1909.

NEW ZEALAND.

NATIVE LANDS AND NATIVE-LAND TENURE:

INTERIM REPORT OF NATIVE LAND COMMISSION, ON NATIVE LANDS IN MOKAU-MOHAKATINO BLOCK.

Presented to both Houses of the General Assembly by Command of His Excellency.

Native Land Commission, Wellington, 4th March, 1909.

To His Excellency the Governor.

MAY IT PLEASE YOUR EXCELLENCY,—

We have the honour to forward a further report on Native lands.

MOKAU-MOHAKATINO BLOCK.

One of the first matters that we had to do was to investigate a block of land known as the Mokau-Mohakatino Block. This block has an interesting history. It is situated on the Mokau River, and was investigated by the Native Land Court, and the title ascertained on the 2nd June, 1882. After the investigation of title, Mr. Joshua Jones, who was residing in the Mokau district, entered into negotiations with certain owners for the lease to him of a block of land thus described:—

"All that piece of land situated in the County of Taranaki aforesaid, and containing by estimation 30,000 acres, more or less, known as the western portion of the Mokau-Mohakatino Block No. 1, being land awarded to the lessors at a sitting of the Native Land Court held at Waitara on the 2nd June, 1882, and which was described [as bounded] as follows in the lease signed by some of the Native owners to the said Mr. Jones: Bounded on the west by the sea, on the north by the Mokau River, on the east by a line drawn from the mouth of the Mangapohue Stream due south to the Mohakatino River, and on the south by the Mohakatino River; excepting and reserving thereof a block of 500 acres or thereabouts marked and specified on the plan of the land produced at the Native Land Court on the 2nd June, 1882, and on the plan drawn on the lease."

We annex to our report a copy of the plan drawn on the lease. Mr. Jones did not obtain the signatures of all the owners to his lease, and there was no partition of the land, and consequently he had no title under his lease, as he had not obtained the signatures of all the owners. In 1884 a statute was passed by the Parliament of New Zealand entitled "The Native Land Alienation Restriction Act, 1884." That Act was, as its title declares, an Act temporarily to prevent dealings in Native land by private persons within a defined district of the North Island. The land described in the lease was included in this district, and the Act provided as follows (see section 3):—

"After the coming into operation of this Act no person shall, either by himself or his agent, directly or indirectly negotiate for the purchase, or acquire, or contract or agree to purchase or acquire, from any Native, or from any person on behalf of any such Native, any Native land within the territory described in the Schedule to this Act; and any person committing a breach of this provision

shall be liable to a penalty of not less than one hundred pounds and not exceeding five hundred pounds, which may be recovered in a summary way before any two or more Justices of the Peace, and shall also be liable to imprisonment for any term not exceeding twelve months."

There were other clauses prohibiting contracts for the acquisition of land, prohibiting any Native from making, signing, or executing any instrument for the sale or purchase of the land, and declaring that any contracts in contravention of the Act were to be voided and any moneys paid to the Natives not recoverable at law or in equity.

Mr. Joshua Jones complained to the Government that this was unfair to him, as he was prevented from completing his lease that had been partially signed, and accordingly Parliament in 1885 passed a clause under the Special Powers and Contracts Act (see First Schedule to that Act, No. 17, first column) which enabled him to complete his negotiations entered into with the Native owners of the land described in the second column. The land described in the second column, however, included land outside the lease—that is, it included the whole of Block No. 1, the eastern boundary being a line drawn from the mineral spring at Totoro, on the Mokau River, due south to the Mohakatino River. This power was given by the Legislature in consequence of a report of the Public Petitions Committee of the House of Representatives, No. 17, 1885. It will be noticed that it was said he had entered into negotiations with the Natives for the lease for a term of fifty-six years of the whole block. There does not seem to us to have been any agreement in writing made with the Natives and Joshua Jones for a lease, except for the portion described in the lease of 1882. There must have been a dispute between the Natives and Mr. Jones as to what land he was to get under the lease. This is described by him in his own evidence given before a Commission in 1888 (see Appendix to the Journals of the House of Representatives, G.–4c, p. 37). In 1886 the Native Land Administration Act was passed, and it purported to control dealings in land owned by Natives. It prohibited the ordinary means that had been formerly allowed of private persons dealing with Natives. All leases had to be granted through a Commissioner. In consequence of this Act being passed, Mr. Jones said that this statute prevented him completing his lease, and he appealed to the Government to be allowed to complete his lease. A Royal Commission was set up to investigate his claim, and this Commission was issued by the Governor on the 21st January, 1888, and reported on the 20th August, 1888. In consequence of the report of this Commission a statute was passed in 1888. This statute, however, was not passed by Parliament without strong objection being taken to it by the members of the House who represented the Native people, and its important provisions were only carried in Committee by narrow majorities. That statute was passed in the last days of the session, and was exceedingly precise in its terms. Section 3 provided,—

