of the great pre-Columbian civilisations has always been a powerful presence. Nineteenth-century Mexican liberals had “dismissed the Aztecs as mere barbarians and viewed contemporary Indians as a hindrance to their country’s modernization.”⁴³ But by the early decades of the 20th century the mood had shifted towards a strong identification with the pre-Columbian past as the foundation of Mexican identity; this cultural reversal could also involve a defence of communal land ownership.⁴⁴ The Mexican revolution of 1910–1920 had an enormous impact on the development of *indigenismo* not only in Mexico but in Latin America as a whole. In the Mexico of President Lázaro Cárdenas, President from 1934 to 1940, and as exemplified by such cultural icons such Manuel Gamio, Diego Rivera, and Frieda Kahlo, this renewed interest in indigenous collectivism fused with Marxism, Mexican *indigenismo*, and a certain amount of admiration for the USSR — although not for Stalin — to produce a cultural climate which was very receptive to re-establishment of collective tenures in the form of the government’s *ejido* (community lands) programme. The Mexican left also felt a strong sympathy for the besieged Spanish republic and for its radical agrarian policies.

Indigenismo was not confined to Mexico. It was a cultural and literary movement which had important impacts in many Latin American countries.⁴⁵ It could also interconnect with Latin American Marxism. After Mexico, the country where this cultural, political, and literary movement had the greatest impacts was Peru, which, like Mexico, was heir to a long history of pre-Columbian high civilisations and a rich literature relating to the Spanish conquests and their aftermath. In Peru, a key figure was José Carlos Mariátegui (1894–1930), whose book *Siete ensayos de interpretación de la realidad peruana* “is a cornerstone of the indigenist movement to this day”.⁴⁶ Mariátegui and other Peruvian essayists such as Luis Valcarél explored the connections between the supposedly “socialist” pre-Columbian Inca state and contemporary Marxism.⁴⁷ Mariátegui “saw in the survival of the *ayllu* (the basic structure of the communal system of the Inca empire) the key to synchronise economic structures with Marxism”.⁴⁸ These ideas have dominated Peruvian

42 “Crofters for New Zealand” *Auckland Star* (Vol XIX, Issue 277, 23 November 1888) at 3. The article reported that “[a] committee under the presidency of the Marquis of Lorne is inquiring into Mr W.L. Rees’ Crofters Colonisation Scheme.”

43 David A Brading “Manuel Gamio and Official Indigenismo in Mexico” (1988) 7(1) *Bulletin of Latin American Research* 75 at 75.

44 *Ibid.*, 76–77.

45 For general surveys see René Prieto “The literature of Indigenismo” in Roberto González Echevarría and Enrique Pupo-Walker (eds) *The Cambridge History of Latin American Literature: Vol 2: The Twentieth Century* (Cambridge University Press, Cambridge, 1996) 138; Rebecca Earle *The Return of the Native: Indians and Myth-Making in Spanish America, 1810-1930* (Duke University Press, Durham, 2007). *Indigenismo* was much less significant in the Rio de la Plata countries, where the indigenous population was relatively small or even (in the case of Uruguay) basically completely absorbed, and which were dominated by large-scale immigration from southern Europe in the 19th century.

46 René Prieto “The literature of Indigenismo” in Roberto González Echevarría and Enrique Pupo-Walker (eds) *The Cambridge History of Latin American Literature: Vol 2: The Twentieth Century* (Cambridge University Press, Cambridge, 1996) 138 at 149.

scholarship on the Inca state until very recently (the Nahua *calpulli* inspired similar aspirations and hopes in Mexico).⁴⁹ Another key figure in Peru was the novelist, anthropologist, and essayist José María Arguedas (1911–1969), the subject of an important intellectual biography by Mario Vargas Llosa.⁵⁰ There are also connections between *indigenismo* and the socialist APRA (American Popular Revolutionary Alliance) political party (or movement), founded by Victor Raúl Haya de la Torre in 1924.

A similar spirit characterised Federal Indian policy in the United States under Roosevelt. The key figure is John Collier, who can be said to be the most important single figure in the history of Federal Indian law in the United States. He exemplified a new era in Federal Indian policy and was the chief architect of the Indian Reorganisation Act 1934 (IRA).⁵¹ Collier had earlier led an attack on the allotment system originally introduced into the reservations by the General Allotment (Dawes) Act of 1887.⁵² He founded the American Indian Defense Association in 1923 and always opposed assimilation. In 1933 Roosevelt took the step of appointing Collier to the position of Commissioner of Indian Affairs, placing Federal Indian administration under the control of one of its most prominent critics. Collier and his officials, including Felix Cohen, immediately began work on the legislation enacted as the Indian Reorganisation Act 1934 the following year. The Indian Reorganisation Act was a milestone in American legal history and many of today's Indian governments were established under it, although it must also be conceded that the legislation has attracted some recent criticism.⁵³ Wilcomb E Washburn, however, has written that “Collier’s work as commissioner of Indian affairs is probably the most impressive achievement in the field of applied anthropology that the discipline of anthropology can claim.”⁵⁴ Collier was well aware of the new mood of *indigenismo*, land reform, and socialism emanating from Mexico, and was an open admirer of President

47 See Carmen Bernard *Un Inca platónico: Garcilaso de la Vega 1539-1616* (Fayard, Paris, 2006) at 325–326. European Marxists, as Bernard notes, were also interested in the “socialist” Incas, including Louis Baudin, author of *L’Empire socialiste des Incas*, which appeared in Paris in 1928. For a detailed study of these themes see Juan José R Villarias Robles *El sistema económico del imperio inca: Historia crítica de una controversia* (Colección Tierra Nueva y Cielo Nuevo, Madrid, 1998).

