1948

NEW ZEALAND

REPORT AND RECOMMENDATION ON PETITION No. 240 OF 1932, OF HORI TUPAEA AND FOUR OTHERS, PRAYING FOR RELIEF IN CONNECTION WITH WHANGANUI-O-ROTU (OR NAPIER INNER HARBOUR) AND THEIR RIGHT OF PROPERTY THEREIN

Presented to Parliament in Pursuance of the provisions of Section 27 of the Maori Purposes Act, 1933

Maori Land Court (Chief Judge's Office),
P.O. Box 3006, Wellington C. 1., 23rd June, 1948.

Memorandum for the Right Hon. the MINISTER OF MAORI AFFAIRS.

WHANGANUI-O-ROTU (NAPIER INNER HARBOUR)

PURSUANT to section 27 of the Maori Purposes Act, 1933, I transmit to you the report of the Court on the claims and allegations contained in petition No. 240 of 1932, of Hori Tupaea and others, concerning Whanganui-o-Rotu, commonly known as the Napier Inner Harbour.

The petitioners seek redress in respect of the area formerly known as the Napier Inner Harbour, and known to the Maoris as Whanganui-o-Rotu, the greater part of which became dry land as a result of the Hawke's Bay earthquake in 1931. The report of the Court is of considerable length, and for your assistance in considering it I will briefly summarize the facts and the main questions in issue.

It is to be noted that, although this petition is prompted by the fact that the area in question was, by the earthquake, converted from an area covered by water to an area of dry land, the Maoris laid claim to it many years before the earthquake. The matter was first brought before the Maori Land Court in 1916.

It appears to have always been considered by the Crown that the area was included in the sale by the Maoris to the Crown of the Ahuriri Block under a deed of sale made on 17th November, 1851. In 1874 the area was vested in the Napier Harbour Board by the Napier Harbour Reserves Act, 1874, and in 1929 a certificate of title under the Land Transfer Act was issued to the Napier Harbour Board.

The Maoris, on the other hand, have contended that the greater part of the area was not included in the sale to the Crown.

The claim of the petitioners is summarized in clause 8, and the prayer of the petition, which are as follows :—

8. Your petitioners therefore submit that they have—

(*a*) A claim as of right to the territory represented by the islands, now lost or left undefined in the general emergence of land ; and

(*b*) A claim according to equity and good conscience, with a large measure of right, to share in the benefits which may accrue from the added territory.

WHEREFORE your petitioners humbly pray that your Honourable House will make provision by law for an examination of these claims of your petitioners, and for the satisfaction of such just and equitable rights as your petitioners may be found to possess ; and for such further or other relief as to your Honourable House may seem meet.

The present Court in its inquiry has directed its attention to two main questions, namely :—

(1) Whether the area was included in the sale to the Crown.

(2) If not, whether the area was an arm of the sea, in which case it would belong to the Crown, subject, perhaps, to fishing and possibly other rights of the Maoris ; or whether it was an inland non-tidal water, in which case it would have belonged to the Maoris as part of their tribal territory.

These questions required to be determined in order to determine whether the rights of the Maoris were in any way invaded by the vesting of the area in the Harbour Board. The Court in its report has shown that it is of the opinion that the greater part of the area was not included in the sale to the Crown, but it has been unable on the evidence submitted to it to come to a final conclusion on the second question set out above. The views of the Court are summarized at the end of the report in paragraph 163 appearing on pages 89–91 of the printed report.

In expressing the view that the greater part of the area was not included in the sale to the Crown, the Court has differed from the view taken on this question by a Commission set up in 1920 to deal with the matter. The Court in its report deals at length with this question and sets out fully the grounds for the conclusion (see paragraphs 19–89).

The petitioners ask for the " satisfaction of such just and equitable rights as they may be found to possess." In order to establish that they do possess some just and equitable rights it appears to me that they must be able to show that they had some rights in respect of the area, at the time when it was vested in the Harbour Board, when whatever rights, if any, they had appear to have been extinguished.

Owing to the lack of evidence above referred to the Court has been unable to decide this matter one way or the other. It does appear, however, that if the area was not included in the sale the Maoris, at the time of the vesting in the Harbour Board, must either have owned the area under their customs and usages or must have had some fishing and, possibly, other rights in it ; and such rights of ownership or other rights must have been extinguished by the vesting, without payment of any compensation. However, at the time when the rights, if any, which they had were extinguished in 1874 the results of the earthquake could not have been foreseen, and therefore any redress to which they may be entitled should be assessed on the value of those rights at the time when they were extinguished.

The petitioners suggest that the very great increase in value of the area as the result of the earthquake should enable some recompense to be made to them, whereas prior to the earthquake such was not feasible.

If the finding of the Court that the area was not included in the sale to the Crown is accepted, then it appears that the Maoris did possess some just and equitable rights on account of the extinguishment of their rights, whatever they were, by the vesting in the Harbour Board; but as they have failed to establish just what those rights were I am not in a position to make a recommendation as to the manner in which they should be recompensed for their loss.

This, I think, should be a matter for further consideration by the Government.

D. G. B. MORISON, Chief Judge.

In the Native Land Court of New Zealand, Ikaroa District.—In the matter of section 27 of the Native Purposes Act, 1933; and in the matter of petition No. 240 of 1932, of Hori Tupaea and four others, praying for relief in connection with Whanganui-o-Rotu (or Napier Inner Harbour) and the right of property therein.

AT a sitting of the Court held at Hastings on the 19th day of April, 1934, before John Harvey, Esquire, Judge, the hearing of this matter was commenced, but such hearing is still uncompleted.

1. Upon a reference by His Honour the Chief Judge of the said petition for inquiry and report, and upon hearing all evidence adduced and submissions made on behalf of the claims respectively of the petitioners, the Napier Harbour Board and the Crown, and upon recourse being made to all records that were available to the Court, the following progress report is submitted.

2. The subject-matter of this petition was known to the Maori people of former times as Te Whanganui-a-Orotu, which name has been corrupted and shortened to Whanganui-o-Rotu. It comprised a land-locked sheet of water, approximately 8,000 acres in extent, highly prized by a considerable community for the abundance of fish (including shell-fish) that it contained, and for the comparative ease with which such food could be secured. It was also called the Maara (or garden) of Tawhao. Latterly the area has been known to Europeans as part of the Napier Inner Harbour.

3. The petitioners state that they are descendants and relatives of the persons who sold the Ahuriri Block to the Crown in the year 1851, and that this sale did not include—

the large lagoon which was called by the Maoris Whanganui-o-Rotu later described as the Ahuriri Lagoon and now often referred to as the Napier Inner Harbour.

4. They further state that, through the territorial rights of the Crown incorrectly having been assumed to apply to the Whanganui-o-Rotu, they have been deprived of their own exclusive right to it, and that, while in the past they viewed the acknowledgment by the Crown of their common right to fish the waters as an inadequate but not intolerable expression of their rights, an entirely new and acute situation arose when,

through a convulsion of Nature, a large portion of the area became dry land and their last remaining legal right (if only a common one) entirely disappeared. They pray for an examination of their claims and

for the satisfaction of such just and equitable rights as your petitioners may be found to possess.

5. At the hearing the petitioners were represented by Mr. Raniera Ellison, of Te Aute; the Napier Harbour Board by Mr. W. T. Prentice, a licensed interpreter employed by the legal firm of Sainsbury, Logan, and Williams; and the Crown by Mr. H. B. Lusk (Crown Solicitor), who had associated with him Mr. Pfeiffer, an officer of the Lands and Survey Department.

6. The Whanganui-o-Rotu appears to represent a phase in the formation of part of the land which constitutes the fertile Hawke's Bay plains of to-day. Its nature, creation, and existence were (prior probably to the advent of man) governed by natural laws, which briefly might be said to have operated somewhat after this fashion:—

7. In the first place, we are told that long ago a huge subsidence occurred of—among other places—the land then lying between the present Mahia Peninsula to Cape Kidnappers shore and cliff-line, and an indefinable line now far out to sea. Following upon this subsidence and by reason of seismic disturbance in the form of a series of distinctly local upward thrusts there was recovered from the sea, little by little, some of the land previously engulfed. It may be that only a very small portion of the submerged area has so far reappeared. In addition to the earthquake factor operating in this work of natural reclamation, the rivers that emptied themselves into Hawke's Bay also assisted.

8. These rivers, or some of them, carried down to the sea a detritus of stones which, from the action of river and sea water forces, became a fine gravel. This fine gravel, on account of its susceptibility to movement from tide and current forces, became distributed as the composition of the beach practically all along the coast-line from the Mahia Peninsula to Cape Kidnappers. Where the water adjacent to the cliff-line was comparatively deep this shingle was thrown up by the forces of the sea against the base of the cliff, but wherever an area of shoal water occurred it was thrown up into the form of a spit or gravel-bar in a position approximating the effect of drift and current forces on a general line of demarcation between shoal and deep water. To the landward side of these bars, or gravel-banks, waters were impounded forming a string of lakes, or lagoons, such as Whakaki (and the other lagoons between Wairoa and Nuhaka), Tangoio, and Te Whanganui-o-Rotu.

9. By the same action gravel-bars formed at the mouths of the rivers along the coast, and for a time would completely block their normal flow into the sea. In the case of the Whakaki and Tangoio Lagoons, as these gravel-banks are raised by the severity of storms to a point considerably above the level of ordinary high-water mark they preclude the regular flow and reflow of the tides over the land between them and the cliff-line.

10. But while they prevent the sea from entering they also prevent the fresh water impounded within from escaping into the sea, with a result that the water-level of the lagoon may (if percolation and evaporation does not relieve the pressure) rise to a point considerably above the level of high-water mark. In fact, the level of fresh water may rise to the point where it commences to run over the gravel-bank. So soon as this occurs the lagoon water rapidly cuts a channel through the soft gravel-bank down to a level approximately that of the sea for the time being. Thus if the scour occurs at low tide a deep channel will be cut, whereas if the overlapping should occur at high tide the initial corrosion would not be so severe.

11. The period for which the channel will remain open depends to a very great extent upon the state of the sea. A long period of calm seas would result in the channel remaining open or partly open for that period, with a result that the salt water of the sea would permeate the fresh water of the lagoon. The relative time taken by a lagoon

to reach the point when it would naturally burst over and through the gravel-bank depends almost entirely upon the rainfall occurring within its catchment area and the height to which rough seas have repaired the previous breach in the gravel-bank.

12. It will thus be seen that the character of these lagoons is the subject of a collection of natural influences, some of them being—

(*a*) The rainfall within the catchment area.

(*b*) The height and substance of the gravel-bank for the time being raised between the lagoon and the open sea.

(*c*) The amount of percolation in either direction which takes place through the gravel-bank.

(*d*) Evaporation of the water of the lagoon.

(*e*) The quantity of salt which becomes incorporated into the waters of the lagoon as a result of—

(1) Salt water, spray, and spume being forced over the top of the gravel-bank during severe storms.

(2) Salt water being forced by a rising tide through the gap in the gravel-bank while such gap remains open or partly open to the sea, and the amount of such salt water that escapes back into the sea as the tide recedes.

(*f*) Any change in the catchment area of the lagoon—as, for instance, a change in the course of a river which fed or becomes a feeder of the lagoon.

13. These lagoons, therefore, are unique in that their waters are not sea-waters, although the sea sometimes has access to them. They are not arms of the sea, although open at times to the sea; and their waters are not tidal waters, although at times tidal influence is felt.

14. The foregoing remarks are not intended to be taken as dogma on the geological formation of this part of the country or as an exhaustive dissertation on the cycle which constituted the watering and dewatering of the Whanganui-o-Rotu. The Court is concerned only with trying to collate and settle to its own satisfaction the available evidence on the class of waters (using the word in its legal sense) those comprising the Whanganui-o-Rotu, fall or at a given time fell.

15. The case put forward on behalf of the Crown at this hearing was as follows:—

In the Native Land Court.—In the matter of the petition *re* Whanganui-o-Rotu.

CASE FOR THE CROWN

1. The claim by the Petitioners that Whanganui-o-Rotu has been reserved by the Crown for the Natives is entirely without foundation. *Vide*, paras. 19 to 23.

The claim is based on a return appearing in the Appendix to the Journals of the House of Representatives for the year 1862 at page 9 (E, No. 10).

This return was prepared by a Mr. Andrew Sinclair, apparently an officer of the Native Department, and as shown by his prefatory letter on page 5, E–10 was compiled with difficulty and on incomplete material.

It purports to be a return showing "general reserves for natives which have been made in cessions of territory to the Crown."

The cession of territory affecting Whanganui-o-Rotu is the conveyance of the Ahuriri Block from the Natives to the Crown dated 17th November, 1851, as set out at page 491, Vol. 2, Maori Deeds, North Island, and if any such Reserve as that claimed it should appear in that Deed.

The Deed nowhere makes any such Reserve.

On the contrary the Deed itself forecloses that this Lagoon or arm of the sea known as Whanganui-o-Rotu was intended by all parties to pass to the Crown (if indeed it was not already Crown property by virtue of the Common Law). *Vide*, paras. 24 to 38.

The Deed does in fact make certain reserves and the first is "the island in the Whanganui-o-Rotu Lake named Roro-o-Kuri."

The very reservation of this island in this Lagoon demonstrates the fact that the Lagoon (incorrectly described as "Lake") was intended to pass by the Deed. Had Whanganui-o-Rotu as a whole remained the property of the Natives or been reserved to them why specifically reserve this island?

Further by the Deed there is reserved to the Natives an equal right with Europeans to the fish, cockles and other productions of the sea, &c.

The mention of these reserves in the Deed lends weight to the finding of the Commission of 1920 that the words appearing in the Deed "with their seas, rivers, waters, timber and all appertaining to the said land" evidenced the intended sale of this Lagoon to the Crown.

Vide, paras. 40 to 55. To strengthen the argument that all parties intended and knew that the Native rights (if any) in Whanganui-o-Rotu had been ceded to the Crown the Court is referred to the report of Mr. Park to the Chief Commissioner, Mr. Donald McLean, dated 7th June, 1851, appearing on page 313 C No. 1, Appendix to Journals 1862 in which at page 314 he says speaking of the Ahuriri Block "the most valuable part however of this block is the Harbour, consisting of a large sheet of water or lagoon about five miles long by two wide and on the Coast defended from the sea by a shingly spit; the depth of water nowhere exceeding nine feet. At the mouth of the Lagoon is the Harbour proper, being several channels out into the sea with a depth of from 2 to 2½ fathoms at low water; there is no bar and it is perfectly safe and easy of access at present for vessels of from 40 to 100 tons."

Further in a report by the Chief Commissioner to the Colonial Secretary dated 9th July 1851 and reported at page 311 C No. 1 the following appears—"The Ahuriri Block of 300,000 acres, including the Harbour, was valued by Mr. Park, the Surveyor, and myself at £1,500."

Your Honour is also referred to the letter of the Commissioner to the Colonial Secretary of the 29th December 1851 commencing at page 315 C No. 1.

Paras. 114 to 121. In the year 1874 Parliament vested this very Lagoon Whanganui-o-Rotu in the Napier Harbour Board by the Napier Harbour Reserves Act 1874. It is inconceivable that had this Lagoon ever been reserved to the Natives Parliament with knowledge of any such reserve which they must have had would have vested such property in the Harbour Board and deprived the Natives of its ownership.

Para. 70. It is true that the description of the boundaries as set out in the Deed do not embrace the Lagoon but the plan accompanying the Deed apparently does include the Lagoon (the plan is produced).

This is of little importance however considering the very inartistic drawing of such deeds and the mass of evidence demonstrating the actual agreement of the parties.

Vide, paras. 90 *et seq.* 2. Irrespective altogether of the question of reserve it is submitted that if Whanganui-o-Rotu was in fact not an inland non-tidal water but a lagoon or arm of the sea subject to tidal influence then the Crown was in fact by common law the owner of such lagoon below high water mark. It is confidently claimed by the Crown that Whanganui-o-Rotu was for centuries prior to 1851 but at any rate at the date of the signing of the Deed of Sale a lagoon or arm of the sea and subject to the rise and fall of the tide.

(See *Halsbury* 2nd Edit. Vol. 6 Para. 973 at page 725.)

Para. 105. The limits of Native customary title are high water marks. Whatever the title of Natives might be to inland non-tidal waters they have no title to any part of the sea whether landlocked or otherwise. This appears to have been determined by the Court of Appeal in *Waipapakura* v. *Hempton*, 33 N.Z.L.R. 1065.

Para. 115. Your Honour is also referred to section 2 of the Public Reserves Act 1854 authorizing the Governor on behalf of His Majesty to dispose of any below high water mark in any harbour, arm or creek of the sea.

No claim was made to the Court to Whanganui-o-Rotu by the Natives before 1916, but it is true that claims have been made to this Lagoon since that time but on no occasion has any claim been substantiated or sustained by any tribunal.

Paras. 56 to 61. We would refer Your Honour to proceedings for investigation of title to Whanganui-o-Rotu in Native Land Court files and Minute Books of 1916 now with the Court, and the subsequent appeal both of which applications were dismissed.

Vide, paras. 25 to 38. We would also refer Your Honour to the findings of the Native Land Claims Commission of 1920 (copy produced herewith).

It is respectfully submitted that in view of the findings of the Native Land Court and of the Commission the question of ownership of Whanganui-o-Rotu has been finally settled and should not now be re-opened.

3. On the question as to whether Whanganui-o-Rotu was prior to November 1851 or at any rate at that date, which it is submitted is the vital date, really an arm of the sea partially landlocked and subject to tidal influences we submit the following evidence—

(*a*) Copy of Captain Cook's chart dated October 1769 showing a distinct entrance to the landlocked Whanganui-o-Rotu and showing also opposite the entrance a mile off shore a depth of 14 fathoms. Para. 104.

The original chart can no doubt be inspected by Your Honour at the Dominion or Parliamentary Library Wellington.

(*b*) A map in Yates, New Zealand dated 1835 showing entrance to what is called McDonnell's Cove which is in fact Whanganui-o-Rotu. The word "Cove" is only used it is submitted in connection with sheltered portions of the sea coast. Para. 96.

(*c*) Admiralty Chart 1855 (produced) showing entrance to Harbour before any artificial work done there and showing 5 fathoms of water at entrance and tidal speed of 7 knots.

(*d*) Harbour Board Commission Map dated 1863 (produced) showing varying depths all over the Whanganui-o-Rotu and at the North-eastern extremity of lagoon showing ebb and flood of the tide right up to Western extremity known as Wharepanga. No artificial works had then been carried out. Paras. 91 to 94.

(*e*) Map of late survey by Mr. Rochfort showing exact present position of all islands mentioned in the Harbour Board Act of 1874 thus refuting claim of Petitioners that islands incapable of identification and therefore lost to them.

(*f*) Evidence given on the Commission of 1920 by Mr. Henry Hill, B.A., F.G.S.

(*g*) "Transactions of N.Z. Institute" 1908 Vol. 41 page 429 giving diagrams prepared by Mr. Hill of former configuration of the coast.

It is submitted that no evidence can be produced to show that any of the Harbour Works executed at the Port have affected the character of the Water in the Lagoon as suggested by the Petitioners.

We do not intend to discuss seriatim the various clauses of the Petition but the Crown cannot admit the correctness of many of the statements contained therein and submits that they are not borne out by evidence.

It is noted that the Petitioners tacitly admit that they did part with their title to the Lagoon but suggest that the changes brought about by the earthquake have created a new position entitling them to share the benefits derived by the Harbour Board due to Nature's upheaval.

16. Summed up, the Crown claims—

(*a*) That the lagoon was never at any time reserved to the Natives and that its inclusion in the return (E.–10 of 1862) of

general reserves for Natives which have been made in cessions of territory to the Crown.

was a mistake of the compiler Mr. Andrew Sinclair.

(*b*) That the Whanganui-o-Rotu was intended by all parties to pass to the Crown under the Deed of Conveyance of the Ahuriri Block to the Crown dated 17th November, 1851, and that it did so pass.

(*c*) That the Whanganui-o-Rotu was at the date of the signing of the deed of conveyance of the 17th November, 1851, a lagoon or arm of the sea and, being subject to the rise and fall of the tide, was by common law the property of the Crown.

17. The case put forward by the Napier Harbour Board is as follows:—

In the Native Land Court, Ikaroa District, New Zealand.—In the matter of Application No. 44 for an inquiry into the Petition of Hori Tupaea and others for relief in connection with Whanganui-o-Rotu and right of property therein.

CASE FOR THE NAPIER HARBOUR BOARD

ON behalf of the Napier Harbour Board, in whom the Whanganui-o-Rotu is vested, I fully concur in the written reply made by the representative of the Crown in answer to the arguments in support of the Petition filed by the Petitioners herein and in addition and supplementary thereto say :—

Paras. 123 to 139.

1. (*a*) That the statement made by the Petitioners in Paragraph 3 of the Petition that " according to the Maori Elders this Lagoon was formerly an inland lake having no natural outlet " and their contention in their argument filed herein that the Lagoon was a fresh water lake, is not borne out by Maori history, nor can any written evidence or record of the same be found to verify the statements.

Para. 140.

(*b*) According to the Maori Elders the first Maori to come here was Tara. He was a great grandson of Toi Kairakau as appears in the following Whakapapa given by Elsdon Best in *The Maori*, Vol. 1 page 48 :—

TOI
|
RONGO-UEROA
|
WHATONGA
|
TARA

Tara lived 26 generations ago (about 650 years). According to the evidence given by Waha Pango, one of the oldest Maoris who appeared before the Royal Commission at Napier in 1920, there was an opening to the Lagoon said to be half a mile in width at the mouth. When Tara, coming from Wairoa in his canoe, paddled into the entrance and jumped ashore he suddenly heard a Putorino being played at Wairoa and expressed his astonishment by emitting several (100) Ketekete (noise made by clicking the tongue against the roof of the mouth). The name of the entrance has since been known as Keteketerau. Traces of this entrance can still be seen to this day.

[*His Honour is referred to the dip in the Napier–Petane Road some little distance on the Petane side of the Beacons. The two banks of the original opening can be clearly seen.*]

Hence, at the very beginning of the occupation of this district by the Maori the waters of the Lagoon were tidal with a natural outlet at Keteketerau.

(*c*) The next important date is some 150 years later during the time of Tawhao. According to John White in his *Ancient History of the Maori* Vol. VI page 212 the following is the Whakapapa of Tawhao

RANGI-NUI-A-MONOA (Toi's wife)
|
OHO-MAI-RANGI
|
MUTU-RANGI
|
HOTU-OPE
|
HOTU-ROA
|
HOTU-MATAPU
|
MO-TAI
|
UE
|
RAKA
|
KAKATI
|
TAWHAO

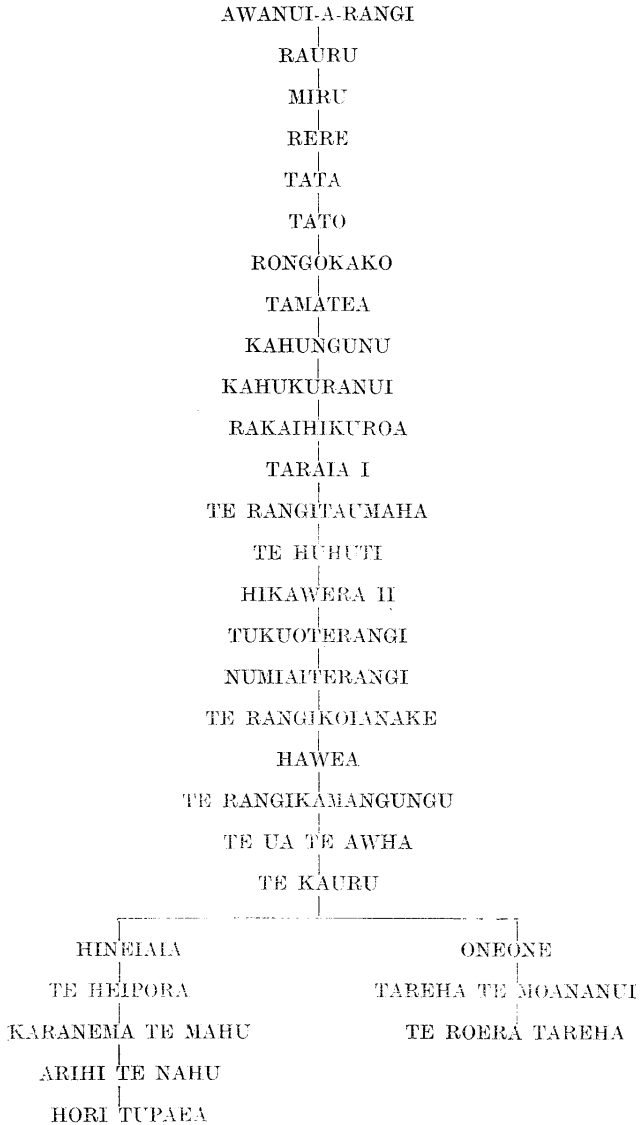
(*d*) The Lagoon got the name of Te Mara-a-Tawhao, which means, the garden of Tawhao, and was so called on account of the prolific supply of food obtained there. This food as described in the Petition signed in 1919 by Mohi te Atahikoia and 47 others is set out as follows :—

" The foods in the sea were the fishes schnapper, mullet, kahawai, shark, eels, and the shell fish, pipis kuku kina, and paua ; also several other kinds of foods of the Maori are in this sea.

"The above foods being two main foods of our ancestors and our forefathers, and are to-day with us, and will be handed down to our children after us."

It is submitted that these are all products of the *sea* and not *fresh water* products and this fact shows that the Lagoon was salt water and tidal and always connected with the open sea by some channel.

(*e*) The next incident in connection with the channel was in the time of Taraia I. Attached hereto is the Whakapapa of two of the Petitioners Hori Tupaea and Te Roera Tareha going right back to Awanui-a-rangi, a grandson of Toi. This Whakapapa is taken from the records given in the Omahu case in 1889.



(*f*) According to this Whakapapa Taraia I lived about 400 years ago (16 generations). In Napier Minute Book 17 page 200 appears an account given by Paora Kaiwhata, one of the Maori Elders, of the fight between Taraia I and Tunui-a-rangi on the Petane Beach opposite Heipipi Pa. After the parties made peace the account goes on to say that Taraia and his party went to the heads at Keteketerau on the spit to get some fish. Tunui then leaving his people went to a place where he had a monster which he used as a horse, and the first thing the people saw was him riding the monster out to sea. The cove at Whareponga in the Lagoon where Tunui kept this fish is referred to in these days by Natives as the "Stable where Tunui kept his horse." This would indicate that the channel at Keteketerau was still in existence at this time.

Para. 141. (*g*) This channel appears to have been in existence in 1769 when Captain Cook came. One may gather this from the fact that when two leagues from the Southwest corner of the Bay nine canoes came out to him, and the Keteketerau entrance is marked on his chart.

Para. 141. (*h*) The Whanganui-o-Rotu never had the reputation of being the waters of the eel. That reputation was held by the three lakes at Te Aute, principally Roto-a-Tara. This would probably have a good deal to do with the Roto-a-Tara raids made in the early part of the last Century as described by Percy Smith in his book *The Wars of the 19th Century*.

Para. 142. (*i*) On the investigation of title to the Whanganui-o-Rotu in 1916 the applicants never put forward any claims to the Lagoon as a fresh water lake, and one of the grounds on which the application was dismissed was that the waters were tidal and that private ownership only extended to high water mark. As a result of this Petition the Native petitioners were advised that the Crown was the owner of all tidal lands.

Paras. 56 to 61. (*j*) In their Petition to Parliament in 1919 made by Mohi Atahikoia and 47 others the Petitioners made no claim to the Lagoon as a fresh water Lagoon. In fact such an idea did not exist as they referred to it as the sea, and the two classes of foods therein mentioned, being products of the sea, were stated to be the two main foods of their ancestors and their forefathers. It is only since Judge Acheson of the Native Land Court, gave his decision in the Ngapuhi case, wherein the Natives were awarded the bed of a fresh water lake, that the Petitioners have suddenly discovered that Te Whanganui-o-Rotu was formerly an inland fresh water lake. A copy of this Petition and the evidence taken before the Commission is produced herewith.

Para. 143. 2. The rest of the claims made in the Petition and in the arguments of the Petitioners filed in support thereof have already been dealt with in the Crown's reply.

Paras. 113 to 121. 3. In addition to the Statutory title conferred by the Napier Harbour Board Reserves Act 1874 and the amending Act of 1887 the Napier Harbour Board holds Certificate of Title H.B. Volume 18 folio 259 for Te Whanganui-o-Rotu.

4. The fishing rights of the Natives and the Pakehas have always been recognized and they have never been interfered with by the Napier Harbour Board.

5. With reference to paragraph 8 of the Petition the claim of the Natives to (*a*) "the territory represented by the islands" is not challenged by the Napier Harbour Board, and the said islands have already been defined by survey. With reference to (*b*) "a claim according to equity and good conscience," this is somewhat out of the ordinary to the claims usually made by Maoris to their lands. Such a claim is non-existent and cannot be entertained or admitted on behalf of the Napier Harbour Board nor can their claim to "a large measure of right to share in the benefits which may accrue from the added territory." There is no added territory, the land in question instead of being below water has been raised above water, and still remains the property of the registered owners, the Napier Harbour Board.

(Coulson & Forbes, *Law of Waters*, 4th Edition, page 36)

W. T. PRENTICE.

18. Summed up, the Harbour Board claims:—

That the Whanganui-o-Rotu is held by the Napier Harbour Board under a statutory title conferred by the Napier Harbour Board Act, 1874, and the amending Act of 1887, and that the Board holds a certificate of title, H.B. Volume 18, folio 259, for the area.

19. We will deal firstly with the contention that the water was not reserved from a cession of territory to the Crown.

20. When Mr. Mantell was made Native Minister in 1861 he became exceedingly active in an endeavour to see that the Maori race were given title to reserves that had been promised them. Official records show that the non-fulfilment of these promises had been exercising his mind for some time previously.

21. On the 11th November, 1861, therefore, Mr. Mantell called upon Donald McLean, Chief Commissioner of the Land Purchase Department, for a return showing every promise or engagement which had been made by the Government to Natives that they should have Crown grants issued to them. The return was to be divided into two classes. Firstly, cases where reservations of land for individual chiefs had been made or promised, as part of the consideration in deeds of cession ; and, secondly, cases where promises had been made not connected with Cession of territory (E.–10/1862, p. 3).

22. The return was compiled by Andrew Sinclair, at one time a Government Surveyor employed by the Land Purchase Department and at one time Colonial Secretary, and it included, under the heading " Name of reserve," the words " Whanganui Lake."

23. I do not attach much importance to these words in this return, as it appears to me that they are part of the description of Roro-o-Kuri—*i.e.*, " Roro-o-Kuri (in the) Whanganui Lake " set up for want of space in two lines instead of one—

Thus " Roro Okuri."
" Whanganui Lake."

Strength is lent to this assumption by reason of the fact that there is neither map number nor area opposite the entry " Whanganui Lake," although both were available to Mr. Sinclair if he had required them. Furthermore, there is no reference to a reservation of the Whanganui-o-Rotu in the deed of cession, but Roro-o-Kuri, which is reserved, is described as being in the Whanganui-o-Rotu Lake.

24. With regard to the second contention of the Crown's representative, that it was the intention of the parties to the deed that the lagoon should pass to the Crown. the following observations apply. As a preliminary, however, it should be noted that the Lands Department have placed themselves in the repugnant dual positions of claiming that it was the intention of *all parties* that the lagoon should pass by the deed, although it was already owned by the Crown under the common law as an arm of the sea. More may be said upon this point when the question of what was lagoon and what was harbour is being discussed.

25. The deed of conveyance of the 17th November, 1851, is in the Maori language and purports to convey to the Crown what was designated as the Ahuriri Block. The construction of the effect of this deed in so far as it relates to the Whanganui-o-Rotu has already been the subject of an inquiry by the Native Land Claims Commission of 1920. Its report may be found on page 12 of P.P.G. 5 of 1921, and is summarized as follows in the final paragraph : -

> We think, however, that, whether they appreciated the full effect of the dealing (of which there is some doubt) or not, it was made clear to the Natives that the Crown was buying the land and their interests in the harbour, and when in the sale of the land they included, according to the deed " the sea (moana) and the rivers and the waters and the trees and everything appertaining to the said land " they intended to give over the use of the harbour, although perhaps in doing so they were not fully conscious of the effect it would have on those fishing-rights that they were so anxious to retain. It is only to the harbour that the reservation of fishing-rights and landing-places could apply.

26. The Native Land Claims Commission (like this Court) was not a Court of Construction, and its findings, influenced as they apparently were by what it conceived to be the intention of the parties to the deed, must not necessarily be taken as presaging the result of a judgment of a Court of Construction charged with construing the terms of the deed.

27. Before a Court of Construction extrinsic evidence is admissible for the purpose of determining the literal meaning of the words used and for no other purpose. In *Shore* v. *Wilson*, (1842) 9 Cl. and F. at page 555, Parke, B., says :—

I apprehend that there are two descriptions of evidence (the only two which bear upon the subject of the present inquiry) and which are clearly admissible in every case for the purpose of enabling a Court to construe any written instrument, and to apply it practically. In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms, or indeed any expressions are used, which at the time the instrument was written, had acquired an appropriate meaning either generally or by local usage or amongst particular classes. This description of evidence is admissible, in order to enable the Court to understand the meaning of the words contained in the instrument itself by themselves, and without reference to the extrinsic facts on which this instrument is intended to operate. For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible—viz., every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court whose province it is to declare the meaning of the words in the instrument, as near as may be in the situation of the parties to it.

From the context of the instrument and from these two descriptions of evidence, with such circumstances as by law the Court, without evidence, may of itself notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the Court being to declare the meaning of what is written in the instrument, not of what was intended to be written.

In the same case, at page 565, Tindal, C.J., says :—

The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it, for the ablest advice may be controlled and the clearest title undermined, if at some future period parole evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.

The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to the general rule above stated that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and the change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which in many instances use a peculiar language employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the Court or Judge to construe the instrument, and to carry such real meaning into effect.

But whilst evidence is admissible in these instances for the purpose of making the written instrument speak for itself, which without such evidence would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party, I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed; and that in no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, whether religious, political, or otherwise, any more than by express parole declarations made by the party himself, which are universally excluded, for the admitting of such evidence would let in all the uncertainty before adverted to; it would be evidence which in most could not be met or countervailed by any of an opposite bearing or tendency, and would in effect cause the secret undeclared intention of the party to control and predominate over the open intention expressed in the deed.

28. Again quoting from the same case, Lord Campbell, at page 863, says :—

In construing such an instrument, you may look to the usage to see in what sense the words were used at that time ; you may look to contemporaneous documents, as well as to Acts of Parliament, to see in what sense the words were used in the age in which the deeds were executed ; but to admit evidence to show the sense in which words were used by particular individuals is contrary to sound principle.

29. It may be noted at this point that the Court may refer to a dictionary for the purpose of ascertaining the meaning of a word, and that where a document is written in a foreign language a translator may be employed.

30. The following is a true copy of the deed of conveyance of the Ahuriri Block, together with a translation thereof, both made by reference to the original deed itself by competent translators for the purpose of and at the direction of this Court :—

TENEI PUKAPUKA i tuhituhia nei i tenei ra ara i tekau ma witu 17th o nga ra o Nowema i te tau o to tatou Ariki kotahi mano e waru rau e rima tekau ma tahi 1851 HE PUKAPUKA tino wakaae na matou na nga Rangatira me nga tangata katoa o Ngatikahununu e mau nei nga ingoa ki tenei pukapuka noho nei matou ki tenei huihuinga mo matou mo a matou whanaunga me a matou uri katoa e whanau i muri iho ia matou kia tino tukua rawatia tou matou whenua e mau nei te ahua ki te pukapuka ruri o te whenua e piri nei ki tenei pukapuka kia WIKITORIA TE KUINI O INGARINI ki nga Kingi Kuini ranei o muri iho ia ia ake ake tonu atu A E WAKAAE ANA HOKI TE KUINI O INGARINI mona kia utua matou mo taua whenua ki nga pauna moni kotahi te mano taki tahi e rima rau taki tahi £1500 Kotahi mano £1000 o aua moni kua riro mai ki o matou ringaringa i tenei ra na to MAKARINI ko nga rau e rima £500 ka homai hoki kia matou i nga ra o Nowema i te tau o to tatou Ariki 1852 hei utunga whakamutunga rawatanga mo ta matou whenua ake tonu atu.

NGA ROHE O TE WHENUA

Nga rohe i wakaaetia e matou kia hokona i te timatanga o a matou huihuinga korero kia te Makarini koia enei ka timata i te huinga e puta ai nga wai o Tutaikuri raua ko Puremu ki te Moana ka haere i te wai o Puremu te rohe puta noa ki Tamihinu ka tae ki reira ka haere tonu i toro i Tutaikuri puta noa ki Ohakau ka tae ki reira ka mahue a Tutaikuri ka haere i te ruritanga puta noa ki te Po-o-Tariha ki te Umukiwi ka haere tonu i te ruritanga o matou tahi ko Paka te kai-ruri ki Kohurau ka tae ki reira ka haere tika tonu ki te huinga o Waiharakeke ki Ngarururo ka tae ki reira ka waiho tonu te rohe kei runga i te tihi o Te Kaweka puta noa ki te huinga o Mangatutu ki Mohaka ka haere tonu te rohe i roto o Mohaka puta noa ki Mangowhata ka haere i roto i te wai o Mangowhata tae noa ki te ara haerenga mai o Taupo ka haere tonu mai i runga i taua ara ki Titi-o-Kura ka waiho tonu i runga i taua ara tae noa mai ki Kai-waka ka haere i roto i te wai o Kai-waka puta noa ki Opotamanui tae noa ki te Wai-o-Hinganga ka haere tonu te rohe i roto i te Wai-o-Hinganga puta noa ki te Whanganui-o-Rotu haere tonu ki te wahi e wakatapua mo matou ki te Niho puta atu ki te Rereotawaki ka mutu te wahi kia matou ka haere tonu te rohe ki te Puka puta noa ki te Wai-o-Puremu A, e kore ano hoki matou e tuku i etahi tangata Maori kia wakararu i nga Pakeha ana noho kei roto i enei rohe.

No etahi huihuinga korero o matou tahi ko te Makarini raua ko Paka ki te Awapuni ka wakaaetia e matou kia tukua katoatia te tahuna kohatu i Rau-horu puta noa atu ki Ahuriri i wakaaetia ano hoki e matou i taua huihuinga kia tukua katoatia a Matarua-hou ko Puke-Mokimoki anake te wahi o Matarua-hou e puritia mo matou me te wahi iti i tanumia ai nga tamariki me te whanau o Tariha ki nga wa e takoto kau ai taua wahi i nga mahinga o nga Pakeha.

Kua oti ia matou i o matou huihuinga korero te mihi to tangi te poroporoaki te tino wakaae tapu kia tukua rawatia enei whenua o a matou tipuna tuku iho kia matou me nga moana me nga awa me nga wai me nga rakau me nga aha noa iho aha noa iho o aua whenua kia WIKITORIA TE KUINI O INGARINI ake tonu atu.

KO NGA WAHI E WAKATAPUA MO MATOU KOIA ENEI :—

1st Te tuatahi Ko te Motu i te Moana o Whanganui-o-Rotu i huaina ko Te Roro-o-kuri.

2nd Te tuarua Ko te wahi i ruritia e matou tahi ko Paka te kai-ruri e huaina nei ko Whare-rangi he wahi pumau atu mo matou nga rohe o taua wahi ka timata ki te Niho ka haere i runga i te ruri puta noa ki te Wakamarumaru witi atu ki te Ahititi ka tae ki reira ka ahu mai ki runga i te ruritanga puta noa ki te Rereotawaki wakamau atu ki te Niho.

3rd Te tuatoru E rima rau 500 o nga eka ki te wahi e huaina nei ko Puketitiri ko nga tahere manu anake mo matou ki te nuinga o taua ngaherehere ki Puketitiri e wakaaetia ano kia taheretia e matou.

E wakaae ana matou kia wakatakotoria kia mahia nga ara ruri nui o te Kuini ki roto ki o matou whenua tapu i nga wa e rite ai ia te Kawana o Niu Tireni kia mahia aua ara.

