1910.

NEW ZEALAND.

NATIVE AFFAIRS COMMITTEE

REPORT OF THE) ON THE PETITION OF KOOPU ERUETI AND OTHERS, OF WHANAU-APANUI, PRAYING FOR A REHEARING WITH REGARD TO THE TUNAPAHORE BLOCK (No. 435/1909); TOGETHER WITH ADDRESSES OF COUNSEL.

(Mr. JENNINGS, Chairman.)

Brought up 15th November, 1910, and ordered to be printed 17th November, 1910.

ORDERS OF REFERENCE.

Extracts from the Journals of the House of Representatives.

Thursday, the 7th Day of July, 1910.

Ordered, "That Standing Order No. 219 be suspended, and that a Native Affairs Committee be appointed, consisting of twelve members, to consider all petitions, reports, returns, and other documents relating to affairs specially affecting the Native race that may be brought before the House this session, and from time to time to report thereon to the House; with power to call for persons and papers; three to be a quorum: the Committee to consist of Mr. Greenslade, Mr. Herries, Mr. Jennings, Mr. Kaihau, Mr. Macdonald, Mr. Mander, Hon. Mr. Ngata, Mr. Parata, Dr. Rangihiroa, Mr. Rhodes, Mr. Seddon, and the mover."—(Hon. Mr. Carroll.)

Wednesday, the 13th Day of July, 1910.

Ordered, "That the name of Mr. Dive be added to the Native Affairs Committee."—(Hon. Mr. Carroll.)

REPORT.

Petitioners pray for a rehearing with regard to the Tunapahore Block. I am directed to report that, in the opinion of the Committee, this petition should be referred to the Government for consideration.

15th November, 1910.

W. T. Jennings, Chairman.

ADDRESSES OF COUNSEL.

TUESDAY, 25TH OCTOBER, 1910.

(1.)

MR. C. P. SKERRETT, K.C. (with him Mr. Kelly), for the petitioners, and Mr. H. D. Bell, K.C. (with him Mr. Fell), appeared to oppose.

The Chairman: Without unduly trespassing on your good nature, Mr. Skerrett, the Committee would like you to assist it by giving your address in as concise a manner as is practically possible.

Mr. Skerrett: I can quite appreciate what you say, and I will endeavour to give effect to your wishes. As the Committee knows, this petition relates to a block of land known as Tunapahore, of 5,500 acres, a settlement fourteen or fifteen miles northward of Opotiki, and the application is, in short, that the decision of a Royal Commission originally said to consist of Judge Seth-Smith, A. L. D. Fraser, and Hone Heke—a decision which was really given by Judge Seth-Smith and Hone Heke alone—should be sent to some competent tribunal for reinvestigation upon three grounds, which I will endeavour to express succinctly and then elaborate further. The first ground is this: that the judgment of the Royal Commission reverses the carefully considered judgments of four several Courts in favour of my clients, with all the disadvantages of lapse of time, and without the corresponding advantages which those Courts had of actually seeing and hearing the witnesses. That is the first ground we shall present to the Committee. The second ground—and it is almost equally cogent—is that the title of the two contending tribes depends absolutely on occupancy—that is to say, that the title of the Whanau-Apanui and the title of the Ngaitai—whom my friend Mr. Bell represents—both rest and have always been based exclusively on the occupancy of the block; and we shall show that there is no question of the occupancy of the block, which was always in my clients' (the Whanau-Apanuis') possession, by absolutely conclusive and overwhelming testimony. The third ground is that the judgment of the Commission absolutely includes in the award of the Ngaitai the kaingas and cultivations of the hapus of the Whanau-Apanui. You, Mr. Chairman, will find that these are the three main grounds on which we shall press for a Commission. Now, there are one or two preliminary observations I desire to make, and the first is that there are three blocks of land in precisely the same or very much the same position. The block on the sea-coast is Tunapahore, which adjoins the Kapuarangi Block, and that joins, again, the Takaputahi Block. All these three blocks were appurtenant to the Takaputahi Block, and their titles were really in the main determinable by the occupancy of that block. The Takaputahi Block consists of broken forest land which was used jointly with Tunapahore, and it was used for hunting, so that the title to these blocks was in the main to be determined by the ownership and occupancy of the first-named block. That is the fact I desire to show the Committee at once. In the report of the Commission to which I have referred, Commissioners Seth-Smith and Hone Heke say, "It has been admitted by all the parties that in ancient times the three adjoining blocks were occupied by the Native owners as one undivided piece of land"; and the judgment of Judge Scannell, which dealt with Takaputahi, is equally emphatic. He says, "The Kapuarangi Block itself, from the nature of the country, which is very broken, consisting principally of high hills and deep valleys covered with forest, appears never to have been regularly occupied in the same way that the coast lands were, and was used chiefly for getting birds and latterly pig-hunting, and the signs of occupation as given in evidence are very few, but, such as they are, are claimed by each party to the exclusion of the others, and it is acknowledged by all the parties that nothing remains at the present time to prove to whom they really did belong." I need not trouble you further on that. It was common ground that the title of these three blocks depended upon occupation of the coast lands. The claimants may be said to consist of three parties, one of whom may be disregarded by this Committee. One is the Whanau-Apanui, on the one side, and Ngaitai on the other, and a tribe called the Ngaariki is the third claimant; but for the purpose of this petition the Ngaariki may be put out of mind. I have already indicated that the nature of the claim of both these rival tribes—for one of whom I appear, and my friend Mr. Bell appears for the other—was occupation, and, further, there was the expulsion of a tribe called the Ngaariki. Before I deal with the second ground—namely, occupancy—I desire briefly to put before the Committee the course of the litigation. The ascertainment of the title to the Tunapahore Block took place in 1885 before an experienced Judge of the Native Land Court—namely, Judge Mair; and he awarded a small part at the western end to the Ngaitai, and the rest of the block to my clients the Whanau-Apanui. Judge Mair substantially decided in favour of my clients at that hearing. Now, the Ngaitai did not apply for a rehearing, but the Whanau-Apanui did; but this application for rehearing was refused, and ultimately the Act of 1895 was passed, which authorized a rehearing. That rehearing took place in 1898 before Judges Edgar and Johnson, and those experienced Judges of the Court, after listening to the witnesses in a very patient investigation, awarded the whole of the Tunapahore Block to Whanau-Apanui, my clients. That judgment was given by two of the most careful Judges of the Native Land Court, and my clients' claims were completely established. But something happened between the year 1885, when the original judgment was given, and the year 1898, when Judges Edgar and Johnson gave their judgment in favour of my client, and that circumstance was this: In 1895 the Kapuarangi Block came on for investigation—that is the next block to the Tunapahore—and that was heard by a very experienced Judge—namely, Judge Scannell. Judge Scannell dismissed the Ngaitai claim to Kapuarangi and awarded