48 René Prieto “The literature of Indigenismo” in Roberto González Echevarría and Enrique Pupo-Walker (eds) *The Cambridge History of Latin American Literature: Vol 2: The Twentieth Century* (Cambridge University Press, Cambridge, 1996) 138 at 149–150.

49 In fact in Mesoamerica the basic unit was not the tribe or clan but rather the city state, in Nahua *altepetl* (“the water, the mountain”). The “Toltecs” (*Tolteca*) were the people of the city of Tollan, the Chalca the people of Chalco and so on: see Christian Duverger *L’origine des Aztèques* (Éditions du Seuil, Paris, 1983) at 126. The *calpulli* (pl. *calpultin*) were sub-units of the city state, not “tribes”.

50 Mario Vargas Llosa *La Utopía arcaica: José María Arguedas y las ficciones del indigenismo* (Fondo de Cultura Económica, México DF, 1996). Arguedas was the product of a *mestizo* family from the Peruvian Andes and grew up speaking fluent Quechua. His best known works are two novels *Yawar Fiesta* (1941) and *Los ríos profundos* (1958). Depressed by the complex intellectual controversies relating to (and within) Peruvian *indigenismo*, Arguedas committed suicide in 1969. Vargas Llosa’s intellectual biography of Arguedas is also a profound reflection on the currents and counter-currents within Peruvian *indigenismo*.

51 On Collier see Lawrence C Kelly *The Assault on Assimilation: John Collier and the Origins of Indian Policy Reform* (University of New Mexico Press, Albuquerque, 1983); Kenneth R Philp *John Collier’s Crusade for Indian Reform, 1920-1954* (University of Arizona Press, Tucson, 1977); EA Schwartz “Red Atlantis Revisited: Community and Culture in the Writings of John Collier” (1994) 18 *American Indian Quarterly* 507. Collier began his career helping to organise immigrant workers in New York and was a committed New Dealer.

52 General Allotment Act 25 USC § 331 (Dawes Act).

Cárdenas and his policies, including building up the labour unions, agrarian reform, and nationalisation of the petroleum industry. (American business leaders and conservatives were notably less enthused about any of these policies, needless to say, nor were they fond of the Indian Reorganisation Act.) Collier was also personally friendly with Manuel Gamio, a prominent archaeologist and anthropologist in Mexico and a leader of Mexican *indigenismo*.⁵⁵ The two worked together on the Inter-American Indian Institute, established after a major international conference in 1940 at Pátzcuaro. Gamio and Collier were both “indigenists” in the sense that they were personally committed to community life and to the values and ethics of indigenous peoples as a counter-weight to what they perceived as the selfish individualism of the modern world. Indians had the right to their own forms of cultural expression, but it was more than that: those cultures embodied ethical ideas which were valuable in their own right. The same spirit also emanates from the book *The Cheyenne Way*, an admiring study of the customary law of the Cheyenne published by the legal scholar Karl Llewellyn and the anthropologist E Adamson Hoebel in 1941.⁵⁶

Thus in the 1930s, both Mexico and the United States pursued a similar anti-assimilationist path in indigenous policy. This was a significant policy reversal for both countries, driven by progressive “indigenist” officials: Gamio in Mexico and Collier and Felix Cohen in the United States. Policies in both countries shared a rejection of earlier liberal models of individualising tenures and favoured a return to collectivist communal tenures.

What of New Zealand? It is certainly the case that ideas of the social value of land and a belief in the moral and social values of the family farm (as opposed to the great estate) had an impact in New Zealand. At least to some extent there was an awareness of contemporary thinking about collective tenures, and instances can be found where this awareness surfaced in the Native Land Court, at least amongst the better-educated and more widely-read judges, as the Court slowly came to see itself as a vehicle for preserving customary tenure, rather than supplanting it.

Nevertheless, no equivalent of the Indian Reorganisation Act was ever enacted in New Zealand. Whether policy-makers in New Zealand in 1934 even knew about it is doubtful. The closest New Zealand equivalents of Collier and Gamio were Sir Apirana Ngata and

53 Critical interpretations include Russel Lawrence Barsh and James Youngblood Henderson *The Road: Indian Tribes and Political Liberty* (University of California Press, Berkeley, 1980); Lawrence C Kelly “The Indian Reorganization Act: The Dream and the Reality” (1975) 44 *Pacific Historical Review* 291; for vigorous defences see Clayton R Koppes “From New Deal to Termination: Liberalism and Indian Policy, 1933-1953” (1977) 46 *Pacific Historical Review* 543; Elmer R Rusco “John Collier: Architect of Sovereignty or Assimilation?” (1991) 15 *American Indian Quarterly* 49; Wilcomb E Washburn “A Fifty-Year Perspective on the Indian Reorganization Act” (1984) 86 *American Anthropologist* (New Series) 279. Washburn writes (at 288) that he “would ask anthropologists critical of the Collier approach to explain what achievements they can point to that compare with his, or that do not actually and necessarily build on the foundation he created.”

54 Wilcomb E Washburn “A Fifty-Year Perspective on the Indian Reorganization Act” (1984) 86 *American Anthropologist* (New Series) 279 at 287.

55 Gamio is listed in the acknowledgments to John Collier *The Indians of the Americas* (Mentor Books, Washington DC, 1947) (along with Felix Cohen, Nathan Margold, Harold Ickes, and others).

