

SESS. II.—1897.
NEW ZEALAND.

HOROWHENUA CASE.

MEMORANDUM BY THE HON. THE MINISTER OF LANDS IN CONNECTION WITH SECTION XIV.
OF THE HOROWHENUA BLOCK.

Laid upon the Table by the Hon. J. McKenzie, with the Leave of the House.

It was stated by counsel for the Public Trustee in the course of his address to the Court on the 11th day of August, 1897, the date on which the trial of the action Public Trustee against Sir Walter Buller was set down for hearing, that the Public Trustee was not in a position to adduce evidence to justify the Supreme Court in setting aside the registration of the defendant's dealings with Section 14. According to the ordinary rules of equity, a man who, knowing another to be a trustee, deals with him as absolute owner, is not permitted to retain the benefit of his dealing. But I am told that if the dealing is under the Land Transfer Act the Judges have decided that much more than mere notice or knowledge of the trust must be proved in order to invalidate the dealing—active fraud, they term it.

If this is the correct position of the matter, it is not for me to question the course adopted by counsel for the Public Trustee. But if that is the position, then I am satisfied that Parliament did not by its Act of last year effect what it was intended should be effected; and certainly the statement by counsel that they had no evidence to support such a case does not in the least affect the position which I have taken up in this matter.

The statements which, as a layman unversed in the nice distinctions between ordinary fraud and “active fraud,” I made against Sir Walter Buller were shortly as follows: (1) That he had robbed Natives of their land in the Horowhenua Block; (2) that he had induced the Natives to squander their land for the purpose of keeping on foot litigation which could only benefit the lawyers engaged. The finding of the Royal Commission practically sustained these statements, but it has been alleged that they have failed in the Supreme Court. With this view I do not concur. Indeed, notwithstanding the admission by counsel for the Public Trustee in the Supreme Court that they could not adduce evidence in that Court against Sir Walter Buller, I am satisfied that there was plenty of evidence to support what I have averred; and I intend now to point out the evidence which justifies this statement, and leads me to the belief that there has been a miscarriage of justice in the Supreme Court.

I will premise by saying that everything I affirm in this connection will be based upon what Sir Walter Buller has stated himself, and will consist in great part of extracts from his own evidence. The evidence is available to any person who wishes to see it. It is recorded in the Horowhenua Commission papers, and it is recorded in the books of the Native Appellate Court. Some of it is to be found in the pages of *Hansard*, so that the statements I make can be verified, and any person who likes can satisfy himself that I am not in any sense overstating the matter.

SIR WALTER BULLER'S MEANS OF KNOWLEDGE.

In the first place, then, Sir Walter Buller is to be judged in this matter by a somewhat strict standard. He is a man who possessed a very extensive Native practice for a very long period of time. In fact, from 1874 to 1886 he had the largest Native Land Court business in New Zealand. He was, further, a man who was well conversant with Native titles, with the means of searching for and ascertaining the title to any block and the evidence given in respect of the investigation into or partition of any block. Horowhenua Commission evidence, p. 242.

Another circumstance is this: that Sir Walter Buller was extremely well acquainted with the history and the internal position of all the West Coast blocks. His practice lay in a very large measure on the west coast of this Island, and no man probably was more intimately acquainted than he was with the titles to and the position of the various blocks between here and the Rangitikei River.

We therefore start with Sir Walter Buller as a man who had special means and opportunities of knowing all the salient facts connected with the West Coast blocks, and the greatest possible facilities and the best knowledge how to obtain access to all the necessary information in

respect of any Native block, more especially blocks situated on the west coast of this Island. This fact ought to be kept steadily in view. It is not a question of a layman or an ordinary lawyer, but of a much experienced, an industrious, and a very widely informed Native agent and lawyer.

Horowhenua
Commission
evidence, p. 242.

Further than this, Sir Walter Buller had from the year 1874 to 1886 acted on and off, or practically always, for Major Kemp both in and out of the Native Land Court. He knew more of Major Kemp's business than any other man, and he knew, amongst other things, that Major Kemp was the sole certificated owner of the Horowhenua Block, and, as such, that he was trustee for 143 Natives whose names were registered in the Native Land Court records.

