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McHUGH, P. G. 'Man perishes but the land remains.'

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Paul Gerard McHugh

"'Man Perishes But the Land Remains'; the Alienation of  
Maori Land under Part XXIII and S.438 of the Maori  
Affairs Act, 1953."

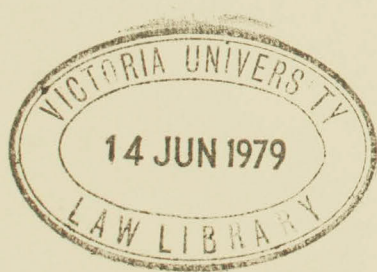
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THE ALIENATION OF MAORI LAND UNDER PART XXIII AND S.438

OF THE MAORI AFFAIRS ACT, 1953

"... Sit, Governor, sit, a governor for us - for me, for all, that our lands may remain with us - that those fellows and creatures who sneak about, sticking to rocks and to the sides of brooks and gullies, may not have it all. Sit, Governor, sit, for me, for us. Remain here, a father for us ..." (1)

The above words contain a symbolic wealth of the issues arising in any treatment of Maori land. This paper will look at the alienation of Maori land under multiple ownership through Part XXIII of the Maori Affairs Act, 1953 and in doing so will present some of the issues and ironies present in the impassioned words. Section 2 of the principal Act gives a comprehensive definition of the word "alienation" which can include any "transfer, sale, gift, lease, licence ....." (2) The emphasis in this paper will be on the sale and transfer of the land for it is in this area that the most controversy arises. For the purposes of this paper "multiple ownership" means any Maori freehold land (as described in S.215) being land owned for a legal estate in fee simple by more than ten owners as tenants-in-common. Section 215 lays down exclusively the processes by which a particular owner may alienate land. To the owner the most significant method is the last one listed in the Section - an alienation by means of Part XXIII of the Act which requires a duly staged meeting of owners. Section 438 of the Act, which is seen as complementary to Part XXIII, gives the Maori Land Court power to vest land in trustees in order to facilitate the use, management or alienation of any Maori freehold land. This power is essentially in the hands of the Court although there can be no doubt that its use of S.438 is sensitive to

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external influences and is not simply a mechanism the Court triggers of its own accord. Broadly speaking there is a divergence in attitudes towards land between Maori and Pakeha. The Maori perceived land in a spiritual and ancestral context (3) whilst the Pakeha settlers brought with them the utilist concept of land as

"an individually owned, freely marketable entrepreneurial resource" (4)

To a large extent, as this paper will indicate, this divergence of views is still present.

In recent times various Maori organisations (5) have expressed concern at the continuing alienation of Maori land. By and large this fear extends to the alienation of Maori land under multiple ownership for it is within this land that the cultural and communal value of land arises. For instance there was relatively little controversy over Part 1 of the 1967 Maori Affairs Amendment Act (b) which changed the status of Maori land owned by four persons or less to that of general land. The Maori accepted, for the most part, that the land affected by Part I was being used by their people in the 'pakeha' way and hence no cultural significance attached to this land. The question however of the compulsory acquisition of uneconomic shares in multiply-owned land brought a loud reaction from the Maori because of the way it impinged upon and took away from a lot of them something cherished - their turangawaewae (7). Section 23 of the 1974 Maori Affairs Amendment Act (the Rata Amendment) abolished the conversion of uneconomic interests but the issue presented an indication of how important the institution of multiple-ownership is to the Maori.

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It is too simplistic to say that there is a straight divergence of views - the pakeha-settler ethic versus the Maori communal concept. With the passage of time there has inevitably been a cultural 'rub-off' of either race on to each other (8). What is the Maori concept today? Undoubtedly some pakeha elements have become part of the view. Kawharu draws a distinction between rural tribal attitudes and those of the urban migrant, or absentee owner. He says:

"Rural tribal settlements are therefore neither fully European nor fully Maori. What gives their values a unique character is the aggregate of individual, a not always consistent, choice between those values that are customary, kinship-oriented, and Maori and those that are not. For the migrant, on the other hand, or rather the absentee owner, beliefs and attitudes are much more closely meshed in with those of suburbia. The few dilemmas with which he may grapple are comparatively abstract and personalised and without social consequences for the tribal community."(9)

Kawharu's words (and indeed most of his books) were written before the Maori land march in late 1975. The effect of the march upon the 'migrants' has been marked and largely unexpected - it has enabled them to 'rediscover their roots' and the importance in retaining their ownership (even if it is of little economic value). Hence there is an unwillingness amongst urban migrants to sell their shares and so Kawharu's distinction is, in 1978, less justifiable. The Maori concept of land today, for both urban and rural Maori, retains the essential elements of communism, self-identity and status despite the inroads of the pakeha world.

There is an old saying that it takes judicial decision up to 20 years to reflect any change within the community's view. In 1961

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the Government officially dropped its policy of assimilation (10) however for a long time the concept of assimilation largely dominated the Maori Land Court's notion of 'helping' the Maoris. (11) The policy of assimilation resulted from the pakeha's seemingly arrogant assumption that his way of life was best and the one for the Maori 'by hook or by crook'. Seventeen years after the abandonment of assimilation the writer believes a shift in the Maori Land Court's approach is discernible - the Court, in general, now seems to be intent not upon 'assimilation' but rather to protect the separate system of tenure and all the values that the Maori land system represents. It is a laudable change in direction.

*Too many  
slang  
expressions*

In the light of the above this paper will first investigate the history of Part XXIII since 1953 in both its legislative form and judicial use. Secondly the paper will look at S.438. It is the writer's view that S.438 contains some undesirable elements and that these elements can be removed without hindering the purposes of the section.

PART 23

Part XXIII was largely a pakeha response to the Maori notion of communal ownership. Without delving into history too much, one of the most significant concepts the white settler brought was the notion of land as an individually owned freely marketable commodity - The new rulers very early started the process of

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individualisation of land title so that they could legitimately secure title. The process tried to take account of Maori custom but it seems that this attention to custom was a subterfuge for the settler's aim of acquiring control of land (12). The individualisation process only clumsily followed Maori custom - for instance it could find no room for the ariki's power of veto which was a central feature (of Maori custom). (13)

Land came to be vested as a legal estate in fee simple amongst various hapus and shares were apportioned. The passage of time saw ownership become fragmented and the number of shares accordingly increase. Part XXIII of the Maori Affairs Act 1953 is an attempt to deal with land under multiple ownership by a democratic and formalised process of calling meetings of owners. Today meetings of owners have become a cultural institution to the Maori. They can be called for a variety of reasons (specified in the Act) since the land is owned by them as tenants-in-common, all of whom have the right to consult and be consulted (14). Inevitably many cultural factors determine the decisions and resolutions made at a Part XXIII meeting. As such they are perhaps more of interest from the social science aspect than the legalistic. (15) The main attention of this paper will be on a legalistic side of Part XXIII though questions relating to social aspects must necessarily arise.

The powers of the Maori Land Court under Part XXIII of the Act can be put under two headings:

- (a) power to summon a meeting of owners
- (b) power to confirm, modify or disallow a resolution passed at a meeting

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- i. power to look at procedure and conduct of the meeting
- ii. power to look at the content of the resolution

The Court has long determined that an application made under S.307 of the Act for a direction of the Court summoning a meeting of assembled owners is a separate and distinct proceeding from an application to confirm a resolution through the latter flows from or has its origins in the earlier proceedings. (16) The Court has, therefore, divided its powers concerning Part XXIII into the two distinct compartments and it is best to discuss each power individually.

#### THE COURT'S USE OF THESE POWERS 1953 - 1974

##### (a) Power to Summon Meetings of Owners

This power was granted by S.307 of the Act. The section provided in what circumstances and for what purposes various parties might make an application to the Court for a meeting of owners. The Court upon receipt of the application and subject to its own discretion (17) then directed the Registrar of the Maori Land Court to call a meeting of owners. The application must contain a search of the Maori Land Court title showing the derivation of the interests of the present owners, as well as a list in alphabetical order of the names and addresses of the present owners. (18) An application by a proposing alienee was normally processed as a matter of course except where the Court believed he had insufficient finance to proceed and the meeting would therefore be a waste of time. Furthermore the old S.370 stipulated that no meeting could be declared invalid because any owner failed

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to receive notice of the meeting. However a distinction can possibly be drawn between that type of situation and the instance where a person affected by an order of the Court had no notice of the proceedings and therefore no chance of presenting their case. (19) Moreover regulation 3 of the Maori Assembled Owners Regulations 1957 requires the Registrar to send notices to every owner. Section 308 requires a statement of the terms of every proposed resolution that is to be submitted to the meeting<sup>to</sup> be attached to the notices. The purpose was to prevent the assembled owners being 'taken by surprise' though this purpose was not always achieved. The 1967 Amendment did not affect the operation of the Court's power in this area. The Court applied the power routinely and without significant controversy until 1974.

(b) Power to Confirm, Modify or Disallow a Resolution

(i) Power to Investigate Conduct and Procedure at Meetings

This power is separate from power to look at the content of the resolution because it is quite possible for the Court to disallow a resolution on the basis of some irregularity when the content of that resolution is quite innocuous, i.e. no link between procedure and content is necessary.

