How do Things Get Started? Legal Transplants and Domestication: An Example from Colonial New Zealand

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'Unearthing' is a problematic task for historians. To some extent it assumes continuity between the past and the present, and that matters identified by whatever means as 'traditions' in the present were understood that way in the past. It is a backward looking task, rather than an exploration of understandings at a moment in time. Rather than 'unearthing', this article seeks to start at the beginning and to think about how things get going in colonies. It pays attention to foundations and to questions of institutional design. This article draws on literature on legal transplants, and examines one example of a legal transplant in New Zealand: the Resident Magistrates' Court, focusing in particular on its civil jurisdiction. If not the 'number eight wire' approach, it is a recognition of pragmatism - the ways in which legal forms, both discursive and institutional, circulated Empire and are made and remade in new times and places in response to local circumstance.

Introduction

'Unearthing' is a problematic task for many legal historians. To some extent it assumes continuity between the past and the present, that by tracing backwards or forwards we can identify, uncover or recuperate 'traditions'. Its imagery is of unbroken, seamless, lines and genealogies, stretching from the past to the present or the present to the past. Most problematic is the question of how we identify 'traditions' and when something came to be identified as a 'tradition'. As a matter of method do we start with some event, practice or institution and go forward – hoping that at some point we find they have become understood as traditions? Or do we go backward from some practice we now identify as a tradition, to try to discover its origins, seeking to identify when it first became seen as something with the character of a 'tradition', for it most likely will not have been understood as such at its outset (whenever that may have been).

Of course to start this way is not to say that these are either impossible or necessarily undesirable tasks, but they are tasks of which many legal historians are likely to be wary. Such an enterprise is probably most closely aligned with a tradition of history writing which draws on Foucault's archaeology, whereby one examines the discursive traces left by the past in order to write a 'history of the present'. Archaeology looks at history as a way of understanding the processes that have led to

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what or who we are today.[1] Such a way of writing history focuses on regimes of practices, often aligned with an examination of the power-knowledge they produce. Or, one could self-consciously write a kind of practical or presentist history. This often takes the form of a history of progress, tracing the emergence and forms of legal institutions – particularly constitutional institutions.[2] As Herbert Butterfield famously said:

> "… presentist historiography …. characteristically begins by taking an institution or an idea from the present together with the contemporary role, function or purpose presently used to justify that institution or idea, and then describes its historical development *as if* this purpose or role had governed its emergence and transformation right from its origin onwards."[3]

It is, as Paul McHugh had recently reminded us, a history told of the past for the purposes of the future.[4] But this is, of course, an approach that sits well with many of the aims of legal scholarship and with the roles and tasks of lawyers, if not of historians.

However, for some legal historians what is most important is conceptual and intellectual understandings in a particular time/place. These understandings are often linked to institutions (understood broadly), regardless of their later trajectory or how they might allow us to write a 'history of the present'. This article takes such an approach. Rather, therefore, than 'unearthing', this article seeks to start at the beginning of settler judicial institutions in colonial Aotearoa/New Zealand and to think about how things get going in colonies. It pays attention to foundations and to the ways in which colonies organise their legal institutions, forms and practices. These foundations may or may not become later identified with some pattern or practice which comes to be seen as a 'tradition' or perhaps as the basis of a 'tradition'. This article draws on recent literature on legal transplants, and examines an example of such transplants in New Zealand: the Resident Magistrates' Court. In particular, this article focuses on the civil jurisdiction of that court.

In some ways, therefore, this article seems to take a somewhat tangential approach to the question of constitutional traditions. It looks to foundational institutions rather than constitutional foundations, although the extent to which these are separate may not be so great. However, thinking about transplants and movement around the Empire generally is one framework that might help to explain the New Zealand origins of practices and institutions which might now be thought of as foundational and might come to be thought of as founding traditions. At the same time the article seeks to push back a little against any rejection of the 'number eight wire' approach, not just to constitutional change but to understanding origins and

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1 Michel Foucault *The Order of Things: An Archaeology of the Human Science* (Routledge Classics, London, 2002); *The Archaeology of Knowledge* (Tavistock, London, 1972).

2 On 'practical history' see Michael Oakshott "The Activity of being an Historian" in *Rationalism Politics and other essays* (Methuen & Co, London, 1962) at 137.

3 Quoted in J. Bartelson, *A Genealogy of Sovereignty,* (Cambridge University Press , Cambridge), 1995 at 57

4 PG McHugh, "A Common Law Biography of Section 35" forthcoming (2013) *University of Toronto Law Journal* (on file with the author)*;* For earlier similar comments see PG McHugh "The Common-Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past" (1998) 61 *Sask. L. R.* 393.

traditions at all. This article simply seeks to remind us just how pragmatic the legal origins of British colonies often were – of the ways in which discourses, practices and institutions circulated the Empire, finding new homes, becoming domesticated, worked and re-worked into new forms in response to local circumstance.[5]

Legal Transplants

The literature on legal transplants offers an important way into thinking about the study of legal history and into the way in which discourses and institutions moved around the Empire.[6] The idea of a legal transplant connotes simply the idea that concepts, rules or institutions are often derived from, or are influenced by, those of other times/places. Interest in 'transplants' has grown over the last 40 years, driven more by those interested in comparative law perhaps than legal historians (although the two are not strictly separable). Perhaps the most influential legal historian in this area is Alan Watson. He has argued that many of the legal developments in our modern world can be traced to legal transplants (laws and institutions) from other times and places. Many laws and institutions are simply transplanted, not developed locally on the basis of local innovation.[7] They remain largely unchanged in their new home. Hence, for Watson law cannot be seen as a reflection of society. Against this somewhat a-contextual position, a different strand of transplant literature emphasises that once taken from its original location and moved law cannot stay the same in its new locale.[8] Thus, transplants involve a degree of cultural adaption, a domestication that is the necessary counterpart of the transplantation — whether it concerns the law, or other social or cultural artifacts that travel across space".[9] What is at the heart of the gulf between the two positions is different conceptions of how 'law' should be understood.

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5 None of this, of course, is to ignore the point made by both JGA Pocock and Tim Murphy that there is a sense in which all common law thought of law as law addresses questions of tradition. I am largely side-stepping this. See JGA Pocock *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century*(reprint, Cambridge University Press, Cambridge, 1987); Tim Murphy *The Oldest Social Science: Configurations of Law and Modernity* (Clarendon Press ,Oxford, 1997).

