The alienation of Maori land under Part XXIII and section 438 of the Maori Affairs Act 1953

P. G. McHugh*

The determination of disputes over Maori land can be of considerable practical importance in certain parts of New Zealand. This is borne out by the establishment in 1978 of a Royal Commission to investigate the operation of the Maori Land Court. In this article, the decisions of the Maori Land Court are examined in one of the most crucial areas of adjudication, the alienation of Maori land. The writer highlights a number of shortcomings in the present law and makes recommendations for legislative reform.

I. INTRODUCTION

> . . . 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]

These words are a symbolic indication of the wealth of issues that arise in any treatment of Maori land. This article in its consideration of the alienation of Maori land under multiple ownership through Part XXIII and section 438 of the Maori Affairs Act 1953 will look at some of the issues and ironies present in those impassioned words. Though the Act gives a comprehensive definition[2] of the word "alienation" the emphasis here will be on the sale and transfer of the land for it is in this area that most controversy arises. Further, for the purposes of this article "multiple ownership" means[2a] any Maori freehold land owned by more than ten persons as tenants in common. Section 215 lays down exclusively the processes by which a particular owner may alienate land and of these the most significant method for an owner is alienation under Part XXIII of the Act which requires a duly convened meeting of owners.

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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 *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Wellington, 1890) 21.

2 Section 2 Maori Affairs Act 1953. 2a Described in s.215 of the Act.

Finally, 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 the use of section 438 is sensitive to external influence 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 utilitarian concept of land as " . . . an individually owned, freely marketable entrepreneurial resource".[4] To a large extent, as this paper will indicate, that divergence of views is still present.

In recent times various Maori organisations[5] have expressed concern at the continuing alienation of Maori land. This fear mainly extends to the alienation of Maori land under multiple ownership for it is with this land that the cultural and communal value of land arises. For instance there was relatively little controversy over Part I of the 1967 Maori Affairs Amendment Act[6] which changed the status of Maori land owned by four persons or less to that of "general land", formerly known as "European 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. However, the question of the compulsory acquisition of uneconomic shares in multiply owned land brought a loud reaction from the Maori people because 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 abolished the conversion of uneconomic interests but the issue provided an indication of the importance to the Maori of the institution of multiple ownership.

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 one race on to the other.[8] What is the Maori concept of land 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:[9]

3 See J. Metge *The Maoris of New Zealand — Rautahi* (Revised Ed., London, 1976) and D. Sinclair "Land: Maori View and European Response" in King (ed.) *Te Ao Hurihuri — The World Moves On* (Wellington, 1975) 115 ff.

4 E. Schwimmer "The Aspirations of the Contemporary Maori" in E. Schwimmer (ed.) *The Maori People in the Nineteen Sixties* (Auckland, 1968) 20.

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: N.Z. Parliamentary debates Vol. 403, 1976: 12 and Vol. 416, 1977: 5195.

6 Maori Affairs Amendment Act 1967, ss. 2-14.

7 Literally a standing place for the feet. This concept besides giving a Maori particular right 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, op.cit., 236, and more especially Sinclair, op.cit., 165. For an example of the feeling the concept arouses, see N.Z. Parliamentary debates Vol. 301, 1953: 2301.

8 Kawharu *Maori Land Tenure* (Oxford, 1977) 240 ff.

9 Ibid., 241.

> Rural tribal settlements are therefore neither fully European nor fully Maori. What gives their values a unique character is the aggregate of individual, and not always consistent, choice made 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 personalized and without social consequences for the tribal community.

Kawharu's words, and indeed most of his book, were written before the 'Maori Land March' in late 1975.[10] 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 ownership of their land (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 communalism, self-identity and status despite the inroads of the pakeha world.

There is an old English saying that it takes judicial decision up to twenty years to reflect any change within the community's view. In 1961 the Government officially dropped its policy of assimilation.[11] However for a long time the concept of assimilation largely dominated the Maori Land Court's notion of 'helping' the Maori.[12] 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 less concerned with assimilation and more intent upon protecting the separate system of tenure and all the values that the Maori land system represents. It is a laudable change in direction.