Kapuarangi entirely to the Whanau-Apanui. You will see the importance of that judgment, because whoever was entitled to Kapuarangi was also entitled to Tunapahore. The next circumstance also referred to 1895, and that was the original investigation of the Takaputahi Block, which is the further adjoining block. I would like to point out to you the boundaries of the blocks which our clients claim. [Boundaries explained on plan to Committee.] Upon that investigation the Ngaitais' claim was dismissed, and a half-claim to the westward or southward, as the case may be, which is the blue line indicated in the plan, was awarded to the Whanau-Apanui, and the balance of the block was awarded to the Whakatoheas. Now, the significance of that judgment is that the allowance of the full claim of the Whanau-Apanuis to that block of land was based on their ownership of the Tunapahore Block in question. The next step in the matter, as I have mentioned, was an appeal in 1898 held before a Native Appellate Court. Before the Appellate Court all the parties were represented, and the Native Appellate Court awarded the whole of the Tunapahore to the two hapus of Whanau-Apanui. The Court declared that the Whanau-Apanui had much the best right to the occupancy of the land. So there is the judgment of the Native Appellate Court awarding the whole of the land to the Whanau-Apanui. What they did with regard to Kapuarangi was to affirm the previous judgment, and to allow 9,000 acres to the Ngaitai. With regard to the Takaputahi Block, they awarded the whole of that to the Ngaitais. They say, "The whole block is awarded to Ngaitai, with whom will be included the persons for whom Wi Pere claims." We have, therefore, four considered judgments in our favour. We have, first, the initial judgment of Judge Mair in 1885; secondly, we have Judge Scannell's judgment in the Kapuarangi Block, in which he in the most emphatic terms declares the right of the Whanau-Apanui to Tunapahore; then we have the judgment in the Takaputahi in 1895, which also sets up the title of my client to Tunapahore; and lastly we have the judgment in 1908 in the Native Appellate Court of Judges Edgar and Johnson, who solemnly affirm and award us the whole of Tunapahore, to the exclusion of every one else. One could hardly imagine a stronger position from the point of view of adjudications of competent Courts. Here are four solemn judgments, one substantially awarding our claims, and the other three awarding them in the whole. Well, that position was disturbed by the Commission I have referred to—a Commission set up under the Act of 1901, and which was to have consisted of Judge Seth-Smith, Mr. A. L. D. Fraser, and Hone Heke. Unfortunately, Mr. Fraser was not able to act, but the other Commissioners sat, and their judgment was as follows: They excluded entirely the Whanau-Apanui, and awarded the block to the Ngaitai and the Harawaka, drawing a line at a point which I will indicate. They took the Hawai River as the boundary, and awarded the western part to the Ngaitai and the eastern part to the Harawaka. Approximately that divided the block into about two equal portions. With regard to the Kapuarangi they did the same thing—they divided the block into two portions, and awarded one half to the Ngaitai and the other half to the Harawaka. It will be seen, then, that the judgment of the Commission was a complete and entire reversal of the previous judgments of the Native Land Court, and I shall ask the Committee's indulgence later on to refer to the judgment, because I can find no reason at all for the exclusion of the Whanau-Apanui and the inclusion of the Ngaitai. I desire now to establish my second ground before returning to the judgment, and the second ground I repeat for the benefit of the two members who were not here at the commencement of my address, and it is this: that both the Ngaitai and the Whanau-Apanui depend as to their title to Tunapahore on occupancy, and whoever was the occupant of Tunapahore was entitled to the land; and I shall call to the attention of the Committee the evidence as found by the Judges on that point. I desire to sketch very briefly the nature of the Whanau-Apanui claim, only to the extent of showing that it was based on occupancy. The Whanau-Apanui claimed to represent the ownership of the original inhabitants—of the original primeval inhabitants of this district, claiming their descent from Muturangi, a descendant of Motatau, centuries before the arrival of the Tainui canoe. This is how the Whanau people acquired the tribal name of Ngaariki, and afterwards changed this tribal name to Apanui. This is important, because the Whanau claimed first to have been the Ngaariki and afterwards to have changed from the Ngaariki to the Apanui. Now, the origin of the name Ngaariki came about in this way: The common ancestor of the Ngaariki and the Apanui was Muturangi, the descendant of Matatau, whom I have just now named. His daughter married Tuariki, and from that, Tuariki, the tribal name was taken of Ngaariki, and the tribe was named Ngaariki for four generations at least. Then, at the expiration of those four generations the land was owned by Turirangi, one of the Ngaariki, who gave the mana of this land and other lands to his son Apanui by Rongomaihuatahi. It will thus be seen that Apanui, founder of the tribe so named, was the descendant of the original inhabitants of this part of the country, commencing from Matatau through Muturangi and Tuariki to Apanui, and there was therefore—and this is of some importance—a long and continuous occupancy of these lands by the Ngaariki and then by the Apanui, as I propose to explain. We have it, therefore, that this territory was given by the ancestor Turirangi to Apanui. Now, Turirangi had two families, one by a wife named Hinetama, and the descendants of that marriage acquired the resident name Ngaariki-Tahaehae; but the descendants of the other marriage—namely, Turirangi and Rongomaihuatahi—and the descendants of that marriage of which Apanui was the first son, called themselves afterwards Apanui. Now, it has to be remembered, therefore, that in the gift of this land by the common ancestor Turirangi to Apanui the Apanui and their relations the Ngaariki—namely, the children of the first marriage—resided together on the block; but quarrels ensued, and the result was that the Ngaariki, the children and descendants of the first marriage of Turirangi, were expelled from the block, and the land was retained by my clients the Apanui. That occurred about four generations from the marriage between Turirangi and Hinetama. Now, the Ngaitai were strangers to this piece of land. According to our story, their sole acquaintance with this piece of land was, as explained in the report of the Commissioners, as follows: "In consequence of their repeated conflicts with Ngatiporou, Ngatimaru, Ngapuhi, Ngaiterangi, and

Whakatohea, and other tribes, the Ngaitai, who had been a numerous and powerful people, had become much weakened—so much so that at the close of an expedition to Turanga as allies of Whanau-a-Apanui they feared to return to their own kaingas at Torere, and sought the protection of the Whanau-a-Apanui from the dreaded attacks of their old enemies the Whakatohea. In response to this appeal the Whanau-a-Apanui assigned to them certain places of residence on Tunapahore, and thus for the first time the Ngaitai became occupiers of this land." This is what we allege.

Mr. Bell: That is under the Whanau claim.

Mr. Skerrett: That is quite clear. I am going to deal with the Ngaitai claim. All I have done is to state the case of my clients. According to my clients the Ngaariki were for many generations in possession of this land; secondly, they are the Ngaariki under another name; and, thirdly, according to their contention the Ngaitai only recently and in quite modern times came into possession of part of Tunapahore as guests under the hospitality of the Apanui, the Ngaitai being pressed by the Whakatohea, and being afraid to return to their own kaingas. Now, I desire to put before the Committee the Ngaitai claim, because I want to show that that is founded on possession, because if I can show that the Ngaitai founded their claim on possession, then I can show this Committee that there can be taken only one view of their claim, and that is that they have none. That is why I am pressing this point—my whole object is to show that the Ngaitai claim must be shown by possession of the block, because I can show by judgments of the Court that the Ngaitai could never have been in possession of this land; they did not know the position of the pas and the cultivations, because those pas were known and pointed out by my clients the Apanui. If I can show that their claim must be founded on possession, then I can show you that they have no claim at all. Now, I propose to show the Ngaitai's claim, and hope to do it as fairly as possible. I understand the Ngaitai base their claim upon an ancestress, Torere-nui-a-rua, who landed at Torere in the Tainui canoe. Torere is just near a pa. [Place pointed out on plan.] That unquestionably and indisputably is their land. Now, I would point out this: that the Ngaitai claim that they were in possession of this land Tunapahore for twenty-six generations, with the exception of one generation, which I will presently mention, and two short intervals which need not be considered. I pause here to ask the Committee to consider whether, if it is true that this tribe was in possession of this land Tunapahore during twenty-six generations almost continuously, with the exception of one generation, does this Committee, or could any intelligent Committee, believe that they would not have known all about the pas on the block? This Tunapahore Block only contains about 1,000 acres of habitable land, therefore the extent to which the pas and kaingas would go would be only about 1,000 acres; and if that is true—and this is the whole basis of the Ngaitai claim, that they were in possession of it for twenty or twenty-five generations—then it is incredible that they should not have known of the pas on this small block of land. I will quote from Judge Scannell's judgment on the Ngaitai claim. He says, "Ngaitai claimed that the Kapuarangi Block formed part of the tribal estate from the time of their ancestress Torere-nui-a-rua, who landed at Torere from the Tainui canoe twenty-six generations ago, down to the present time, and during all this time has been in their exclusive possession, except during the time of the Ngaariki-Rotoawa occupation, to be referred to further on, and two short intervals—once when the tribe visited Hauraki, and again during the visit to Turanga, the absence on each occasion being only for a comparatively short period, and that on their return each time they found the land unoccupied and resumed occupation." The history of the Ngaariki-Rotoawa is then stated by Judge Scannell as follows: "As already mentioned, Ngaitai claim that Tunapahore and Kapuarangi were part of their tribal estate from the most ancient times, and that the Tunapahore, or coast portion of the land, was occupied by the bulk of the tribe from generation from the days of Torere-nui-a-rua down to the times of Karoku—a contemporary of Apanui—a period of fifteen generations, when a refugee tribe from some part of the Turanga district, whence they had been forcibly expelled, called Ngaariki-Rotoawa, came to Tunapahore, having travelled along the coast through the Ngatiporou and Whanau-Apanui districts unmolested; that these refugees were hospitably received by Ngaitai, and located on a part of the Tunapahore Block, which the Ngaitai vacated for that purpose. On the marriage of one of their important women, Patunga, with the Ngaariki chief Whakapakinga, which appears to have taken place immediately after the arrival of Ngaariki, a part of Tunapahore—only according to the Ngaitai evidence—was at first given up to Ngaariki, but eventually the whole of that block was, it is said, left to them, the Ngaitai, with the exception of a few persons related to Patunga, retiring to Torere. The Ngaariki-Rotoawa, according to Ngaitai, continued to live at Tunapahore till Whakaihu, the child of Whakapakinga and Patunga, grew up to manhood, and became chief of the tribe, when dissensions, the cause of which it is unnecessary to enter into, arose between the two tribes, resulting finally in the expulsion of Ngaariki first from Tunapahore, afterwards from Tirohanga, where they had settled, and eventually from the district, Ngaitai resuming occupation of Tunapahore, and residing on the land down to the year 1858, when they went to Torere, this latter migration, they say, being the consequence of a quarrel with Whanau-Apanui, brought about by that tribe encroaching on their land at Tunapahore, where a few of them had settled at first in consequence of the marriage of two of their women with two chiefs of Ngaitai, and this led eventually to a claim being made to Tunapahore by the whole of the Whanau-Apanui—or Whanau-a-Harawaka—and that when peace was made in 1856 it was on the conditions that Ngaitai should go to Torere and Whanau-Apanui to Maraenui, Ngaitai carrying out their part of the terms, but Whanau-Apanui disregarding them." Now, it will be seen from what I have just mentioned that the whole claim of the Ngaitai is founded upon a long continuous possession of this piece of land; secondly, that they allege that their possession was interfered with at the time of the reception of the refugee tribe—that is, the Ngaariki. What they do not know, or what they do not mention, is where the Ngaariki came from. No one knows, according to the Ngaitai account. According to the Apanui, "They were our people