Horowhenua
Commission
evidence, p. 253.

It must be borne in mind with regard to this block that the Horowhenua Block is not an ordinary block. It has from the very earliest period stood out as a block with a peculiar history, and has always attracted attention. Both its area and position too marked it out. It was a block which had been awarded in the centre of a very large tract of country. The remnant of the Muaupoko had had this awarded to them in 1873 in opposition to the strong protests of the Ngatiraunkawa. Sir Walter Buller knew, as did every one else, that at the time of the Court in 1873 Major Kemp, with a strong body of armed Natives, was encamped on or close to this Horowhenua Block, and was demanding it from Sir Donald McLean on the threat of bloodshed, and was thereupon awarded it; and he knew further of the fighting, and bickering, the burnings, the threatened bloodshed in connection with the award of this land to the Muaupoko.

I only mention these facts as leading up to this point: that Sir Walter Buller's attention, equally with the attention of other men who took any interest in Native affairs at that time, must have been directed since 1873 to the peculiar position of this block, and Sir Walter Buller himself, in the course of his professional intercourse with Major Kemp, must have frequently discussed the position of that block with him.

MAJOR KEMP'S POSITION UP TO 1886.

Otaki minute-
book, Vol. i.

Now, it is worth while to remember the position Major Kemp took up in 1873 with regard to the Horowhenua Block. He said, in effect, he was asserting a right to the land for the Muaupoko and other tribes, but only as their agent in the matter. And such was the fact. Major Kemp resided at Wanganui, and Wanganui, not Horowhenua, was his ancestral place. It is true he claimed kindred with the Muaupoko Tribe, who had been awarded this Horowhenua Block, but Major Kemp, until a very late period, never asserted a substantial personal claim to Horowhenua. And the land was awarded to him in 1873, and he took it in his own name, in trust for himself and the other owners. That cannot be disputed. To use Sir Walter Buller's own words, Major Kemp was "in fact and in law trustee" for the 143 registered owners.

SIR WALTER BULLER'S FIRST AGREEMENT.

Horowhenua
Commission
evidence, p. 242.

Native Appellate
Court printed
evidence, p. 83.

Now, Sir Walter Buller states that before his departure for England in the year 1886, knowing the position of the title and Kemp's trusteeship, he obtained from Major Kemp a promise to lease him a lake called Papaitonga, situated on the south portion of the block, and now forming portion of Subdivision 14, and a small piece of land close to the lake. It is a remarkable fact that neither Sir Walter Buller nor Major Kemp has any recollection where and when this arrangement was made and what the terms were. They are both agreed in stating that all they remember was that Sir Walter Buller requested Kemp to lease him a portion of the land including the lake, and that Major Kemp consented. And both of them now state that that arrangement was present to both of their minds from the year 1886 up till 1892. Sir Walter Buller was unable to say whether this arrangement was made shortly before his leaving for England or not, and when he was asked why the arrangement was not carried out in 1886, before he left New Zealand, or in 1890, when he returned, he was unable to state. The fact is significant, because there was even in 1886 nothing to prevent a lease from being granted, and I suggest that the story is a mere afterthought to account for the fact that, while certain of the other Natives dealt with the portions of the land awarded to them beneficially in 1886, Major Kemp did not for six years attempt to deal with this Subdivision No. 14, which it is now alleged was awarded beneficially to him in 1886, and for the very good reason that he was perfectly well aware that it was trust property until it was suggested to him that he could claim it beneficially by, I venture to suggest, Sir Walter Buller.

Native Appellate
Court evidence,
p. 83.

Now, the whole point I am concerned with is this: Was there or was there not any evidence that Sir Walter Buller was aware of the trust in respect of Subdivision No. 14? Sir Walter Buller admits that prior to his leaving for England in 1886 he knew that Major Kemp was trustee for the 143 registered owners, including himself, in respect of the whole block. Surely, then, it lies upon Sir Walter Buller to prove that he knew of the extinguishment of this trust as regards Subdivision No. 14. Has he done it?