"The Native Land Court shall, as soon as conveniently may be after the passing hereof, make partition of the said Block No. 1, in order to ascertain and allocate all the respective interests and shares of the Native owners who shall have signed a certain lease from the Native owners of the said block to the said Joshua Jones up to the date of the sitting of the Court, and the Court may require the Surveyor-General to make and furnish an approved plan of the portion of the said block to which the Natives who have signed the lease shall be entitled, and the said Joshua Jones shall, until such sitting, proceed to obtain all the remaining signatures of the Natives requisite to complete such lease."

It also provided for the registration of the said lease, and that "The Native Land Administration Act, 1886," shall not be deemed to repeal or affect the powers granted to him under the Act of 1885. It has to be observed that by sections 3 and 4 one lease alone was spoken of. That is the lease —the only lease that was in existence—dated the 12th July, 1882. Mr. Jones was allowed to get signatures to that lease up to the sitting of the Court and no further, and also allowed to have that lease registered in the Native Land Court. There do not seem to have been any new signatures

added to the lease after the passing of the Act of 1884. In 1888 "The Native Land Administration Act, 1886," was repealed, and it was provided, subject to the provisions of "The Native Lands Frauds Prevention Act, 1881," and of "The Native Lands Frauds Prevention Act 1881 Amendment Act, 1888," that the Natives might alienate and dispose of their land, or any share or interest therein, as they think fit.

We presume that it was under the authority of this Act that Mr. Jones obtained the leases from the Natives of the part of Block No. 1 not included in the original lease of 1882. It is clear that such leases cannot come under the provisions of the Act of 1888. "The Native Land Alienation Restriction Act, 1884," was repealed by the Act of 1886. It appears clear that the leases were not made by virtue of "The Special Powers and Contracts Act, 1885." The power given by that statute was to complete the negotiations for a lease that had been pending—that is, for a lease for fifty-six years. The leases granted, however, after 1888 were leases for fifty-six years, which would count from the date of the leases. That would be for three years more than was contemplated by "The Special Powers and Contracts Act, 1885." After the execution of these leases, Mr. Jones executed a mortgage to Mr. John Plimmer, on the 2nd April, 1890, over all the leases. There was a transfer under the power of sale in the mortgage by Mr. John Plimmer to Wickham Flower, of London; but by various transactions since, the leases have become vested in Mr. Herman Lewis, who has mortgaged them to Sarah Jane Le Froy, Archibald Bence Jones, Henry Kemp Welch, and Colin Campbell Scott Moncrieff. All these leases and transactions are entered on the provisional register-book of the Land Transfer Department at New Plymouth. Mr. Jones attempted by caveat to prevent registration of these transactions; but a full bench of Judges of the Supreme Court refused to allow Mr. Jones to even litigate the matter, or that his caveat should stand, on the grounds that he had by agreement in litigation in England bound himself not to contest the right of the mortgagees to proceed with the registration of the mortgage documents. This agreement was in these terms:—

"Mr. Jones undertakes not to apply to Mr. Flower's executors, to the Court here, or in New Zealand, for any further time to delay the registration of the above-mentioned documents, the present extension to the 1st March, 1907, being final."