The pre 1967 S.227 ss 1 (a) quite clearly gave the Court power to look at the conduct and procedure of a Part XXIII meeting so far as resolutions of alienation were concerned. The Court by virtue of S.227 ss 6 had discretionary power to confirm the alienation despite any informality or irregularity in the mode of execution of the resolution if it was satisfied the irregularity was immaterial. If however the irregularity made a material difference

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the Court could find that the instrument of alienation was not duly executed and make such order as it saw fit. (20)

The 1967 Amendment Act repealed (inter alia) S.227 ss 1(a) and ss 6 so that the Court's position seemed a little confused. Sections 314 and 317 indirectly continued the Court's power to look at procedure. Moreover the Court, quite naturally saw this power as being conferred by the mere existence of the formal provisions so that <sup>the</sup> 1967 Amendment Act made no difference to the Court's power to look at procedure. The difficulty arises as to what the Court can do upon finding that an irregularity has occurred. Does the absence of ss 6 mean that the Court now has no discretion to disregard the irregularity (if it is an immaterial one) and is obliged to call for another meeting of owners whenever any irregularity, however trivial is proved before the Court? As this paper will show, old habits die hard in the Maori Land Court and the better view would seem to be, in the absence of any decision on the point, that the discretionary power to ignore an immaterial irregularity survived despite ss 6 repeal. This view is sustainable by virtue of the fact that the Court has power to look at procedure, that it is a 'Court of the people' (22) and must exercise its power over immaterial irregularities in a way that serves the people i.e. on a discretionary basis. It does not serve the people to have them recalled for another meeting to pass the same resolution simply because of a minor and immaterial technicality.

S.310 requires a Recording Officer being either the Registrar of the Court or an officer of the Department to attend the meetings.

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Because the Maori Land Court is "a Court of the people" the Recording Officer has a degree of discretion as to how to conduct the meeting. He may, for example, go to a vehicle outside the building where the meeting is being held and record the vote of a person too sick to enter the building (23). The Court however retains power to rule upon the Recording Officer's use of his discretion. The Recording Officer is also responsible to ensure that every owner's right to be heard is observed. The Court's approach to this aspect has not been affected by legislative change.

~~To constitute a quorum up until 1974 under S.309 ss (1), three individuals entitled to vote had to be present during the whole time of the meeting. In 1967 the quorum requirements were tightened up to a certain extent by the new sections 6A-6C added by S4 ss (4) of the Maori Purposes Act 1967. The Court thus had power (only upon application) to fix a quorum for any meeting. Where no quorum was fixed it has to be ten owners or one quarter of the total number of owners (whichever was the less) and the owners constituting this quorum had to own not less than one quarter of the beneficial freehold interest in the land in respect of which the meeting was called.~~

~~These quorum requirements made the alienation of land relatively easy. A minority could pass a resolution of alienation in the face of a silent or unknown majority. The pakeha applied his rationale to this section; the owners all receive notices and have equal opportunity to come and express their opinion, if they do not come it is their own fault and displays their lack of interest. Maoris gathered together do not necessarily follow the pakeha system which~~

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" .... that the idioms and concepts are beyond the majority is usually clear in 'post mortem' exchanges" (25)

In legislative form, therefore, this provision reflected the pakeha concept of 'democracy' - a concept the Maori has never really been at home with.

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The Court's attitude to proxies has always been strict and precise (as shown in Re Matahina AID). Up until 1968 the Maori Assembled Owners Regulations provided that the proxy for an owner could only be another owner or the wife or husband of an owner (26). In 1968 in accordance with the Prichard-Waetford Report's (27) recommendation that restrictions on the alienation of Maori land should be relaxed regulation 7(2) was revoked and replaced by a provision which allowed "any person of full age and capacity" to be appointed proxy for an owner. The 1968 amendment to the Regulations also made it compulsory to fill in a proxy form as laid down in the schedule to the Amendment. The proxy giver can limit the proxy's authority (Regulation 10(1)). If a person who has appointed a proxy attends the meeting then the proxy cannot vote for him - Regulation 10(2). However if the proxy giver arrives after voting has commenced this is too late to revoke the proxy (28). Regulation 11 provides for the manner in which notices of proxy must be given to the Recording Officer.

ii. Power to Look at the Content of the Resolution

Up until 1967 this power was regarded by the Court as its major 'quasi-parental' power. The Court could by S227 ss1(b) disallow or modify any resolution if it believed the alienation "contrary to equity or good faith, or to the interests of the Maori alienating" .

Section 227 prescribed other considerations the Court could take into account, notably that the alienation would not result in undue aggregation of farm land and that the consideration was adequate.

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How then did the Court use this discretion? The Prichard-Waetford Report (29) analysed the Maori Land Court's use of S227 and recommended that S227 s1(b) be repealed:

"This will result in the price in the case of a sale and the rent in and terms in the case of a lease and the rate of interest and terms in the case of a mortgage being the primary matters for the Court to decide" . (30)

The Committee's dissatisfaction with S227 s1(b) arose because:

"...the individual approach of many Judges to questions of alienation have been coloured by the belief that it has been and is a function of the Court, except in very special circumstances, to preclude the alienation of land by Maoris". (31)

They echoed the view that the Act was not aimed at the protection and preservation of Maori land as such.

"...the Act is designed, and can only be applied, as a Statute protecting the Maori from his own improvidence in respect of his dealings with the land in contrast with the land itself" . (32)

The Committee then went on in paragraph 135 to give illustrations of how it thought s1(b) was being 'misused' by the Maori Land Court bench:

"We agree that some Judges have assumed that their duty is to refuse sales. Hence the complaint elsewhere of a Judge saying 'This is not your land - you are only a trustee for it.' If such is being or has been said, and we accept it that it has, our comment is justified" .

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Yet the Committee undermines its argument when it notes that:

"The position has not been helped by all appeals against refusal of confirmation or against variation of the contract having, so far as we have ascertained, failed." (33)

The Chairman of the Committee, Ivor Prichard, a former Chief Judge of the Maori Land Court, would have been sitting on most of those appeals and the Chief Judge (34) has traditionally had an influential presence. If all those appeals had failed, surely there were good grounds for their not succeeding? Neither does the Committee produce evidence as to what the resolutions that had been refused contained. It is highly likely that the Judge who in one district confirmed only six sales in a whole year, disallowed the others because the consideration was not adequate or on grounds of undue aggregation. Anyway - how many resolutions of sale did that particular Judge face during the year?

*Could be written as statements of doubt by logical analysis by judges rather than as questions*

The Committee seemed to advance the argument that the Court was not confirming as many resolutions of alienation as it should. They blamed the attitude of the bench and S227 ssl(b). However statistics indicate that the removal of S227 ssl(b) did not materially increase the number of Part XXIII alienations (35) - that is, the contention that the bench was using, ssl(b) to disallow many resolutions that should have gone through was not sustainable.

In para 136 an example is given of the Court's refusal to allow an alienation of land under multiple ownership to a Maori Incorporation. The Court refused to confirm because

"...the heritage should be preserved in view of Departmental development." (36)

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That is, there was a possibility of the land being developed without a change of ownership. On that basis the decision was meritorious. Moreover is one example and more significantly an example of Maori selling to Maori sufficient basis for justifying relaxing the restrictions on sales from Maori to pakeha?

The Committee was anxious to find out

"... what the Maoris of today wish to be the law as to their future contracts."

To find out they asked Maoris at every meeting to vote for a choice of three men as an indication of their feelings on S227.

"No 1 man - I want my freedom from the Maori Land Court over my sales and leases. I am not the fool the Maori was years ago and I will be able to make better deals if I am able to make them on the spot and if they are not 'subject to confirmation by the Maori Land Court'.

No 2 man - I want my freedom in the same way as the No 1 man and I object to the Court telling me whether I can lease or sell and generally directing what I do. I agree that we have made much progress and that things should not be as they were in the past but I do think that there is one thing that the Court can help some Maoris for a few years yet, and that is on the question of price and rent. I think that the Court should have some authority on these two points and no others.

No 3 man - I know that we are at times fed up with the Court with all its delays and with its telling us what we can do with what is really our own land, but nevertheless the Court in just the form it is in today has preserved for Maoris land that would otherwise have slipped through their fingers. In spite of all we have thought and said I consider that the Court should be retained just as it is for some years yet" .

Not surprisingly No 2 man was the majority choice. One can see that the way the choices were expressed No 2 man was the natural option. The options were framed in a 'loaded' manner - in all the options the Maori Land Court is described in negative terms even by the third man who is meant to be the advocate for the Court's wider powers. The range of choices play an emotive language: the emphasis is on the Maori coming

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of age, being able to handle the pakeha world but being held back by the Court. This image is inherent in every choice despite the fact that the three men are ostensibly a range of choices from one extreme to the other. Within such a framework of choice the natural tendency would be towards the middle order, the compromise, the No 2 man .

In addition to the way the questions were posed the procedure used to register opinion seems doubtful:

"The Deputy Registrar or some other person noted the opinions at meetings in figures of one where the great majority were for one of the men and of half where that would nearer show the feeling.

Adding these up we find... No 1 man - 8 votes  
No 2 man - 23 votes  
No 3 man - 7 votes

i.e. for 38 of the meetings" (37).