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

II. PART XXIII

Part XXIII of the Maori Affairs Act 1953 was largely a pakeha response to the Maori notion of communal ownership. 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 individualisation of land title so that they could legitimately secure title. The process tried to take account of Maori custom but it seems that the attention to custom was a subterfuge for the settler's aim of acquiring control of land.[13] The individual-

10 See n.5.

11 Metge, op.cit., 305.

12 There is a Maori saying: "'Let's assimilate' is what the shark said to the kahawai before he ate him for breakfast".

13 For a full discussion see G.J. Allan "The Conquest of British Law over Maori Land" LL.M. Research Paper V.U.W. 1977.

isation process only clumsily followed Maori custom. For instance it could find no room for the ariki's power of veto in tribal matters which was a central feature of Maori custom.[14]

Land came to be vested as a legal estate in fee simple amongst various hapus or descent groups within a tribe and shares were apportioned. The passage of time saw ownership fragmented and the number of shares accordingly increased. 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 section 306 of the Act), since the land is owned by them as tenants in common, all of whom have the right to consult and be consulted.[15] Inevitably many cultural factors determine the decisions and resolutions made at a Part XXIII meeting. As such they are perhaps more of interest to the social scientist than the lawyer.[16]

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. This power can be further divided into:
   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 section 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 though the latter flows from or has its origins in the earlier proceedings.[17] The Court has, therefore, divided its powers concerning Part XXIII into the two distinct compartments and it is best to discuss each power individually.

A. The History of these Powers 1953-1974

1. *Power to summon meetings of owners*

This power was granted by section 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[18] 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

14 An ariki is a Maori chief; as to the custom, see G.L. Pearce *The Story of the Maori People* (Auckland, 1968) 70 ff.

15 Kawharu, op.cit., 212.

16 For a full discussion of cultural and deliberative aspects of meetings of the Maori in general, see Kawharu, op.cit., 212 ff.

17 A settled point in the Court, reiterated in *Re Papatupu 5A2* Wanganui Appellate Court Minutes Book (ACMB) Vol. 12 Folios 317-22, 28 February 1969.

18 Section 307(7) Maori Affairs Act 1953 (prior to 1974 Amendment).

addresses of the present owners.[19] An application by a proposing transferee 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 former section 307 stipulated that no meeting could be declared invalid because any owner failed to receive notice of the meeting. However a distinction can possibly be drawn between that type of stipulation 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 his case.[20] Moreover regulation 3 of the Maori Assembled Owners Regulations 1957 requires the Registrar to send notices to every member. Section 308 requires a statement of the terms of every proposed resolution that is to be submitted to the meeting to 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.

2. *Power to confirm, modify or disallow a resolution*

(a) Power to investigate conduct and procedure at meetings.

This power is separate from the 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 section 227(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 section 227(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 the Court could find that the instrument of alienation was not duly executed and make such order as it saw fit.[21]

The 1967 Amendment Act repealed inter alia section 227(1)(a) and (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 the power as being conferred by the mere existence of the formal requirements for Part XXIII meetings so that the 1967 Amendment Act made no difference in 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 subsection (6) mean that the Court now has a discretion to disregard the irregularity (even if it is an immaterial one) and is obliged to call

19 Rule 103 Maori Land Court Rules 1958.

20 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.

21 Section 227(1) (a) and (6) (prior to the 1967 Amendment).

for another meeting of owners whenever any irregularity, however trivial, is proved before the Court? 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 the repeal of subsection (6). 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.

Section 310 requires a Recording Officer, being either the Registrar of the Court or an officer of the Department of Maori Affairs, to regulate the meetings. 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.

In 1967 the quorum requirements before a meeting could be commenced were tightened up to a certain extent by the new sections 6A — 6C added by section 4(4) of the Maori Purposes Act 1967. The Court thus had power 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. To keep a quorum during the meeting under section 309(1) three individuals entitled to vote had to be present during the whole time. This last requirement was not changed until 1974.