56 Karl N Llewellyn and E Adamson Hoebel *The Cheyenne Way* (University of Oklahoma Press, Norman, 1941).

Sir Peter Buck (Te Rangihiroa), but Ngata was very conservative in many respects and had to contend with much official hostility to his Maori land development schemes, while Buck fled the then stultifying conformity and isolation of New Zealand for Yale University and then the Bishop Museum in Honolulu. Some academics such as I.L.G. Sutherland at Canterbury University, a cultural anthropologist trained originally at the University of Glasgow and who worked closely with Ngata, may have become influenced by the new indigenist and relativist mood.⁵⁷ Indeed it has been suggested that this may be one of the explanations for the tensions between Sutherland and Karl Popper at Canterbury University College: a conflict between revalorisation of “tribalism” and Popper’s commitment to the open society.⁵⁸ The Second World War resulted in some important changes in policy, but these were quickly negated in the 1950s, a period which saw an active effort to reactivate assimilation and which witnessed further efforts to remodel Maori land tenure in the direction of what was euphemistically described as “title improvement”. Policy in New Zealand eventually swung back to an attempt to revive collective tenures, but this did not gain much traction until the 1970s and even then it required massive Maori political mobilisation, including demonstrations and land occupations, to bring it into full realisation. These ideas, not exactly novelties when they began to influence policy in New Zealand, now strongly mark the current legislation (Te Ture Whenua Maori/Maori Land Act 1993) and the current practice of the Maori Land Court. Whether the current restrictive regime really is progress is, of course, the question.

Internationally the wheel has turned yet again. International agencies have become enamoured of land titling and privatisation, having convinced themselves that by such means rural Latin America can be lifted out of the poverty trap in which it remains enmeshed. It is likely that the neo-Malthusian analysis of Garrett Hardin and other like-minded theorists have played an influential role in laying the foundations for this latest ideological shift.⁵⁹ In Mexico the old arguments of the Liberals and the *Científicos* of last century have re-emerged in another guise, although at the present day the ideological

57 On Sutherland see James Ritchie “Sutherland, Ivan Lorin George 1897-1952: Ethnologist, university professor” *Dictionary of New Zealand Biography* (1998) vol 4 at 506; and Oliver Sutherland *Paikea: The Life of I.L.G. Sutherland* (Canterbury University Press, Christchurch, 2013).

58 Malachi Haim Hacohen *Karl Popper: The Formative Years 1902-1945* (Cambridge University Press, Cambridge, 2000) at 340. Popper wrote his classic text *The Open Society and its Enemies* (Routledge, London, 1945) in New Zealand. Popper equated fascism and Nazism with “tribalism” and with the philosophical tradition deriving from Plato and the latter’s idealisation of reactionary Sparta as contrasted with “open” commercial and democratic Athens. (Popper does mention the Maori people briefly in *The Open Society*, likening them to the tribal peoples of Homeric Greece.) The sections of Hacohen’s book dealing with Popper’s residence in New Zealand from 1937 to 1946 offer an interesting perspective on the intellectual climate of New Zealand at this time: a genuinely free and open society in many ways, it was also characterised by extreme isolation, with a chronically underfunded and small-scale university system; moreover (so it is claimed) “[f]oreign economic and intellectual contacts were virtually limited to Britain” (at 336). See also, and to similar effect, the entry by Peter Munz on Popper in the *Dictionary of New Zealand Biography*: see Peter Munz “Popper, Karl Raimund, 1902-1994: Philosopher” *Dictionary of New Zealand Biography* (1998) vol 4 at 412-514. Hacohen’s account of Popper’s years at Canterbury University College requires, however, to be read alongside Oliver Sutherland’s account of the same events: see Oliver Sutherland *Paikea: The Life of I.L.G. Sutherland* (Canterbury University Press, Christchurch, 2013) especially at 332-334. Sutherland was a brilliant pioneering scholar and student of Maori affairs, who was a critic of the lingering racism still evident in some parts of New Zealand in the 1930s and 1940s. He defended Ngata from the criticisms made of him by a 1934 commission of inquiry.

fountainheads for the neo-liberal line of thinking are the World Bank, FAO (Food and Agriculture Organization of the United Nations), and the Inter-American Development Bank. These institutions perceive “land titling, the setting up of land registries, and market-led land reforms as central instruments in the fight against rural poverty in Latin America.”⁶⁰ A major World Bank policy statement on land reform research by K Deininger arguing along these lines was released in 2003 and has had significant effects on lending policies.⁶¹ The benefits seem, however, to be no less elusive than New Zealand’s great privatisation experiment of the 19th century.⁶² In New Zealand that experiment was ended, belatedly, by legislation enacted in 1974 and 1992. But these achievements, if that is what they are, are now under attack. A renewed liberal discourse is in the ascendant, in New Zealand as elsewhere, and it is certain that the law relating to Maori freehold land will soon feel its effects.

59 See Garrett Hardin “The Tragedy of the Commons” *Science* (New York, 13 December 1968) at 1243–1248; and Garrett Hardin “Extensions of ‘The Tragedy of the Commons’” *Science* (New York, 1 May 1998) at 682–683. One cannot even begin to engage with the immense literature relating to the so-called “tragedy” here. A foremost critic is the anthropologist Elinor Ostrom: see Elinor Ostrom *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, Cambridge, 1990). The main criticisms that Ostrom and others have advanced is that Hardin’s theoretical model does not conform to the reality of customary management of common lands either historically or at the present day. Recognising that this may often be the case, however, does not mean that Hardin’s ideas thereby lose all persuasive force; if it is important to recognise that Hardin’s theoretical model does not always fit with the actual realities of customary management, it is no less important to avoid romanticising customary tenures, which certainly can be managed in highly oppressive ways at times and which can certainly become dysfunctional (as in the case of the rundale system in Ireland).

