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To New Zealand for Land: The Timber Industry, Land Law, and Māori Dispossession in Nineteenth-Century New Zealand

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Abstract: This paper analyzes the influences of the timber industry on the development of the colony of New Zealand and its land law during the nineteenth century, especially in regard to the dispossession of the indigenous Maori population from the Kauri forests of the North Island. By conducting a case study of Mangakāhia v the New Zealand Timber Company, Ltd. (1882), this paper illustrates the manner by which Maori landowners were increasingly barred from full legal status by the New Zealand courts, and how the economic and political power of the timber industry allowed the Court of Appeals to essentially dismiss Mangakāhia's case out of hand.

On 22 December 1881 the New Zealand Court of Appeals began hearings for *Mangakāhia v the New Zealand Timber Company, Limited*.[1] The Timber Company had requested a demurrer[2] following the objection of Hāmiora Mangakāhia to the building of a railroad across his land at Whangapoua, near Auckland on the North Island.[3] According to the court records, Mangakāhia challenged the workers of the Timber Company for their alleged trespassing, and following several verbal and written warnings took legal action when they refused to leave. Mangakāhia's declaration was summarized in the trial record and described the nature of the ownership and origin of title that he held over the land in question, drawing reference from the Native Lands Act 1873. The declaration then summarized the action Mangakāhia had taken against the Timber Company before concluding with the claims of the plaintiff—£500 and an injunction against the Company.[4] However, by the end of January the case was over. The demurrer was granted, and the Timber Company won a

[1] Mangakāhia v. N.Z. Timber Co., 1882 NZ App. 345 (1884 Vol. 2).
[2] Demurrer: a formal objection or appeal to a legal pleading. Jonathan Law and Elizabeth A. Martin, *A Dictionary of Law,* s.v. "demur" (Oxford, UK: Oxford University Press, 2018).
[3] Note: the author possesses no knowledge of the Māori language, and therefore has used English terminology or third-party translations when available. Any resulting misinterpretations are entirely the fault of the author.
[4] Mangakāhia v. N.Z. Timber Co., 346.

surprisingly simple legal victory against the strongest Māori landholder in the region.

If the title claimed by Mangakāhia over the land was true and complied with the current law of New Zealand, then why was the demurrer allowed for the Company on 24 January 1882? *Mangakāhia v The New Zealand Timber Company* was by no means a landmark case in the legal history of New Zealand. No significant attention was drawn to the outcome by contemporary newspapers nor modern historical analysis, and it is clear from the New Zealand Law Reports that the trial itself was significantly shorter in length than many others.[5] However, the sheer speed and efficiency of the trial demonstrated how New Zealand law had evolved from the days of first contact and early settlement, through the 1840 Treaty of Waitangi and formal colonization, to the multiple Native Lands Acts and related legislation of the late nineteenth century. This paper will argue, as shown by the statements of the Timber Company, that by the 1880s New Zealand's land law had developed in a manner which made it very easy to deny property rights to the Indigenous Māori, especially when the timber industry was involved.

For years, the understanding of land law in New Zealand developed around a debate that echoed in other common law societies—the relationship between force and law. Scholars such as Stuart Banner, in his overview of Indigenous dispossessions in the Pacific world, argued that the law was the chief engine of dispossession in New Zealand.[6] Despite occasional conflict, initial contact between the British and the Indigenous inhabitants of New Zealand was quite favourable, and the agricultural basis of Māori society gave them a perceived legal equality with European settlers.[7] The question of the existence of Māori title to their land was indisputable, and therefore dispossession needed to take place via the law.

This assessment was challenged by others, such as James Belich, who argued along an older vein that it was not until the Māori lost their allegedly equal standing with the British through armed conflict that true dispossession took place. Because of the primacy that modern western society has placed on the law, Belich stated it was inevitable that "the legal approach often wins out" in the debate surrounding factors of colonization. As such, other approaches are needed to appreciate the bigger picture in which colonialism and dispossession actually took place.

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[5] As compared to other cases in the NZ Law Reports, 1884.

[6] Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press, 2007), *Conquest by Contract* and *Conquest by Land Reform.*

[7] Banner, *Possessing the Pacific*, 60.

For example, while the 1865 creation of the New Zealand Native Land Court is often cited as a central tool of Māori dispossession, Belich noted that its opening coincided with the arrival of the first of nearly 18,000 British soldiers who fought in the New Zealand Wars of the late nineteenth century.[8] Although it is undeniable that the influences of law and force continue to have a central role in dispossession, more recent scholarship has problematized this binary, especially in the wider discussion of Indigenous dispossession around the common law world.

In *Unmaking Native Space*, Paige Raibmon argued that the actions of individual colonists, "the microtechniques of dispossession," played a major role in Indigenous land-takings in colonial British Columbia. While many of her specific examples remain outside the scope of this paper, her broader statements remain equally as valid in the New Zealand context as they were in North America. Raibmon argued that "breaches of the spirit and letter of colonial laws were not so much colonial anomalies as they were constituent elements of colonialism," and therefore we must turn to other "discrete practices on the ground" to identify the 'true' relationship between the various factors of dispossession.[9] Unfortunately, references to such 'discrete practices' are as difficult to come by in New Zealand as in British Columbia. However, although written law was as easily ignored in the New Zealand example, the dismissal of Mangakāhia's charges against the New Zealand Timber Company showed that the spirit and letter of the law was not, in fact, breached. Instead, the Company made use of the flexible and contradictory nature of the common law to receive a favourable outcome to the hearing, working entirely within a legal framework that had evolved in a manner which aided dispossession.