The 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 thinking 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 assumes complete knowledge and unfettered willingness to express opinion.[24] Moreover in many situations "[T]hat 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.

The Court's attitude to proxies has always been strict and precise. Up until 1968 the Maori Assembled Owners Regulations 1957 provided that the proxy

22 See *Re Matahina A1D* Maori Land Court, Rotorua, 30 October 1959, 108 folio 336.
23 Ibid., 1. 24 See Metge, op.cit., 200 ff. 25 Kawharu, op.cit., 227.

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.

(b) 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 section 227(1)(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.

How then did the Court use this discretion? The Prichard-Waetford Report analysed the Maori Land Court's use of section 227 and recommended that section 227(1)(b) be repealed: "This will result in the price in the case of a sale, and the rent 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".[29] The Committee's dissatisfaction with section 227(1) 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".[30] It 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".[31] The Committee then went on in paragraph 135 to give illustrations of how it thought section 227(1)(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

26 The proxy for the trustees of an owner under disability could however, have been any adult person: r.7(2) Maori Assembled Owners Regulation 1957.

27 *Report of Committee of Inquiry into Laws Affecting Maori Land and Powers of the Maori Land Court* (Wellington, 15 December 1965) with Ivor Prichard, Esq., Chairman, and Hemi Tono Waetford, Esq., member, referred to as the Prichard-Waetford Report.

28 See *Re Matahina A1D*, supra n.22. 29 Op.cit. 71, para. 144.

30 Ibid., 68, para. 135, quoting a submission made to the Committee.

31 Ibid., 67, para. 134, quoting from the same submission.

only trustee for it'. If such is being or has been said, and we accept it that it has, our comment is that it is not justified".[32] 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."[32] The Chairman of the Committee, Hon. Mr Ivor Prichard, a former Chief Judge of the Maori Land Court, would have been sitting on most of these appeals and the Chief Judge has traditionally had an influential presence. If all those appeals had failed, surely there were good grounds for their not succeeding? Neither did 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?

The Committee seemed to advance the argument that the Court was not confirming as many resolutions of alienation as it should. It blamed the attitude of the Bench in section 227(1)(b). However statistics indicate that the removal of the provision did not materially increase the number of Part XXIII alienations,[33] that is, the contention that the Bench was using section 227(1)(b) to disallow many resolutionss that should have gone through was not sustainable.

In paragraph 136 of the Report 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".[34] 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 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".[35] To find out they asked Maoris at every meeting to vote for one of three men as an indication of their feelings on section 227:[36]

> 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

32 Ibid., 68, para. 135.
33 See *Government White Paper on Proposed Amendments to the Maori Affairs Act 1953, the Maori Affairs Amendment Act 1967, and Other Related Acts* New Zealand Parliament. House of Representatives. Appendix to the journals, Vol. 3, 1975, E.20. (presented to the House of Representatives 21 November 1973): 68-69.
34 Prichard-Waetford Report, op.cit., 68, para. 136.
35 Ibid., 69, para. 138.
36 Ibid., 70, para. 138.

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 for some years 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 plays on emotive language: the emphasis is on the Maori coming 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:[37]

The Deputy Registrar or some other person noted the opinions at meetings in figures of 1 where the great majority were for one of the men and of ½ where that would nearer show the feeling.

Adding these up we find that the opinions were:

No. 1 man — 8 votes
No. 2 man — 23 votes
No. 3 man — 7 votes

i.e. for 38 of the meetings.

Surely a straight aggregate for each option totalled from all of the meetings would have been more reliable and left no room for personal judgments that could not be consistently applied from meeting to meeting. The writer believes that 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. 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 section 227 (1) (b) were extremely doubtful. The Committee's findings on what it perceives the majority of Maori landowners as wanting may not be very reliable, yet the

37 Ibid., 70, para. 140.

Committee, given only six months in which to report, proceeded to make a recommendation on that basis. The result was the repeal of section 227(1)(b) and the loss of the Court's parental power to look at the content of resolutions of alienation.

In a sense the repeal was merely an acknowledgment 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 section 227) were being processed as long as the consideration was adequate and there was no undue aggregation.