KEMP'S POSITION AFTER THE PARTITION IN 1886.

Native Appellate
Court evidence,
p. 85.

Shortly after Sir Walter Buller's departure for England Major Kemp was induced to apply to the Native Land Court for the purpose of partitioning the Horowhenua Block, and the partition duly took place in November and December of that year. Upon the partition Major Kemp was awarded several sections in his own name, and one section was awarded to Major Kemp and Warena Hunia, and one to Ihaia Taueki. These sections were all awarded by the Native Land Court to the various grantees in their own names without mention of any trust. But, with regard to these sections, it is undisputed that all (except No. 14) were awarded on trust. Leaving that apart, let us consider the others. One was the Allotment No. 1, which was to be sold to the Manawatu Railway Company, and was understood at the time to be in trust for all the owners; No. 2 was 4,000 acres, given to Major Kemp, to be sold to the Government for a township. This also was to be sold upon trust for the whole of the Native owners, and the proceeds applied in their favour. No. 6 was awarded to Major Kemp, and it was understood to be upon trust for

certain Natives who had been left out of the title. No. 9 was awarded to Major Kemp, and unquestionably upon trust for the descendants of Te Whatanui; and No. 10 was awarded to Major Kemp, with the condition that it was to be sold and the proceeds spent in the payment of a certain bill of costs of Kemp's. No doubt the land was given to Kemp himself, but it was given to him for the purpose of discharging a certain debt. No. 11 was awarded to Major Kemp and Wirihana Hunia, as it is asserted, upon trust for the whole of the Muaupoko. No. 12 was awarded to Ihaha Taueki upon trust for the whole of the Muaupoko, and it is also alleged that No. 14 was awarded to Major Kemp upon trust as an alternative section for the Ngati-raukawa. Now, all these sections were awarded in an untrammelled state to Major Kemp, or to Major Kemp and Wirihana Hunia, or to Ihaha Taueki. Land Transfer certificates were issued absolutely in the names of these persons, and, as far as could be judged from the title, the whole of these sections were awarded to the nominal owners as absolute beneficiaries; and that was the position with regard to the great bulk of them on the return of Sir Walter Buller from England in 1890. Judged by the Land Transfer books, for years after the partition there was everything to show that Major Kemp, Wirihana Hunia, and Ihaha Taueki all held these respective allotments in exactly the same manner: if beneficially, then all beneficially; if in trust, then all in trust. There was no doubt a caveat issued in respect to No. 11 by Mr. Bartholomew, but that was simply to protect a flax license which he had obtained from Major Kemp.

SIR WALTER BULLER'S NOTICE OF THE TRUST.

Sir Walter Buller returned from England in May, 1890. The Horowhenua case was at Appellate Court that time exciting a considerable amount of interest. In the early part of 1890 an application had been made by Kemp for the partition of No. 11, which was in the names of Major Kemp and Warena Hunia, and for the first time in the course of the proceedings in connection with the partition of the block it was alleged by Major Kemp that No. 11 was a trust block. The proceedings at this partition were lengthy, and very complete minutes were taken; and during the course of these proceedings Major Kemp, on cross-examination, defined his position with regard to the whole of the sections the titles for which had been issued in his name. Amongst others he stated, with regard to No. 14, *that it was held by him upon trust for the descendants of Te Whatanui*; and, with regard to No. 9, *that it was not held for himself alone; that he held it for a special purpose; that he would see that the tribe did not suffer, and, if necessary, it would be transferred to them*. The whole of the evidence is contained in one of the ordinary minute-books of the Native Land Court, and is accessible to the public in the ordinary way. Appellate Court evidence, p. 83.

Immediately after the decision of the partition Court, which held that it could not take notice of any trust as against the title of the registered proprietors, Major Kemp caused a caveat to be registered as against No. 11, asserting this trust.