Another major factor in the discussion of Māori dispossession is that of language. In 2011 Tony Ballantyne argued that the European colonial system was at its core a "culture of paper," and the increasing primacy of the written word and the subsequent emphasis on literacy irreparably altered the medium of historical discourse in colonial New Zealand, as well as the balance of power between the colonizers and the

[8] James Belich, "Review of *Possessing the Pacific* by Stuart Banner," *American Historical Review* 113 No.5 (2008): 1473.

[9] Paige Raibmon, "Unmaking Native Space: A Geneaology of Indian Policy, Settler Practice, and the Microtechniques of Dispossession," in *The Power of Promise: Rethinking Indian Treaties in the Pacific Northwest*, ed. Alexandra Harmon (U of Washington Press, 2008), 67.

colonized.[10] This was especially true in regard to written law, specifically the 1840 Treaty of Waitangi (Te Tiriti o Waitangi) and the various legislative acts which will be discussed later in further detail. The primacy of the written word was also keenly felt in the context of the Native Land Court,[11] which was one of the primary tools of dispossession in New Zealand from its founding in 1865. Ballantyne argued that the European foundations of evidence in the Court, the practices of "map-making, inscription, and formal archivization, that underwrote state-sponsored geographic knowledge," inherently excluded the Māori traditions of "naming and claiming,"[12] and is therefore a very similar implicit argument to that presented by Stuart Banner in *Possessing the Pacific.* The primacy of language within the colonial system clearly disadvantaged even those Māori who had grown up within that system, as shown by Mangakāhia's experience with the New Zealand Court of Appeals.

In recent decades the discussion of Indigenous dispossession in the common law world has expanded beyond the legislation-force dichotomy that dominated it for so long, thus making room for the much more nuanced discussion of the practices of individual settlers and Indigenous peoples, language, and the medium of history itself. While this paper will remain focused on the legislative, legal, and economic forces of dispossession, I will not be ignoring the issues brought up by Ballantyne and others. As previously mentioned, issues of language are quite prominent within the discussion of legal dispossession, whether in the context of the Treaty of Waitangi, the Native Land Courts, or elsewhere. It remains important to recognize that the works of Banner, Belich and Ballantyne are unable to provide a complete analysis of this complex subject on their own, and it remains the work of current and future scholars to continue to problematize the topic of nineteenth-century Māori dispossession. In the words of Matthew Palmer, writing on the Treaty of Waitangi, "it is time to reassess whether New Zealand wishes to clarify the meaning of the Treaty or, at least to clarify who should have the authority to clarify that meaning."[13] As will be shown, the question of clarity is a recurring theme in the legal history of New Zealand, from the

[10] Tony Ballantyne, "Paper, Pen, and Print: The Transformation of the Kai Tahu Knowledge Order," *Comparative Studies in Society and History* 53 no. 2 (April 2011): 236.

[11] As of 1954 the Māori Land Court.

[12] Ballantyne, "Paper, Pen, and Print," 255.

[13] Matthew Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington: Victoria University Press, 2008), 18.

1840 Treaty of Waitangi, the beginnings of 'formal' colonization, and Mangakāhia's legal defeat in 1882.

Despite direct reference to several pieces of mid-Victorian legislation as legal precedent, the historical context of *Mangakāhia v The New Zealand Timber Company* dates to the earliest history of colonial New Zealand. European first contact with New Zealand occurred in 1642, when Dutch explorer Abel Tasman made a brief stop on the islands. Tasman's short visit proved quite hostile, with four of his crew and an unknown number of Māori killed, but his 'discovery' put New Zealand on the map for future European explorers. [14] Over a century passed before the next recorded European explorer, James Cook, arrived in New Zealand in 1769. Both explorers and their crews were awestruck at what they viewed to be a very industrious civilization with relatively advanced agricultural practices compared to Indigenous peoples elsewhere.[15] In addition to Māori agriculture, Cook made another observation during his time in New Zealand, one that would have long-lasting consequences—the kauri.