60 Monique Nuijten “Family Property and the Limits of Intervention: The Article 27 Reforms and the PROCEDE Programme in Mexico” (2003) 34 *Development and Change* 475 at 476. There is a large and somewhat critical literature examining the effects of land titling and privatisation programmes in Mexico and Central America, programmes driven to a significant degree by World Bank policies: see, for example, Liza Grandia *Enclosed: Conservation, Cattle and Commerce among the Q’eqchi’ Maya Lowlanders* (University of Washington Press, Seattle, 2012); Megan Ybarra “Violent visions of an ownership society: The land administration project in Petén, Guatemala” (2008) 26 *Land Use Policy* 44 (a study of phase one of the World Bank’s land administration project in northern Guatemala); Megan Ybarra “Slashed and Burned: The Debate Over Privatization of Q’eqchi’ Lands in Northern Guatemala” (2011) 24 *Society and Natural Resources: An International Journal* 1027.

61 Klaus W Deininger *Land Policies for growth and poverty reduction: a World Bank policy research report* (World Bank and Oxford University Press, Washington DC, 2003).

62 In fact some commentators have argued that it is private titling rather than customary management of communal lands which is significantly responsible for the loss of forest cover and environmental degradation generally in such regions as northern Guatemala: see, for example, Liza Grandia *Enclosed: Conservation, Cattle and Commerce among the Q’eqchi’ Maya Lowlanders* (University of Washington Press, Seattle, 2012) at 85: “[w]hile there are certainly environmental consequences to Petén’s [northern Guatemala’s] exponential demographic explosion, agrarian inequity and the destruction of indigenous commons have thus far been equally, if not more, responsible for the diminished carrying capacity of the lowlands”. Grandia also argues that the supposed transparency and clarity of private titling is not the experienced reality for indigenous people in a country like Guatemala: “[w]hile the customary Q’eqchi’ land system is perfectly transparent to its community members, the bureaucratic state process of land titling seems opaque, chaotic, and unjust to them”. This book is particularly valuable for its case studies of this Maya people in Belize and in Guatemala: the environmental effects of settlement are quite different in each country, largely because the Q’eqchi’, according to Grandia, have been better able to retain their methods of customary land management in Belize, and the environmental and ecological consequences have as a result been much less (at 100–101).

NLC148 Kawhia (1889)

(1889) 6 Otorohanga MB 61–67

King Country region

Acreage not stated

Native Land Court, Kawhia

Judge Mair; Paratene Ngata, Assessor

12 March 1889

Partition (of Aotea or Rohe Potae block)

Ngati Hikairo, Waikato

Native Land Court Act 1886

(1) Historical and legal introduction

Kawhia (“abundance of everything”¹⁶⁹) is the name of a large harbour and estuarine system located on the west coast of the North Island and situated roughly midway between Auckland and New Plymouth. The harbour is very extensive, but much of it is shallow and tidal: the harbour mouth is obstructed by a bar. The small town of the same name is located on the northern shore of the harbour. Traditionally Kawhia is regarded as the final resting place of the *Tainui* canoe. The Kawhia region was the scene of many important events in the history of the Tainui peoples and was the original homeland of Ngati Toa, who migrated from Kawhia to the Kapiti region in the early 1820s under the leadership of Te Pehi and Te Rauparaha. There is some evidence that in the 1830s there was a shore whaling station located at Albatross Bay, south of Kawhia heads.¹⁷⁰ Kawhia was for a time a port of some importance and a customs station was established there by the government in the 1850s. The Wesleyan Mission Society established a mission at Kawhia in 1835 led by John Whiteley. Following negotiations between the Anglican Church Mission Society and the Wesleyan Mission Society (WMS), the mission was closed, but was re-established by Whiteley in 1839. The management of the mission was subsequently taken over by Cort and Annie Jane Schnackenberg. In 1859 the Austrian geologist Ferdinand von Hochstetter visited Kawhia where he stayed with local settlers and found the first fossil ammonites to be recorded in New Zealand; he describes Kawhia in his study of New Zealand geology published in Vienna in 1864.¹⁷¹ With the outbreak of the Waikato war in 1863, the WMS mission was moved north to Raglan (Whaingaroa).

Kawhia became a part of the autonomous Rohe Potae and efforts were made by the Kingitanga leadership to further develop it as a port. Kawhia was later the base of the

169 This is the translation given in AH McClintock (ed) *An Encyclopaedia of New Zealand* (1966) vol 2 at 211.

170 See Dick Craig *The King Country (Rohe Potae)* (Waitomo News Ltd, Te Kuiti and Otorohanga, 1990) at 180.

171 See CA Fleming (ed) and Ferdinand von Hochstetter *Geology of New Zealand* (Government Printer, Wellington, 1959 [1864]) at 66–67; Mike Johnston and Sarah Nolden *Travels of Hochstetter and Haast in New Zealand, 1858-60* (Nikau Press, Nelson, 2011) at 77–78.

Kawhia Native Committee, set up under the Native Committees Act of 1883, by which such committees could supplement the work of the Native Land Court. Maori in most parts of the country regarded the Native Committees Act of 1883 as a disappointment, and showed little interest in the new legislation as a result, but Ngati Maniapoto, under the leadership of the young John Ormsby (Hone Omipi), made a real effort to set up a Committee and make it work.¹⁷² Ormsby, son of the Waipa schoolteacher Robert Ormsby and Mere Pianika Rangihuriria of Ngati Pourahi, hapu of Ngati Maniapoto, remained active in Maori land matters all his life and he later became an assessor of both the Resident Magistrate's Court and of the Native Land Court. The Kawhia Native Committee's findings are sometimes referred to in various judgments of the Native Land Court relating to the Rohe Potae.

Today Kawhia is a popular holiday destination, known for its fishing, hot springs on the beach at Te Puia, and for the Kawhia Kai Festival held every February. The principal descent group of the region today is Ngati Hikairo but Waikato groups also have an established presence there.