It was while matters were in this ferment with regard to this particular block that Sir Walter Buller—Major Kemp's guide, philosopher, and friend—returned from England. Two or three months afterwards Parliament sat; Major Kemp and a large number of the tribesmen came down to Wellington, and took part in the proceedings before the Native Affairs Committee in the House with a view to having a trust declared. And yet Sir Walter Buller states that he has not the slightest recollection of having any communication with Kemp in Wellington in that year, and that he has absolutely no recollection of having taken any part whatever in connection with these proceedings, although he was unable to say definitely that he did not. What an extraordinary statement. Sir Walter Buller, with a promise of a lease of part of the block, to take no interest in the block, or in his great and honoured client Major Kemp's proceedings! I venture to think that Sir Walter Buller, whose house on the Terrace was such a well-known rendezvous for important Natives, would not have allowed a man for whom he has such high respect as Major Kemp to be in Wellington during this long period of time without communicating with him, nor would Major Kemp be likely to forget his friend and adviser Sir Walter Buller in the troubles that were then pressing him. I think it is very reasonable to suppose that not only did Major Kemp see Sir Walter Buller at that time, but that Major Kemp informed him very fully what his business in town was; and, if so, it seems more than likely a man of Sir Walter Buller's industry and interest in Native matters would not have omitted to have satisfied himself by personal perusal of the minute-books of the state of the Horowhenua Block. I pause here. *If Sir Walter Buller did peruse the minutes, then, even then in 1890, he had clear notice that a trust was alleged by Major Kemp himself with regard to Section 14*. However, up to this point we have no direct evidence that this was so, although I certainly consider it a very strong inference. Appellate Court evidence, p. 86.

In 1891 the rehearing Court sat in connection with his Section No. 11. The main point in dispute before the rehearing Court was as to whether a trust could or could not be declared by the rehearing Court in respect to this block. One of the Judges who sat on the rehearing Court was Judge Mair, a brother-in-law of Sir Walter Buller. The rehearing Court finally gave its judgment, and decided that it could not give effect to any trust that might exist. This ended the matter as far as the Native Land Court was concerned.

In the session of 1891 Judge Mair was in Wellington staying with Sir Walter Buller. Again, in that year Kemp and a large number of the Muaupoko were present in town striving strenuously to have a trust declared in connection with Subdivision 11. Sir Walter Buller admits that at that time Judge Mair, who was living in his house, informed him of what had taken place in connection with Horowhenua No. 11, and, although Sir Walter Buller has said he has no recollection of having seen Kemp or taken any part in connection with Horowhenua during the session of 1891, the fact seems almost incredible. If it be true that Sir Walter Buller did have communication with Kemp, then I can hardly credit that he did not, with his usual thoroughness, go into the matter and make the ordinary inquiries. In all probability, indeed, the very books in connection with the case were with Judge Mair at Sir Walter Buller's own house, and if Sir Walter Appellate Court evidence, p. 87.

Appellate Court
evidence, p. 83.

Horowhenua
Commission,
p. 249.

Horowhenua
Commission,
p. 254.

Horowhenua
Commission,
p. 254.