The kauri, or *Agathis Australis*, is a very large species of tree native to the Coromandel Peninsula of New Zealand's North Island.[16] Capable of reaching immense sizes, Cook described the kauri as providing "such masts as no country in Europe can produce."[17] However, it was many years before any official notice was taken of this observation, and it was not until the early nineteenth century that colonization and industrial development began to take off in any organized manner.[18] As for timber specifically, even the Royal Navy's ever-growing thirst for masts, spars, and other high-quality woodwork was not enough to justify sailing to the far side of the world, especially during a lengthy period of war against France.[19] Despite the lengthy delay in official action by the navy on the question of New Zealand timber, small independent contractors were quick to make their mark on the fledgling trade. Although the days of even a small-scale domestic timber industry were far ahead, as the neighbouring colony of New South Wales expanded, individual ships

[14] "A Brief History of New Zealand," New Zealand Immigration, https://www.newzealandnow.govt.nz/living-in-nz/history-government/a-brief-history (accessed November 30 2018).
[15] Banner, *Possessing the Pacific*, 48.
[16] John Halkett and E.V. Sale, *The World of the Kauri* (Auckland: Reed Methuen Publishers, 1986), 1.
[17] Michael Roche, *History of New Zealand Forestry* (Wellington: G.P. Books, 1990), 14.
[18] E.V. Sale, *Quest for the Kauri: Forest Giants and Where to Find Them* (Wellington: A.H. and A.W. Reed, 1978), 14.
[19] Robert G. Albion, *Forests and Sea Power: The Timber Problem of the Royal Navy 1652-1862* (Cambridge: Harvard University Press, 1926), 326.

came in increasing numbers to New Zealand to gather kauri. These voyages faced a rocky start, however, following one of the most infamous episodes in New Zealand's history—the *Boyd* Massacre.

In December of 1809, the merchant brig *Boyd* anchored off the northern coast of New Zealand, returning to England after delivering a load of transported convicts to Australia. In an effort to maximize profit from the trip, Captain John Thompson decided to fill his empty hold with a load of kauri spars for the trip back to England, which even by the early 1800s were renowned in Europe for their high quality. He also provided transport back to New Zealand for several Māori who were visiting Australia, including Te Ara, the son of a chief.[20] Specific accounts vary, ranging from refusing to work for his passage to minor theft, but regardless of the reason, Te Ara was flogged by the captain during the voyage. Te Ara desired revenge and directed Captain Thompson to land for kauri near the home of his tribe, whom he rallied to his defence. The captain and several of his officers and men disembarked to search for suitable wood with assistance from the local Māori, but when they attempted to turn back due to "fears of increasing Māori anger,"[21] they were slaughtered by the Māori, who then took their clothing, returned to the ship, and killed the majority of the crew and passengers. The reports of the five survivors and physical evidence suggest widespread cannibalism took place at the scene of the massacre, terrifying the European settlers who heard the news.[22] Events such as the *Boyd* Massacre were by no means common occurrence in New Zealand, but fears of continued troubles with the Māori put a stop to major developments within the New Zealand timber industry for many years. Small-scale practices continued as they had before the *Boyd* Massacre, but larger ventures were put on hold until 1814, when the newly-founded and short-lived New South Wales and New Zealand Company sent two ships to gather kauri spars on the east coast of the Coromandel Peninsula.[23]

Although an anecdote reporting that the Royal Navy used kauri spars at the 1805 Battle of Trafalgar is likely false, New Zealand spars would have entered European navies by the end of the Napoleonic Wars (1803-1815).[24] However, even when large-scale trade began again, the

[20] Kelly Chaves, "Great Violence Has Been Done: The Collision of Māori Culture and British Seafaring Culture 1803-1817," *The Great Circle* 29 No. 1 (2007), 33.
[21] Chaves, "Great Violence Has Been Done," 22.
[22] "The Boyd," *The Sydney Gazette,* 8 May 1832, 4.
[23] Thomas Simpson, *Kauri to Radiata: Origin and Expansion of the Timber Industry of New Zealand* (Auckland: Hodder and Stoughton, 1973), 23.
[24] Roche, *History of New Zealand Forestry*, 15.

Royal Navy was hesitant to commit too many resources into so distant a market.[25] Despite this, the pressures placed upon the Navy by the Napoleonic Wars and the necessities of the *Pax Britannica*, required more timber than Europe could provide, necessitating a resumption of trade with New Zealand. The first major Royal Navy-sponsored expedition for kauri took place in 1820, when HMS *Dromedary* and the supply ship *Coromandel* travelled to New Zealand. However, due to confusion between species it is almost certain that the majority of wood collected was actually kahikatea, a significantly inferior wood for naval purposes.[26] This mistake, combined with the enormous cost of the voyage itself (estimated fifty percent higher than spars of equal quality from North America),[27] convinced the Admiralty that New Zealand timber was more trouble than it was worth, and although smaller voyages continued, the lack of interest by the Royal Navy temporarily ended large-scale interest in kauri.

Trade began to flourish, however. Regardless of the difficulties, the Navy's need for timber would remain unquenched until the development of iron warships in the 1860s.[28] Additionally, increased British settlement in New Zealand had sparked a boom in the 'domestic' timber market, and mills began springing up on the North Island. By 1826, a small timber mill and shipyard had been founded at Horeke, one of the first established British settlements in New Zealand.[29] The settlers' safety had been guaranteed by one of the local chiefs, a necessity in a period of fierce intertribal warfare. This early settlement bore no comparison to the later, formal colonization of New Zealand after 1840, nor to the necessities of land acquisition suggested by Stuart Banner.[30] However, given its extremely limited nature and the evident consent of the local chiefs, it is unlikely that these early settlers felt that any necessity to obtain formal title to the land from the Māori.