—they were a branch of us. We lived with them until quarrels arose, and we expelled them." The Ngaitai did not venture to say who the refugee tribe were. These are the two claims, and I venture to submit that I have conclusively established that they are both based on occupancy. I am going to give you the evidence of occupation, and I may ask any member of the Committee, sitting as a Judge, whether he would attach the slightest importance or value to the evidence of possession of the Ngaitai. I will read the evidence to you with little or no comment. This is Judge Scannell's judgment in 1895 upon the facts as to occupation—and I direct the Committee's careful attention to it: "From the evidence given, and its contradictory nature, it appeared to the Court to be absolutely necessary, in order to enable it to arrive at a decision satisfactory to itself, that an inspection of the Tunapahore Block should be made. It was admitted on all sides that this was the settled part of the common land, and each party claimed constant occupation of that block from the earliest times to the exclusion of the others, and each also claimed that all the marks of occupation on that part of the block belonged to them. At this inspection it was clearly seen that Ngaitai could never have occupied as they claimed. Within a comparatively small area there were found to be at least a dozen old pas of which they had no knowledge whatever. It would have been impossible for any tribe to have occupied the land as the Ngaitai claimed to have done from the earliest times, and remain in ignorance of such prominent and important marks of occupation. These pas are mostly close to the coast, and could not have been unknown to any living on the land for one or two generations, much more to one who had lived on it, as Ngaitai claimed to have done, during twenty-five generations—that is, from Torerenui-a-rua's time down to 1858. All these pas, and others, together with other marks of occupation, were pointed out and named by Whanau-Apanui and Whanau-a-Harawaka. From the evidence given in the case, and the result of the inspection of Tunapahore, the Court is of opinion that the claim of Ngaitai to Kapuarangi, as part of their tribal estate, has not been sustained, and the claim is therefore dismissed." Now, if you once arrive at the conclusion that whoever was in occupation of this land was the rightful claimant, can any one doubt that the Ngaitai never had occupancy? Judge Scannell went on the land himself, and they could not point out those pas. Judge Scannell says that if they had lived there only a generation or two it would have been impossible for any tribe to have remained in ignorance of such prominent and important marks of occupation, let alone twenty generations. Now, it does not stop there. I am going to read a short passage from the Native Appellate Court's judgment in 1898: "The judgment in Kapuarangi was based largely upon the signs of occupation at Tunapahore, as pointed out by Whanau-Apanui and Ngaitai respectively to the Court when it went to inspect that land; and especially upon the fact that at least a dozen old pas on that land, pointed out by Whanau-Apanui, were entirely unknown to Ngaitai, although they assert a continuous occupation of that land for twenty-six generations. It was inconceivable to that Court, and is equally inconceivable to this Court, that a tribe in continuous occupation of land from ancient times should be ignorant of the sites of the pas that formerly stood upon it. Moreover, there is considerable discrepancy in the Ngaitai statements about these pas. One witness at the Tunapahore hearing knows of comparatively few, another knows of more; and at the hearing of Kapuarangi it was evident their knowledge of the pas had considerably improved from what it was during the hearing of Tunapahore, leading irresistibly to the conclusion that they had gained their extra knowledge either during the hearing of Tunapahore and of the Whanau-Apanui case in Kapuarangi, or that they had since made an inspection of the land. It also appeared from the Ngaitai evidence that considerably more than half of those pas had been built by Ngaariki, not by Ngaitai." You see the importance of this: "It also appeared from the Ngaitai evidence that considerably more than half of those pas had been built by Ngaariki, not by Ngaitai." That is conclusively in favour of our case, because our case is that the Ngaariki occupied this land for generations—that we are the Ngaariki, the descendants of Ngaariki. The case that my friend's clients must make is that the Ngaariki were only on the land for a generation. How is it that these pas are not Ngaitai pas, not Apanui pas, but Ngaariki pas? The judgment continues, "This brings us to the next point—viz., the alleged conquest over Ngaariki by Ngaitai, or by Whanau-Apanui. As Ngaitai admit—indeed, assert—that most of the pas on Tunapahore Block were built by Ngaariki, it is important to decide who these Ngaariki were. Ngaitai assert that they were a tribe of refugees from the Turanga district, that they came up the coast and were received by Ngaitai as visitors, and that they lived on Tunapahore for about one generation, and were then driven out by Ngaitai to the westward, when their association with Ngaitai ceased. Now, it is hardly credible that a party of refugees could in one generation build the greater part of the pas on this block, which are over forty in number. Again, Ngaitai speak of only one intermarriage between themselves and this party of refugees—viz., that between Patunga, a woman of Ngaitai, and Te Whakapakinga, of Ngaariki. The issue of this marriage was Whakaihu, and beyond this Ngaitai know nothing of the descendants of this party of refugees, whom they call Ngaariki-Rotoawa. Their advocate, Hone Patene, strove to show that the Ngaariki, now living at Whakatane, and who at the former hearing set up a claim to Tunapahore, are descendants of the Ngaariki-Rotoawa driven out by Ngaitai, but without success; for the Ngaariki witnesses set up lines of descent from ancestors connected with Whanau-Apanui, whereas Ngaitai generally deny that Ngaariki-Rotoawa had any connection with Whanau-Apanui. It is true that Ngaariki witnesses claimed descent from Whakapakinga and Patunga, but Whanau-Apanui say that Te Whakapakinga was descended from the ancestors through whom they claim, and give his line of descent, while Ngaitai do not know from whom he was descended. Under these circumstances the Court must conclude that Te Whakapakinga was descended from the Whanau-Apanui ancestors." I skip the next paragraph in the judgment, as relating to Wi Pere, and go on to the following one: "The Whanau-Apanui also say that Ngaariki formerly lived at Tunapahore, and that the Ngaariki who were driven westward were a section of their

own people with whom disputes had arisen, and that it was the ancestors of the present Whanau-Apanui, not Ngaitai, who drove them out. They also assert that the present Ngaariki—*i.e.*, those now living at Whakatane—though related to themselves by ancestry, lost any right to the land when they were driven out. This agrees with the statements by Ngaariki themselves as to their ancestral descent. The Ngaitai have not pointed out any important inconsistencies in the Whanau-Apanui statements regarding Ngaariki. The Court is therefore forced to the conclusion that the Ngaariki, who at one time lived on Tunapahore, were a section of the people now generally known as Whanau-Apanui. And as Ngaitai admit that most of the pas on Tunapahore were built by Ngaariki, Whanau-Apanui case is considerably strengthened. It is not denied by Whanau-Apanui that Ngaitai did live on Tunapahore Block for a time, commencing about the year 1835, when, as Whanau-Apanui allege, Ngaitai were placed there by Whakatane, a Whanau-Apanui chief, to keep out of the way of the vengeance of Whakatohea, a section of whom they had just defeated at Te Muhunga, in the Turanga district. It is quite evident from the account given of numerous fights, that Ngaitai were a brave people not backward in upholding their own prestige. But they were a small tribe as compared with their neighbours on either hand—the Whanau-Apanui and the Whakatohea—and about this time it would seem that they had been somewhat weakened, as would appear from their migrations once to Hauraki and twice to the Turanga district. It is therefore not incredible that on this occasion they may have stood in need of and have accepted from Whanau-Apanui protection against their powerful neighbours the Whakatohea. Be this as it may, only two explanations are given of the occupation of Ngaitai at Tunapahore. One is that they were placed there by Whakatane, the other that they had lived there from the time of their ancestress Torere-nui-a-rua, twenty-six generations before. The Court cannot accept the latter alternative, chiefly because of the Ngaitai ignorance of the old pas on the land. It is therefore compelled to adopt the other alternative. It is supported in adopting this view by the fact that practically all the instances of occupation either on Tunapahore or Kapuarangi adduced by Ngaitai can be referred to the period of their alleged residence on Tunapahore about 1835 by permission of Whakatane. Almost the only definite act of ownership alleged, prior to that time, is the tree said to have been felled by Te Kaiwhakaruaki for a canoe. The canoe, however, was never completed, in consequence, Whanau-Apanui assert, of the objection raised by them. Another point in the Ngaitai case is their assertion that Whanau-Harawaka, some members of whom they admit had a right to and lived on the land, did so (1) by right of their descent from Te Whaki, a Ngaitai woman who married Apanui, the ancestor of all Whanau-Apanui, including Whanau-Harawaka; and (2) in consequence of later intermarriages with Ngaitai. The first assertion is incredible, (1) because there are no descendants of Te Whaki now amongst Ngaitai, proving that when Te Whaki married Apanui she entirely abandoned Ngaitai, and threw in her lot with her husband's people; and (2) because nearly all Whanau-Apanui can trace descent from Te Whaki through her son Harawaka. So that, even if the right did come from Te Whaki, it would avail Ngaitai nothing. The second assertion cannot be believed, because nearly all the descendants of these intermarriages are, properly speaking, Whanau-Harawaka or Whanau-Apanui, not Ngaitai—the male side in nearly every case being the Whanau-Apanui or Whanau-Harawaka side. It seems to us, therefore, that those persons of Whanau-Harawaka who lived on the land did so by right from the Whanau-Apanui side, and the Whanau-Harawaka occupation is no ground for saying that Ngaitai have any right to the land." Now, these pas I beg to call the Committee's attention to were big pas, some of them having walls as high as 20 ft. They were some forty in number, on a small area of about 1,000 acres; and yet these people, who base their claim on occupation, were unable to describe them, notwithstanding an alleged occupation of from twenty to twenty-five generations. I submit, therefore, that we have shown that we have had the judgment of four Courts substantially in our favour, and it has been reversed by the Commission, but not by the original Commission which Parliament set up, because the Commission did not have the benefit of Mr. Fraser's assistance. The reason given—and I am sure the Committee will pardon the necessary criticism of the result of the Commission—seems to me to be very inadequate. This is the statement: "Upon a review of the whole of the evidence we are of opinion that the balance is in favour of the Ngaitai claim as to the original ownership of the land, but the Whanau-a-Te-Harawaka have by their occupation of certain portions clearly established a right to share in it. This joint ownership becomes easily intelligible when the close relationship established between the two tribes by marriage is taken into consideration. Apanui himself had two Ngaitai wives, of whom Te Whaki, the mother of Te Harawaka, was one, and several other marriages between members of the two tribes, followed by residence on the land, took place in subsequent generations. We do not think any other section of the Whanau-a-Apanui has satisfactorily established a claim." Now, sir, upon the face of this judgment it is difficult to understand how these gentlemen arrived at this conclusion. The whole title on both sides depended upon occupation. How, then, could these gentlemen, in face of the admitted evidence, exclude the claim of the Apanui and allow the claim of the Ngaitai? The Commissioners speak of intermarriages between the Ngaitai and the Apanui; but that is completely explained by the judgment in the Appellate Court, which must have been overlooked by the Commission. Judges Edgar and Johnson, speaking of that intermarriage, say, "The first assertion"—that is, the assertion that they claim through the marriage of Apanui with Te Whaki—"is incredible, (1) because there are no descendants of Te Whaki now amongst Ngaitai, proving that when Te Whaki married Apanui she entirely abandoned Ngaitai, and threw in her lot with her husband's people; and (2) because nearly all Whanau-Apanui can trace descent from Te Whaki through her son Harawaka; so that, even if the right did come from Te Whaki, it could avail Ngaitai nothing." Now, apparently the Commissioners differed from that conclusion. One feels always the difficulty of the objection that there must be an end to litigation at some