6 The other body of literature which could be drawn upon is that which focuses on 'networks'. Drawn largely from Empire scholarship, this literature emphasises the myriad networked connections of (particularly the British) Empire, and the ways in which knowledge was disseminated throughout the Empire. It seeks to contribute to the breaking down of the metropole/periphery dichotomy, focusing instead on the multiple paths individuals and knowledge took across and around the globe. Literature on transplants focuses more closely on laws and institutions and the ways in which they behave in a new locale. The focus is often on the transformation of the institution and whether it is an agent of local change. Networks tends to focus more on the actual movement - how ideas circulate. Oddly, these literatures often have nothing to say to each other. For networks see, for example, the work of Alan Lester, Zoe Laidlaw, Antoinette Burton, Tony Ballantyne.

7 Alan Watson *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, Athena, GA, 1974); Alan Watson "Comparative Law and Legal Change" (1978) 38 *Camb. L. J.* 313; Alan Watson "Aspects of Reception of Law" (1996) 44 *Am. J. Comp. Law* 335.

8 See, most famously, Pierre Legrande "The Impossibility of 'Legal Transplants'" (1997) 4 *Maastrict J. Eur. & Comp. L.* 111.

9 Graziadei, "Legal Transplants and the Frontiers of Legal Knowledge" (2009) 10 *Theoretical Inq. L.* 693, 696. See also David Nelkin and Johannes Fest (eds) *Adapting Legal Cultures* (Hart Publishing, London, 2001).

Of course, the debate on transplants is hardly that polarised. There are numerous positions in between, and the debate is not one confined to law or legal history but crosses history generally, anthropology, sociology and economics – and each discipline has its own inflection. What might be generally accepted now (if not by Watson) is that transplants or diffusions do not always take place one way; that the pathways by which this happens may be complex and indirect; that legal rules and concepts are not the only objects of transplantation; that it can just as easily be individuals as governments who affect this; that the new norm/law/institution rarely wholly replaces local prior law; and, perhaps most importantly (and contra Watson) that transplants rarely retain their identity in their new locale: they transform.[10]

This article is not intended as a contribution to debates on how to understand 'transplants' broadly. Nor does it seek to find some definitive 'origin' for the New Zealand Resident Magistrates' Court. Rather, its intentions are simple: to consider a specific institution as a reminder of the pragmatism that often underlay choice and design of colonial institutions. In so doing some of the antecedents of the Resident Magistrates' Court will be considered, as well as and the changes wrought to the new court as part of its domestication in a new setting. The article contends that the Resident Magistrates' Court is in fact a striking example of the movement of a legal form and its transformation on the basis of local innovation for local circumstance. Whether this says, or could say, anything about the relationship of law and society is left to one side, as is the question of how (for these purposes) 'law' might be thought of. In order to consider the trajectory of the Resident Magistrates' Court, this article draws specifically on the particularly useful approach of Christopher Tomlins in "Transplants and Timing".[11]

Institutions, such as the Resident Magistrates' Court are not, as we know, "conjured *ex nihilo*".[12] Transplants were regular occurrences in the Empire.[13] Some were almost direct transfers, at least in form, if not in their ultimate domestication. Many institutions directly imported from England fit into this category. New Zealand was a relatively late acquisition for the British. By 1840 Britain had already established colonies in places as far flung as the Cape, Newfoundland and Tasmania. In all of these not only had judicial institutions (of various kinds and various levels of professionalism) been established for some time, but New Zealand was in fact at the long end of a process throughout the 1820s and 1830s whereby new charters of justice and new judicial institutions had been created for almost a dozen colonies. There was, therefore, a ready pool of examples of institutions to which the officers of the new Crown colony of New Zealand could look for inspiration. One such institution was the English Resident Magistrates Court, as modified for particular circumstance in other colonial locales.

Transplants, however, do not just include the institution itself, but the discourses, ideologies and intellectual strategies that underpinned choices of institution and institutional design. As Tomlins puts it: "long-established ideas that

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10 This is based in part on the summary of literature by William Twining in "Diffusion of Law: A Global Perspective" (2004) 49 *J. Legal Pluralism and Unofficial Law* 1, particularly at 34-5.

11 Christopher Tomlins "Transplants and Timing: Passages in the Creation of an Anglo-American Law of Slavery" (2009) 10 *Theoretical Inq. L* 389.

12 At 391.

13 For an acknowledgement of the importance of institutional precedents in the Empire see Peter Spiller, Jeremy Finn, Richard Boast *A New Zealand Legal History* (2nd edn, Brookers, Wellington, 2001) at 67.

furnished a respectable genealogy; familiar practices adapted to serve new purposes."[14] In the context of the project of English colonisation, Tomlins outlines the need for "promoters of colonies …to resort both to a broad, discursive *extra-structure* of ideas that explained and justified their enterprises, and a more detailed, technical *infrastructure* of institutions and processes…. In both, law was of a major institutional and ideological importance."[15] For Tomlins, "both the extrastructure and infrastructure were transplants, each lifted from one context to be embedded in another".[16] In Tomlins' consideration of the spread of slavery laws, extra-structure is the 'law of nations', specifically that relating to discourses of 'manning and planting', while the infrastructure was the legal apparatus of slavery. This article takes these ideas down to a more localized level: the institution of the Resident Magistrates' Court (specifically the engagement by Māori with its civil jurisdiction) and the justifying ideas and discourse of assimilation that in part underpinned the transplantation and transformation of the institution of the Resident Magistrates' Court for local circumstance.

Infrastructure: The Resident Magistrates' Court

The *Resident Magistrates Court Ordinance* was enacted in 1846. It is unclear whether it has a direct precursor, but in form it appears largely based on a melding of the 1837 South Australian Legislation which created Resident Magistrates Courts (the *Magistrates and Justices Act*) and the 1844 *Native Exemption Ordinance* (NZ).[17] Notably, George Grey, who introduced the New Zealand legislation in 1846, was Governor of South Australia from 1841-1845.