Buller did read those books at that time, *then he had clear and distinct knowledge that Major Kemp asserted that he held No. 14 in trust*. Be that as it may, however, it is manifestly clear that, at any rate with regard to No. 11, Sir Walter Buller knew in 1891 that Major Kemp was clothed with the office of a trustee, and as I read his evidence he was equally aware of the same fact with regard to Nos. 6, 9, 1, and 2. During all this time, too, Sir Walter Buller took no step to have his verbal arrangement with Major Kemp carried into effect. He was asked for a reason about this, but was unable to give it. And it was only in May, 1892, after Sir Walter Buller had secured the freehold of a portion of the other block, Waiwiri, adjoining the Papaitonga Lake, that he seems to have bethought himself of his verbal arrangement with Major Kemp. It is very difficult to find out from Sir Walter Buller what steps he took prior to entering into negotiations with Major Kemp to inform himself whether Major Kemp was trustee or not. Sir Walter Buller declined to pin himself down to any statement at all. He admitted that he might have seen the minute-books. He implied that he had seen the certificate of title of the whole of the blocks, and he further said he made the inquiries usually made by a solicitor, but he did not remember when and where. In another place he says he made no more inquiries than the Trust Commissioner made; and, again, he states in another place that he took no steps whatever to ascertain whether or not there was any question of trust as regards Subdivision No. 14 beyond obtaining Major Kemp's statutory declaration as by law required. And, again, he says that he never asked Kemp whether he was trustee except in the way of getting him to sign a statutory declaration, and that he is not aware of asking any member of the tribe as to the position of No. 14. And yet all this time Sir Walter Buller was aware that in one, at any rate, and probably all the other blocks held in exactly the same position, the owners appearing in the certificate of title as absolute owners were trustees for the members of the tribe.

The Horowhenua Commission, in reference to this matter, reported as follows: "The only conclusion that we can come to is that Sir Walter Buller knew, prior to his leaving in 1886 for England, that the whole block was held by Kemp in one title in trust for the tribe, and that on his return he, notwithstanding, did, without making inquiry to ascertain that the trust was extinguished, purchase part and lease other parts of the trust property." Surely that is true on Sir Walter Buller's own evidence, and it is the result that will suggest itself to any reasonable man.

Appellate Court
evidence, p. 81.

But the emphatic and the significant point of the whole matter is, I again repeat, this: *If Sir Walter Buller did read the minutes of the Court of 1890 he must have known that Kemp asserted that he was trustee of No. 14*. And the inference is almost irresistible that he had read those minutes prior to May, 1892, the date when Sir Walter Buller first entered into his dealings with Major Kemp. These dealings consisted of a transfer of a small portion of the land, some 11 acres, and a lease of some 500 acres. Later on I will have something to say about the consideration-money for this lease, but at present I am only concerned with the one point—had Sir Walter Buller notice of a trust when he took these dealings or had he not. In the month of July, 1892, Sir Walter Buller—to use Mr. H. D. Bell's phraseology—supplanted Mr. Bell as Kemp's solicitor, and took active control of matters in connection with the Horowhenua Block, which has resulted at present in landing Kemp in a liability of several thousands of pounds for costs, and in dissipating some £9,000 of the Muaupoko money. Now, it is a remarkable fact that before rushing into the vast expense Sir Walter Buller never approached Warena Hunia to get from him a definite answer, Yes or No, as to whether he would do anything for the tribe prior to this huge expense being incurred for legislation, litigation, and public petitions. Sir Walter Buller's explanation is this: that he knew that Warena Hunia would not agree. He was pressed in cross-examination how he knew that fact; and, taking care as far as possible to safeguard himself, he suggested the information which had led him to neglect the simple step of approaching Warena Hunia in the matter. Sir Walter Buller says:—

Appellate Court,
p. 88.

"Mr. McDonald put it to me whether I thought it was reasonable that I should put the people to great expense without consulting Warena as to the prospect of his giving up the land. Mr. McDonald asked me if I had read the minute-book. I would like to read two passages from it [Otaki, No. 13, page 263, Wirihana's evidence]: 'I heard that all the Muaupoko agreed to give their interest in this land to do what they liked with,' &c., to 'left out.' Same volume, page 268, Baker's address: 'I intend to put in a declaration of trust by Major Kemp (section 41 of Act of 1886 quoted). The object is to secure the land for Muaupoko Tribe,' &c., to 'present Court.'"