Surely a straight aggregate for each option totalled from all of the meetings would have been more reliable and left no room for personal judgements that could not be consistently applied from meeting to meeting. The writer believes on that basis the figures arrived at are unsatisfactory. In paragraph 141 the Committee says:

"Those who supported the No 3 man were we think mainly men of substance who feared that any change might bring an increase of taxation."

The writer has spoken informally to a person present at some meetings held by the Committee. This person indicated that the "men of substance" were normally elders or representatives of a group of owners. Instead of all these owners coming along to the meeting they had sent a representative. When it came to counting hands the representative could only be counted as one despite the support that had not accompanied him.

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It was therefore rather unfair to say that proponents of No 3 man were primarily concerned with keeping the tax rate down.

The writer believes that the grounds put forward for the repeal of S227 ssl(b) were extremely doubtful. The Committee's findings on what they perceive the majority of Maori landowners as wanting can be seen in a very doubtful light yet the Committee (given only six months in which to report) proceeded to make a recommendation on that basis. The result was the repeal of S227 ssl(b) and the loss of the Court's parental power to look at the content of resolutions of alienation.

In a sense the repeal of S227 ssl(b) was merely an acknowledgement of what the Judges were doing already. The indications are that for the most part resolutions up to the time of the Amendment (under the old S227) were being processed as long as the consideration was adequate and there was no undue aggregation.

The fact that the repeal of S227 ssl(b) did not produce a sizeable increase in the number of resolutions confirmed by the Court indicates that the old 'good faith' power had been sparingly used by the Court (38). The Court's interpretation of "equity or good faith" recognised the possibility of a wide interpretative value but it appears that this possibility was seldom realised.

This view is also borne out by the Court's decision in Re Mangatu 1, 3 and 4 Incorporated (39). The bench indicated that there was no general duty cast upon it to protect Maoris in all matters affecting them and which properly came before the Court but there was a special duty where legislation provided for the exercise of such a special duty.

The same echo is heard in Re Tauranga Taupo 2B2L45 (40)

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"As this Court sees the position there is no magic in the word 'equity' or for that matter in the words 'to equity or good faith' as used in S227 (1) (b) supra. That section provides that except as otherwise provided in the same section, no alienations shall be confirmed unless the Court is satisfied as to certain specified following matters."

The Court in confirming a resolution seemed to be implicitly asking the question whether or not the Maori was getting the best deal possible (41). The necessity to retain land in Maori ownership was never expressed as a consideration. In this respect the Court's attitude, although protective was essentially assimilationist - seeing how best to mould the Maori into the shape of the pakeha world.

However the Prichard-Waetford report obviously saw the bench as not being 'assimilationist' enough for as a result of the report a new S227 was enacted in 1967. This resulted in the Court's power to look at the content of resolutions being reduced to two areas:

(a) to ensure the consideration was adequate. A new S227A was added to provide that the consideration was deemed to be adequate if the price was not less than the value of the land (ascertained by a special valuation pursuant to S228) with the addition of fifteen percent to the value.

(b) to prevent any undue aggregation of farm land within the prescribes of the Land Settlement and Promotion Act 1952.

The position prior to Rata's 1974 Amendment Act was that the alienation of Maori Land under Part XXIII <sup>there,</sup> was relatively easy. The quorum requirements for meetings of owners were not onerous and the Court's protective powers had been substantially removed to be re-expressed into narrow and definite borders.

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should be restructured

SINCE 1974

The Court's powers under Part XXIII have been divided into two areas: (42)

- (a) power to summon meetings of owners
- (b) power to confirm, disallow or modify the resolution.

The 1967 Amendment Act as shown, took away a lot of the Court's powers in (b). The Court accepted that its powers had gone despite the temptation to try and reassert its parental jurisdiction by a 'fair large and liberal' interpretation of its reduced powers under (b). (43)

Although the Government had abandoned its policy of assimilation the 1967 Amendment was an overt continuation of the policy. Criticism of the 1967 Amendment was widespread and mostly justified:

"The most significant aspects which the 1967 reforms had in common with their precursors of the second half of the nineteenth century were the total neglect of the instructional and financial problems involved in helping the Maori to make 'better use of his land'; and, in obvious contrast, the smoothing of the path by which he might rid himself of this land to the European." (44)

The 1967 Amendment heralded the beginning of a new awareness amongst the Maori. Maori reaction against both the Prichard-Waetford report and the 1967 Amendment arose with surprising speed given the relative political quietude of the Maori people over the preceding years. The Maori sensed that to bring about any concrete results they would have to start lobbying in the corridors of power as Sir Apirana Ngata had done many years before. More potent 'political clout' was needed, the traditional method of negotiation through the elder was becoming outdated and found sadly wanting. Ironically enough this meant that the only way of preserving tradition was by abandoning it in so far as political manoeuvre was concerned. An example of this burgeoning awareness is the upsurge in Maori

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pressure groups such as Te Matakite and Nga Tamatoa over the past few years.

In 1972 the Labour Party was swept into power. Matiu Rata promptly set about remedying some of the wrongs he believed present in the Maori land law legislation. On 21 November 1973 the Government White Paper on proposed amendments to the Maori Affairs Act 1953 was presented to Parliament (45). The paper observed grave concern at....

"... the very large numbers of transactions by way of sale undertaken since 1967 whereby for all intents and purposes, the lands have gone forever from Maori ownership.

With the strong ties between people and their land, the Government recognises the right of kin-groups to remain proprietors of their land, and intends to ensure the retention of as much as possible of the remaining land in Maori ownership and management" (46).

Mat Rata did not return the Court's quasi-parental jurisdiction but instead introduced stricter procedural requirements which ensured that the meetings of owners were well-attended before any alienation resolution could be passed. He also returned to the Court much of its former jurisdiction that enabled it to enquire into adequacy of consideration. In essence Rata maintained the clear defined path of Part XXIII that 1967 had established - that is he gave the Court none of its discretionary powers to confirm, modify or disallow a resolution as it had enjoyed under the old S227 ssl(b). Perhaps in the light of the Court's earlier 'assimilationist' trend he was wary of the way the Court might use such discretion. If that last point of conjecture is true then it was proven to be wrong for around 1974 the Maori Land Court started taking a marked change of direction.

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Through the years 1967 - 1974 the Court was in a period of 'limbo' - its parental wings had been clipped yet the Court accepted this fact quietly as perhaps it was bound to. However events on the political scene must have had their effect on the Maori Land Court for around 1974 the Court came out of hibernation.

One can only guess as to whether or not there is a causal connection between the change in the bench's attitude and the increasing awareness of the Maori's inferior social position, however the writer believes the connection is real and too marked to be merely coincidental. The 'connection' is evidenced by a recent practice the Court has adopted and two recent decisions in the Tairawhiti district.

As stated the 1967 Amendment removed a lot of the Court's powers in (b). The Court has lately relocated its parental jurisdiction in power (a). This relocation has been activated by what seems to be a new ( or at least revitalised) appreciation on the bench of the significance of land to the Maori people. In addition there has also been claims that the new parental powers are not sustainable by a reasoned interpretation of the Act and the Court's history of usage in area (a).

It is now necessary to investigate first of all the changes Rata made to procedural requirements for meetings and the Court's powers to look at the content of the resolutions, i.e. matters arising under category (b).

Power (b): To Confirm, Disallow or Modify a Resolution

i. Procedure at the Meeting

*This should be included before comments re Cts change in direction*

Section 31 of the 1974 reform filled in the legal vacuum created in 1967 and gave the Court once again direct power to ensure that:

"the instrument of alienation has been executed and attested in the manner required by this Act" (47)

Section 36 repealed the 1967 provision which gave anyone of full age and capacity qualification to act as a proxy. The same section repealed the 1967 provisions relating to quorum and the Court's power to fix one.

The rules relating to proxies were changed to a position similar to the pre 1967 days. The proxy holder had to be some specified relative of an owner. This provision was resurrected as an acknowledgement of the kinship factor inherent in Maori land under multiple ownership. As many of these people could also own shares in the land it is also an attempt to see that the votes and discretionary powers therein conferred remain in the hands of the owners so that they can decide themselves the future use of their land. More significantly the 1974 reform changed the quorum requirements. Although for a meeting to remain constituted at least three individuals entitled to vote had to be present during the whole time of the meeting the actual quorum requirements were tightened.

Under a new subsection 6B to S309 where the proposed resolution is for the sale of land, the quorum consists of the owners together owning at least 75% of the beneficial freehold interest in the land. For leases the quorum requirement lessens with the decreasing term for a lease so that for a lease over 42 years at least 75% of the shares must be represented but for a lease of less than seven years only 20% need to be represented.

As with the pre 1967 legislation the votes are counted on the basis of the shares (48). The rationale behind this is that those who occupy and work the land would normally have the greatest proportion of shares and as their livelihood and economic interests are <sup>the most</sup> affected the most by the proposed alienation it is only fair that they have voting power proportionate to their percentage of shares in the land. This rationale is sound for the most part, however it produces problems when the users of the land

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are not significant share holders or when there is one owner who owns a great percentage of the shares and wishes to do something with the land that the other owners do not wish and because of his shares is in a powerful position. This paper will later investigate the approach at least one Judge has taken to the problem.