The South Australian Act established Resident Magistrates' Courts throughout the colony of South Australia. According to Hague, Charles Mann, the first Advocate-General for South Australia, who drafted the Act, based the South Australian Act on legislation in force in the Cape Colony.[18] In all three colonies (the Cape, South Australia and New Zealand), the Resident Magistrates' Courts were established for two purposes: the prosecution of minor offences not amounting to felonies and the recovery of small debts. The Cape Ordinance appointed Magistrates, to be known as 'Resident Magistrates' to particular districts.[19] Within his district the resident magistrate had civil jurisdiction of no more than 10 pounds (s 3) excluding any jurisdiction relating to the "title to any lands or tenements, or any fee, duty or office". There was also criminal jurisdiction where the punishment was not "death, transportation or banishment", but limiting punishments to fines of 5 pounds, imprisonment not exceeding 1 month (s 5).

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14 At 390.

15 At 392.

16 At 392.

17 *Magistrates and Justices Act* 1 Vict. No 2. (1837) (SA); An *Ordinance to Exempt in Certain Cases Aboriginal Native Population of the Colony from the Ordinary Process and Operation of the Law* 7 Vict. No 18 (1844) (NZ).

18 Ralph Hague *History of the Law in South Australia 1837-1867* (Barr Smith Press, Adelaide, 2005) ch. 8. This work was originally written around 1936 and later and deposited at the State Library of South Australia, PRG 215. It was later published by Barr Smith Press. Hague would have been referring to *An Act for Creating Resident Magistrates and Clerks of the Peace* Act No. 33 of 1827 (Cape Colony).

19 Those districts already existed for the purposes of previous institutions, for example the Courts of the Landdrost or the Heemraden. These institutions were abolished by the new Cape Act.

As in the Cape legislation, the South Australian Act authorised that districts be created and a Resident Magistrates' Court for each district be constituted (ss 1, 2). The Act conferred jurisdiction on the Court of the Resident Magistrate to hear and determine all actions, plaints and suits for the payment of any debt, damages or matters not exceeding a set amount, here £20, and to award costs; but the court could not determine any actions relating to the title to land or where rights in future might be bound. In 1838 the entire province of South Australia (except Kangaroo Island) was proclaimed as a single district for the purposes of the Act.[20] The criminal jurisdiction of the Resident Magistrates' Court extended to "crimes or offences not amounting to a felony" and such crimes must have been committed or have occurred within the district of the Resident Magistrate before whom the matter was being heard. Thus, jurisdiction was tied to district. There was no right of review/appeal for civil or criminal matters.[21]

Minor offences were the traditional fare of Magistrates Courts, both in New South Wales and Tasmania and, of course, in England. Benches of Magistrates came together to form the courts of quarter and general sessions. New South Wales maintained this tradition. In 1823, s 19 of the *New South Wales Act* authorised the governor to establish courts of general or quarter sessions, with the same jurisdiction as their English counterparts.[22] These courts continued to handle a significant proportion of the criminal workload for many years. In South Australia, the institution of the Resident Magistrates' Court took on the same role and it had, according to Henry Jickling, Acting Supreme Court Judge, the immediate effect of reducing the workload of the Supreme Court, particularly with regard to petty criminal matters.[23]

However, while minor criminal offences were the staple of Magistrates' Courts, petty civil matters were not. While at that time in England Magistrates did have wage fixing powers, their jurisdiction did not cover minor civil such as small debt recovery. That was the province of Courts of Requests. Nor did the Magistrates in New South Wales have such powers, although this jurisdiction had been conferred on them twice, briefly, in the past. Jurisdiction for small debt was, as in England, vested in New South Wales in Courts of Requests and remained so until 1846. In that year in most districts Courts of Requests were abolished and their jurisdiction over small debt was transferred to new Courts of Petty Session.[24] This jurisdiction still had no counterpart in England at the time, although notably 1846 was also the year that in England the new County Courts were created, one aim of which was to facilitate small debt recovery.[25] These were in part a substitution for Courts of Requests throughout England.

While South Australia chose to implement from the beginning a system of debt recovery before Magistrates – terming them Resident Magistrates' Courts rather than Courts of Petty Session – the jurisdiction conferred upon them was almost identical to

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20 *South Australian Gazette and Colonial Register* (6 January 1838) 1 at 1.

21 The Cape Act gave a right of appeal for civil (s IV), but not criminal (s V), matters.

22 *An Act to Facilitate the Proceedings of Justices of the Peace in the exercise of their summary Jurisdiction* 6 Geo IV No. 9 (1825); *An Act for Instituting and Regulating Courts of General and Quarter Sessions in New South Wales* 10 Geo IV No. 7 (1829).

23 *South Australian Gazette and Colonial Register* (28 April 1838) 4 at 4.

24 *An Act to Amend the Law relating to the Recovery of Small Debts in all Parts of the Colony* 10 Vict. No. 10 (1846) (NSW). However, Courts of Request were maintained in Cumberland, Port Phillip and Melbourne, but given the same jurisdiction as the new Courts of Petty Session.

25 *An Act for the Recovery of Small Debts* 9 & 10 Vict. c 95 (1846) (UK).

that of the New South Wales Courts of Requests at the time (prior to the transfer of jurisdiction to Petty Sessions). Further, as specified in the 1832 New South Wales *Courts of Request Act*, determinations were to be made "in a summary way" (a phrase which did not appear in the Cape Act). Section 3 provided that determinations were final: there was no right of review. From the beginning, the South Australian Act was thought by many to be flawed. Its wide jurisdiction, the failure to specify a right of review and an upper limit of £20 were just some of the criticisms.[26] In addition, the actual practice of the court came to defeat a number of the objects of the Act, not least the goal of an inexpensive system of justice for small debts. While the problems above were of concern to the public, the failure in South Australia to specify that the Court was one of equity and good conscience proved far more problematic. Wigley, the first Resident Magistrate, insisted that the Court therefore adhere to the full rigour of common law forms of action and pleading.[27]

The features of the Resident Magistrates' Courts which proved unpopular in South Australia were in fact 'standard' in other jurisdictions for Courts of Request. The monetary limit in New South Wales Courts of Request was lower, only 10, and remained so when the Courts were largely abolished in 1846 and the new Courts of Petty session were constituted. The decried failure to grant a right of appeal was in fact a facet of the English system of the time, and therefore of the New South Wales Courts of Requests (see 1832 Act, s 23). As noted by one of the members of the Legislative Council during debate on the *Small Debt Recovery Act* 1846, to grant a right of review would undermine the goal of speedy, final, justice. Finally, the New South Wales Act did not specify that the court was to be one of "equity and good conscience" until 1842.[28] Despite this, it was lauded, at least in the press, as providing an easy, non-technical means of debt recovery.