The fact that the repeal of section 227(1)(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 interpretive value but it appears that this possibility was seldom realised.

That view was 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. This is echoed in *Re Tauranga Taupo 2B 2L 45:*[40]

> 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 Section 227(1)(b) supra. That section provides that except as otherwise provided in that 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 implicity 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 section 227 was enacted in 1967 which 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 section 227A 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 section 228) with the addition of fifteen percent to the value;

38 Government White Paper, supra n.33.

39 Maori Appellate Court Gisborne 30 May 1969. Gisborne ACMB 27 folio 118. See also *Digest of Selected Judgments in the Maori Land Court* (up to December 1958), 13.

40 Aotea District, 4 July 1963, Whanganui ACMB No. 12 folio 135, page 16 of the judgment.

41 See for a good example *re Te Whetu A3B* Auckland ACMB 13 folio 61. The headnote succinctly states the situation:

> 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 purchase — confirmation refused.

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

Prior to the 1974 Amendment Act the alienation of Maori Land under Part XXIII was therefore 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 within narrow and definite borders.

B. The 1974 Amendment (and change in outlook?)

The Court's powers under Part XXIII have been divided into two areas: (a) power to summon meetings of owners; (b) power to confirm, disallow or modify the resolution.

The 1967 Amendment Act took away a lot of the Court's power 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.[42]

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:[43]

> 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.

The 1967 Amendment heralded the beginning of a new awareness among 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.[44] More political strength 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 pressure groups such as Te Matakite and Nga Tamatoa over the past few years.

In 1972 the Labour Party was swept into power. The Hon. M. Rata, M.P., the new Minister of Maori Affairs, promptly set about remedying some of the wrongs he believed present in the Maori land 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[46]

42 Section 5(j) Acts Interpretation Act 1924. See, for an example, *Re Mangawhero* 2 Wanganui ACMB 12 folios 312-6.

43 Kawharu, op.cit., 308.

44 Ibid., 29-32.

45 *Government White Paper on Proposed Amendments to the Maori Affairs Act 1953, the Maori Affairs Amendment Act 1967, and Other Related Acts* New Zealand. Parliament. House of Representatives. Appendix to the journals ,Vol. 3, 1975, E.20. (presented to the House of Representatives 21 November 1973).

46 Ibid., 8. The first part of the quotation is probably not sustainable in the sense that the 1967 Amendment did not have a large effect on the number of alienations.

> . . . the very large number 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.

The Minister did not return to the Court's quasi-parental jurisdiction but meetings of owners were well-attended before any alienation resolution could be passed. He also returned to the Court much of its former jurisdiction to enquire into adequacy of consideration. In essence he maintained the clearly defined path of Part XXIII that the 1967 legislation had established — that is, he gave the Court none of the discretionary powers to confirm, modify or disallow a resolution it had enjoyed under the old section 227(1)(b). Perhaps in the light of the Court's earlier "assimilationist" trend he was wary of the way the Court might use such a discretion. If this last point of conjecture is accurate then it was proven to be wrong for around 1974 the Maori Land Court started taking a marked change of direction.

Through the years 1967 to 1974 the Court was in a period of limbo — its parental wings had been clipped and 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 it seems 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 Court'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 many of the Court's powers in category (b). The writer believes that 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 have 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 category (a).

It is now necessary to investigate first of all the changes the 1974 Amendment made to the procedural requirements for meetings and the Court's powers to look at the content of the resolutions, i.e. matters arising under category (b).

1. *Power to confirm, disallow or modify a resolution*

(a) Procedure at the meeting.

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 for a meeting to be commenced were tightened.

Under a new subsection (6B) to section 309 where the proposed resolution is for the sale of land, the quorum consists of the owners 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 7 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 the more affected 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 are not significant shareholders or when there is one owner who owns a great percentage of the shares and wishes to do something with the land contrary to the wishes of the other owners but because of his shares is in a powerful position. This article 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 forced 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 alienation arises because of the inherent nature of Maori land under multiple ownership. The land is fragmented, many owners have moved away and cannot be located or if they can they simply cannot 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 do nothing. Their inaction does not necessarily arise from indifference as is

47 Section 31(1) (a) Maori Affairs Amendment Act 1974, replacing s.227(1) (a) of the principal Act.

48 Section 31(2).

often claimed. Since the Land March[49] these people or absentee landowners have become reluctant to sell their land (turangawaewae) and let their fire die.