Ko nga mahinga ika pipi kuku me etahi atu kai o te moana e wakaaetia nei kia mahia tahitia e matou tahi ko nga Pakeha aua kai ko a matou waka Maori e tukua ana hoki kia u ki uta ki nga wahi o te taone e wakaaetia e te Kawana o Niu Tireni hei uranga waka mo matou.

A, mo ta matou wakaaetanga pono i te aroaro o tenei wakaminenga ki nga tikanga katoa o tenei pukapuka kua oti nei ia te Makarini te panui mai kia matou i tenei ra ka tuhia iho o matou ingoa me o matou tohu tapu.

A, mo te wakaaetanga o te Kuini o Ingarini mona ki nga tikanga katoa o tenei pukapuka ka tuhia iho e te Makarini te kai-wakarite whenua o te Kawana. tona ingoa DONALD McLEAN, Land Commissioner. Nga Kai-titiro ki enei homaitanga utu me enei tuhinga ingoa.

ROBERT PARK, Government Surveyor.
ALEX. ALEXANDER, Settler.
EDWARD SPENCER CURLING, Settler.
FREDERICK SEDGWICK ABBOTT, Settler.
WIREMU TAKO, Wellington Chief.
JAMES BUCHANAN McKAIN.
C. L. H. PELICHET, Asst. Surveyor.
JAMES WILLIAMSON, Clerk.
J. THOMAS, J.P.

(Signed)

TARIHA × his mark
PAORA TOROTORO
KARANEMA TE NAHU ×
and 297 other signatures.

[*Translation*]

THIS DEED written on this Seventeenth day of November in the year of Our Lord One thousand eight hundred and fifty one 1851 is a paper of the full consent of us The Chiefs and all the people of Ngati-Kahungunu at this meeting assembled whose names are hereunto subscribed on behalf of ourselves our relations and all our descendants who shall be born after us entirely to give up our land the plan of which is annexed hereto unto VICTORIA THE QUEEN OF ENGLAND and to the Kings and Queens her successors for ever AND the Queen of England on her part agrees to pay us for the said land the sum of One thousand five hundred pounds £1500 of which monies One thousand pounds £1000 has been paid into our hands on this day by DONALD McLEAN, ESQUIRE, the five hundred pounds £500 will be paid to us in the days of November in the year of Our Lord One thousand eight hundred and fifty two 1852 as a final last payment for that land for ever.

THE BOUNDARIES OF THE LAND

The boundaries of the land that we agreed to sell at our first meetings with Mr. McLean are these: Commencing at the place where the Tutaikuri and Puremu rivers meet and discharge themselves into the sea, the boundary runs up the Puremu river to Tamihinu, at which place it continues up the Tutaikuri river to Ohakau where it leaves the Tutaikuri river and goes along the survey line until it reaches Tariha's post at Umukiwi thence continuing along the survey line laid down by Mr. Park the Surveyor and ourselves to Kohurau, on reaching which place it runs directly to the junction of the Waiharakeke stream with the Ngarururo river, thence the boundary follows the top of the Kaweka range until it reaches the junction of Maungatutu stream with the Mohaka river, thence the boundary runs down the Mohaka river until it reaches Mangowhata stream when it runs up the Mangowhata stream to the Taupo road and along that road to Titi-o-kura thence continuing along that road to Kai-waka stream and thence down the Kai-waka stream to Opotamanui thence to Wai-o-Hinganga river where it continues down the Wai-o-Hinganga river until it reaches the Whanganui-o-Rotu thence to the place reserved for us at te Niho going on as far as Rere-o-tawaki where our reserve ends, the boundary continues thence to Te Puka and on to the Puremu river AND we will not permit any Native to molest the Europeans within these boundaries. At former meetings between ourselves and Messieurs McLean and Park at Te Awapuni we agreed to entirely give up the whole of the boulder bank at Rua-horu extending as far as Ahuriri. We also agreed entirely to give up Mataruahou, Pukemokimoki being the only portion of Mataruahou reserved for ourselves together with the small piece of land where the children and family of Tariha are buried for as long as the land remains unoccupied by Europeans. NOW we have in our assemblies sighed over wept over and bidden farewell to and solemnly consented entirely to give up these lands descended to us from our ancestors with their seas, rivers, waters, timber and all appertaining to the said lands to VICTORIA THE QUEEN OF ENGLAND for ever.

NOW these are the portions reserved for ourselves :—

1st The First : The Island in the Whanganui-o-rotu Lake named te Roro-o-Kuri.

2nd The Second : The portion surveyed by Mr. Park the Surveyor named Wharerangi as a lasting possession for ourselves. The boundaries of the said piece of land commence at te Niho thence along the survey line to Whakamarumaru crossing thence to Ahititi on reaching which place it runs along the survey line to Rere-o-tawaki and on to te Niho.

3rd The Third : Five hundred 500 acres at the place called Puketitiri with a right to snare birds throughout the whole of the forest of Puketitiri.

We also agree that the Queen's lines of road may be laid off and constructed through our reserves at such time as the GOVERNOR OF NEW ZEALAND shall see fit to commence such roads.

It is agreed that we shall have an equal right with the Europeans to the fish, cockles, mussels and other productions of the sea and that our canoes shall be permitted to land at such portions of the town as shall be set apart by the GOVERNOR OF NEW ZEALAND as a landing place for our canoes.

And in testimony of our true assent in the presence of this assembly to all the conditions of this DEED which has this day been read over to us by DONALD McLEAN ESQUIRE we hereunto sign our names and marks.

And in testimony of the consent of the QUEEN OF ENGLAND to all the conditions of this DEED the name of DONALD McLEAN the GOVERNMENT LAND COMMISSIONER is hereunto affixed.

(Signed) DONALD McLEAN,
Land Commissioner.

WITNESSES to these payments and to these signatures :

(Signed) ROBERT PARK, Government Surveyor.
(Signed) ALEX. ALEXANDER, Settler. TARIHA × his mark.
(Signed EDWARD SPENCER CURLING, Settler. and 299 other signatures.
(Signed FREDERICK SEDGWICK ABBOTT, Settler.
(Signed) WIREMU TAKO, Wellington, Chief.
(Signed) JAMES BUCHANAN McKAIN.
(Signed) C. L. H. PELICHET, Asst. Surveyor, True Translation.
(Signed) JAMES WILLIAMSON, Clerk.
(Signed) I. THOMAS, J.P.

WM. B. BAKER,
for the Chief Commissioner.

Certified as correct :

(Sgd.) HARI WI KATENE,
Licensed Interpreter,
1st Grade, Wellington.

(Sdg.) J. H. GRACE,
Licensed Interpreter,
1st Grade, Wellington.

31. A copy of the plan found attached to the deed is appended hereto as Appendix A.

32. It will be noted that the deed is in a foreign language —*i.e.*, the Maori language ; and that in determining the construction to be put upon its terms it is necessary to give the words comprising it their value and meaning in the Maori language. No translation of the terms of the contract appears to have been a part of the deed when it was signed in 1851. An incorrect and very untrustworthy translation became attached to the deed at some time, and this translation, reproduced with the deed in Maori in Turton's *Book of Deeds*, Vol. 2, page 491, was perhaps the basis upon which the Native Land Claims Commission in 1920 came to the conclusion that the Whanganui-o-Rotu was included in the deed of conveyance of 17th November, 1851.

33. It seems plain from official correspondence that counsel for the Natives in 1920 (Mr. Myers, now the Right Hon. Sir Michael Myers, P.C.) also was forced to rely upon the translation found in Turton's *Book of Deeds*—he was to be allowed to see the original deed (and original incorrect translation attached to it), but was not to be permitted to have copies made.

34. Reference to the Whanganui-o-Rotu is confined to one passage in the deed, which reads as follows :—

. . . tae noa ki te Wai-o-Hinganga ka haere tonu te rohe i roto i te Wai-o-Hinganga puta noa ki te Whanganui-o-Rotu haere tonu ki te waihi e wakatapua mo matou ki te Niho . . .

35. This passage is translated in Turton's *Book of Deeds* and in the translation attached to the original deed, as follows :

. . . (To Opotamanui) thence to Waiohinganga to Whanganui-o-Rotu thence to our reserve at Te Niho . . .

The translation made by this Court's translators, Messrs. Grace and Katene, is as follows :—

(The boundary goes to Opotamanui) thence to Wai-o-Hinganga river where it continues down the Wai-o-Hinganga river until it reaches the Whanganui-o-Rotu thence to the place reserved for us at Te Niho.

36. The following is a more literal translation :—

The boundary proceeds within the waters of the Esk river until it emerges upon the Whanganui-o-Rotu continuing on (from there) to . . . Te Niho.

37. In 1920 the Natives placed before the Commission a description of boundaries that had been supplied them, which read as follows :—

. . . Ki Opotamanui ; ka rere atu ki Waiohinganga ki Whanganui-o-Rotu ; ka rere atu . . .

In other words, they were asked to work upon a retranslation into Maori of the original incorrect translation of the deed.

38. It appears, therefore, that this incorrect translation has been responsible for much of the past trouble, as well as for the extravagant claims made by the Crown representatives down to date that the whole of the Whanganui-o-Rotu is included in the territory passed by the deed, because the Whanganui-o-Rotu is a point in the boundary. The Natives at all times have claimed to the contrary that they did not sell the Whanga and that it was excluded from the deed. They were not at any time able to seize upon the proof of their contentions, but at all times stressed their inability to realize that the deed should have effected a directly opposite result from what was their intentions and the arrangement made by Makarini (Sir Donald McLean). It appears quite plain that the Natives were correct and that the Crown representatives have been wrong, for there is no doubt that the word " Whanganui-o-Rotu " is used, and used only to denote the point in the Esk River from which the boundary swings to Te Niho. It is not a point in the boundary-line ; it really marks the terminating-point of a section of the boundary-line.

39. So much for the legal position. We can now go into the correspondence and reports with the idea of ascertaining what justification the Lands Department representatives had for submitting that it was the intention of the parties that the Whanganui-o-Rotu should pass by the deed.

40. In the prepared case for the Crown the following passage occurs :—

To strengthen the argument that all parties intended and knew that the Native rights (if any) in Whanganui-o-Rotu had been ceded to the Crown the Court is referred to the report of Mr. Park to the Chief Commissioner, Mr. Donald McLean, dated 7th June, 1851, appearing on page 313 C No. 1 Appendix to Journals 1862 in which at page 314 he says speaking of the Ahuriri Block " the most valuable part of this Block is the Harbour, consisting of a large sheet of water or lagoon about five miles long by two wide . . . and on the Coast defended from the seas by a shingly spit ; the depth of the water nowhere exceeding nine feet. At the mouth of the lagoon is the Harbour proper, being several channels cut into the sea with a depth of from 2 to 2½ fathoms at low water ; there is no bar and it is perfectly safe and easy of access at present for vessels of from 40 to 100 tons."

Further in a report by the Chief Commissioner to the Colonial Secretary dated 9th July 1851 and reported at page 311 C No. 1 the following appears : " The Ahuriri Block of 300,000 acres, *including the Harbour*, was valued by Mr. Park, the Surveyor, and myself at £1,500."

Your Honour is also referred to the letter of the Commissioner to the Colonial Secretary of the 29th December commencing at page 315 C No. 1.

41. To begin with, I cannot follow the necessity for adding " (if any) " after Native rights in the second line. There is no doubt whatever that the Natives considered they had full rights of ownership of the Whanganui-o-Rotu when they met Mr. McLean to

discuss the Ahuriri deed of purchase. If Mr. McLean had any doubts as to their rights, he wisely kept them to himself; to have questioned Moananui's rights in the "Maara-a-Tawhao" would have been suicidal to the enterprise McLean was engaged upon—that of purchasing a block from Hapuku and another from Moananui (or Tareha) (sworn enemies) in such a manner that neither could feel or assume that he was being belittled. It must be remembered that this purchase took place at a time when the rights and feelings of the Natives (particularly those of "friendly" Natives) had to be respected.

42. Mr. McLean had a reputation for fair dealing; he resorted to no tricks to cover up his meaning, so that when we find present-day people—Government officials and Maoris—at variance regarding the actual meaning of a McLean matter we have only to look to his formal deeds and clearly worded reports for a true picture of what he actually did in that matter.

43. It is felt that the first thing necessary to a full understanding of the correspondence regarding this purchase is a realization of what is meant by the word "Ahuriri." It was freely used by the Land Purchase Officers in their official reports, and from both the Maori and Native Land Court viewpoint it was often very loosely used.

44. Ahuriri in its correct application is the name given to the opening by which in 1851 the waters of the Tutaekuri River and the swamps adjoining its lower course made their way to the sea. It was the entrance to what was known in later years as Port Ahuriri. This was the Maori conception of Ahuriri. It was also the European conception of the meaning of the word when used alone, as its use in the following instances and in official correspondence generally will show.

45. Extract from Colenso papers (Hocken Library, Dunedin):—

Waitangi, 19th December, 1850.

"This morning Mr. McLean left for Ahuriri where a large meeting of Chiefs is now about to be held concerning the selling of the harbour and adjacent localities to the Government."

Extract from same papers (a few days later):—

". . . Crossing Ahuriri Harbour and landing on the opposite shore I found Mr. McLean and the Chiefs very busily engaged." (NOTE.—This meeting was held on the Meance Spit.)

Extract from same papers (15th January, 1851):—

"Mr. McLean is at Ahuriri"; and, later, "Mr. McLean came from Ahuriri to see me" (Colenso being unwell at the time).

Extract from a letter written by Colenso to the Rev. R. Cole from Waitangi (28th October, 1853):—

I think you knew there was only one European built house at Ahuriri (proper) and that one a licensed public house; now there is another building there on this side of the entrance (the first being on the opposite side) which is also licensed for the same purpose.

46. In another part of his journal Colenso fears that a horse that he had brought from Gisborne may attempt to return by swimming across the Ahuriri Harbour.

These are instances of the correct use of the word "Ahuriri."

47. In 1856 the Ahuriri district for the registration of births, &c., extended from the Mahia Peninsula to Woodville. This appears to be the widest use made of the name, although Mr. McLean, in his letter of the 21st December, 1850, refers to "the central Ahuriri plains about the Waipukurau."

48. This tendency towards a loose use of the word no doubt prompted Colenso to add the word "proper" in his communication to the Rev. Cole, to ensure that the latter gentleman (who was connected with the London Office of the Missionary Society) might understand that Colenso was not referring generally to the district between Woodville and Mahia.

49. Apart from all these instances, the Maori signatories to the deed of cession put the meaning of the word, for the purposes of the deed, beyond all shadow of doubt when they say they have agreed to give up the boulder-bank from "Ruahoro to Ahuriri."

50. I hope that the foregoing explanations will facilitate an understanding of the terms used in the official correspondence which now follows :—

District of Napier

No. 1

THE CHIEF COMMISSIONER TO THE HON. THE COLONIAL SECRETARY, NEW MUNSTER

Ahuriri, December 21, 1850.

SIR,—

General: Refers to the sale of land in the Waipukurau plains, and to the prohibition of settlers leasing land from the Natives.

I take advantage of a small schooner, the "Rose," sailing direct for Wellington to report that I arrived from Manawatu at te Waipukurau the central Ahuriri plains on the 11th instant. On the 13th, the whole of the principal Chiefs from Ahuriri and the surrounding settlements assembled to meet me, and on the 14th, they agreed at a public meeting to dispose of a tract of land, the boundaries of which have been given to me in writing by Te Hapuku the principal Chief.

On the morning of the 16th I went out with a body of Natives to examine the boundaries and take formal possession of the block offered for sale; afterwards I proceeded with Te Hapuku to Pa Tangata, thence to the Aute, where a small but beautiful tract of land was offered to me by the Natives for a portion of which Messrs. Northwood and Tiffin agreed to pay them £60 a year, as will be seen by a correspondence herewith enclosed.

I am glad to state that the leasing of land from the Natives which was becoming general has been entirely prohibited in this district; the Chiefs, after various arguments in favour of the system, agreeing to co-operate with me in carrying out the provisions of the Native Land Purchase Ordinance, sess. 7, No. 19.

Yesterday I had a large meeting of Natives at Ahuriri, when they described the boundaries of the land they have for some time wished to dispose of to Government.

There is now sufficient employment for two active surveyors to mark off the Native reserves and cut the external boundaries, where there is no river or other natural feature to mark them. I may here be permitted to add that I should feel most happy if His Excellency would secure Mr. Park's services for conducting this survey, as he is not only an excellent hand at managing Natives, but he is both practical, correct, and expeditious in carrying out any duty with which he is entrusted.

Natives to join the surveyors can be employed here at a moderate rate.

It is essentially necessary that the utmost expedition should be used to acquire this splendid district, which is peculiarly adapted for sheep grazing, and which would be readily taken up by the Wairarapa settlers, whose flocks are increasing so rapidly that they must shortly have an outlet for them. I find also that an excellent line of road at a comparatively small expense could be carried across the country to Manawatu, and there is every probability that the central Ahuriri plains about the Waipukurau, will eventually become the site of a flourishing little English settlement; there is abundance of wood, water, and rich soil in that vicinity.

Hoping you will excuse this hurried communication.

I have, &c.,

DONALD MCLEAN,
Land Commissioner.

The Hon. the Colonial Secretary, Wellington.

District of Napier

No. 2

THE CHIEF COMMISSIONER TO THE HON. THE COLONIAL SECRETARY, WELLINGTON

Ahuriri, December 28th, 1850.

SIR,—

General: Further reference to the Waipukurau.

I had the honor to address you on the 21st by the schooner "Rose," stating that I had held several meetings with the Natives of this district at which they agreed to dispose of certain tracts of land, and that there was sufficient employment for two surveyors, to survey the external boundaries, estimate the extent of the purchases, and mark off the Native reserves.

My reasons for applying for two surveyors are, first to expedite, as much as possible, the negotiations in which I am employed in this district, in order that a country may be opened up for the Wairarapa settlers, in which most of them may be able to obtain runs from the Government, and discontinue, without much disadvantage to themselves, the present system of leasing from the Natives.

Secondly, Hapuku, the principal chief, would be exceedingly jealous and displeased, if the land offered by a rival chief Tareha, should be surveyed before his, which is forty miles distant; although it is essential that Tareha's land in the neighbourhood of the Ahuriri harbour, where settlers are most likely to form their earliest establishment, should, if there is only one surveyor, be attended to first.

By carrying on simultaneous surveys this jealousy could be avoided, and from the preliminary arrangements I shall make, awaiting further instructions, I hope to be able to superintend both parties and conduct the service at less expense of both time, and means, than would eventually result from having only one surveyor.

The inner boundary of the Ahuriri block borders on the Taupo country, which will render a distinct survey of that part very necessary, if His Excellency favours this application by sending surveyors. Shortly I shall write to the Taupo claimants to meet me at the interior boundary, to prevent their raising fresh claims or future difficulties.

The blocks of land offered for sale by the Natives are not extensive but as the tribes with whom I am negotiating are claimants to large tracts of unoccupied country, extending from Hawke's Bay to Manawatu and Wairarapa, I am in hopes that the Government may be enabled to carry on purchasing steadily towards these districts. The acquisition of the Ahuriri country will of itself be of great importance, from possessing the safest, and I may say, only harbour on this side of the island, between Wellington and Tauranga on the North East coast. Until the surveys are progressed, and the country further explored, I cannot convey any idea of the terms of payment to be submitted for the consideration of Government.

The proximity of Wairarapa renders the ideas of the Natives most extravagant on this subject.

I have, &c.,

DONALD McLEAN,
Land Commissioner.

The Hon. the Colonial Secretary, Wellington.

District of Napier

No. 3

THE CHIEF COMMISSIONER TO THE HON. THE COLONIAL SECRETARY, WELLINGTON

Hawke's Bay, January 23rd, 1851.

SIR,—

I have the honor to report that since my letters of the 21st and 28th ultimo, the Natives off Ahuriri have agreed to sell another fine district of land in extension of the block offered by them at the public meeting held at the Waipukurau, the particulars of which I have already communicated. General.

There are several portions of land such as the head land, and water frontage at the Ahuriri river and harbour which the Natives are retaining for the purposes of fishing and trading, and which together with some belts of timber reserved by them, it would be very desirable to purchase, even at a higher price than is usually paid for waste lands.

Wood is rather scarce in this district and the land about the harbour would be indispensable for the purpose of a Government settlement.

To prevent the expense of future negotiations, and obviate the difficulty of hereafter acquiring land when its value is enhanced by the location of English settlers, I shall act until further orders under the impression that it is the desire of Government to acquire, consistently with a due regard to the interests of the Natives, as great an extent of land, especially between this and the Wairarapa as it is possible for me to purchase.

From the desire by several parties, some of whom are named in the margin, to obtain sheep runs for which this country is peculiarly adapted, I have reason to expect that in a few years a considerable revenue may be realized from the Ahuriri. With a view to extending the coast frontage of the block offered for sale at the Ahuriri harbour, I intend in a day or two, to visit some of the claimants

J. Thomas, Esq.,
—. Tiffen.
Mr. Golland.
Mr. Alexander.
Mr. Munn.
Mr. Villiers.

at the Mohaka river, about 30 miles north of this place, thence to extend my journey to Tauranga to give the people here time to save their wheat crops and to acquire information for the Government respecting the Natives in that quarter, some of whom are interested in the negotiations in which I am now engaged. After my return from Tauranga another general meeting of the Heretaunga tribes will be held at Pa Tangata, to consider the boundaries and extent of the block recently offered for sale, after which it would be desirable to have the necessary surveys vigorously carried on.

Hoping that you will have the goodness to notice these proceedings to His Excellency the Governor in Chief and the Lieutenant Governor.

I have, &c.,

DONALD MCLEAN,
Land Commissioner.

To the Hon. the Colonial Secretary, Wellington.

District of Napier

No. 6

THE CHIEF COMMISSIONER TO THE HON. THE COLONIAL SECRETARY, WELLINGTON

Wellington, 9th July, 1851.

SIR,—

Respecting the prices and mode of payment for Ahuriri Block, Te Hapuku's Block, and Mohaka Block.

I have the honour to submit for the consideration of His Excellency the Governor-in-Chief, the terms of payment which the Natives of Hawke's Bay agree to accept for the blocks of land they offer for sale to the Government.

1st. The Ahuriri block of three hundred thousand (300,000) acres, including the harbour, was valued by Mr. Park the Surveyor, and myself at One thousand five hundred pounds (£1500) which sum the Natives agree to take for it, by receiving a first instalment of One thousand pounds (£1000), and a second and last instalment of Five hundred pounds (£500) next year.

2nd. Te Hapuku demands for a block of similar extent as the former, although much superior in quality, a sum of Four thousand eight hundred pounds (£4800), to be paid in four yearly instalments, and requests that he should receive a first instalment of one thousand eight hundred pounds (£1800) to satisfy all the claimants and induce many of them at Hawke's Bay, as well as at Wairarapa, to dispose of their lands to the Government; the remaining instalments he wishes to be paid in three equal annual amounts of One thousand pounds (£1000) in each year.

3rd. A block of about One hundred thousand (100,000) acres at the Mohaka river, recently surveyed for which a sum of eight hundred pounds (£800) in four equal annual instalments of two hundred pounds (£200) a year, will be sufficient payment.

4th. The total amount of land in the three blocks may be estimated at (700,000) seven hundred thousand acres, for the payment of which a first instalment of three thousand pounds (£3,000) will be required. This sum may at first sight appear large, although when divided among the several claimants, it will scarcely amount to eighteen shillings (18s.) each, while the average price of all the purchases, inclusive of Native reserves, will be under 2½d. per acre.

5th. The remaining instalments will be comparatively moderate, amounting to One thousand seven hundred pounds (£1700) the second year, and twelve hundred pounds (£1200) in each year for the two subsequent instalments.

I enclose herewith a translation of a letter from Te Hapuku to His Excellency, in which, with a few slight deviations, he relates the substance of a conversation I had with him and his followers, at a meeting held with them in April last, respecting the price of their land.

At this meeting the Natives used some forceable speeches and appeals for a payment of from ten to fifteen thousand pounds for Te Hapuku's block, stating what was quite true, that they were in the habit of receiving large sums of money for letting small spots of land to whaling parties, with whom they carried on a profitable pork and flax trade, besides supplying the stations with provisions and receiving, during successful seasons, considerable sums as their share for working in the boats, and the various other employments about the fisheries, therefore they considered, when parting for ever with their greatest property, the land,

that they should be handsomely paid for it and repeatedly alluded to the large rents, now amounting to upwards of eleven hundred pounds (£1100), annually paid to the Wairarapa Natives with whose system of leasing land they would more fully sympathise, if the Government did not pay them liberally for the districts they were now offering. I told the Natives that the price of the land, in its present wild, and to them, almost valueless state should not be the principal object for them to keep in view, neither should they attach such importance to the sums they had been adventitiously receiving from whaling and other sources; but that they should rather direct their attention to the benefits that all of them who were disposed to be industrious, would derive from the introduction of body of European settlers, who would constantly reside among them and create a demand for their labour and productions.

I have already demonstrated to the Natives of Hawke's Bay that the system of leasing land from them would not be any longer tolerated by the Government, pointing out to them at the same time that they suffered less injustice by this prohibition than they imagine, in as much as the actual sale of their land even at a lower rate than the Government afterwards resold it at, would be the means of gradually introducing a numerous English population, who would diffuse wealth and prosperity among them, and who would be restrained by English laws from committing any aggressions on themselves or their permanently reserved properties or estates.

The sum which I mentioned to Te Hapuku and his tribe as an equivalent for their block, was Three thousand pounds (£3000), informing them that I had no power to fix with them for any definite amount until the matter was referred to His Excellency the Governor-in-Chief, to whom I should advise them to appeal if dissatisfied with my proposals.

Te Hapuku and his followers willingly agreed to refer their case to His Excellency, and after a day or two's consideration reduced their demands to £4800, a sum which they earnestly expect to receive for their land, and which it may be advisable to grant, to ensure the co-operation of Te Hapuku in purchasing the country from Hawke's Bay to Wairarapa, as he certainly appears to be not only the cleverest, but the most influential and powerful Chief in this part of the island, whose co-operation will be found of great value and importance to the Government.

The success which has attended the Government operations for the acquisition of land at Hawke's Bay, combined with the proposed liberal regulations for depasturing stock on Crown Lands, which are being passed in the Legislative Council, has given a severe shake to the unauthorized squatting on Native Lands at Wairarapa; and I trust that a system so injurious to the welfare of the community at large will soon be effectually stopped.

It is quite certain that while such squatting exists, the Natives even as far North as Auckland will oppose the sale of land in the expectation, although valueless to them at present, that they may realize high rents for it. If it could be shown that the Natives themselves were much improved by such a system, it would be a strong argument in its favour; but from all that I can learn these rents obtained without much care or labour, are injudiciously expended, and the greatest recipients are frequently, if not always, the most idle and dissolute characters of their tribe, whose reckless conduct, and increasing cupidity, render the position of the settlers holding land under them not only disagreeable and precarious but in every way repugnant to the independent feelings of an Englishman.

Several of the Wairarapa settlers, as well as many from Wellington and different other places, are preparing to remove to Hawke's Bay immediately after the Natives have received the first instalment which I shall be prepared to pay to them at any time His Excellency may direct.

I herewith enclose a report from Mr. Park in which he gives a detailed description of the surveyed blocks the Natives agree to sell, as well as of the general capabilities of the Ahuriri district, which promises before many years to contribute greatly to the wealth and importance of this part of the colony.

I have, &c.,

DONALD MCLEAN,

Commissioner for acquiring the cession of Native Lands.

To the Hon. the Colonial Secretary, Wellington.

District of Napier

Encl. 2 in No. 6

ROBERT PARK, ESQ., SURVEYOR, TO THE CHIEF COMMISSIONER

Ahuriri, 7th June, 1851.

SIR,—

Reporting on three blocks of land Hapuku's, Ahuriri, and Mohaka.

Acceding to your request I send you a brief report upon the three blocks of land lately agreed to be purchased by you from the Natives of Ahuriri and others.

The first lying nearest Wellington and called Hapuku's Block, contains nearly 300,000 acres, and is bounded as follows. On the East by the sea, along which it extends from Matahuia the Northernmost Point, to Parimahu the Southernmost Point, a distance estimated at 17 miles in a straight line partly cliff and sandy beach.

There is no harbour but there is a sufficient shelter at Tuingara for vessels; several small ones having anchored there and landed and received goods, as also wool from a Station belonging to Messrs. Northwood and Tiffen close by, on the South from Parimahu to a Stream called in the Ruataniwha plain; the boundary runs in nearly a straight line, a distance of about 23 miles following the line passing over low hills covered principally with fern; on the west, along the said stream called flowing Northwards to the Tukituki river across to the Waipawa River and from thence up a small stream called to the Northern boundary, the whole distance being about 21 miles, and in nearly a straight line—the Streams well defined. This boundary passes through rich grass land and embraces a small portion of the Ruataniwha plain (some 40 miles long by 10 miles wide), a plain which for beauty of position, fertility of soil, mildness of climate and abundance of wood and water, stands unrivalled in New Zealand; and on the North and North East partly by the edge of a swamp and stream as far as Pa Tangata on the Tukituki River, and partly by that river; from thence, upwards, along the Ngakoutawa Stream to a range of hills, along said range for a short distance and then Eastwards to the sea at Matahuia; the whole distance being from 36 to 38 miles.

The block is nearly square and is a most valuable one; beautifully diversified by hill and plain; the soil is generally very rich and is nearly all covered with excellent grass. The Tukituki River which is navigable for canoes in the winter time as far as the Western boundary, runs through the richest parts and there are minor streams; the road from Port Nicholson via Wairarapa will likewise pass through it and every where roads can be made at a moderate expense; there is abundance of good timber (Matai, Kahikatea, Totara, &c.), and although the largest portion is included in the Native reserves, this will be no detriment, as the Natives are willing to sell the wood at a moderate rate. There is also a fine site for a town near Waipukurau, and close to a range of low hills, composed of a shelly limestone adapted for building purposes.

The next, the "Ahuriri Block," is distant from the last about 20 miles, and contains also about 300,000 acres. It is bounded on the East partly by the Waiwhinganga Stream, and partly by the coast, a low shingly spit dividing the harbour from the sea and runs from Petane on the Waiwhinganga to Motuwhahou at the entrance of Ahuriri harbour, a distance of about 7 miles. Embracing the harbour, the southern boundary runs across to the Tutaikuri River and continues along it to Owhakou, where it leaves the river to run in nearly a straight line to Waiharakeke at the base of a high mountain range, Kaweka, the whole distance about 35 miles, on the West by Kaweka some 16 miles to Mangatutu on the Mohaka River; and on the North and North-East partly by the Mohaka River, partly by the Native road to Taupo, and partly by the aforesaid Waiwhinganga to Petane, a distance in all of about 32 miles.

This block is very much broken by hills and streams and is principally covered with fern, but wherever the fern has been burned off, or along the footpaths, the grass springs up abundantly, and it only requires sheep and cattle to make it a rich pastoral country; there is little or no wood towards the sea, but inland there are some fine groves of excellent timber.

The most valuable part however of this block is the harbour, consisting of a large sheet of water or lagoon, about five miles long by two wide, indented on the Western shore by a beautiful little bays fit for residences, and should be parcelled off in 10 or 50 acre lots; and on the coast, defended from the sea by a shingly spit; the depth of water nowhere exceeding 9 feet. At the mouth of the lagoon is the harbour proper, being several channels cut into the sea with a depth of from 2 to 2½ fathoms at low water; there is no bar, and it is perfectly safe and easy of access at present for vessels of from 40 to 100 tons; on the North Spit there is room for a small town where the present European houses are.

But supposing a settlement should be formed here, the harbour might be made available for vessels of much larger tonnage. By reclaiming about 18 acres (see sketch), at the base of Moturoahou (or the island as it is called), the body of water, would have a clean sweep out, deepening and widening the Channel, and on this reclaimed land might be built the lower town, on the island the higher; forming a depot for the produce of the country for 100 miles round: great portions of the lagoon might also be reclaimed; as you are likely to purchase the whole of the land from East Cape to Port Nicholson, I cannot imagine a finer site for a settlement than the district altogether would form. The unpurchased land lying between the two blocks and generally known as the Ahuriri plain, is as you are aware, covered with large swamps, but all of them drainable; the lower part being a dead flat the drains might form (Channels) canals intersecting the plain in every direction, making an easy and cheap mode of transport, the distance from Wellington by the Wairarapa is somewhere about 150 miles and the road from what I have seen of the country, would not be an expensive one to make, the greatest obstacle being a bush about 40 miles along between the Ruataniwha and the Wairarapa.

The Mohaka block is distant about 21 miles from the Ahuriri block, and contains about 80,000 to 90,000 acres. On the South-east it is bounded by the sea, the distance from Mohaka southwards to Waikari being about 7 miles, all cliff; the beach at the base is passable in the summer time, but is rather dangerous from the cliffs constantly falling.

The southern boundary is formed by the Waikari river, along which it runs to its source about 16 miles to a place called Patuwahine on the Mangaruru range, from thence down to the Mohaka 2 miles further. On the West and North by the Mohaka river, following it until it joins the sea, the whole distance may be 30 miles.

This is a fine river and navigable for canoes as far as the Ahuriri block, but much impeded with rapids and large blocks of stone; there is a whaling station at the mouth, the boats belonging to it passing in and out at almost all weathers. There is a regular traffic between Mohaka and Ahuriri carried on by the Natives when they have produce for sale.

The soil is very good: there is sufficient timber for all purposes, and the land not too much broken, as in the Ahuriri block, and a little more grass, than on the Mohaka, some table plains above the river, and pleasant spots at the bends below. Altogether it is a very pretty little purchase, and would make three or four good runs, the great drawback being the badness of the road, which is, as it runs at present, execrable. It appeared to me, however that one might be got further inland, and which accords with the Native opinion; but I had not time to examine it. There is some good building stone inland: on the Mohaka and Waikari rivers sand and limestone. The former would make excellent grindstones, the Natives using it for that purpose. I have only to add that the climate is magnificent, nothing can be finer. I have only lost three days in as many months from wet weather, as it generally rains at night, or early in the morning, the wind steady and bracing, and not too strong; in fact, quite a summer in the depth of winter.

Accompanying I send two sketch maps, one of the district generally, and one of the entrance of the harbour.

I have, &c.,

ROBERT PARK, Surveyor.

To Donald McLean, Esq., Land Commissioner.

District of Napier

No. 7

THE CHIEF COMMISSIONER TO THE HONOURABLE THE COLONIAL SECRETARY, WELLINGTON

Ahuriri, 19th November, 1851.

SIR,—

I have the honor to report to you, for the information of His Excellency the Governor-in-Chief that the first instalment of purchase money for Te Hapuku's district was paid to the Natives at the Waipukurau on the 4th instant, on which date the deed of sale, signed by 377 claimants, was duly executed. There was a numerous attendance of Natives from different parts of the island, and the utmost

Reporting payment of the first instalment for Hapuku's block.

care was taken with the assistance and co-operation of the principal Chiefs, to make a fair and impartial distribution of the amount, not only among the several claimants residing in the district but also to those who arrived from the Wairarapa, Manawatu, and other distant places.

Te Hapuku had a neat house built for the occasion abundance of food provided, and every preparation made for the reception of his numerous guests.

On the 7th instant, I arrived at Ahuriri, where I found that Tareha and his followers were not behind Te Hapuku in making similar preparations, messengers were despatched by him to collect the tribes from the different parts of the coast and on the 17th instant, the deed of sale was signed and the first instalment of one thousand (£1000), for the district and harbour of Ahuriri was handed over to the claimants.

The original deeds for both purchases, with translations, are herewith forwarded. In the course of a few days I intend to proceed to Mohaka to pay the first instalment of Two hundred pounds (£200) for that district, and shall afterwards take an early opportunity of reporting more fully on the several arrangements entered into with the different tribes at Hawke's Bay.

I have, &c.,

DONALD MCLEAN, Land Commissioner.

To the Hon. the Colonial Secretary, Wellington.

District of Napier

No. 10

THE CHIEF COMMISSIONER TO THE HONOURABLE THE COLONIAL SECRETARY, WELLINGTON

Wellington, 29th December, 1851.

SIR,—

In continuation of my several reports in reference to the progress of negotiations for the purchase of land from the Natives of Hawke's Bay, I have now the honour to state to you, for the information of his Excellency the Governor in Chief, that the several arrangements with these tribes for the cession of:

General: Has reference to the newly acquired tracts of land in the Hawke's Bay district and the general elegibility of its position.

Te Hapuku's Block of 279,000 acres at £4800,
The Ahuriri Block of 265,000 acres at £1500,
The Mohaka Block of 85,700 acres at £800,

have been carried out, the separate deeds of sale for each purchase duly executed, and the first instalment of £3000 handed over to the claimants, on the dates and in the proportions specified in the margin.

4th Nov., 1851, Te Hapuku's Block £1,800; 17th Nov. 1851, the Ahuriri Block, £1,000; 5th Dec. 1851, the Mohaka Block, £200.

The terms of payment granted by His Excellency for these districts have given general satisfaction to the Natives; so much so, that Te Hapuku (in consideration of having received the sum he applied for in his letter, forming an enclosure to my report of the 9th of July last), has freely granted and pointed out to me the boundaries of another beautiful block in the Ruataniwha plain in extension of the late purchase, which may be estimated at twenty miles long, by one to two miles wide.

I consider, moreover, that this liberal treatment of Te Hapuku's claim is likely to ensure that Chief's friendly co-operation in purchasing the whole of the country from Hawke's Bay to the Wairarapa, of which district, comprising upwards of three millions of acres he is allowed to be the most influential and powerful Chief.

Tareha and other Chiefs at Ahuriri were anxious to have several portions of valuable land reserved for them on both sides of the Harbour, especially on Mataruahau Island, which they had always considerable reluctance in transferring, from a fear that they might be eventually deprived of the right of fishing, collecting pipis, and other shell-fish which abound in the Bay; these rights so necessary for their subsistence, I assured them they could always freely exercise in common with the Europeans, and in order that they should be fully satisfied on this point a clause has been inserted in the deed to that effect.

With reference however, to the reservations for fishing villages and other purposes, I objected to all of them excepting one Pa, in the occupation of Tareha, where some of his relatives are buried, and which he is to retain until such time as the Government may hereafter require the spot for public improvements, such as deepening or reclaiming some portions of the Harbour.

In lieu, however of these reservations so much demanded by the Natives, and which would materially interfere with the laying off a town, I proposed to Tareha that he, as the principal Chief, on relinquishing all claims to such spots, should have a town section granted to him in any place he might select on the North Spit of the Harbour, which he has agreed to accept, and I hope that His Excellency will approve of this arrangement; I also informed the Chiefs that His Excellency had instructed public reservations to be made, which would most probably include a site for a church, hospital, market-ground, and landing place for their canoes, and that every facility would be afforded them of re-purchasing land from the Government.

The various questions of boundaries, Native reserves, price of land, and other details, had been so frequently and fully discussed, and all other arrangements and conditions inserted in the deeds of sale were easily understood, and their importance as binding treaties fully comprehended and readily subscribed to by the great majority of the claimants, whose conduct at the several meetings was marked with the utmost regularity and propriety.

Copies of the original deeds, with plans attached are being prepared to forward to Te Hapuku and other principal Chiefs of the Ahuriri district; and it will be observed that a clause has been inserted in both Te Hapuku's and the Ahuriri deeds, securing to the Governor of New Zealand, a right, at any time he wishes to exercise it, of forming public roads through all the lands that have been reserved for the Natives.

I need not allude to the various advantages of these purchases further than to state that they secure to the Government and the colonists a permanent interest in the most valuable and extensive grazing and agricultural districts in the North Island of New Zealand; the best—indeed I may say the only comparatively safe Harbour from the Port of Wellington to the 37th degree of latitude on the North-East Coast of the Island; the best position for forming a township, from having, in contra-distinction to other settlements, a large extent of back country to support it; the most eligible situation to occupy for preventing smuggling, overlooking the sperm fisheries on the East Coast, and for controlling the reckless characters and runaways who have been in the habit of sheltering themselves at Hawke's Bay, and who with the Natives, sometimes influenced by their example, are beginning to feel the salutary effect of having English law administered at these distant places.