There were several abortive attempts at reforming the Resident Magistrates Court in South Australia. In 1841 Justice Cooper of the Supreme Court of South Australia drafted a bill to bring much of the Act in line with the Court of Requests in New South Wales, although he did not suggest actually replacing the Resident Magistrates' Court with a Courts of Requests. It was never enacted, due, it seems, to considerable unpopularity.[29] In 1843 Smillie, the Advocate General, similarly recommended that the Court be remodeled along the lines of New South Wales. In response to Smillie's 1843 report on the Resident Magistrates' Court George Grey noted that it would be better to prevent the contraction of small debts than to allow courts for their recovery, labeling such courts "positive nuisances".[30] Nevertheless, the Court was there to stay, at least for the moment, lasting until 1850. By the time Grey left for New Zealand in 1845 the only changes which had been made had been the drafting of new rules for the court by Cooper (and these had proven unpopular with litigants).[31] However, despite Grey's apparent dislike of small debt courts, by

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26 Hague, *South Australia*, above n 18, ch 8.

27 This is despite the rules of court having been drawn up to exclude the use of English pleading, requiring only that plaintiff to furnish in writing two copies of his claim or demand, one for the court and one for service.

28 *An Act to Consolidate and Amend the Law Relating to Courts of Requests* 6 Vict. No 15 (1842) (NSW).

29 For a summary of the bill see the *Southern Australian* (25 February 1842) 3 at 3.

30 Hague, *South Australia*, above n 18.

31 Smillie, Advocate General for South Australia, State Records Office of South Australia (SRSA) GRG 24/4, Advocate General's opinion, 15 May 1843.

1846 New Zealand had a number of such courts. Grey inherited a Court of Requests, and added a Resident Magistrates' Court.[32]

In South Australia, in New South Wales post-1846 and in New Zealand, the granting of minor civil jurisdiction to Magistrates recognised the practical difficulties of administering justice, particularly in civil matters, in colonies with distant settlements, in which it was often difficult for litigants to travel to the nearest Court of Requests. Māori had been involved in commerce even prior to the British assertion of sovereignty, trading, for example, with missionaries and whalers. They participated in the new economy created by the settlers post-1840 in many ways: they supplied goods to, and traded with settlers; worked in various capacities for Europeans, both privately and on public projects, such as construction of roads; and bought and sold *inter se* the new goods which become increasingly available, from trousers to schooners. Grey claimed that at the time of his arrival Māori were virtually excluded from being able to obtain redress against Europeans: the Supreme Court only sat twice per year and fees could amount to 100s of pounds. Nor were the Courts of Requests of much more use, as their limits were too low, and they were therefore 'quite inapplicable to the kinds of cases arising between Maori and the Europeans'.[33] Chiefs were forced to travel, pay for their accommodation and upkeep, and wait until a court was open for business.[34] Similar distances and delays were, of course, also the matters that also led both South Australia and New South Wales to give Magistrates jurisdiction over small debts through their magistrates courts, although in neither of those jurisdictions was it contemplated that indigenous peoples would access such courts. By 1846, however, Grey had determined that a specific forum was needed for cases in which Māori alone or Māori and Europeans were involved. By quickly addressing Māori concerns in matters in which disputes were most likely to arise he hoped to remove 'plausible pretexts for resorting to violence' in order to obtain satisfaction.[35]

The *Resident Magistrates' Court Ordinance* therefore enacted a regime specifically for Māori for civil debt enforcement.[36] Resident Magistrates were

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32 *An Ordinance to Provide for the establishment of Resident Magistrates Courts, and to make special provision for the Administration of Justice in certain cases* The first Court of Requests had a short lifespan of less than six months (mid to late 1841) and had a virtually identical jurisdiction to the 1832 New South Wales equivalent. It had, however, a much higher monetary limit for actions: *An Act for Instituting Courts of Civil Jurisdiction, to be called "Courts of Request", in different parts of the Colony of New Zealand and its Dependencies* 4 Vict. No 6 (1841). The Court was then re-enacted in mid-1844. In between there was a County Court with both criminal and civil jurisdiction: *An Ordinance for Establishing County Courts of Civil and Criminal Jurisdiction* 5 Vict. No 2 (1841). The appointment of Chapman J to the Supreme Court in Wellington made it practicable for more matters to be taken to the Supreme Court, rendering the District Court apparently unnecessary, but reinstituting the need for a court for small debt recovery: *An Ordinance to Establish Courts of Request for the more easy and speedy recovery of Small Debts* 7 Vict. No 8 (1844).

33 Governor Grey to Earl Grey, 4 February 1848, ANZ, G 25/2, p. 344; The National Archives (London) (TNA), CO209/51 at fol. 196 ff.

34 Governor Grey to Gladstone, 14 November 1846, ANZ, G 25/2 at 262.

35 Governor Grey to Gladstone, 14 November 1846, Archives New Zealand (ANZ), G 25/2, at 261.

36 The court was also open for business when no Māori were involved. In this case it had a similar general jurisdiction over petty civil matters and criminal matters as its South Australian counterpart. General civil jurisdiction was up to a limit of £20 (s 26), decisions were made by way of summary hearing (s 26), and they were final (s 14). Concurrent with the Resident Magistrates' Court, as noted above, fn 32, there also existed a Court of Requests. The two institutions were identical in respect of several crucial matters. They had the same monetary

appointed in districts throughout the North Island (and later the South Island) where there was significant Māori population. The Resident Magistrates were given jurisdiction in all civil matters where at least one party was Māori up to claims of £100 (s 12), a very high monetary limit for the time. Grey noted that Māori 'frequently entered large pecuniary transactions, of two or three hundred pounds'.[37] Claims for this amount would previously have required the matter to go before the Supreme Court. For example, in 1846, just prior to the enactment of Grey's Ordinance, Ropata Nuitone o Te Pakaru was forced to resort to the Supreme Court to recover the value of 193 pigs which had been part payment to Johnstone Wilkinson for the purchase of the cutter, "Finetta". Effectively this was an instalment contract, the total price of which was 300 pigs (value around £120) to be paid over 9 months.[38] The two had later entered into a subsequent contract which purported to say that the in the event the cutter was lost at sea the whole contract would be null and the plaintiff would have no claim. Apparently, instalment contracts for the purchase of boats of this type were not infrequent. They were often fraudulent. According to Grey, Europeans would travel to remote parts of the North Island and enter into contracts like that in *Ropata Nuitone Te Pakaru v Wilkinson*. Once all the instalments had been paid, there would be no boat and the seller would have disappeared.[39] In this case, the boat was wrecked prior to completion of the contract. The plaintiff was awarded £96, 10s.[40] However, the defendant subsequently absconded, leaving Te Pakaru with nothing more than a bill of costs of approximately £45.[41]