In 1889 the Native Land Court continued with the colossal task of subdividing the Rohe Potae block, commencing the year by sitting at Kawhia before returning to Otorohanga to continue with the work of partition and determining lists of owners. The Court sat more or less continually for most of the year. Judge William G Mair continued to preside, with the able assistance of Paratene Ngata of Ngati Porou.¹⁷³

In the Rohe Potae case of 1886 (vol 1 NLC127), the Kawhia block had been set aside for Ngati Hikairo and Waikato, but the respective shares of these two groups were postponed for further inquiry.¹⁷⁴ In its judgment in 1886 the Court had this to say about Kawhia:¹⁷⁵

"[W]e say that we are of opinion that there was no conquest of Kawhia, according to the strict meaning of the term, but that Te Rauparaha and his people went away quietly at a time when there was no fighting; that Ngatimaniapoto and Ngati Hikairo were at that time established in Kawhia, though the means by which they obtained a footing there are not clearly shown, and that a section of Waikato, namely Kiwi's people acquired rights of ownership of certain localities at some period subsequent to Te

172 See MJ Ormsby "Ormsby, John 1854-1927: Ngati Maniapoto negotiator, local politician, farmer, businessman" *Dictionary of New Zealand Biography* (1993) vol 2 at 367-368. See also Native Committees Act 1883, ss 11 and 14.

173 Ngata resigned around the end of 1889 and when the Court resumed sittings at Otorohanga in 1890 he was replaced by Nikorima Poutotara of Hauraki, who had been the assessor for the Court's investigations of title to the Taupouiatia block from 1886 to 1887.

174 See (1886) 2 Otorohanga MB 68-69; vol 1 at 1189-1190. Order IV of the 1886 decision was: "That an Order for that piece of land known as Kawhia bounded on the N by the external boundary from Kaukumara to where the Mangaora stream crosses (or to its nearest point of approach), then by that stream to Kawhia harbour, and by the shore of that harbour and the coast line to the commencing point, as shown approximately on the plan, and excluding that portion which is held under Crown grant, issue in favour of the claimants and such members of Waikato, as can prove that they or their elders were in possession about the year 1840 [emphasis added]."

175 (1886) 2 Otorohanga MB 66-67; vol 1 at 1189.

Rauparaha's departure, and lived there on friendly terms with Ngatimaniapoto though there was some quarrelling in after years with Ngatihikairo; that in the absence of a proper survey the extent of the rights so acquired by Waikato cannot now be definitely fixed; that Ngatimahanga took no part in the affairs of Kawhia after Te Rauparaha went away and have no claim now; and further that the evidence about vessels, flour mills &c., goes to show that Ngatimaniapoto were, up to the time of the Waikato War [that is, 1863–1864], the principal people in Kawhia.”

In this passage the Court must be understood to be bracketing Ngati Hikairo with Ngati Maniapoto.

Land tenure in the Kawhia-Aotea area is very intricate, and even includes an Old Land Claim at Aotea, that relating to the claim of the Wesleyan mission on the western side of the Aotea harbour. Kawhia block, the subject of this case, lies on the northern side of Kawhia harbour and is just inside the Rohe Potae 1886 block northern boundary; part of it fronts on to the Tasman Sea coast north of the harbour entrance. Immediately to the north of the Kawhia block is the Aotea South block, outside the Rohe Potae boundary, which was originally the southern half of the Manuaitu-Aotea block investigated separately in 1887.¹⁷⁶ There are in fact a number of blocks around the harbour, of which the Kawhia block proper is just one. The other blocks around the harbour, in a clockwise direction, are Waihohonu, Motukotuku, Te Kauri, Te Awaroa, Hauturu West, and Taharoa.

With respect to Kawhia block proper, the two sides — that is, Ngati Hikairo and Waikato — were unable to agree on a boundary, and the Native Land Court thus had to carry out the task itself.¹⁷⁷ The Court sat at Kawhia, rather than at Otorohanga, the usual venue for the Rohe Potae sittings. As well as hearing the Kawhia case, the Court made a number of partitions and succession orders and fixed the lists of owners for Manuaitu,¹⁷⁸ a part of the Manuaitu Block heard two years earlier, and dealt with some other blocks in the Kawhia-Aotea region as well. The hearings for the Kawhia partition lasted from 20 February to 8 March 1889 and the judgment set out below was given by Mair and Ngata on 12 March. The largest portion of the block was allocated to Ngati Hikairo. On the basis of the evidence given at the original investigation in 1886 and that given at the partition, the Court saw no reason to alter its views: “the residence of the Waikato at Kawhia did not give them a title”.¹⁷⁹ Consequently, “the only people entitled to the consideration of the Court are those who resided continuously from the first up to the year 1840 or thereabouts”.¹⁸⁰ That meant, essentially, Ngati Hikairo, but also included

176 The judgment for Manuaitu-Aotea is at (1887) 16 Waikato MB 304–319. It was heard by Mair and Ngata at Alexandra (Pirongia) from March to May 1887. An enormous amount of evidence was given in this case, taking up nearly the whole of (1887) 16 Waikato MB. At the end of the hearing Manuaitu-Aotea was split into three blocks, Aotea South, Aotea North, and Manuaitu. The claimants for Manuaitu-Aotea were Ngati Whakamarurangi and Ngati Tuirirangi, and there were many counter-claims. See (vol 1 NLC130).

177 See Paul Husbands and James Stuart Mitchell *The Native Land Court, land titles and Crown land purchasing in the Rohe Potae district, 1866-1907* research report commissioned by the Waitangi Tribunal (Wai 898, Doc#A79, 2011) at 165.

178 See Schedule of Owners for Manuaitu Block and Manuaitu No 1A, (1889) 6 Otorohanga MB 99a–99b.

179 (1889) 6 Otorohanga MB 63–64.

some Waikato people who remained at Kawhia after the “main body” had returned home. The Court is here applying the 1840 rule in the sense that those members of Waikato who had left Kawhia before 1840 could not now press a claim.