Before I left Ahuriri, settlers were arriving with their flocks and herds on the interior plains, which are covered with peculiarly fine grasses for sheep grazing. Mr. Park has made considerable progress in laying off a town at the Ahuriri Harbour; and subject to His Excellency the Governor-in-Chief's approval, I have made preliminary arrangements, which I shall submit in a few days, for the purchase of additional tracts of country, extending from Hawke's Bay to Wairarapa.

I have, &c.,

DONALD MCLEAN, Land Commissioner.

The Hon. the Colonial Secretary, Wellington.

51. The following points from the correspondence are worthy of note:—

In Park's letter of 7th June, 1851, he refers to "the harbour, consisting of a large sheet of water . . ."

In Mr. McLean's letter of the 9th July, 1851, he says—

The Ahuriri Block of 300,000 acres, including the harbour, was valued by Mr. Park and myself . . .

Both these letters were written before the deed was signed and represent at the most what was hoped for under a tentative arrangement in course of being made between the parties.

52. In Mr. McLean's letter of the 19th November, 1851, written two days after arrangements were completed and the deed was actually signed, he reported that—

On the 17th instant, the deed of sale was signed and the first instalment of £1000 for the *district and harbour of Ahuriri* was handed over to the claimants.

53. In Mr. McLean's letter of the 29th December, 1851, he refers to the desire of Tareha and others to reserve valuable lands "on both sides of the harbour." These lands were on the North Spit, South Spit, and Scinde Island, which lie on the sides of Ahuriri Harbour "proper." The same letter says that the Natives wished to reserve "the shell fish which abound in the Bay." This Bay was not the Whanganui-o-Rotu, neither was it the Ahuriri Harbour, it was Hawke's Bay. The last paragraph to this letter reports that—

Mr. Park has made considerable progress in laying off a town at the Ahuriri Harbour.

54. The conclusion one arrives at is that all parties understood the Ahuriri Harbour to be the Ahuriri opening and the cove immediately adjoining it. The limit of this harbour appears to have been the point where the old traffic bridge crossed from Napier to the Meanee spit side.

All the rest of the watered area to the northward, including the place where the present Westshore bridge now stands, was the Whanganui-o-Rotu or, as it is often called throughout the official correspondence quoted herein, the Ahuriri Lake or Whanganui Lake.

55. It would appear also that the summing-up of the Native Land Claims Commission of 1920 correctly sets out the position provided the reference therein to the harbour is confined in application to the Ahuriri Harbour, and not to the Whanganui-o-Rotu as a whole. While I think this conclusion is justified on the general grounds set out herein, I must again suggest that when Mr. McLean, in his letter of the 29th December, 1851, stated that he objected to all of the requests of the chiefs to have valuable lands reserved for them on both sides of the harbour he was speaking of the harbour that he had bought or arranged for, and he could have meant only the Ahuriri Harbour or Port Napier, because he did reserve Wharerangi, which is on one side of the Whanganui-o-Rotu, and Roro-o-Kuri, which is inside it. Both of these were big reserves and valuable reserves.

56. The Natives have in various ways attempted to establish their claim to the Whanganui-o-Rotu.

57. The following minutes represent their efforts on the 13th April, 1916, to establish title :—

Extract from Napier Minute Book No. 66, page 235, Hastings, 13th April, 1916

Present : M. Gilfedder, Judge.
N. Winiata, Clerk & Intpt.

TE WHANGANUI O ROTU
INVESTIGATION OF TITLE

Mr. Prentice for the Napier Harbour Board opposed.

Mr. A. L. D. Fraser for the Natives said he could not lead any evidence for the Natives as he had made a careful inquiry and came to the conclusion that the natives have no title. He produced plan 1226 Red and a copy of the agreement between the Crown and the Natives for the purchase of the land now in question.

Mr. Prentice said the area is 7,900 acres. It is not Native land or customary land but is vested in the Napier Harbour Board by a special Act of Parliament. See Act of September 1854. Land vested in Superintendent of Province. Land at Coast or below high water mark 1st. Grant No. 1249 vested in the Superintendent of Hawkes Bay—Napier Harbour Board Act 1874. Land reserved and set aside for Harbour Board. Harbour Board was constituted in 1875. Reserves under Harbour Act and Reserves Act see schedules—which describes the Whanganui-o-Rotu. In 1887 an amending Act was passed See Sec. 3 of Napier Harbour Board Act. This land is therefore vested in the Napier Harbour Board. It is not Native Land and the Court has no jurisdiction except the Government gave special jurisdiction under Sec. 25 of the Act of 1909. It is also beyond the province of the Court to question any title or grant issued before 1892. See Sec. 432 of the Act of 1909. (According to the agreement for the sale of Ahuriri Land made 17/11/1851 between Donald McLean, Land Commissioner on behalf of the Crown and Tareha Paora Torotoro, Karanamu te Nahu, and others.) The consideration was stated to be £1500 and the boundaries of the purchased land are set out.

Decision was given as follows. The area of land and water of which the Whanganui-o-Rotu is part was purchased from the Natives in 1851 for the sum of £1500 by the Crown. By subsequent Acts, Parliament empowered the Crown to vest land of this kind in Superintendents of Provinces and

Harbour Boards and in 1874 this land was vested in the Napier Harbour Board. It has ceased to be Native Customary land or Native land and the Court has no jurisdiction under Section 24 of the Act of 1909. The Governor can confer jurisdiction under secs. 25/1909 and 124/1913. Secs. 84/1909 and 43/1913 refer to the alleged interests of Natives in customary land. Section 11/1912 and the amendment 13/1914 give power to investigate the title to Native Reserves on the application of the Minister of Lands.

Section 432 of the Act of 1909 forbids the calling to question of any grant or instrument of title issued prior to 1892. It therefore seems that the Court has no jurisdiction to go back and investigate the title to this area called Whanganui-o-Rotu. Therefore applications 97 and 98 are hereby dismissed.

58. It will be noted, incidentally, that while there can be no doubt of the soundness of the decision, both Judge Gilfedder and Mr. A. L. D. Fraser (who appeared for the Natives) assumed that the Whanganui-o-Rotu had been sold to the Crown.

59. On the 9th May, 1916, Waha Pango, Aporo te Huiki, and Hiha Ngarangioue appealed against this decision of 13th April, 1916. The following is a literal translation of the grounds of appeal submitted by the appellants, and shows the bewilderment caused by Judge Gilfedder's dictum that the Whanganui-o-Rotu had been purchased by the Crown in 1851.

This is an application for an appeal by us to the Chief Judge of the Native Land Court in connection with a judgement delivered by Judge Gilfedder in respect of a case—the name of land being Whanganui-o-rotu, that is, a lake. Our application concerns the land under the water of the said lake. Our application appeared in the *Gazette* for the 8th of February 1916. The application number was 136, and the names of the applicants were, Hiha Ngarangioue and Oriwia Porau. It was proceeded with on the 13th of April. This lake was separated (excluded) by Mr. McLean from the land sold in the Ahuriri Block. The year that it was sold by the Rangitiras and the Tribe was 1851. This is the amount with which the Ahuriri Block was bought—£1500. Whanganui-o-rotu was not in the sale. Ahuriri is the block that is set out in the deed of sale—and Ahuriri alone. You will now understand. This lake Whanganui-o-rotu should be carefully examined on the deed of Mr. McLean where it shows that the land reserved and returned by the Government of Mr. McLean is situated by the lake. The names of the reserves are these: Rorookuri, Wharerangi and Puketitiri area 500 acres. You will observe Chief Judge that these three reserves are within the boundary of the sale, that is, within the lake of Whanganui-o-rotu, and hence our appeal and application for an Appellate Court to be sent to us. When the Court opened at Hastings on the 13th of April Mr. Fraser stood up and told the Court that this lake was sold by the elders to the Crown in the year 1851. Mr. Fraser asked Judge Gilfedder to dismiss the (their) application. Judge Gilfedder dismissed it. The Maoris told him that the lake was not sold and that the deed of sale of Ahuriri was here, and the lake was not set out in the deed. Here is the deed—we have it. Mr. Fraser said that the whole of the lake was included in the said sale and that the Court was not to listen to the Maoris. We said that the Chief Surveyor at Napier had made a map, and that he said that the land under the water had not yet been before the Court. The Judge then decided that the lake was included in the sale. Then the Maoris asked to have that deed of sale produced, and asked as to who signed it. We therefore ask that this appeal be heard and an Appellate Court be sent. If the Chief does not agree then we will petition the House. We are applying under the conditions of the second hearing.

GOD BLESS KING GEORGE V!

WAHAPANGO.
APORO TE HUKI.
HIHA NGARANGIOUE AND OTHERS.

60. The following minutes of 11th April, 1919, show the manner in which this appeal was disposed of:—

Extract from Napier Minute Book No. 63, page 212, Hastings, 11th April, 1919.

Present: Jackson Palmer, Chief Judge, Presiding.
Walter Edward Rawson, Judge.
Oka Heketa, Clerk & Intpt.

WHANGANUI A ROTU

Decn. 13/4/16. on Investigation of Title. Appeal of Wakapanga and Aporo te Huiki.
Mr. Grant. Appellants desire to withdraw appeal.
Te Wahapango: I and Aporo desire to withdraw appeal. Appeal dismissed. £5 costs to go to Mr. Grant (Harbour Board's Solicitor) £25 balance to go to Aporo Huiki of Puketapu.

61. The next airing given to this claim was before the Native Land Claims Commission of 1920; upon proceedings arising out of a petition by Mohi te Atahikoia and 47 others, which read as follows: —

TO THE HONOURABLE THE SPEAKER AND MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE DOMINION OF NEW ZEALAND IN PARLIAMENT ASSEMBLED: GREETINGS.

This is a petition from us, your petitioners, praying and applying to you, the Honourable Members of Parliament, and to your Government asking you to consider our Petition.

The reason of that Petition, is the taking by the Harbour Board of the land under the water, the name being that known as the sea of Te Whanganui O Rotu, known secondly (in point of time) by the name of the sea of Ahuriri.

The reason for taking this land is that the block of land known as Ahuriri block was sold by the Maoris owning that block in the year 1851. On the seventeenth day of November, the Maoris owning that block arranged with McLean, known as Te Makarini, that the land under the water should not be taken as well as the water; the reason was as follows:—That the foods in the sea were the fishes Schnapper, mullet, kahawai, shark, eels, and the shell fish, pipis, kuku, kina and Paua; also several other kinds of foods of the Maoris are in this sea.

The above foods being the main foods of our ancestors and our forefathers, and are today with us, and will be handed down to our children after us.

Mr. McLean agreed to this arrangement, and agreed to have that portion of the sea exempted from the sale of the Ahuriri Block. You will see the deeds of sale when Mr. McLean bought that land; you will also see the names of the boundaries of the block agreed to by the Maoris to be sold to Mr. McLean's Government, and you will also, those of you members who are clear as to the exemption of that portion of the sea in the year 1851, you will see by the map a plan of the agreement with Mr. McLean as to how the boundaries should be run by the surveyor, and how that part of the sea was left out of the sale, and returned by Mr. McLean's Government to the Maoris, and down to the present time that part of the sea known as Te Whanganui o Rotu has been placed before the Native Land Court for hearing.

The Native Land Court has stated that they will not hear the case until the Government instructs them to hear it, so you the Honourable Members of Parliament will be now clear as to our petition to you. For you, the Members of Parliament, to have instructed a judge of the Native Land Court to hear our claims to that portion of land under the sea, referred to above, and to that part of the sea which can be reached by our canoes and boats.

This matter we brought before Parliament in the year 1918: Mr. Herries replied that we should meet the Harbour Board at Napier. We have met the Napier Harbour Board on the 10th May 1918. We showed the clerk of that Harbour Board the deed of agreement with Mr. McLean in the year 1851 the returning of that portion of the sea known as Te Whanganui o Rotu, to the Maoris, and also the return of a portion of the land of Puketitiri, which was returned to the Maoris in the year 1851.

The number of acres returned by Mr. McLean was five hundred acres (500). You will see that area in the deed, which will be attached to this Petition for your information.

Honourable Members, you will also find attached to this Petition the reply from the Harbour Board, stating that they do not disagree with that deed of arrangement with Mr. McLean, with that portion of the sea. Therefore, your petitioners, make application to your Government to instruct the Land Court to hear the claims for the part of the sea of Te Whanganui o Rotu and the reserve of Puketitiri.

Those appearing in support of this Petition will shew you the deed of agreement with Mr. McLean.

This closes our petition, and our signatures are here signed below:

GOD SAVE KING GEORGE THE FIFTH.

(Sgd.) MOHI TE ATAHIKOIA and 47 others. (46?)

62. A summary of the findings of this Commission has already been given (*vide* para. 25).

63. At the hearing the claims of the petitioners were stated by their counsel to depend—

(*a*) Upon the construction of the body of the deed of cession.

(*b*) That the land did not come within the Public Reserves Act, 1854, and was not Crown land that could be granted.

64. With regard to the question of construction, the real point of the deed is bound up in the boundaries and description of the land which it purports to change the ownership of. The essence of the contract is the land it describes and represents. Great care was taken by both parties to see that the boundaries were clearly defined by reference to natural features—that they were fixed and immutable. The "bounds" were traversed by the surveyor and by representatives of the Native owners.

65. This was highly necessary. It was necessary that the surveyor record the boundaries shown to him and it was equally necessary at the time of this deed which was before the institution of the Native Land Courts for the Natives representing themselves to be the owners to demonstrate to the Crown representatives, by walking the bounds of their territories, that they had a right to it and that they could exercise such rights without having their action challenged by other tribes or peoples. It was a well-known fact that when one tribe was engaged in selling its land adjoining tribes were well advised to keep a close watch along their own boundaries for signs of the surveyor.

When therefore the Deed goes on to say that—

> The boundaries of the land that we agreed to sell at our first meetings with Mr. Mclean are these

it would seem that the boundaries quoted are to form the periphery of the land sold: Whatever is within the boundary is a thing dealt with: Whatever is without the boundary is a thing apart. Strength is given to this view by the final sentence which occurs after a meticulously correct recital of a well-defined boundary-line (that could be followed from the description to this day). "*And we will not permit any Native to molest the Europeans within these boundaries.*"

66. Two other parcels of land the sale of which is evidenced by this deed are described separately in the deed as follows:—

> At former meetings between ourselves and Messieurs McLean and Park at Te Awapuni we agreed to entirely give up the whole of the boulder bank at Ruahoru (Ruahoro) extending as far as Ahuriri. We also agreed entirely to give up Mataruahou (Scinde Island) Pukemokimoki being the only portion of Mataruahou reserved for ourselves together with a small piece of land where the children and family of Tareha are buried for as long as the land remains unoccupied by Europeans.

The description of these three parcels of land is immediately followed in the deed by this passage:—

> Now we have in our assemblies sighed over, wept over and bidden farewell to and solemnly consented entirely *to give up these lands* descended to us from our ancestors *with their* seas. rivers, waters, timber and all appertaining to the *said lands* to Victoria the Queen of England for ever. [The italics are mine.]

> Now these are the portions reserved for ourselves:—
>
> 1st The First: The island in the Whanganui-O-Rotu Lake named te Roro-o-Kuri.
>
> 2nd The Second: The portion surveyed by Mr. Park the surveyor named Whareraugi as a lasting possession for ourselves. The boundaries of the said piece of land commence at te Niho thence along the survey line to Whakamarumaru crossing thence to Ahititi on reaching which place it runs along the survey line to Rere-o-tawaki and on to te Niho.
>
> 3rd The Third: Five hundred acres at the place called Puketitiri with a right to snare birds throughout the whole of the forest of Puketitiri.

67. At this point it might be noted that part of the unbroken boundary line of the first parcel of land sold is described as running—

> to the place reserved for us at Te Niho going on as far as Rere-o-Tawaki where our reserve ends

while part of the boundary line of the area reserved is "to Rere-o-Tawaki and on to Te Niho." Between Te Niho and Rere-o-Tawaki the boundaries of land sold and land reserved are identical. If the line between the two points is to be a direct one for one purpose it must surely be the same for the other purpose, and if that part of the Whanganui-o-Rotu lying between such line and the shore is included within the land sold the same piece of the Whanga would be reserved as part of the second reserve provided for in the deed.

68. To avoid the danger of assuming that words in the deed are surplusage, we must assume that the Island of Roro-o-Kuri was specifically reserved to the Natives because it was deemed to be included in the first parcel of land covered by the deed. This island would be included within the boundaries of the first parcel in the deed if the boundary-line were deemed to run in a direct line from the mouth of the Esk River to Te Niho. If, therefore, the boundary-line runs directly from the mouth of the Esk to Te Niho so as to include part of the Whanga and the Island of Te Roro-o-Kuri, it must, I suggest, run directly between Te Niho and Rere-o-Tawaki, thus including a further part of the Whanga, and the Natives have not been given an area reserved to them by a strict reading of the terms of the deed.

69. Both of the portions already mentioned of the Whanganui-o-Rotu that were within the boundary-line of the Ahuriri deed are now included in the Harbour Board's title under the 1874 Act, together with the portion of the Whanganui-o-Rotu, which was outside the boundaries of the territory passed by the deed.

70. We can now revert to a further examination of the question of construction of the deed. Attached to the deed is a plan (Appendix A). It will be noticed that the red edging includes the Whanga and that the reserves are shown in red. There is no mention in the deed of colour or of colour having any significance, and it is therefore possible that the plan annexed to the deed was not in any way coloured when the deed was signed. One might go as far as to say that either there was no colour on the plan when the deed was signed or that if it were there it was not treated by any of the parties to the deed as being of any effect, for this reason: not only does the red edging include the Whanganui-o-Rotu, which the Natives say they did not sell, but it includes numerous islands which the Crown admits, and has always admitted, are Native papatipu land. It may be that the colouring was due to a mistake and it may be that it was applied after the deed was executed.

71. On the 7th August, 1866, before Judges Smith and Munro, an order for Crown grant under the Native Land Act, 1865, was made in favour of Paora Torotoro and nine others for lands which were included in a consequent Crown grant dated the 3rd October, 1866, and therein described as follows:—

All that parcel of land in our province of Hawkes Bay in our Colony of New Zealand containing by admeasurement 620 acres more or less situate at or near Napier in the Province of aforesaid being called or known by the name of Pahou and numbered Ten N (10N) being an isthmus bounded towards the East by High water line on the Shores of Hawkes Bay towards the westward partly by the waters of the Waiohinganga and partly by high water line on the Shore of Napier Harbour and bounded towards the South by a line bearing N 80° O.E. one thousand two hundred (1200) links. Also all those other parcels of land situate as aforesaid containing by admeasurement four (4) acres more or less being islands in Napier Harbour called or known by the name of Te Ihu-o-terei (Te Ihu-o-Tikei) and Parapara and numbered Eleven N (11N). Bounded on all sides by high water mark on the shores of the said Islands and also that other parcel of land situate as aforesaid containing by admeasurement seventy (70) acres more or less being an Island in Napier Harbour called or known by the name of Te Roro-o-Kuri and numbered Twelve N (12N) Bounded on all sides by high water line on the shore of the said Island.

72. The four parcels of land included in this one order of the Native Land Court stand in the following relationship to the Ahuriri deed of cession:—

(*a*) The Pahou Block is bounded at the South by Ruahoro (the northern limit of the shingle bank that comprises the second parcel of land in the deed), and is bounded on the west partly by the Waiohinganga River, with the Ahuriri Block on the opposite bank. It is wholly *outside* the boundaries quoted in the deed, and is *outside* the red edging on the plan attached to the deed.

(*b*) The Island of Roro-o-Kuri is included *within* the boundaries quoted in the deed; is *within* the red edging on the plan, and is the first reserve made from the first parcel of land described in the deed.

(*c*) The Parapara and Ihu-o-Tikei Islands are, it is submitted, *outside* the boundaries quoted in the deed, but *within* the red edging on the plan attached to the deed. The fact that they were found by the Court (only fifteen years after the signing of the Ahuriri deed) to be Native papatipu land seems to indicate that one should not be impressed unduly by the colouring of the plan attached to the deed when such colouring is found to be in conflict with the written terms of the deed, and the nature of acts to which both Crown and Natives must have been in agreement over.

73. A further reason for assuming that the Whanganui-o-Rotu (as such) was not included within the boundaries of the land sold by deed of cession of 1851 can be found by reference to the title history of other islands in the Lagoon.

74. In 1918 the Natives applied for investigation of title to the Urewiri and other islands in the Whanga. The matter came before Judge Jones at Napier on the 12th February, 1918, and could not be proceeded with for the reason shown in the minutes that—

As to the Islands claimed there was no survey and the map M30 submitted to Court does not appear to be a sketch map of the islands but of the surrounding land. If the Chief Surveyor will approve of it as a sketch plan of the islands the Court would be prepared to go on.

75. The explanation of the Court's inability to proceed with the investigation of title lies in the substance of Rules 19 and 20 of the Rules of Court, which read as follows :—

19. Except as provided in the next succeeding rule, the Court shall not proceed with the investigation of the title to customary land until the land is surveyed and the Court has before it an approved plan.

20. If the land has not been surveyed the Court may proceed with the investigation of title upon a sketch-plan approved by the Chief Surveyor and accepted by the Court as sufficient for the purpose of the investigation.

76. On the 19th February, 1918, complaint was made by one of the interested Natives (Pera Hohepa) that Judge Jones was unable to proceed with the investigation on account of there being no plan, and that—

the Natives were unable to get the Chief Surveyor to certify to such a plan or plans.

77. On the complaint being referred to the Under-Secretary for Lands, he replied, on 1st March 1918—

that the Commissioner of Crown Lands, Napier, was informed on 12th September 1917 that there was no objection to a plan of the islands called Uruwiri (Urewiri) Poroporo, Tirowhangahe, Tuteranuku, Awa-awaka and Matawhero being supplied to the Court.

78. The necessary plan, however, was not supplied to the Court, and this application for investigation of title was eventually dismissed for want of prosecution.

79. On the 20th February, 1922, applications for investigation of title were made in respect of—

Matawhero.
Tuteranuku.
Te Awawaka.
Te Roro-o-Kuri.
Poroporo and Tirohangahe
Urewiri or Kouriwiri.

80. On the 23rd February, 1922, the Registrar wrote to the Chief Surveyor, Napier, asking whether his records showed these islands to be still Native customary land, and, if so, whether or not there were any plans sufficient to enable the Court to proceed with the investigation of the titles.

81. The reply of the Chief Surveyor, dated the 6th March, 1922, is quoted in full :—

I have to acknowledge receipt of your letter of the 23rd ultimo, and in reply to advise that I think it is safe to conclude that all the islands mentioned above with the exception of Te Roro-o-Kuri are customary land. The latter Island is held under Deeds Title 38/550 by a person named David Milne. There is a detail map in this office from a survey by a surveyor named Pelichet. This was done in 1851 and his field book shows it was carefully executed, and was a good survey of that time. This plan is the one referred to by Mr. Knight in the Inner Harbour petition. Whether it is good enough for production before the Court on the investigation of title I cannot say. It is difficult to say as to what extent the area and shape of these islands have suffered by the effluxion of time. If the investigation is with the idea of establishing the interests of the Natives concerned, prior to the partition of the land, it would be advisable for the Court to order a periphery survey of each of the Islands for the purpose of determining its correct area, and having a plan produced on which the investigation could be reliably based. The work would not require to be done again when the partition lines are being run.

82. The reply of the Registrar of the Native Land Court, dated 9th March, 1922, is as follows :—

Referring to your memorandum of the 6th instant with reference to the above blocks I have to inform you that at the present time I do not consider it desirable to have any further survey work carried out until such time as the investigation of the title has been decided by the Native Land Court, and when the matter is being dealt with by the Court, further surveys can be requisitioned if the Court thinks it necessary to do so.

83. The applications came before the Court (Judge Gilfedder) on the 5th August, 1924, the minutes being as follows :—

Investigation of title to some Islands or rather sand banks in the Whanganui-o-Rotu Lagoon. One of these Te Roro-o-Kuri is owned by David Milne under C.T. 38/550 (or deeds title). The other islands are useless and there is no plan of any them. It will be necessary to have surveys made if it is desired to go on with the investigations.

See letter from Lands & Survey Department.

Adjd. sine die.

84. Subsection (5) of section 396 of the Native Land Act, 1909, reads :—

Any Judge of the Native Land Court may exercise the power conferred by this section upon that Court or upon the Appellate Court if he is of opinion that a survey is necessary or expedient for the purpose of the jurisdiction of either of those Courts or for the completion of any order made by either of those Courts, whether before or after the commencement of this Act.

85. Although the Chief Surveyor pointed out the necessity for a survey and the Court realized the necessity for a plan, no requisition for survey was made, and these applications for investigation of title were, like their predecessor, dismissed for want of prosecution on the 19th February, 1925.

86. The preamble to the Napier Harbour Board Empowering Act, 1932–33, declares definitely that Uruwiri, Poroporo, Tirowhangahe, Tuteranuku, Awa-a-waka, and Matawhero Islands are Native land the title to which has never been investigated, ascertained, or determined.

87. These islands are still Native land and are now held under freehold order of the Native Land Court by representative Natives as trustees for those entitled.

88. The foregoing being so, it seems most difficult to conceive of a construction being put upon the Ahuriri deed of cession of 1851 that would include the Whanganui-o-Rotu as a whole without including these islands scattered over the surface of that part of the Whanga which is outside the recited boundary-line of the first parcel to the deed.

89. It is all very well to point to a provision in the deed which purports to include with the sale of the land

The sea (moana) and the river, and the waters and the trees, &c.

and to say that such provision passes to the Crown " the sea (moana) rivers waters and trees, &c.," *within* the boundaries set out in the deed. It is another thing altogether when an attempt is made to read into such a provision a disposal of " seas, rivers, waters, and trees " occurring outside the boundaries of the deed. Recourse to contemporaneous

documents will show that such words constituted a stock phrase and were placed in deeds of cession for the same purpose that such words as "lands tenements and hereditaments" were added to descriptions in other deeds—that is, for the purpose of making the deed speak for itself and show that there could not be in the mind of the vendor any doubt regarding the extent to which he was divesting himself of his interests.

90. We now come to the third contention of the Crown representatives, that the Whanganui-o-Rotu was at the date of the signing of the deed of cession on the 17th November, 1851, a lagoon or arm of the sea and, being subject to the rise and fall of the tide and being within territorial limits, was by common law the property of the Crown.

91. At the hearing Mr. Pfeiffer produced a plan (a copy of chart No. 1 that had been prepared for the Harbour Commission of 1865) that he certified to the best of his knowledge and belief as being a copy of a plan which was lost in the fire following the earthquake of 1931 and which represented a survey by Pelichet in the year 1851.

This copy of chart No. 1 is annexed to this report as Appendix B.

92. It tends to establish—if it does not definitely establish—that in 1865 there was a tidal influence in the Whanganui-o-Rotu and that the strength of the *ebb tide* at Ahuriri (using that word in its proper sense) was from 6 to 7 knots. It cannot, however, be taken as indicative of the conditions obtaining in 1851 as it can quite definitely be established that it was not a true copy of Pelichet's plan, but was a chart made by a Mr. Bousfield for the use of a Harbour Commission of 1865.

(NOTE.—The significance of some non-Maori place-names on this map can be explained as follows: Sir Charles James Napier conquered Scinde in 1843 at the battle of Meanee. There was another fight at Hyderabad, the capital of Scinde. Places designated by these names on chart No. 1 were not so named in 1851.)

93. The true history of chart No. 1 (Appendix B) is as follows:—

On the 13th September 1864 Commissioners were appointed—

to enquire into and report upon the best means of deepening and improving the Ahuriri Harbour.

In the *Hawke's Bay Government Gazette* of 17th October, 1864, tenders were called for the preparation of a chart of Napier Harbour and roadstead.

The tender of O. L. W. Bousfield, Surveyor, was accepted, and in the *Gazette* for 25th November, 1865, is published his report to the Commissioners. This report was also published in the *Hawke's Bay Herald* of 2nd December, 1865. It reads as follows:—

Woodthorpe, April 17, 1865.

SIR—

Herewith I have the honor to lay before you the charts, numbered as per margin,* of the Ahuriri Lake, and Roadstead, and of Hawke's Bay, made in conformity with the terms of the contract entered into by me with the Harbour Improvement Commission on the 24th December, 1864.

In laying before you the result of my survey I shall draw your attention to the present condition of the Ahuriri Harbour and Lake, and to such important changes affecting it as are now taking place, and to such as have occurred within the last ten or twelve years; and I shall, with a view to simplify the subject as much as possible, divide it into four parts, viz:—

1st. Ahuriri Lake.
2nd. The Entrance to Port Napier and the Roadstead.
3rd. The Rivers flowing into the Lake, and through the Ahuriri Plains, and—
4th Hawke's Bay.

First, the Ahuriri Lake, illustrated by chart No. 1.

You will gather, from the soundings marked on the chart, that this sheet of water is nearly of a uniform depth, excepting only in places where it is influenced directly by the action of the tide, or by that of prevailing strong winds; the one forming channels, the other sand and mud banks. The greatest depth of water is from 7 feet to 9 feet 6 inches at high spring tides, with a soft, muddy bottom, nor am I able to discover that a greater or lesser depth was ever known to exist.

* Chart No. 1 of Ahuriri Lake. Scale, 20 chains.

Chart No. 2 of Port Napier and Roadstead. Scale, 10 chains.

Chart No. 3 of Hawke's Bay, showing Ahuriri plains, scale 1 inch to 1 mile.

I must draw your particular attention to the formation of mud flats and sand banks now going on on the southern side of the lake, the cause of which formation, I venture to suggest, will be found in the partial deposit, by the combined action of the west and north-west winds, and flood tide of earth washed down by the Tutaekuri River when in flood; the accumulation added to by the great disturbance created on the bar outside, and upon the whole of the lake exposed to the action of those winds and which are the prevailing winds during the spring of the year, when freshets are most frequent. It is worthy of remark that, during a heavy north-west gale, the water in the mouth of the harbour. on the bar, and in all the exposed parts of the lake is discoloured, as in a fresh, owing to the stirring up of the bottom by the action of the wind; and there can be no doubt that the effect produced by the accumulation of matter thus thrown by the aid of the flood tide on the banks of the southern bight of the lake, is sensibly felt in the course of time. It is to the gradual action of these causes to which I beg to draw your attention, as they appear to be the great and primary principles at work, in the slow, but sure, filling up of the lake. For it would seem that the process is going on, not from the bottom upwards, as might be inferred, but from the side inwards, possibly, but not perceptibly assisted by the upheaval of earthquakes.

There does not appear to me to be any particular channel in any part of the lake, that piece of water being, as I said before of a nearly uniform depth. It is now possible to cross at high water to the western side from Napier, in almost any course from Battery Point in from 3 feet to 9 feet of water. Some ten years ago this could be done by taking Onepoto for the starting point. It will also be observed that the Tutaekuri River used, about that time, to cross the mud flats on the line marked K.

The water round the small island lying off the Eastern Spit shoals gradually away on either side, until it attains its greatest depth, but where the channel is confined between "Long Point" and the Sand Spit just off that point on the west side, there by the increased force of the tide, the water deepens to 10 feet, for a short distance, until it again expands. It is to be noted that in all cases where the flow of the tide is confined between obstructions as in the above instance, there will be found a deeper channel.

There are numerous sand spits, or shell spits forming off Charlton's Spit, although the tide just there runs stronger than anywhere else inside the lake.

It will be seen by reference to the charts, that the ebb and flow of the tide is from south to north and from north to south in the bay, and that its greatest force is felt just where the mouth of the lake now is; and that so long as the tide ebbs and flows in that direction, so long will a great force of water press upon the sand spit, forming the lake, at about that particular spot; and as the rate of the flow of the tide through the entrance is from 6½ to 7 knots, it is clear that the action of the flood and ebb tides upon the entrance must be something like that of a force pump, the rush of water being so tremendously strong; and I have no doubt that that force may be used to any extent, for the purpose of opening new channels and of keeping open old ones.

Secondly, the Ahuriri Roadstead and Entrance to Port Napier, illustrated on a scale of 10 chains to 1 inch on Chart No. 2.

The Rangitira Sand-bank, which is the particular feature of this harbour entrance is subject to great changes shifting its position under the influence of heavy gales of wind. It has been known to extend right across the entrance, so as to render the passage of vessels exceedingly dangerous, but its general position I believe to be about where it is marked on the chart.

The rise and fall of the tide ranges from three feet four inches to three feet seven inches: ordinary springs from four feet to four feet four inches; occasional high spring tides produce a rise of four feet six inches. The highest tides recorded by Mr. Murray (to whom I am indebted for these figures) is four feet eight inches, the rate of flow being as before stated, from 6½ to 7 knots per hour at the narrowest part of the entrance.

It will appear by comparing the chart now submitted to you, made by myself with that made by Mr. Park in 1850 and with that made by Captain Drury of H.M.S.S. Pandora in 1855, that the entrance to Port Napier is undergoing great and rapid changes; for according to the charts made by those gentlemen, the width of the entrance was in their time from 6 to 7 chains: now according to the

chart made by me it is 13 chains, having increased to twice its width in 15 years—a very rapid change indeed. The depth of water is materially affected by this change in the width of its passage: for whereas by Captain Drury's soundings the greatest depth was five fathoms in 1855, now I find in 1865 the greatest depth to be four fathoms, from which data it would seem that as the entrance to the lake widens so also does it shallow, and that the quantity of water is not affected by the increase or diminution of the width of that passage, from which significant fact some very important conclusions may be arrived at affecting the contemplated harbour improvements.

The direction of the ebb tide rushing out of the harbour was, about a month ago, due north, but it is subject to deflections according to the position of the bar or the Rangitira Bank.

The "Iron Pot" appears to have been formed by a tidal eddy and to be maintained alone by that cause, and I am inclined to think that any interference with that natural condition of things must result in its filling up so as to be useless for shipping purposes. It is evident from the following table of soundings (as per margin)* taken in 1862 and 1865 that since the commencement of what are called the "Harbour Improvements" a very great change for the worse has taken place in this interesting locality; at all events it can only be maintained in a useful state at an enormous first and an annual expenditure.

Iron pot { *1862—11 feet to 12 feet } Deepest.
1865— 9 " 10 "

The shoals just inside the entrance shift under the influence of high floods and heavy seas, but return to their normal position upon the subsidence of the disturbing cause.

Thirdly, the rivers flowing through the Ahuriri Plains and into the Lake.

The Native chiefs, owners of the Ahuriri Plains strongly opposed my taking levels over that line of country, upon the ground that, somehow or other, that operation was connected with the introduction of steamers into their rivers. Mr. Commissioner Cooper was present at the time of these objections being made and to him I referred the matter, but that gentleman did not appear able to make any impression upon the objectors in favour of the levels.

I have, however, taken some few levels and measurements, from which you will gather that the fall of the Ahuriri Plains is from West to East, and that from North to South or South to North there is no material inclination, at all events not sufficient to overcome the natural tendency of the rivers flowing through the lower part of the plains to flow into the sea at due east from their sources, except in the case of the Tutaekuri river, if after all exception may fairly be taken to that river, which for the last two miles of its course runs from South to North upon which line the fall is slightly more than between the point of its deflection and the sea, going East.

A section line drawn from Pakowai to Mr. Rhodes' flats will show that the bottom of the Ngaruroro River at Pakowai is very much lower than that of the Tuki Tuki on Rhodes' flats; in fact, it is some feet below high water mark at Awapuni for by measurement I find that the north bank of the river at Pakowai is 18 feet above low water mark and that the depth of water below that again is about 9 feet and that the rise and fall of the tide is about 2 feet 6 inches. The Tuki Tuki river bed at the point B is about 26 feet above high water mark at the point C. It is to be observed as a consequence of this that the fall of the Ngaruroro from Pakowai is very gradual and that there is but a slow run in the water to the sea; whereas the Tuki Tuki river runs with great force from B to C, although the distance is shorter than from the point A (Pakowai) to the sea at Awapuni. The Ahuriri Plains, then may be considered to incline gradually from West to East.

The mouth of the Ngaruroro and Tuki Tuki rivers is for the present at Awapuni as shown on Chart No. 3 but as it shifts between the place and Waipureku under the influence of heavy floods and high seas it is difficult to say how long it will remain where it is now. The depth of water in the channel inside the bar is from 1½ to 3 fathoms at high water, on the bar from 7 feet to 9 feet. It is at best however a dangerous passage and requires great caution and skill on the part of masters bringing in small craft.

The depth of water in mid-channel up the Ngaruroro from the Ferry to Pakowai is about 9 feet.

The Tutaekuri river has a depth of about 9 feet from the first bend to Hallet's bend, where it shoals from 7 to 4 feet under the Meanee Bridge. The fall from "Hallett's Bend" to the junction with the Lake is 2 feet 39–100 and the fall from Meanee Bridge to the sea will be in an Easterly line about 1 70–100.

The "Waiohinganga" or Petane river does not seem to have much influence on the lake; its greatest depth at high water between its confluence with that piece of water and "Villers" is about 8 feet beyond which point it is not much affected by the tide. In floods this river runs out to sea at Petane and the channel running into the Ahuriri Lake is then only practicable for boats when the fresh is at its highest, but at any time that channel carries off but a portion of the waters of this river, as a great quantity of water must necessarily filter through the loose shingle beach, which bars out the sea on the subsidence of the floods.

Fourthly, Hawke's Bay between Kidnappers and Waikari. Offers no particular feature, as likely to affect the improvements of Port Napier, worthy of note. The soundings taken by me are materially the same as those taken by Captain Drury 10 years ago, and I am not able to discover any new rocks or shoals or other remarkable alterations as having taken place since that time nor do the frequent shocks of earthquake which have occurred within that period seem to have effected the slightest change in the bottom of the bay.

I trust I have succeeded in conveying to the Harbour Commission a clear idea of the present state of our harbour, and that the charts will prove entirely to your satisfaction. I have spared neither time, trouble or expense in this matter, so as to secure as accurate results as possible, nor have I neglected to obtain all available information upon the subject. Mr. Murray has kindly furnished me with every assistance, both statistical and material, which I have required from him, and I am indebted to him for much valuable information and some practical hints.

I have the honor to be,
Sir,

Your very Obedt. humble Servant,
O. L. W. Bousfield, Surveyor.

H. S. Tiffen, Esq., Chairman Harbour Commission, Napier.

94. This chart No. 1 therefore does not assist much, although it is useful for comparison with the plan attached to the deed (Appendix A.).

95. The following evidence was given before the Native Land Claims Commission of 1920:—

Recorded Minutes of Commission

Whanganui-A-Rotu and Puketitiri (*contd.*)
Napier, 13th August, 1920.

Present: R. N. Jones, Chairman.
J. Strauchon, J. Ormsby } Members.
H. W. Katene, Clerk & Interpreter.

Nepeta Puhara, sworn. Live at Moteo. Am interested in Whanganui-a-Rotu lake. Was born in 1858. My elders told me that it was a fresh water lake and that it was released from time to time by allowing it to flow into the sea. They had cultivations along the shore of the lake. Know present opening. There was an older opening at Keteketerau. Cannot say distance from present block, but it was near Pahou Block. At mouth of Waiohingaanga stream. The new opening was in existence in 1851. It has since been made deeper by dredging. In 1874 I saw workmen digging it. Before the dredging the fish would have been eels, whitebait, pipis and crayfish—all fresh water fish. Since the deepening salt water fish is caught—flounders and other fish. The Natives fished for these fish after the deepening. I claim my elders never intended to dispose of lagoon. They reserved it as a source of maintenance for the Native people. There are pipi banks and they are very plentiful. The reclamation works are covering some of the pipi beds and killing the pipis in other beds.

xx by Mr. Grant.] My elders were Paraone Kuare (my father) and others who told me about the lagoon. The lake rose with the fresh water and covered the plantations. This was flood water from Waiohingaanga and Tutaekuri streams. The lake was then the same as now. Was it not that there was an opening which the rough sea sometimes closed, and then it required re-opening? Yes, at

Keteketerau the opening got blocked. Wharerangi was one of the cultivations. It was in the hills but Kopaki was on the sea coast. It was on the lake. At time of the sale one would require to swim across the opening. The first settlement was at Onepoto. Heard that ships could not get to Onepoto Bay.