In a petition to the House, Mr. Jones contended that this agreement or compromise was made in a suit in the High Court of Justice in England, over which suit the Court had no jurisdiction. The contention that the Court in England had no jurisdiction because the property mortgaged was situated outside England is absurd, and in conflict with a decision of the Supreme Court of New Zealand, and of many decisions of the English Courts. He stated that Mr. Justice Parker had so ruled. There is no report of any such ruling or decision, and it is in direct conflict with the decision of Mr. Justice Parker in a later case (see Deschamps *v.* Miller—1908, 1 Ch., p. 856).

Mr. Herman Lewis and his mortgagees are the owners on the provisional register, and the Supreme Court of New Zealand has decided that Mr. Jones cannot contest their right to be there.

The question that seems to us to arise is, are the existing leases valid? First, as to the 1882 lease—that is, the first lease—the lease that, in accordance with the Government Proclamation, Mr. Jones was to be allowed to complete. The Proclamation said,—

"That Joshua Jones, of Mokau, settler, shall be entitled to complete the negotiations entered into by him with the Native owners of the said lands for a lease thereof for the term of fifty-six years; and provided that the said lease *is or may be validly made for such term.*"

It will be noticed that the land was inalienable save by lease for a term of fifty-six years. This means a lease in possession, not reversion. A lease for fifty-six years commencing at a future time would be invalid. If it had been an agreement for a lease to be executed at a future time, that would have been valid (see Otago Harbour Board *v.* Proudfoot—O.B. & F., p. 119; and Dowell *v.* Dew—12 L.J. Ch., p. 158).

But the term of this lease begins about a year after its date, though under a covenant the tenant is assumed to be entitled to possession at once. It is a lease not in possession (see Foa, "Landlord and Tenant," p. 33). If it were held to be in possession, the term is beyond the term that was sanctioned by law. The lease therefore seems to us to be invalid. It was contended before us by the counsel for the present mortgagor and mortgagees of the lease that the lease would be valid, and Ani Wata *v.* Grice (2 N.Z. L.R., C.A., p. 95) and Te Ruihi *v.* Grice and Others (4 N.Z. L.R., C.A., p. 219) were cited. In these cases the leases were executed as escrows; in this case the lease was not executed as an escrow, nor was it held to be an ineffective lease till all had signed. It purported to be an immediate lease, and it would operate on the signature of any of the tenants in common as a lease of the tenant-in-common's share who signed. These cases are therefore inapplicable. Further, all the owners have not yet signed this 1882 lease—seventeen owners have not signed. The lease, therefore, cannot be a lease of Block 1F, but only at most a lease of the interests of the tenants in common that have signed the lease.

It is also to be observed, according to the evidence given by the late Judge Butler, who was a most expert translator and interpreter, that the Maori translation annexed to the deed is inaccurate. He said he noticed in the translation that it was stated that the Natives were to be entitled to 10 per cent. of the proceeds of the coal after deducting expenses, whereas in the Maori translation it said nothing about deducting the expenses. The mistake is no slight or trifling one: the difference between 10 per cent. before or after expenses have been deducted is most important, and no business man requires the difference to be pointed out. The law necessary to the validity of the deed in this respect has not therefore been complied with. If not, however, invalid, the Native lessors could take proceedings to declare the lease forfeited, and for this reason:—