Grey pointed out that in entering contracts, particularly instalment contracts of the kind above, Māori had little understanding of the law of contract or of legal procedure.[42] For this reason, matters before the Resident Magistrates' Court were to be determined according to 'equity and good conscience'. Thus, it was neither a court of common law nor one of equity,[43] and decisions were to be made according to the more discretionary norms of 'real justice and good conscience', although such courts could apply common law or equitable principles, or a modified version of them. Courts of equity and good conscience were not common in Australasia at the time. While 'equity and good conscience' was most commonly associated with small debt recovery courts, neither the New Zealand Court of Requests, nor its New South Wales counterpart (until 1842), nor the South Australian Resident Magistrates' Court were

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limit, they both allowed no appeals and both proceeded by way of summary procedure (1844: ss 9, 11, 21). They differed however in one very significant ways: before the Resident Magistrates' Court decisions were to be made according to 'equity and good conscience' (s 13), while the Court of Requests was to proceed 'according to all the Laws and Ordinances in force for the time being…' (1844: s 21).

37 Governor Grey to Gladstone, 14 November 1846, ANZ, G 25/2 at 261.

38 *Ropata Nuitone o te Pakaru v Johnstone Wilkinson* SC Auckland, 7 September 1846, reported in the New Zealand Spectator and Cook's Strait Guardian (26 September 1846) 3 at 3 per Martin CJ; see also "Auckland civil minute book", 1844-1856, ANZ, BBAE 5635/1a at 47.

39 Governor Grey to Gladstone, 14 November 1846, ANZ, G 25/2 at 262.

40 The newspaper report claims he was awarded £96, 10s, while Grey informed the colonial office that he received the full sum of £120: Governor Grey to Earl Grey, 6 February 1847, ANZ, G25/2 at 350.

41 At 350.

42 Governor Grey to Gladstone, 14 November 1846, ANZ, G 25/2 at 261.

43 Courts of equity and conscience were neither courts of common law or of equity: *Becke v Wells* 1 C & M 76 (1832) (149 ER 321).

jurisdictions of equity and good conscience.[44] Governor Grey wrote to Earl Grey that '[making the court one of equity and good conscience] was a precaution which appeared quite necessary, as the natives are wholly ignorant of the manner in which agreements should be drawn, and the greatest frauds have been practiced upon them in many instances by Europeans who hoped by some legal technicality to escape the punishment they merited'.[45] The ordinance was intended to ameliorate proceedings involving exactly the kind of transaction which was at issue in *Ropata Nuitone Te Pakaru*, involving multiple contracts, questions of law, and with respect to which it had been necessary for both sides to engage barristers.

Extrastructure

The *Resident Magistrates' Court Ordinance* might therefore be seen as a kind of legal 'bricolage'. It form it clearly has a number of antecedents. It is a pragmatic melding of elements of different regimes, re-cycling them and recasting them for a new time/place. What makes this transplant particularly interesting and important is the ways in which its domestication involves re-working to fashion a court for Māori.

On the civil side, the Resident Magistrates' Court in South Australia was technically open to Indigenous Australia. The year of its enactment, 1837, was also the year that the Colonial Office determined that Indigenous Australians were subjects of the Crown),[46] but there is no history (at least that we so far know of) in any Australian colony of Indigenous Australians pro-actively accessing civil courts. By contrast, in New Zealand the Resident Magistrates' Court was passed, at least in part, specifically in order to give Māori a forum for debt recovery. While it is likely that minor criminal matters could have come before the Resident Magistrates' Court in South Australia, the failure to modify criminal procedure, along with the other general problems which faced courts of any level in prosecuting Aboriginal Australians (in particular the lack of interpreters) undoubtedly led to few criminal actions – although such a conclusion may well be changed by new data. By contrast again, in New Zealand, the *Resident Magistrates' Court Ordinance* demonstrates an understanding of the need to modify criminal proceedings with respect to Maori accused, particularly with respect to the prevalent problem of larceny. Thus, in its new home this Act was passed with the specific aim of providing institutions which not only were inclusive of, but were specifically designed to enable, Māori engagement with British law.

As well as providing a much needed forum for debt recovery, the *Resident Magistrates' Court Ordinance* had a further, broader, aim: namely to 'introduce' Māori to British law, to induce them to make use of the new tribunals and thereby to 'assist' in the administration of that law.[47] Grey introduced the ordinance with the

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44 On courts of request as courts of equity and conscience see Harry Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, Toronto, 1985).

45 Governor Grey to Gladstone, 14 November 1846, ANZ, G/25/2 at 267.

46 The decision that Indigenous Australians were subjects of the Crown was not made until 1837, and was the result of a policy determination rather than a court decision. For perhaps the first unambiguous assertion see Glenelg to Bourke, 26 July 1837, *Historical Records of Australia Series I* (Library Committee of the Commonwealth Parliament, Canberra, 1914-1925) vol XIX at 48. For a local admission of this see Instructions, Deas Thompson (Colonial Secretary NSW) to Magistrates, enclosure 5 in Gipps to Glenelg, 21 July 1838, GBPP, 1839 (526), 33