Nepata Puhara xx by Mr. Knight.] Cannot say when Keteketerau was first made, but I heard it was first opening. Cannot say when new opening was made. Cannot say when they finished getting fresh water fish out of lake, but it was when Napier South was reclaimed. It was then we ceased to fish for eels and other fish. We still get eels. About 30 years ago was when I last saw a crayfish. The salt water killed the kakahi. That was about 30 years ago.

Re-xd by Mr. Myers.] I got inanga out of the lagoon when I was a boy and also as a man. We still fish for inanga. In summertime we get the inanga still. As a boy I got kakahi but that was a long time ago.

By Chairman.] Waiohingaanga river and Tutaekuri river used to run into lake. The water got out at Keteketerau but it was not a continual opening. There were dead buried at mouth of Keteketerau. When the mouth was opened on one occasion the burial ground was affected and bodies washed away, and so the old opening was abandoned and a new one made. Keteketerau was renamed Ruahoro on account of this washing away.

Porokoru Maapu, sworn.] Live at Moteo. Claim to be interested in Whanganui-a-rotu. Am 53 years of age. When a boy lived at Moteo and Poraiti. I fished in the lagoon. I used to get fresh water fish whitebait (inanga) and eels, but not kakahi. The opening was then at its present place. It was dug about 1851. The water is now much deeper. We used to take barges and to swim horses across. I know that Keteketerau was first opening and then later the present one. I was told that the two streams and other smaller streams flowed into the lake, and when the opening was blocked would cause their cultivations to be flooded. The Maoris decided to open up the present opening. Some homes of the people were at the "Iron Pot". Certain winds would blow, close the opening and flood the homes. Natives then decided to make the new opening.

xx by Mr. Grant.] The opening at Keteketerau was one chain wide. The tide came in and out a little. We had a settlement at Okahu. Why did lake not dry up when opening was made? On account of banks being high between lake and sea.

xx by Mr. Knight.] I did not see schnapper in the lake as a boy.

Not re-xd. Mr. Myers said this was all the evidence he wished to call.

Tuehu Pomare calls evidence:—

Waha Pango, sworn.] Living at Matahiwi now. I lived at Petane, at Waiohiki, Omarunui and other places adjoining the lake. I was at Te Ongaonga when the deed of 1851 was executed. That is where the railway line leaves the breakwater. After the sale to Government was agreed upon and price fixed Akuhata te Hapua a brother of Paora Torotoro stood up and addressed Mr. McLean the Government Officer. He requested one favour that there should be reserved to the Natives the Whanganui-a-rotu as it was their source of food. He also asked that Wharerangi be reserved. Also for Puketitiri. That was bush land where they were accustomed to snare birds for food. McLean replied and said what they asked for was just and it would be given effect to and the boundaries located. As far as the reserves were concerned that was carried out. The fish in the lake were eels, inanga, kokopu, and flounders. Before the opening this was a fresh water flounder. After the opening was made sea flounders were found there. Fresh water flounder is Mohoao. Salt water flounder is Maramaratotara. We had an eel weir at Wairoaiti called Te Waha-o-te-marangai. Keteketerau got its name as follows. It was originally called Ruahoro. Tara, a chief came from Wairoa and heard the sounds of a flute from Wairoa. He was so surprised that he expressed his astonishment a hundred times. Keteketerau was closed before I was born. I never saw any opening there. The mouth at Keteketerau was half mile in width and you can still see its traces. Upokopoito is wrongly named on map produced. The place of that name is on the Napier side and not on west shore side—not far from Awatoto station.

xx by Mr. Myers.] I was born in 1841 (12 July 1841). Cannot give history as to new opening. Heard the old one was closed through witchcraft.

xx by Mr. Prentice.] I signed petition to Parliament. The whole of Whanganui-a-rotu was not fresh water at time of sale in 1851. When opening was closed water became fresh. (Refers to petition which cites salt water fish as being obtained by ancestors.) How do you account for this? Because when it was closed it was fresh water fish that we got. When it was open salt water came in. (Explains how rivers got blocked by action of sea and required reopening.) Sometimes the water in the harbour would be salt and sometimes fresh.

Not xx by Mr. Knight.

Not re-xxd.

By Chairman.] The Maoris brought their canoes at Pakake at the mouth of opening. The canoes would go in and out when channel was open.

Te Roera Tareha, sworn.] Live at Waiohiki. Know boundaries. The lake was outside the boundary of the land sold. Te Puka should have been excluded from sale. That is an island (Park's island). Rorokuri another island should also be excluded. Three principal islands in lake were reserved from sale. Taputeranga (or Watchman Island). I mean all islands in lake were reserved from sale.

Not xd.

Commission adjourned to 10.30 a.m. 14th August 1920.

PUKETITIRI AND WHANGANUI-A-ROTU (*contd.*)

Napier, 14th August, 1920.

Mohi te Atahikoia, sworn.] Live at Pakipaki. I was one who gave evidence before Parliament in 1918. Mohi (myself), Tareha and Waha Pango gave the evidence. I told the Committee we had a copy of original deed. The Native Affairs Committee advised us they had no power and suggested we confer with the Harbour Board. They said it was the faults of former Governments. If we got no satisfaction we were to go back to Parliament and the legislature would consider matter. The Harbour Board conferred with us. The Clerk and Mr. Prentice represented the Harbour Board. The Clerk asked us to make a statement and he would report to the Board. An answer from the Harbour Board did not come for some time, and it was then in the shape of a copy of the deed. The Board's representatives did not object to or question our claim. Hand in copy of minutes taken at this conference. This was returned with the copy of the deed. I wrote for a more definite reply but got no answer, and I then placed another petition before Parliament. In 1915 petition the Solicitor representing the Harbour Board was not present. I know of other streams that required artificial opening or assistance in relieving the water pressure. The name Whanganui-a-rotu was derived thus—Te Orotu was the name of a person. Whanganui was a fresh water lake and it was called Te Orotu's lake. Keteketerau was the first outlet to the lake. The present opening was made by Tu Ahuriri many generations ago. Some of Tu Ahuriri's descendants are in the South Island. Taiaroa and others are his descendants. The outlet was named after Ahuriri. The elders say that this opening got blocked at times the water oozing through. When the rivers were in flood the water rose and were let out by reopening the outlet. Tangoio is another lake of similar nature. That also becomes blocked and openings have to be made to allow the water to go out. The training walls made keep Ahuriri always open, and salt water fish now enter the lake. Fish in lake were flounders eels inanga and fresh water fish. After the opening became permanent salt water fish would enter. Ngarururo and Tukituki streams also become blocked by the action of the sea. Wairoa river which is larger than these also becomes blocked. Te Whakaki lagoon is another and becomes blocked at times. Fresh water fish are caught there. I am old enough to remember the original sales of land and can recall people receiving the money in Waipukurau sale of 1851. Cannot say which was first sale. The Natives were paid as follows—half in gold and half by token. The Government had not sufficient gold to pay in cash. The Government did not purchase the lakes. This happened with regard to Wairarapa lake. For this latter they were subsequently compensated. The stone tokens were all redeemed in cash. A block was called Tau-kohikohi-kohatu (The period when payment was made by stones.) We received full payment for the land but not the land covered with water. The name Upoko-poito refers to a place on the coast from here to Ngarururo stream. Okahu is the name of the place marked Upoko-poito on map.

Not xxd.

Tuehu Pomare closes evidence.

96. It seems plain from this evidence that the following is the Maori conception of the character of the Whanganui-o-Rotu. It was that of a fresh-water or brackish-water lagoon which had to be opened occasionally when the waters from the streams feeding it caused the water-level to rise to a point that menaced their homes and cultivations situated on the low ground bordering the lake. While the lake was open to the sea certain sea-fish would enter, but the main catch was of fresh-water fish. At times, through evaporation and percolation of the water through the retaining bank of gravel closely approximating the inflow from the feeder rivers and creeks, the lagoon would remain completely landlocked and at a static level. It then had all the characteristics of a fresh-water lake. The opening originally made to relieve the pressure of water and reduce the level of the lagoon was at Keteketerau, which was situated at a dip in the road about a mile to the north of the present Westshore Bridge. On one occasion when an outlet was made slightly to the Napier side of Keteketerau the scour of water carried away an adjacent burial-ground. That opening was called Ruahoro, and by that name is mentioned in the deed of cession and shown on the plan attached thereto. Lately a fresh opening was made or reappeared at Ahuriri, and from that time the Keteketerau, or Ruahoro, opening has remained permanently closed. An examination of the Pahou

title would make it appear that the Ruahoro opening was distinct from Keteketerau and was situated about 10 chains to the south of Keteketerau. As Captain Cook's chart of October, 1769, shows the opening at Keteketerau, or Ruahoro, and as the map in Yates' New Zealand, published 1835, shows McDonnell's Cove (which was entered by way of the Ahuriri opening), it can safely be assumed that the Ahuriri opening again came into being between 1769 and 1835. It is, I think, also safe to assume that the Ahuriri opening was in existence before 1824, because the accounts of the fall of Pakake Pa (which stood on an island where the Ahuriri Railway-station now stands) speak of a break at that time in the coast-line between what is now known as Meanee Spit and Scinde Island.

97. Documentary evidence concerning the condition of this body of water in olden times is, of course, meagre. In *Old Hawkes Bay* (W. Dinwiddie, 1916), which pamphlet was produced before the Commission of 1920, at page 47 we find the following :—

An interesting description of Ahuriri in 1855 appeared in *Chamber's Journal* for September, 1857 (reprinted, *Herald*, April 10th and 24th, 1858). The writer was a Mr. Dodson (*Herald*, September 4th 1874). He says :—

"At Ahuriri in Hawkes Bay on the coast of the Northern Island, have been discovered fine plains covered with good natural grasses, combined with the temperate climate due to the 40th parallel of latitude. Many squatters have already settled on extensive sheep runs on the upland Ruataniwha plains, and these pastoral colonists, will doubtless be followed by agriculturalists as soon as the Government succeeds in purchasing the extensive alluvial plain at Ahuriri . . . The Ahuriri plain is a good type of its kind, and illustrates well the peculiar process of the formation. Six rivers flow through the plain into a common channel about 20 miles long at the back of a beach of small moveable shingle. The channel leads to a lagoon about 20 miles in extent, lying at the back of the narrow beach also, and on the side of the plain opposite to Cape Kidnapper. An opening of 150 yards in width from the lagoon to the sea at the island pa is the only outlet for all these rivers in summer, but in winter each river is swollen by heavy rains, bursts through the beach, and makes to itself a separate mouth. Notwithstanding that the tide rushes through the main opening at the rate of six or seven knots an hour, the lagoon is rapidly silting up, and mudflats are appearing wherever there is easy water. . . . The influx of settlers into this favourable district has already raised up at the entrance of the lagoon three public houses . . ."

At page 50 Mr. Dinwiddie says : "The description suggests considerable changes in the configuration of the Inner Harbour."

98. At page 45 we find the following :—

The port of Napier in the early days was at Onepoto where various traders had their stores. Gough Island, now covered with merchant offices, had a native pa or village. Small vessels were dragged over the mud flats to Onepoto and loaded. Napier was still separated from the country by the impenetrable swamp, and a small 4 ton boat, "The Sailor's Bride" which used to ply between the port and Waipureku (East Clive) was the only means of access to the South. Waipureku was then a bustling place of trade. For some time the settlers had a difficulty in getting their wool to port. Goods were got up by the Tukituki in Native canoes, but the Native canoes were extortionate, and at last a punt was built. The natives charged £5 a load from the port to Waipukurau, and in one case it is recorded that they struck when they got to Rotoatara for another 30s. The trip took three days. At last Mr. Alexander solved the difficulty by starting a bullock team (*Herald*, June 13th, 1868). Another help to the transport of goods was provided by Burton's boating service. He tendered steamers arriving and took passengers to Poraite (Mr. Alexander's) and Maraetara (Mr. Carter's). In June 1857, when Mr. Stafford, then Premier, visited the farm, he put up at Mr. Alexander's. Burton also has a large punt at Mohaka and a whale-boat at Wairoa. His boats went up to Patangata. Starting from Munn's Hotel they got through the swamp by poling to Tareha's Bridge, then into Tareha's creek to the source of the Waitangi, then they were dragged two or three chains over a bed of mud. After that it was plain sailing till the entrance of the Ngaruroro was reached where shingle often lodged . . .

At page 42 the following passage occurs :—

An interesting description of an early visit to Ahuriri I take from the *Hawke's Bay Herald* (June 13th, 1868) :—

The writer says : "It was about 1850 that reports first reached Wellington of the fine tract of country open for settlement at 'Hourede' as Ahuriri was called in those days. There were said to be miles of plain covered with luxuriant grass. He quotes from an account given by an old settler of his

first acquaintance with this district in 1851-2, who says: 'I remember on meeting a gentleman who had been round the East Cape in a small vessel, asking him if he knew anything of the Hourde. "Oh, yes", he replied, "I called in there in the schooner. We sailed into a big swamp and landed in the bottom of a little gully. On climbing up an immense hill, and looking over the surrounding expanse, we saw nothing but a long sand spit with the Pacific Ocean on one side and an everlasting swamp backed by snowy mountains on the other." But I said surely there must be fine country somewhere about there. "No such thing, the dry land is all sand and fleas, and the water all salt and stinking bog water."

He modified this afterwards by saying that there were some clay cliffs, but Captain Rhodes had bought them for a bale of blankets and a few muskets, to settle a whaling station on.

99. At page 37 there is what purports to be a description of the place by Mr. W. B. Rhodes, as published in the *New Zealand Gazette and Wellington Spectator* of 24th April, 1841. This, however, is only an extract, and, unfortunately, it omitted all reference to the point that was exercising the minds of the members of the Commission of 1920.

100. To remedy the omission, the following is a full copy of Mr. Rhodes' article, and to show what was *not before* the 1920 Commission I have underlined [*printed in bold type*] that which is included in Mr. Dinwiddie's paper and was before the 1920 Commission:—

[Extract from *New Zealand Gazette and Wellington Spectator*, Saturday morning, April 24th 1841]

The Editor of the *New Zealand Gazette and Wellington Spectator*.

SIR,—

I am induced to send the following description of a district in the North Island known only to a few Europeans in consequence of an observation in your paper a short time since, wherein you expressed a desire to receive communications of the kind. **The district described is known by several names though most familiar to Europeans is the name of McDonald's Cove. Many pronounce the name Awridi, but Aoriri, the name I use is sanctioned by the Missionaries.**

The nearest point of the district to Port Nicholson is distant about sixty miles. I have commenced with the bearings and latitude as likely to be useful. Commencing at Cape Turnagain in latitude 40° 33′ South, from thence continuing along the coast around Cape Kidnappers to a white cliff bearing from the latter North West by North in latitude 39° 24′ South bounded on the East partly by the sea and Hawkes Bay, on the North by a line West South West from the said cliff 20 miles into the interior, on the South by a line West from Cape Turnagain (and also by the New Zealand Company's Lands) 20 miles and bounded on the Westward by a line parallel and distant twenty miles from the Main direction of the coast, cutting off the Headlands and connecting the two last mentioned points parallel with the boundaries on the coast, estimated at 880,000 acres more or less.

The roadstead is sheltered from the prevailing winds and there is a good anchorage in eight fathoms of water at one mile from the shore. At the entrance of the River in the proper channel there is three fathoms water; and, immediately passing the bar, it dips to seven and nine fathoms, shingly bottom. The entrance of the River is generally smooth and the ebb tide of fresh water runs out at the rate of seven miles per hour which renders it rather dangerous for vessels swinging to their anchors unless due caution is used. The river shortly loses itself for a time in a large shallow lagoon, nevertheless there is a channel towards the South into a cove or natural dock, sheltered from all wind and out of the influence of the tides, the depth of water in the cove I did not ascertain, I was informed by the natives that numerous small coasting craft, and amongst others the cutter Harriett, Captain R. Barrett, anchored in the cove. One large American Whaler requiring water and refreshments once anchored in the river, thus proving that **this place would answer as a sea port second to Port Nicholson.**

The pah is built at a small island at the entrance of the river a few yards from the mainland. Immediately about the south entrance of the port the land is low and swampy with the exception of one headland which, and the low island where the native pa is built and an island adjoining, would be eligible for the site of a sea port town but **I should recommend the principal settlement to be placed about ten miles inland on the banks of a river communicating with the port, being near the centre of a fine alluvial valley, apparently surrounded with hills of moderate elevation containing probably about 200,000 acres of grassland, mostly clear of fern and with the exception of some tutu bushes already to put the plough into without any preparatory expense in clearing. There are three large groves of fine timber in this flat sufficient for all purposes of building and fencing &c. I have seen no place to equal it in New Zealand for depasturing sheep or cattle,** and, from its proximity to Port Nicholson, being only distant viz. (The Port) 120 miles by the valley of the Hutt and the commencement of the district as mentioned before sixty six miles, it must become of great importance, and will be a great acquisition as a grazing and agricultural district to the important settlement of Port Nicholson and metropolis of Wellington.

This important valley is intersected by three rivers and numerous tributary streams. The communication from the port with the interior is to cross the lagoon which may be done at high water with a large boat or small steamer of light draft of water. There is considerable depth of water in the river and the tide is exceedingly rapid. After going about fifteen miles up the navigation becomes impeded with timber. I imagine these rivers to take their rise in the distant mountain range to the Westward and probably from the same source. I had no opportunity of examing the country except part of the valley alluded to, but consider the greater part of the 880,000 to be available land.

From conversations with Natives I concluded there was little difficulty in travelling to Port Nicholson and I am sanguine that the valley of Aoriri will be found to communicate with the valley of the Hutt, the Natives also travel to Cook's Straits, keeping near the banks of the river which they follow in for some time after leaving Aoriri and I have every reason to think this river is the Manawatu therefore there is little doubt easy communication may be had to most parts of the interior and West Coast.

Cattle bred there might after the bridle road is cut be driven to Port Nicholson, the different settlements in the straits and to the Plymouth Company's settlement at Taranaki. The natives have also a path through a pass in the interior range of mountains by which they can communicate with Caffia and Wycatto. The rivers in the valley of Aoriri abound with eels which are caught and cured in immense quantities by the Natives and keep good for several months. About this part of New Zealand it is very thinly populated and the natives have had but little intercourse with the white people and missionaries, they are, consequently, more ignorant and barbarous than the generallity of natives but they wish to have some Europeans settle amongst them.

I am, Sir,

Your Obedient Servant,

W. B. RHODES.

Te Aro, April, 22nd, 1841.

101. At page 37 there appears an extract from an account by Messrs. Thomas and Harrison. The full text of this contribution is as follows :—

New Zealand Spectator and Cooks Straits Guardian, Wellington, Saturday morning, 10th May, 1845

EXTRACT FROM JOURNAL OF A WALK ALONG THE EAST COAST TO TABLE CAPE BY MESSRS. THOMAS AND HARRISON

On the 27th after three hours walk along a sandy beach we came within three or four miles of Kidnappers when the road turns off on some sand hills, thence up a very steep and high hill, the path now lay across the summit of the range forming the southern boundary of the Houriri plain, towards the south west we saw the river Tukituki winding through a valley till it discharges itself with the Awapuni into the sea. Descending the hills we again came on the beach along which we walked four hours passing Kurupa's Pa and some lagoons, crossing the Tukituki and Awapuni at its junction. Here is a large Pa at which we stopped for the night. We were well taken care of, the natives providing for us well, according to the chief's instructions. The next day with a man and a boy we went off in a canoe for the Bluff of Houriri the wind blowing very strong and coming ahead delayed us much. It was 2 p.m. before we got through the channel and lagoons and had landed at the opposite side of the Houriri River ; the harbour formed here by the river opening the lagoon was what is termed McDonald's Cove, is good for vessels of about 100 tons. There is a strong tide at all times, the land immediately around the lagoon is swampy and would require an embankment to render it available for the formation of a township. At the mouth of the river there are two small low sandy islands which might answer for a few stores but there is no wood and water must be brought from a distance ; the plain of Houriri lying between two ranges of hills running north and south and stretching away towards the Manawatu with which it is connected by other valleys and plains is about 60,000 to 70,000 acres in extent, consisting for the most part of grass intermixed with bullrush and swamp.

102. As further contribution to the description of Ahuriri and surrounding places we can take firstly a portion of a letter from Captain Drury of H.M.S. "Pandora," published at the command of the Governor in the *New Zealand Gazette* of 1855, page 73. The letter is dated 25th June, 1855, and goes on to say :—

Hawke's Bay – Ahuriri.—We arrived in Hawkes Bay on the 26th February anchoring N. 77° W. 1½ miles from the Bluff. We remained in the roadstead off Ahuriri ten days and at one time I was in great hopes of getting into the harbour, having found it deeper than usually reported. There was 12′ 6″ at high water, at the shoalest point, which was only just below our draft of water. The tides are rapid but by leaving the roadstead at or near high water there was little difficulty in entering. I have supplied the Commissioner of Crown Lands with a tracing of our survey of the entrance, and I think the local authorities could easily place two beacons in line to guide vessels in, removing their positions should the freshets affect the channel. The following remarks are appended to the plan.

Directions for entering the Harbour.—The present leading marks may not always be correct; it is said that the Rangitira Bank is effected by the freshets. On entering or leaving the harbour it must be remarked that the flood sets across the entrance to the Eastward. Therefore on passing the Point, steer for Meanee Point, and the deepest anchorage is immediately inside it. On leaving the harbour, it must be remembered, the ebb sets to the Westward, directly towards the Rangitira Bank. The flood stream runs for nearly two hours after high water to cover the extensive flats.

The strength of the tide at the entrance is six to seven knots. The proper time to approach is when it is high water by the beach, there will then be sufficient stream to enter. Vessels drawing six to seven feet of water should anchor off M'Kains Hotel as there is less tide there.

Lat. 39° 28′ 44″ S.
Long. 176° 55′ 30″ E.
Variation 16° E.
High water, full and change, 7 hrs. 50 min.

This harbour is adapted to vessels drawing ten to eleven feet of water, and is certainly the only harbour deserving the name between Tauranga and Wellington, and within it is capable of considerable improvement.

Roadstead.—The roadstead is very good and what are termed the black north easters give ample warning of approach.

Reef.—There is a reef bearing N. 19° E. 2 miles from Ahuriri Bluff having eight feet of water, and we found the bottom uneven north of these rocks.

Climate.—The climate of Hawke's Bay is, I am inclined to believe the best in New Zealand. Alike exempt from the humidity of Auckland, and the fiery breezes of Wellington. The inland navigation near Ahuriri is a great natural acquisition to this province beside the Ahuriri.

Tukituki River.—The Tukituki disembogues seven miles to the Southward, having a changeable bar, but is navigable for twelve miles for boats.

Nga-ra-Rura River.—This river, the Nga-ra-Rura, runs from the Eastward, intersecting the province, and is navigable many miles into the interior.

The Town of Napier.—The town of Napier, and buildings around the port are rapidly advancing and the communication with the settlements of the interior being so simple, both by land and water, this fertile district will become of great importance and the exports must soon be considerable.

Want of Timber.—The report mentions the scarcity of timber which has to be imported as natives hold the only timber available and the price is high.

Natives.—The Natives of this district appear frank and obliging in their disposition; they are generally better dressed and more advanced in civilization and obedience to English authority than any of the tribes I have met in this island.

Anchorages in Hawkes Bay.—The anchorages in Hawkes Bay are: Long Point, in the North Bight of the Bay and Cape Kidnappers at the South. The former offers shelter during North East and South East Gales and the latter in South Easterly and the East side of the Peninsula from the Southwards.

Wairoa River.—It is my intention to examine this part of the coast more minutely during the ensuing season. We found the Wairoa, a considerable river, had changed its mouth within the last three years, having shifted 1½ miles to the Eastward.

The entrance is very difficult, but within it has a depth of 12–14 feet and navigable for boats twelve miles.

Curios Quarrel.—Some years ago when the river was blocked up, the Natives at either end of the Boulder Bank began to cut a channel and a dispute nearly caused a war.

Whalers.—The whaling encampment at Long Point which consists of about one hundred Europeans, is considerably reduced by the wages given for other labour and from the scarcity of the Scamperdown Whale.

103. Following upon this description we turn to a further extract from Captain Drury's report of the 17th December, 1855, published in the *New Zealand Gazette*, Volume IV, No. 1, of 4th January, 1856, at page 2. This report goes on to say:—

We found considerable change in the entrance to Ahuriri since March last, but not less water. The Rangatira Bank is now connected with a low spit extending from the South shore, about one third of a mile north of the mouth.

The anchorages in Hawkes Bay are Ahuriri, Long Point and Cape Kidnappers.

Ahuriri Roads is safe in South, South West and North West winds and during the ordinary summer North East sea breezes. The anchorage is after shutting in Cape Kidnappers bringing the bluff to bear South East by East and about one mile off the harbour in six fathoms, good holding ground.

104. Reference to Captain Cook's chart of October, 1769, shows the opening at that time to have been either at Ruahoro or Keteketerau. It was not at that time at Ahuriri. It could probably be taken as a fact that a complete blockage of all outlets to the Ahuriri

Harbour and Whanganui-o-Rotu occurred once at least between 1769 and (say) 1824 (Pakake fight), because a considerable height of water behind the gravel-bar provided the only means whereby at that time an effective channel could be cut to the sea—and no considerable height of water could be attained while Ruahoro was open as an escape to the sea. In other words, it seems necessary to assume that Ruahoro became closed before one can visualize a body of water behind the gravel-bank sufficient to run over or be led over the spit at Ahuriri and cause the channel we now know by that name. It may possibly be suggested that Ahuriri was cut by a change in course of the Tutaekuri River between 1769 and 1824 while Ruahoro was still open, but for this to be so it would be necessary to suppose that there was at that time no communication between Ahuriri Harbour and Whanganui-o-Rotu sufficient for the augmented volume of water from the southern end to find its way out by way of Ruahoro. The nature of the ground, however, leads me to assume that before the inland water rose to the normal height of the gravel-bank it would have made a continuous sheet of water from Petane to Scinde Island and caused a scour through Ruahoro that would have been sufficient to keep it open and automatically wide enough to take all the water offering.

105. Now I think it can be taken that the Whanganui-o-Rotu has not been continuously open to the sea for the past two hundred years (or centuries as the Harbour Board case puts it). It is quite evident that an opening at Keteketerau or Ruahoro would be closed up directly a heavy sea followed a dewatering of the Whanga. Up to (say) 1769, then, we can treat the Maori version as entirely trustworthy—*i.e.*, the lake closed up at times and remained closed up for considerable periods, and had to be reopened by the hand of man.

106. In 1824 we find the opening to be at Ahuriri. I can find no evidence that at any time after that date it closed, but much evidence of strenuous endeavours exerted by harbour-making authorities to keep it open. The statement has been made that the opening once closed despite these attempts to keep it open, but so far no satisfactory substantiation of this point has been made.

It seems, however, necessary to look into this aspect in order to determine what would be the effect if one were satisfied that there were periodic closings of the mouth of the Whanga.

107. I have made a diligent search, and, as far as I can see, the legal status of waters similar to those of the Whakaki Lagoons, Tangoio Lagoon, and the Whanganui-o-Rotu before the signing of the Treaty of Waitangi have never been the subject of proceedings in point in the Supreme Court of New Zealand. The Native Land Court has issued titles based upon the rights of the owners found entitled under their customs and usages in respect of the lagoons at Whakaki and in respect of the lagoon at Tangoio. The reference to the Treaty of Waitangi in this paragraph is for the purpose only of referring to a date at which it might be assumed no pakeha artificial means had been adopted to vary permanently the characteristics of the Whanganui-o-Rotu.

108. In New South Wales the extent to which the territorial rights of the Crown affect lagoons similar to those now being discussed has been determined. On the 28th March, 1905, the following judgment was delivered in the case of *Attorney-General* v. *Merewether*, N.S.W.S.R., Vol. 5, at page 159, by A. H. Simpson, C.J. in Eq. :—

By Crown grant dated the 29th February, 1840, the Crown granted to Robert Dawson a piece of land containing fifty acres in the parish of Newcastle, described in the grant as being one of five allotments of fifty acres each, measured to the South of James Mitchell's nine hundred and fifty acres, commencing at a small creek at the northern extreme of the west boundary line, and bounded on the west by a line bearing south seventeen chains, on the south by a line bearing east fifty chains to the beach, and on the east and north by the beach and a south margin of a small lake (dividing it from James Mitchell's nine hundred and fifty acres farm) bearing up westerly to the northern extreme of the west boundary line aforesaid, reserving among other things all land within one hundred feet of high water mark on the sea coast and on every creek harbour and inlet.

The nine hundred and fifty acres granted to James Mitchell is described in the Crown grant of the 6th January 1836 as bounded on the west by a southerly line of one hundred and thirty three chains to a creek at the meeting of the salt and fresh water, on the south by that creek or salt water lake east to the sea beach.

The question at issue is whether the Crown is entitled to a reserve of one hundred feet measured from the southern shore of the lake or lagoon. This depends on the true meaning and effect of the grant. This is partly a question of fact and partly of law.

It will be noticed that the reservation is of " all land within one hundred feet of high water mark on the sea Coast, and on every creek, harbour and inlet " ; this means high water mark on the sea coast and high water mark on every creek, harbour, and inlet.

The evidence given on either side appears at first to be conflicting, but any apparent discrepancy is, I think, almost entirely removed by noticing the date to which the witness's evidence refers. Without going minutely into the evidence, I find as follows : (1) That the state of the lagoon was continually varying, according to the conditions of wind and weather ; (2) that the lagoon was more or less permanently separated from the sea by a sand-bar which rose some feet above the ordinary level of the lagoon and above high water mark, whether at spring or neap tide ; (3) that after a heavy rainfall the creek or stream running into the lagoon from the west filled up the lagoon until the water was nearly on a level with the top of the sand-bar ; (4) that when this was the case a channel was often made artificially across the bar, and the water allowed to run into the sea ; (5) that occasionally the water of the lagoon made a channel by its own pressure across the bar ; (6) that the water running through the channel widened and deepened it ; (7) that, when the water in the lagoon had run out, the channel was soon closed by the action of the sea and wind banking up the sand-bar ; (8) that in recent years, when a channel in the bar was open, the sea water flowed into the lagoon on some occasions at high water—the depth of the sea water so flowing in, in the channel, varying from one foot to two or three inches ; (9) that previously to 1880 there was rarely or never any inflow from the sea, except by waves sometimes lapping over the bar ; (10) that at high spring tides, with a south easterly gale blowing, the waves of the sea ran up the outer slope of the sand-bar, and the end of the waves ran over into the lagoon ; (11) that the water in the lagoon was salt, at any rate at the eastern end, from the access of sea water ; (12) that in 1840 the lagoon was less exposed to the entrance of the sea than in recent years ; and (13) that the lagoon was not subject to the ordinary ebb and flow of the tide.

Alexander Patrick, one of the defendants witnesses, whose evidence I see no reason to doubt, says that in the nineties the bar was closed for a period of one year and nine months at a time, and that it would often remain closed for six months or three months ; and that from 1870 to the present time he should say the lagoon was not open more than thirty days in the year.

With reference to (9), only one of the witnesses for the Crown knew the lagoon before 1900. Hicks knew the Lagoon from 1887 to 1891, and he says he has seen the tide running in occasionally. On the other hand, many of the defendants witnesses have known the lagoon in earlier years. H. Smith from 1869 to 1871 ; Donaldson, from 1847 to 1849 ; Croaker (who was borne in 1840) from his earliest years to the present time. All these witnesses say they never saw the sea flowing in ; only the waves breaking on the bar, and part of them going over.

As regards the law, the earliest authority referred to was the Year Book (22 Edw. III 93) : " *Nota queschacun eau que flowe et reflowe est appel' bras de mer, si tant avant come el' flowe.*" This is cited as an authority by *Sir Matthew Hale* in his *De Jure Maris et Brachiorum Ejusdem* (Cap. IV, II. 2) " That is called an arm of the sea where the sea flows and reflows, and so far only as the sea so flows and reflows."

Hall in his *Treatise on the Seashore*, edited by Moore (3rd ed.), at p. 669, says : " This dominion (of the King) not only extends over the open seas, but also over all creeks, arms of the sea, havens, ports, and tide rivers, as far as the reach of the tide, around the coasts of the kingdom. All waters, in short, which communicate with the sea, and are within the flux and reflux of its tides, are part and parcel of the sea itself, and subject in all respect, to the like ownership."

In applying the principles of law to the facts of any case, the Court, in my opinion, must have regard to the general character of the lake or lagoon in question at the date of the grant. For instance if a lagoon were subject to the ebb and flow of the tide for three hundred and sixty four days in the year, I apprehend that it would be an inlet of the sea, although it was closed to the sea by a sand-bar on one day of the year. Taking the opposite extreme, if the lagoon were closed to the sea three hundred and sixty four days in the year, and open one day only, I apprehend it would not be an inlet of the sea. The Court in my opinion, must look at all the facts in each case, and therefore, every case must stand on its own circumstances. It is really a question of fact, just as in cases of alluvion ; it is for the jury to say whether the accretion has been so slow and gradual as to be imperceptible.

On the facts of this particular case, I come to the conclusion that in 1840 the Glenrock Lagoon was not an inlet of the sea within the meaning of the grant, and consequently, there was no reservation of one hundred feet along the southern shore of the lagoon. This was the only point in dispute. Subject therefore to a declaration that the Crown is entitled to a reservation of one hundred feet along the sea coast as shown in the plan annexed to the information, the information is dismissed with costs.

109. A further case bearing upon the points at issue in this inquiry is that of *Attorney-General* v. *Swan*, N.S.W.S.R., Vol. 21 (1921), p. 408. At page 414 Mr. Justice Street (then Chief Judge in Equity of the Supreme Court of New South Wales) says :—

In the year 1840 a grant of two thousand acres of land was made by the Crown to one Andrew Lang. The land was described as bounded partly by Illawarra Lake and by Mullet Creek, but amongst a number of other reservations contained in the grant was a reservation " of all land within one hundred feet of highwater mark on the sea coast and every creek, harbour, and inlet." In the course of time the land was subdivided into smaller areas, and the defendant became the owner of two adjoining lots situated on a tongue of land bounded on one side by the waters of the lake and on the other by the waters of Mullet Creek. In the conveyancees these lots were described as bounded by the shore of the lake on one side and by Mullet Creek on the other. It is claimed on behalf of the Crown that Mullet Creek is a creek or inlet of the sea, and that Illawarra Lake is a harbour or inlet of the sea, within the meaning of the grant, and the Crown claims to be entitled to the land within one hundred feet of high-water mark on the creek and on the lake. The defendant denies that the creek and the lake are inlets of the sea, and he asserts alternatively that, if he is wrong in this, and if the grant did not operate to divest the Crown of the land which it now claims, he has acquired a title by the fact that he and his predecessors in title have had continuous and undisturbed possession adversely to the Crown for upwards of sixty years.

Illawarra Lake is one of a series of lagoons on the coast of New South Wales all of which are more or less similar in character, and all of which were probably formed much in the same way. As it exists at the present day it is a sheet of water intermittently open to the sea, and with a number of streams of varying sizes emptying themselves into it on its landward shores. The effect of the sea's action is to close its mouth or entrance by heaping up sand in the form of a bank or bar, and when closed in this way it remains closed until it is artificially opened by fishermen, or is forced open by the pressure of the accumulation of water within it. This state of things has been going on in all probability for many hundreds of years, and it may safely be assumed that it represents the state of affairs existing at the date of the grant as well as at the present time. From such information as has been put before me it appears that for a period of thirty-four years, or thereabouts, prior to the institution of these proceedings, that is to say from February, 1887, to February of this year, it has been open for approximately twenty-six years and closed for approximately eight years, and that on every occasion except two artificial means were resorted to to open it. The information is not complete, and fuller and more exact information, if it could be obtained, would probably show that it was closed for a longer period than appears. The fact too that on each occasion except two it was opened artificially, goes to show that, if it had been left to open itself naturally, it would have remained closed for some additional but unascertainable period. Taking the period of thirty-four years, however, to which I have referred, it is probably a fairly accurate assumption that it has been open to the sea for about two-thirds of the time and closed for about one-third. All the witnesses who have been familiar with the locality for any length of time agree in saying that it is more often open that closed.

His Honour here discussed in detail the evidence as to tidal influence in the lake and in Mullet creek, and then continued :—

I do not think that it is necessary to discuss the evidence further. It establishes that the lake is only intermittently open to the sea ; that when open the ordinary neap tides do not enter it ; and that the movements which Mr. Halligan recorded in Mullet Creek and its entrance are not visible to the ordinary observer, and do not synchronise with or correspond in periodicity with, the movements of the ocean tides. These things are all established by the evidence of the Crown witnesses, and they are in my opinion sufficient to determine the case. The facts that the waters of the lake are salt, and that when the channel is open there is a certain degree of communication with the ocean are not sufficient to make the lake an inlet of the sea within the meaning of the law. " That is called an arm of the sea," says Sir Matthew Hale (*De Jure Maris et Brachiorum Ejusdem*, Cap. IV), " where the sea flows and reflows and so far only as the sea so flows and reflows." That is the test, and in applying that principle to the facts of any case the Court must, as was pointed out by Simpson, C.J., in Eq., in *Attorney General* v. *Merewether* (*supra*) have regard to the character of the waters in question. In that case as in this, he was dealing with a lagoon or lake intermittently open to the sea, and he said : " For instance, if a lagoon were subject to the ebb and flow of the tide for three hundred and sixty four days in the year I apprehend that it would be held to be an inlet of the sea, although it was closed to the sea by a sand-bar on one day of the year. Taking the opposite extreme, if the lagoon was closed to the sea three hundred and sixty four days in the year and open one day only, I apprehend it would not be an inlet of the sea. The Court, in my opinion, must look to all the facts in each case, and, therefore, every case must stand on its own circumstances." He came to the conclusion in that case that the lagoon in question was not an inlet of the sea within the meaning of the grant, and that consequently a reservation of one hundred feet above high water mark did not apply. In *Booth* v. *Williams*, 9 N.S.W.S.R. 592, I held that Deewhy Lagoon, which is similar in character to Illawarra lake, and is intermittently open and closed to the sea, could not be said to be with the influence of the ebb and flow of the tides in the ordinary course of things, and was, therefore, not an arm or inlet of the sea. My decision in that case

was reversed by the High Court (*Williams* v. *Booth*), upon other grounds, but no dissent from this view was expressed, and in point of fact O'Connor, J., expressed his concurrence in it. He said (at p. 354): "In examining the subject matter and the surrounding circumstances it is important to consider the nature of Deewhy Lagoon. I agree with the learned Judge that it is not an arm of the sea according to the test laid down by Sir Matthew Hale in his treatise *De Jure Mari et Brachiorum Ejusdem*."

For similar reasons I am of opinion that Illawarra Lake is not an arm or inlet of the sea. It is impossible to measure exactly the periods during which it has been open or closed to the sea since the date of grant, but the evidence shown, as I have pointed out, that it has been open and closed at intervals from time immemorial, and that when closed by the action of the sea it would remain closed permanently but for the pressure of the accumulation of fresh water from within. It is more often open than closed, no doubt, but it is periodically closed for long periods at a time, and I do not think that in these circumstances it could fairly be said that it was within the ebb and flow of the tides in the ordinary course of things, even if, when open it were subject to the daily flow of the tides. I do not think, however, in point of fact that it is subject to the daily flow and reflow of the sea tides when open.

110. The judgment here goes on to a discussion of the tests to be applied in determining whether waters are tidal or not, and concludes this section as follows:—

I think that in such cases what is intended by high-water mark is the mark of limit of high water based on observation of the actual visible rise and fall of the tide, and ascertained in the manner pointed out in *Attorney General* v. *Chambers*. It is plain upon the facts of this case that on the Western shores of the lake and in Mullet Creek there is no daily visible rise and fall corresponding in any way with the movements of the sea tides. Even, therefore, if the fact that the lake is only intermittently open to the sea were not sufficient to decide the case it could not, in my opinion, be successfully contended that when open the ordinary sea tides flow and reflow within it. I am clearly of opinion therefore, that the lake and the creek are not inlets of the sea, and that the reservation in the grant of one hundred feet above highwater mark has no applicability.