It was in this manner that the timber industry became the foundation of British colonial efforts in New Zealand. Cook's initial observations of the quantity and quality of kauri wood sparked an initial interest in an attempt to fill the timber requirements of the Royal Navy, allowing for the creation of a fledgling industry that was integral to the first British

[25] Michael Roche, "Forest Conservation for Royal Navy Timber Supplies in New Zealand 1840-1841," *The Mariner's Mirror* 73 no. 3 (1987): 261.
[26] Roche, *History of New Zealand Forestry*, 16.
[27] Ibid*,* 17.
[28] Albion, *Forests and Sea Power,* 403.
[29] Halkett and Sale, *The World of the Kauri*, 45.
[30] Banner, *Possessing the Pacific*, 72.

settlements in New Zealand. Despite episodes such as the *Boyd* Massacre, early European contact with the Māori generally left the settlers with a very favourable disposition towards the native New Zealand population, which greatly influenced New Zealand land policy following the Treaty of Waitangi. The firm establishment of the New Zealand timber industry would lead to rapid deforestation within a few decades, putting increasing pressure on to the timber companies to acquire more land—often to the detriment of the Māori.

The 1840 Treaty of Waitangi remains one of the most significant documents in the colonial history of New Zealand. Its groundwork was laid as early as 1831, when the chiefs of New Zealand addressed a letter to King William IV requesting assistance against the French in the region.[31] The chiefs also expressed concerns regarding some of the British settlers in the area, requesting the king "be angry with them that they may be obedient, lest the anger of the people of this land fall upon them."[32] Although no direct examples are mentioned in the letter, it is likely that the Māori were concerned with events such as the *Boyd* Massacre flaring up into open conflict, as they nearly did in 1809 and again later against the French. One of the key aspects of this letter was the Māori acknowledgement of the land as their only 'real' source of wealth within the European context. Special attention is paid in this letter to the timber and flax industries, which are acknowledged, along with pork and potatoes as tradable goods, "and then we see the property of Europeans. It is only the land which is liberal towards [the Māori]."[33] This explicit acknowledgement of the importance of alienable land, alongside the specific mention of timber and flax, very clearly shows the importance that these issues held in the minds of both the British and the Māori years before an official treaty.

The Treaty of Waitangi was preceded by the New Zealand Declaration of Independence in 1835. Written at the encouragement of James Busby, appointed in 1831 as the King's Resident in New Zealand, the Declaration established a confederation—the "United Tribes of New Zealand"—confirmed Māori sovereignty over the whole of New Zealand, and requested the king's continued protection over them.[34] The Declaration was acknowledged by Lord Glenelg, Secretary of State for

[31] Colonial Office, "Correspondence with the Secretary of State Relative to New Zealand," (London: W. Clowes and Sons, 1840), 7.
[32] Colonial Office, "Correspondence with the Secretary of State Relative to New Zealand," 7.
[33] Ibid.
[34] Ibid.

the Colonies, who was enthusiastic that the Māori showed "a due regard to the just rights of others and to the interests of His Majesty's subjects."[35] The Declaration of Independence proved to have very little long-term impact, as it was overshadowed in importance by the Treaty of Waitangi five years later. Its most important effect was the official recognition of Māori sovereignty over New Zealand, which was formally surrendered to Britain in Waitangi. This would prove to be the source of many problems in the years ahead.

The controversy regarding the Treaty of Waitangi hearkens back to discussion of language in colonial systems emphasized by Tony Ballantyne. When signed in 1840, only a very small number of the approximately 500 chiefs signed an English copy of the treaty. The rest signed in Māori, a document which Claudia Orange has shown differed substantially from the English version.[36] Orange described the ensuing confusion as a "war of sovereignty," as colonized and colonizer each tried to enforce their own interpretation of what the treaty actually meant. In fact, the translation issues surrounding the treaty caused so much discord that it remains impossible to talk about a single Māori understanding of what the treaty conveyed.[37] This turbulent period continued until the 1860s, when the colonial government assumed direct control of Māori affairs, assigning legal equivalence between the Māori and European settlers.

The central issue that the treaty raised was the same issue that it inherited from the Declaration of Independence five years earlier—that of sovereignty. It is evident from the modern translation of Sir Hugh Kawharu (scholar and chief of the Ngāti Whātua until his death in 2006), that the original Māori translation of the treaty was very different from the English text. In a literal translation of the Māori text, he highlighted an issue with specific definitions in article one. The English text reads:

> The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation *all the rights and powers of Sovereignty* which the said Confederation or Individual Chiefs respectively exercise or possess, or may be

[35] Letter from Lord Glenelg to Maj-Gen. Bourke, New South Wales (25 May 1836), in *Facsimiles of the Declaration of Independence and the Treaty of Waitangi* (Wellington: George Didsbury, 1877), 5.
[36] Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen and Unwin, 1987), 1.
[37] Orange, *The Treaty of Waitangi*, 3.

> supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof (Author's emphasis).[38]

However, instead of "sovereignty," the Māori text used the word "kawanatanga," which roughly translates as "government" or "governance." Kawharu made specific note that "there could be no possibility of the Māori signatories having any understanding of government in the sense of 'sovereignty' … on the basis of experience or cultural precedent."[39]

It is here that we get into a deeper analysis of Ballantyne's discussion of the role that language played in colonial systems. To the Europeans the wording of the treaty was set in stone, although the common law remained flexible enough that the exact interpretation could change from court-to-court, a phenomenon which almost always benefitted the colonial power.[40] For the Māori, their plethora of understandings as to the meaning of the treaty created a massive imbalance in the negotiating positions of the two sides, effectively allowing the colonial government to dominate the debate surrounding the treaty for much of the nineteenth and twentieth centuries.[41] The effective control over the language of sovereignty that the treaty provided the Europeans was something highly emphasized in Mattthew Palmer's *The Treaty of Waitangi*, in which he argued that the treaty needs to be redefined in a manner that allows "the prospering of Māori as Māori," and not simply as the lesser partners of a long standing colonial system.[42] The fact that such inequalities still exist between the various understandings of the treaty nearly 200 years after its signing emphasizes the very real issues Waitangi and its interpretations caused for the Māori over the past centuries and today.

The controversy over sovereignty created by Waitangi remains a major focus of New Zealand land law to this day, but by 1860 the question had moved past sovereignty and became one of official, legal title. As Stuart Banner argued, due to British understandings of Māori property law it was very unlikely that *terra nullius* would become official policy in New Zealand as it had in Australia.[43] Instead of deciding whether or not the Māori possessed title to their land, the question became: how much of

[38] *The Treaty of Waitangi,* trans. by Dr. Sir. Hugh Kawharu, 1.
[39] *The Treaty of Waitangi*, 2.
[40] Orange, *The Treaty of Waitangi*, 3.
[41] Ibid, 4.
[42] Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, 361.
[43] Banner, *Possessing the Pacific*, 60.

New Zealand *did* they in fact possess? This was a fairly complicated question. The agricultural basis of much of Māori society suggested a more settled lifestyle than elsewhere in the British colonial project. Additionally, there were very strong reasons for the settlers to desire a confirmation of complete Māori title, ranging from humanitarian concerns to settlers who needed such proof of ownership to justify their own land purchases.

Conversely, many settlers complained about vast tracts of 'waste land,' which they believed the Māori to be squandering by not actively using them.[44] John Locke's conception of property rights, which formed the basis of the British understanding of land ownership, held that it was the labour that is put into the land that defines ownership, and this labour was understood in the sense of European agriculture.[45] Despite the similarities of the two agricultural systems that impressed early European explorers, once colonization began in earnest it became much easier for the public imagination to dismiss what were seen as inferior Māori agricultural practices. Additionally, in early colonial New Zealand the Māori possessed a much higher percentage of the land for their population density than did the British, which in the vein of Locke was seen as unfair:

> And will any one say he had no right to those Acorns or Apples he thus appropriated, because he had not the consent of all Mankind to make them his? ... If such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him.[46]

Many government officials had quite different views of how Māori land ownership should translate into the British system. In Barbara Arneil's *The Wild Indian's Venison,* she stated that the Crown's view of Indigenous title in eighteenth-century North America was directly opposed to the Lockian notions held by many settlers, and believed that "the aboriginal peoples of North America are sovereign, self-governing nations with exclusive jurisdiction over and ownership of their territories."[47] Favourable correspondence between the Māori and the

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[44] Banner, *Possessing the Pacific,* 64.
[45] Barbara Arneil, "The Wild Indian's Venison: Locke's Theory of Property and English Colonialism in America," *Political Studies* XLIV (1996): 62.
[46] John Locke, *Two Treatises of Government* (Sixth Edition, London, 1764), 196-197, https://www.gale.com/primary-sources/eighteenth-century-collections-online (accessed April 30 2019).
[47] Arneil, "The Wild Indian's Venison," 61.

British government in 1840 suggests that this positive sentiment continued into nineteenth-century New Zealand,[48] but unfortunately little concrete evidence of Parliament's stance on the Māori remains to validate this. The original English text of Waitangi was largely silent on the issue of land rights, and it proved to be a question that saw significant differences in opinion from settlers, the local government, and the Colonial Office, especially as the century continued.[49] Although the eventual decision officially sided with recognition of complete title for the Māori, confusion arising from miscommunications in Waitangi as well as differing conceptions of property rights necessitated more definitive legislation.

Such legislation took a surprisingly long time to come about. Even once acts related to land purchase and native title began appearing, constant amendments and revisions prolonged the confusion for many years after Waitangi. However, despite such confusion, specific land use rights began to factor heavily into these first pieces of property law, especially relating to "purchase of the right of cutting timber or other trees."[50] This early focus on codifying logging rights in New Zealand emphasizes the importance of the timber industry to the colony's economy, and by extension to its law and governance. Additionally, the Native Land Purchase Act 1846 also makes specific mention of the Crown's sole right to purchase land directly from the Māori – all other purchases were deemed illegal.[51] The first major piece of legislation regarding purchase of Māori land, and also the first specific act mentioned in *Mangakāhia v The New Zealand Timber Company*, was the Native Lands Act 1862, "An Act to provide for the ascertainment of the Ownership of Native Lands and for granting Certificates of Title thereto …"[52] The Act's preamble acknowledged the absence of definitive legislation in the twenty-two years since Waitangi but failed to fully define the relationship between existing native land title and that which existed under the British system, necessitating further legislation over the years to come. Unfortunately, despite the attempt of a legal reckoning, at over two decades after Waitangi it was much too late to avoid bloodshed.