A key personality in the drama of the Kawhia case was Wiremu Te Wheoro, chief of Ngati Naho (a section of Waikato based in the Mercer-Meremere area), who had acted as an ally of the Crown during the New Zealand wars and who played an important role in the King Country negotiations. He later battled to protect the interests of Ngati Naho and other Waikato groups in the Kawhia area. Te Wheoro was a counter-claimant in the adjacent Manuaitu-Aotea case of 1887 and he led the Waikato claim to Kawhia in this case in 1889. To get a full sense of the complexities of the iwi and hapu interrelationships of this area, all of the evidence in the Manuaitu-Aotea and in Kawhia cases (and probably in the other Kawhia harbour blocks as well) needs to read together and fully analysed, a colossal task in its own right.¹⁸¹ In Manuaitu-Aotea, Te Wheoro had some success, and the Manuaitu block on the coast just north of the Aotea harbour entrance was allocated to Ngati Naho and a group called Ngati Whare along with the Manuaitu-Aotea claimants (Ngati Whakamarurangi and Ngati Tuirirangi). In the Kawhia case Te Wheoro and Ngati Naho were allocated a very small interest in an area known as Pakarikari, which adjoins Aotea South and does not in fact front on to Kawhia harbour. Another area was also set aside for Te Wheoro and his people and given the name “Maketu”. This must have been a very disappointing outcome for him. The rest of the block, including Kaiwhai Island, was awarded to Ngati Hikairo. The Kawhia case was essentially a defeat for Te Wheoro and Waikato. On 23 March 1889 Mair and Ngata closed the Court sitting at Kawhia. The Court re-opened on 9 April at Otorohanga and immediately started hearing another key Rohe Potae partition, Kakepuku-Pokuru (vol 2 NLC152).¹⁸²

The later history of Kawhia block is one of intricate Crown purchases and partitions.¹⁸³ The first major partition was on 5 April 1892, when Kawhia was partitioned into Kawhia A-W (Kopare, Pohutu, Paiaka, Puketutu, Pokopoko etc). Some of these partitioned areas were then acquired, or part-acquired by the government. There were the usual issues over partitions, boundaries between sellers and non-sellers, and survey costs that always accompanied the Crown purchasing system at this time. Some areas were later taken for scenic purposes.

(2) Significance of case

This is an important partition of a historically and culturally important area within the Rohe Potae boundaries. In terms of procedure, this case is of interest as one in which the Court made a site visit (“[t]he Court having considered the evidence and viewed the land with the signs of occupation and other things have come to this decision”). The Court visited the site of a pa at Pukerua, “the existence of which was denied by Waikato”, but the Court was able to see clearly that “the formation of the earthworks shows that it was built for fighting with guns”.¹⁸⁴ The case is one of the very few where historical

180 Ibid.

181 A task beyond the time and resources of the author. In fact a full study of all the evidence would justify several PhDs.

182 (1889) 6 Otorohanga MB 311–328.

183 See Paula Berghan *Te Rohe Potae District Research Assistance Projects: Block Research Narratives* research report commissioned by the Crown Forestry Rental Trust (Wai 898, Doc#A60, 2009) at 248–293.

documentary evidence is referred to by the Native Land Court: “the Chiefs mentioned in the writings of the first Missionaries at Kawhia about the years 1834-6 were Ngati Hikairo only”.¹⁸⁵

(3) Secondary literature

This case forms part of the general Rohe Potae sequence (see references for original investigation of title in 1886 (vol 1 NLC127)). The essential source for the history of the Rohe Potae partitions is the report on this subject prepared for the Waitangi Tribunal’s Rohe Potae Inquiry by Paul Husbands and James Mitchell (2011).¹⁸⁶ Events at Kawhia in the early decades of the 19th century are covered very fully by Angela Ballara in her book *Taua* (2003): her account is essential reading for the full context of this case.¹⁸⁷ The general tenurial history of the Kawhia block is covered by Paula Berghan in her collection of block research essays relating to the Rohe Potae district.¹⁸⁸ On Wiremu Te Wheoro, see Gary Scott’s essay on him in the *Dictionary of New Zealand Biography*.¹⁸⁹

(4) Textual note

The judgment is very clearly and legibly set out in the minutes, but the punctuation is more than a little wayward, and gives the impression of being a record of an English translation of the judgment written down while the Maori original was being given in Court. I have converted commas to full stops in a number of places in the text to clarify the sense.

NLC148.1 Judgment

[61] This land known as Kawhia Block forms a part of the Rohepotae block and was adjudicated upon by the Court at Otorohanga in the year 1886.¹⁹⁰

A separate Order was made for this Block in favour of two tribes viz Ngati Hikairo on the Claimants side and to those of the Waikato who were there resident about the year 1840.

It was also then decided by the Court that on a proper map of this Block also of the Te Awaroa and Te Taharoa Block being produced that the Court would then determine the share of the Waikato within those Blocks.

184 (1889) 6 Otorohanga MB 66.

185 (1889) 6 Otorohanga MB 64.

186 Paul Husbands and James Stuart Mitchell *The Native Land Court, land titles and Crown land purchasing in the Rohe Potae district, 1866-1907* research report commissioned by the Waitangi Tribunal (Wai 898, Doc#A79, 2011).

187 See Angela Ballara *Taua: ‘Musket wars’, ‘land wars’ or tikanga?: Warfare in Māori Society in the Nineteenth Century* (Penguin Books, Auckland, 2003) at 278–314. Ballara’s references derive, however, from the main Rohe Potae case of 1886 rather than from the Kawhia partition hearings of 1889 (which generated very full evidence on the history of Kawhia).