111. A further New South Wales case which deals with the question of title to these lagoons is that of *Booth* v. *Williams Deewhy Case*, N.S.W.S.R., Vol. IX (1909), p. 592, but as it does not contribute anything which is not already covered in the two cases quoted it can be passed over.

112. We now leave for a while the case for the Crown and consider that of the Napier Harbour Board.

113. The Board claims that—

In addition to the statutory title conferred by the Napier Harbour Board Act, 1874, and the amending Act of 1887 it holds Certificate of Title H.B. Volume 18 folio 259 for the Whanganui-o-Rotu.

114. The certificate of title referred to, which, *prima facie*, is evidence of an indefeasible title, reads as follows:—

New Zealand

Act of Parliament 1875 No. 65
Act of Parliament 1887 No. 51

H.B. VOL. 18 Fol. 259
Register Book, Volume 115, Folio 193.

Reference: { Land Transfer Compulsory Registration of Title Act, 1924.
Deeds Index Vol. 15 fol. 183.
Application No. C—5893.

CERTIFICATE OF TITLE UNDER LAND TRANSFER ACT

Limited as to Parcels and Title

Corrected 14/1/1935.
R. F. Baird D.L.R.

THIS CERTIFICATE, dated the nineteenth day of April One thousand nine hundred and twenty-nine under the hand and seal of the District Land Registrar of the Land Registration District of HAWKE'S BAY WITNESSETH that THE NAPIER HARBOUR BOARD is seised of an estate in fee simple upon trust for the use benefit and endowment of the said Board under the "Harbours Act 1923" (subject to such reservations, restrictions, encumbrances, liens, and interests as are notified by memorial under written or endorsed hereon, subject
W. A. D. also to any existing right of the Crown to take and lay off roads under the provisions of any Act of the General Assembly of New Zealand) in the land hereinafter described, as the same is delineated by the plan hereon bordered green,

be the several admeasurements a little more or less, that is to say: All those parcels of land containing together seven thousand three hundred and eight acres one rood and twenty-seven perches more or less situate partly in Block IV of the Heretaunga Survey District and partly in the Borough of Napier being part of the land called "Ahuriri Lagoon" in the "Napier Harbour Board Act 1874" and "The Napier Harbour Board Amendment and Endowment Improvement Act 1887"

[SEAL]
W. A. DOWD, Assistant Land Registrar.

CEASED TO BE LIMITED AS TO TITLE
Dated this 25th day of June 1930
R. F. Baird D.L.R.

WE the undersigned hereby certify that the above written is a true copy of the Certificate of Title H.B. Volume 18 folio 259 without plan as issued at the 19th day of April 1929 as examined with the Original thereof by us this 23rd day of November, 1937—

Ian D. MACKAY,
Solicitor
Napier.

H. T. PRENTICE
Law Clerk
Napier.

115. The history of events leading up to the issue of this certificate of title will now be traced.

One of the first Acts passed in the first session of the first New Zealand Parliament was the Public Reserves Act, 1854.

The preamble to this Act and sections 1, 2, and 3 are as follows:—

Extract from "An Act for regulating the Management of certain Lands reserved for Public Purposes in the Several Provinces of New Zealand

14/9/1854.

Preamble. WHEREAS in the several Provinces of New Zealand lands have been heretofore and may hereafter be reserved for various purposes of public utility, the legal title whereto is vested in Her Majesty: And whereas it is expedient to establish in each of the said Provinces a system of local management of such of the said lands as are or may be held for purposes of local concern:
BE IT ENACTED by the General Assembly of New Zealand as follows:—

Governor may grant to Superintendents Her Majesty's interests in demesne Lands. 1. It shall be lawful for the Governor of New Zealand, with the advice of his Executive Council at any time and from time to time after the passing of this Act, in the name and on the behalf of Her Majesty, to grant to the Superintendent of each Province in New Zealand, and his successors, all such estate and interest as Her Majesty now hath or may have in all or any of the lands within such Province forming part of the demesne lands of the Crown, which shall have been at any time heretofore and now are or may hereafter be reserved or set apart for purposes of public utility within the said Province, except such of the said lands as shall have been and now are or may hereafter be reserved for purposes of military defence, the service of any office or department of the General Government, or for the benefit of the native inhabitants of the said Colony.

Also in lands reclaimed from the sea, &c. 2. It shall be lawful for the Governor of the said Colony, with the advice of his Executive Council to grant and dispose of any land reclaimed from the sea, and of any land below high-water mark in any harbour, arm or creek of the sea, or in any navigable river or on the sea coast within the said Colony, either to the Superintendent of the Province and his successors, in or to which such land is situate or adjacent, or in such other manner to such other persons and upon such terms as shall be thought fit: Provided always that every such grant or disposition within any Province, other than to the Superintendent thereof, shall be made in pursuance of a joint recommendation by the Superintendent of such Province and of the Provincial Council thereof: Provided also that nothing herein contained shall prejudice the rights of persons claiming water frontage.

Such grant to be valid against Her Majesty, her heirs and successors. 3. Every such grant shall be sealed with the Public Seal of the Colony, and shall be valid and effectual as against Her Majesty, her heirs and successors, and shall have the same force and effect as a direct grant from the Crown, and for the purposes of registration shall be deemed to be a grant from the Crown, and every such grant shall declare the purposes for which such lands shall be held, whether general or specific, as the case may be.

116. Under this Act a small portion only of the Whanganui-o-Rotu (approximately what could have been the then Native and official idea of the extent of the Ahuriri Harbour) was by Crown grant vested in the Superintendent of the Hawke's Bay Province. The text of this Crown grant is as follows, and the plan that formed part of it is attached to this report as Appendix C.

Crown Grants R.6.A.

GRANT UNDER THE PUBLIC RESERVES ACT, 1854

VICTORIA by the Grace of God of the United Kingdom of Great Britain and Ireland Queen,

To all to whom these presents shall come: GREETING.

KNOW YE that for good consideration Us thereunto moving We for Us Our Heirs and Successors Do hereby Grant unto His Honor Thomas Henry Fitzgerald of Napier Superintendent of Our Province of Hawke's Bay and his Successors Superintendents of the said Province ALL that parcel of land be the same above or below highwater mark in the Province of Hawke's Bay aforesaid in Our Colony of New Zealand situate in the Harbor of Napier and bounded towards the North by a line commencing at a point on the seaward face of Meanee Quay in the town of Napier opposite to the Southeasternmost angle of Alfred Street thence running Eastward along the seaward face of Meanee Quay aforesaid and along the seaward boundaries of a Native Reserve and of a Government Reserve and again along the seaward face of Meanee Quay to the Government Reserve at the Western head of Port Napier thence along the seaward boundary of the said Reserve to its easternmost point thence across the mouth of the harbor to the Westernmost point of the Government Reserve at the Eastern head thence along the seaward boundaries of the said Reserve and of the Town Sections numbered respectively five hundred and eighteen five hundred and seventeen and five hundred and sixteen and of the Custom House Reserve thence across the seaward termination of a public road or street and along the seaward boundaries of the Town Sections numbered respectively five hundred and fifteen and five hundred and fourteen thence across the seaward termination of a public road or street and along the seaward boundaries of the Town Sections numbered respectively five hundred and thirteen the same being an Educational Reserve and five hundred and twelve thence along the seaward face of Waghorne Street to the Western angle of the Town Section numbered five hundred thence along the seaward boundaries of the said Section of a Government Reserve and of the Town Sections numbered respectively four hundred and ninety nine four hundred and ninety eight and four hundred and ninety five four hundred and ninety three four hundred and ninety one four hundred and eighty nine and four hundred and eighty seven thence across the seaward termination of a public road or street and along the seaward boundaries of the Town Sections numbered respectively four hundred and eighty five four hundred and eighty three and four hundred and eighty one to the Northeastern angle of the Section last named thence across Waghorne Street and along the Eastern boundary of the Town Section numbered four hundred and eighty thence along the Southern side of the Hardinge road to the Northeasternmost angle of the Town Section numbered four hundred and seventy thence along the Eastern boundary of the Section last named and the seaward boundary of the Town Section numbered four hundred and sixty nine the same being an Educational Reserve thence across Waghorne Street and along the seaward boundaries of the Town Section numbered four hundred and sixty eight thence across a public street or road and along the seaward boundaries of the Town Sections numbered respectively four hundred and sixty seven and four hundred and sixty six thence across Waghorne Street and along the seaward boundaries of the Town Section numbered four hundred and fifty seven thence along the Hardinge road to the Battery Reserve thence along the seaward boundaries of the said Battery Reserve to the commencement of the Battery Road TOWARDS the East by the Battery Road aforesaid from the Point last named to Battery Point thence by the Hyderabad Road to its junction with the Havelock Road thence by the Wellesley Road to a point opposite to the Southwesternmost angle of the Government Reserve at the Southern extremity of the Town of Napier TOWARDS the South by a line bearing South Eighty five degrees West a distance of Two miles and Sixteen chains or thereabouts to a point due South of the point of commencement And towards the West by a line bearing due North a distance of one mile and twelve chains or thereabouts to the Point on Meanee Quay first above named

Entered on Record this 9th day of January, 1861.
(Sgd.) W. GISBORNE,
For the Colonial Secretary and Registrar.
R. No. 6A, Folio 81.

EXCEPTING ALWAYS out of the said boundaries the Town Sections situated upon Gough Island and numbered respectively five hundred and twenty four to five hundred and thirty seven both inclusive also a public reserve at the Northern extremity of the said Island and the Public roads or streets called respectively Colin Street Campbell Street and Lucknow Street AS the said Lands and Harbour of Napier are set forth in the plan to this Deed of Grant annexed and therein defined by a red line ALSO ALL that parcel of land in the Province of Hawke's Bay aforesaid containing by admeasurement Two roods more or less situate in the Town of Napier aforesaid and being the Town Sections respectively numbered four hundred and eighty two and four hundred and eighty four Bounded towards the North by the Hardinge Road two hundred and fifty links towards the East by the Town Section numbered four hundred and eighty two hundred links towards the South by Waghorne Street two hundred and fifty links and towards the West by the Town Section numbered four hundred and eighty six two hundred links AND ALSO ALL that other parcel of land in the Province and Town aforesaid containing by admeasurement three roods more or less being the Town Sections numbered respectively four hundred and sixty three four hundred and sixty four and four hundred and sixty five Bounded towards the North by the Hardinge Road three hundred links towards the East by the Town Section numbered four hundred and sixty two two hundred and fifty links towards the South by Waghorne Street three hundred links and towards the West by the Town Section numbered Four hundred and Sixty nine the same being an Educational Reserve two hundred and fifty links As the same are delineated on the plan to this Deed of Grant annexed WITH ALL the rights and appurtenances thereto belonging TO HOLD unto the said Thomas Henry Fitzgerald and his successors Superintendents of the Province of Hawke's Bay for ever IN TRUST for the Improvement of the Harbour of Napier and for the Construction and Maintenance of such Docks Piers and other works therein as may be deemed advisable for facilitating the Trade and Commerce of the Town and Port of Napier aforesaid.

IN TESTIMONY We have caused this Our Grant to be sealed with the Seal of Our Colony of New Zealand.

(No. 140, Rr. 6A)

WITNESS Our trusty and well beloved Thomas Gore Browne C.B. Governor and Commander in Chief in and over the Colony of New Zealand this twenty ninth day of December in the twenty fourth year of Our Reign and in the year of our Lord one thousand eight hundred and sixty.

(Sgd.) T. GORE BROWNE.

With the advice and consent of the Executive Council

(Sgd.) E. W. STAFFORD
„ F. WHITAKER

SIGNED by His Excellency the Governor in the presence of

(Sgd.) E. W. STAFFORD, Colonial Secy. of New Zealand.
„ F. WHITAKER, Atty. Genl., Auckland.

118. Section 12 of the Public Reserves Act, 1854, provided against any infringement of Native rights. It read as follows :—

12. Nothing herein contained shall in any way prejudice or effect the right of any person or body corporate in to or over any such lands, except the right of Her Majesty, her heirs and successors.

119. By the Napier Harbour Board Act, 1874, the unsold portion of the Whanganui-o-Rotu (that lying to the south of a line from the mouth of the Esk River to Te Niho) became further involved by the following provisions :—

2. The lands described in the Schedule hereto are hereby reserved and set aside for the use benefit and endowment of such Harbour Board as shall hereafter be constituted for the Harbour of Napier, in the Province of Hawke's Bay, under an Act of the Legislature of the said Province, to be passed in pursuance of " The Harbour Board Act, 1870," and upon the constitution of such Board shall vest therein without any conveyance, upon the trusts and for the purposes aforesaid.

3. Such of the said lands as before the passing of this Act shall have been granted by the Crown and shall have been vested in the Superintendent of the said Province, whether subject to any trusts or for any purposes or not, shall, on the passing of this Act, be held by him upon the trusts and for the purposes mentioned in the second section hereof; and such of the said lands as shall not before the

passing of this Act have been granted by the Crown, shall, on the passing of this Act, be granted to the Superintendent of the said province, upon the trusts and for the purposes mentioned in the second section of this Act: Provided however that all the lands described in the said Schedule shall be deemed to be reserves within the meaning of and subject to be dealt with under "The Public Reserves Act, 1854," and any Act amending the same, and "The Harbours Act, 1870," and any Act amending the same; but the purpose for which such reserves are hereby made shall not be alterable by the provincial Council of the said Province.

120. In this Act what was known to the Europeans of (say) 1851 as Ahuriri Harbour (or Ahuriri Harbour (proper) a little later) is described as the "Port Ahuriri Lagoon of 74 acres." What was known to the Maoris as Whanganui-o-Rotu is described as "The Ahuriri Lagoon of 7,900 acres."

The certificate of title resulting from these Acts has already been quoted as paragraph 114.

121. This certificate of title, founded as it is upon an Act of Parliament, would appear to be unassailable and indefeasible unless Parliament itself should decide to make it vulnerable or defeasible. Without going exhaustively into the abstract question of the rights of Parliament, it would seem that two quotations sum up the present position. These are, firstly—

The power and jurisdiction of Parliament is so transcendant and absolute, that it cannot be confined either for cause or persons within any bounds. (Coke.)

The second one is—

In fact there is only one humanly possible thing that Parliament cannot do, and that is to bind any succeeding Parliament. For the same sovereign power which enacted the restraining statute will reside in the Parliament which proposes to alter or repeal it; and, consequently, the enactments of that later Parliament will be equally binding with those of the earlier. (Stephens.)

122. There would really be no further need to comment upon the case for the Harbour Board were it not for the fact that it purports to go beyond establishing the title of the Board: it goes so far as to attack the status and question the *bona fides* of the petitioners. I think that this is an unfair attack, particularly so if it allows Mr. Prentice to establish points in the Maori history of the district by direct statement or inference and not by evidence. We know that Mr. Prentice has a good knowledge of Maori history, so profound in fact that one has no difficulty in recognizing his efforts in this case as those of an advocate. I offer the following comments upon this aspect of the case for the Napier Harbour Board:—

123. As regards clause 1 (*a*): What seems necessary for the petitioners to do is to establish that the Whanganui-o-Rotu was not an arm of the sea or that they had rights which could be asserted over it. It is not necessary that they prove it to be a fresh-water lake so long as they can make it appear that this water or land covered by water is a property over which they had assertible rights. Conversely to Mr. Prentice's statement that the Natives had not proved the lagoon to be fresh, I asked him to supply evidence that it was, in 1851, tidal. He submitted the following points, which he claimed to be proof of this fact, and which I will set out and deal with clause by clause:—

124:—

1. *Chart No. 1:* Prepared for Harbour Commission in 1865. This chart is already before the Court, and attached to it you will find a statement by Mr. Pfeiffer to the effect that this particular plan is a copy of Pelichet's plan drawn in 1851 in the same year as the purchase was completed. This plan indicates an inward and outward flow of tide; the strength of tide is given as 6 to 7 knots. For the information of the Court we may mention that the outward flow of the tide is indicated by a plain arrow and the inward flow by a feathered arrow. This is the practice usually adopted in Admiralty charting.

125. I have already dealt with the authenticity of this Chart. It is not a copy of Pelichet's plan drawn in 1851 although it may have been founded on it. It is the one referred to in Mr. Bousfield's letter of the 17th April, 1865, as "Chart No. 1 of *Ahuriri*

Lake" in contra distinction to "Chart No. 2 of *Port Napier* and Roadstead." Mr. Knight, when addressing the commission of 1920, made reference to Pelichet's plan. He was endeavouring to show that the area of Whanganui-o-Rotu was tidal in 1851, yet with Pelichet's plan and field-book available to him all that he could say was—

Rear entrance of present opening was an island with a pa upon it. The plan shows various depths of water. Inside the entrance there was 5 to 6 feet of water at low water in one spot. Produce Admiralty chart of Hawke's Bay district made in 1849 to 1855. At entrance depth given as 2 and 3 fathoms. That would be 12 to 18 feet. This is conclusive that at date of purchase the inside waters were tidal. Therefore the Natives must fail in their claim.

126. I think it is sufficient comment to say that Mr. Knight was an exceedingly zealous officer and one who could be depended upon to overlook nothing that would confound Native claimants to land held in his opinion by the Crown. If the most that he could find on Pelichet's plan to support his case was a reference to 5 to 6 feet of water inside the entrance, then it is safe to assume that Pelichet's plan did not contain all or any of the arrows (feathered or otherwise) depths and current speeds that are shown on chart No. 1. It is also well to remember that the entrance (Ahuriri) referred to was as much the mouth of the Tutaekuri River as anything. In Bousfield's plan of 1865 the channel of that river is distinctly shown.

127:—

2. *Chart No. 2:* We submit this chart not previously produced. This chart shows the entrance to the Lagoon on a larger scale, the details can be ascertained more readily from this No. 2 chart.

This chart shows the entrance was tidal in 1865. It also shows a breakwater and an unfinished breastwork which may have had some influence on the opening. I think Mr. Pfeiffer reads too much into the Chart when he adds in his certificate that it shows that both ebb and flow of the tide have a strength of 6 to 7 knots. Ahuriri was the outlet of a number of streams as well as the Tutaekuri River, which at times carries a considerable volume of water. (According to Mr. Dodson, para. 97, it was the normal opening for the six Hawke's Bay rivers.) It is only reasonable to assume that the ebb would be stronger than the flow. In certain times of flood there would be no flow of the tide at all, although the water of the river and lagoon would be backed up by the rising tide.

128:—

3. We produce also the *Government Gazette* for the Province of Hawke's Bay issued on the 10th January, 1861, on page 3 of which will be found a short description of the mud flats lying to the south of Scinde Island. We draw particular attention to the words "Shallow salt water lagoons" and "low tide" as indications that the area to the south of Scinde Island was tidal.

129. The description referred to is one by the Provincial Surgeon, and is dated 31st December, 1860. The full quotation is as follows:—

South of the Island (Scinde Island) and in its immediate vicinity is a large extent of morass and shallow salt-water lagoons, of from 1 to 2 feet in depth, which exposes at low tide a large surface of mud flat from which arises a variety of noxious and pestilential gases, at times excessively fœtid and almost intolerable.

Napier Town proper is situated on a shingly flat which is nearly on the sea-level. The salt water freely percolates through this, and at the depth of a few feet the rise and fall of the tide may be observed by digging a hole in the surface.

The exhalations from this porous crust can scarcely be considered compatible with the preservation of health, neither is it so, and when the town has increased, considerable apprehension may be entertained that they will prove a fertile source of fevers, agues, diarrhœa, rheumatism, &c., especially when the difficulty of draining be taken into account; fortunately, the island itself contains an abundance of space for the occupation of many thousands of souls.

130. A reference to chart No. 1 will show that in 1865 there were four non-tidal salt-water lagoons between the town of Napier and the tidal water to the south. These doubtless were the "shallow salt-water lagoons" referred to, as it is a characteristic of their type that they become most objectionable when their waters fall in unison with

the tide, and as there were no other bodies of water in the vicinity that would answer the description of "lagoons." The fact that a spring, or lake, or land-locked lagoon rises and falls in sympathy with the tides does not make them tidal waters. Actually at the present time the water in a large drain at the back of the reclamation works on the Whanganui-o-Rotu rises and falls in sympathy with the tides, although no visible flow of the tide can reach it and it is a mile from the sea.

131. There was, of course, water to the south of Napier in 1865, either salt water which came up the channel of the Tutaekuri River or river water backed up by rising tides, but I am quite satisfied that it was not to this water that the Provincial Surgeon was referring.

132:—

4. We refer the Court to Commodore Drury's chart of the Ahuriri Road and Port Napier Anchorage. This map was prepared in 1855. On it you will find arrows showing the inward and outward flow of tide, and in the entrance you will find that the strength of the tide is given as 6 to 7 knots.

133. This chart, if the one produced to the Court, I find has been corrected four times since 1855—*i.e.*, in the years 1865, 1881, 1892, and 1895. How then can it be indicative of conditions in 1851?

134:—

5. We would ask the Court again to refer to chart No. 1, and particularly to the delta formation at the mouth of the Tutaekuri River and also at the mouth of the Purimu Creek. We submit that this chart clearly indicates how the land on the Heretaunga Plains was formed, and this map, in our opinion, bears out the statements contained in the paper by the late Henry Hill, Esquire, F.G.S., which is published in the "Transactions of the New Zealand Institute," 1908, Volume 41, page 429, to which the Court is referred. At the hearing of the previous Commission in 1920 Mr. Hill gave evidence as to his researches in the geological formation of this part of Hawke's Bay.

135. This paragraph calls for little comment. The late Mr. Hill's article was entitled "The Great Wairarapa: A Lost River," and concluded with the following passage:—

Thus the past can easily be dovetailed with the present. Construction and destruction are ever in operation, and all the forces of Nature have one of these two ends in view. A whole district like that along the east coast may suddenly disappear, but upon the ruins new foundations at once begin to be built that in the end show sufficient growth as to become suitable as man's dwelling-place. The geologist cannot say how long it will take to fill up the waters that were once land-areas, but the process that immediately followed the disappearance of the Great Wairarapa still continues, and will continue unless there should come another period of volcanic activity and earth movements such as was experienced at the going out of the Pliocene and the coming in of the Pleistocene periods in the geological history of this country.

136. His evidence before the Native Land Commission of 1920 was as follows:—

Was Inspector of Schools. Have heard evidence given this morning. I do not think it was ever a fresh water lake. Cape Kidnapper to Mahia Peninsula was at one time joined. I speak geologically. A river in my opinion then ran through to Poverty Bay. An earthquake period supervened and the bay subsided. The cliffs show the area of subsidence. The rivers then sent water into the land subsided. The Heretaunga plains have been gradually filled up by river material. Shingle from Tukituki was diverted across the Bay, and this continued around the bay forming lagoons as far as Whakaki. Shingle spit along Ahuriri must have been there for hundreds of years and separated the lagoons from ocean proper. White in his *Ancient History of the Maori* referring to Takitimu canoes refers to Watchman Island and Rorokuri Island (Vol. 3/75).

Tawhao remarked about the shell fish of Whanganui-o-Rotu.

Before sandspit was formed I think the Tutaekuri came further back. Until formation of sandspit it would be open sea. Have no doubt from cliffs that they were originally on sea coast. I found shells which show that the water was salt. Thus in study of plant life it differs from that of an inland lake.

Have made a study of artesian wells and of various strata and they bear out my theory that it was once part of the sea.

Under cross-examination by Mr. Myers the witness continued:—

Marine shells are found on top of Rimutaka. It means that the land was at one time under the sea. The changes I spoke of may have taken place thousands of years ago. I base my theory on geological observations. Some times the theory set up is not correct. Question of shell fish goes back to time immemorial. There are many shell fish within the inner harbour. Cannot say whether the fishing or shell fish have been affected by the Harbour Works.

To Mr. Ormsby he said :—

The lagoon may have got blocked by action of sea and rivers. This would last for months.

137. It will be noticed that the late Mr. Hill's evidence couples the Whanganui-o-Rotu with the other lagoons as far north as Whakaki and assigns the same characteristics to each. If this is so, then the Whanganui-o-Rotu at some time or one time was not an arm of the sea.

138. Paragraphs 6 and 7 draw further reference to markings on chart No. 1 which indicate the presence of tidal waters. As already stated, this chart is of conditions in 1865, which conditions are fully described in the report which enclosed the chart.

139. Paragraph 8 (the concluding one) contains extracts from official correspondence which is printed in full in this report. One extract is misquoted—unintentionally no doubt—but the mistake, if not noticed, would strengthen the Crown's case at the expense of the Natives'. A determination of what was meant by the Ahuriri Harbour settles any point raised in this paragraph.

140. We can now return to the case for the Harbour Board, paragraph 1 (*b*), (*c*), (*d*), (*e*), and (*f*). I can allow no value whatever to be placed on this personal discourse by Mr. Prentice. He has not given the whole story; he was not in a position where he could have been prompted to give it all, and he was not subject to cross-examination. It is not in the ends of justice that statements of a partisan should be accorded the weight of evidence. It is perhaps a little ludicrous that he should describe the fruits of the garden of Tawhao five hundred years ago by quoting from the 1919 petition of Mohi te Atahikoia and 47 others. He did this because it suited his purpose, not because it agreed with Maori history and tradition, and notwithstanding the fact that Waha Pango, when under cross-examination by Mr. Prentice before the 1920 Commission, gave a perfectly normal explanation of this passage in this 1919 petition.

141. As regards paragraph 1 (*g*), this point has already been dealt with. So far as paragraph (*h*) is concerned, the Court was informed that the drying-up of the lagoon disclosed the remains of certain eel-weirs, so that there must have been some eels there. (The evidence of Paora Kauwhata in Napier M.B. 19, at page 414, also makes reference to eels in the Whanga and to eel-weirs—

When the water was low or become dry in the inner Harbour people began to live on eels.)

142. Paragraph 1 (*j*): The proceedings and judgment of the 1916 Native Land Court are set out fully herein. I can find no reference in these proceedings nor in the grounds of appeal against the decision which bears out Mr. Prentice's statement that one of the grounds for dismissal of the Natives' application was that the area constituted tidal waters.

143. Paragraph 1 (*k*): I think that the dignity of the Harbour Board suffers when its case becomes an attack upon the *bona fides* of the Native petitioners. As has been seen, the Natives have been claiming this lagoon for a great number of years before the 1st August, 1929—the date of Judge Acheson's Omapere Lake judgment. Furthermore, the *petitioners* under the petition now before the Court *do not* claim that Whanganui-o-Rotu was formerly an inland *fresh-water* lake. They say, in paragraph 3 of the petition, that—

According to the Maori elders this lagoon was formerly an inland lake, having no natural outlet, and an opening was artificially made by the Maoris and from time to time kept clear, in order to release flood waters and to save cultivations and food crops on the banks.

There is nothing here about a fresh-water lake. The Court has no hesitation in saying that paragraph 3 of the petition as a whole is more accurate a statement of the case than is that of the Harbour Board.

144. Paragraphs 2, 3, 4, and 5 of the Harbour Board's case require no comment.

145. We now come to a point where it is necessary to consider the terms and effect of the Treaty of Waitangi. Article the Second of the Treaty reads as follows :—

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests, Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession ; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Pre-emption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

146. From the earliest times the Treaty has been a subject of controversy not as might have been expected between the Native race and the Crown, but among the Secretaries of State. Select Committees, Legislators, land companies, and others who, from a sense of duty or motives of personal or public interest, endeavoured to make it speak or be silent.

As instances of this divergence of opinion one could quote from the despatch of Lord Stanley his opinion on an aspect of a report of the Select Committee of the House of Commons appointed on the 30th April, 1844, to inquire into " the state of the colony of New Zealand and into the proceedings of the New Zealand Company." This Committee, which was under the chairmanship of Lord Howick (who, as Earl Grey, subsequently became Secretary of State for the Colonies) characterized the Treaty as " a part of a series of injudicious proceedings " and declared that the acknowledgment by the local authorities of a right of property on the part of the Natives in all their wild lands after British Sovereignty had been assumed was not essential to the true construction of the Treaty and to be an error that had produced very serious consequences.

147. In Lord Stanley's opinion thus to restrict the Native territorial rights to those lands actually occupied for cultivation appeared wholly irreconcilable with " the large words of the Treaty of Waitangi " and with the directions of the Marquis of Normanby to Captain Hobson to obtain " *by fair and equal contract* the *cession* to the Crown of such *waste lands* as might be progressively required for the occupation of settlers " (Instructions of 14th August, 1839).

148. Incidentally, although the House did not adopt the resolutions of the 1844 Select Committee, its report had a considerable influence on the course of affairs in the colony when the Chairman, as Earl Grey, assumed control of colonial affairs and endeavoured to give effect to its recommendations. The constitution and instructions of 1846 certainly appear more in keeping with the assertion of Mr. Somes (Governor of the New Zealand Company) that " we have always had very serious doubts whether the Treaty of Waitangi made with naked savages by a Consul invested with no plenipotentiary powers could be treated by lawyers as anything but a praiseworthy device for amusing and pacifying savages for the moment " than with the value hitherto placed upon the Treaty by previous Secretaries of State, prominent members of the House of Commons, and the Maori race itself.

149. The fact that the constitution of 1846 was not immediately put into effect and was never put into effect in its original form appears to strengthen the idea that the rights of the Maori under the Treaty of Waitangi demanded respect for reasons which are admirably set out in the *Constitutional History and Law of New Zealand* (Hight and Bamford), at page 198 :—

It is doubtful whether the colonists had reached that condition of self-control in which they might safely be entrusted with any considerable powers of self-government with dominion over the aborigines ; nor were the Maoris likely to acquiesce in the confiscation of their waste lands which the Governor was instructed to effect. Grey was therefore constrained to proceed warily with the establishment of the constitution. At a time when English public opinion set little value on the maintenance of the bonds between the Home land and the colonies, one grevious blunder in administration might involve their immediate severance. In Grey's view, the constitution was not a truly representative one ; conferring as it did upon a small section of the inhabitants exclusive power over a large number of their fellows, whose interests in many respects were totally opposed to their own. The exclusion of the

Maoris would not have militated against the success of the constitution but for the probability that the colonists would eagerly seize the opportunity it afforded to legislate so that they might acquire the native lands, even at the cost of war. The scattered and defenceless British settlements contained only some ten or twelve thousand people—less than a tenth of the Maori population. The Maoris were exceedingly well informed on political questions, were keenly alert to all the rumoured changes, and extremely jealous of their rights. The first certain indication of the violation of the Treaty of Waitangi would have been the signal for the uprising of a courageous people, possessed of great military skill, who would have experienced little difficulty in annihilating the white intruders upon their territories. The European minority, Grey feared, would certainly be tempted to arrange the taxation in such a way as to compel the Maoris to contribute the greater part of the money used in paying soldiers to coerce them—a course which was certain to end in disaster.

Another important consideration was the fact that those " to whom the new powers were to be entrusted would benefit largely from expenditure and would have a direct interest as great as possible " in legislating to increase the Government expenditure. The inhabitants of Wellington especially were largely interested in Government contracts for making roads and military works. Moreover the majority of the few votes cast would support the New Zealand Company in its proceedings, many of them directly opposed to the best policy of the Imperial Government and to the general interests of the colony.

After mature consideration, Grey decided that he could best guard the fair fame of England by strictly adhering to the solemn promises, made on several previous occasions by the Imperial Government to confirm the natives in the possession of all their land rights recognised by the Treaty. The mere rumour of an intention to use the native waste lands without compensation had driven the northern tribes to rebellion ; and he remembered the pledges of Lord Stanley that the provisions of the Treaty of Waitangi would be honourably fulfilled. It was their trust in the honesty of these promises that had impelled friendly natives, such as Waka Nene, to offer that assistance which had proved essential to the suppression of the rebellion.

Once the Constitution was in force, it would be extremely difficult to amend it. The Governor himself had no power to alter it beyond moving the boundaries of the municipal districts. It did not commend itself to him as the type of constitution with which the Imperial Parliament should endow a free colony. Such an enthusiastic and far-sighted Imperialist as Grey was not ignorant of the lessons to be learnt from the history of Canada during the period 1791–1840, when its two provinces of Lower Canada (Quebec) and Upper Canada (Ontario) were governed by a Legislative Assembly of Representatives conjointly with an Executive nominated and controlled by the Crown. In both Provinces, but especially in Quebec, where race differences increased the complexity of the political situation, conflicts between the Governor and the Legislature grew in number and intensity until affairs were brought to a head by the rebellions of 1837. In colonies with such a form of government the Assemblies would naturally endeavour to secure control of the patronage, which, in the hands of the New Zealand Company, would prove a most dangerous instrument, liable to be used without due regard to the ultimate interests of the colony. The independence of the executive would of itself tend to create a feeling of irresponsibility on the part of the Assembly, and convert the orderly and healthy rivalry of party statesmen into the clack and clamour and insidious intrigue of irresponsible politicians " If a dominant country grants to a dependency, popular institutions and professes to allow it self-government, without being prepared to treat it as virtually independent, the dominant country by such conduct mocks its dependency with the semblance of political institutions without the reality. It is no genuine concession to grant a dependency the names and forms and machinery of popular institutions, unless the dominant country will permit these institutions to bear the meaning which they possess in an independent community ; nor do such apparent concessions produce any benefit to the dependency, but, on the contrary, they sow the seeds of political dissensions."—Lewis, in *The Government of Dependencies*.

If it were not prepared to grant New Zealand full autonomy, the Imperial Government would have done better in preserving the Crown colony system in its entirety. Instead of placing irresponsible power in the hands of men unlikely, from their circumstances, to take a general view of the situation, apart from their own narrow and immediate interests, it should have allowed the Governor and officers full scope as impartial arbiters between the settlers and the natives, protecting the latter from unscrupulous treatment and encouraging the former in the employment of all fair means for overcoming any obstacles raised by the aborigines to the rapid industrial and commercial development of the colony.

Genuinely influenced by these considerations, which were no doubt seconded by his autocratic temperament, Grey decided not to give effect to that part of the instructions relating to the Assemblies, and he asked the Secretary of State to modify the constitution. In taking this step he was supported by the opinions of Bishop Selwyn, Chief Justice Martin, and the Wesleyan Mission Committee.

150. In effect it appears to have been the opinion of Captain George Grey in 1846 that the enfranchised portion of the then white population of New Zealand would violate the terms of the Treaty if given the power and opportunity to do so and that the whole of such population was insufficiently strong to withstand the serious consequences that were bound to ensue.

151. There seems no need to pursue the political situation further because its changes and the manner in which the provisions of the Treaty were made effective or left ineffective are reflected in the legislation of the country. This legislation has had the attention of the Privy Council in the case of *Nireaha Tamaki* v. *Baker*, (1901) A.C. 561, and I feel that in no way can one sense the assertability of Native rights better than by a study of its judgment. The argument and judgment as reported are as follows (NOTE.—The judgment has been sub-paragraphed for convenience of reference) :—

J.C., 1900, May 9, 16; 1901, May 11.

151A. NIREAHA TAMAKI, Plaintiff; and BAKER, Defendant.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Law of New Zealand—Native Title to Possession of Land—Land Act, 1892, ss. 136, 137—Jurisdiction as to Cession to the Crown—Native Rights Act, 1865, ss. 3, 4, 5.

The Civil Courts have jurisdiction under the Native Rights Act, 1865, ss. 3, 4, 5, to ascertain as therein provided Native title to and interest in land according to custom or usage of the Maori people. And they are bound in any action in which such title is involved to recognize the rightful possession and occupation of lands by the Natives until lawfully extinguished, and to give effect to it.

The appellant having alleged a Native title of occupancy to the lands in suit in a manner which was consistent with the Crown's seisin thereof in fee,

Held, That his suit to restrain an unauthorized invasion of it was maintainable, and that the Court had jurisdiction to decide at least that the title alleged was in existence and had not been extinguished by cession to the Crown in manner provided by statute, or by other proceeding legally effective for that purpose.

Wi Parata v. *Bishop of Wellington*, 3 N.Z.J.R. (N.S.) S.C. 72, considered.

Quaere, Whether Native title can be extinguished by an exercise of the prerogative.

The respondent, as Commissioner of Crown Lands, having notified the land in suit under s. 136 of the Land Act of 1892, offered it for sale or selection in terms of s. 137, and advertised the sale thereof,

Held, That the appellant was entitled to sue for an injunction until his title was extinguished according to law, and the Court had jurisdiction to decide whether the respondent's action was within his statutory powers.

151B. Appeal from a judgment of the Court of Appeal (May 28, 1894) upon certain points of law which had been ordered to be argued before the trial of the action. The case is reported in 12 N.Z.L.R. 483.

Present: The Lord Chancellor, Lord MacNaghten, Lord Davey, Lord Robertson, and Sir Henry De Villiers.

J.C., 1901

Nireaha Tamaki v. *Baker.*

The appellant is an aboriginal Native and a member of the Rangitane Tribe of Maoris. The respondent is the Commissioner of Crown Lands in the Provincial District of Wellington, appointed under the Land Act, 1892.

The subject-matter of the action was the title to a certain triangular block of land containing about 5,184 acres, and a further piece of land between the southern boundary thereof and the Makahaki River, which the appellant claimed to be either lands owned by the Natives under their customs and usages, or lands belonging to his tribe under an order dated September 13, 1871 (set out in their Lordships' judgment), of the Native Land Court, but which the respondent contended were vested in Her Majesty the Queen.

151C. Upon the settlement of the colony in the year 1840, a Treaty, known as the Treaty of Waitangi, and set out in their Lordships' judgment, was entered into by Lieutenant-Governor Hobson and a number of the Native chiefs, by which the latter ceded to Her Majesty all their rights and powers of sovereignty, and Her Majesty confirmed and guaranteed to the chiefs and tribes of New Zealand and to the

respective families and individuals thereof the full, exclusive, and undisturbed possession of their lands, estates, forests, fisheries, and other properties which they might collectively or individually possess so long as it was their wish and desire to retain the same in their possession; but the chiefs yielded to Her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof might be disposed to alienate at such prices as might be agreed between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

151D. The Governor having on July 7, 1893, notified in the *Gazette* under s. 136 of the Land Act, 1892, that a block of land which included the land in dispute in this action was open for sale or selection, subsequently advertised the same for that purpose as second-class rural land. The appellant thereupon sued for a declaration that the same still remained land owned by Natives under their customs and usage, whether under the aforesaid order of September 13, 1871, or otherwise, and for an injunction against selling or advertising the same. The respondent by his defence raised (*inter alia*) objections to the jurisdiction of the Supreme Court of New Zealand to try the matter put in issue by these proceedings, and by consent certain issues of law were formulated and submitted for decision. The third and fourth issues with were as follows:—

(3) Can the interest of the Crown in the subject-matter of this suit be attacked by this proceeding?

(4) Has the Court jurisdiction to inquire whether as a matter of fact the land in dispute herein has been ceded by the native owners to the Crown?

At the hearing of those issues it was admitted that the Attorney-General should have been made a defendant, and it was agreed that the questions should be argued and determined as though he had been made a party and had raised the defences raised by the respondent.

151E. The Court held that, so far as the plaintiff based his title on the order of September 13, 1871, the fact that no survey had ever been deposited in pursuance of such order was fatal to his claim, which consequently rested on a pure Maori title of occupancy; and that the case accordingly fell within the direct authority of *Wi Parata* v. *Bishop of Wellington*(1), according to which the assertion of the claim of the Crown was sufficient to oust the jurisdiction of that or any other Court in the colony to try a claim which rested on such a title. "There can be no known rule of law," it said, "by which the validity of dealings in the name and under the authority of the Sovereign with the Native tribes of this country for the extinction of their territorial rights can be tested. Such transactions began with the settlement of these islands: so that Native custom is inapplicable to them. The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice. The security of all titles in the country depends on the maintenance of this principle."

(1) 3 N.Z.J.R. (N.S.) S.C. 72.