The result of the more restrictive quorum requirements was that Maori land became harder to alienate by Part XXIII meetings. The quorum requirements were undoubtedly a statutory recognition of the kinship factor in meetings and it was a step towards ensuring that if the pakeha notion of democracy was going to be enforced on the Maori it would be enforced in a situation where most owners had to be present as opposed to the old situation where they merely had the opportunity to be present. The difficulty of Part XXIII alienations arises because of an inherent nature of Maori land under multiple ownership. The land title was fragmented, many owners had moved away and could not be located or if they could be located they simply could not afford the time or money to travel many miles back home for a meeting. Some of these people appoint proxies but most of them simply did not do anything. Their inaction did not necessarily arise from indifference as is often claimed. Since the Land March these people or absentee landowners have become reluctant to sell their land (turangawaewae) and let their 'flame' die.

The answer to the problem does not lie in negative provisions such as the compulsory acquisition of uneconomic interests as this practice only serves to alienate the Maori people (49). The writer believes there are solutions to the problem but they lie outside the scope of this paper. It is sufficient to note however that the quorum requirements are to a small extent a mixed blessing. For absentee landowners it is a measure of comfort to know that their interests are relatively secure,

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however for Maori owners working the land it can be a source of bedevillment when they seek to develop the land by, for instance, forming an incorporation and selling the land to it (50). S438 has provided one way around the latter problem.

If the meeting lapses then under the new S315A the report of the lapse is passed on to the Maori Land Advisory Committee of the local district. The Committee in each district is composed of the District Officer of the Department of Maori Affairs, two officers of Government Departments (such as the Department of Agriculture and Fisheries) and four persons representing the Maori population of the district. There is therefore a Maori majority on the Committee although these representatives theoretically at least do not appear to have to be Maori. It is submitted that that should be the case. Under S315A(4) the Committee after such consultation with the owners as is reasonably practicable, makes a recommendation to the Minister of Maori Affairs regarding the effective use, management or alienation of the land. The Minister acts upon this recommendation as he sees fit.

The writer believes it is an important principle that Maori land remain in Maori ownership. It is submitted on that basis that the Committee should have no power to recommend an alienation by way of sale except a sale to a Maori incorporation or a Trust Board (51). Moreover it should have no power to recommend leases greater than a 25 year period with statutory provision for a review of rent every five years. In the case of leases to timber companies, a right of renewal for ten years should be recommended with a review of rent twice during that period. These recommendations are made as a way of balancing what is fictitiously seen to be a conflict between the need to retain Maori land in Maori hands and the need for this country to use its small area of land to economic purpose. The Minister's actions should be subject to the same limitations.

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That then is the new procedure for the holding of meetings and the ensuing consequences of the meeting lapses under the 1974 Amendment. The Court's power in this area is minimal and its role is a supervisory one to ensure that due procedure is followed. There is nothing calling for the exercise of the old 'parental' jurisdiction.

ii. The Content of the Resolution.

S31 of the 1974 reform lets the Court look at the content to ensure that:

- (a) the alienation does not breach any trust to which the land is subject
- (b) that the alienation will not result in the undue aggregation of farm land
- (c) That the value of any millable timber, minerals etc has been taken into account in ascertaining the consideration
- (d) that having regard to the relationship (if any) of the parties and any other special circumstances the consideration is adequate.

Although the Court's role of inspection is enlarged beyond those of 1967 there is still no return to anything like the old S227 s1(b) powers of the original 1953 Act.

The Court's powers under category (b) (power to confirm, disallow or modify a resolution) as affected by the 1974 Amendment fall first for discussion because these legislative changes have had important ramifications on the practice of the Maori Land Court. Importantly these changes, besides acknowledging the peculiarities of Maori land ownership, also continued the high degree of statutory regulation over the Court's power and related aspects arising under category (b). Changes in procedure at meetings and power to confirm have left little room for a 'quasi-parental'

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jurisdiction. It is against this background of a regulated category (b) that the Court's use of power (a) i.e. (power to summon a meeting) must be looked <sup>reviewed</sup>.

Power (a) Power to Summon Meetings of Owners

The Maori Land Court has over recent years started the practice of directing the Recording Officer to bring certain matters to the attention of the owners. The direction to the Returning Officer accompanies the Court's order to summon a meeting of owners. The direction to the Recording Officer (or rather the advice the Court gives to the owners) can range from advice that reviews of rent at five or six more years are more usual to advice that if they do not attend the meeting it may stop the resolution going through (52).

This advice the Court has begun giving the owners through these directions to the Recording Officer is a marked change in direction. There is no specific provision in the Act allowing for such directions so this practice is essentially one the Court has initiated of its own accord. Because this practice has no specific anchor in any legislative provision there is no reason why the Court could not have been doing it during the 1950's and 1960's. This practice is a direct attempt to solve the problem noted earlier: to ensure that the idioms, concepts and implications of the resolution are made clear to the owners. The Court has constantly reiterated that it only has those powers which statutes specifically give it. This practice marks a departure from that view and evidences a change in direction for the Court away from the narrow pakeha view of democratic meetings to a realisation that the Maori are in many ways in a less advantageous position than most pakeha landowners. In short it appears to be a jump from 'assimilation' to bi-culturalism - a desirable change in direction.

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Rata material

disorganized

The above practice is significant because it was not activated by any legislative change (53). The Rata Amendment produced a new S307 relating to the Court's power to summon meetings of assembled owners (54). The most significant change was that as the Act also abolished the Board of Maori Affairs the advantages this body and the Crown enjoyed in so far as the old S307 was concerned were removed.

Under the old S307 the Board of Maori Affairs made the application for the summoning of the meeting on the Crown's behalf which meant by the proviso to the old subsection 1 that the application did not have to be submitted to the Court but was processed directly by the Registrar. The Rata Amendment changed that position making it necessary for the Crown to submit an application for a meeting to the Court in the same way that any individual proposing alienee had to. This meant that the new subsection 6 gave the Court, for the first time, complete discretion over the summoning of meetings involving alienations proposed by either private interests or the Crown:

"The summoning of a meeting shall be at the discretion of the Court" .

It is against this background that two recent decisions of the Maori Land Court, in the Tairawhiti District, both decisions of the same Judge, can be looked at. Indeed the change noted can even provide some explanation for the decisions.

The Waipuka 2R1 Block was a 13.652 ha area of land fronting on to the sea, two miles from Waimarama village with the other boundary being a road running parallel to the shore a few hundred yards inland. The Pukepuke Tangiora estate owned 2100.591 shares out of a total of 5387. The remaining 3286.409 shares were held by 29 other owners. The land was leased to a J. Moeke and his wife, who also farmed adjoining land. On 5 August 1976 a meeting was held to consider a resolution to renew the Moeke's lease which had expired. The Trust told the meeting

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that as the estate intended to purchase the land it would vote against the resolution. The trustee indicated to the meeting that it would apply to the Court for another meeting and would file the appropriate resolutions. The Court subsequently refused the trusts application for a meeting of owners (55).

The Court saw the issue as being:

"...whether or not a substantial owner of Maori land held in multiple ownership can compel the sale of the land to himself by outvoting such of the other owners...present or represented at a meeting of assembled owners."

The Judge, R.M. Russell, looked first at Section 5(j) of the Acts Interpretation Act 1924 which required the Court to give Part XXIII such 'fair large and liberal' construction as to best ensure the attainment of its purpose. He then looked at in Re Managatu 1, 3 & 4 Blocks (56) a case in which the 'quasi-parental' jurisdiction of the Court is re-affirmed. Having established the Court's protective role the Judge identifies the difference between Maori concepts of land and the English view. He sees Part XXIII as an English attempt to accommodate the Maori concept:

"...Its purpose is to enable owners to deal with their own land. It has worked well in the past because the majority of the owners of individual parcels of land have been related to each other and the tradition has been that matters upon which there is a difference of opinion should be discussed as fully as possible in the hope that family unity might be maintained by reaching a concensus" (57)

The Judge points out that if the meeting was called the alienation would be a formality:

"...since the estate could expect to command a majority of the voting power at any meeting that might be called, there was nothing that the other owners could do to resist the acquisition of their interests in the land by the estate" (58)

He finds two facts persuasive. First of all if the estate became sole owners they would rent the land out to the Moekes.

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As far as the use of the land was concerned, the alienation would simply maintain the status quo. Secondly the land was on Waimarama beach and the access was good. Evidence indicated the land's value was increasing and that the trust wanted to take advantage of this increasing value.

In the light of the above Russell says:

"The purpose of Part XXIII is to facilitate dealings with Maori land held in multiple ownership by the Owners of that land. The purpose was not to enable a substantial owner to dispossess the other owners in order to make speculative profits for himself, an objective that he could not have achieved by partition or any other proceedings." (59)

That was his basis for using the Court's discretion under S307 ss6 and he refused to summon a meeting of owners.

In Re Puhatikotiko 2C3 (60) Russell extended his Waipuka decision.

R. Coates, a person without any Maori ancestry, had as a result of the 1967 Amendment Act, managed to purchase undivided interests in Maori land until he was the majority shareholder. He had farmed the land for a number of years as lessee and finally he sought to purchase the land through a Part XXIII meeting. His application for a meeting was turned down. Russell reiterated that:

"There is no way in which the owner of the majority interest in general land can compel the minority owners to sell their shares to him..." (61)

He says his decision in Waipuka

"...amounts to no more than a rule that the decision on whether or not to sell land to a major owner should be made by a majority in shareholding of the other owners whose views can be ascertained" .