The lease contained the following covenant:—

"The Lessee shall immediately upon the execution of these presents proceed to Mokau and enter upon and reside upon the demised lands and will as soon as conveniently may be provide a competent and sufficient staff of surveyors for surveying and measuring the said land and testing the same for the discovery of minerals and developing the resources of the land And shall and will as soon as possible after the execution of these presents take the necessary steps for forming a company with a capital of thirty thousand pounds at the least for developing and working the said mines minerals and timber of which said company at least two of the said Lessors shall be appointed directors and shall be elected and chosen by a majority of the said Lessors and from and after the expiration of twelve months from the first day of July one thousand eight hundred and eighty-three shall during each succeeding year expend the sum of at least three thousand pounds in raising winning and making marketable the said minerals and timber and in making roads erecting buildings and making such improvements as may be required in the Mokau and Mohakatino River as may be necessary for more effectually carrying out and conducting the conveyance and shipping of the produce of the said mines and timber And shall and will at the expiration of each year of the said term as soon as possible after the yearly balance of the said company shall have been struck furnish to the Lessors a copy of the account of such company showing the profit or loss accrued to the company during such year and shall also upon request made by the Lessors or any ten or more of them submit to the inspection of the Public Trustee for the Colony of New Zealand or any person to be appointed by him such yearly statement of account and all books of account papers and documents showing the transactions of the said company and the statement of assets and liabilities of the same And shall and will pay the rent or royalty accruing each year to the Lessors on account of the said premises to each of the Lessors personally or to some person duly authorised by him. In case the Lessors shall at the expiration of the said term desire and request the Lessee to continue to lease the said land mines minerals and timber for a further period the Lessees shall and will accept a lease of the same for a further term of fifty-six years subject

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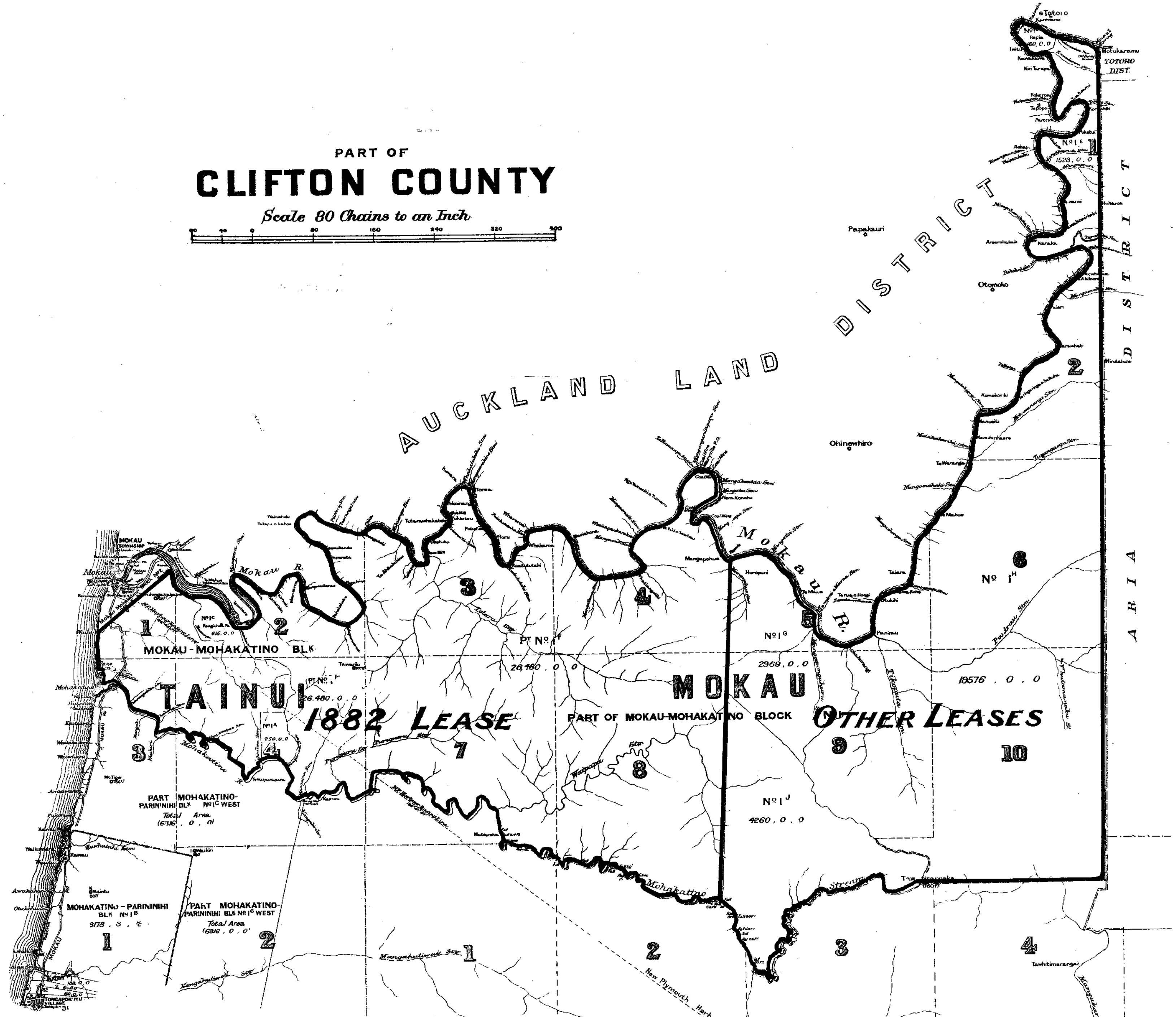