The course of legislation bearing upon the questions decided in this appeal is stated in their Lordships' judgment. Cohen, Q.C., and J. W. Gordon, for the appellant, contended that the assertion of a claim by the Crown was not sufficient to oust the jurisdiction of the Courts. The decision of the matters in controversy in this suit does

not involve any question of prerogative or of the validity of any act of the Crown. The real point at issue is the authority of the respondent to notify and advertise for sale or selection the land in suit. The respondent is an executive officer of the Crown, whose authority is limited and defined by statute. The question is whether he has exceeded his authority, and its decision turns on the construction of statutes and other documents from which his authority is alleged to be derived. He has no power to exercise the prerogative, or by any act of his to extinguish the Native title to the lands in suit. Nor has the Crown through any other agent dealt with the appellant or with any other Natives for the extinction of their title, whether the aboriginal title or the title as judically ascertained. The Court has and must have jurisdiction to decide the main issue in this suit—whether the respondent's acts are acts of usurpation done without any warrant of authority. The prerogative title of the Crown is not attacked. The Native title, that of possession and occupancy, coexists with and is based upon the Crown title. The case of *Wi Parata* v. *Bishop of Wellington*(1), on which the Court of Appeal founded its judgment, has no application. The respondent founded his claim to take the proceedings complained of upon s. 136 of the Land Act, 1892. The question of prerogative does not arise. The appellant is entitled to question, and the Court has jurisdiction to decide, the legality of the respondent's acts, whether they were duly authorized by ss. 136 and 137 of the Land Act, 1892, which depends upon the true construction of those sections, the true effect of the circumstances which led to his acts, and the nature and regularity of those acts: see *Tobin* v. *Reg.*(2). The questions raised by this suit are all within the cognizance of a Court of law; there is no act complained of which can properly be regarded as an act of State; the act complained of is one done by a servant of the Crown in the supposed performance of his duty. *Blake*, Q.C., and G. R. Northcote, contended that the Court had no jurisdiction to entertain or decide this suit. The Crown has the sole right, as invariably held by the Courts of the colony, of determining whether the interests of the Natives in any lands had or had not been ceded to the Crown. Any declaration by the Crown to that effect, or any proceeding of the Crown, such as the proceeding complained of in this suit, implying such a determination, was conclusive of the fact and could not be reviewed by a Court of law. This view, moreover, has been adopted by the Legislature in several Acts: see Native Lands Act, 1867, s. 10; Native Land Act, 1873, s. 105; Land Act, 1885, s. 247; Land Act, 1892, s. 250. All transactions with the Natives for the cession of their rights in any lands to the Crown are acts of State. The right of determining when the title of Natives to any lands has been extinguished is a prerogative right of the Crown. The assertion by the Crown of its title to the lands in suit as Crown lands involves an exercise of that prerogative right, and cannot be called in question in any Court. Reference was made to *Cook* v. *Sprigg*(1). A case of *Reg.* v. *Symonds* was also referred to as reported in parliamentary paper, December, 1847, relative to the affairs of New Zealand, p. 64. It was a case as to the legality of the course pursued by Sir G. Grey's predecessor in waiving the Crown's right of pre-emption from the Natives over large tracts of lands in favour of specified individuals, and it decided that such waiver was illegal and void, and that the persons specified acquired no legal right by such waiver. The view adopted

(1) 3 N.Z.J.R.(N.S.) S.C. 72.

(2) (1864) 16 C.B. (N.S.) 310, 359.

(1) (1899) A.C. 572.

by the Legislature and the Courts, that it is for the Crown alone to decide whether the title of Natives to lands in the colony has or has not been extinguished, has become the foundation of all titles to land in the colony, and it would be unjust and contrary to principle that that view, even if erroneous, should now be upset. Notwithstanding the complicated proceedings in this case, the issue is very simple, whether there is a right to sue the Crown and a jurisdiction to entertain the suit; and under all the circumstances it should be held that the appellant was not entitled to sue to have it declared that what was practically an act of the Crown and of the State was unauthorized: see *Wi Parata* v. *Bishop of Wellington*(1). Reference was also made to *Cherokee Nation* v. *State of Georgia*(2); *Worcester* v. *State of Georgia*(3); *Fletcher* v. *Peck*(4); *Johnson* v. *Mackintosh*(5). Cohen, Q.C., replied, citing *Reg.* v. *Hughes*(6); *Rogers* v. *Rajendro Dutt*(7).

(1) 3 N.Z.J.R. (N.S.) S.C. 72.
(2) (1831) 5 Peters, U.S. 1.
(3) (1832) 6 Peters, U.S. 515.
(4) (1810) 6 Cranch, 87.
(5) (1823) 8 Wheaton, 543.
(6) (1865) L.R. 1 P.C. 81.
(7) (1860) 13 Moo. P.C. 209.

1901. May 11.

151F. The judgment of their Lordships was delivered by Lord Davey: This is an appeal by an aboriginal inhabitant of New Zealand against an order of the Court of Appeal in that colony, dated May 28, 1894, in which questions of great moment affecting the status and civil rights of the aboriginal subjects of the Crown have been raised by the respondent. In order to make these questions intelligible it will be necessary to review shortly the course of legislation on the subject in the colony.

The Treaty of Waitangi (February 6, 1840) is in the following words:—

Article the First

The Chiefs of the Confederation of the United Tribes of New Zealand, and the separate and independent Chiefs who have not become members of the Confederation, cede to Her Majesty the Queen of England, absolutely and without reservation, all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess, over their respective territories as the sole sovereigns thereof.

Article the Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the Third

In consideration thereof, Her Majesty the Queen of England extends to the Natives of New Zealand Her Royal protection, and imparts to them all the rights and privileges of British subjects.

151G. By the 2nd section of the Land Claims Ordinance of 1841 (repealing the New South Wales Act, 4 Vict., No. 7) it was—

Declared enacted and ordained that all unappropriated lands within the Colony of New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony are and remain Crown or domain lands of Her Majesty Her heirs and Successors and that the sole and absolute right of pre-emption from the said aboriginal inhabitants vests in and can only be exercised by Her said Majesty Her Heirs and Successors.

No doubt this Act of the Legislature did not confer title on the Crown, but it declares the title of the Crown to be subject to the "rightful and necessary occupation" of the aboriginal inhabitants, and was to that extent a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi. It would not of itself, however, be sufficient to create a right in the Native occupiers cognizable in a Court of law.

151H. In the year 1852 New Zealand, which up to that time had been a part of New South Wales, received a constitution as a self-governing colony. By the New Zealand Constitution Act of that year (15 and 16 Vict., c. 72), s. 72, the Assembly was empowered to make laws for the sale, disposal, and occupation of waste lands of the Crown and lands wherein the title of Natives shall be extinguished as hereafter mentioned, and (s. 73) it was made unlawful for any person other than Her Majesty to purchase or accept from aboriginal Natives land of or belonging to or used by them in common as tribes or communities, or to accept any release or extinguishment of the rights of such aboriginal Natives in any such land. By s. 8 of 25 & 26, Vict. c. 48, power was given to the General Assembly to repeal s. 73 of the previous Act.

151J. By the Native Rights Act, 1865, of the Colonial Legislature (29 Vict., No. 11) it was enacted (s. 2) that every person of the Maori race within the Colony of New Zealand, whether born before or since New Zealand became a dependency of Great Britain, should be taken and deemed to be a natural-born subject of Her Majesty to all intents and purposes whatsoever; (s. 3) that the Supreme Court and all other Courts of law within the colony ought to have and have the same jurisdiction in all cases touching the persons and the property, whether real or personal, of the Maori people, and touching the titles to land held under Maori custom or usage, as they have or may have under any law for the time being in force in all cases touching the persons and property of natural-born subjects of Her Majesty; (s. 4) that every title to and interest in land over which the Native title shall not have been extinguished shall be determined according to the ancient custom or usage of the Maori people so far as the same can be ascertained. And (s. 5) that in any action involving the title to or interest in any such land, the Judge before whom the same shall be tried shall direct issues for trial before the Native Land Court.

151K. By the Native Lands Act, 1865 (29 Vict. No. 71), after a recital that it was expedient to amend and consolidate the laws relating to lands in the colony which were still subject to Maori proprietary customs, and to provide for the ascertainment of the persons who according to such customs were the owners thereof, and to encourage the extinction of such proprietary customs, and to provide for the conversion of such modes of ownership into titles derived from the Crown and for other purposes therein mentioned, it was enacted (s. 2) that "Native land" should mean lands in the colony which were owned by Natives under their customs or usages; (s. 5) that the Native Land Court (which had been established under earlier legislation) should be a Court of Record for, amongst other purposes, the investigation of the titles of persons to Native lands; (s. 21) that any Native claiming to be interested in a piece of Native land might apply for the investigation of his claim by the Court in order that a title from the

Crown might be issued to him; (s. 23) that the Court (after certain notices had been given) should ascertain the right, title, or interest of the applicant and all other claimants to or in the land in question, and order a certificate of title to be issued specifying the names of the persons or of the tribe who, according to Native custom, own or were interested in the land, describing the nature of such estate or interest and describing the land comprised in such certificate. By s. 25 it was provided that no order for a certificate of title should be made unless a survey of the lands in question made by a duly licensed surveyor was produced during the investigation, and it should be proved that the boundaries had been distinctly marked out on the ground. It is from the neglect of this very useful provision that the whole difficulty of fact has arisen in the present litigation. By ss. 46 to 48 provision is made for the issue of Crown grants to the persons mentioned in any certificates and to purchasers from them, which latter grants were to be as valid and effectual as if the lands had been ceded by "the Native proprietors" to Her Majesty.

By the Native Land Act, 1877 (41 Vict. No. 91), s. 6, power was given to the Native Minister to apply to the Native Land Court to ascertain and determine what interest in any plot of land had been acquired by or on behalf of Her Majesty, and all lands declared in any order made on such application to have been so acquired should from the date of the order be deemed to be absolutely vested in Her Majesty. This section has been repealed, but is re-enacted in a subsequent Act.

The Native Land Act, 1865, has been repealed by the Native Land Act, 1873, but was in force at the date of the orders made by the Native Land Court on September 13, 1871, hereafter mentioned. The provisions of the earlier Act, with some alterations and additions, were re-enacted in the Act of 1873. The only sections to which reference need be made for the present purpose are ss. 101 and 102, by which the Native Land Court is directed to hear and determine any reference from the Supreme Court under the Native Rights Act, 1865, and the effect of the decision of the Land Court thereon is defined, and s. 105, by which it is enacted that any notification published in the *New Zealand Gazette*, and purporting to be made by or by the authority of the Governor, and stating that the Native title over any land therein described was extinguished previously to a date therein specified, shall for all purposes be received as conclusive proof that the Native title over the land described in such notice was extinguished at some time previously to the date therein specified, and that such land on such date ceased to be Native land within the meaning of the Act.

151L. Their Lordships do not think it necessary to review the series of Land Acts which were passed prior to 1892 for the purpose of enabling the Government to sell and dispose of Crown lands discharged from Native claims. The Act in force at the commencement of the present action was the Land Act of 1892, No. 37. By s. 3 of that Act Crown lands are defined to mean and include (amongst other things)—

> All native lands which have been ceded to Her Majesty by the Natives, or have been purchased or otherwise acquired in freehold from the Natives on behalf of Her Majesty, or have become vested in Her Majesty by right of Her prerogative.

By ss. 22 and 26 provision was made for the constitution of ten land districts (of which the Wellington Land District is one) with a Commissioner of Crown Lands for each district, and by s. 28 the powers and duties of the Commissioners were defined. By s. 106 Crown lands were divided into three classes: (1) town land, (2) suburban land, and (3) rural land. By s. 136 the Governor was empowered by notification in the *Gazette* to declare that any rural land within the colony (with an immaterial exception) should be open for sale or selection in the manner and upon the conditions mentioned in the Act. By s. 250 it is enacted that whenever the Governor is satisfied that any Native lands acquired by Her Majesty in any way or purchased out of moneys authorized to be expended on purchase of lands in the North Island are free from Native claims and any difficulties in connection therewith, he shall by Proclamation ordain such lands to be Crown lands subject to be sold and disposed of; and thereupon such lands so proclaimed shall become subject to the provisions of the laws in force regulating the sale and disposal of Crown lands.

151M. On September 13, 1871, three orders were made by the Judge of the Native Land Court.

The first order was for the issue of a certificate of title under the Native Land Acts, 1865 and 1869, to certain Natives (not including the appellant) in respect of a block of land containing about 22,000 acres, known as and called Kaihinu No. 1, when a proper survey of the said land should have been furnished to the satisfaction of the Chief Judge. And it was further ordered that, whenever a Crown grant should be made of the said land, the legal estate therein should vest in the grantees on September 13, 1871.

The second was a similar order in all respects as to a block of land containing about 19,000 acres, and called Kaihinu No. 2, in favour of certain Natives (also not including the appellant).

The third was again a similar order in all respects as to a block of land containing 62,000 acres and called Mangatainoka Block, in favour of certain Natives (including the appellant) and all others (if any) of the members of the Rangitane Tribe. By subsequent proceedings certain parts of this block (not including the areas in dispute) have been detached, and have been ceded to the Crown.

151N. By a deed dated October 10, 1871, various blocks of land (including Kaihinu No. 1 and Kaihinu No. 2, but not including the Mangatainoka Block) were surrendered by the Natives interested to the Crown. The boundaries of these blocks were not mentioned in this deed, but there is a plan on the deed the accuracy and effect of which are in controversy.

By a Proclamation dated July 2, 1874, the then Governor of the colony, "being satisfied that the lands described in the Schedule hereto are free from Native claims, and all difficulties in connection therewith, in pursuance and exercise of the power and authority vested in me by the Immigration and Public Works Act, 1873," proclaimed the said lands to be waste lands of the Crown, subject to be sold and dealt with in accordance with the provisions of the laws in force. The

Schedule includes all the blocks of land ceded by the deed of October 10, 1871, as the same are particularly delineated on the plan drawn in the margin of the deed.

151o. On July 13, 1893, the respondent, by public notice, offered a block of land called Kaiparoro, 20,000 acres in extent, and containing portions of Kaihinu No. 1 and Kaihinu No. 2, and part of an area of 5,184 acres, the title to which is in dispute in this action, for sale or selection "in terms of s. 137 of the Land Act, 1892," and he subsequently advertised the intended sale in the local newspapers. It is stated in the respondent's case in this appeal that a previous notification was made by the Governor pursuant to s. 136 of the Act of 1892, and published in the *Gazette*, declaring open for sale the block called Kaiparoro, but there is no mention of such document in the statement of claim or the defence, and it is not referred to in the judgment of the Court, nor does it appear to their Lordships to be material to the questions which they have to decide on this appeal.

The appellant thereupon commenced the present action. The allegations in the amended statement of claim are confused, and some of them are irrelevant, and the prayer certainly goes beyond any relief which, in the most favourable view of his case, he can be entitled to. He sets out the several documents the effect of which has been already stated. He does not in terms allege his title to block Mangatainoka, or that he and the other members of his tribe are enjoying the use and occupation of the lands in dispute, but he sets out the order relating to that block, and in paragraph 36 alleges that no licence has been granted to any other person to occupy the lands in dispute. Their Lordships think that for the present purpose they are not bound to scan the sufficiency of the allegations too closely, and they must assume that the appellant has alleged, or can by amendment allege, a sufficient title of occupancy in himself and the other members of his tribe to raise the questions in controversy on this appeal.

151p. The substance of the appellant's case appears to be that no proper or sufficient surveys of blocks Kaihinu No. 1, Kaihinu No. 2, or Mangatainoka, have ever been made, and that the respective boundaries between the last two blocks have never been ascertained, and that a certain triangular block of 5,184 acres and another piece of land are not parts of Kaihinu No. 2 (as claimed by the respondent), but parts of Mangatainoka, and that the Native title in those portions of the last-named block has never been extinguished by cession to the Crown or otherwise. By paragraph 36 of the statement of claim the appellant submits that the said triangular piece of land and the other piece of land still remain land owned by himself and other aboriginal Natives under their customs and usages, whether under the said order of the Native Land Court or otherwise. His prayer is—

1. For a declaration in the terms of his previous submission.
2. That the pieces of land form part of the Mangatainoka Block.
3. For a perpetual injunction to restrain the respondent from selling the two pieces of land, or from advertising the same for sale or disposal, as being the property of the Crown, and for further relief.

151q. Their Lordships observe that the order of the Land Court, not being completed by a certificate, does not confer any title on the appellant, but they think it is evidence of his title, and the Act does not appear to make the obtaining of the certificate a condition precedent to the assertion of a Native title. In fact, no certificates were issued in respect of blocks Kaihinu No. 1 and Kaihinu No. 2.

The issue of fact between the parties is whether the pieces of land in question were parts of Kaihinu No. 2 or of Mangatainoka. But if the action comes to trial there will be another question, whether the pieces of land have in fact, even if erroneously, been included in the deed of cession of Kaihinu No. 2, or in some Proclamation or other Act of the Governor, which by the Acts in force is made conclusive evidence against the appellant.

Their Lordships, however, have not now to deal with the merits of the case, or to say whether the appellant has or ever had any title to the pieces of land in question, or whether such title (if any) has or has not been duly extinguished, or to express any opinion on the regularity or otherwise of the respondent's proceedings. The respondent has pleaded, amongst other pleas, that the Court has no jurisdiction in this proceeding to inquire into the validity of the vesting or the non-vesting of the said lands, or any part thereof, in the Crown.

An order was made for the trial of four preliminary issues of law, of which two only (the third and fourth) were dealt with in the order now under appeal. They are in these terms:—

3. Can the interest of the Crown in the subject-matter of this suit be attacked by this proceeding?

4. Has the Court jurisdiction to inquire whether, as a matter of fact, the land in dispute has been ceded by the native owners to the Crown?"

Both these questions were answered by the Court of Appeal in the negative.

151R. Their Lordships are somewhat embarrassed by the form in which the third question is stated. If it refers to the prerogative title of the Crown, the answer seems to be that that title is not attacked, the Native title of possession and occupancy not being inconsistent with the seisin in fee of the Crown. Indeed, by asserting his Native title, the appellant impliedly asserts and relies on the radical title of the Crown as the basis of his own title of occupancy or possession. If, on the other hand, the unincumbered title alleged by the respondent to have been acquired by the Crown by extinguishment of the Native title be referred to, it is the same question as No. 4 and the answer to it must depend on a consideration of the character of the action and the nature of the relief prayed against the defendant. As the Court of Appeal point out, what they had to determine was in the nature of a demurrer to the statement of claim. The substantial question, therefore, is whether the appellant can sue, and whether, if the allegations in the statement of claim are proved, he will be entitled to some relief against the respondent. It is not necessary for him to show in this proceeding that he will be entitled to all the relief which he seeks.

151S. The learned Judges in the Court of Appeal thought that the case was within the direct authority of *Wi Parata* v. *Bishop of Wellington*(1), previously decided in that Court. They held that "the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the colony. There can be no known rule of law," they add, "by which the validity of dealings in the name and under the authority of the Sovereign with the Native tribes of this country for the extinction of their territorial rights can be tested." The argument on behalf of the respondent at their Lordships' bar proceeded on the same lines.

(1) 3 N.Z.J.R. (N.S.) S.C. 72.

151T. Their Lordships think that the learned Judges have misapprehended the true object and scope of the action, and that the fallacy of their judgment is to treat the respondent as if he were the Crown, or acting under the authority of the Crown for the purpose of this action. The object of the action is to restrain the respondent from infringing the appellant's rights by selling property on which he alleges an interest in assumed pursuance of a statutory authority, the conditions of which, it is alleged, have not been complied with. The respondent's authority to sell on behalf of the Crown is derived solely from the statutes, and is confined within the four corners of the statutes. The Governor, in notifying that the lands were rural land open for sale, was acting, and stated himself to be acting, in pursuance of the 136th section of the Land Act, 1892, and the respondent in his notice of sale purports to sell in terms of s. 137 of the same Act. If the land were not within the powers of those sections, as is alleged by the appellant, the respondent had no power to sell the lands, and his threat to do so was an unauthorized invasion of the appellant's alleged rights.

In the case of *Tobin* v. *Reg.*(2) a naval officer, purporting to act in pursuance of a statutory authority, wrongly seized a ship of the suppliant. It was held on demurrer to a petition of right that the statement of the suppliant showed a wrong for which an action might lie against the officer, but did not show a complaint in respect of which a petition of right could be maintained against the Queen, on the ground, amongst others, that the officer in seizing the vessel was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by Act of Parliament, and in such case the maxim *respondeat superior* did not apply. On the same general principle it was held in *Musgrave* v. *Pulido*(1) that a Governor of a colony cannot defend himself in an action of trespass for wrongly seizing the plaintiff's goods merely by averring that the acts complained of were done by him as "Governor" or as "acts of State." It is unnecessary to multiply authorities for so plain a proposition, and one so necessary to the protection of the subject. Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority. The Court of Appeal thought that the Attorney-General was a necessary party to the action; but it follows, from what their Lordships have said as to the character of the action, that in their opinion he was neither a necessary nor a proper party. In a constitutional country the assertion of title by the Attorney-General in a Court of Justice can be treated as pleading only, and requires to be supported by evidence

(2) 16 C.B. (N.S.) 310.

(1) (1879) App. Cas. 102.

151U. But it is argued that the Court has no jurisdiction to decide whether the Native title has or has not been extinguished by cession to the Crown. It is said, and not denied, that the Crown has an exclusive right of pre-emption over Native lands and of extinguishing the Native title. But that right is now exercised by the constitutional Ministers of the Crown on behalf of the public in accordance with the provisions of the statutes in that behalf, and there is no suggestion of the extinction of the appellant's title by the exercise of the prerogative outside the statutes if such a right still exists. There does

not seem to be any greater difficulty in deciding whether the provisions of an Act of Parliament have been complied with in this case than in any other, or any reason why the Court should not do so. In so saying, their Lordships assume, without deciding, that if it be shown that by an act of the Governor done pursuant to the statutes the land has been declared free from Native claims, it will be conclusive on the appellant.

151v. A more formidable objection to the jurisdiction is that no suit can be brought upon a Native title. And the first paragraph of the prayer was referred to as showing that the appellant sought a declaration of his title as against the Crown. Their Lordships, however, do not understand that paragraph to mean more than that the Native title has not been extinguished according to law.

The right, it was said, depends on the grace and favour of the Crown declared in the Treaty of Waitangi, and the Court has no jurisdiction to enforce it or entertain any question about it. Indeed, it was said in the case of *Wi Parata* v. *Bishop of Wellington*(1), which was followed by the Court of Appeal in this case, that there is no customary law of the Maoris of which the Courts of law can take cognizance.

(1) 3 N.Z.J.R. (N.S.) S.C. 72.

151w. Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of the 3rd and 4th sections of the Native Rights Act 1865, by saying (as the Chief Justice said in the case referred to) that "a phrase in a statute cannot call what is non-existent into being." It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence. By the 5th section it is plainly contemplated that cases might arise in the Supreme Court in which the title or some interest in Native land is involved, and in that case provision is made for the investigation of such titles and the ascertainment of such interests being remitted to a Court specially constituted for the purpose. The legislation both of the Imperial Parliament and of the Colonial Legislature is consistent with this view of the construction and effect of the Native Rights Act; and one is rather at a loss to know what is meant by such expressions "Native title," "Native lands," "owners," and "proprietors," or the careful provision against sale of Crown lands until the Native title has been extinguished, if there be no such title cognizable by the law, and no title therefore to be extinguished. Their Lordships think that the Supreme Court are bound to recognize the fact of the "rightful possession and occupation of the Natives" until extinguished in accordance with law in any action in which such title is involved, and (as has been seen) means are provided for the ascertainment of such a title. The Court is not called upon in the present case to ascertain or define as against the Crown the exact nature or incidents of such title, but merely to say whether it exists or existed as a matter of fact, and whether it has been extinguished according to law. If necessary for the ascertainment of the appellant's alleged rights, the Supreme Court must seek the assistance of the Native Land Court; but that circumstance does not appear to their Lordships an objection to the Supreme Court entertaining the appellant's action.

151x. Their Lordships, therefore, think that, if the appellant can succeed in proving that he and the members of his tribe are in possession and occupation of the lands in dispute under a Native title which has not been lawfully extinguished, he can maintain this action to restrain an unauthorized invasion of his title. The question whether the appellant should sue alone or on behalf of himself and the other members of his tribe on an allegation that they are too numerous to be conveniently made co-plaintiffs is not now before their Lordships, but it does not seem to present any serious difficulty.

If all that is meant by the respondent's argument is that in a question between the appellant and the Crown itself the appellant cannot sue upon his Native title, there may be difficulties in his way (whether insurmountable or not it is unnecessary to say); but, for the reasons already given, that question, in the opinion of their Lordships, does not arise in the present case.

151y. In the case of *Wi Parata* v. *Bishop of Wellington*(1), already referred to, the decision was that the Court has no jurisdiction by *scire facias* or other proceeding to annul a Crown grant for matter not appearing on the face of it, and it was held that the issue of a Crown grant implies a declaration by the Crown that the Native title has been extinguished. If so, it is all the more important that Natives should be able to protect their rights (whatever they are) before the land is sold and granted to a purchaser. But the dicta in the case go beyond what was necessary for the decision. Their Lordships have already commented on the limited construction and effect attributed to the 3rd section of the Native Rights Act, 1865, by the Chief Justice in that case. As applied to the case then before the Court, however, their Lordships see no reason to doubt the correctness of the conclusion arrived at by the learned judges.

(1) 3 N.Z.J.R. (N.S.) S.C. 72.

In an earlier case of *Reg* v. *Symonds*(1) it was held that a grantee from the Crown had a superior right to a purchaser from the Natives without authority or confirmation from the Crown, which seems to follow from the right of pre-emption vested in the Crown. In the course of his judgment, however, Chapman, J., made some observations very pertinent to the present case. He says: "Whatever may be the opinion of jurists as to the strength or weakness of the Native title, it cannot be too solemnly asserted that it is entitled to be respected that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers." And while affirming "the Queen's exclusive right to extinguish it" secured by the right of pre-emption reserved to the Crown, he holds that it cannot be extinguished otherwise than in strict compliance with the provisions of the statutes.

(1) Parl. papers relative to the affairs of New Zealand, Dec., 1847, p. 67.

Certain American decisions(2) were quoted in the course of the argument. It appears from the cases referred to, and others which have been consulted by their Lordships, that the nature of the Indian title is not the same in the different States and where the European settlement has its origin in discovery and not in conquest different considerations apply. The judgments of Marshall, C.J., are entitled to the greatest respect, although not binding on a British Court. The decisions referred to, however, being given under different circumstances, do not appear to assist their Lordships in this case. But some of the judgments contain dicta not unfavourable to the appellant's case

(2) *Cherokee Nation* v. *State of Georgia*, 5 Peters, U.S. 1; *Worcester* v. *State of Georgia*, 6 Peters U.S. 515; *Fletcher* v. *Peck*, 6 Cranch, 87; *Johnson* v. *Mackintosh*, 8 Wheaton, 543.

151z. Their Lordships are therefore of opinion that the order of the Court of Appeal should be reversed, and a declaration should be made in answer to the third and fourth issues of law as follows: That it not appearing that the estate and interest of the Crown in the subject-matter of this suit, subject to such Native titles (if any) as have not been extinguished in accordance with law, are being attacked by this proceeding, the Court has jurisdiction to inquire whether as a matter of fact the land in dispute has been ceded by the Native owners to the Crown in accordance with law, and the respondent should be ordered to pay the costs of the hearing before the Court of Appeal, and they will humbly advise His Majesty accordingly.

Their Lordships observe that the declaration asked for by the statement of claim is too wide in its terms, and if the appellant succeeds in the action he can at the most be entitled to a declaration that the Native title in the lands in dispute has not been, or is not shown by the respondent to have been duly extinguished according to law (which is probably what is meant), and the injunction asked for should be limited by omitting the word "perpetual" and inserting "until the Native title in the said lands has been duly extinguished according to law," or some similar words. Their Lordships, of course, say nothing as to the other defences, and express no opinion on the question which was mooted in the course of the argument, whether the Native title could be extinguished by the exercise of the prerogative, which does not arise in the present case.

By the Order in Council of July 8, 1895, leave is given to the appellant to appeal from the judgment of the Court of Appeal of July 13, 1894, it is not denied by the respondent, and the appeal has been argued on the assumption on both sides that the order of May 28, 1894, was intended, and that leave to appeal from that order was intended to be given. Their Lordships, therefore, will humbly advise His Majesty that the Order in Council should be read and have effect as if the words "the judgment of the Court of Appeal of New Zealand of May 28, 1894," were substituted therein instead of the words "the said judgment of the Court of Appeal of New Zealand of July 13, 1894."

The respondent will pay the costs of this appeal.

Solicitors for appellant: *Hollams, Sons, Coward, and Hawksley.*

Solicitors for respondent: *Mackrell, Maton, Godlee, and Quincey.*

152. I would draw particular attention to that passage of the judgment which I have numbered as paragraph 151w and 151x, as it appears to be the guide by which the true value of a Native Land Court decision in the Kauaeranga 28A Block (a strip of foreshore between high- and low-water mark) may be assessed.

The status of the particular class of land, of which Kauaeranga 28A formed part, is discussed in parliamentary paper (House of Representatives) F. No. 7 of 1869, and in a preamble to a proposed resolution by Mr. J. C. Richmond there appears in the following terms what might be styled the politic or diplomatic (as opposed to the legal) conception of the potentialities of an exercise of the Crown's prerogative as a means whereby the assertibility of Native customary rights may be denied:

The claims of the Maori owners of adjoining lands stand on a better basis. Such claims have been tacitly admitted in practice to have some force. (See Mr. Williamson's and Mr. Mackay's evidence.) Their equitable value is not inferior to that of the claims to *terra firma* recognised by "The Native Lands Act, 1862." The Treaty of Waitangi, which is supposed to cede all prerogative rights to the Crown, cannot with wisdom or policy be insisted on, in the face of that Act, for the purpose of establishing any proprietory or usufructuary rights on the part of the Crown or the Colony. It would be inconsistent with past practice reaching back to a period long before the passing of "The Native Lands Act, 1862," and impolitic with a view to the early and peaceful extension of the gold fields and

of colonisation generally, to insist on any such rights in the present case. At the same time the prerogative rights, however fictitious, may be binding on the Courts of Law. I therefore propose the following as Resolutions to be adopted by the Committee.

One can now add that up to the present day it has still been found impolitic to oppose the fictitious title of the Crown under its prerogative against the statutory customary title of the Natives.

153. The full text of the Kauaeranga 27A judgment, which was delivered by Chief Judge F. D. Fenton at the end of November, 1870, is as follows :—

Native Land Court November, 1870.

KAUWAERANGA JUDGMENT

(BEFORE CHIEF JUDGE FENTON)

THIS is an application by Hoterene Taipari, and others, for a certificate of his title to a piece of land near Shortland, bounded towards the east by high-water-mark, towards the south by a line nearly at right angles to the shore line commencing near the Kauwaeranga Creek, towards the north by a line nearly parallel to the southern boundary, and towards the west by a low-watermark on the Waihou or Thames river. The land is covered by high-water of ordinary tides, but is left by the water as the tide recedes. It forms an extensive mudflat, and is not available for use as a highway by persons on foot when the waters have left it, except along a narrow margin near the shore.

The other facts, as proved in evidence, are as follows : The land at Shortland abutting on the land claimed has been granted by the Crown, upon certificates of the Court, to the claimants and opposing claimants.

The land claimed had been possessed and used by the claimants and opposing claimants and their ancestors for generations, for fishing with stake nets, and as a preserve for curlews, and as a private ground for gathering shellfish (pipis).

That such use has been exclusive, other tribes having been kept off.

The New Zealand Government has endeavoured to deal with the claimants and others for the purchase of their rights in this land.

The Crown opposes the claim, on the following grounds :—

By the law of England, the foreshore belongs to the Crown, and can only be held by a subject by grant of the Crown, either existing or presumed by prescription. This seisin of the Crown is an incident of sovereignty. The sovereignty of the Crown in New Zealand must not be held to be founded on the Treaty of Waitangi solely, but upon settlement. That this incident of sovereignty has been consistently sanctioned and maintained by decisions of the Courts of England and by the Courts of the United States of America. That the Native Lands Acts do not affect the Crown ; and that Maoris cannot own the foreshore according to their customs and usages, as such ownership would be in derogation of the prerogative of the Crown ; and that the Court has, therefore, no jurisdiction to try the claim.

On behalf of the claimants, it is urged that the above arguments cannot apply to New Zealand, the relations between the Crown and the Maoris being strictly defined by the Treaty of Waitangi and by that document only. That in England not only the foreshore, but all other land, belonged at one time to the Crown by the right of the conquest made by William I ; that grants from the Crown are presumed respecting both classes of land alike, and that the foreshore remains in the Crown simply because, generally, it was of no use to anyone. Whereas, in England, all land was originally in the Crown, in New Zealand all land originally belonged to the Maoris. That the doctrines of feudalism can have no application to the lands of New Zealand, and that neither English law, nor the Civil Law can be allowed to influence the rights of Maoris to lands to which, in the words of the statute, they own according to their customs and usages. That the treaty took none of their territorial rights from the Maoris, but expressly guaranteed the preservation of them as they were in 1840. These rights are not disputed over the main land, and they should not be disputed over land covered by the sea, if they can be proved to have existed. That the Goldfields Act, 1868, recognised these rights to a certain extent ; the Shortland Seabeach Act, 1869, repeated such recognition ; and that the Executive Government had made attempts to acquire them from the Maoris by purchase.

It is at once evident what a vast range of constitutional and international law the inquiry into this subject must embrace, and the Court feels that Parliament could never have contemplated that the Native Land Court should have to determine questions demanding so much research, and involving such great responsibility and such important consequences. Influenced by this thought, I endeavoured to induce the parties to agree to a formal judgment framed by arrangement in such a manner that resort could easily and immediately be had to the Supreme Court, where alone such grave matters should be decided. But the parties did not accede to this proposal, and this Court is therefore bound to give decision. Could the Court suppose that this decision would be final, it would content itself with simply expressing its opinion in the usual manner ; but, influenced by the hope that it may yet be the wish—as the Court thinks it is the duty—of the parties to apply to the Supreme Court to review this judgment, it seems that due respect to that tribunal demands that this lower Court should not limit itself to a bare statement of the conclusions at which it has arrived, but should set forth the reasoning through which its decision has been arrived at.

The view taken by the counsel for the Crown of the origin and status of the sovereignty of the Crown in these islands forms the basis of the arguments on which the prerogative is urged as entirely inconsistent with, and utterly destructive of, all claims of this character. Our first endeavour must therefore be to determine the true basis of the sovereign authority, and at what date and under what circumstances it originated. And in pursuing this investigation the very fluctuating and contradictory character of the acts of State done by the English authorities will appear very clearly, and suffice to explain the anomalous position that the question has occupied, and the embarrassment and doubt which may be traced through the whole career of legislative and executive action respecting it.

The rules which have been recognised as international law, by which civilised nations or nations possessing an organised form of government may validly assert the right of acquisition of territories inhabited by savages, must, in Courts of Law, be deduced not simply from those principles of abstract justice which the Creator of all things has impressed on the mind of His creature man, and which are admitted to regulate in a great degree the rights of civilised nations whose perfect independence is acknowledged, but from those principles also which partly derived from necessity, partly founded on force, have been acknowledged as good by civilised States, and in particular have been adopted by our own Government and given to us as the rules for our guidance.

The principle which all civilised States agreed to acknowledge as the law by which the right of acquisition, which they all asserted, shall be regulated as between themselves is, that discovery gave title to the Government by whose subjects or by whose authority it was made, against all other Governments, which title might be consummated by possession (*Johnson* v. *McIntosh Wheaton*, "Reports of the Supreme Court, United States," Vol. 8). The relations which were to exist between the discoverers and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interfere between them (*id.*).

Acting upon this rule, Captain Cook, under a commission from the Crown of England, in the year 1769, discovered, circumnavigated, and took possession of the Islands of New Zealand, in the name of his Majesty George III. This act was performed in the most formal manner, and was published to the world. Tasman, the Dutch navigator, had previously sighted the North Cape, but it does not appear that he did any international act with the view of establishing a title.

In the year 1787 a Royal Commission was granted to Captain Philip, appointing him Captain-General and Governor-in-Chief in and over the territory of New South Wales and its dependencies. This territory was described in the Commission as "extending from Cape York, latitude 11·37 south, to the South Cape, latitude 43·30 south; and inland to the westward as far as 135° east longitude; comprehending "all the islands adjacent in the Pacific Ocean within the latitudes of the above-named capes." Norfolk Island, Van Diemen's Land, and the islands of New Zealand as far south as Akaroa, are clearly within the prescribed limits.

In 1814 the Governor and Captain-General of New South Wales and its dependencies, acting on the representation of the Crown, by public proclamation declared New Zealand to be a dependency of his government, and by regular commission of *dedimus potestatem* appointed Justices of the Peace to act there. Amongst these were three Hokianga chiefs, aboriginal natives of the country—Ruatara, Hongi, and Korokoro. In 1819 Governor Macquarrie appointed other English magistrates in New Zealand, amongst them the Rev. M. Butler, a member of the Church Mission. These Justices, or some of them, exercised the authority bestowed upon them, by apprehending offenders and sending them for trial to the seat of Government in New South Wales.

About 1822 a company was formed in the British Islands for the colonisation of part of New Zealand, and the purchase of a large tract of country was effected for the purpose. And during the whole of these periods, as well as subsequently, New Zealand was frequently visited by the Royal ships of war, which, to a certain extent, enforced the authority of the Crown, and administered or caused to be administered a sort of justice. Considerable numbers of the subjects of the Crown also settled permanently at the Bay of Islands and elsewhere, purchased land for themselves, and carried on a thriving trade, so much so that in the year 1836 no less than 151 ships visited the Bay of Islands. If the history of the transactions of the English Government and people ended here, it would seem that the undoubted title established by Captain Cook might be deemed to have been consummated by possession, and that the sovereignty of the Crown of England had been established by the acts of its own authorised officers, together with the unauthorised proceedings of its subjects, which would enure for its benefit.

On the other hand, however, we find statutory enactments which contain almost a recognition by the King, Lords, and Commons of Great Britain that New Zealand was not part of the British dominions.

The Act 57 George III, cap. 53, is entitled, "An Act for the More Effectual Punishment of Murders and Manslaughters Committed in Places not in his Majesty's Dominion's." The preamble is—"Whereas grievous murders and manslaughters have been committed at the settlement in the Bay of Honduras, in South America, &c., and the like offences have also been committed in the South Pacific Ocean, as well on the high seas as on land in the islands of New Zealand and Otaheite, and in other islands, countries, and places not within his Majesty's dominions, by the masters and crews of British ships, and other persons who have for the most part deserted from or left their ships, and have continued to live and reside amongst the inhabitants of those islands, &c. The Act then provides for

the punishment of offences so committed " in the said Islands of New Zealand and Otaheite, or within any other islands, countries, or places, not within his Majesty's dominions, nor subject to any other European State or Power &c."

The Statute 4 George IV, cap. 96, enacts that the Supreme Court in the colonies of New South Wales and Van Diemen's Land may try offences " committed in the islands of New Zealand, Otaheite, or any other island, country, or place, situate in the Indian or Pacific Oceans, and not subject to his Majesty's or to any European State," if such offences are committed by British Subjects.

The Statute 9, George IV, cap. 83, repeats that enactment in the same words, adding only that the punishment for the offence shall be the same as if the crime had been committed in England.

On the 16th November, 1831, a letter to King William from 13 of the chiefs of New Zealand was transmitted to Lord Goderich, praying the protection of the British Crown against the neighbouring tribes, and against British subjects residing in the island, and stating their apprehension of a settlement being effected by the French, called in the letter " the tribe of Marion."

In consequence of this letter, Lord Ripon, on the 14th June, 1832, despatched Mr. Busby as British Resident, with credentials to the missionaries, partly to protect British commerce, and partly to repress the outrages of British subjects on the natives. His Lordship sent with Mr. Busby a letter in which the King was made to address the chiefs as an independent people. Their support was requested for Mr. Busby, and they were reminded of the benefits they would derive from the " friendship and *alliance* of Great Britain."

In the month of June, 1822, a bill was brought into the House of Commons for the prevention of crimes committed by his Majesty's subjects " in New Zealand, and in other islands of the Pacific, not being within his Majesty's dominions." This bill was rejected because Parliament could not lawfully legislate for a foreign country.