He sees the views of the minority as being ascertainable in four ways:

- (1) the major shareholder applying for the summoning of a meeting of assembled owners to consider a resolution to sell the land to himself can agree to abstain from voting on the resolution.

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(2) the Court can direct that notice of the hearing of the application to summon the meeting be given to all owners, so that any owners opposing sale may attend the Court hearing and oppose the calling of the meeting. The Court, in the light of submissions from both sides, then decides whether or not to summon the meeting.

(3) the Court can follow the practice it has already adopted. It can call the meeting but direct the Recording Officer to inform the owners of the quorum requirements and if they are opposed to sale how to use them to their advantage.

(4) in cases where the major owner proposes alternative resolutions to sell or lease a discussion can be held before the meeting is formally opened....

"If the applicant finds that there are owners who oppose sale and are likely to leave before the meeting opens he will undertake not to vote his shares on the sale resolution in return for those owners agreeing to remain at the meeting and consider his lease resolution."

Coates rejected any of these 'practical solutions'.

"All these practical solutions proceed on the basis that the other owners should be given an opportunity of deciding whether or not to sell their land but that a major owner should not be allowed to oust his co-owners on his own terms"

None of these 'practical solutions' are required and laid down by statute yet it seems that the Court can impose them in one form or another. Failure to follow these solutions at a meeting if it was undertaken to do so could doubtlessly allow the Court to refuse to confirm any ensuing resolution on the grounds that the resolution had not been executed properly.

Russell's 'practical solutions' are essentially ways of finding out what the majority of the minority wants. He does not want to constrain a minority to submit to something which is unfair to them. Most notable is his second

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'practical solution'. What this solution means is that the Court can hold an 'unofficial' meeting of owners and find out how they feel. After gauging the probable outcome of an official meeting the Court can adjudicate upon that probable outcome. How would the Court look at that outcome? In the light of Russell's two decisions the words of the old S227 ssl(b) ring:

"contrary to equity, or good faith, or to the interests of the Maori alienating."

This is clearly a reappearance of the quasi-parental jurisdiction, the only change being that the power is exercised a step earlier than in the pre 1967 days and that the Court's powers of modification are somewhat reduced. Instead of looking at the content of the resolution after a meeting has passed it, the Court is now looking at the content of the resolution before deciding whether or not to summon a meeting. Hence it is also a relocation of the parental jurisdiction.

Russell's decision in Puhatikotiko 2C3 is pending appeal (62) and it is hard to know whether the line these two cases have started will be continued. Two of the grounds for appeal are that the Court has acted wrongly in its exercise of a statutory discretion and that it has usurped the owner's franchise: The writer cannot see how these grounds can be satisfactorily made out. There is first of all no provision directing the use of this discretion and secondly the 'practical solutions' Russell offered appear to be reasonable and ensure that the opinion of the majority of the landowners (as opposed to a majority based on possession of shares) is realised. Of course the Court is not directly empowered to order any of the practical solutions and in this sense the Court can be quite clearly seen as moving away from the notion that it only has those powers that

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legislation specifically gives it. However if the Maori Appellate Court upholds Russell's decision it is likely that they will confine this revamped parental power to situations where a majority shareholder seeks to use his majority to compel the minority to sell to him.

In the light of the high degree of regulation of power (b), the recent practices of the Court under power (a) can be seen as a minor resurrection and relocation of the quasi-parental jurisdiction away from power (b) due to statutory intervention into category (a).

Persons unhappy with the idea of assimilation can be pleased with the approach the Court is taking. Most Maori agree that the Courts parental power is desirable and, arguably, even more so today now that the bench has shown its willingness to take explicit account of Maori feeling. It is to be hoped that the Maori Land Court will continue to be sensitive to Maori feeling. Perhaps the 'Europeanized' mode of leadership emerging in the Maori will ensure that that will always be the case. The Court is however still a statutory creature so any legislative intrusion might upset the fine balance that exists today between the bench and its attitudes to Part XXIII meetings; if there is to be any intrusion it must be of a positive nature.

For the most part mutuality exists between the bench and the Maori however there is a possibility that the 'fine balance' might be upset by an over-zealous Court over-reaching itself. S438 might, and has come close to being that 'spanner in the works'. S438 has become increasingly used mainly as a result of Rata's tightened quorum requirements. It is the writer's view that it contains some undesirable elements that can be removed without hindering its purpose.

Section 438.

S 438 of the Maori Affairs Act 1953 provides a device for the Maori Land

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Court to vest land in trustees. Subsection 1 provides:

"For the purpose of facilitating the use, management, or alienation of any Maori freehold land, or any customary land or any general land owned by Maoris, the Court, upon being satisfied that the owners of the land have, as far as practicable, been given reasonable opportunity to express their opinion as to the person or persons to be appointed a trustee or trustees, may, in respect of that land, constitute a trust in accordance with the provisions of this section."

The purpose of s438 is to facilitate the handling of land when the owners cannot be traced or located (i.e. a quorum for a Part XXIII meeting cannot be obtained) or when it is necessary to protect the owners interests. S438 is often seen as being complementary to Part XXIII - a Part XXIII meeting lapses, the Maori Land Advisory Committee reports and a s438 trust is constituted (though not necessarily based upon the Advisory Committee's report).

Before discussing proposed changes to the current s438 it must be stressed that for the most part s438 has been used positively and desirably, indeed some of the legislative amendments the writer recommends are followed as a matter of course by the Court. The White Paper on Maori Land noted the beneficial aspects of s438:

"The process has proved remarkably acceptable to the Maori owners generally, affording them responsibility in dealing with their own lands, also involvement and identification therewith. Many, many thousands of acres of land have been so put to use with resultant productivity as a consequence." (63)

The writer is concerned to remove some undesirable elements from s438 (as evidenced by two recent examples) whilst also retaining the benefits observed by the White Paper.

s438 in its present form has been significantly altered from its original form in the 1953 Act. One of the most significant changes was that precipitated by the 1966 Court of Appeal judgement is Hereaka v. Prichard (64). At the time of the case subsection 1 of S438 provided:

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"The Court may, on application made to it in that behalf or of its own motion during the course of any proceedings before it, make an order under this section vesting any customary land or Maori freehold land or land owned by Maoris in any trustee or trustees, to be held upon and subject to such trusts as the Court may declare for the benefits of Maoris...." (my underlining).

Hereaka concerned litigation over the trouble-ridden Rangatira B and C Blocks. The central issue concerned whether or not the Maori Land Court could create a trust vesting land in a trustee in order to transfer it to the Taupo County Council for various purposes. In the light of subsection 1 (as it then was) the Court held that any S438 trust must have as its object the benefit of Maoris and it is not sufficient if its direct result is for the benefit of someone else and it benefits the Maori only indirectly. In other words the Maori must be the cestuis que trust. The Court's reasoning turned directly upon the words of subsection 1: "for the benefit of Maoris....."

S142 (1) of the Maori Affairs Amendment Act 1967 provided an entirely new S438. The Prichard-Waetford report made no recommendations concerning S438 so far as Hereaka was concerned however the total removal of the words upon which that judgement turned lead one to the inescapable conclusion that the legislative intended to realise North P's ominous words in that case:

".... that this is really a trust providing for the alienation of the land to a stranger, and it cannot possibly be said that the land is held on trust for the benefit of the Maoris" .

Moreover the judges indicated in that case that powers of alienation, as provided for in S438, only arose as an 'incidental' power of the trustees. That is, in most cases trusts established for the sole purpose of alienation were outside the Maori Land Court's jurisdiction unless it could be shown that the alienation directly benefited the owners.

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There can be no doubt that the Court of Appeal decision severely lessened the potential of the old S438 as an alienation device. However, as noted, a new section emerged soon after that judgement. In the future over other changes to the Act during 1967 the changes to S438 were largely invoiced. The new S438 made it possible for trusts to be established for the purpose of alienating the land. The words in the new subsection 1 are unmistakeably clear;

" for the purpose of facilitating the use, management or alienation of any Maori freehold land ....."

In short whereas the old S438 prevented trusts being established solely to facilitate the alienation of Maori Land the 1967 Amendment made it a distinct possibility. It is submitted that the old S438 was distinctly preferable to the present one. Turning now to look at the present section...

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In Albert v Nicholson (65) the Supreme Court held that a s438 trust could be imposed despite the wishes of the majority of owners. As s438 is designed for situations where a quorum cannot be obtained the writer believes the Court should not be competent to impose a trust upon a group of owners who can produce a 75% quorum. It is submitted that it should be a statutory requirement that the Court append a certificate to all s438 trusts stating that the trust is being established because either a quorum could not be obtained or because the owners had passed a resolution calling for one at a duly constituted Part XXIII meeting. If the 'certificate' requirement and its accompanying prerequisites had been the law then the problem of the apparently 'undemocratic' situation in Albert would never have arisen. The suggested limitations on the situations in which a s438 trust can be established could be neatly fitted as a proviso to subsection 1.

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Besides defining the instances for a s438 trust it is submitted that the Court's wide powers of appointment of trustees must be restricted. It should be a statutory requirement that the majority of trustees be owners of the land. There is provision for advisory trustees who can be drawn from specialist ranks such as the Department of Agriculture or the owners solicitor. The recommended requirement would prevent the situation where an insurance company had been appointed trustee over land which it wished to acquire for itself!