The answer to the problem does not lie in negative provisions such as the compulsory acquisition of uneconomic interests as this practice serves only to alienate the Maori people.[50] The writer believes there are solutions to the problem but they lie outside the scope of this article.[51] It is sufficient to note however that the quorum requirements are to some extent a mixed blessing. For absentee landowners it is a measure of comfort to know that their interests are relatively secure, however for Maori owners working the land it can be a source of bedevilment when they seek to develop the land by, for instance, forming an incorporation and selling the land to it.[52] Section 438 has provided one way around the latter problem.

If the meeting lapses then under the new section 315A 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 Ministry 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 section 315A(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.

It is important that Maori land remain in Maori ownership and on that basis 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.[53] Moreover it should have no power to recommend leases greater than a 25 year period with statutory provision for a review of rent every 5 years. In the case of leases to timber companies, a right of renewal for 10 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.

Such then is the procedure for the holding of meetings and the consequences if the meeting lapses under the 1974 Amendment. The Court's power in this

49 See n.5.

50 See especially D. Sinclair 'Land Since the Treaty: The Nibble, the Bite, the Swallow" in M. King (ed.) *Te Ao Hurihuri — The World Moves On* (Wellington, 1975).

51 See Sinclair, op.cit.; also J.K. Hunn *Report on Department of Maori Affairs* (Wellington, 1961) 58.

52 For an example see the *Report of the Department of Maori Affairs and the Maori Land Board and the Maori Trust Office for the Year 31 March 1977* New Zealand. Parliament. House of Representatives. Appendix to the journals, 1977, E.13:9.

53 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 which existed in pre-settler days. These bodies would deal with the land consonant with Maori sentiment.

area is minimal and its role is a supervisory one to ensure that due procedure is followed.

(b) The content of the resolution.

Section 31 of the 1974 reform enables the Court to look at the content to ensure that: 1. the alienation does not breach any trust to which the land is subject; 2. the alienation will not result in the undue aggregation of farm land; 3. the value of such things as millable timber and minerals has been taken into account in ascertaining the consideration; 4. 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 that of 1967 there is still no return to anything like the old section 227(1)(b) powers of the original 1953 Act.

The Court's powers 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. The changes, besides acknowledging some of the peculiarities of Maori land ownership, also continued the high degree of statutory regulation over the Court. Changes in procedure at meetings and power to confirm have left little room for a quasi-parental jurisdiction. It is against this background that the Court's use of the power to summon a meeting must be seen.

2. *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 year intervals are usual to advice that if they do not attend the meeting it may stop the resolution going through.[54]

The advice which the Court has begun giving the owners through these directions to the Recording Officer is a marked change in approach. There is no specific provision in the Act allowing for such directions so the practice is essentially one the Court has initiated of its own accord. Because the practice has no specific anchor in any legislative provision,[55] there is no reason why the Court could not have been doing it during the 1950s and 1960s. The practice is a direct attempt to solve the problem noted earlier: to ensure that the idioms, concepts and implications of the resolution are made clearer to the owners. The Court has constantly made the point that it has only 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 is in many ways in a less

54 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 202-220.

55 An amendment to the Act in 1976 provided for judges to be able to issue practice notes to guide parties to proceedings. A meeting of owners is not a proceeding before the Court. Indeed, s.264(2) might be construed as preventing the Court from ordering the Recording Officer to bring certain matters to the attention of the owners.

advantageous position than most pakeha landowners. In short it appears to be a jump however small from assimilation to bi-culturalism — a desirable change in direction.

The above practice is significant because it was not activated by any legislative change.[56] The 1974 Amendment produced a new section 307 relating to the Court's power to summon meetings of assembled owners. 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 former section 307 was concerned were removed.