"The reading of the minute-book strengthens my contention that it was no use approaching Warena. I got the fullest information before I went to Parliament. I never heard till the Royal Commission any suggestion of a moral obligation on part of Kemp and Hunia. At the time I advised Kemp to go to Parliament in 1892 I had satisfied myself that it was useless approaching Hunia, seeing that he had declared himself to be absolute owner. In the early part of 1892 I had read a pamphlet containing a statement of Warena Hunia regarding Horowhenua Block, on page 3 of which appears the following paragraph: 'Subdivision No. 11, containing 14,975 acres, was awarded to Major Kemp and myself, our shares being undefined, &c.' In the face of such a statement as that it was utterly useless to communicate with Warena Hunia. I had the pamphlet in my possession in 1892, when we were fighting before the Native Affairs Committee, and I never did attempt to treat with Warena."

I submit that in these admissions of Sir Walter Buller there was *the amplest evidence that he had notice of a trust in respect of No. 14*. Hitherto there has perhaps been nothing more than the strongest circumstantial evidence to prove that he knew; but at this point we have certainty. *Here we have Sir Walter Buller's own direct admission*. How do I make this out?

Otaki minute-
book. Vol. xiii.,
p. 177.

In the first place the minute-book (Otaki, No. 13), which Sir Walter Buller had read prior to going to Parliament in 1892, contains Kemp's own statement that *he held that land not for himself, but for the Ngatiraukawa*; and in Warena's pamphlet, which was in Sir Walter Buller's possession in 1892, which he admits having read early in 1892, there is a statement *that after*

No. 14 had been cut off for Major Kemp to give to the Ngatiraukawa he retains that block for himself. I say that this in itself is absolutely clear and conclusive evidence that Sir Walter Buller, at any rate before the second dealings in October, 1892, and before he can have expended any sum of money of any consequence in respect of the first dealings, was fully aware that a trust was asserted by Major Kemp and by Warena Hunia in respect of No. 14. Out of Sir Walter Buller's own mouth it is thus proved beyond the shadow of a doubt that in the month of September or October, 1892, at the latest, he had full notice that a trust was asserted in No. 14. And yet counsel for the Public Trustee say there was no evidence. And Sir Walter Buller knew more. Prior to his taking his mortgage in October, 1894, he knew it was very questionable whether the whole partition of the block and the whole title to Section 14 was not utterly bad and invalid, and whether the legal flaws did not of themselves in law constitute Major Kemp a trustee of No. 14. Sir Walter Buller, as solicitor for Major Kemp, was responsible for a statement of claim in an action of Kemp and others against Warena Hunia in which several allegations of law, all of which were relied upon in the statement of claim as invalidating the title to the sections of the Horowhenua Block, were put forward as destroying the title of the certificated owners of Block 11, a block the title to which stood in identically the same position as No. 14. And yet Sir Walter Buller, in full knowledge that Kemp and Hunia alleged a trust in No. 14, in full knowledge that these law points existed, which Kemp's own lawyers alleged invalidated the title to the block, took from Major Kemp a mortgage, thus further incumbering as against the tribe this piece of land, No. 14. And yet the counsel for the Public Trustee says there was no evidence. They may be right from a legal standpoint, but if the law of the land says that knowledge of facts such as these is not sufficient to invalidate the title of a skilled lawyer and a skilled Native agent, then so much the worse for the law of the land. But, be the law what it may, any upright man would say that any one who, with the knowledge that Sir Walter Buller possessed, dealt with trust property in breach of the trust, was dishonest, dishonourable, and fraudulent in his dealings.

See statement of claim, Kemp v. Warena te Hakeke.

SIR WALTER BULLER'S LEASES.