time or other, but I would point out that we have been stripped of the benefit of four judgments by the judgment of an informal tribunal which has been held long after the period when the evidence was fresh, and which has not heard the evidence which was brought before the Native Land Courts which gave judgment in the matter; and we therefore ask that the matter should be delegated to a further tribunal. We suggest that it be referred to two Judges of the Native Land Court, who should, if they see fit, determine the matter after hearing further evidence or after hearing counsel on behalf of either party. I think they should review the judgments on the evidence, including the judgment of the Commission, and decide who are the owners of the Tunapahore Block. I may add that the Kapuarangi Block has lately become of no importance, because Ngaitai has sold its portion of the land to the Government and got the proceeds. There is only one other observation I wish to make, and that is this: As another reason for opening the case, incredible though it may seem, the whole of the kaingas and cultivations of the claimants are given away by this judgment to their opponents, which seems to me to be extraordinary on the face of it. That is what has been done in this matter. Now, an attempt has been made to alter this. There was a petition to this House by the Harawaka, and it was suggested that the matter should be left to the Hon. Messrs. Carroll and Ngata. The Harawaka submitted the claim to Mr. Carroll, Mr. Ngata being unable to attend to it, and he awarded the kainga referred to 170 acres, and Mr. Ngata has extended that to 270 acres.

Hon. Mr. Ngata: Mr. Carroll's award was prior to the recommendation of the Committee.

Mr. Skerrett: I do not think it is a matter of very great importance. The fact I want to mention is this, that the award to the Harawaka was merely an award of the kainga referred to as part of the cultivations, and was not intended to affect their claim, or the claim of Apanui, who got nothing under this award, to the other portion of the land. Under all these circumstances we ask with some confidence that this matter should not be permitted to remain in its present position, but should be referred to some competent tribunal. I think the Committee will see from the brief statements I have made that it is not surprising that the Apanui, whom I represent, should feel themselves to have been grossly and cruelly outwitted by the claim of the Ngaitai, founded on occupancy which, to use the language of the learned Judge, was incredible. I do not think I can be of any further assistance to the Committee. May I ask this: Do the Committee think it would be of any use for me to call any evidence in support of this petition? The facts are common ground. We have discussed the matter on the basis of the judgments and proceedings of the Courts, and not upon extraneous matter.

Mr. Herries: What is the position of the Harawaka?

Mr. Skerrett: I suppose the Harawaka concur in this litigation. There is some one here representing them.

Mr. Herries: Are they prepared to have the matter reopened, and possibly lose what they have.

Mr. Skerrett: Yes.

Mr. Bell: These Apanui who are now petitioning are not in the block at all, so they have nothing to lose.

Mr. Herries: Is the claim on occupancy and ancestry?

Mr. Skerrett: Yes.

Mr. Herries: You lay more stress on the occupancy?

Mr. Skerrett: Yes, that is the only proof that is capable of ancestry. The Ngaitai claim from Torere-nui-a-rua, and they claim consistent occupation except during a disturbance by the refugee tribe whom they expelled. There is one very curious thing: That one tribe was expelled is certain, because the dates agree. It agrees pretty well with the date when the Apanui say they put out their neighbours. We say we turned them out; the Ngaitai say they turned them out. The Ngaitai say they were in occupation of Tunapahore, and we say we were.

The Chairman: With regard to taking further evidence, the Committee will decide that later.

WEDNESDAY, 26TH OCTOBER, 1910.

(2.)

Mr. H. D. Bell, K.C.: I am afraid I was right, sir, in wishing to go on with my address yesterday before the Committee rose, because I see that I shall scarcely have the same judges to address as my learned friend Mr. Skerrett had. I hope, however, to make my position with regard to the Ngaitai clear, and I also hope to be as brief as he was. I desire to make it clear at the outset that, while as to the Ngaitai, whom I represent, there is no possibility of mistake, there is just this possibility of error as to the petitioners. The Apanui as a tribe have been left out, and Harawaka, a sub-hapu of Apanui, have been admitted. When speaking of the Apanui the Commission sometimes mean the whole tribe and sometimes mean the hapu of Apanui who were admitted.

Mr. Herries: The judgment in the contest between the Apanui and Ngaitai.

Mr. Bell: The general contest. Whanau-Apanui, of course, means the whole tribe. In the list Apanui means the hapu which was admitted. I am unable to avoid possibly apparent confusion, and want to make it plain that that difficulty may present itself. The Harawaka who were admitted were descended from Ngaitai through the lady who married Harawaka. Mr. Skerrett put the matter in this way: He said that a tribe named the Ngaariki had been in occupation before the arrival of the Tainui canoe, and then upon the arrival of the canoe marriages took place as the result of which Apanui are the Ngaariki. That is to say, he claims

that they are the same people as the Ngaariki, who, he says, were there before the canoe. Then he sought to establish an exclusive ownership of the land in Apanui, and a continuous exclusive occupation. What my learned friend Mr. Skerrett avoided was reference to and any attempt to explain the fact — because this fact is admitted by the Apanui — that Ngaitai was from time to time in occupation with them of this very land. Now, there has been no reference whatever to that before the Committee, but it has been proved further by the judgment and from the admissions of the Apanuis themselves, so that, whatever may have been the occupation of the Apanui, it certainly was not exclusive of the Ngaitai. Then, my learned friend referred to certain evidence with regard to the old pas. I will deal with that in detail, but I want to show the Committee at the outset that it proves far too much. Of course, Mr. Skerrett was logical enough when he stated (*a*) Ngaitai never occupied that land at all, and (*b*) that he could prove that by their ignorance of certain old pas which were built by the Ngaarikis. But if it is admitted that the Ngaitai were in occupation of the land with Apanui—admitted, I mean, by Apanui —then, of course, the evidence of ignorance of the pas cannot prove that they were not in occupation when it is admitted that they were, so that he proves too much. The point I want to make now is that Mr. Skerrett depended upon exclusive occupation; but there are certainly admissions not only in the judgments, but in this very petition, that the Ngaitai were in joint occupation of these very lands for thirty years. Therefore if some of these persons must have known of the existence of these pas, then the argument falls to the ground. Then, finally, my learned friend Mr. Skerrett said he had the judgments of four separate Courts in his favour; and that to me is an astonishing argument, and I will endeavour, quite briefly, by reference to the judgments themselves, to show that there is no foundation whatever for Mr. Skerrett's contention on that point. I say that he has not those judgments in his favour. On the contrary, I claim the several judgments to have been in favour of the Ngaitai with the exception of two—of Judge Scannell's—which I will show the Committee were reversed by the Appellate Court itself, and not by the Commission. Now I come to the point upon which we are not at issue. Mr. Skerrett says that the three blocks—the Tunapahore, Kapuarangi, and Takaputahi—are practically all one, that the boundaries are surveyors' boundaries, and that the three blocks together constitute a block occupied by the people, whoever they may be, practically as one. That I do not dispute. It is so found, and I will refer to it in the petition and by the several Courts. It is admitted by all the parties before the Courts, and admitted by the Apanui before the Commission. And Mr. Skerrett relies on it, because he brings in the judgment of Judge Scannell as a judgment affecting the Apanui—rightly enough. One judgment is wholly reversed, and the other reversed as to part. If you take, then, this foundation, that the three blocks are practically a series—that the divisions are surveyors' divisions, and you are to treat Tunapahore, Kapuarangi, and Takaputahi practically as one—then you have the decision of Judge Mair, and the decision of the Appellate Court, before the Commission sat, that these blocks were held in common. Now, Ngaitai were equally entitled with the Apanui in the blocks which have a common derivative title. If you take the three blocks as one, then you find that the ascertainment of the block as one block in three divisions has been partly Ngaitai and partly Apanui. Now, the Committee is aware that the lands lying to the westward of Tunapahore—when I speak of Tunapahore I mean the collective three, although I have occasionally to refer to it in its individual character—indisputably belong to the Ngaitai who occupied it, and on the other side of these blocks the people who descended are entitled. Now, this individual block of Tunapahore is a piece of land on the coast—low-lying land which the Courts appear to say was the natural land the Natives would have settled on. The big blocks were only for hunting and catching birds, and the probability is apparent to every one that the occupation of this piece of low-lying land would have been naturally close. Remember that these people were fighting together until 1858—that is to say, on the Torere side the Ngaitai would have had their hapus in cultivation, and on the other side of Tunapahore the Apanui would have had their cultivations and homes. Now, I would remind the Committee that the only available materials are the judgments. The minute-books are not available. They are in Auckland. And I am unfortunate in not being able to bring the matter out in detail. But from the judgments I think enough can be arrived at to see that the Commission came to a just conclusion from the Native Land Court's decisions. Having said so much, I turn to the petition itself. If you will refer to paragraph 8 (d) of the petition, which I will read, you will find it is thus stated: "The many pas within the Tunapahore Block were, according to the Ngaitai statements, built by Ngaariki, and only very few pas were built by Ngaitai. Your petitioners say the same, except that the Ngaitai built no pas. Ngaitai say that these people only lived here a short time and then went away." So there is this admission by the petitioners, that these pas were built by Ngaariki, not by Apanui, and these are the pas with respect to which ignorance is alleged. In paragraph 9 it says, "Even though Ngaitai and Te Whanau-Apanui were many times combined when they were fighting with one another or fighting with other tribes." You see that is an emphasis of the fact that these two peoples were living in friendly amity on this common boundary. They were not peoples fighting one another, but were fighting with other tribes, and many times combined. "Ngaitai were originally a large and powerful tribe, but because of their continual defeats by Ngatiporou, Ngatimaru, Ngapuhi, Ngaiterangi, and Te Whakatohea, they became fewer in number, and powerless, and that condition of things having become so continuous right down to the close of their going to Turanga as the companions of Te Whanau-Apanui, they were afraid to remain living at their kaingas at Torere, and sought the Whanau-Apanui to protect them."