Under the old section 307 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 former subsection (1) that the application did not have to be submitted to the Court but was processed directly by the Registrar. The 1974 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 proposing alienee had to. That 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. It is against that 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 hectare block 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 Moekes' lease which had expired. The trustee told the meeting that as the estate intended to purchase the land it would vote against the resolution and indicated to the meeting that the estate would apply to the Court for another meeting and file the appropriate resolutions. The Court subsequently refused the trust's application for a meeting of owners.

The Court saw the issue as being[57]

> . . . 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 who might be present or represented at a meeting of assembled owners.

Judge R. M. Russell looked 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 Nos. 1, 3 & 4 Blocks* a case in which the quasi-parental jurisdiction of the Court was affirmed.[58] Having established the Court's protective role the judge identified the difference between Maori concepts of land and the

56 But perhaps by social change.

57 *Re Waipuka 2R1* Napier MB. 110 folio 233, at 3.

58 [1954] N.Z.L.R. 624, 627.

English view. He regarded 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 consensus.

The judge pointed out that if the meeting was called the alienation would be a formality:[60]

> . . . 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.

He found two factors persuasive. First if the estate became sole owner it would rent the land out to the Moekes. 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 Judge Russell said:[61]

> 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.

That was his basis for using the Court's discretion under section 307(6) and he refused to summon a meeting of owners.

In *Re Puhatikotiko 2C3*[62] Judge Russell extended his *Waipuka* decision. R. Coates, a person without any Maori ancestry, had through various 'loopholes' in the Act managed to purchase undivided interests in a Maori owned block 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. Judge Russell reiterated "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 . . . ".[63] He said 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 saw the views of the minority as being ascertainable in four ways:

(a) 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.

(b) 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

59 Supra n.57, 4. 60 Idem. 61 Ibid., 5.
62 Supra n.54. 63 Ibid., 1.

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.

(c) 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.

(d) 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 who 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."[64]

Coates rejected all these 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 or laid down by statute yet the Court purports to be able to impose them in one form or another. Failure to follow these solutions at a meeting if it was undertaken to do so could doubtless allow the Court to refuse to confirm any ensuing resolution by exercising its power in the second category to look at the content and procedure at the meetings.

Judge 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 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 Judge Russell's two decisions the words of the former section 227(1)(b) seem to live again: "contrary to equity or good faith, or to the interests of the Maori alienating". This is clearly a reappearance of 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.

Judge Russell's decision in *Puhatikotiko 2C3* is pending appeal to the Supreme Court[65] 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 but it is difficult to 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" Judge Russell offered appear to be reasonable and ensure that the opinion

64 Ibid., 2.

65 The Maori Appellate Court refused to adjudicate on an interlocutory point so counsel for Coates moved the whole issue into the Supreme Court.

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 has only those powers that legislation specifically gives it. However if the Supreme Court upholds Judge Russell's decision it is likely that it 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.

Persons unhappy with the idea of assimilation can be pleased with the approach the Court is taking. Most Maoris agree that the Court's 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 a too zealous Court over-reaching itself. Section 438 might be, and has come close to being a 'spanner in the works'. Section 438 is being increasingly used, mainly as a result of the tightened quorum requirements. It is the writer's view that it contains some undesirable elements that can be removed without hindering its purpose.

III. SECTION 438

Section 438 of the Maori Affairs Act 1953 provides a device for the Maori Land 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 section 438 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. Section 438 is often seen as being complementary to Part XXIII — a Part XXIII meeting lapses, the Maori Land Advisory Committee reports and a section 438 trust is constituted (though not necessarily based upon the Advisory Committee's report).

Before discussing proposed changes to the current section 438 it must be stressed that for the most part section 438 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 section 438:[66]

> 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.

66 Supra n.45 at 7-8.

The writer is concerned to see removed some undesirable elements from section 438 whilst retaining the benefits observed by the White Paper.

Section 438 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 in *Hereaka* v. *Prichard*.[67] At the time of that case section 438 (1) provided:[67a]

> 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 benefit of Maoris* . . .