[48] Colonial Office, "Correspondence with the Secretary of State Relative to New Zealand," 7.
[49] Banner, *Possessing the Pacific*, 60.
[50] New Zealand, *Native Land Purchase Act, 10 Victoriae 1846*, no. 19.
[51] *Native Land Purchase Act, 10 Victoriae 1*846, no. 19.
[52] New Zealand, *Native Lands Act, 26 Victoriae 1862*, no. 42.

For much of the nineteenth century, many of the Māori tribes engaged in some form of warfare, either against each other or the British.[53] The Māori were by no means a peaceful people even before European contact, but increased trade with the Europeans in the late 1700s eventually introduced modern weapons to the islands, sparking a period of fierce intertribal conflict known as the Musket Wars. Officially, the wars lasted from 1807-1842, but as many of the individual conflicts bled over from an earlier time, it is hard to tell for certain. For this reason, many historians dispute the name 'Musket Wars,' as the very name suggests a larger European role in the outbreak of war. However, it is indisputable that European contact and trade made the wars bloodier and more destructive than they otherwise would have been.[54] The Musket Wars were also directly responsible for much of the early legislation post-Waitangi, as the Arms Importation Act 1845 was passed expressly to put an end to the import of the weapons that 'fueled' the Musket Wars.[55]

The New Zealand Wars, on the other hand, were much more directly related to the issue of property rights. The first confirmed action of the conflict was the Wairau Affray on the South Island, which was sparked by an attempted forced clearance of Māori by members of the New Zealand Company. The Company was in possession of a deed to the land (which was later confirmed to be fake), and after an attempted arrest of two of the local chiefs fighting broke out, leaving over twenty settlers and four to six Māori dead. [56] This was the only conflict of the Wars to take place on the South Island, with the vast majority of the fighting taking place in the North where land was in much higher demand, the European and Māori populations in closer contact, and therefore potential for conflict much higher.

Much like the Musket Wars that preceded them, the New Zealand Wars were a collection of smaller conflicts pitting various Māori tribes against one another. They lasted roughly from 1845-1872, but unlike the previous intertribal wars featured a heavy British presence involving over 18,000 regular soldiers, supported by colonial militia and several pro-

[53] James Belich, *New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland University Press, 2015), 17.
[54] New Zealand Ministry for Culture and Heritage, "Musket Wars," *New Zealand History,* https://nzhistory.govt.nz/war/new-zealands-19th-century-wars/the-musket-wars (accessed on Nov. 30 2018).
[55] New Zealand, *Arms Importation Act, 9 Victoriae 1*845, no. 1. It should go without saying that this act did not end the import of firearms to New Zealand.
[56] Belich, *New Zealand Wars*, 21.

British Māori tribes.[57] The Wars' origins in land tensions and the following punitive land seizures by the government were critical to the development of land law and legal precedent in New Zealand during the late nineteenth century. Additionally, as argued by Belich, the Wars played a much more direct role in the dispossession of Māori than any previous or forthcoming legal action, as without the power imbalance created by such a large-scale conflict, future legislation would not have been enforceable on the ground.[58] The 'successes' of *raupatu* and the Native Land Courts would suggest that this was very much the case.

The government land seizure of the 1860s was the single most significant transfer of land in New Zealand's colonial history. Referred to by the Māori *raupatu* (loosely 'confiscation' or 'seizure'), the dual goals were to punish the rebellious Māori tribes while simultaneously generating enough revenue to pay off the debts of nearly twenty years of guerilla warfare.[59] The legislation was passed as part of the New Zealand Settlements Act 1863, which despite a length of only six pages managed to 'legally' acquire over three million acres of land, roughly four percent of New Zealand and fifteen percent of the land remaining in Māori possession.[60] The legislation's enduring controversy stems from the indiscriminate seizures from 'rebel' and 'loyal' Māori alike, as it was deemed cheaper to simply pay compensation to the latter who found themselves dispossessed.[61] The controversies and unrest surrounding the seizures in part led to the founding of the Native Land Court.

If the *raupatu* seizures were the single most significant transfer of Māori land, the Native Land Court was the most important tool used by the New Zealand government to 'verify' Māori land claims within the British colonial system. This 'individualization of title' was seen in a similar humanitarian context to the initial British annexation of New Zealand, and many Māori chiefs, even those who rebelled during the Wars, expressed favourable sentiment towards the (perceived) confirmation of their title. [62] The court was established by the Native Lands Act 1865, which required that the court verify and confirm title to Māori land *before* it could be leased or sold.[63] When the court first sat in

[57] Ibid, 15.
[58] Belich, review of *Possessing the Pacific*, 1473.
[59] Bryan Gilling, "Raupatu: The Punitive Confiscation of Māori Land in the 1860s," in *Land and Freedom* (1999), 121.
[60] Gilling, "Raupatu," 117.
[61] Ibid, 120.
[62] Banner, *Possessing the Pacific*, 85.
[63] New Zealand, *Native Lands Act, 29 Victoriae 1865*, no. 71.