188 Paula Berghan *Te Rohe Potae Inquiry District Research Assistance Projects: Block Research Narratives* research report commissioned by the Crown Forestry Rental Trust (Wai 898, Doc#A60, 2009).

189 Gary Scott “Te Wheoro, Wiremu Te Morehu Maipapa ?-1895: Waikato leader, assessor, soldier, native commissioner, mediator, politician, diplomat” *Dictionary of New Zealand Biography* (1990) vol 1 at 524–526.

190 (1886) 2 Otorohanga MB 55–70 (vol 1 NLC127).

[62] Accordingly on completion of the map of this Block notice of Sub-division was given in Nos. 6 and 9 of the Gazette notifying a sitting of the Court for the 6th February 1889.

The case was opened on the 6th, on the 7th, Mr James Edwards, the Conductor for the Ngati Hikairo claim pointed out those parts of the land which they proposed to set apart for the Waikato, that is to say for the descendants of Te Kanawa, including land at Pakarikari and at Maketu with the boundaries in each case.

However Te Wheoro would not agree to this proposal and negotiations went on until the 19th when Te Wheoro pointed out to the Court those portions of the land in this Block which Waikato proposed to set aside for Pikia and Ngati Hikairo situated at Te Papa-o-[Karewa], at Oweka and thence to Omiti and also at Manawatuka up to Mangaora.

This proposal was objected to by the Ngati Hikairo, thus the two sides were unable to form any agreement as to the division of the land, the Court therefore would seek in the evidence to be given concerning the occupation and the other things a satisfactory division of the land.

1. The Ngati Hikairo being the Claimants for this land were represented by J. Edwards.
2. The hapus of Waikato represented by Te Wheoro.

These were the only cases set up on either side.

The Court commenced to hear the evidence on the 20th February and finished on 8 March.

Te Wheoro was the first to bring forward evidence bringing (5) five Witnesses, who gave much evidence about the occupation, the settlements, the mana; and the dead, the sacred places and the burial grounds and also the residences of Europeans, and the divisions of the land from the time of the first occupation by Waikato to the time of their return to Waikato and also gave evidence concerning the occupation from that time until the present.¹⁹¹ They (Waikato) say that the Ngati Hikairo have no right by occupation or any other source of claim [63] to this land with the exception of a small piece at Omiti given to Pikia as a residence for them, this is their only right, that the later occupation by Ngati Hikairo was recent they being placed there by Tawhiao and that others settled there merely to be near the other Missioners which did not confer any right to the land.¹⁹² Much evidence to this effect was given on behalf of Ngati Hikairo who only called one witness viz. John Cowell who said that this land belonged to Ngati Hikairo by ancestral right, that Ngati Hikairo were resident here at the time that Potatau and the Waikato arrived here for the purpose of selling flax to the first Europeans at Kawhia and that on the return of the Waikato people to Waikato, the Ngati Hikairo and their sub-hapus continued in occupation of the land, and he also said that the only person of Waikato who remained was Te Kanawa, he being a relative of Pikia continued to live at Pakarikari until his death and whose son Kihirini continued to live there with the Ngati Hikairo.

That Kiwi did not live on this Block, but resided at Aotea and Te Taharoa.

191 Full stop inserted replacing comma to clarify the sense.

192 Comma replaced by full stop.

He also gave much evidence about the occupation, the settlements, the graveyards and other things, he also produced to the Court a letter written by the Rev Mr Woon in the year 1857 giving the dates of his residence at Kawhia from the year 1834 to 1836, and the names of those Chiefs of Ngati Hikairo who lived there with him at that time, and much other evidence.

The Court then decided to call Pikia and questioned him about the matters in dispute, and as he belonged to the Ngati Hikairo¹⁹³ side, the Court allowed Te Wheoro to cross question him fully about the things concerning the Waikato, the whole of his evidence was confined to the Ngati Hikairo only.

The Court having considered the evidence and viewed the land with the signs of occupation and other things have come to this decision about the land.

That, from the evidence given at this Court and also at the Court during the hearing of the Rohepotae at Otorohanga, the Court has not altered its decision, viz, that the residence of [64] the Waikato at Kawhia did not give them a title, it cannot be said that they took possession of the land at that time; on the other hand it is more probable that all the hapus assembled at Kawhia on the arrival of the first Europeans and afterwards returned home.¹⁹⁴ Although the land may have been covered by them at that time they afterwards returned to their own places.¹⁹⁵ Such occupation therefore could¹⁹⁶ give any right to the land, nor did the burial of their dead as they recovered them afterwards, therefore the only people entitled to the consideration of the Court are those who resided continuously from the first up to the year 1840 or thereabouts.

The Court at Otorohanga found that Ngati Hikairo was the tribe who resided permanently on the land and also that those persons of Waikato who continued to live here up to the year 1840 after the main body of the tribe had returned to Waikato had also acquired an interest in the land.¹⁹⁷

The Court is still of the same opinion, that the Ngati Hikairo permanently occupied this land, that the pas on it belonged to them, that only their children were attending the schools established by the Missionaries on this side of Kawhia, that the Chiefs mentioned in the writings of the first Missionaries at Kawhia about the years 1834-36 were Ngati Hikairos only, and that they owned all the vessels belonging to Kawhia in those days.

Again it was the Chiefs of Ngati Hikairo who placed the land under the authority of the Maori King Potatau, this statement was confirmed by Whitiora Kumete the oldest man on the Waikato side, in addition there is the continual occupation up to the period of the war with the Europeans in Waikato.

As to the Waikato side, the Court finds that Pakarikari and Maketu were the places occupied by those persons of the Waikato whose residence was permanent, that is to say by Te Kanawa and his companions.