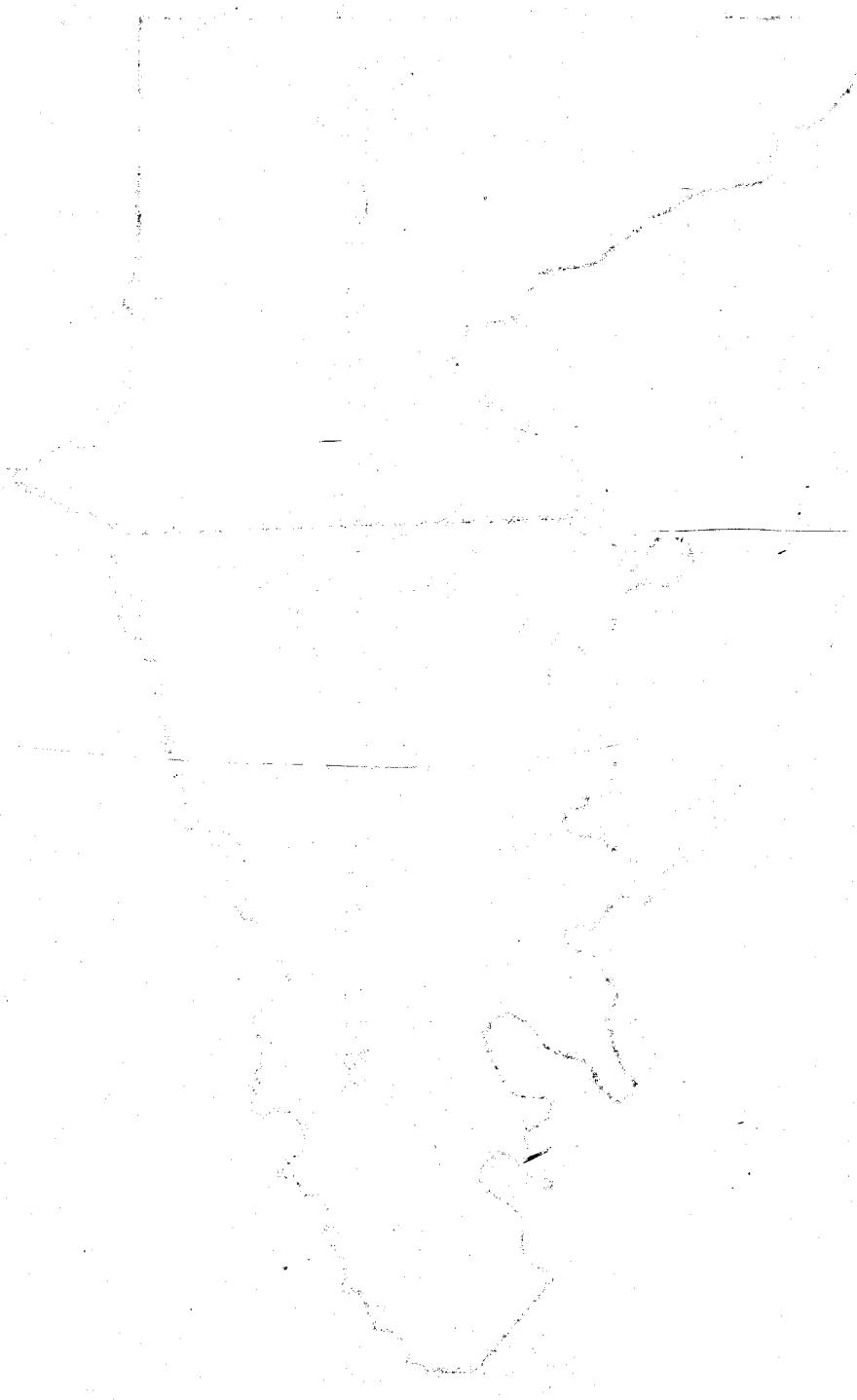

to the payment of the same rents and royalties as are hereby reserved and made payable and to the performance and observance of like covenants liberties powers and restrictions as are herein set forth. The Lessees shall in case any of the land hereby demised shall be clear of the indigenous growth during the said term forthwith and at all times thereafter cultivate use and manage such cleared land in a good husbandlike manner and at the expiration of the said term shall and will quit and deliver up the said land to the Lessors in good heart and condition and sown in good mixed English pasture grasses and all fences erected thereon in good substantial condition."

Now, this covenant has never been fulfilled, and it is a continuing covenant. It has been said, however, that the Natives waived the performance of the covenant by a signed written agreement cancelling the covenant and receiving in lieu thereof an increased rent. No doubt ordinary lessors might have entered into such an agreement, but this agreement is an attempted variance of a lease that to be valid has to be executed according to statutory requirements. It is, in fact, the making of a new lease, and to be valid it would have had to be executed as a lease and to have received the certificate of a Trust Commissioner. It has no such certificate, and it is therefore, in our opinion, invalid and ineffective. The covenant stands, and the lessors can proceed, after the proper and necessary legal steps are taken for the ejection of the present tenant. So much for the 1882 lease of Block 1F.