1866, two things quickly became clear. First, the court itself was horribly inefficient and made faulty judgments in the vast majority of cases, either awarding land to the 'wrong' person or simply sucking the money out of the Māori landowners through the lengthy and expensive process. Secondly, as Stuart Banner argued, "the Native Land Court was … the conduit for the flow of a vast quantity of land from Māori to British owners over the rest of the century."[64] Because the costs of the acquisition of title were so high and usually fell solely on the Māori, land was nearly always sold at a fraction of its actual worth, pushing many Māori further into landlessness and poverty.

With the exception of the experiences of the plaintiff, this largely set the stage for the legal climate that would dictate the outcome of *Mangakāhia v The New Zealand Timber Company*. Hāmiora Mangakāhia had a long history of fighting for Māori property rights, and his own life was in effect a summary of the development of nineteenth-century property law in New Zealand. Born around 1838, Mangakāhia grew up in a post-contact world, immersed from birth in the rapidly-changing economic, cultural, and political world that was early colonial New Zealand. His family originated from Whangapoua but had to flee during the inter-tribal violence of the Musket Wars.[65] Nevertheless, he eventually returned to the land, tracing his title back to his ancestors and his ties to the local tribe. Hāmiora's distrust of the British was inherited from his brother, Mohi, who had lost much of his land to settlers, largely due to the failings of the Native Land Court. In an effort to curb its faults, Mohi eventually became an agent of the Court before finding his way into Māori politics, where he was expected to stand for election to one of the Māori seats in Parliament in 1876. However, his death in 1875 caused Hāmiora to inherit his brother's problems, including his troubles with land-hungry speculators.

These troubles were centered around the specific land in question, land that would eventually be fought over in court. The Mangakāhia land at Whangapoua was heavily forested, and by the late nineteenth century was one of the few substantial kauri forests remaining.[66] Despite the initial lack of interest in an international kauri trade, scattered shipbuilding had exploded into a massive domestic industry by the 1850s.[67] An 1861 census

[64] Banner, *Possessing the Pacific,* 103.
[65] Angela Ballara, "Mangakahia, Hamiora," *The Dictionary of New Zealand Biography*, 1993, https://teara.govt.nz/en/biographies/2m29/mangakahia-hamiora (accessed Nov. 30 2018).
[66] Halkett and Sale, *The World of the Kauri,* 53.
[67] Roche, *History of New Zealand Forestry*, 39.

estimated that over 85% of the 6,000 buildings in Auckland were constructed of kauri,[68] and by the early 1880s there were over forty operating sawmills producing nearly 260,000 cubic meters of cut kauri annually.[69] The steep growth of the kauri industry was enormously detrimental to the forests of New Zealand, with less than 10% of the original kauri forests left standing at the turn of the twentieth century.[70] Even by 1881 the kauri shortage would have been felt very acutely by the various timber companies and traders in the region, necessitating the acquisition of Mangakāhia's lands.

The hearing itself was held in Auckland, relatively close to the lands held by Mangakāhia. Although both parties possessed solicitors for the trial, it is clear from the records and the wording of the original declaration that Mangakāhia possessed a fairly complete understanding of the English judicial system of the time, making direct references to major pieces of legislation that bore relevance to the issue at hand.[71] This was further enhanced by the legal and political background that Mangakāhia possessed through his brother, suggesting a much greater knowledge of the intricacies of late nineteenth-century England land law than the average Māori or European would have possessed.

The most heavily cited Act during the trial was the Native Lands Act 1873, which was referenced frequently in both Mangakāhia's original declaration and the demurrer hearings. The importance of the 1873 Act largely relates to how it handled the pre-existing legislation regarding Māori ownership. In section 4, it repealed the five previous Native Lands Acts of 1865, 1867, 1868, 1869, 1870, as well as section seventy-three of the Constitution Act. However, the 1873 Act did *not,* in fact, invalidate any pre-existing rights to the land, as its stated goal was:

> to establish a system by which the Natives shall be enabled at a less cost to have their surplus land surveyed, their titles thereto ascertained and recorded, and the transfer and dealings relating thereto facilitated: And whereas it is of the highest importance that a roll should be prepared of the Native land throughout the Colony, showing as accurately as possible the extent and ownership thereof, with a view of assuring to the Natives without any doubt whatever a sufficiency of their land for their support and maintenance, as also for the purpose of establishing

[68] Halkett and Sale, *The World of the Kauri*, 52.
[69] Ibid, 53.
[70] Ibid, 204.
[71] Mangakāhia v. N.Z. Timber Co., 1882 NZ App. 345 (1884 Vol. 2).