Mr. Skerrett: That is in 1835, remember.

Mr. Bell: That is so. But I wish to read passages of the petition which establish the fact that there was a joint occupation. They were living together and fighting on the boundary, and when they became weak they sought the Whanau-Apanui to protect them. "A. Ngaitai are a tribe who migrated at many times, so that Torere was abandoned. There was one migration

to Hauraki, two to Turanga, one to Omaio, and three to Maraenui, and Torere was forsaken for many years—not a single person remained living on the land." So that, according to Apanui, for some time antecedent to the occupation of 1835 there was not a single person living there and could not have had any acquaintance with the land. "B. Te Whanau-Apanui caused Ngaitai to migrate from Turanga after the fighting by Te Aitanga-a-Mahaki, Te Whanau-Apanui, and also Ngaitai, against Te Whakatohea, and Te Whanau-Apanui placed them on Maraenui, and afterwards returned them to their own land at Torere. C. Subsequently a chief of Ngaitai died, and Te Whanau-Apanui went to the tangi and to visit Ngaitai at Torere, and while they were there they heard a word expressed by Te Whakatohea proposing to attack and slaughter Ngaitai in revenge for their having suffered defeat at Turanga. D. Because of this report Whakatane and Rangipaturiri, who were chiefs of Te Whanau-Apanui, proposed to take Ngaitai to the southern side of Tunapahore to live, so that they might be close to Te Whanau-Apanui to protect and assist Ngaitai, and Ngaitai were taken at that time and located at that place, and Te Waaka Patutoro was placed in the position of their chief. E. They had not been living there for long when they began to interfere with the cultivations of Te Whanau-Apanui, and through this evil work on the part of Ngaitai they were told by Te Whanau-Apanui to return to Torere, and Ngaitai replied to them in this wise: that they 'refused to move, as they were the anchor of a man-of-war' (an epigram). F. As the result of this evil work of Ngaitai a fight arose between these peoples in the year 1856, and subsequently peace was made by Hakaraia, and Ngaitai returned to Torere, and Te Whanau-Apanui remained in occupation of this land." To summarize that, the Committee will see that on the petitioners' own statements, which I am adopting for my present argument, between 1835 and 1858 these people, the Ngaitai, were in occupation of that southern part of Tunapahore—that is to say, they were in occupation of the very land which has been awarded to them, and therefore, if it be the fact that the land was in their occupation they must have known of the pas. These people did know of the pas. The explanation is that what took place in 1858 was that Hakaraia directed that both sides should depart wholly from Tunapahore. Ngaitai went in accordance with the terms of the truce, and Apanui would not go. So that since 1858, admittedly, Ngaitai have been obeying the terms of Hakaraia's judgment, and the result of it is that they were not in the same position as people living on the land to point out the locality of the pas. The matter came before the Court where these pas were brought into question, in 1895, nearly forty years afterwards, and the Court took it from the people who had not been on the block for thirty-three years, and, according to the Court, must have known the pas if they had been in occupation of this land, and then they were asked to come into competition with people who had been there all the time. It has been proved that they were in occupation, and it is said that they should have known if they did not know, after a lapse of forty years, specific details in connection with those pas. Now, if you go to 11E, you will see that the petitioners say, "The hearing of Takaputahi Block took place before Judge Scannell in the year 1895, and, even though Tunapahore, Kapuarangi, and Takaputahi are three separate lands, they are all one land. That is why so much has been said about these lands actually resting on the occupation and workings of Tunapahore." So that it is not my learned friend Mr. Skerrett, but these gentlemen, who say that if you find the decision affecting one of these blocks it will affect them all. Then, if you look at 11G you will find that there is only one place of burial of the Ngaitai: "G. As to the burial-places of the dead, there is only one burial-place of Ngaitai which is admitted by us in the southern partition—*i.e.*, Whiroariki alone." That refers to us. If you attach any weight to the burial-place, it says that they were there dating from the actual time when they were placed there by Te Whanau-Apanui. The Appellate Court gave Takaputahi wholly to Ngaitai. Judge Scannell had given the whole of Tunapahore to Apanui.

Mr. Skerrett: But they emphatically confirm Judge Scannell's judgment in connection with Tunapahore.

Mr. Bell: My friend is still evading the fact of his own admission, that the three blocks are one.

Mr. Skerrett: Not at all.

Mr. Bell: Well, it seems so to me. I will leave the petition now, and take Judge Mair's judgment. To my astonishment, my learned friend Mr. Skerrett stated that that judgment was in his favour. He referred to Judge Mair as an able Judge, and took the credit of his judgment. The judgment was to the same effect as that of the present Commission which is now being attacked. Judge Mair's judgment is given in the printed petition for rehearing by Whanau-Apanui, immediately after the judgment of Takaputahi, and was the earlier judgment of 1885. Judge Scannell's judgments were in 1895, and the Appellate Court's judgment in 1898. I should like to read a great dealt of it, but I do not wish to take up the time of the Committee. Judge Mair, in the second paragraph, says, "If then there is so much difficulty in ascertaining the truth about circumstances occurring only twenty-five years ago, and in which persons now in the Court are said to have taken a prominent part, how much more difficult must it be to estimate the value of evidence relating to events dating back many generations! On the question of ancient boundaries of this land we are not clear. It would appear that Tunapahore, or Motatau, as some call it, was at one period in possession of a tribe called Ngaariki, and the strong point in the claims both of Ngaitai and Te Whanau-Apanui is the conquest of that people, while Ngaariki, though admitting there was fighting amongst themselves, deny that they were conquered and that they lost their land. The Court does not think it necessary to seek further back for the title to this land, nor to inquire from whence Ngaariki came, nor how they acquired possession. That they did hold possession of it is evident from the number of old walled pas, which both sides state belong to Ngaariki." I want to emphasize that, because that appears throughout. These old pas were not the pas of either the Apanui or Ngaitai—they were pas built by Ngaariki, which