On the 13th April, 1833, the Governor of New South Wales, in obedience to Lord Ripon's orders, addressed instructions to Mr. Busby, in which New Zealand was expressly mentioned as a foreign country, and Mr. Busby himself as being accredited to the chiefs. This document throughout assumes the independence of New Zealand.

On the 29th April, 1834, General Bourke, the Governor of New South Wales, transmitted to Lord Stanley a proposal from Mr. Busby for establishing a national flag for the tribes of New Zealand " in their collective capacity "; and advised that ships built in the islands and registered by the chiefs should have their registers respected in their intercourse with the British possessions. Sir R. Bourke reported that he had sent three patterns of flags, one of which had been selected by the chiefs; that the chiefs had accordingly assembled with the commanders of the British and three American ships to witness the inauguration of the flag, at which Captain Lambert and the Officers of H.M.S. " Alligator " were present. The flag was declared to be the " national flag " of New Zealand, and being hoisted was saluted with 21 guns by the " Alligator." On the 21st December 1834, a despatch was addressed to Governor Sir R. Bourke by Lord Aberdeen, approving all these proceedings in the name of the King, and sending a copy of a letter from the Admiralty, stating that they had instructed their officers to give effect to the New Zealand registers, and to acknowledge and respect the national flag of New Zealand.

Apparently in consequence of this letter of the Secretary of State, the British Resident *at* New Zealand, as he then styled himself, assembled as many chiefs as he could get together; and a Declaration of Independence was unanimously agreed to, and signed by 35 chiefs, fairly representing, as the resident said, the tribes of New Zealand from the North Cape to the latitude of the river Thames. The instrument itself, and the despatch of the British Resident communicating it, are subjoined :—

" British Residency at New Zealand,
" Bay of Islands, November 2, 1835.

" Sir,—I have the honour to enclose herewith a copy of a declaration by the chiefs of the Northern parts of New Zealand of the independence of their country, and for their having united their tribes into one State, under the designation of the ' United Tribes of New Zealand.' In this declaration they entreat that his Majesty will continue to be the parent of their infant State, and that he will become its protector from all attempts upon its independence; and it is at their unanimous desire that I transmit this document in order to its being laid at the feet of his Majesty.—I have &c.,

" (Signed) JAMES BUSBY,
" British Resident at New Zealand.

" Mr. Under-Secretary Hay, &c.

" DECLARATION OF THE INDEPENDENCE OF NEW ZEALAND

" 1 We, the hereditary chiefs and heads of the tribes of the Northern parts of New Zealand, being assembled at Waitangi, in the Bay of Islands, on this 28th day of October, 1835, declare the independence of our country, which is hereby constituted and declared to be an independent State, under the designation of the ' United Tribes of New Zealand.'

" 2. All sovereign power and authority within the territory of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity, who also declare that they will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of the government to be exercised within the said territories, unless by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled.

" 3. The hereditary chiefs and heads of tribes agree to meet in Congress at Waitangi in the autumn of each year for the purpose of framing laws for the dispensation of justice, the preservation of peace and good order, and the regulation of trade ; and they cordially invite the Southern tribes to lay aside their private animosities, and to consult the safety and welfare of our common country by joining the confederation of the united tribes.

" 4. They also agree to send a copy of this declaration to his Majesty the King of England, to thank him for his acknowledgment of their flag ; and, in return for the friendship and protection they have shown and are prepared to show to such of his subjects as have settled in their country, or resorted to its shores for the purpose of trade, they entreat that he will continue to be the parent of their infant State, and that he will become its protector from all attempts upon its independence.

" Agreed to unanimously on this 28th day of October, 1835, in the presence of his Britannic Majesty's Resident."

Lord Glenelg, in a despatch to General Bourke, dated 25th May, 1836, acknowledged the receipt of the Resident's letter and its enclosures, and after recapitulating the contents of the Declaration said : " It will be proper that the chiefs should be assured in his Majesty's name that he will not fail to avail himself of every opportunity of showing his good will, and of affording to those chiefs such support and protection as may be consistent with a due regard to the just rights of others, and to the interests of his Majesty's subjects."

Most of the foregoing facts and instruments are referred to in a memorandum transmitted by Lord John Russell to Lord Palmerston, on the 18th March, 1840, and Lord John Russell concludes the paper with the following words : " If these solemn Acts of the Parliament and of the King of Great Britain are not enough to show that the pretension made by this company (the New Zealand Company), on behalf of her Majesty (to the sovereignty of New Zealand), is unfounded, it might still further be repelled by a minute narration of all the relations between New Zealand and the adjacent British colonies, and especially by the judicial decisions of the Superior Courts of those colonies. It is presumed, however, that, after the preceding statement, it would be superfluous to accumulate arguments of that nature, and the rather because they could not be intelligibly stated without entering into long and tedious details."

The formation of the New Zealand Association, and afterwards of the New Zealand Land Company, compelled the Government of Great Britain either to acknowledge the sovereignty of the Crown over the New Zealand Islands, or absolutely to disclaim it. At the time, there is little doubt they were in a position, without embarrassment, to take either one course or the other. There was no question with any foreign power, and the natives would have made no resistance to a proceeding, the meaning and effect of which they were unable to comprehend, so long as it did not interfere with any of their material rights or interests.

The Government chose the latter course, and numerous despatches and declarations of Her Majesty's Secretaries of State, written at this period, are consistent in enunciating and maintaining the principle that New Zealand was regarded by her Majesty as a free and independent State in alliance with Great Britain.

Thus, on the 12th of December, 1838, Lord Glenelg wrote to Lord Palmerston, recommending the appointment of a British Consul at New Zealand, and, on the 31st of the same month, Lord Palmerston expressed his concurrence in the suggestion.

In reply to a communication made on the 29th April, 1839, by Mr. Hutt, on behalf of the New Zealand Company, Lord Normanby, on the 1st of May, announced that " Her Majesty's Government could not recognise the authority of the agents whom the company might employ, and that if, as was probable, the Queen should be advised to take measures without delay to obtain a cession in sovereignty to the British Crown of any parts of New Zealand which were or should be occupied by her Majesty's subjects, officers selected by the Queen would be appointed to administer the Executive Government within such territory."

On the 13th of June, 1839, Lord Normanby wrote to the Lords Commissioners of the Treasury, stating that circumstances had transpired which had further tended to force upon her Majesty's Government the adoption of measures for providing for the Government of the Queen's subjects resident in or resorting to New Zealand, and with that view it was proposed that certain parts of the Islands of New Zealand should be added to the colony of New South Wales, as a dependency of that Government, and announced that Captain Hobson, R.N., who had been selected to proceed as British Consul, would also be appointed to the office of Lieutenant-Governor. A despatch, dated the 1st of July, 1839, from Lord Normanby to the Lords Commissioners of the Admiralty, says : " It having been deemed expedient by her Majesty's Government to establish some competent authority in the Islands of New Zealand, it has been determined that Captain Hobson, R.N., should proceed thither, invested with the character of British Consul. The first object contemplated in making this appointment is to obtain from the native chiefs the cession to her Majesty of certain parts of those Islands which it is proposed should be added to the colony of New South Wales, as a dependency of that Government, when Captain Hobson should assume the character of Lieutenant-Governor."

The Treasury minute, which was made in consequence of Lord Normanby's letter, is dated the 19th July, 1839, and sanctioned the advance of the funds necessary for the new undertaking and concluded : " But Mr. Hopkins will at the same time state to the Marquis of Normanby that, as the proceedings about to be adopted in regard to New Zealand in the event of the failure of the anticipated

cession of sovereignty and of the contemplated revenue, may involve further expenditure from the funds of this country, beyond the salary of the consul, already included in the estimates for consular services for the current year, my Lords have considered it necessary that the arrangement should be brought under the cognizance of Parliament; and they have therefore directed that a copy of their minute, giving the sanction now notified to Lord Normanby, shall be laid before the House of Commons."

The publication of this minute seems to have excited much interest in France, which up to that time had regarded New Zealand as a British possession. It was stated in evidence before the committee of the House of Commons, which sat in 1838, that the witness had seen no less than 40 French newspapers commenting upon the minute, and urging the French Government immediately to fit out an expedition to take possession of a country which was thus authoritatively declared to be still open to the enterprise of civilised nations. This step was ultimately taken, but too late.

On the 14th August, 1839, Lord Normanby wrote his instructions to Captain Hobson. The despatch is long, but a portion of it bears so directly upon the subject of our inquiry, and shows so clearly the ideas which were intended to be embodied in the convention with the natives of New Zealand which Captain Hobson was directed to make, that they may advantageously be extracted:—

"The Ministers of the Crown have deferred to the advice of the committee appointed by the house of Commons in 1836, to inquire into the state of the aborigines residing in the vicinity of our colonial settlements; and have concurred with the committee in thinking that the increase of national wealth and power, promised by the acquisition of New Zealand, would be a most adequate compensation for the injury which must be inflicted on this kingdom itself, by embarking in a measure essentially unjust and but too certainly fraught with calamity to a numerous and inoffensive people, whose title to the soil and to the sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government. We retain these opinions in unimpaired force, and, though circumstances entirely beyond our control have at length compelled us to alter our course, I do not scruple to avow that we depart from it with extreme reluctance.

"The necessity for the interposition of the Government has, however, become too evident to admit of further inaction. The reports which have reached this office within the last few months established the facts that, about the commencement of the year 1838, a body of not less than 2,000 British subjects had become permanent inhabitants of New Zealand, that among them there were persons of a bad or doubtful character—convicts who had fled from our penal settlements, or seamen who had deserted from ships; and that these people, unrestrained by any law, and amenable to no tribunals were alternately the authors and the victims of every species of crime and outrage. It further appears that extensive cessions of land have been obtained from the natives, and that several hundred persons have recently sailed from this country to occupy and cultivate those lands. The spirit of adventure having thus been effectually aroused, it can no longer be doubted that an extensive settlement of British subjects will be rapidly established in New Zealand; and that unless protected and restrained by necessary laws and institutions, they will repeat, unchecked, in that quarter of the globe, the same process of war and spoliation under which uncivilised tribes have almost invariably disappeared as often as they have been brought into the immediate vicinity of immigrants from the nations of Christendom. To mitigate, and if possible, to avert these disasters, and to rescue the immigrants themselves from the evils of a lawless state of society, it has been resolved to adopt the most effective measures for establishing amongst them a settled form of civil government. To accomplish this design is the principal object of your mission.

"I have already stated that we acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgment in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's immediate predecessors, disclaims for herself and for her subjects every pretension to seize on the islands of New Zealand, or to govern them as part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages, shall be first obtained. Believing, however, that their own welfare would, under the circumstances I have mentioned, be best promoted by the surrender to her Majesty of a right now so precarious, and little more than nominal, and persuaded that the benefits of British protection, by laws administered by British Judges, would far more than compensate for the sacrifice by the natives of a national independence which they are no longer able to maintain, her Majesty's Government have resolved to authorise you to treat with the aborigines of New Zealand for the recognition of her Majesty's sovereign authority on the whole, or any part of those islands, which they may be willing to place under her Majesty's dominions.

* * * * *

"All dealings with the aborigines for their lands must be conducted on the same principles of sincerity, justice, and good faith as must govern your transactions with them for the recognition of Her Majesty's sovereignty in the islands."

Captain Hobson, in the same month, replied to this despatch, and (amongst other things) calls Lord Normanby's attention to the absence of any distinction in his instructions between the North Island and the Southern Island, to the latter of which the Declaration of Independence did not relate,

observing " that it was obvious that the power of the Crown might be exercised with much greater freedom in a country over which it possesses all the rights that are usually assumed by first discoverers than in an adjoining State which had been recognised as free and independent." But as this inquiry has reference only to the Northern Island, it is not necessary to notice this distinction.

The last dispatch which I will allude to was written by Lord John Russell on the 4th March, 1840, to John Thompson, Esq., who had asked for a charter of incorporation of a proposed New Zealand Agricultural, Commercial, and Banking Company. His Lordship said : " That as by a series of Acts of Parliament, as well as by the measures formerly taken by the Executive Government in this country (England), the sovereignty of Great Britain over New Zealand is expressly disavowed, the Queen cannot be advised to grant any such charter."

More authorities might be quoted, but it appears unnecessary to strengthen the position that for many years, up to and including 1840, the King, Lords, and Commons of England have distinctly and absolutely disavowed all pretensions to the sovereignty of the New Zealand Islands, or to any dominion or authority over them. The sole origin, therefore, of her Majesty's dominion here, and the relation in which her Majesty is placed with the aborigines, both as to their political status and their territorial rights, must, subject to subsequent modifications, be looked for in the result of Captain Hobson's operations.

Early in 1840 Captain Hobson arrived in the Bay of Islands in H.M. ship " Herald," and to a large assembly of chiefs produced a convention, called by him a treaty, which was translated to them sentence by sentence by the Rev. H. Williams. After some deliberation, and at one time a doubtful contention, the instrument was accepted and signed there and then by " 46 head chiefs, in the presence of at least 500 of inferior degree." This document, known as the Treaty of Waitangi, is dated the 6th day of February, 1840, was announced on the 7th by a salute of 21 guns from H.M. ship " Herald " ; and was subsequently signed by the majority of the leading chiefs of this land. It purports to be made by her Majesty with " the chiefs of the confederation of the united tribes of New Zealand "—*i.e.*, those who were parties to the Declaration of Independence, as well as with " the separate and independent chiefs who had not become members of the confederation." By Article I the chiefs ceded to her Majesty absolutely and without reserve all the rights and powers of sovereignty which the said confederation or independent chiefs respectively exercised or possessed, or might be supposed to exercise or possess, over their respective territories as the sole sovereigns thereof. By Article II the Queen confirmed and guaranteed to the chiefs and tribes of New Zealand and to the respective families and individuals thereof the full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries, and other properties, which they might collectively or individually possess, so long as they might wish to retain the same in possession. By Article III her Majesty extended to the natives of New Zealand her royal protection, and imparted to them all the rights and privileges of British subjects.

In a despatch to Governor Gibbs, dated 17th July, 1840, Lord John Russell communicated to him the entire approval of her majesty's Government of the measures which he had adopted, and the manner in which they were carried into effect by Captain Hobson. All question of previous sovereignty being now removed, it remains to inquire what is the effect of this Treaty of Waitangi, which on the one hand fixed the sovereignty in the Crown, and on the other guaranteed to the natives all their lands, estates, forests, fisheries, and other properties.

Having in the recent case of *De Hirsch* v. *Whitaker and Lundon*, inquired with some minuteness into the subsequent legislation, it will not be necessary again to review the strangely fluctuating view of the character attached by the legislation of this colony and of England to the interests possessed by the aborigines in the wild lands of New Zealand under this compact. From the Lands Claims Ordinance of 1841, to the impracticable Royal Instructions of 1846, and on to the Constitution Act, the views have constantly varied. The Native Lands Act, 1862, was the first effort of the legislature to define and regulate the lands and estates of the natives under the Convention, and was the final settlement of two conflicting lines of interpretation, and indeed of thought. Its preamble recited the second article of the Treaty of Waitangi, and that it would greatly promote the peaceful settlement of the Colony, and the advancement and civilisation of the natives, if their rights to the land were ascertained, defined and declared ; and if the ownership of such land, when so ascertained, defined and declared, were assimilated as nearly as possible to the ownership of land according to British Law ; and that, with a view to the foregoing objects, her Majesty might be pleased to waive in favour of the natives so much of the said Treaty of Waitangi as reserves to her Majesty the right of pre-emption, and to establish Courts, and to make other provisions for ascertaining and defining the rights of the natives to their land. The Act of 1865, repealing that Act, was passed, to provide for the ascertainment of the persons who, according to Maori proprietary customs, are the owners of the land in the colony, and to provide for the conversion of such modes of ownership into titles derived from the Crown. These two acts entirely coincide with the Treaty, and must be regarded as a complement of it.

I do not think the English Acts Act, 1858, affects the case ; and the only other statute to which it is now needful to refer, as carrying out or modifying the Treaty, is the Native Rights Act, 1865, which says, " Every title to, or interest in, land over which the native title shall not have been extinguished, shall be determined according to the ancient custom and usage of the Maori people, so far as the same can be ascertained." The question then is : (1) Is this mudflat land in or to which the Maoris, in 1840, had any and what estate, title, or interest or over which they exercised rights of ownership ? (2) And, did the cession of the sovereignty of the Island to her Majesty have the effect of destroying such right or title as if it previously existed ?

In the previous case (Whakaharatau) no proof was given in evidence of the exercise by the Maoris of any easement, or right of fishery, and the land was claimed simply as land above highwater mark is claimed: and the judgment in that case was that the question of ownership of any portion of the foreshore by a Maori must depend simply as a question of fact, and as the claimants had not proved any facts showing ownership, or usufructory occupation, the claim was dismissed. In the case now before the Court, consistent and exclusive use of the *locus in quo* has been clearly shown from time immemorial. As far as the evidence goes, no persons except the claimants and their ancestors have, at any time, appropriated to their use this land, nor has the exclusive right of the claimants to enjoy it, as they always have enjoyed it, ever been disputed by anyone up to the present contention. That the use to which the Maoris appropriated this land was to them of the highest value no one acquainted with their customs and manner of living can doubt. It is very apparent that a place which afforded at all times, and with little labour and preparation, a large and constant supply of almost the only animal food which they could obtain, was of the greatest possible value to them; indeed of very much greater value and importance to their existence than an equal portion of land on terra firma. It is easy to understand then why the word "fisheries" should appear so prominently in the instrument by which they admitted a foreign authority to acquire rights of sovereignty over their country. The insertion of the word "forests", evidently a word of surplusage, and the application of the doctrine *noscitur a sociis*, might afford ground for an argument that the word "fisheries" must be regarded as applying to franchises or easements in fresh-water streams; but I cannot think that the phrase should be so limited. I am of opinion, especially remembering the very clear, and almost stringent nature of the instructions given to Captain Hobson, that it was the intention of both parties to the compact to guarantee to the aborigines the continued exercise of whatever territorial rights they then exercised in a full and perfect manner, until they thought it fit to dispose of them to the Crown. The natives kept to themselves what Vattel calls the "useful domain," while they yielded to the Crown of England the "high domain." Moreover, in *Scratton* v. *Brown*, 4 B. and C. 486, with reference to the use of the word "forest," the same question of the use of words of surplusage arise in the construction of the words "sea-grounds, oyster-layings, shores, and fisheries." Bayley, J., said: "The deed purports to pass all that and those sea-grounds, oyster-layings, shores, and fisheries." If it had conveyed the sea-grounds only, that *prima facie* would soon have operated as a grant of the soil itself. For generally speaking, the soil passes by the word ground, as, by the word wood, the soil in which the wood grows passes. If the grantor had intended to pass a limited specific privilege and easement in the soil, and not to have used such comprehensive words, but words limited and restricted in their sense. But then the words *oyster-laying* are introduced, and it is said that from these words it is to be inferred that, by the words *sea-grounds* it was intended to convey a privilege of laying oysters only," &c. But the Court would not allow the addition of these lesser words to restrain the effect of the word "sea-grounds," by which the soil was held to pass; and the learned Judge said: "It appears to me that the deed does pass, not a mere privilege or easement, but the soil so far, at least, as the surface is concerned."

The Court then is of opinion that the rights which these claimants and their ancestors, from the earliest times, exercised over this parcel of land, constitute a privilege or easement, which is included in the word "fishery," used in the Treaty; but whether their possession of these mudflats was sufficient to make a title to the soil itself, will remain for inquiry.

Before ascertaining the exact character of these rights, it will be as well to examine briefly Mr. McCormick's argument that with the sovereignty of the Crown came all the incidents of sovereignty, all the common law of England, and all the eminent dominion which the doctrines of feudalism attach to the Crown in reference to land, to the extinction of all rights which, ordinarily appertaining to the prerogative, or to the *jus privatum* of the Crown, can only be in a subject by virtue of a grant from the Crown, or by prescription. I have left the question of *jus publicum*, or public right of the King and people to pass and repass, both on the water and on the land, unnoticed, for that question may be more fitly decided by the Supreme Court in deciding the effect of the grant which will issue on the certificate of the Court. I would refer, however, in passing to *Attorney-General* v. *Burridge*, 10 Price 350, and to *Attorney-General* v. *Parmeter*, 10 Price 378.

In his argument Mr. McCormick took from the text-books, the doctrine that all colonies were held either (1) by conquest, (2) by cession, (3) by discovery and possession; and abandoning for this case, as a matter incapable of discussion, the two first, he founded his argument in the title of the Crown derived from the third method. The previous part of this inquiry has shown that the Crown, Lords, and Commons have frequently, and in the most absolute manner, disclaimed and repudiated any such title to the sovereignty of New Zealand. King William's letter to the Hokianga chiefs, Lord Normanby's instructions to Captain Hobson, and Lord John Russell's despatch to Mr. Thompson, written in March, 1840, in which he stated that her Majesty declines to grant a charter because she has no sovereignty in New Zealand (the result of Captain Hobson's operations being then unknown in England) would alone forbid the sanction of any of her Majesty's Courts to the idea of this being a colony founded by discovery and possession—at least so far as this island is concerned. This point has been already decided, and it is needless to again go over the ground. I may add, however, that, as a fact, many of the colonies of the Empire have been originally founded by private individuals, who subsequently got charters or grants from the Crown, or in later days obtained Acts of Parliament. Thus, Barbadoes, originally discovered by the Portugese, was afterwards rediscovered by a ship of Sir William Courtine's returning from America, and was granted to the Earl of Pembroke. Instances are not wanting in which compacts somewhat similar to the Treaty of Waitangi have been made, sometimes accompanied

with money payments, for the soil, or even for the sovereignty. Thus Sir Stratford Canning took possession in 1815 of Singapore, at that time belonging to the Malays, the subjects of the Sultan of Lahore; and in 1825 he bought the domain from the Sultan, for a sum of money. There is probably no case of a colony founded in precisely the same manner as New Zealand—*i.e.*, by contract with a race of savages, the Crown of England obtaining the sovereignty or high domain, and confirming and guaranteeing to the aborigines the useful domain, or the use and possession of all the lands. Vattell certainly speaks of Penn's Treaty as if he has purchased sovereign right in Pennsylvania, as well as the fee-simple of the soil, but I think the passage refers to what Penn thought himself that he had acquired rather than to the interpretation the Courts would put upon that transaction.

I do not think it necessary to inquire minutely whether all the incidents of feudalism attached to the soil of New Zealand immediately the Treaty of Waitangi was signed. There does not appear to me to be any reason for seeking for analogies and parallels in the consequence of a proceeding which is itself without a parallel. The fundamental principle of the feudal doctrines is that all land is holden of some superior lord, originally with a view of keeping up a certain organization for supplying fighting men, for the service of the lord or king. And although the original cause of the foundation of feudalism has long since disappeared, yet the doctrine of tenure remains as the law of real property. But real property means land actually or by presumption held of or at some time or other *granted** by the Crown. Land owned by natives according to their customs or usages can in no sense be deemed subject to the same rules as real property in its technical sense. And we find the Legislature in the Native Rights Act, 1865, directing the Supreme Court, whenever any such question arises before it, to send the issue down for trial by the Native Land Court. And this distinction is very clearly preserved in the Act under which the Court is now sitting. The interpretation clause says that "native lands shall mean lands in the colony which are owned by natives under their customs or usages. Hereditaments shall mean land the *subject of tenure*, or held under title derived from the Crown, or land before Crown grant, and land after Crown grant. The case of *Veale* v. *Brown* (decided in the Supreme Court) will therefore not assist our inquiries, until it is decided whether this *locus in quo* is a hereditament, or in other words that it belongs to the Crown; but this point is the object of the inquiry, so that this process of reasoning would simply lead us round in a circle.

Nor will it avail to say, with Mr. Hesketh, that native land is allodial. I believe that allodium exists in some parts of the Shetland Isles at the present day, but I am not aware that our Courts have ever furnished any illustration of the laws that regulate it. Nor do I profess to be certain what would be the effect upon our case of declaring this land subject to allodium. It does not follow that the *jus publicum* of the Crown representing king and people would then have no existence. Thus the statute of Connecticut, 1838, declared that every proprietor in fee-simple of lands "had an absolute and direct dominion and property in the same," and they were declared to be vested with an allodial title. And although Chancellor Kent states broadly that "feudal tenures have no existence in this country," yet the feudal fiction appears to have been preserved that the lands are held of some superior or lord; for the socage lands of the State of New York are, by an Act, declared not to be deemed discharged of "any rent, certain, or other services incident or belonging to tenure in common socage due to the people of the State or any mesne lord." And socage tenures are of feudal extraction, and retain some of the leading properties of feuds, being distinguished by a fixed and determinate service, which was no military from knight service. If an analogy must be had, the nearest resemblance to the characteristics of native land might, perhaps, be found in the fokland as distinguished from the bocland of our Saxon ancestors.

But none of these speculations seem to the Court to be of much importance. The real question is a question of fact—Was the land now claimed, at the date of the Treaty of Waitangi land or a fishery collectively or individually possessed by aboriginal natives? For, if it was, the full, exclusive, and undisturbed possession thereof is confirmed and guaranteed to the possessors by the Crown of England. And this fact is clearly proved. We must seek then in the Treaty itself for the true solution of our problem, and it only remains now to inquire whether the cession of the sovereignty of the island to her Majesty has the effect of destroying the Crown's guarantee. And the first idea that naturally suggests itself is, that this guarantee was the main consideration for the cession. And, I do not see how one part of an instrument, of which the intention is clear, can be held thus to destroy another part, unless there is irreconcilable conflict. And here there is no conflict. In England, where the whole soil of the country fell to the King by conquest, and grants either exist or are presumed and for all such as has left the Crown, whether, above or below high-water-mark, large portions of the foreshore are owned in fee-simple absolutely by private persons, and there are numerous instances of private holdings of maritime properties, such as oyster-beds, right of fishing with stake-nets, right of carrying away sand and shells, and even of cutting sea-weed below low-water-mark, and others, resembling the right under investigation.

"I think it very clear," says Lord Chief Justice Hale (De jur. Maris, 18, *Hargreave's Law Tracts*), "that the subject may, by *custom and usage* or prescription, have the true propriety and interest of many of these several maritime interests, which we have before stated to be *prima facie* belonging to the King."

"Fishing may be of two kinds ordinarily, viz., the fishing with the net which may be either as a liberty without the soil, or as a liberty arising by reason of and in concomitance with the soil, or interest or propriety of it; or otherwise it is a local fishing, that ariseth by and from the propriety of the soil.

* But still *held* under the Crown.

Such are *gurgites*, weares, fishing-places, &c., which are the very soil itself." In the case of the Abbot of St. Benedict, Hulm, it was held that a subject may have a separate right of fishing exclusive of the King, and of the common right of the subject, and that the right of the Abbot to have a several fishing was not a bare right of liberty or *profit a prendre*, but the right of the very water and soil itself, *for he made weares in it*" (*Id.*) And these rights may be in gross or appurtenant to a manor, as in the case of *Blundell* v. *Cotterall*. The grantee in *Scratton* v. *Brown*, with title derived from Lord of a Manor, had only as his own freehold the sea-grounds and a piece of adjacent land for a boat-house. Blundell was held to own the fishery, and the shore to the exclusion of persons wishing to bathe, and he was Lord of the Manor.

Lord Talbot De Malahide has oyster-beds at Malahide, near Dublin, which he periodically lets out to persons for money rents. And accepting the principle that all properties, rights, privileges, or easements of this character are held to be derived from the King, for *prima facie* they are all his, yet immemorial several use having been proved, the Courts will presume the grant. And in our case the title is older, for the ownership was before the King, and the King confirmed and promised to maintain it.

I am therefore unable to see any conflict in the terms of this compact, but a clear and very intelligible description of rights, which were to be reciprocally ceded, acknowledged, and confirmed.

Returning then to the point, whether the right which is the subject of our inquiry comes under the word "land," which will warrant an order for the soil, or under the word "fishery" which must limit the Court to a privilege or easement—it is remarkable that the use to which this land has been immemorially put by the natives is exactly the same as that to which the shore at Great Crosby was put by Blundell, the plaintiff in *Blundell* v. *Cotterall*, who had "the exclusive rights of fishing thereon with stake-nets, and of driving those stakes into the soil that they might support the nets." Still I am of opinion, though I do not hold the opinion without doubt, that, if the word "fishery" were not present in the Treaty, the word "land" would not suffice to support a claim in the natives to the foreshore of sufficient value to be turned into an absolute freehold interest in the soil, for a "fishery" will mean an interest of no higher character than a privilege or easement. Bayly, J., said in *Scratton* v. *Brown*: "I have already said that the grantee might have had either the soil or the fishery, or *the mere privilege of laying and taking oysters*; or he might have taken the soil from the Crown by one grant, and the fishery by another."

And I think that the Court, in deciding this, the first case of the kind that has occurred in the colony, is justified in allowing some weight to the consideration of the great public interests involved. I cannot contemplate, without uneasiness, the evil consequences which might ensue from judicially declaring that the soil of the foreshore of the colony will be vested absolutely in the natives, if they can prove certain acts of ownership, especially when I consider how readily they may prove such, and how impossible it is to contradict them if they only agree amongst themselves. And I am not without precedent in allowing my mind to be influenced by such considerations. Best, J., dissented from the rest of the Court in *Blundell's* case on the ground chiefly of the great public injury which would be inflicted. "I am fearful," said that learned Judge, "of the consequences of such a decision" [that the public are precluded from passing except at particular places over the beach to the sea without the consent of some lord of a manor] "and, much as I dislike differing from the rest of the Court, I cannot assent to it."

The fact that the Government has been negotiating for the purchase of their rights is not needed to strengthen the case of the claimants, for it has not appeared what rights the Government recognised, and they may be the same that the Court awards. I have made no allusions to the Goldfields Act, 1868, for the provision contained therein was limited to "the purposes of that Act," and the Shortland Beach Act, 1859, simply kept things as they were, evidently to give time for Parliament to settle the question by legislation, which it has not done.

I do not wish to encumber the judgment, which is already too long, by referring to the questions that were raised before the Supreme Court in the case of *Crawford* v. *Secren*, for the sovereignty of the other islands would probably be found to rest on different acts of State; and moreover, our case can be decided on other grounds. And, I must again express my hope that a case of so much importance will not be allowed to rest on the opinion of any Court except that of the highest in the land. Lyttelton's maxim that "the honour of the King is to be preferred to his profit" has not been forgotten, but it appears to me that there can be no failure of justice if the natives have secured to them the full, exclusive, and undisturbed possession of all the rights and privileges over the *locus in quo* which they or their ancestors have ever exercised; and the Court so determines, declining to make an order for the absolute propriety of the soil, at least below the surface.

154. On the 23rd May, 1871, it was ordered that a certificate of title "of Nikorima Poutotara and Pineha Marutuahu to the exclusive right of fishing upon and of using for the purposes of fishing whether with stake-nets or otherwise the surface of the soil of all that portion of the foreshore or parcel of land between high water mark and low water mark at Grahamstown in the district aforesaid (Hauraki) containing fourteen acres and twenty five perches and known by the name of Kauaeranga No. 28A be made and issued to the Governor."

From the file it appears that the certificate issued on the 6th July, 1871, and that before the land was granted to the Thames Harbour Board under the Act of 1876 the Natives had conveyed their rights to the Crown.

155. The petitioners urge their ancient fishing practices in the waters of the area as support to their claim to ownership of the soil. On reviewing this phase of the petitioners case, however, it is necessary to remember that mere fishing-rights do not carry with them the ownership of the soil. If the Maori people owned the Whanganui-o-Rotu, their fishing-rights were merely part of the general right of ownership. If, on the other hand, the area is tidal water of the sea or forming an arm of the sea, some assistance may be had from a perusal of *Waipapakura* v. *Hempton, (1914) 33 N.Z.L.R.*, p. 1065.

156. In this case, at pp. 1071 and 1072 (*ibid.*), Stout, C.J., says :—

S.C. 1914
WAIPAPAKURA v. HEMPTON
STOUT, C.J.

> Even if the Treaty of Waitangi is to be assumed to have the effect of a statute it would be very difficult to spell out of its second clause the creation or recognition of territorial or extra-territorial fishing-rights in tidal waters. There is no attempt in the Fisheries Act, 1908, to give rights to non-Maoris not given to Maoris. All have the right to fish in the sea and in tidal rivers who obey the regulations and restrictions of the statute. This statute has not given, and no New Zealand statute gives, any communal or individual rights of fishery, territorial or extra-territorial, in the sea or tidal rivers. All that the Fisheries Act does is to regulate all fisheries so as to preserve the fish for all. There are concessions given, but these concessions are to Maoris, as appear in the sections already referred to, and do not affect the question to be decided in this case. Now, in English law—and the law of fishery is the same in New Zealand as in England, for we brought in the common law of England with us, except in so far as it has not in respect of sea-fisheries been altered by our statutes—there cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast. In the sea beyond the three-mile limit all have a right to fish, and there is no limitation of such general right in the regulations dealing with such waters. There is special legislation regarding extra-territorial waters the result of treaties, but that does not apply to us. In the tidal waters—and the fishing in this case was in this area—all can fish unless a specially defined right has been given to some of the King's subjects which excludes others. It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give such an exclusive right to the Maoris, but if it meant to do so no legislation has been passed conferring the right, and in the absence of such both *Wi Parata* v. *The Bishop of Wellington*(1) and *Nireaha Tamaki* v. *Baker*(2) are authorities for saying that until given by statute no such right can be enforced. An Act alone can confer such a right, just as an Act is required in England to confer such a right unless some charter from the Crown prior to Magna Charta can be proved : see *Halsbury's Laws of England*(3). There is no allegation in this case that the land over which the tide flows belongs to the Maoris. The Maoris have land adjoining, but if so the Crown grant would be to high-water mark and would not include the land under the sea or tidal waters. In *Mueller* v. *The Taupiri Coal-mines, Limited*(4) the Court of Appeal held that even the bed of a navigable river remained vested in the Crown and did not pass to grantees of land fronting the river.
>
> Therefore, so far as sea-fisheries are concerned—and the question of fishing-rights on inland rivers adjoining Maori land is not before the Court—there must, in our opinion, be some legislative provision made before the Court can recognize the private rights, if any, of Maoris to fish in the sea or in tidal waters.

(1) 3 N.Z.Jur. N.S. S.C. 72.
(2) (1901) A.C. 561.
(3) Vol. XIV, p. 574, pars. 1269, 1274.
(4) 20 N.Z.L.R. 89.

157. With regard to the reference to *Mueller* v. *The Taupiri Coal-mines, Limited* in the foregoing paragraph, it is well to remember that in *Tamihana Korokai* v. *the Solicitor-General*, 15 G.L.R. at page 106, Stout, C. J., says :—

> The case of *Mueller* v. *The Taupiri Coal-mines, Limited*, turned on the effect of a grant under the Land Acts.

158. It will be seen, therefore, that, although the ancient fishing usages of the Maori people over the area in question may be good evidence of occupation and to some extent evidence in the matter of the nature of the lagoon, they could not have been used to set up a title against the Crown unless the area was deemed to be "land" within the meaning of the various Native Land Acts.

159. As regards the extent to which the Treaty may have reserved to the Natives the title to land covered by non-tidal water—*i.e.*, "land" within the meaning of the Acts—and the manner in which these rights, if any, may be ascertained, the following extract from the judgment of Edwards, J., in *Tamihana Korokai* v. *the Solicitor General*, 15 G.L.R. at page 108, is particularly instructive:—

In support of his contention that the bed of the lake cannot be the subject of a Native title under Maori customs and usages, the *Solicitor-General* relies upon the inherent improbability that there was any intention, either by the Treaty of Waitangi or by the statutes relating to Native lands, to recognise any such right. To hold that there is such a right would be, the Solicitor-General contends, to destroy the right of navigation in all non-tidal waters to the great detriment of the public. Such considerations might well have induced those responsible for the Treaty of Waitangi to have so framed that document as to preclude any claim by Natives to the exclusive possession of land covered by navigable non-tidal waters. It may even be suggested that the words of the Treaty which guarantee to the Maoris "the full exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties" were intended to reserve to the Natives merely the right to fish in non-tidal waters, without recognising in them any property in the land covered by such waters. It is quite possible—indeed not improbable—that there never was any Maori custom or usage which recognised any greater right in land covered by navigable non-tidal waters than this. That is a question which neither the Supreme Court nor this Court can determine. If there never was any such custom or usage prior to the Treaty of Waitangi, then the Crown will get the advantage of that when that question has been determined by the Native Land Court, or in the last resort by the Judicial Committee of the Privy Council. But if there was such a custom or usage the Treaty, so far as it is effective, is sufficient to preserve it. The Treaty, like every other instrument must be construed in accordance with the plain legal significance of the words used, and the Courts cannot speculate as to whether or not those words were used in another sense not apparent upon the face of the instrument, or necessarily to be inferred from the subject with reference to which they are used. A lake, in contemplation of the English law, is merely land covered by water, and will pass by the description of land: *Bristow* v. *Comican*, 3 A.C. 641; *Johnston* v. *O'Neill*, 1911 A.C. 552. Whatever rights were conserved to the Maoris by the Treaty of Waitangi were fully recognised by the Native Lands Act, 1862, which recited the Treaty, and was enacted with the declared object of giving effect to it.

All the subsequent Native Lands Acts have in turn given to the Maoris the right to invoke the jurisdiction of the Native Land Court for the purpose of investigating their claims to lands alleged by them to be owned under Maori customs and usages. If it can be established that under those customs and usages there may be a separate property in the bed of a lake, I cannot doubt that the jurisdiction of the Native Land Court with respect to Native lands extends as much to the land covered with water as it does to lands covered with forest.

160. I quote also the judgment of Chapman, J., in the same case as illustrating the inherent rights of the Maori people to have ascertained their titles to lands over which their customary title has not be extinguished:—

1912

TAMIHANA KOROKAI *v.* THE SOLICITOR GENERAL

COURT OF APPEAL

I agree with the judgments which have been read. It has been argued that the Treaty of Waitangi was an international treaty entered into with chiefs having the sovereignty. The contrary opinion was pronounced by the Supreme Court in *Wi Parata* v. *The Bishop of Wellington*, 3 N.Z. Jur. N.S. 72. The terms employed and the mode of execution of the treaty leave it at least an open question whether it was so regarded at the time. It professes to be made with certain federated chiefs and certain chiefs who are not federated, but it does not state over what territories they exercised authority though the text of the treaty seems to suggest that it was contemplated that it should be made with several chiefs who might possibly be regarded and were provisionally and hypothetically treated as sovereigns of their respective territories. Later it became a matter of general knowledge derived I presume from maps prepared pursuant to section 21 of "The Native Land Act, 1873" that there are eighteen or twenty tribes in New Zealand. If that be so the numerous signatories of the Treaty of Waitangi can hardly be described as sovereign chiefs. I agree that if they had been explicitly so declared by Her Majesty's government or had been so treated in a course of political transactions that would have been sufficient to make them so and that their numbers and their individual unimportance would not have rendered this impossible provided that in each case there was a sovereign to a territory: *Hemchand Devchand* v. *Azam Sakaral Chhotamlal*, 1906 A.C. 212. The whole current of authorities shows, however, that the question of the origin of the sovereignty is immaterial in connection with the rights of private persons professing to claim under the provisions of the treaty of cession: *Cook* v. *Sprigg*, 1899 A.C. 572. Such a treaty only becomes enforceable as part of the municipal law if and when it is made so by legislative authority. That has not been done. The sense in which the treaty has received legislative recognition I will refer to later.

Here it is admitted that the Natives can properly commence a proceeding in the Native Land Court to have their claim of title investigated. If they could not, then a writ of prohibition would lie against them and the Court at the suit of any stranger. That carries with it the consequence that unless their proceeding is stopped by some legal obstacle, they have and can assert at least a possible claim. They, therefore, have some right, and the first thing to be considered is what that minimum right is. To ascertain this the whole body of legislation may be looked at. I assume, as has generally been assumed, that the proposition is made out that the lands of Natives were vested in the Crown by virtue of the sovereignty, and that until individual titles are ascertained, they remain so vested. Our own statute law supports that view, but that does not dispose of the matter. Throughout the greater part of the history of New Zealand there have been three separate sets of statutes relating to the alienation of the lands, and the privileges of the Crown, namely, the Land Acts, or as they were formerly called, the Waste Lands Acts, the Mining Acts, formerly Goldfields Act, and the Native Land Acts. None of them are expressly declared to be binding on the Crown; all of them are from their very nature framed to create rights adverse to those of the Crown. Formerly some of these Acts contained express declarations that they did not affect the rights of the Crown—*e.g.*, "The Otago Waste Lands Act, 1866," section 129: "The Goldfields Act, 1866," section 116. These declarations were invariably regarded as repugnant to so much of the Acts as created titles against the Crown.