Subsection 1 provides owners with an opportunity to express their opinion upon proposed trustees but not the actual imposition of the trust. Both of these stages are important: Stage 1 - the imposition of the trust; stage 2 - the appointment of trustees. Even if s438 is being used where a quorum cannot be obtained is it right that the owners who can be positively ascertained only have a right of protest at stage 2? If any owners have grounds for believing that the trust itself need not be established they should have a statutory right to say so. However this right would probably be rarely exercised if the ambit of s438 was limited by the suggested proviso to subsection 1.

The Court had wide powers over the terms of the trust. Subsection 5 provides that:

"The order made by the Court may confer on the trustee or trustees such powers, whether absolute or conditional, as the Court thinks fit, but, subject to any express limitations or restrictions, the trustees shall have all such powers and authorities as are necessary for the effective performance of the trusts."

The Court by virtue of subsection 3 can modify the order creating the trust at any time. Paragraph (b) gives the Court power to vary the terms of the trust by making a new trust order in substitution for the previous one.

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The Ngatihine dispute illustrates the potential of the Court's power of modification.

The Ngatihine block occupies 13,262 acres of relatively unused Northland land. In March 1974 the Maori Land Court appointed a trust under S438. At the first meeting of the trust it is recorded that the trust was formed to initiate the formation of an Incorporation and that the Secretary was to contact forestry companies to ascertain if they had any interests in forestry in that area. It seems that this was not done as Carter Holt had already worked out detailed plans for the use of the block. It also appears that this plan was made at least seven months before the Court created the s438 trust. The trustees decided to lease the land to Carter Holt but one trustee Graham Alexander refused to do so because he believed that the lease was disadvantageous and that not enough 'shopping around' had been done. When Alexander refused to sign the lease the other trustees made an application to remove Alexander from the trust. Alexander appealed against his removal and was subsequently reinstated in August 1976. However the Maori Appellate Court acting under the powers given it by s438 ss5 altered the terms of reference of the trust. It defined the terms of reference as being the leasing of land to Carter Holt Farm and Forestry Ltd., with some modification to the original lease.

The writer has no wish to discuss the merits of the Carter Holt lease as arguments can be made both for and against it (66). What should be noted is that the Court's power of modification can easily become one of manipulation: Alexander by refusing to sign the lease is acting in contempt of court (67). It is therefore submitted that once the Court has decided to impose a s438 it should have no power of modification except in response to an application by the trustees asking the Court to modify the terms so that a specified

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action is not ultra vires the trustees' powers. That requirement would have prevented the Court using its powers in a (positively or negatively) coercive way. Also the ultra vires requirement would prevent the other trustees 'ganging up' on a dissentient by threatening legal action - the emphasis would be on solving the problem internally.

The Maori Land Advisory Committee should have a greater role in the establishment of s438 trusts. Particularly for land that is not being put to economic use the Committee should conduct a detailed land usage survey (subject to the writer's proposed limitations on its power to recommend alienations). Consultation with owners should be paramount for this survey. The purpose of the study would be to explore how to get maximum utility out of the land's current ownership.

Once a Part XXIII meeting has lapsed the result gets referred to the Advisory Committee. The Committee should then proceed to make the land usage survey (together with recommendations on prospective trustees) and submit it to the Court. The Court in establishing the trust should take the Committee's recommendations into account especially in defining the terms of the trust.

One of the major features of S438 trusts is that if the trustees decide to dispose of the land then under subsection 7 the alienation does not have to be confirmed by the Govt although the registrar has to be notified. The Prichard-Waetford report looked at s438 and its' history (68) in respect of alienations under the mantle of a s438 trust:

"In very many cases the Maori Trustee was appointed and he found during his early trusteeship that the waiting for a Court and the formal appearance in it was too protracted. Thereupon an amendment to the Act was passed providing that when he is appointed Trustee, confirmation is unnecessary".

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The Committee went on:

"It has been submitted to us that such freedom of confirmation should be extended to all trustees appointed under s438 on the grounds that they should not be appointed unless they are competent to carry out the terms of the trust. We agree but consider that there should be not freedom from confirmation but confirmation as of right on the filing of a simple application".

The Committee's recommendation was followed and s438 alienations became entitled to confirmation simply upon the Registrar noting the alienation,

The writer cannot submit to the principle of confirmation 'as of right' because firstly he believes that administrative expediency is insufficient reason for justifying the important relaxation and secondly because of his distaste for 'alienation' trusts where the terms of the trust conflict with the principle of retaining Maori land in Maori ownership being created solely to facilitate alienation.

It is submitted that 'alienation' trusts should be subject to:

- a) the alienation limitations recommended for the Maori Land Advisory Committee
- b) the limitations envisaged in the Hereaka case.

If the writer's recommendations were in operation then he could submit to the notion of confirmation as of right because alienations by S438 would become more of a rarity and more the result of a considered decision rather than as a legal loop-hole through which to avoid Part XXIII - a 'land use' provision rather than an 'alienation' device.

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*Previous section could be considerably tightened.*

Summary of recommendations concerning s438

- (1) That the original subsection 1 be returned so that the decision in Hereaka v Prichard becomes good law once again - the trust must directly and not indirectly benefit the Maori.
- (2) That a s438 trust can only be constituted by the Court in two situations:
  - i) where a Part XXIII meeting has failed to obtain a quorum
  - ii) where a duly Part XXIII meeting has passed a resolution calling for a s438 trust (as a precursor to, say, incorporation).

The Court must append a certificate that either of the two conditions is met when the order creating the trust is made.

- (3) The majority of trustees must be owners of the land with advisory trustees drawn from areas of expertise.
- (4) Owners who do not want a trust, notwithstanding the recommendations in (2) should have a right to be heard.
- (5) The Court should have no power to modify the terms of the trust except on application by the trustees who can only make such an application to ensure that a certain course of action is not ultra vires.

(6) That trustees be limited in their powers of alienation similar to those recommended by the writer for the Maori Land Advisory Committees.

The writer believes that these proposals would produce a coherent pattern of Maori Land use where the emphasis is on retaining the land in multiple ownership. The cultural need for the Maori to retain their turangawaewae is compatible with the economic demands of the country. The mere fact of fragmented title does not mean that a piece of land cannot be utilized - there are devices to surmount that problem such as

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incorporation, s438 trusts and Trust Boards.

The recommendations made concerning s438 ultimately involve the education of the Maori people, putting tools in their hands not taking the rustic ones they already have out of their hands into better educated and financed pakeha ones. If the Maori is less able to develop his own land then the pakeha as the person who has imposed his culture upon the Maori must take responsibility. S438 as it stands at present has a lot of flaws in it. It is potentially coercive (as is perhaps shown in the Ngatihine situation) and can be used despite the wishes of the owners (Albert v Nicholson) (69) More importantly it can lift the Court into the realm of political controversy - an extremely undesirable situation given the almost invariably positive role the bench plays in protecting the Maoris rights. S438 can possibly be the resort of over-zealous judges believing they know what is best for the Maori and acting accordingly. There is a vast difference between exercising a 'quasi-parental' protective role and exerting a parentally authoritative power.

S438 is undoubtedly needed however the writer believes that the proposed changes would not hamper its positive area of operation noted by the White Paper. Certainly the proposals would have prevented the Ngatihine and Albert situations. In the Ngatihine block a trust was definitely needed (a quorum could not be obtained) but the trustees should have been left to find their own way to develop the land (70). IN Albert a trust was not needed as there was a majority available. If the owners of the block in the latter case felt unable to develop the land themselves then they should have been able to vote for the establishment of a s438 trust to deal with the land.

As time goes on the title to many parcels of Maori land will become more and more fragmented. Pressures from the Pakeha world to use this land for economic

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purposes will increase. S438 will be in the centre of that development. S438 is in need of amendment for as that trend progresses pressures on the bench from the pakeha world to use s438 as a device to alienate Maori Land will increase. If that pressure is halted by limiting s438's operation then, the writer believes, that the Maori owners can retain their turangawaewae yet feel assured that the land is being utilized. S438 can (even in its present form) play a large role in the future of Maori land under multiple ownership however its metes and bounds must be clearly defined.

The alienation of Maori land under multiple ownership can be done by several other methods besides Part XXIII and s438 (most notably by Proclamation). The two methods discussed in this paper are perhaps the most significant. The attitude of the Maori Land Court bench to questions of alienation has, as shown, moved away from the notion of 'assimilation' however the potential of s438 could negate that positive attitude through a Court over-reaching itself moving from parental protection to parental authority. The Court's protective powers must clearly be retained but its wide powers in s438, an open invitation to unjustifiable interference, must be stemmed.

Land is the touchstone to Maori culture - it is all important. It is up to the pakeha-settler to see that that culture is preserved.

Footnotes

- (1) Tamati Pukututu, chief of the Te Uri-o-te-hawatu Tribe speaking at Waitangi prior to the signing of the Treaty. Reported in W. Colenso's The Authentic signing of the Treaty of Waitangi (1890) reprinted Capper Press, 1971.