both parties admit were the original possessors. And Judge Mair says that both parties agreed to that before him. And who conquered Ngaariki? Referring then to the claims by conquest, he says, "The important points are, (1) Were Ngaariki really conquered, and driven away to other places? (2) If they were so conquered, what tribe conquered them and took possession of their land? We will take first the case of Te Whanau-Apanui: Their witnesses state that Apanui Ringamutu was the ancestor to whom the land belonged, and that his people, the descendants of Turirangi, were then known as Ngaariki; that a few generations after Apanui's time quarrels arose amongst them, not about the land, but in consequence of wrongs perpetrated by one family or hapu upon another family, and that the result was that one hapu, under the chief Te Whakaihi, was driven away, and another, under Te Tohi te Ururangi followed; that the land of these two sections was confiscated, the name Ngaariki blotted out, and that of Te Whanau-Apanui substituted. Very little is told of the subsequent history of Te Whakaihi, but Tohi returned to Maraenui on the occasion of the tattooing of his grand-daughter, made peace with the tribe, and was treated as a person of distinction, after which he returned to Whakatane. Te Whanau-Apanui state further that they have held possession of the block ever since. Ngaitai's witnesses state that they (Ngaitai) had been in occupation of the land for many generations when a people called Ngaariki-Rotoawa came to them as refugees from Turanga, were taken under the protection of Ngaitai and placed at Tunapahore; but after a time troubles arose between them and many were killed, and the rest were driven away by Ngaitai, who then reoccupied Tunapahore, and have continued to do so ever since, except when they had to leave their country for fear of Ngapuhi. Now, the two accounts of the exodus of Ngaariki are very different, but Ngaitai's appears to us to be the most probable, inasmuch as Ngaariki were quite a distinct people from Ngaitai, whereas Te Whanau-Apanui say that Ngaariki, whom they expelled, were their own flesh and blood." I do not know whether that is good Maori law, but it is good common-sense that Judge Mair relies on there. Here he says these two people agree that the Ngaariki were turned out, but Apanui say that they turned them out, and Ngaitai say that they turned them out, and Judge Mair says that he does not believe the Te Whanau-Apanui. "We now come to the question of occupation," he says at the foot of the page. "Te Whanau-Apanui, especially that section called Te Whanau-a-te-Harawaka, are closely connected with Ngaitai, and it is evident that for some generations at least both tribes have been living on the land. Whether or not one was living there under the mana of the other we cannot tell, but Ngaitai appear to have occupied the west end of the block and the Whanau-Apanui the other part. As far as we can judge, no boundary was ever defined between them." That is what he found then. His evidence is "for some generations at least." He does not begin it in 1833. He says, "Both tribes have been living on the land. Whether or not one was living there under the mana of the other we cannot tell, but Ngaitai appear to have occupied the west end of the block, and the Whanau-Apanui the other part." Then he disposes of Ngaariki, and he says, "Taking all these circumstances into consideration, we have arrived at the conclusion that the only just settlement of this question is by a division of the land." That is what practically each Court except Judge Scannell's has arrived at. He goes on to say, "We therefore award all that portion of the block lying to the westward of a line running from the mouth of Waiomuri Stream across to the southern boundary of the block, as shown on the map, to Wiremu Kingi and his fellow-claimants of Ngaitai, and the remainder of the block to Apanui." Then he adds, "It is after very careful weighing of the evidence and with the most sincere desire to do justice to all parties that we have arrived at this judgment, and we earnestly hope that both sides will accept this as a fair settlement of the question that has cost them much trouble and bloodshed in the past, and has defied all attempts in the direction of a peaceful solution." He compliments both parties on their friendly conduct. This is very important, because Mr. Skerrett said that the boundary fixed by Judge Mair is only a small portion. I should inform the Committee—this is the only point that I have not in the judgment, but I think probably my learned friend's clients will admit it — that this Hawai was the division fixed by the two halves. Judge Mair's division is this [shown on plan produced], dividing the west block into two halves. Instead of following the river, Judge Mair took a line, and left one strip to Apanui. In contradiction to my learned friend, who states that Judge Mair's judgment is in his favour, I desire to state that his judgment is identical with the report of the Commission. That division of Tunapahore by Judge Mair was not agreed to by Apanui, and they applied for a rehearing, but their application was dismissed, and in the year 1895 Parliament thought it right to grant a rehearing of this block Tunapahore. It was granted by a special Act—I do not know what the Act is generally called now, but it was what is understood as a "washing-up" Act—and the Act recites that the parties were not present through some mistake, and so the case was not properly heard. So Tunapahore came up for a rehearing, and in the meantime, in 1895, Judge Scannell had dealt with the other two blocks by his judgments. He awarded both of those blocks, Kapuarangi and Takaputahi, to the Apanui; so that in 1898 the Appellate Court, by force of the Act which had granted the right of appeal in Tunapahore and the right of appeal which actually existed in these two blocks, had in review the whole case in connection with these three blocks. I submit that it is very important, in considering Judge Scannell's judgments, to note that the assessor did not agree—there was dissent. If you will oblige me by referring to the judgment of Takaputahi, on the second page of the petition, at the top, you will see that he says, "The Takaputahi Block is very broken forest country, probably never permanently occupied, or, if so, at such a remote period that all traces of such permanent occupation have long since been effaced, and the Court felt that in weighing and considering the evidence as to present ownership, that given as to other contiguous occupied land and the facts ascertained in connection with those lands are the only 'cause'" [I presume that is a misprint for "means"] "of deciding the present ownership. Before proceeding further I must mention that the assessor, Mr. Edwards, and myself differ as to the conclusions to be arrived at from the

evidence as a whole, and that Mr. Edwards does not agree with me in the award about to be made." I do not know—possibly some members of the Committee may know—who Mr. Edwards was. Apparently he was a half-caste, and I suppose, by being appointed an assessor, he was a gentleman of some standing; but he ought to be, from his having been appointed assessor, a fair judge of such matters as Judge Scannell had to decide, which were not matters of law but matters of Native custom; and Mr. Edwards arrived at a directly contrary conclusion to that arrived at by Judge Scannell, and I conceive that must be of importance unless you are going to ignore an assessor altogether. He goes on, "Previous to the passing of the Native Land Court Act of 1894, if such a difference arose between the Judge and the assessor there was no option but to dismiss the case altogether, thus causing a waste of valuable time as well as of the money already paid in Court fees; but as by section 19 of the Native Land Court Act, 1894, the concurrence of the assessor in any order or judgment is not necessary to the validity thereof, the present judgment will stand valid until varied or reserved by the Appellate Court. Should the unsuccessful parties in the case choose to appeal, which no doubt they will, I have felt from the beginning and mentioned it in Court to all parties concerned when they pressed me to hear the case, that such a hearing would be merely to advance a step towards a final decision. I was aware, and said so, that whatever the decision was, even if the Judge and assessor agreed in that decision, the unsuccessful parties would appeal. It must be understood then that this judgment is not concurred in by the assessor. I will endeavour as briefly as possible to review the main facts put forward and relied on by each party in support of this claim." It is a pity that we have not Mr. Edwards's views, but all we know is that they were diametrically opposed to Judge Scannell's. I ask the Committee to refer to what he said at page (g) of the judgment: "The Court visited Tunapahore as well to test the knowledge of the proofs of occupation of the parties as to see those proofs for itself. Whilst no trace, or very slight traces, as I have said, remained of the cultivations mentioned by Ngaitai, there were over a dozen old walled pas of which they had no knowledge whatever as to name, locality, or history. These were not away in the forest, but for the most part on the coast or within easy distance of it—one especially was so close that travellers along the beach must pass within a few paces of it; it was on a slight rise now partly overgrown with trees, and hidden. The Ngaitai knew nothing of this—either its name, or how it came to be built, or who owned it, and never had any knowledge of it. It was the same with regard to four or five more along the steep ridge close to the beach between Hawai and Tokaroa; only one of all these was known to Ngaitai; and that was on the most conspicuous part of the spur looking west. Ngaitai had stated that one of their principal burial-places had no pa within a considerable distance of it. Whanau-Apanui stated the contrary, that the place they called the burial-ground was really an ancient and unmistakable pa. On inspection, the place was found to be an old pa, with some of the protecting walls 20 ft. high. It was the same in all the other places inspected, where Ngaitai alleged no pas ever stood. Pas were found still standing—not modern-built pas, but pas of ancient construction, and such as could not fail to be known to any residents of the land. Of all marks of occupation I hold the most important to be the old pas standing on the land. These remain traceable for generations, long after every other vestige of occupation is effaced by time; their names, location, and history are commonly known to almost every man, woman, and even child of the tribe owning the land—certainly to the elders of the tribe; and where such a people as Ngaitai, who have their own tribal history at their finger-ends, show such gross ignorance of such a number of pas on a comparatively small space of land which they claimed to have owned and occupied exclusively and continuously for over twenty generations, I can only say that such a claim of ownership appears to me to be pure fabrication." Now, just examine that for a moment. What Judge Scannell says is that these pas were not concealed in the forest, but were on the beach—they were manifest to every one—"one especially was so close that travellers along the beach must pass within a few paces of it; it was on a slight rise now partly overgrown with trees, and hidden." I quite conceive that my friend must feel the force of what I am saying, but the point I am endeavouring to make is this: that here are pas that must have been known to the people who were there, because they were on the beach. Now, these people were there by the admission of all parties. How can you, then, attribute ignorance of things they must have known? What I say is that for forty years, by force of the truce, they had not been there, and the old pas which had been built by Ngaariki had passed from their memory. No doubt they would have some sort of tradition of pas which they had built themselves, but they would not know the old pas except from recent occupation of the land. But they did once occupy the land, and therefore the ignorance attributed to them cannot have the evidentiary weight attempted to be given to it by my learned friend. I do not think I need trouble the Committee with references to the judgment in the Kapuarangi. Again, however, Judge Scannell goes to Tunapahore for his evidence, and again he refers to the question of the pas, and he gave both blocks to the Apanui. Then comes the judgment of the Appellate Court. It is almost comic in its result, because after saying that the three blocks are one, and after going to Tunapahore for their evidence, they give the whole of Takaputahi to Ngaitai, reversing Judge Scannell's decision; they gave 9,000 acres of Kapuarangi to Ngaitai, again reversing Judge Scannell's decision; and they reversed Judge Mair's decision in Tunapahore. Now, if the three blocks were one, you ignore the survey boundaries. Suppose you wipe them out altogether, then the ordinary course of partition would be the course they adopted: they gave one end of the block to Ngaitai, and the other end of the block to Apanui; and that is what I apprehend they intended to do. At all events, they admit having gone to Tunapahore for evidence, and, finding this about the pas, they proceeded to give one block to Ngaitai and 9,000 acres to another, being influenced by the fact that they did not know anything about these old pas. They felt themselves that there must be a division, and they divided the land; that, as I have said, was the judgment. That being the position, it then became evident that the Native