And now let us turn to these leases, and transfers, and mortgages of Sir Walter Buller's. The Public Trustee, in his statement of claim, said that the leases were made at a fraudulent undervalue. Not being a lawyer, I do not presume to say what constitutes, in law, a fraudulent undervalue; but it cannot be gainsaid that Sir Walter Buller gave the Native owner, who was his unskilled client, far less for these lands than he should have done, and far less than he knew he should have done. Sir Walter Buller, besides dealing with Major Kemp, dealt with some other Natives, to whom he did not stand in the relation of solicitor, for parts of an adjoining block. The leases were passed by Judge Mackay as Trust Commissioner, and evidence was adduced to satisfy him that those leases were fair and proper leases, and that the rent was adequate. Now, the evidence given was that the bush part of the adjoining block, Waiwiri, which was leased by Sir Walter Buller—and which was an unworkable, badly-shaped, wedge-like piece of land—was 3s. an acre per annum. And yet for this adjoining piece of land, this Horowhenua No. 14, the lower portion of which is a picked piece of land—a piece of land having a peculiar value of its own, as stated by Sir Walter Buller's own witnesses in the famous action that he brought against Jillett—a piece of land of a good square shape, with a long road and railway frontage, Sir Walter Buller gave a rental of 2s. 6d. an acre—under 3 per cent. of the capital value, even disregarding the special value of this particular section. And yet counsel for the Public Trustee state that they had no evidence to substantiate their charge of fraudulent undervalue. That may be so in strict law; but I do say this: that any man who has the least regard for his own reputation, or who had any nice sense of honour, would never, acting as the solicitor to a Native, have induced that Native to lease to him either that Native's own property or any one else's property at such a low rental. In this connection, it might be instructive to mention a little incident which occurred in connection with Sir Walter Buller's purchase of the adjoining Waiwiri Block. An old Native woman, a poor, landless woman, had some seven or eight acres adjoining the lake which Sir Walter Buller coveted. The law has, wisely or unwisely, provided that no Native shall sell his land unless he has sufficient other land for his occupation and support. Sir Walter Buller, however, induced this old woman, who had no other land, to sell him this piece of land at a high value, no doubt—namely, £10 per acre; but when he came to have the transfer passed before Mr. Mackay, Mr. Mackay declined to certify to it, on the ground that the Native had no other land. Sir Walter Buller seems to have suggested, as a way out of the difficulty, that he should lease to this old woman, for a time long enough to last her lifetime, a portion of the No. 14 Block for her personal occupation and residence; and on this being promised, Judge Mackay seems to have handed over to Sir Walter Buller the transfer of this old woman's interest. Sir Walter Buller, having obtained the transfer, seems to have been very averse to carry out his part of the bargain, and seems to have raised all sorts of difficulties against doing what he promised. However, Judge Mackay was firm, and eventually Sir Walter Buller did lease to this woman a piece of No. 14. It will hardly be credited that what he leased to her was a piece of land situated right at the south-eastern portion of the block, away back across the Ohau River, miles from the railway, chains from a road, dense bush-country, without any means of access, and without the slightest possible value to the Native as a place of abode. Moreover, this lease was never registered, and, as far as can be seen from the Land Transfer books, Sir Walter Buller held his land free from any incumbrances in the way of sub-leases, even during the term of that sub-lease. These facts are on record, and speak for themselves. I cannot think that any honourable man would have done a thing of this sort.

See Waiwiri, Trust Commissioner's file.

See certificate of title.

SIR WALTER BULLER'S MORTGAGE.

And now, lastly, to deal with the mortgage. It is alleged by the statement of claim of the
2—G. 2A.

Appellate Court,
p. 87.

Horowhenua
Commission,
p. 238.

Public Trustee that when Sir Walter Buller took his mortgage, in October, 1894, he concealed from Major Kemp the fact that he intended it to cover all costs then due and all costs thereafter to become due in connection with the Horowhenua Block. Counsel for the Public Trustee stated that they had no strict legal evidence to prove that this was so. They may or may not have had; but it is clear from Sir Walter Buller's own evidence given before the Royal Commission and at the Native Appellate Court, and from the Trust Commissioner's own evidence, and from Major Kemp's evidence, that it was represented to Kemp himself merely as a mortgage to secure the sum of £500 advanced to Mr. Edwards for his conduct of the case; and Sir Walter Buller, when pressed on the subject, and given every chance to do so, never even dared assert that he had informed Kemp. It appears now, that at the time when the mortgage was executed a sum amounting to £1,000 and upwards was due by Major Kemp to Sir Walter Buller; that no account of these costs had ever been rendered to Major Kemp; that he was not told that these costs would be included in the mortgage; and that the only communication to Major Kemp on the subject was that the mortgage was read over to him. It is not alleged that Major Kemp was informed that the mortgage was to cover costs previously incurred, and the fact was certainly not made known to the Trust Commissioner.