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- (2) Section 2, Maori Affairs Act 1953.
- (3) See Metge The Maori of New Zealand - Rautahi p.107ff; see also Sinclair in Te Ao Hurihuri (ed. King) p115ff.
- (4) E. Schwimmer The Aspirations of the Contemporary Maori in The Maori in the Nineteen-Sixties (ed. Schwimmer) - 1968.
- (5) - perhaps the best example is the Te Matakite petition presented at the end of the Maori Land March on the steps of Parliament on 13 October 1975 see Hansard 8 Dec 77 p.5195.
- (6) 1967 Maori Affairs Amendment Act Part I sections 2-14.
- (7) Literally a standing place for the feet. This concept besides giving a maori particular rights on his marae has the larger role of symbolizing his identity as a Maori and his self-esteem and pride in being one. (see Metge p236, and more especially Sinclair in King p. 165)  
  
For an example of the feeling the concept arouses Hansard, 2nd Reading Maori Affairs Act 1953 p. 1450 Off is illustrative.
- (8) see Kawharu Maori Land Tenure (1977) p 24 OFF
- (9) *ibid.* p.241
- (10) Metge, p305
- (11) There is a maori proverb: "lets assimilate" is what the shark said to the Kahawai before he ate him for breakfast" .
- (12) For a full discussion see G.J. Allan The Conquest of British Law Over Maori Land - Research paper VUW - LL.B (Hons) 1977.

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- (13) See Pearce The Story of the Maori People p 70F.
- (14) Kawharu p 212
- (15) For a full discussion of cultural and deliberative aspects of meetings of the Maori in general see Kawhamp p 212ff.
- (16) A settled point in the Court - reiterated in re Papatupu 5A2 Whanganui Appellate Court Minutes Book (ACMB) Vol. 12 Folios 317-22. - 28 Feb 69.
- (17) See S307 ss7 1953 Maori Affairs Act prior to 1974 Amendment.
- (18) Maori Land Court Rules - Regln. 103 1958 Statutory Regulation 162.
- (19) In re Whare Purakau (dec'd) (Gisborne ACMB 27, folio 140) this situation arose and the court ordered a rehearing - the cause of action would emanate from a Court order resulting from the meeting of owners and not from the actual order summoning the meeting.
- (20) Then provided;
- S227 ssl (a) "...no alienation shall be confirmed unless that instrument has been duly executed in manner required..."
- ss 6 "The Court may, in its discretion, confirm an alienation notwithstanding any informality or irregularity in the mode of execution .... if, having regard to the interests of all the parties, it is satisfied that the informality or irregularity is immaterial" .
- (21) Invariably this order would be for another meeting of owners unless the proposed alienee indicated unwillingness/inability (financial) to proceed.

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- (22) See re Matahina AID - Maori Land Court, Rotorua, October 30, 1959 - 108 folio 336.
- (23) *ibid.* pl of the judgement
- (24) See Metge p 200f
- (25) Kawharu p 227.
- (26) proxy for the trustee of an owner under disability could, however, have been any adult person. Maori Assembled Owners Reghs. - regln 7(2) - 1957 S.R. 31.
- (27) Report of Committee of Inquiry into Laws affecting Maori Land and Powers of the Maori Land Court - 15 December 1965.
- (28) see In re Matahina AID
- (29) see note (27).
- (30) *ibid.* para 144 p 71
- (31) *ibid.* paras 134 & 135
- (32) *ibid.* paras 134 and 135.
- (33) *ibid.* para 135
- (34) Much like the current Master of the Rolls.
- (35) see appendix 1.
- (36) Prichard-Waetford Report para 136 .
- (37) *ibid.* para 140
- (38) see Appendix
- (39) M.A.C. Gisborne May 30th, 1969. Gisborne ACMB 27 folio 118  
see also pl3 Digest of Selected judgements in the Maori Land Court  
(up to December 1958)
- (40) Aotea District, 4 July 1963. Wanganui ACMB 12 folio 135 - see page 15 of the judgement.
- (41) See for a good example re Te Whetu A3B, Auckland ACMB 13 folio 61.  
The headnote succinctly states the situation:

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"Lessee purchasing shortly after commencement of Lease consideration at approximately amount of Lessor's interest according to Government Valuation - competition from other possible buyers eliminated by the lease - attitude of Court to such purchases - confirmation refused"

- (42) See earlier, page 5
- (43) Section 5(j) of the Acts Interpretation Act. See, for an example re Mangawhero 2 Wanganui ACMB 12 folios 312-6.
- (44) Kawharu p 308.
- (45) Government White Paper on Proposed Amendments to the Maori Affairs Act 1953 and other Related Acts. Presented to the House of Representatives 21 November 1973. [1975] 1 Appendices to the Journals of the House of Representatives. Parliamentary Paper E 20.
- (46) The first part of the quotation is probably not sustainable in the sense that the 1967 Amendment did not make a large effect on the number of alienations - see Table of figures in Appendix.
- (47) s31 ss1 (a) 1974 Maori Affairs Amendment Act
- (48) S31 ss2
- (49) for a heated treatment see SINclair in King esp. his second essay The Nibble, Bite and Swallow.
- (50) For an example see The 1977 Annual Report of the Department of Maori Affairs (1977) Appendices to the journals of the House of Representatives. Parliamentary Paper E 13; page 9.
- (51) The advantage of this requirement is that the land remains in Maori hands and has been passed over to a benevolent overseeing body similar to that existant in pre-settlor days. These bodies would deal with the land consonant with Maori sentiment.
- (52) See for an example Judge R.M. Russell's comments during Counsel's submissions in re Puhatikotiko 2C3 Block, Gisborne 5 May 1977 - Gisborne MB 120 folios 202-22D.

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- (53) but, as already said, perhaps by social change
- (54) S35, 1974 Maori Affairs Amendment Act
- (55) In re Waipuka 2R1 Napier MB. 110 folio 233
- (56) In re Mangatu 1,3 & 4 Blocks [1954] NZLR 624, 627.
- ( 7) page 4 of the judgement
- (58) ibid
- (59) ibid p 5
- (60) in re Puhatikotiko 2C3 - see note 52.
- (61) page 1 of the judgement
- (62) lodged 29 March 1978. At date of writing the hearing is set for 5 September 1978.
- (63) See note (45) p. 7.
- (64) Hereaka and Ors v Prichard and Ors. . [1967] NZLR 18.
- (65) Albert v Nicholson [1976] 2 NZLR p. 624.
- (66) see for an example of the arguments the Forest Industries Review April 1978 page 2ff.
- (67) At the time of writing the Supreme Court in Auckland had reserved its decision.
- (68) Prichard-Waetford para. 276 p.110 .
- (69) reference see note 65.
- (70) There have been strong suggestions that there was the possibility of developing a Forestry Co-operative on the block
- See Molloy (ref. note (66)) p. 13:

"In a country with limited capital and a transitorial economy in energy terms, a low-capital, high-labour establishment regime has obvious advantages. Finally, a do-it-yourself afforestation programme on Maori land aimed at a diversified, high-quality terminal crop with its associated return of people to rural areas is likely to have three major effects: very substantial, long-term rewards; a partial revival of Maori culture in modified form; and a reduction in youthful anti-social behaviour."

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endix #.

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MAORI LAND COURT

SUMMARY OF PART XIX AND PART XXIII ALIENATIONS

1 April to 31 March

	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973
Applications lodged (signed documents) .. .. .	828	844	859	1,063	1,048	989	1,009	416	156	199	155	17
Applications confirmed (signed documents) .. .. .	635	726	691	954	837	817	788	349	111	133	126	13
Applications of owners called in by Registrar (s. 233) .. .. .	517	475	450	517	515	495	469	457	399	480	431	40
Applications noted by Registrar (s. 233) .. .. .	Nil	Nil	Nil	Nil	Nil	Nil	N.A.	N.A.	172	447	432	63
Applications confirmed .. .. .	254	299	260	283	361	289	304	297	246	314	268	26

NOTE:—1962/1969—Whangarei includes Auckland figures.

ALIENATIONS CONFIRMED BY MAORI LAND COURT

	LEASES						SALES				
	To Maoris		To Europeans		To Maoris		Consid.	To Europeans			
	No.	Area	No.	Area	No.	Area		No.	Area	Consid.	
.. .. .	122	21,581	311	21,327	51	6,663	75,329	412	28,019	515,123	
.. .. .	88	11,714	330	34,129	72	3,502	69,149	383	21,412	553,247	
.. .. .	104	12,991	419	40,946	90	2,768	104,694	457	18,750	793,703	
.. .. .	88	12,718	379	21,312	81	4,822	119,943	522	49,098	1,142,975	
.. .. .	97	23,078	301	33,744	75	6,147	113,864	494	32,933	1,051,149	
.. .. .	111	10,263	317	21,239	89	5,584	332,989	507	24,618	1,902,425	
.. .. .	90	8,243	143	10,797	73	26,753	229,343	294	35,391	1,379,833	
.. .. .	45	4,436	118	15,283	48	7,498	178,325	264	23,984	1,280,251	
.. .. .	53	5,752	102	15,546	41	3,026	204,563	261	21,439	1,195,962	
.. .. .	69	11,970	101	21,932	61	2,398	133,384	258	34,151	2,071,204	
.. .. .	60	9,480	135	33,157	81	6,415	442,837	275	18,219	2,020,911	
Total .. .. .	927	132,226	2656	269,462	762	75,576	2,004,416	4132	307,929	13,906,795	

TEN YEAR PERIOD  
1963 - 1973

	No.	Area	Consideration
Leases:			
To Maoris .. .. .	927	132,226	..
To Europeans .. .. .	2656	269,462	..
Sales:			
To Maoris .. .. .	762	75,576	2,004,416
To Europeans .. .. .	4132	307,929	13,906,795

N.B.—Areas are in acres.