47 Governor Grey to Gladstone, 14 November 1846, ANZ, G/25/2 at 261.

intention that it should 'form... the basis of a system' whereby Maori would not only be introduced to English laws, but if possible 'induced to assist in the administration of them...'.[48] As he told the Legislative Council on introducing the ordinance it was: 'calculated to accustom them [Māori] by degrees to take an active part in the administration of the laws of their country: - a great step in advance which ... appears to be more likely ... to attach them, by the ties of interest and a sense of benefits received, to those Institutions which we have introduced amongst them.'[49] The measure was, therefore, both practical and assimilatory in nature. For Grey, as for some others, the eventual assimilation of Māori and settlers to one legal system – that of British law – was both desirable and inevitable. These 'peculiar courts', as Grey called them, were, therefore, a key to 'ameliorating the position of the natives', ultimately through providing opportunities for their increased civilisation.[50]

As Damen Ward has pointed out, 'assimilationist' thought in Empire at this time took a number of different forms, or had several 'strands'. [51] Some favoured exceptionalism. An exceptional law was one which "set provisos and exemptions from English criminal law, particularly in terms of procedure and penalties such as hanging."[52] Further modifications might include the use of native courts, 'native assessors' or mixed juries. Modification of English law was necessary because Māori had not yet internalized those norms on which civilized legal codes depended. Further, their lack of understanding of British law put them at too great a disadvantage vis-à-vis the settlers.[53] Nevertheless, such schemes were predicated on the basis that they were transitional, eventually indigenous groups would be accustomed to English law, and attain a level of civilisation which rendered such measures unnecessary.

Strict assimilationists, of whom Governor Grey might be counted one, favoured the rejection of customary laws, even *inter se*. Toleration of barbarous customs could never lead to advances in civilisation. In 1840, Grey penned his "Report on the Best Means of Promoting the Civilisation of the Aboriginal Inhabitants of Australia". He wrote that:

> …it is necessary from the moment the aborigines of this country are declared British subjects, they should, as far as possible, be taught that the British laws are to supercede their own, so that any native who is suffering under their own customs may have the power of an appeal to those of Great Britain ….[54]

According to Ward, "Grey stressed that enforcing English law inter se weakened the power of tribal elders over younger Aborigines, thus reducing the social barriers to

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48 At 261.

49 *New Zealand Spectator and Cook's Strait Guardian* (7 November 1846) 3 at 3.

50 Governor Grey to Earl Grey, 4 February 1848, ANZ, G 25/2 at 345.

51 See Damen Ward "A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia" (2003) 1 *History Compass*, AU 049, 001–024.

52 At 9.

53 At 8.

54 George Grey, "Report upon the best means of promoting the civilization of the Aboriginal inhabitants of Australia" enclosure in Russell to Hobson, 9 December 1840, GBPP 1841 (311), 43–5.

Aborigines adopting European culture, law and religion."[55] This was a necessary step on the path to civilisation. It is notable that Grey's Report was most likely written during his time as Resident Magistrate at Kind George Sound, Western Australia.

Grey, at least publicly, was of the opinion that Māori were actively seeking such power of appeal to the laws of Great Britain. As he assured the Legislative Council: "[t]he natives [are] desirous that such a class of officers [Resident Magistrates] be appointed, to whom they might refer their matters of difference for arbitration or adjudication".[56] While Grey might have been in the camp of what Ward refers to as 'strict application, on passing the Resident Magistrates' Ordinance pragmatism seems to have been the order of the day.

The Resident Magistrates' Court was, therefore, the main vehicle through which Grey intended to 'induce' Māori to take up British law and to 'train' them for eventual participation in the broader legal system. The primary mechanism through which this was to be achieved was the inclusion of native assessors. Where the matter was purely between Māori the Resident Magistrates' Court constituted itself as a Court of Arbitration. In this circumstance the Resident Magistrate sat with two 'native assessors', one nominated by each party (Ordinance, s 19). According to Grey at least, Māori accepted the idea that judges made decisions. However, 'the Chiefs' were less happy with British juries.[57] Grey was of the opinion that Māori were not yet 'sufficiently advanced as a race to perform generally the duties of jurymen'. Summary jurisdiction allowed decisions to be made by the Resident Magistrate alone, and alleviated the problem of whether to include Māori on juries.[58] However, Grey acknowledged that their eventual inclusion on juries (before all tribunals) was a necessary precursor to full participation in the new legal system. Thus, through participation as assessors Māori would be 'gradually qualifi[ed] for the performance of the duties of jurymen', a result which for Grey '... must be attained before they will become perfectly satisfied with our laws and the mode in which they are administered'.[59]

The idea of native assessors was certainly not unknown in Empire, although they were more common in the later part of the nineteenth century. Where used, their role was often to aid the court to understand 'native custom' and the often hybrid laws that developed in Empire where local customary laws and English law came into contact. Grey, however, determined that the assessors were not to apply customary law. For an assimilationist this would be a retrograde step. As Grey informed Earl Grey: '... it would perhaps be better not to require our courts in any way to recognize the barbarous customs of the native race because I found if they were required to do so a mixed class of laws might grow into existence ... and the prejudice of the people might be difficult to dispense with or abolish, although very great inconvenience might result from them.'[60]

Māori and the Resident Magistrates' Court: Some Preliminary Data

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55 Ward "Means and Measure", above n 39 at 11.

56 *New Zealand Spectator and Cook's Strait Guardian* (7 November 1846) 3 at 3.

57 Governor Grey to Gladstone, 14 November 1846, ANZ, G 25/2 at 263.

58 At 263.

59 At 267.

60 Governor Grey to Earl Grey, December 15 1847, ANZ, G 25/3 at 137.

Data on Māori use of the Court is spread across a number of series at Archives New Zealand and the National Archives London. In the period 1846-1852 alone there are over 200 court returns. The court sat in late 1846 in Auckland and was then established in other centres Russell; Howick and Onehunga (now suburbs of Auckland) in the North of the Island; Wanganui (or Petre as it was known in 1846) and New Plymouth, both on west coast of the North Island; Wellington and Nelson were the southern settlements. As a generalization, Māori engagement was strongest in the north, perhaps reflecting both density of settlement and longer interaction with European visitors and settlers. A sample taken for Auckland, based on monthly court returns from the establishment of the Court in November 1846 to December 1847, shows that 94 Māori commenced actions before the Resident Magistrates' Court.[61] While it is difficult to establish a success rate (as a number of cases were settled out of court), generally it seems that Māori were frequently successful. Awards ranged from a few shillings to £100. However, Māori were not the only people using this new court. Māori also appeared as defendants on 21 occasions. In two cases both parties were Māori. The remainder of the court's civil work was taken up with minor disputes between Europeans. Numbers of Māori plaintiffs were highest at the outset of the court, declining somewhat across the 14 months surveyed. This may reflect Grey's contention that there was a 'backlog' of cases at the outset and that the threat of litigation by Māori led quickly to fewer Europeans reneging on debts. Typical cases involved payment for goods or work done. The returns were often did not provide details, but where they were specified there are claims for firewood, pigs, small items such as caps, and even occasionally guns. The 'big ticket' items, leading to large damages claims, were boats. In the first 14 months in Auckland many parties (both Māori and European) appear on multiple occasions. The most obvious explanation is that these parties were deeply embedded in the emerging economy – as employers, as workers and as suppliers of produce to the new settlement.