From the earliest period of our history, the rights of the Natives have been conserved by numerous legislative enactments. Section 10 of 9 and 10 Vict., cap 103, called an Act to make further provision for the Government of the New Zealand Islands (Imperial, 1846) recognizes the laws, customs and usages of the Natives which necessarily include their customs respecting the holding of land. Section 1 of 10 and 11 Vict., cap 112, called an Act to promote colonization in New Zealand and to authorize a loan to the New Zealand Company (Imperial, 1847), recognizes the claims of the aboriginal inhabitants to the land. To the same effect is the whole body of Colonial legislation. The expressions "land over which the Native title has not been extinguished," and "land over which the Native title has been extinguished" (familiar expressions in Colonial legislation) are both pregnant with the same declaration. In the judgment of the Privy Council in *Nireaha Tamaki* v. *Baker*, 1901 A.C. 561, importance is attached to these and similar declarations in considering the effect of Colonial legislation. There the whole of the legislation from the date of the constitution is summarized. This summary includes the principal Colonial Acts. Referring to section 5 of "The Native Rights Act, 1865," their Lordships say: "The legislation both of the Imperial Parliament and of the Colonial Legislature is consistent with this view of the construction of "The Native Rights Act, and one is rather at a loss to know what is meant by such expressions as 'Native title,' 'Native lands,' 'owners,' and 'proprietors,' or the careful provision against sale of Crown lands until the Native title has been extinguished, if there be no such title cognizable by the law, and no title therefore to be extinguished." I might refer further to less precise but equally important expressions such as "tribal lands," in "The Native Land Act, 1873," section 21. The various statutory recognitions of the Treaty of Waitangi mean no more, but they certainly mean no less than these recognitions of Native rights.

The due recognition of this right or title by some means was imposed on the colony as a solemn duty. *Nireaha Tamaki* v. *Baker* (at p. 579). That duty the Legislature of New Zealand has endeavoured to perform by means of a long series of enactments culminating in "The Native Land Act, 1909." In this series of statutes one of the most important provisions is that which sets up a special Court charged with the duty of investigating Native titles. The creation of that Court shows that Native titles have always been regarded as having an actual existence. It is quite true that the Courts administering the ordinary laws have never had the means of conveniently investigating such titles. There arose, therefore, a case calling for a special tribunal, and such a tribunal was provided. The lands may be Crown lands, but they are not vacant Crown lands. Such an expression as "Crown lands," may have its fullest meaning or a very modified meaning according to what the Legislature has declared concerning the thing described: *McKenzie* v. *Couston*, 17 N.Z.L.R. 228. In "The Native Land Act, 1909," what was formerly sometimes spoken of as Maori land and was included in the term: "land owned by Natives," is now called "customary land," which term is used to describe land which being vested in the Crown, is held by Natives or the descendants of Natives, under the customs and usages of the Maori people

"Held" here does not mean wrongfully retained, but held and retained under the same customs that were declared to be valid if existent by the Imperial statute of 1846 already referred to and the later enactments, Imperial and Colonial. That this is not inconsistent with such lands being Crown lands is shown by section 88, which specially declares that they shall be regarded as Crown lands while recognizing that this is for the protection of the interests of Natives. To say that these customs are not cognizable by the Supreme Court and that the Supreme Court does not know the nature of the customs and the resulting tenure does not dispose of the legally ascertained fact that the tenure exists. If forced to undertake the task, the Supreme Court might have to ascertain them by means of evidence: *Nireaha Tamaki* v. *Baker* (at page 577).

Though section 24 is only expressed to give power to ascertain titles as between Natives, the resulting judgment produces the consequence of the Native becoming the owner as against all the world, including the Crown. It is not necessary to refer to particular sections. I rely as the Privy Council relied, on the whole plan of the statutes. *Nireaha Tamaki* v. *Baker* is an authority which obliges us to say that though this Court does not know and cannot recognize the nature of the Native title it at least amounts to a right to have the nature of that title ascertained.

Then is there any way by which that right can be met and defeated by the Crown. The practice from the foundation of the Colony has been for the Crown to acquire land by Deed of Cession. These instruments were formerly very imperfect in form. They are usually based upon the assumption that the land is actually vested in the Crown, and that what has to be ceded is the Native right. It is evident that unless some finality can be produced the title of the Crown is always liable to be disturbed by Natives coming in from time to time and making claims. To settle all such questions the Legislature has given the Crown power now expressed in section 85 of "The Native Land Act, 1909," to declare that the Native title is extinguished. It is presumed that that power will be honestly exercised, but when it is exercised the exercise is final.

On behalf of the Crown it is now virtually claimed that there is another mode of producing the same result, namely, by the assertion by the Attorney-General or Solicitor-General in the Native Land Court that the land is the property of the Crown. It is clear, however, that whether the Crown has or has not a prerogative right to defeat this claim it cannot be defeated by the act of the Attorney-General. It is pointed out by the Judicial Committee that neither the Attorney-General nor any other state functionary represents the Crown in this sense: "In a constitutional country the assertion of title by the Attorney-General in a Court of Justice can be treated as a pleading only, and requires to be supported by evidence." *Nireaha Tamaki* v. *Baker* (at p. 576). What evidence then is required? The evidence must at least show some formal and deliberate act in exercise of the prerogative. That case appears to leave open the question whether such an act would be effectual. In the case of *R.* v. *Clarke*, 7 Moo. P.C. 77, the Judicial Committee did not expressly decide that prerogative was entirely merged in statutory provisions relating to the alienation of Crown lands. It may, however, be regarded as questionable whether there is any other mode of putting an end to the jurisdiction of the Native Land Court than a proclamation under section 85. The question is immaterial as in this case as in that there has been no exercise of the prerogative. It is within the power of a Colonial Legislature to limit the prerogative or to direct how it shall be exercised and perhaps it has done so by section 85. The question does not seem to me to be material. It is sufficient to say that it cannot be exercised in the manner suggested.

160. I have purposely delayed setting out the outline of the case for the Natives as presented by Mr. Ellison and his replies to the cases of the Crown and Harbour Board, respectively, until this point in my report for what seems to me to be a good reason. He has covered the ground so comprehensively as to make it necessary, I think, that one should have all available facts on record and have studied them before attempting to examine the soundness of his claims.

The case for the petitioners and their replies to the Crown and Harbour Board cases are set out hereunder. Each is reproduced in full, although it will be noted a certain amount of repetition exists:—

CASE FOR THE PETITIONERS AS PRESENTED BY MR. D. ELLISON

Te Whanganui-o-Rotu (Inner Harbour) has been from time immemorial known as Te Maara-a-Tawhao (the Garden of Tawhao) owing to its fertility. It

was truly a food supply area, and has been so for ages. So greatly was it valued by the natives through the generations that songs were sung, poetry composed and dances created in praise of its productiveness. It was the most valuable part of the Ahuriri patrimony.

Native tradition and all the available evidence demonstrates clearly that in its original state it was a fresh water area with a fair proportion of rich dry flats—the deepest portion of the water area being around Te Pakake Pa.

The food obtained from its waters consisted of eels, flounders (mohoao), Kakahi's, &c., and birds, and from the dry areas kumaras, taros, hues, &c.

Those conditions existed until the Tutaekuri River changed its course, about 1767 and turned the whole area into one sheet of water. The weight of water from within gradually increasing it eventually forced an outlet through which at the time offered the least resistance.

Tutaekuri, prior to it changing its course, had its mouth on the sea coast and not in the Te Whanga. In time of flood the waters from the Waiohinganga, Purimu and other smaller streams found their way into the sea at Keteketerau, near Petane, which outlet was more or less artifically kept open by the Maoris.

It was there as recorded in Banks' Diary, when Captain Cook visited Hawke's Bay and also in the Admiralty Chart in England.

Prior to the sale in 1851 the food obtained from Te Whanga had changed more or less in quantity and kind. They lost the cultivable area, but nevertheless, they were still able to catch flounders, eels, birds, and gather Kakahi; and in addition, they were enabled to catch salt water fish and gather cockles and mussels round the Iron Pot.

From prior to 1840 right up to at least 1874 the Te Whanga was for all practical purposes a fresh water area.

Turnbull Library, Wellington: a report headed "McDonald's cove." Para. 100.

W. B. Rhodes in his report dated 22/4/41 :—

(*a*) The entrance to the river is generally smooth and the ebb-tide of fresh water runs out at the rate of seven miles per hour.

(*b*) The communication from the Port with the interior is to cross the lagoon, which may be done at high water with a large boat . . .

George Edward Wright (2/2/61) :—

The depth of water varies much from 30 to 36 ft., mid-channel at the entrance, to 4 ft. about Captain Charlton's.

Para. 93.

O. L. Bousefield (17/4/65) :—

It was now possible to cross at high water to the Western front of Napier, in almost any course from Battery Point in from 3 to 9 feet of water. Some ten years ago this could be done by taking Onepoto for the starting point. It will be observed that the Tutaekuri used about that time to cross the mud flats on the line marked K.

The rise and fall of the tide ranges from 3′ 4″ to 3′ 7″, ordinary spring from 4 ft. to 4′ 4″.

In the course of time, and with the advent of the Pakeha, the present channel was improved in various ways by heaping of rocks, building piers and dredging.

REPORT OF SELECT COMMITTEE NAPIER H.B. (30/1/61)—2

Herald, 23/2/61.

That before any extended dredging operations are carried on at the eastern Harbour, the South side at least should be secured by piling and planking . . . and when convenient the north side should be secured in like manner.

George Edward Wright (2/2/61) :—

My opinion of Napier Harbour was that if left as it was in 1859 that part of it principally used as a Harbour and called the Iron Pot would soon be closed by the sand and shingle drifting into it.

. . . From the accumulation of sand-banks it was undoubtedly necessary to undertake by artificial means to provide accommodation for vessels if it were desired they should lie in still waters.

I first visited Napier about 7 years ago . . . At that time it was three feet deeper at the entrance to the Iron Pot than it is now.

O. L. Bousefield (17/4/65) :— *Herald*, 2/12/65.

For whereas by Captain Drury's soundings the greatest depth was 5 fathoms in 1855, now I find in 1865 the greatest depth to be 4 fathoms . . .

That since the commencement of what are called the Harbour Improvements a very great change for the worse has taken place in this interesting locality (Iron Pot). At all events it can only be maintained in a useful state at an enormous first cost and an annual expenditure.

Mr. Carruthers :—

There was a probability of the shingle which drifted round the Bluff silting up at the mouth of the Harbour. . . . and in any case these groins will of themselves be very valuable protective Harbour Works tending to improve the bar and widen the Eastern Spit. *Herald*, 2/5/74.

The vigorous prosecution of the proposed Breakwater and Harbour Works at Port Ahuriri is one of the pressing necessities of the place if Napier is to hold her own. *Herald* 4/5/74.

. . . pile driving for the breastwork was started on the 5th instant. *Herald*, 9/5/74.

These works of men have materially altered the character of the Te Whanga. It gradually became tidal and ceased to be a fresh water lagoon.

To the natives, however, this change made no difference to their claim, and to the uses they made of the area. It was still the source of food as it had been to their elders.

In 1851 a sale was made to the Crown of the Ahuriri Block. It was made under three separate arrangements. The first dealt with the main block. Its southern boundary commenced at Purimu and ran in a westerly direction to the Kaweka Ranges. After traversing its westerly and northerly boundaries it fell into the Waiohinganga Stream which formed part of its Eastern boundary. At the mouth of this stream it followed the western foreshores of Te Whanga to the starting point at Purimu. Para. 30.

The reserves made were—Puketitiri,
Wharerangi, and
Te Roro-o-Kuri.

The second arrangement made was in connection with the Gravel Spit—Boundary commenced at Ruahoro on the Wai-o-Hinganga, followed foreshores eastern side of Te Whanga, round foreshores of Harbour (Ahuriri) and back along foreshore of open sea to a point opposite Ruahoro where it turned in to starting point.

The Reserves made were—Te Ihu-o-Terei, and
Parapara.

No. 3 arrangement was for Harbour Proper—Boundary from below old Traffic Bridge around High Water mark along southern and eastern boundary taking in Gough and Te Pakake Islands.

Reserving to natives' canoe landing places, Mataruahou and burial ground of 2 of Tareha's children. And further securing to the natives equal rights with the Pakehas to fishing and to cockle and mussel beds, &c.

Twenty-three years later, in 1874, the whole of Te Whanga was vested in the Napier Harbour Board by Statute. The natives, however, claim that Te Whanga still belongs to them.

Issues of the Case

9E No. 10, 1862 :—

1. Excluded from Sale and shown as a Reserve. Para. 19, *et seq.*

2. The Treaty of Waitangi (Article 2) guaranteed to the Natives the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other property which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession.

It is indisputable that Te Whanga was in the possession of the Natives when the Treaty was signed.

Therefore the Treaty protects the Natives unless it can be shown :—

1. That the Treaty does not apply,
2. That the Natives have sold their interest in Te Whanga, or
3. That Natives have abandoned their interest.

The Treaty constitutes in fact the only condition on which the English Sovereignty in New Zealand is founded.

"*Rights and Privileges*":—

Blackstone—The right of personal security,
The right of personal liberty, and
The right of personal private property.

Argument

1. It has been suggested that the Treaty does not apply because the Te Whanga was a Saltwater Tidal Area—in other words, part of the sea. The answer to that is threefold:—

(*a*) Even if this were correct the Natives are entitled to the Te Whanga because the Treaty refers specifically "to other properties" which they may collectively or individually possess. Even though composed of salt water or tidal the Te Whanga had always been in the possession of the Maoris, and they are entitled to have their claim recognized in priority to the rights of any local body or other institution such as a Harbour Board.

Blue Book, Under-Secretary Hope to N.Z. Comp., 1041/43.

Lord Stanley . . . "Her Majesty distinctly recognized the proprietorship of the soil in the Natives, and disclaimed alike ALL TERRITORIAL RIGHTS and ALL CLAIMS OF SOVEREIGNTY which should not be founded on a free cession by them".

(*b*) In actual fact the Te Whanga has become wholly salt and tidal only in recent years, and that only by intervention of man. Man's interference with natural conditions cannot be invoked to displace the ancient vested rights of the Natives.

At page 33.

The 1921 Commission was in error in reading into Mr. Parks' Report more than it contained. Mr. Parks, in referring to the "large sheet of water" did not say it was salt, though "salt water" might have been inferred when he referred to the Harbour Proper. This would only include the area up to the Iron Pot, so at the date of the sale by far the greater part of the lagoon was non-tidal.

The fact that mussels and pipis and other salt-water shell-fish were not found much beyond the Iron Pot area until recent years clearly demonstrates that for all practical purposes the Te Whanga was still a fresh water lake.

2. It is not contended that the Natives sold Te Whanga. The deed of Sale explicitly excludes Te Whanga. It is suggested, however, that Te Whanga was sold because in the very Deed which excluded Te Whanga there was a general clause inserted which excluded the sea and the rivers and the waters and the trees, and everything else appertaining to the said land.

The answer to this is threefold:—

(*a*) The Deed does not bear the meaning that Te Whanga had been sold. This general clause about the inclusion of the sea, &c., was inserted after completion of negotiations for the Harbour Proper, and was never intended to add to what was conveyed in the operative part of the Deed, which, of course, was the Ahuriri Block.

There is a well recognized principle of construction in documents to the effect that general words following particular words must be read in the light of the particular words. That is how the concluding clause in this document must be regarded. To treat it in any other way is to create an inconsistency and an ambiguity in the Deed.

There is further a well recognized rule in construction that if there remains a doubt as to the effect of a document, recourse can be had to acts done as a guide to the intention of the parties, particularly as to Acts done shortly after the incident.

Date when Harbour Board commenced reclamation works.

In this connection, it is to be mentioned that within ten years the Chief Tareha, one of the actual vendors, set up a claim that he was entitled to land being reclaimed by the Harbour Board, since he had only sold to high-water mark. This fact was accepted by the 1921 Commission.

Then later when the old traffic bridge was put up, Tareha again interposed to have the bridge treated as the limit for the Harbour.

The surveyors themselves did not, as was their bounden duty, connect up boundary as from Purimu to the Port.

Nor did the Crown Purchase Officer declare the Islands within Te Whanga as Reserves which was distinctly necessary if Te Whanga had been sold. The said Islands are still Native Land.

At various times since that date the Natives have raised and maintained their claim to the bed of Te Whanga, notably in 1915, 1918 and 1921. No doubt other claims would have been made before 1915, but for the fact that there was no interference with Native rights until the East Coast Railway Embankment was erected.

It is to be noted that so far as the Natives were concerned there was no suggestion whatever until 1918 that the Natives had parted with their rights to Te Whanga under the 1851 Deed.

The fact that this claim was so consistently maintained right up until the time of the earthquake, in face of what was then an extreme improbability that the bed of the Te Whanga would ever be of any use, proves conclusively that the original vendors and their descendants have never had the slightest doubt but that their ancient fishing ground still belonged to them.

The Commissioner's Report at the foot of page 2 and at the top of page 3 shows how strenuously the Natives insisted on the preservation of their rights over Te Whanga.

An effective answer to the suggestion that Te Whanga was sold is that if any weight whatever is to be attached to the final clause relating to the sea, the rivers, &c., then the delineation of the boundary of the Block sold becomes absolutely meaningless, since it then would cease to be the boundary altogether.

This forces us to the conclusion that Mr. McLean purchasing for the Crown knew that Te Whanga was retained by the Natives, otherwise why was Te Whanga gazetted along with the Rest of the Reserves.

When the 1851 document is viewed in this light it becomes clear that the 1921 Commission was in error in deciding that the Natives had disposed of their interest in Te Whanga by sale.

3. In reply to any other contention that the Natives had abandoned their claim.

The facts above set forth demonstrate that the Natives have not only continued to use Te Whanga but have consistently maintained their claim to the bed of the lagoon notwithstanding that before the earthquake it was never expected that the bed would be raised. The claim of the Natives is not one of recent origin, nor is it in any way inspired by the effect of the earthquake. They put forth the claim to-day in good faith and in the same way as they and their ancestors always have done.

Summed up, then, we say :— Para. 96.

(1) The Te Whanga is naturally a fresh water non-tidal lagoon. It was such when the Maoris acquired their ancient indisputable rights over it.

(2) Those ancient rights can only be displaced by the clearest possible grounds in face of the protection given by the Treaty of Waitangi to the Natives in respect of all their lands, fisheries and other properties collectively possessed by them. Para. 121.

(3) The fact that subsequently to those ancient rights being acquired the Te Whanga became :— Para. 151.

(*a*) In part (up to the Iron Pot) salt water and tidal by the forces of nature, or

(*b*) Wholly salt water and tidal largely by artificial means,—

and not valid grounds for displacing those ancient and valued rights.

4. Whether originally salt water or fresh the Treaty of Waitangi protects the Natives (unless it can be proved that they have since sold Te Whanga) because this area was an inland area of water—an area of the sea within the territorial waters of the Colony and which from the beginning was a fishery and a "property which was collectively possessed" by the Natives. The Maoris have prior rights to the Harbour Board or any other institution or individual. Para. 151.

5. The claim to the bed of Te Whanga has been strenously maintained at all times although nobody ever expected the bed of the lagoon would be raised.

6. No sale of Te Whanga has ever been made in reference to the 1851 sale :—

(*a*) The Te Whanga was expressly excluded from sale and gazetted as a Reserve.

(*b*) This reservation from the land being sold was explicit and express and must be given effect to.

(*c*) The general concluding clause relating to the inclusion of the "Sea, Rivers, &c." does not derogate from the exclusion of Te Whanga or extend the boundaries already clearly limited by the Deed,

(*d*) The Deed must be read if possible to avoid ambiguity or inconsistency. The alternative to Clause (*c*) above is to make the whole deed obscure so far as the land comprised in the sale is concerned because what the deed described as the boundary of the land sold ceases to be the boundary altogether. To allow the deed to operate in this way is to give it an effect which was never intended by the Crown Purchase Officer and was certainly never intended by the Natives. They made clear (as the 1921 Commission found) that they would not sell their ancient rights in the lagoon.

The Deed must in all fairness be construed to satisfy the obvious and admitted intentions of the Natives, and not to work an absolute and irremediable injustice on them.

161:—

REPLY TO CASE FOR CROWN

1. (*a*) The boundaries in the deed clearly indicate that Te Whanga was never sold.

(*b*) The Islands in the said Lake are native customary lands and not Reserves.

(*c*) Of the fifteen reserves recorded in Journals of the House, E. No. 10, page 9, 1862, 14 have already been proven Native Lands. Is it feasible or reasonable to dispute the fifteenth ?

If so, then the facts (*a*) and (*b*) must be shown to be wrong, and the onus of proof is with the Crown.

The return showing " general Reserves " was honestly made, and at the request of Mr. Mantel.

That the deed nowhere makes any such reserve is admitted. There was no need, as it was not included within the area sold. It was exempted and thereafter included in the lists of Reserves.

There is absolutely nothing in the deed to suggest that Te Whanga was intended by all parties to pass to the Crown.

The boundaries in the deed absolutely disprove such a suggestion.

See Appendix, E. 9, page 15. Enclosure 5 in No. 1, Year 1859.

This Proclamation was issued to prevent the Europeans from trespassing on Native properties. First was in reference to lands south of the Tutaekuri, the second was for areas to the north of it.

2. Bounded on the west by the *Eastern Boundary of the Ahuriri Block*, on the north by the Mohaka River, on the east by the Waikari R., and on the south by the waters of H. Bay.

In the face of the above and previous statements of facts, the above suggestion would be altogether indefensible.

Re CROWN RIGHTS BY VIRTUE OF THE " COMMON LAW "

The Treaty of Waitangi was drawn up by the British people at the instigation of the Crown and its terms were acquiesced in by the Native people.

As the Treaty constitutes in fact the only conditions on which the English sovereignty in New Zealand is founded, therefore no law whether common or otherwise can by virtue of that Treaty override any of the privileges solemnly guaranteed to the Natives by that Treaty.

Among those possessions guaranteed to the Natives were their fisheries and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession.

Te Whanga was a possession of the above description and was retained by the Natives.

Lord Stanley in directing Under-Secretary Hope to write the New Zealand Land Company 10/1/43 stated . . . " Her Majesty distinctly recognised the proprietorship of the soil in the Natives, and disclaimed alike all *Territorial* Rights and all claims of sovereignty, which should not be founded on a free cession by them."

What are the limits of these Territorial Rights over which Her Majesty disclaimed all claims of sovereignty (common law) which should not be founded on a free cession by the Natives ?

Te Whanga comes well within the limits of " Territorial Rights."

Lord Stanly's letter continues . . . " that in entering into the arrangement with them *Her Majesty could not contemplate deliberately violating the faith which she had publicly pledged to the Natives* in conveying to the Company rights which on the part of the Crown she had solemnly declared."

To allow the Common Law to deprive us of our Rights to Te Whanga would be distinctly violating the faith which Her Majesty had publicly pledged to the Natives under the Treaty.

Sir Robert Peel . . . " If ever there was a case where the stronger was obliged by its position to respect the demands of the weaker, if ever a powerful country was bound by its engagements with a weaker, it was the engagements contracted under such circumstances with the Native Chiefs."

Our rights to Te Whanga come within the engagements contracted.

The Imperial Government in advising the Governor of New Zealand as to his powers, E. No. 7 page 7, paragraph 8, 1863, stated . . . You would be bound to recognise the negative powers which you would possess by preventing any step which invaded Imperial Rights *or was at variance with the pledges on the faith of which Her Majesty's Government acquired the Sovereignty of New Zealand*, or in any other way marked by evidence injustice towards Her Majesty's subjects of the Native Race.

The Common Law if applied and allowed to over-rule the " pledges " would most certainly be at variance with the intentions of Her Majesty when entering into the Treaty with the Natives.

Mr. Justice Chapman said that the Treaty of Waitangi was imposed upon the Colony as a sacred Trust . . . It was the duty of the Court to take judicial notice of the Treaty of Waitangi.

The Treaty had been recognised by Imperial Statute and by the Land Claims Ordinance of 1841.

It is true that Roro-o-Kuri is first of Reserves mentioned in Deed of Ahuriri Sale. It however was reserved because it was included in the Block sold, *i.e.*, the Ahuriri Block.

The Solicitor for the Crown erred in supposing that Roro-o-Kuri was reserved out of Te Whanga.

We admit reference in the Deed to equal rights with the Europeans, to fishing, cockles, &c., but we confine its application to that area contained in the Harbour proper which was limited by the old Traffic Bridge.

In reference to the words appearing in the Deed " with their sea, the rivers and the waters and the trees and all appertaining to the said land."

Owing to the absence of such evidence as are now before Your Honour, *i.e.*, " Recorded a Reserve " and that " pipies " or " cockles " were not at that period found beyond the Old Traffic Bridge until recent years, when tidal waters commenced to encroach further and further into the lagoon." It was difficult for the Commission to arrive at any other conclusion than that which they themselves saw : " pipies " spread over a large portion of Te Whanga.

The application of the word sea or moana was however confined in 1851 to where the cockles or pipies, fish, &c., were found, and to the only portion that was at that period salt water, namely, the Harbour proper.

The " rivers and waters "—these were actually on the land that was sold—The Ahuriri Block, and did not refer to Te Whanga.

The timbers were also on the Ahuriri Block and not in Te Whanga.

Mr. Parks' statement does not support the argument that Te Whanga had been ceded.

The report was made five months before the Deed was signed. It merely indicated their desire to acquire Te Whanga along with the land from the Natives.

The latter portion of that paragraph indicates the portion that was actually ceded by the Natives for a Harbour.

It was owing to the cession of this Harbour and the arrangements agreed to with the Natives why it was necessary to add to the Deed, " It is agreed we shall have an equal right with the Europeans to the fish, cockles, &c., &c."

The report to the Colonial Secretary of July, 1851, is just another indication of that desire to acquire Te Whanga. That intention, however, was never effected, as is shown by the boundaries, &c.

It seems evident that Parliament in 1874 was not aware that the Natives had not sold Te Whanga as it was already vested in the Superintendent for the District by the Act of 1854.

As to the Act of 1874, we are peculiar to learn why it was necessary to vest that area in two separate sections—Schedule 12 : Port Ahuriri Lagoon of 74 acres—this includes an area that was agreed upon as a Native Reserve for Church, school, &c.

Schedule 14 : The Ahuriri Lake of 7900 acres. You will note it was described as a Lake. A lake is not an arm of the sea.

We further ask why has it always been necessary for the Harbour Board to seek on several occasions since 1874 further powers and authority from Parliament ?

Act of 1875, Act of 1887, Act of 1912, and Act of 1914.

We repeat that the boundaries set out in the Deed and later laid down by survey did not include Te Whanga. The Deed boundaries are those that apply to Te Whanga. Any recent plan with boundaries extended, cannot be accepted.

Paragraph marked 2 : We have already replied to the effect of the Common Law over this area as against our Rights under the Treaty of Waitangi.

We have already submitted arguments and proofs that Te Whanga was in 1841 and even up to 1865, fresh water. The Harbour proper was fresh water even after inauguration of Provincial Government.

See *White Wings*, Vol. 2., page 97 (Turnbull Library).

Reasons for non-success in previous claims have already been submitted. That we had failed in the past is no reason why we should be debarred from making further investigation of our rights, when new and good grounds become available. Especially as our important source of information in these matters has and is still made unavailable to us.

In 1851, tidal waters did not enter the " Lake." Tidal waters merely backed up the flow of fresh water, but did not enter the rapids.

Te Whanga was described in 1851, and at later dates even down to 1874, as a " Lake."

There were several eel weirs in the Lake when Tutaekuri broke into it. Among them was one at Taputeranga. See Napier Minute Book 19, page 414, date 1889.

In addition to Engineers' Reports submitted in the Claim to substantiate our assertion that "without man's intervention the entrance to the Harbour would again have closed up", we beg to submit the following further reports :—

"Council Papers (Provincial), 1869 : Harbour Master's Report :—

"The Bar : Since my last report, the depth of water on the bar has decreased from 13 feet to 10 feet.

"W. G. CELLEM,
"H.M. & Pilot."

"Council Papers, May 13th 1870 :—

"Page 2 : The Bar is very bad just at present, there being only 10 feet at high tide.

H. KRAEFT,
"H.M. & Pilot."

Waipapakauri v. *Hempton* does not apply in this case.

In this claim to Te Whanga our Territorial Right is indisputable :—

(*a*) It was exempted from sale for specific reasons.
(*b*) It was recorded thereafter as a Native Reserve.
(*c*) It was by Statute proclaimed in 1859 a Native Area.

Whereas Waipapakauri's Right under the Treaty was considered questionable.

J. W. Salmond, K.C., in the Waipapakura case said : "Crown Grant Statutory orders vesting land in Maoris may include *Tidal waters*".

Though there was no actual Crown Grant issued in the case of Te Whanga. Yet Acts performed by the Government amount to an acknowledgment of the Right of the Natives to Te Whanga.

162. :—

REPLY TO CASE FOR THE HARBOUR BOARD

I have already given evidence to shew that it was formerly and even down to some years after 1851 a fresh water lagoon.

W. B. Rhodes, 22/4/41—"ebb tide of fresh water, &c."
G. E. Wright, 2/2/61—"only 4 ft. above Captain Charlton's on point below the Bridge, above that was a rapid."
O. L. Bousfield, 17/4/65—"Could only cross lagoon from Onepoto ten years ago 1855."

White Wings (a book), p. 97 : The Iron Pot was a natural basin with the eastern Spit (Now Ahuriri) on the North and Gough and Maori Island on the South. Shortly after the Provincial Government was inaugurated it ordered the forming of a Causeway connecting the two islands, which had the effect of directing the bulk of the *waters of the Tutaekuri River* and the Inner Harbour (Te Whanga) into the main channel.

Tamatea's Pepeha : "Patiki Tahanui" fresh water flounder at Otiere. Shells of fresh water mussels may now be seen almost everywhere in Te Whanga.

So also may one now follow the bed of the Esk Stream well down Te Whanga.

See also Napier Minute Book 19, page 414, date 1889 : Te Ua-a-te Awha, 4 generations from Te Koera Tareha. Eel weir.

Tamatea did not row up Keteketerau. It was a shallow. It was while hauling their canoe up its waters that he heard the strains of his flute floating over the seas.

The mouth of Keteketerau was similarly affected by forces of the ocean as that of Tangoio and even that of Wairoa.

Its mouth was often blocked up by the forces of the sea, so that when after rainy weather the accumulated waters within threatened to flood the cultivations natural outlets had to be made by the natives.

Keteketerau being placed midway along the shingle spit and exposed to forces of the gales from various quarters it was often closed up. In the dry seasons its mouth remained closed for quite a while because the waters from the Purimu, Waiohinganga and other smaller streams were not sufficient to cause a rise in the waters of the lake. The waters from these streams percolated through the long length of shingle beach from Scinde Island to Te Pahou.

Keteketerau was never at any time half a mile wide. Wahapango, who is said to have made the statement, like most of the older natives, had no idea of what a mile or half a mile was or any other distances pakeha measurements.

Keteketerau had at times an outlet is no reason to assume that Te Whanga was a salt water area. It has become salt water only since the intervention of man.

Tunui's monster lived near where the Breakwater now is. Its cove was quite discernible up to the date of the earthquake. It was near where the natives gathered Kinas. It was a very deep hole even to very recent years, the parents when sending their children to Hakarere School or to the Convent were always very particular in warning their children not to go near this place (cove).

Tutaekuri had prior to Captain Cooke's visit changed its course and was flowing into Te Whanga. The whole of Te Whanga was then under water, and undoubtedly a fair quantity of water flowed through Keteketerau but as Te Whanga was even at that date slightly above highwater mark, salt water could not have even entered the lake as the "pupus" were found only at its mouth.

Eels were plentiful in Te Whanga, as plentiful as they were at Whakaki.

(*a*) No answer.

(*b*) It is true that a claim under Equity and good conscience has perhaps never before been made by the natives, and indeed such a claim would not have been made in that Petition had they known of that valuable information in App. & Journals of the House E. No. 10, page 9, 1862.

And that in E. 9, page 15, 1859: In agreeing to make a claim under "equity and good conscience" they had in mind the fact that the Te Whanga was given to the Napier Harbour Board for the purposes of Harbour, and since by the earthquake it had become dry land and of no further use for the purpose it was given, they should at least participate in the area that they had always maintained as theirs.

They argued that that to which the Harbour Board had acquired a right over by Statute had gone out to sea and what remains now is theirs by Right under the Treaty of Waitangi.

(*a*) It was never sold by them.

(*b*) It comes within the scope of the 2nd article of the Treaty.

And supported by the late Queen Victoria's disclaimer over the "Territorial Rights" unless on a free cession by the Natives.

British Territorial area extended three miles to sea though Native fishing rights in some localities extended further out than that.

By virtue of the Second Article of the Treaty, a Treaty recognised by Imperial Statute and by the Land Claims Ordinance of 1841: Our fisheries and other properties were guaranteed to us.

If British Law is to supercede the conditions of a Treaty which is the foundation of Imperial Sovereignty in New Zealand then the Treaty is of no value as it would fail in those conditions guaranteed to the Natives.

163. In recapitulation of the case for the petitioners and their replies to the Crown and Harbour Board cases the Court makes the following submissions:—

(*a*) The portion of the Whanganui-o-Rotu outside the boundaries of the Ahuriri deed has not, as far as the Court can ascertain, been specifically reserved or specifically promised by the Crown to the Natives in any way. Also, such area is not included in the Ahuriri deed of cession to the Crown. If the area was land within the meaning of the Native Rights Act, 1865, or Native land within the meaning of the Native Lands Act, 1865, the owners had an opportunity and right of asserting their title against the Crown until the year 1874, when by Act of Parliament the area was vested in the Napier Harbour Board. Again assuming the area to be "land," this Act of Parliament extinguished the Native title, and the title of the Napier Harbour Board can be set aside only by another Act of Parliament (which is a matter entirely within the discretion, dominion, and control of Parliament itself) or by proceedings in the Supreme Court of New Zealand which could show that the issue of a certificate of title to the Napier Harbour Board was not done in accordance with the provisions of the Act. There has been no suggestion of any mistake in the issue of the certificate, and to this Court it must be considered impregnable to any form of judicial process. Even if the area had been promised, and that does not appear to be so, the only method by which redress could be obtained is by moving Parliament to pass appropriate legislation.

NOTE.—In *Riddiford* v. *the King* the following passage occurs in the Privy Council decision (N.Z.P.C. Cases at page 116):—

> It is impossible to suppose that such an engagement would not be scrupulously fulfilled to the very letter. But suppose there were a failure on the part of the Crown in carrying out its engagement (if it is permissible for the sake of argument to make such a supposition) no Court of law or equity could give relief. The only remedy would be in representation and remonstrance addressed to the advisers of the Crown.

(*b*) There is some fairly strong evidence and material in support of the claim of the petitioners that the Whanganui-o-Rotu was at the time of the Treaty a fresh or brackish water lagoon and as such was "land" within the meaning of the various Native Ordinance and Acts. Upon the last occasion when the petition was before the Court the conductor for the Natives undertook to strengthen the evidence upon this crucial point by showing to the Court and counsel for the Crown various fresh water mussle beds *in situ* and the remains of various eel-weirs within the area under dispute. Possibly owing to the death of Mr. Raniera Ellison, this undertaking was not carried out, in consequence of which this report is made upon an incompleted case and possibly in the absence of telling evidence. The Court had inspected much of the area and noted an increasing impression of immaturity in the sea-shells and growths upon the mud and sand surface the further it got from the tidal channel under the Westshore bridge, and it seemed a natural thing to assume that such a state of affairs could occur (as petitioners' case says it has occurred) through the salt water of the sea being given permanent opportunity at some fairly recent date to dominate the fresh or brackish waters of the lagoon with the dual result of killing fresh-water growth of any kind and introducing in their stead salt-water fish, shell-fish, and that flatness peculiar to sea-water-lain sand. The deep drains in the area had uncovered large sea shells which it was thought may have been deposited there before the shingle barrier was formed, and covered up by mud deposited in the area by the streams converging there, after the barrier was formed. In the hope that this report would contain all available evidence of the character of the area in (say) 1840, the petitioners were requested to submit everything they had, subject, of course, to the right of cross-examination and rebuttal by the Crown and Harbour Board. As already stated, no further evidence has been adduced, although the petitioners have had ample time in which to do so, and the case must go on on the basis only of proven facts.

(*c*) If it could be proved that the area was land in (say) 1840, over which the Natives had a right to assert title by reason of the various Native Acts and Ordinances, and, assuming that the certificate of title in the Napier Harbour Board did not exist, it is possible that the circumstance of tidal waters being over the area for many years prior to the earthquake would not affect the Natives' right to the soil. In the case of *Carlisle Corporation* v. *Graham, (1869)* L.R. 4 Ex. 361; 38 L.J. Ex. 226; 21 L.T. 333; 18 W.R. 318, it is said:—

> If by the irruption of the waters of a tidal river a new channel is formed in the land of a subject, although the right of the Crown and of the Public may come into existence and be exercised in what has thus become a portion of a tidal river or of an arm of the sea the right to the soil remains in the owner so that if at any time thereafter the waters should recede and the river again change its course leaving the new channel dry, the soil becomes again the exclusive property of the owner free from all rights whatever in the Crown or in the public.

(*d*) If the area in question was in the year (say) 1840 below mean high-water mark the question of Native rights over it becomes too involved to be dealt with adequately by this Court, or upon the case presented in these proceedings. It can be said, however, that the law has recognized the assertability of Native rights in the demesne lands of the Crown (*Nireaha Tamaki* v. *Baker*, 1901 A.C. 561, already quoted in full (paragraph 151). The Native Land Court, a special Court with land jurisdiction only was set up to adjudicate upon the rights of Natives under their customs and usages as against the title of the Crown. In some cases, as already shown, the Native Land Court has dealt with lands which lie below high-water mark and the Crown has to some extent recognized these orders by giving a limited title to Natives

(para. 154). The following quotation, therefor, might be considered in considering any submission that the Native Land Court had power to deal with, as land, an area covered and uncovered by the tide :—

> The Coast is, properly, not the sea, but the land which bounds the sea ; it is the limit of the land jurisdiction, and of the parishes and manors—bordering on the sea—which are part of the land of the country. This limit, however, and its character, varies according to the state of the tide. When the tide is in, and covers the land, it is sea ; when the tide is out, it is land as far as low-water mark ; between high and low-water mark it must therefor be considered as *dirisum imperium : R.* v. *Forty Nine Casks of Brandy*, (1836) 3 Hag. Adm. 257, per Sir John Nicholl, at p. 275.

164. The following appendices will be found attached hereto :—

Appendix A.—Copy of Plan attached now to Deed of Cession.
Appendix B.—Copy of Chart No. 1 Harbour Commission of 1865.
Appendix C.—Copy of Plan forming Part of Crown Grant under Public Reserves Act, 1854.
Appendix D.—Copy of Petition No. 240/1932, which gave rise to these Proceedings.
Appendix E.—Copy of Minutes of this Court.
Appendix F.—Copy of Chart No. 2 Harbour Commission of 1865.
Appendix G.—Copy of Plan found in Yates, New Zealand.
Appendix H.—Copy of Captain Cook's Chart of October, 1769.
Appendix J.—Full Copy of Minutes of 1920 Commission.

[*The Appendices mentioned in paragraph 164 of the report have not been printed, but are attached to file N.D. 5/13/17 in the Department of Maori Affairs.*]

For the Court,

[L.S.] JNO. HARVEY, Judge.

Approximate Cost of Paper: Preparation, not given ; printing (658 copies), £203 10s.

By Authority: E. V. PAUL, Government Printer, Wellington.—1948.

Price 1s. 9d.