Affairs Committee of 1901 was not satisfied with the reasons given by the learned Judges in the Appellate Court. Whatever may have been the motive or the moving power before this Committee, and whoever may have been the petitioners, it is perfectly clear that this Committee, if satisfied with the judgment of the Appellate Court, would never have disturbed it. It is plain that this Committee was not satisfied, because it directed that this question should be dealt with, as they somewhat humorously call it, "finally," by a Commission which was to issue under the authority of the Act of 1901. My learned friend Mr. Skerrett referred—I do not know whether it was with sorrow or with pleasure—to the absence of one of the Commissioners; but the commission is not directed to three, but to two of them. So we have the Commissioners reporting, as set out in G.–7, 1904, and the commission is directed to three gentlemen, including the Chief Judge of the Native Land Court, or to any two of them. The inquiry took place, and they made their finding. I want to refer to one or two passages of that finding, but what puzzles me is why the report of this Commission should be treated with anything but respect. I do not know of any Judge of the Native Land Court who has ever carried greater weight, so far as his absolute fairness and determination to get to the root of matters is concerned, than the late Chief Judge of the Native Land Court, Mr. Seth-Smith. I do not say for one moment that he knew as much of Maori customs and habits as some other Judges, but this I do know: that the then Chief Judge did honestly and carefully endeavour by every means to arrive at the root and essence of every matter that came before him. As to the other gentleman, Mr. Hone Heke, who was a member of Parliament, all I have to say is this: that he was at all events independent of the relations of these two people. He came from the north, and he was a man quite fitted to advise and confer with the Chief Judge upon matters of Native custom and occupation; and I should suggest also a fair judge of the value not of the testimony, but of the witness who is giving the testimony. I apprehend that they practically confirmed the judgments of the Courts, which were under their review. I take Judge Mair's judgment of 1885, and I ask the Committee to remember that it is ten years before Judge Scannell's, and Judge Mair's judgment is practically adopted by the Commission as to Tunapahore. The Commission say that the three blocks were by consent of Apanui and Ngaitai treated as one. You will find that, in the Appellate Court, Kapuarangi and Takaputahi were taken together by consent of both parties because they were one. The Commission so treated them—that is to say, they dealt with these blocks as a single block divided by surveyors' boundaries, the ownership to be determined in favour of Apanui or Ngaitai, or both, and they found it to be joint ownership by awarding it to both. They found that that was the course taken by the Appellate Court which had practically so dealt with Kapuarangi and Takaputahi, whatever be their reasons. I say that no one can doubt that, the Court being presided over by His Honour Mr. Seth-Smith, it was a careful and honest attempt to settle these matters in accordance with the desire of the Committee and Parliament; and the conclusion they arrived at the Committee are perfectly aware of. I should like to refer to certain passages of the Commission's finding. Under the heading "Ngaitai Claim" they say, with regard to occupation, "The two tribes continued in joint occupation of Tunapahore, occasionally leaving the land on visits to friendly tribes or on hostile expeditions. On one of these occasions, while the Whanau-a-te-Harawaka were temporarily residing at Ohiwa, on the invitation of the people of that neighbourhood, many of them were treacherously killed. The survivors fled to Tunapahore, and sought and obtained refuge among their Ngaitai friends. The joint occupation was thus resumed, and continued until a quarrel arose in or about the year 1856, in which several hapus of the Whanau-Apanui took part against the Ngaitai." That is the reverse of the Apanui view. "The joint occupation was thus resumed, and continued until a quarrel arose in or about the year 1856, in which several hapus in the Whanau-Apanui took part against the Ngaitai. Fighting ensued at intervals extending over a period of two years, when peace was made on the intervention of a Native clergyman named Hakaraia." That brings us to 1858. "One of the conditions imposed by the peacemaker was that all parties should leave the land. The Ngaitai accordingly retired to Torere, but the Whanau-a-te-Harawaka, after some delay, refused to leave, and have continued to reside on and cultivate some portion of the land down to the present time. Then immediately follows their finding when dealing with the Apanui claim. They say, "In consequence of their repeated conflicts with Ngatiporou, Ngatimaru, Ngapuhi, Ngaiterangi, and Whakatohea, and other tribes, the Ngaitai, who had been a numerous and powerful people, had become much weakened—so much so that at the close of an expedition to Turanga as allies of Whanau-a-Apanui they feared to return to their own kaingas at Torere, and sought the protection of the Whanau-a-Apanui from the dreaded attacks of their old enemies the Whakatohea. In response to this appeal the Whanau-a-Apanui assigned to them certain places of residence on Tunapahore, and thus for the first time the Ngaitai became occupiers of this land. The Whanau-a-te-Harawaka, who derived their hapu name from Harawaka, the son of Apanui and Te Waki, support to some extent the evidence given by Whanau-a-Apanui as to the early history of this land, but they allege that apart from themselves no section of the Whanau-a-Apanui Tribe ever acquired any rights to this land, and that in the several contests and transactions with Ngaariki, Ngaitai, and others they (the Whanau-a-te-Harawaka), and they alone, were concerned as owners of the land. Upon a review of the whole evidence, we are of opinion that the balance is in favour of the Ngaitai claim as to the original ownership of the land, but the Whanau-a-te-Harawaka have by their occupation of certain portions clearly established a right to share in it." Then it goes on in this way: "It has been admitted by all parties that in ancient times the three adjoining blocks, now known as Tunapahore, Kapuarangi, and Takaputahi, were occupied by the Native owners as one undivided piece of land. Takaputahi and that part of Kapuarangi now known as Kapuarangi No. 2 are not before us on this inquiry, but we have found it necessary to admit some evidence of occupation of these last-mentioned pieces as bearing directly upon the ownership of the land under investigation. The evidence before us shows that, while the Ngaitai and the Whanau-a-te-Harawaka

were residing permanently on this land, the principal pas, kaingas, maraes, and urupas were on Tunapahore, the hilly country of Kapuarangi being occupied for the most part only during the hunting and fishing seasons." Of course, if that is true, it disposes of the whole of my friend's case, as the joint occupation by both was practically at Tunapahore, which seems to be common ground, which divided two admitted territories, and the hilly country was only occupied during the hunting and fishing seasons. "No definite boundaries appear to have been laid down for the purpose of locating the interests of the several owners, nor was there any boundary between the blocks now known as Tunapahore and Kapuarangi." With regard to Kapuarangi they vary the decision and divide the blocks. In the meantime I believe part of Kapuarangi had been sold, and that would leave Takaputahi as it was, because in the meantime these people had got the whole benefit of the Kapuarangi lands which had been sold. Now, the Committee has had some little experience—in fact, I rather feel in many ways ashamed of referring to some of these matters because I know they must be at least as familiar to the Committee as to me—but there is this to be said: that every member of the Committee must know—as my friend must know—that when you come to investigate what is the real test, occupation as the source of ownership, you find one party alleging that they have been in occupation and the other party alleging that they have been in occupation, and each party giving reasons why, if there has been joint occupation, the joint occupation shall not count against them. Here you find each party giving divers reasons—possibly honestly, though personally I doubt it; what I mean is that it is mere inventive genius—that is hardly fair; but it is a warped tradition they introduce on both sides when they claim joint occupation. When you find joint occupation, then, unless you can accept one clear explanation and can discard the other explanation, the only safe way to act is as the Courts have acted in this case. I say the Judges of the Courts have treated the joint occupation as a joint occupation *ab origine*, or a joint occupation so long ago as to be the foundation of the title. When you find that the two peoples have intermarried, and the circumstances given in detail in these judgments, then you have the basis of a friendly, joint, and common occupation established firmly by the intermarriages, which is the real, and probable, and common-sense root of the title; and thus the Court proceeds, after having ascertained that, and being unable to accept the doctrine of either as explaining the joint occupation, to award the blocks as far as possible in equal shares. That is what the Commission did. It is quite true that the Commission has accepted the explanation of the joint occupation in favour of Ngaitai, whereas the Appellate Court accepted the explanation of joint occupation put forward by Apanui; but still the joint occupation is there, whichever explanation you take. My learned friend says the Apanui only give an occupation of thirty-three years, from 1855 to 1888: still it is there, and it disposes of the ground of ignorance of the pas, because they were there and must have known of them, and if they did not know they ought to have known, because they were there; so that the ignorance of the pas built by Ngaariki does not appear to have been considered at all as of great weight by Judge Seth-Smith, as it would have been under other circumstances if two peoples were claiming unoccupied land. The true solution, I venture to suggest, is this: that Ngaitai had been away admittedly after the truce of 1858, and therefore they did not have the local knowledge which the Apanui, who lived on the ground, necessarily had; but that they had that local knowledge immediately precedent was very plain from the arguments my friend addressed to you. I am not going to dilate upon the obvious difficulties which must be in the way of an endeavour to obtain a new official hearing. Supposing this Commission's, and Judge Mair's, and the Appellate Court's decisions are all reversed by some new finding, who is going to be satisfied by that? Certainly not I and those I represent for the moment, and I cannot see how we could fail to make and establish a powerful case for further intervention by this Committee. I am not going to dilate on that, because it must be obvious, and it is no part of my business to emphasize a matter which must be perfectly obvious. Here you have had since 1885 a continuous course of inquiry which, with the exception of Judge Scannell's, with whom his assessor did not agree, and whose judgments were reversed, has established a joint ownership of these three blocks, treating the three as one block, and you find that confirmed by the Commission, and the whole course of the litigation is in favour of the joint occupation and the rights of the Ngaitai. I think, however, if I do not refer further to that, that I ought to inform the Committee, first, that the Land Transfer titles were issued after the report of the Commission—that is to say, the matter was apparently put an end to by the delivery of the Land Transfer title; and, second, that the Ngaitai title has been leased to Europeans. I do not say that ought to stand in the way of justice—certainly not; but it certainly should be a very grave consideration before the case is reopened to see where justice lies. If my learned friend could satisfy the Committee that the evidence was all one way—that these Judges had been perverse, that a monstrous injustice had demonstrably been done—then I should not have a word to say, because justice must be done. But that is not what he is seeking. He is seeking another inquiry to see where justice lies. To do that I maintain that he must establish something a great deal more than a *prima facie* case. He takes, or his clients take, their view of the title. They say, "We are the Ngaariki—we are their descendants—and we can prove that Ngaitai never had any right." Ngaitai can say, "We are the original owners, and we can prove that the Apanui never had any right." Well, some one has to decide between them. The answer is, that is the very matter which the several Courts inquired into, and which, it was hoped finally, the Commission inquired into. The fact of joint occupation was not in dispute, nor was it in dispute that these pas had not been built by either party. Between these two cases, as in all Maori cases of title, somebody has got to decide and somebody has got to be dissatisfied. It may be, for all I know, that Apanui has the better case, though I say Ngaitai has; but that proves nothing. No new evidence is suggested, no new matter is suggested, nothing is suggested as to the incompetence of the tribunal; but who was to decide? Certainly, in the first instance, the tribunal which is set up by Parliament to settle and determine such questions. It has been settled and determined,