Hereaka concerned litigation over the trouble-ridden Rangatira B and C Blocks. The central issue was 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. In the light of subsection (1) (as it then was) the Court held that any section 438 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 cestui que trust. The Court's reasoning turned directly upon the words of subsection (1) "for the benefit of Maoris . . .".

Section 142 (1) of the Maori Affairs Amendment Act 1967 provided an entirely new section 438. The Prichard-Waetford Report made no recommendations concerning section 438 so far as the *Hereaka* decision was concerned, however the total removal of the words upon which that judgment turned leads one to the inescapable conclusion that the legislature 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 Maoris".[68] Moreover the judges indicated in that case that powers of alienation, as provided for in section 438, 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.

There can be no doubt that the Court of Appeal decision severely lessened the potential of the old section 438 as an alienation device. However, as noted, a new section emerged soon after that judgment. In the furore over other changes to the Act during 1967 the changes to section 438 were largely ignored. The new section 438 made it possible for trusts to be established for the purpose of alienating the land. The words in the new subsection (1) are unmistakably clear: "For the purpose of facilitating the use, management, or alienation of any Maori freehold land . . .". In short whereas the old section 438 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 section 438 was distinctly preferable to the present one.

67 [1967] N.Z.L.R. 18. 67a Emphasis added. 68 [1967] N.Z.L.R. 18, 28.

In 1976 in *Albert* v. *Nicholson*[69] the Supreme Court held that a section 438 trust could be imposed despite the wishes of the majority of owners. As section 438 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 provide a 75% quorum. It is submitted that it should be a statutory requirement that the Court append a certificate to all section 438 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*'s case would never have arisen. The suggested limitations on the situations in which a section 438 trust can be established could be neatly included as a proviso to subsection (1).

Besides defining the instances for a section 438 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 has nominated trustees 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 section 438 is being used where a quorum cannot be obtained, is it right that the owners who can be positively ascertained have only 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 section 438 was limited by the suggested proviso to subsection (1).

The Court has 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.

The Ngatihine dispute illustrates the potential of the Court's power of modification. The Ngatihine block occpuies 5514.55 hectares of relatively unused Northland land. In March 1974 the Maori Land Court appointed a trust under section 438. At the first meeting of the trust it is recorded that the trust was formed to initiate the formation of an incorporaation 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 Farm and Forests

69 [1976] 2 N.Z.L.R. 624.

Ltd. 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 section 438 trust. Six trustees decided to lease the land to Carter Holt but the other 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 the Maori Land Court to remove Alexander from the trust. He was removed under section 438(3)(a) in July 1975. Alexander appealed against his removal to the Maori Appellate Court.

After hearing evidence for two days the Maori Appellate Court gave an interim decision on 3 December 1975 in which the Court intimated its view that the whole question of the Carter Holt lease required looking into. The Court got a Mr Groome, Forestry Consultant, to investigate and advise the Court what should be done with the block of land.

The Court decided to accept the eventual recommendation of Mr Groome that the Carter Holt lease be modified in various particulars and that negotiations by the trustees be confined to the Carter Holt Company with the intention that the company might agree to the proposed modifications and thus a new and final agreement be made.

The Court then varied the terms of the trust under section 438(3)(b) so that Groome's recommendations had to be followed by the trustees and finally made an order rescinding the Maori Land Court order which had removed Alexander as trustee. Alexander still refused to sign, the Maori Land Court again removed him as trustee in December 1977 and finally the matter came before the Supreme Court.[70]

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 has 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 section 438(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 section 438(3)(b). Finally it was submitted that if there was not a variation then what the Court had done amounted to a new trust order, a course authorized by section 438(3)(c) in combination with section 438(2).

Mahon J. 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:[71]

> 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

70 *Alexander* v. *The Maori Appellate Court* (1978) Unreported, Auckland Registry, A 1628/77 per Mahon J.

71 Ibid., 23.

> administer the trust in accordance with the terms declared by he Maori Land Court, and to vest that power in delegates appointed by the Maori Appellate Court.