Such is my comment on the Horowhenua proceedings, and nothing has thus far transpired in connection with them which weakens the belief I have already expressed, namely,—

(1.) That Sir Walter Buller knew prior to his leaving in 1886 for England that the whole block was held by Kemp in one title in trust for the tribe, and that on his return to New Zealand he, without making inquiry to ascertain that the trust was extinguished, purchased part and leased other parts of the trust property.

(2.) That Sir Walter Buller had knowledge that Kemp and Warena Hunia agreed in asserting that Major Kemp held this Block No. 14 for others as well as himself, both when he dealt with the land in October, 1894, and when he dealt with the land in October, 1892; and, all the evidence goes to show, when he dealt with the land in May, 1892.

(3.) That Sir Walter Buller took his leases at a great undervalue from his own client.

(4.) That Sir Walter Buller procured from Kemp a mortgage which he now alleges covers large sums of money for costs due to Sir Walter Buller, but which costs were never intended by Kemp to be covered by the mortgage, and which sums Kemp was never informed were covered by the mortgage.

(5.) That Sir Walter Buller fomented and encouraged legal proceedings which have resulted in casting the tribe in thousands of pounds of costs without making the least effort to avert this huge expenditure, a large proportion of which might probably have been easily saved had he approached Warena Hunia in the first instance, and a large proportion of which has gone into his own pocket.

It will be observed that my allegations are based on different considerations from those in the action brought by the Public Trustee. They were made prior to the report of the Royal Commission. They were investigated by that tribunal, and were substantially proved by its report.

The reason of the failure of the Public Trustee's action is not far to seek. By the Act of 1896 the Legislature referred it to the Appellate Court to determine whether a trust existed in respect of Subdivision No. 14, and to the Supreme Court to determine whether Sir Walter Buller's dealings were valid. The functions of the two Courts were separate and distinct, and the Supreme Court was not to be approached until the Appellate Court had given its judgment. That was the clear intention of Parliament. What happened? The Appellate Court, instead of itself deciding the questions referred to it, practically threw it upon the Supreme Court to do so. The Supreme Court with one hand threw back until October the case referred to it by the Appellate Court, and with the other forced the Public Trustee to go to trial in August. The consequence was that the Public Trustee was called upon to establish in the Supreme Court the existence of a trust, and also to accept the burden of proving that if the trust existed Sir Walter Buller had notice of it. This his counsel advised could not be done in that Court, and hence the proceedings failed. If, however, the intention of Parliament had been given effect to, and the Appellate Court had first decided the question of trust, the Public Trustee could in the Supreme Court have thrown on Sir Walter Buller the onus of proving that he had no notice of the trust, or that, if he had had notice of it, the trust was extinguished prior to his dealings. It is abundantly clear from his own admissions that this he could never have done. He has been impeached in a court of conscience, before the tribunal of public opinion. He has escaped in a Court of law by a series of legal quibbles.

For myself, I have no quarrel with Sir Walter Buller. Throughout the whole of this unpleasant matter I have been moved solely by a sense of public duty, and no considerations of personal convenience will induce me to swerve from what in my conscience I conceive my public duty to be.

Having regard to the report of the Royal Commission, and the fact that no evidence was attempted to be adduced in the Supreme Court, I am of opinion, and in this my colleagues concur, that a wrong has been done, and the matter should not be allowed to remain in its present unsatisfactory state. A Bill will therefore be introduced declaring Section 14 to be Native land, and providing for an investigation into the title, and the registration of all dealings therewith that have been made by the true owners and are in accordance with equity and good conscience.

JOHN MCKENZIE.

Approximate Cost of Paper.—Preparation, not given: printing (1,375 copies), £3 13s.

By Authority: JOHN MACKAY, Government Printer, Wellington.— 1897.

Price 3d.]