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ADDENDUM [19/9/78]

This paper began as an attempt to look at developments within the Maori Land Court concerning the attitude and approaches the bench was taking to Maori land. The writer believed (and still does) that the bench was trying to re-establish a form of the old parental jurisdiction. The tide of political events in the area was offered as an explanation for the obvious change in attitude. It is also important to remember the Maori Land Court judges tend to become somewhat understandably a little insular, to think they live in a world of their own. In addition they sometimes are inclined to forget that they are a statutory court and more importantly that their decisions can be appealed to the traditional Supreme Court/Court of Appeal hierarchy.

Bearing the above in mind three recent happenings are of sufficient import to justify this addendum. They are:

- 1) The unreported Supreme Court decision of Mahon, J. in re the Ngatihine Block delivered in Auckland, 28 July 1978
- 2) the Maori Appellate Court's refusal to rule on a technical point in re Puhatikotiko 203 and the subsequent forwarding of the whole issue to the Supreme Court.
- 3) The recently introduced Maori Affairs Bill 1978, and recently announced Royal Commission on the Maori Land Court.

The Ngatihine decision falls first for discussion because the writer believes it will have repercussions on how Puhatikotiko will be decided. Before the Supreme Court in Ngatihine the appellant Alexander asked the Court for orders quashing or setting aside the following decisions:

- i) The order of the Maori Land Court removing the applicant (Alexander) from office as trustee on 14 July 1975.
- ii) That part of the order of the Appellate Court of 12 August 1976 which directed the trustees to execute a new lease; the part of the Appellate Court order which

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reinstated the applicant as trustee was not attacked.

iii) The order of the Maori Land Court made on 6 December 1977 removing the applicant as trustee.

Note that with respect to the first and third points they were lodged together in one application. All Counsel agreed that if the Court found for the applicant on the second issue then the other application must also succeed. On that basis the Judge dealt with the second issue first.

Perhaps a point not made explicit enough in the paper was that when the Appellate Court altered the terms of the trust they did so pursuant to a Forestry Consultant's report. The Court had commissioned a Taupo consultant to report upon the lease. Upon receipt of his report the court using s438 proceeded to modify the terms of the trust in accord with the report. The consideration was to be fixed by the Forestry Consultant and the terms of the new lease were to be mutually settled by counsel for the beneficial owners and by counsel for the trustees. The Court's actions in that respect can be clearly seen as parental, what they were doing was investigating the merit of the original lease. The question arose as to whether or not the Court had jurisdiction to do that.

Counsel for the Appellate Court argued that the substituted trust order was within the Court's jurisdiction. He pointed to the traditional guardianship role the Court had had over Maori interests. Counsel also made three substantive submissions. It was first argued that the allegation of the applicant did not go to any question of jurisdiction because the Appellate Court had power to substitute a new trust order pursuant to s438(3)(b) which provides that in respect of a trust already constituted under that section the Court may -

" ... vary the terms of the trust by making a new trust order in substitution for the existing trust order."

Secondly it was argued as a matter of authority that the substituted trust order was in fact and in law a "variation" in terms of s438(3)(b). Finally it was submitted that if there was not

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a variation then what the Court had done amounted to a new trust order, a course authorized by subsection 3(c) of s438 in combination with s438 (2).

The Judge found that the order the Court made was in excess of jurisdiction because the terms of the lease necessarily usurped some of the powers of the trustees.

" It was for the trustees, and not for the Forestry consultant, to settle with the Company what the consideration of the lease was to be. The nature and substance of the order, therefore, was to deprive the trustees of their statutory right to administer the trust in accordance with the terms declared by the Maori Land Court, and to vest that power in delegates appointed by the Maori Appellate Court."

He goes on to say:

" The 1967 amendment represented Parliamentary recognition of the onward march of the Maori race towards equality with Europeans in the freedom of alienation of land. Alienation by individual owners is still restricted insofar as it requires confirmation by the Maori Land Court. But trustees for specified beneficial owners duly appointed under s438 may sell or lease Maori land on behalf of the beneficial owners without let or hindrance and that right is not to be qualified or destroyed by any form of well-meant judicial intervention, so long as it is exercised in terms of the empowering trust."

Mahon was probably concerned that the condition imposed by the Court was a backdoor way of re-introducing the old requirement of the Court's confirmation of s438 alienations - a feature which disappeared in 1967. His rationale amounts to a rule that the Court can impose no conditions that amount to it exercising any of its powers under Part XIX of the Act which it would use in confirming any other alienation of Maori land. Subsection 7 makes it plain that the Court is not to confirm any alienation by trustees in whom land is vested under the section. That rationale is certainly sustainable and underlies Mahon's judgement.

The problem is that that reasoning might seem to conflict with other provisions of the section which quite clearly give the Court powers to establish a trust <sup>the terms of which</sup> ~~that~~ they determine beforehand in a 'parental' way. Section 5 provides:

" The order made by the Court may confer on the trustee or trustees such powers, whether absolute or conditional, as the Court thinks fit, but, subject to any express limitations or restrictions, the trustees shall have all such powers and authorities as are necessary for the effective performance of the trusts."

Moreover subsection 3 would seem to give the Court powers easily interpreted as being capable of being exercised parentally by virtue of the fact that they can be exercised "at any time".

How then is the apparent conflict to be reconciled? With respect to Mahon, J. the writer believes his decision to be wrongly decided on the facts though his rationale is supportable to a certain extent.

One must look at exactly what the Court's powers under Part XIX are. Essentially the power of confirmation of an alienation is a review of a conditional contract the Maori has already entered into (conditional upon confirmation by the Court). The effect of subsection 7 is that the Court cannot impose any conditions that amount to confirmation of alienations - that is, a condition that makes any contract of alienation the trustees enter into conditional upon Court approval.

There is a difference between that situation and the one where the Court can regulate the activities of the trustees before the contract is entered by virtue of its power in defining the terms of the trust. To reduce the discussion so far into a proposition: the Court can regulate and impose conditions relating to the content of the contract of alienation the trustees ultimately enter into (subsections 3 and 5), however the Court cannot impose conditions that would amount to its confirming the transaction after the contract of alienation has been entered into.

The above seems the only way of reconciling Mahon's decision with the whole of the section. Unfortunately it is a reconciliation that accords with some of his reasoning but not with his decision on the facts.

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The writer is therefore somewhat wary of Mahon's decision. Nevertheless its effect might be to curb the over-zealousness the Court has shown in its use of the section. That is desirable to a certain extent however the basic objections to s438 remain and Mahon has done nothing (and could realistically have done next to nothing) to relieve those objections. Legislative action not judicial decision is the only answer.

However Mahon's decision is clearly a 'smack on the bottom' for the Maori Land Court and its effect might be to dampen the Court's attempts to introduce a revamped parental jurisdiction in other areas.

In re Puhatikotiko the Maori Appellate Court had appointed a Napier lawyer, Mr T Gallon, to represent the absent landowners and to contest the appeal by the proposing alienee. Counsel for the appellant claimed that counsel should also be appointed for those absentee owners favouring the sale. The Appellate Court refused to rule on the point and directed the appellant to go to the Supreme Court on that point so counsel moved the whole issue there.

Without a doubt Part XXIII has even less potential than s438 as a repository for the parental jurisdiction. If the Supreme Court was so keen to strike away much of the Court's parental efforts in s438 then it is not too hard to foresee the Court also doing that in this appeal. In addition the indications are that Mahon, J. will adjudicate upon the issue. If he follows his Ngatihine approach and looks at the history of Part XXIII he might readily and quite safely come to the conclusion that Part XXIII excludes the parental jurisdiction. To some extent that conclusion would be supported by the part of this paper that notes how Part XXIII powers have become more regulated and defined.

The chances are therefore that Russell's re-vamped parental jurisdiction will be over-ruled.

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Cynical observers have said that the recent happenings noted in the addendum could spell the end of the Maori Land Court as it is ~~at~~ present constituted. They argue, perhaps with some force, that an administrative matter such as the summoning of a meeting should never have to get as far as the Supreme Court, it is a symptom that the Maori Land Court is too far into its own little world. Ngatihine can readily be construed as supporting that cynicism. Further weight can be gained from the terms of reference of the Royal Commission which require it to look at the justifications for the Court's existence and to see whether or not the Court is properly performing its functions. Possibly another sign is the recent postponing of some scheduled appointments to the Maori Land Court bench. Certainly there are good grounds for the cynical observation noted.

However whatever is the outcome of the above the introduction of the Maori Affairs Bill into the House of Representatives recently and the fact that it will be going before a Select Committee means that at last some attempts are being made to find out how the Maori feel about the processes that regulate their land.

The writer closes with the observation that perhaps the Royal Commission and the Bill (which for the purposes of this paper <sup>proposes</sup> ~~makes~~ no change in the law) are simply political ways of taking the heat out of the Maori Land issue.

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