As to the other leases, it may be said that all the signatures except one to these leases were obtained before the 16th September, 1889; that is the day upon which "The Native Lands Frauds Prevention Amendment Act, 1889," was passed and came into force. They were also all obtained after the passing of "The Native Lands Frauds Prevention Act Amendment Act, 1888," sections 5 and 7 whereof are as follows:—

Section 5. "It shall not be lawful for any person to negotiate, either on his own behalf or as agent or trustee for any other person, for the purchase, conveyance, transfer, lease, exchange, or occupation of any Native land, or of any land or any estate, right, title, or interest therein, or for any agency or authority to deal therewith or in relation thereto, unless such land is now owned under Crown grant, memorial of ownership, or certificate of title issued under either a Native Land Court Act or a Land Transfer Act to not more than twenty owners, or unless such land shall hereafter become and shall have been so owned for forty days."

Section 7. "Any person who on his own behalf or as agent or trustee for any other person shall take or accept any conveyance, lease, transfer, gift, or other assurance from any Native, whether to himself solely or to himself and others, of any Native land, or of any land not heretofore owned as aforesaid, or which, becoming hereafter so owned, shall not have been owned for forty days as aforesaid, or who shall be a party to any negotiation, agreement, contract, or promise for the making to him, or to him and others, or to any other person, of any such conveyance, lease, transfer, gift, or other assurance, or for the accepting or giving of any such agency or authority, shall forfeit and pay a penalty not exceeding five hundred pounds, to be recoverable in a summary way."

"Every such conveyance, lease, transfer, gift, and other assurance, agreement, contract, promise, agency, and authority, shall, except as hereinafter provided, be illegal and void."

