

disproportioned to the offence, and the oppressed party would claim to be tried by the European Magistrate; at least, in this part of the country no Native would now submit to lose two thousand acres of first-rate level alluvial soil, having the advantage also of water carriage, because he happened to wish (aloud) that the devil had a lot of fellows who were always stealing his pigs. In these days he would fly to the Magistrate. For the reasons, therefore, that I have mentioned, I do not see how an aboriginal native can acquire any land held by Native title by another except in the same way that a European may acquire land from another European—that is to say, by purchase, gift, or inheritance—with this difference only, that a legal title would not be acquired until the transaction had been ratified in the Native Land Court.

Acquisition cannot be supposed to be made under the “voluntary arrangement” authorised by the Native Land Act, as it only provides for a division of the lands already owned by the parties on an exchange of equivalents between them.

4. Any Established Principles by which the Native Land Court is guided in determining the Rights of Claimants and Counter-claimants.

The Native Land Court determines claims strictly by Native usage and custom, of which the Judge must be a master; and in the course of my practice in the Native Land Court I have never been able to fix upon any established principle for my guidance except that of ascertaining in each particular case in the best manner I could what really was the Maori usage and custom as relating to the ownership, and if any very minute link was missing to fill up the gap with natural equity, because, although natural equity is seldom practised by the strong, it has been ever invoked by the weak, and may therefore, in a petty or subsidiary way, be admitted as a factor in Maori usage and custom. . . .

EXTRACT from a LETTER from Judge MONRO to the CHIEF JUDGE, Native Land Court, dated 12th May, 1871.

. . . The advent of the English colonists found the Maori tribes and families in possession of certain tracts of territory the boundaries of which were approximately settled, if not with the accuracy of survey, yet with sufficient distinctness to render any considerable encroachment upon them cognisable within such limits. It does not appear that there was any generally admitted individual and personal tenure further than that of mere occupancy and cultivation, and certainly no indefeasible hereditary right limited to any one member of a family at all answering to our ideas of inheritance by promogeniture. A man enclosed and cultivated a portion of the common land of his tribe, and no other man had a right to disturb either him or his family, sons or daughters, while he continued to do so. The land was theirs in occupancy, and its produce was theirs in property, but neither the original occupant nor his family had any estate in fee in the land.

The communal right so existing was recognised by the Crown in the Treaty of Waitangi; but, inasmuch as it was one too much at variance with the habits of a civilised community to be adopted by the colonists, provision was made by the same treaty for its gradual extinction in the pre-emptive right given to the Crown, which was then made an instrument for the gradual exchange of the vague and imperfect occupancy tenure of the Maori tribes into the more definite and fuller proprietary tenure of individual citizens, whether Maori or European, which alone could be recognised by the law of a settled civil Government. . . . Although the entire lands of any tribe were owned by the whole body of it in its widest extent, yet sections of that tribe had their several portions of territory restricted to them by the same condition of occupancy by which the larger tribe held the larger area.

EXTRACT from a LETTER from THEOPHILUS HEALE, Esquire, to the CHIEF JUDGE, Native Land Court, 7th March, 1871.

THE first and fifth head on which I am desired in your letter of the 17th ultimo to report justify me in going beyond my own proper province of survey. I am induced, therefore, to make a very succinct sketch of the whole question of Native-land titles and the means adopted to convert them into legal freehold before considering the improvements which appear to me to be required in the existing mode of dealing with them, both in its general conduct and especially in that branch of the system in which I am more particularly concerned.

Omitting altogether, for the sake of brevity, the historical facts which sustain these views, I take for granted (1) that the Native title to the land is communal, all the free families of the tribe which acquired land being its proprietors, the chiefs* having no greater rights in it than the other members of the tribe, except in so far as at the present time they generally represent a greater number of families; (2) that this title was founded entirely on ancient and uninterrupted occupation, or on conquest followed by such acts as in Native eyes implied continued occupation, or, at least, dominion; (3) that this title vested in the community, and maintained only by its physical force, was such as could not possibly be recognised by Courts bound in matters of real estate by the rules of the English common law; (4) that these rights were in the largest and most general terms confirmed and guaranteed by the Treaty of Waitangi, and that some machinery became absolutely necessary for ascertaining the individuals in whom the right to the land lay according to

* NOTE.—Perhaps this was not always so. Before the greater numbers of *hapus* split off from the original tribes the authority and recognised rights of the chiefs may have been greater, since it is very common to hear adverse claimants representing different *hapus* all admit that the land originally belonged to one common ancestor, who is said to have made a division of it.