A mere 6 [six?] years after the signing of the Treaty of Waitangi accessing of the civil jurisdiction of the Resident Magistrates' Court by 94 Māori plaintiffs over a 14 month period demonstrates both a significant engagement with the new court and suggests a considerable embedding of Māori in the emerging Auckland economy. Such data of course begs the question why Māori so readily resorted to the court. Grey believed that it both gave Māori a practical platform for resolving disputes with Europeans – disputes which would otherwise have led to discontent and violence – and that Māori in some ways recognised the superiority of British law. The first of these explanations may hold an element of truth, the second is more contestable. However, their continued acceptance of the judgments of the court, even when these judgments went against Māori, demands further questioning.

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[61] One of the issues in interpreting court returns is that some Māori adopted European names. It can, therefore, be difficult to be sure that all Māori have been counted from the returns. Court returns sampled can be found at ANZ, AGCO 8333 IA 1/53, 46/1907; IA 1/54, 47/41; IA 1/54, 47/205; IA 1/55, 47/421; IA 1/57, 47/637; IA 1/57, 47/876; IA 1/58, 47/1085; IA 1/60, 47/1440; IA 1/62, 47/1907; IA 1/61, 47/1666; IA 1/62, 47/2053; IA 1/63, 47/2358; IA 1/64, 47/2638. A comprehensive return was sent from Auckland covering 1 November 1846 to 21 August 1847 (IA 1/60, 47/1627). However, full names are not used in the return and hence it is more difficult to establish which parties are Māori. Where possible, therefore, individual returns have been used. In a dispatch to Earl Grey, Governor Grey confirmed that the Auckland court had the highest caseload in this period. He suggested that over a similar (but not precisely defined) period as that surveyed that there were 122 cases involving Māori and Europeans and 2 involving only Māori: 15 December 1847, ANZ, G 25/3 at 138.

Lyndsay Head points to the recognition by Māori, in the wake of the inter-tribal wars and destruction of the 1830s, of the 'possibilities of a 'civil' life'. Head sees early conflict resulting from changes wrought by the influx of Europeans:

> '... as the 'chief obstacles to the pursuit of civil modernity – that is if one takes civility as an expanded and increasingly personal ownership of wealth created by trade with foreigners. War, and its ethos, threatened civility. ... One way of understanding post-contact experience was through an understanding of how the foreigners ordered their world ... Christian teaching became a primer for change.' [62]

Christianity proscribed certain ways of life and set up 'peace as the condition of modernity'.[63] Peace was protected by law. Head's central focus is Māori attitudes towards, and support for, the Treaty of Waitangi and the subsequent development of 'Māori citizenship'. She suggests that support for the state and for the church was an attempt to understand the new society. Conversion to Christianity required a new framework: God's law was 'efficacious in the area where traditional society had nothing to say: it dispensed *utu* without war'.[64] Thus (British) law was an alternative to *tikanga* (traditional laws, customs). It promoted peace.

The Court, therefore, provided an interface between Māoridom and the new society of the settlers. The new courts may well have been one of the ways Māori sought to negotiate their way in both worlds. As Māori increasingly took part in this new society, and became enmeshed in its economy, the result was unpaid goods, debts and unpaid wages. If we accept Head's thesis, therefore, Māori resort to, and acceptance of, the new settler courts can be understood as part of a conscious engagement by Māori with the new settler society and a pursuit of what it could offer: the possibilities of a 'civil life'. While Māori had, since 1840, been formally subjects of the British Crown,[65] their engagement in the new economy and its institutions – particularly the courts which were an embodiment of the Crown's authority – shows Māori fashioning a new, albeit still unstable and constestable, subjecthood (or, to use Head's term, citizenship).[66]

Although very few records remain of the working of the Court of Arbitration, it is here that one might find evidence for the adjustment by Māori to the new modernity – to their acceptance of, and desire to participate in, 'civil society'. It is one thing to engage with British law where Europeans are involved and *tikanga* (laws and customs) offers no solution, it is another to take actions against other Māori where *tikanga* (despite Grey's attempts to discourage resort to it) still applied. In order to see

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62 Lyndsay Head "The Pursuit of Modernity in Maori Society: the Conceptual Bases of Citizenship in the Early Colonial Period" in Andrew Sharp and Paul McHugh (eds) *Histories of Power and Loss: Uses of the Past – a New Zealand Commentary* (Bridget Williams Books: Wellington, 2001) at 102.

63 At 102.

64 At 103. Here *utu* means 'reciprocity', ie reciprical action as a result of wrongdoing.

65 Treaty of Waitangi, art. 3.

66 I am not sure I would use either the term citizenship (Head's term) or subjecthood (my substitution) here. Citizenship is not a concept that was current in New Zealand in this period. Subjecthood also must be understood to be a contestable concept in this period. At this time, 'subjecthood' for indigenous groups in Empire was rarely understood to carry all the rights that accrued to British subjects.

any cases in this category it is necessary to look at different data - from Wanganui in the late 1840s and early 1850s.[67] Between mid-1847 and the end of 1852 there are 21 cases from Wanganui (the Petre) which can be identified where both parties are Māori.[68] While native arbitration cases (as they are called in the records) did include the cases for unpaid goods or other debt, there were also claims not so commonly seen in the commercial centre of Auckland: for example assault or killing of animals.[69] However, by far the majority were for a quite different claim: damages for criminal conversation.