1G, containing 2,969 acres, was, by partition order dated the 24th March, 1889, held by eighteen owners, eleven of whom have signed the lease; 1H, containing 19,567 acres, by one of the same partition orders was held by thirty-one owners, all of whom have signed the lease; and 1J, containing 4,169 acres, by one of the same partition orders was held by thirty-six owners, twenty of whom have signed the lease. Therefore, when the leases for 1J and 1H (each containing more than twenty owners) were signed, they were not only illegal—the Amendment Act, 1889, not then being in force—but the lessee was also liable to a penalty of five hundred pounds for procuring the same.

Subsequent to the lessee obtaining leases for 1H and 1J—which were, *inter alia*, invalid as containing more than twenty owners—"The Native Lands

Frauds Prevention Act, 1889," was passed, and section 3 thereof was as follows:—

"The words 'to not more than twenty Natives,' in section 5 of 'The Native Lands Frauds Prevention Act 1881 Amendment Act, 1888' (hereinafter called 'the said Act'), shall not apply to land owned by Natives under Crown grant, memorial of ownership, or certificate of title under either a Native Land Court or a Land Transfer Act issued before the passing of the said Act, or in respect of which an order has been made by the Native Land Court for the issue of a Crown grant, certificate of title, or memorial of ownership, or an order under 'The Native Land Court Act, 1886,' declaring the owners or persons entitled on investigation of title or partition before the passing of the said Act—

"(1.) If such land does not exceed five thousand acres in area; or

"(2.) If a contract in writing for the alienation of such land or any area or any part thereof had been made and not completed before the passing of the said Act.

"And the said section shall be read and construed in respect of such lands as though the said words 'to not more than twenty Natives' had been omitted therefrom: Provided that nothing in the said fifth section shall be deemed to prevent a lease of land so owned or the subject of such order as aforesaid not exceeding ten thousand acres."

So far as the lease of 1H is concerned, the block contains 19,000 acres and has thirty-one owners. The lease of this block is therefore invalid unless it be contended that the lease is made in virtue of "The Special Powers and Contracts Act, 1885." Regarding such a contention, it has to be noticed, first, that the words of the Governor's Proclamation do not purport to do away with the need of statute law providing for the validity of leases. We have already set out the words of the Proclamation. Further, it is clear that the Act of 1885 assumed that the lease or agreement for lease then in existence was to be concluded. This lease does not seem, therefore, to have been in pursuance of the Act of 1885, nor can it be said to have been in pursuance of the Act of 1888; but, as we have said, even if it had been a lease under the Act of 1885, that Act does not purport to alter the existing law required for the validity of a lease, and this lease is contrary to the existing law, and therefore invalid. As to the leases of Blocks 1J and 1G, we desire to point out that the leases purport to be leases by certain lessors. The leases of these respective blocks are of different dates, and the terms are all for fifty-six years. This will mean different leases, having different endings. As there is no tenendum clause fixing the date for the commencement of the leases, the term of fifty-six years must be presumed to commence at the date of the lease. The rent in every one of the leases purports to be rent paid to the lessors. The result, therefore, is that the rent is not a rent for the whole block, but a rent payable to the lessors who signed the lease. The rent under such conditions, therefore, for various leases will be as follows:—

Block 1J.

One lease commenced 56 years from 1st July, 1889: Rent, £36 per annum for the first 28 years, and £72 per annum for the balance.

Another lease of the same block commenced 1st June, 1889, for 56 years: Rent, £26 per annum for the first 28 years, and £70 per annum for the balance.

Total rentals: £62 per annum for the first 28 years, and £142 for the balance of the term.

Block 1H.

One lease commencing 1st July, 1889, for 56 years: Rent, £36 per annum for the first 28 years, and £70 per annum for the balance.

Another lease commencing 31st May, 1889, for 56 years: Rent, £35 per annum for the first 28 years, and £70 per annum for the balance.