He went on to say[72]

> 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 s 438 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.

His Honour was probably concerned that the condition imposed by the Court was a backdoor way of re-introducing the old requirements of the Court's confirmation of section 438 alienations — a feature which expressly disappeared in 1967. His rationale amounts to a rule that the Court can impose no conditions in section 438 trusts that amount to its 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 underlines Mahon J.'s judgment.

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 the terms of which they determine beforehand in a 'parental' way. Subsection (5), already quoted, is a good example of this. 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? 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 into 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 foregoing is the only way of reconciling Mahon J.'s decision with the whole of the section, though it is agreed that there is in practical terms a thin line between regulating a contract of alienation before it is entered into (which it is suggested is permissible) and doing so afterwards. The fundamental point that seemed to escape Mahon J., it is respectfully submitted, is that the Maori Affairs Act 1953 in effect creates a mini Trustee Act in respect of dealings with

72 Ibid, 25.

Maori land though clearly the former is nowhere as comprehensive as the latter. Section 443 supports such a view especially in the words of subsection (2): "Any person so appointed shall have the same rights and powers as he would have had if appointed by a decree of the Supreme Court in an action duly instituted . . . ". Thus when Mahon J. refers in the final sentence of his judgment to the chance of the Ngatihine dispute being resolved by "a tribunal which has not yet expressed any views in the matter" he is at variance with the Maori Affairs Act 1953. It is therefore submitted that his judgment does little to dispel unease with section 438.

It is not intended to discuss the merits of the Carter Holt lease as arguments can be made both for and against it.[73] 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. It is therefore submitted that once the Court has decided to impose a section 438 trust 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 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 dissident 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 section 438 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 is 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 section 438 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 Court, although the Registrar has to be notified. The Prichard-Waetford Report looked at section 438 and its history in respect of alienations under the mantle of a section 438 trust:[74]

> 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.

The Committee went on:[75]

> It has been submitted to us that such freedom from confirmation should be extended to all Trustees appointed under section 438 on the grounds that they should not be

73 See for an example of the arguments (1972) 9 Forest Industries Review No. 4, 2 ff.
74 Supra n.27, 110, para. 275. 75 Ibid., para. 276.

> 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 section 438 alienations became entitled to confirmation simply upon the Registrar noting the alienation.

The writer cannot agree with the principle of confirmation 'as of right' first because administrative expediency is insufficient reason for justifying the important relaxation and secondly because of the undesirability of alienation trusts the terms of which conflict with the principle of retaining Maori land in Maori ownership and which have been 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, and (b) the limitations envisaged in the *Hereaka* v. *Prichard*.[76] If these recommendations were in operation alienations by section 438 would become more of a rarity. They would also be the result of a considered decision rather than a legal loop-hole by which to avoid Part XXIII — a land use provision rather than an alienation device.

Summary of Recommendations Concerning Section 438

(1) The original subsection (1) should replace the present subsection, so that the decision in *Hereaka* v. *Prichard*[76] becomes good law once again — the trust must directly and not indirectly benefit the Maori.

(2) A section 438 trust should be created by the Court in two situations only: (i) where a Part XXIII meeting has failed to obtain a quorum; (ii) where a duly constituted Part XXIII meeting has passed a resolution calling for a section 438 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) Notwithstanding the recommendations in (2), owners who do not want a trust 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) Trustees should be limited in their powers of alienation in a way similar to that recommended by the writer for the Maori Land Advisory Committees.

These proposals would produce a more 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 incorporation, section 438 trusts and trust boards.

76 [1967] N.Z.L.R. 18.

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 purposes will increase; section 438 will be in the centre of that development. Section 438 is in need of amendment for as that trend progresses pressures on the Bench from the pakeha world to use it as a device to alienate Maori land will increase. If that pressure is halted by limiting its operation then the writer believes that the Maori owners can retain their turangawaewae yet feel assured that the land is being utilized. Section 438 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.

LEPROSY RELIEF

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It was founded by **P. J. Twomey,** universally known as **"The Leper Man".**

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