193 The word "tribe" here has been crossed out.

194 Comma replaced by full stop.

195 Comma replaced by full stop.

196 Sic — from the context the meaning must be "could *not* give".

197 See (1886) 2 Otorohanga MB 66-67, vol 1 at 1188-1189.

The Ngati Hikairo having agreed to partition off those places for the Waikato people, the Court does not think it necessary to go into the question of occupations, or marks on those portions of [65] the land.

As to the boundary pits at Tangi te Korowhiti said to have been dug by Te Kanawa, it is by no means clear and the same may be said about the other marks and boundaries, the different descriptions of which all differed.

The evidence given about Pingareaka was weak, it appears that at one time he lived at [Whatetiri] with the Ngati Apakura but was driven away to Aotea when the boundary marks were dug at [Purangatapuwaē] and Te Arero, therefore it cannot be said that he acquired any rights by occupation.

Neither can the Court allow the claim that Te Kanawa, Kiwi and Pingareka were left to hold Kawhia, though this plea¹⁹⁸ might hold good in other places where Waikato have rights: But why did they leave the Ngati Hikairo to live so long on the land to build pas on it for the purpose of fighting them, and why did they not drive them off the land?

On comparing the evidence given here with that given at Otorohanga, the Court finds a great difference, concerning the sale of Pouewe about which there has been much dispute; the Ngati Hikairo say that the sale of the land was well considered and then agreed to by Ngati Hikairo in order to remove the “tapu” for Waikato. The other side say that Kiwi had authority over the land, it was said by the representative of Waikato at Otorohanga; that the land was not sold by Kiwi, but leased to Cowell, payment being received by Kiwi during the time of Cowell’s son, the land was given by Kiwi to his wife Mata a woman of Ngati Apakura, and it was also said that possibly the land was sold by Cowell to Charlton.

It is impossible to say which side is right, but the land was sold by some one, had it not been there would have been no uncertainty about the ownership now!

As to the building by Ngati Hikairo of the pa at Te Puru, the evidence on each side is very conflicting, one thing only being plain, that it was built by Ngati Hikairo for the purpose of resisting Waikato.

[66] The Court examined the pa at Pukerua, the existence of which was denied by Waikato, the formation of the earthworks shows that it was built for fighting with guns.

Both sides differ as to the occupation by the troops, but the Court has seen a communication from Mr T.W. Lewis, the U.S.¹⁹⁹ showing that it was the Chiefs of Ngati Hikairo who agreed as to the position fixed upon as the site for the redoubt, and that it has been returned to them together with the houses thereon, but the Court does not place much stress on that fact or on the later settlements since the Waikato War as during that period the tribes of Waikato have made many temporary homes on other lands.

The Court having considered the evidence now give [sic] its Judgment as to the division of the land between Ngati Hikairo and Waikato as follows:

198 Here the word “place” has been crossed out and corrected so as to read “plea”, which seems to fit more closely with the context.

199 That is, Under Secretary (of the Native Department).

- I. An Order will issue in favour of Te Wheoro and those other persons on the Waikato side whose names are included in the original order for that part of the Kawhia Block to be called "Pakarikari Block" Bounded on the N. by the boundary of the Rohepotae from peg No II near Pukeatua, to Awaawaroa thence proceeding by that stream to a fence which crosses it, following the ditch and bank to the Corner on the Southern side of the gate, then in a straight line to a tutu bush on the Orongohura stream, thence following up the stream to the pond above the Milldam, thence running Westwards (just clear of a point on N. side of pond) to a mark near a potato house where a clump of rushes has been knotted, thence running in a straight line to a small inlet of Parangi lake where there are the remains of a fence, from there through the lake to Pukawau Point, thence crossing the lake at its narrowest it runs direct to Peg II of the Rohepotae boundary.
- II. An Order will issue in favour of Te Wheoro and Tuteao Kiwi and other persons of the Waikato tribe whose names are in the original Order for that portion of the Kawhia Block to be known as "Maketu Block" the boundaries of which [67] commence on the beach at Paringatai at the end of the ditch and bank by the side of the gate, thence to the first Pohutukawa tree inside the fence, thence to a Pohutukawa tree on the top of the hill (there is a dry tree on the northern side of it) thence running W'erly²⁰⁰ in a straight line to peg No. IX on the Coast line of Kawhia Block, then by the Sea beach by the shore of Kawhia Harbour to the commencing point.

It remains for the Waikato side to make out their lists of names for these two Blocks and persons who are so entitled may be included in both Blocks.

- III. An Order will issue in favour of Hone Te One, Pikia and Hone Wetere together with those persons of Ngati Hikairo whose names are inserted in the original Order for the remaining portions of Kawhia Block including the Island of Kaiwhai.²⁰¹

Further subdivisions of these three blocks may be made if the persons to whom they are awarded so desire, on such Subdivision being made and lists of owners for each piece handed in, the Court will make orders as desired.

The Waikato side must pay a proper proportion of the cost of the first survey, the Ngati Hikairo also to pay their due share.

On completion of the survey and approval of the Plans of each division of this land as made by the Court and on payment of the costs of the survey the Orders will be issued to the owners.²⁰²

200 Inserted (same handwriting as the judgment).

201 This is an island in Te Wharu Bay on the northern side of Kawhia Harbour. It is one of a number of islands in the harbour (others include Te Motu and Motukaraka).

202 For the Schedule of owners for Kawhia, see (1889) 6 Otorohanga MB 92-95. These are all Ngati Hikairo names, 265 names in all, some of them minors for whom the names of the trustees are also recorded in the minutes. There is also a separate owners' list for Maketu block, a section of Kawhia at the northern side of the harbour entrance (at 98). There is a list of owners for Pakarikari; 27 names, including Te Wheoro (at 100).