Another lease commencing 29th January, 1890, for 56 years: Rent, £35 per annum for the first 28 years, and £70 per annum for the balance.

Total rentals: £105 per annum for the first 28 years, and £210 per annum for the balance of term.

Block 1G.

One lease commencing 1st July, 1889, for 56 years: Rent, £25 per annum for the first 28 years, and £50 per annum for the balance.

Another lease commencing 31st May, 1889, for 56 years: Rent, £25 per annum for the first 28 years, and £50 per annum for the balance.

Total rentals: £50 per annum for the first 28 years, and £100 per annum for the balance of term.

The whole of the owners of these blocks have not signed: in 1G seven owners have not signed, and in 1J sixteen owners have not signed. These leases, from any point of view, cannot be more than leases of the interests of the owners that have signed.

There are subleases in Block 1F, but we have not had them before us. The defects in their landlord's title are of course defects in their title, for they have no registered title on which they can rely. The leases are, in fact, only on the Provisional Register.

The question now is, what do we recommend? The present mortgagee and mortgagors have contended, by their counsel, that, even if the lease of Block 1F is liable to be forfeited, the Supreme Court would, under "The Property Law Consolidation Act, 1908," section 94, grant relief. Relief might be granted once, but, if granted, the covenant would still have to be fulfilled; and are the mortgagees and mortgagor prepared to fulfil it? We doubt it.

The rental is, in all the leases, entirely inadequate, and if the Maoris had been ordinarily sensible business men they never would have executed any such leases. It was suggested before the Commission that they had been induced to sign the lease through the supply of beer to them. This the Commission negatived, although it was plain that large quantities of beer were brought into the settlement at the time the 1882 lease was signed. The loss that has fallen on the Maoris through their want of business capacity and knowledge is great, and one cannot help feeling sympathy for them in the position in which they are placed. It does not seem to us that any sympathy is required for those who dealt with them in their leasehold transactions. The land held under lease would, we believe, be suitable for settlement, and could be largely developed. There seems to us little chance of either the mortgagor or mortgagees developing the land such as was contemplated when the lease of 1882 was first signed, and it is a question whether some arrangement might not be made between the mortgagor, the mortgagees, and the Maoris to provide for the suitable and immediate settlement of the land.

We had the representatives of the Maori owners before us in Auckland, and they were disinclined to spend any money in purchasing out the interests, if any, of the mortgagor and mortgagees. Possibly, to avoid litigation, they might consent to pay a certain sum of money to the mortgagor and mortgagees if the land was revested back in them. The total amount claimed by the mortgagees is £14,000. This is the amount that Mr. Lewis is said to have paid for the interests of Flower's executors in the leases. We doubt very much whether the Maoris would be inclined to give such a large sum. If a sum somewhat less than that was accepted the Maoris might be inclined to set aside 10,000 acres of the whole block to pay off such a sum, and, if anything was left after the payment of the sum agreed upon, that sum should be held for the development of the land which would be given to the Maoris. After taking the 10,000 acres out of the block we believe the Maoris would consent to half the remainder of the block being opened on lease for European settlement, and the other half being set aside for their own occupation.

We understand that the Maori owners have little or no land, and that it is necessary they should have some of this area for settlement purposes. If an agreement such as we have suggested were come to it might be wise to vest the land in the Maori Land Board, so that speedy and effective means could be obtained to give effect to it.

We feel sure, however, that the Maoris would sooner either litigate the matter or wait till the end of the lease, if it should be determined the leases were valid, than pay large sums to the mortgagor or mortgagees for the cancellation of any rights they may have over the land. They seem very strong on this point, and we are not surprised, considering how they have been treated, and how little they have obtained during the past twenty-eight years from their land. We may add, of course, that those who have not signed the leases are not bound, and if the land were partitioned it might be discovered that the mortgagors and mortgagees would really be left with land that would be of little service to them.

We have the honour to be,

Your most obedient servants,

ROBERT STOUT,
JACKSON PALMER, } Commissioners.

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