> endowments for their permanent general benefit from out of such land.[72]

With this goal in mind, it was no surprise that Mangakāhia's original declaration based his claim to ownership on the 1873 Act, also making reference to the decision by the Native Land Court on 11 December 1879, when they "…caused a memorial of ownership to be inscribed, signed and sealed … in favor of the plaintiffs, as owners of the said land, and which said memorial of ownership is still in full force and effect…"[73]

Given this statement, it would seem foolish for the Timber Company to claim that Mangakāhia's possession of the land was not the central issue of the hearing, but that is exactly what they did. The Timber Company argued that the issue at hand was one of right of entry, rather than possession of the land itself: "in order to have the right to enter…[and thus the right to *deny* entry to others]… [Mangakāhia] must have the legal estate" to the land in question.[74] They continued this train of thought, arguing that despite the ruling of the Native Land Court, legal estate existed only once native title has been extinguished, as "the estate, according to native custom, is one which a Court of Law cannot define", and thus the estate for Mangakāhia's land "would appear to be in the Crown *jure gentium.*"[75] Simply put, despite the costs and troubles of working through the Native Land Court, all Mangakāhia had achieved was the right to sell his land, nothing more.

The plaintiffs' rebuttal suggests that Mangakāhia recognized that this argument was coming and had expressly worded the initial declaration to guard against it. Unfortunately for Mangakāhia, his argument was hypothetical rather than based on precedent, as was the Timber Company's. More to the point, the Timber Company based their argument around a slew of previous case law,[76] whereas Mangakāhia based his on an interpretation of the Native Rights Act 1865 and the Native Lands Act 1873. Specifically, he stated that if he had chosen to lease his land, as per section 48 of the 1873 Act, the lessee would have "all the incidents of ownership,"[77] including right of entry, suggesting that those in possession of memorial of ownership "should be treated as the

[72] New Zealand, *Native Lands Act, 37 Victoriae 1873*, no. 56.
[73] Mangakāhia v. N.Z. Timber Co., 1882 NZ App. 346 (1884 Vol. 2).
[74] Mangakāhia v. N.Z. Timber Co., 1882 NZ App. 347 (1884 Vol. 2).
[75] Mangakāhia v. N.Z. Timber Co., 1882 NZ App. 348 (1884 Vol. 2).
[76] Mangakāhia v. N.Z. Timber Co., 1882 NZ App. 345 (1884 Vol. 2).
[77] Mangakāhia v. N.Z. Timber Co., 1882 NZ App. 351 (1884 Vol. 2).

owners of a fee simple."[78] Such a suggestion, they claimed, was the "whole point" of the Native Rights Act 1865, which clearly stated legal equivalence between the Māori and European-born settlers in the colony –"every person of the Māori race within the Colony of New Zealand whether born before or since New Zealand became a dependency of Great Britain shall be taken and deemed to be a natural born subject of Her Majesty to all intents and purposes whatsoever."[79] Using such a literal interpretation of the Act, it could easily be argued that there was no legal difference between Māori land held in traditional tenure and land held in British fee simple.

The Timber Company's final statement in the trial record evidently left no further room for debate, as the demurrer was allowed. Arguing the difference between 'title' and 'ownership,' they dismissed the Native Rights Act 1865 as "merely declaratory," recognizing similarities but not equivalencies between Māori and European land rights.[80] Their entire argument can be summed up by the following claim: Mangakāhia's declaration was based on Māori concepts of land rights, and despite his claim that the Native Rights Act 1865 declared equivalency between English and Māori law, English concepts of entry rights did not exist under Māori land law and therefore, title based on that law *could not* be used as the foundation of a trespassing declaration. In effect, the Timber Company did not dispute Mangakāhia's claim to the land, they simply disputed his ability to evict them, and the court agreed.

Mangakāhia v The New Zealand Timber Company was decided in barely a month, with only three statements being presented to the court. But those three statements provide a clear summary of conceptions of property law in late nineteenth century New Zealand in a much more practical manner than the legislative acts themselves. Based on the development of land law in New Zealand from discovery through to the 1880s, it was all-but inevitable that Mangakāhia's declaration was successfully appealed. Initial contact between Europeans and the Māori beginning with Tasman, Cook, and later generations of settlers suggested similarities between agricultural practices in English and Māori society, and therefore in property law. However, although these comparisons were acknowledged by official pieces of legislation it is clear that by 1881 it was generally accepted that "the physical similarity of British and Māori agricultural methods masked fundamental differences between

[78] Mangakāhia v. N.Z. Timber Co., 1882 NZ App. 348 (1884 Vol. 2).
[79] New Zealand, *Native Rights Act, 29 Victoriae 1*865, no. 11.
[80] Mangakāhia v. N.Z. Timber Co., 1882 NZ App. 351 (1884 Vol. 2).

conceptions of property."[81] Additionally, the timber industry proved instrumental to the original colonial settlement of New Zealand, and despite slow beginnings eventually exploded into domestic and international markets. This put enormous pressure on the government and courts to acquire some form of property rights to the increasingly sparse kauri forests from the Māori inhabitants, yet another roadblock to legal equality for the Māori. Finally, the development of the law itself, through Waitangi, various legislative acts, and the establishment of the Native Land Court had a subtle purpose, not explicitly stated but nevertheless implied and understood – despite supposed similarities, acknowledgement of Māori ownership, and confirmation of the rights of the Māori as British subjects, the land law of New Zealand had developed in a manner that was fundamentally exclusive against the Indigenous inhabitants of New Zealand, as Hāmiora Mangakāhia found out in 1882.

[81] Banner, *Possessing the Pacific*, 49.

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