The common traditional response to adultery was *muru*, a kind of 'compensation and retribution', against the wrongdoer.[70] A *taua* (war party) would be sent and goods would be taken. Physical injury could also be inflicted and was not uncommon where adultery was concerned. While *muru* was traditionally accepted by both sides (victim and transgressor) it seems that the courts may have offered an alternative avenue for redress: one which not offered redress, but which did so without invoking inter-hapū violence. *Hona Tuawhitia v Hone Whakapau* (1851) is representative of such a case. The claim was described as one of 'criminal intercourse', but was in fact criminal conversation. Aparahama Tipae (Ngati Apa) was sworn in as assessor for the plaintiff, while Hone Wiremu Hango (Ngati Tumango) was sworn in as assessor for the defendant.[71] The charge was admitted, and damages of £2 ordered. The damages were commuted by 'general consent' to 2 months of assisting at the Wanganui Court House.[72] Just a few months before, in November 1850, Rapaena was ordered to pay damages for two actions for criminal conversation and one of damage to property, brought against him respectively by Karipa and Matia. Again, two assessors (Hori Kingi and Tahana Hiko) sat with the Resident Magistrate in Putiki. He was ordered to pay damages to both plaintiffs.[73]

A fourth case from 1849 also involved criminal conversation – this time described as adultery. In *Noble v Haramia*, William Noble swore (under the unsworn testimony ordinance) that Haramia had had been caught by Te Wepu having criminal 'connexion' with his (Noble's) wife. Noble claimed his wife had admitted the 'connexion' but had run away before he had been able to have her charged with the crime of adultery. Wepu also gave evidence, swearing he had caught Haramia with

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67 Data on the Resident Magistrates' Court is generally sparse. Focus here is on Wanganui between 1847 and 1852 as it is one of the only locations from which any court records (as opposed to court returns) survive. From surviving records it seems that Māori use of courts varies between settlements in any case and each should be examined separately.

68 This data is taken from Wanganui Magistrates and Petty Session records of fines 1845-1853, ANZ, ADEC 16332, JC-WG1/1/1.

69 For debt see *E Ramia v Poewa* Resident Magistrates' Court, Wanganui, 21 May 1852; for assault see *Heremiah v Hore Patara, Hare v Paura* Resident Magistrates' Court, Wanganui, 10 October 1851; for killing of a pig see *Te Matoa te Atua v Hakaraie te Whakataki* Resident Magistrates' Court, Wanganui 21 May 1851, all in above n 66 (unpaginated).

70 Ministry of Justice, New Zealand *A Glimpse Into the Māori World: Māori Perspectives on Justice*, 2001, available at <www.justice.govt.nz/publications/publications-archived/2001/he-hinatore-ki-te-ao-maori-a-glimpse-into-the-maori-world> (accessed 26 September 2013).

71 More likely Hoani Wiremu Hipango.

72 *Hona Tuawhitia v Hone Whakapau* Resident Magistrates' Court, Wanganui, 12 February 1851, above n 66, unpaginated. Interestingly, in no cases found so far has the status of the plaintiff's marriage been raised.

73 *Karipa v Rapaena; Matia v Rapaena*, 23 November 1850, Resident Magistrates' Court, Wanganui, RM Hamilton.

Noble's wife. The case was tried before the Resident Magistrate, Major Wyatt, and three assessors, Hori King, Tahana and Wiramu Edwards. Haramia was ordered to pay £20 damages. The record further notes that Te Wepu and one Hapemaua agree to pay the damages on behalf of the defendant. The record is signed, somewhat shakily, by Te Wepu.[74]

The highest profile (and best recorded) instance of criminal conversation, however, was the first Court of Arbitration decision in Wellington. In June 1848 E Tako, a well-known local Māori leader, brought an action for criminal conversation against Karena with respect to his wife, A Hue.[75] According to the newspaper report, E Tako opened by stating that 'previous to the pakeha coming amongst them, an offence of this kind was generally expiated by the instant death of the party implicated, especially where the woman was the wife of a chief...'. He apparently further stated that he was willing to submit to the course recommended by the Magistrate, but insisted that the defendant also be punished according 'after the Māori fashion'. The Resident Magistrate, St. Hill, explained that damages would be awarded. Although reluctant, E Tako eventually agreed to follow the court procedure. After much evidence, the Hill and the assessors awarded a sum of £20. The very high damages (rather than the more common £2) reflected the *mana* (prestige, authority) of the victim, E Tako. Both the newspaper, and St Hill, in a subsequent dispatch, stated that at the conclusion of the trial E Tako was satisfied with the verdict and requested that the judgment be reported: 'All over New Zealand, that the Maoris may see how the Pakehas settle these things, and that there may be hereafter no more bloodshed should these things come to pass'. St Hill noted that, by contrast, five years before a Māori man had shot his wife's seducer as retribution.[76]

Conclusion

In the 1840s and beyond, the institution of the Resident Magistrates' Court in New Zealand was one of the focal points for Māori engagement with settler law. Māori pro-actively engaged with British law from the beginning of the colony – and they still do. The contemporary treaty settlement process is more than proof of this. Is this a pattern? Or a practice? Or a tradition? It may not be any of these, and it was certainly not perceived as such in 1846. But it is an observation and one that will come as no surprise to many people in New Zealand.

The Resident Magistrates' Court is a quite unique example in Australasia of a legal transplant. Its history shows a singular transformation and domestication of an English institution (and perhaps tradition – that of the lay justice of the institution of the magistrate), transplanted via other colonies, and adapted for local circumstance and need. It also shows, however, how much in the British Empire was started by happenstance, the chance location of individuals, and a bit of legal 'bower-birding'.

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74 *Noble v Haramia* Resident Magistrates' Court, Wanganui, 29 January 1849.

75 *E Tako v Karena* Resident Magistrates Court, Wellington, 9 June 1848, reported in the *New Zealand Spectator and Cook's Strait Guardian* (14 June 1848), 2 at 2 per St Hill RM with two assessors, Porutu and Te Teira Wetu.

76 St Hill, Resident Magistrate, Wellington to Sinclair, Colonial Secretary New Zealand, 25 July 1848, enclosure in Governor Grey to Earl Grey, 19 August 1848, GBPP 1849 (1120) at 34. It is notable that St Hill's despatch uses identical language to that of the report in the newspaper.

Perhaps if there is a tradition revealed in this article, it is not a one of constitutionalism, but one of colonisation.