and I venture to submit to the Committee that what is necessary—and not before the Native Affairs Committee alone—is that in all such matters if you are going to have a new trial you must establish, not that you have a strong case—but you must establish that you have an overwhelmingly strong case. No Court will grant a new trial because it is said that a Judge would have found differently if it had been heard before him. You must find that the Judge must have found wrongly in some special direction before a new trial can be granted. That is the rule of the Courts. There must be something like that here before this Committee, or there is no end to it. Let us assume that Mr. Skerrett has a strong case. I do not admit that, because I do not see how he can have, but I put it as strong as that against myself. Suppose there had been a continuous line of decisions in these Courts and the Appellate Court in favour of Apanui, and then suppose the Committee and Parliament after that sent the matter to a Commission for the purpose of reinvestigation and cancellation of titles. What is to happen before that Commission? Has the Commission no authority to reverse the continuous line of decision? If not, what is it for? It gives its decision. You have exhausted the Courts, you have exhausted the Commission, you have established your final Court of Appeal, which has given its decision, and then there is to be another Court. I venture to submit that that can only be established by the presentation of an overwhelming case by the other side, and I submit that, apart from the discussion of the merits, this Committee will properly dismiss the petition.

Mr. Herries: I want to know whether you maintain that the Harawaka and the Whanau-Apanui are practically the same—that the satisfaction given to the Harawaka by the Commission is practically giving it to the Whanau-Apanui.

Mr. Bell: No; they exclude the Apanui. It is the Harawaka alone who have been found to be in continuous occupation. We have not the least objection to Harawaka being left in with the Apanui in the Apanui's division, but it is clear that the position is this: that the Apanui put forward a claim, and that Harawaka insisted before the Court that they, and not Apanui, were entitled. They maintained a separate case, and the judgment was in favour of Harawaka.

Mr. Herries: You were speaking of joint occupation, and said Ngaitai practically admitted that, but that did not include Harawaka.

Mr. Bell: Yes, that is all they did admit.

Mr. Skerrett: The discussion between Mr. Bell and myself has made it clear what a plain and, indeed, simple case this is. As I said in opening, no difficult question of ancestry or question of Native law was involved in this case, but what was involved was one of simple fact: Who were the ancient occupiers of this ground, the Whanau or Ngaitai? The Ngaitai case involved two things: They had been there twenty-six generations, with the exception of one generation; secondly, that these Ngaariki were only in possession for a short generation. Now, my friend pooh-poohs the judgments of Judge Scannell and the Native Appellate Court upon this pure question of fact. Judge Scannell says that the ignorance of the Ngaitai of these old pas was incredible if they had occupied the land as they claimed, and that their statement as to their long occupation was a fabrication, and on his judgment Mr. Bell relies as being in his favour. The Native Appellate Court says it is incredible to think that people like the Ngaitai could have been ignorant of these things. I cannot help thinking that Mr. Bell in his explanation seemed to imagine that the learned Judges were referring to church steeples or some other prominent objects in the landscape. He says these people were in occupation of the land, and must have known of these pas, and therefore they did know of these pas. But that is the point—they did not know the pas. That is a fact that was ascertained clearly and distinctly, and therefore my friend's contention is quite inaccurate. It is quite clear that these pas were old pas concealed with brushwood and timber, and were unknown to the Ngaitai. If they had been known to the Ngaitai it would have been conclusive evidence of occupation. They were known by us and were pointed out by us, as is shown in the judgment. Now, I wish to point to another matter: Both parties admit that many of these pas were Ngaariki pas. My friend's case is that the Ngaariki were only in occupation for a generation. That is the case of the Ngaitai beyond any question. Read any judgment you please—you will find that the Ngaitai were the people who came in the Tainui canoe. They occupied this land for twenty-six generations, with the exception (so they say) of the admission of the Ngaariki for one generation to a joint occupation, and with the exception of two journeys, each occupying a short time, and when they returned and found the land unoccupied, we resumed occupation. Yet it is admitted that there are many pas which are Ngaariki pas, and could not have been erected in the comparatively short time of one generation. I have only one further observation to make: I may have taken a slightly favourable view when I stated that Judge Mair's judgment was wholly in our favour. You will remember that I pointed out that he gave part of the land to the Ngaitai. But my friend has sinned more grievously than I have when he has laid down the statement that the Native Appellate Court judgment is in his favour. I ask the Committee to read it. The Appellate Court, in the most emphatic terms, said it was inconceivable that the Ngaitai could have been in occupation of this ground, and the mere fact that they whittled down the Kapuarangi Block 9,000 acres is nothing at all. It will be seen that my friend's clients insisted that the occupation of Tunapahore did not affect the Whakatohea. At page 5 of the Native Appellate Court's judgment this is the Ngaitai's ground of appeal: "(1.) That it is part of the Ngaitai tribal estate, and that they alone occupied it, as shown by kaingas, burial-places, and other signs of ownership. (2.) That it is one land with Torere, which is acknowledged to be Ngaitai land. (3.) That the track leading inland from Torere to Peketutu, on the Motu River, is exclusively a Ngaitai tribal track, the tribal tracks of Whanau-Apanui and Whakatohea being in other places not on this land. (4.) That sufficient weight was not allowed to the agreement entered into in 1879. (5.) That too much weight was allowed to the Whanau-Apanui occupation of Tunapahore as establishing

the right of Whanau-Apanui to Takaputahi." It may be an inconsistency in the judgment, but that does not get away from the fact that you have to consider that these learned Judges in the most emphatic way disputed the occupation of Ngaitai in Tunapahore. One other point, and then I am done. My friend said that the Commission seemed to rely upon the relationship arising between the Harawaka and the Ngaitai by the fact that Apanui married Te Whaki, who was a Ngaitai. But I desire to point out that the Native Appellate Court, in dealing with that matter, say, "The first assertion is incredible, (1) because there are no descendants of Te Whaki now amongst Ngaitai, proving that when Te Whaki married Apanui she entirely abandoned Ngaitai, and threw in her lot with her husband's people; and (2) because nearly all Whanau-Apanui can trace descent from Te Whaki through her son Harawaka. So that, even if the right did come from Te Whaki, it would avail Ngaitai nothing." So that it is quite clear that any right arising from the marriage of Te Whaki to Apanui would not descend to the Ngaitai. My friend complains that we ask too little. I think we have: I think that upon the evidence we should have asked this Committee to give us the land, and restore the judgment of the Native Appellate Court. But we ask for something fairer than that. We say that the matter should be referred to three Judges, to review it, and to see if justice has or has not been done. I need hardly point out that no one wants to interfere with the registered rights of Europeans in the block.

Approximate Cost of Paper.—Preparation, not given; printing (1,500 copies), £7 18s. 6d.

By Authority: JOHN MACKAY, Government Printer, Wellington.—1910.

Price 6d.]