1915.

NEW ZEALAND.

NATIVE LAND CLAIMS ADJUSTMENT ACT, 1913:

REPORT AND RECOMMENDATION ON PETITION (No. 113 OF 1911) OF CHARLES SMITH AND TWELVE OTHERS RELATIVE TO THE INTERESTS OF MARARA TE KARAKA (DECEASED) IN TE MAHANGA No. 2 BLOCK.

Laid on the Table of the House of Representatives pursuant to Act.

In the Native Land Court of New Zealand.

REPORT OF THE CHIEF JUDGE OF THE NATIVE LAND COURT ON PETITION (No. 113 OF THE YEAR 1911) OF CHARLES SMITH AND TWELVE OTHERS TO PARLIAMENT, PRAYING FOR AN INQUIRY AS TO WHETHER THE INTERESTS OF MARARA TE KARAKA (DECEASED) IN TE MAHANGA No. 2 BLOCK COULD BE DEVISED BY WILL, AND FOR CANCELLATION OF GRANT OF PROBATE OF THE WILL OF THE SAID MARARA TE KARAKA.

In compliance with the provisions of section 2, subsection (1), of the Native Land Claims Adjustment Act, 1913, I referred this matter to the Native Land Court on the 23rd March, 1914. The Court sat at Wairoa on the 2nd December, 1914, and as no other Judge was available I held the inquiry myself, and elicited the following facts:—

1. The original restriction on the title to Te Mahanga No. 2 Block was as follows: "Inalienable by sale, or by lease for a longer term than twenty-one years, or by mortgage, except with the consent of the Governor being previously obtained to every such sale, lease, or mortgage." (This restriction does not bar an alienation by will: *vide* 2 Gazette L.R., p. 368, *re* Rauruna Takeke; and King *v.* Price, 7 Gazette L.R., p. 45.)

2. Marara Karaka was on the 26th June, 1879, appointed sole successor to Maata Kereponga, an original grantee in the land (Te Mahanga No. 2).

3. Marara Karaka made a will in favour of Arapeta Hapuku and his wife Oriwia Parone and the latter's child, Teone Ngaruhe. The will is dated the 19th November, 1890, and the restriction above set out is not in conflict with its provisions.

4. Wairoa Minute-book, Volume vii, folio 17, shows that in December, 1892, applications for the partition of this block were pending before the Native Land Court (Judge Barton), and that Piripi Purupuru applied that Tare Mete (present petitioner) should conduct his case.

5. On the 14th January, 1893, this partition case was again continued before Judge Barton (Vol. vii, folio 70), and Tare Mete said to the Court, "I could not see Arapeta Hapuku at Napier, but I told his wife that I would conduct the case of Marara, the successor of Maata Kereponga. Arapeta has always acted as conductor for Marara." The Court allowed him (Tare Mete) to act accordingly. On the 20th January, 1893, the subdivision of Te Mahanga No. 2 was completed by the Court and agreed to by its owners, and thereupon Tare Mete arose in Court and said (Vol. vii, folio 102), "It is the wish of all parties to have the land made inalienable." The minutes continue: "Objectors challenged. None appeared. Request granted. The land to be inalienable except by lease."

If the position is here reviewed it will be seen that Tare Mete, who was at the time appearing for Arapeta Hapuku, was by this action of having the land declared "inalienable except by lease" attacking the provision in the will of Marara Karaka, which was in favour of his own clients (Arapeta, his wife, and her child), unknown to them and behind their backs. It is quite possible that Tare Mete did not know of the existence of the will when he did so, but that excuse falls to the ground if he subsequently tried (as in the present case) to gain an advantage from what he then did in ignorance.

When the will was made it was, after probate, good and effectual in law to pass the interest of Marara Karaka, the testator, to Arapeta and his wife and her child, and it is questionable whether the order of restriction as above, made on partition some two years later by Judge Barton, even if otherwise valid—which is not admitted—was sufficiently retroactive to render

the effect of the will nugatory. It is true that a will speaks as *at the time of the death of the testator*, but this general rule applies principally to the property under disposition. The death of the testator took place after Judge Barton's restriction was ordered. I need not, however, go into a review of the effect of Judge Barton's restriction order upon a valid will existing when the restriction order was made, because I must point out that Judge Barton had no power to make the restriction order, and his act in that respect was a nullity.

Prior to the passing of the Native Land Court Act, 1886, which was an amendment and a consolidation of the Native-land laws then existing, the Native Land Court acted upon what was called the Native Land Division Acts. By section 4 of the Native Land Division Act, 1882, power was given to the Court when dividing—*i.e.*, partitioning—land to impose restrictions, or to alter or vary them. This power was frequently exercised by the Judges of those days, but section 115 of the 1886 consolidation repealed all these former Acts and with them this section 4 of the Native Land Division Act, 1882; and it did not re-enact section 4 aforesaid or any substitution thereof, so that after the passing of the 1886 Act there was no longer any power in the Native Land Court to impose or alter restrictions when it made a partition—that is, the restrictions existing on the original title were brought down automatically on the subsequent partition titles. The practice of the Native Land Court in those days was very lax, and a lot of the Judges did not notice this change, but continued without jurisdiction to impose or alter restrictions on division (partition); and in the partition of Te Mahanga No. 2 in 1893 Judge Barton, without jurisdiction, altered the original restriction as above set out. The effect of such alteration, if valid, would have been to thereafter prevent the will passing the land.

If the Native Land Court proceedings had not been so lax when Judge Barton made this order in 1893 he would have seen from the amending Act, No. 37 of 1888, section 13, that Parliament had taken notice of the mistakes made by the Native Land Court Judges, and had validated their restriction orders made on partition up to the passing of the last-named Act, and no further.

It will be seen from the above and from the address in the present petition matter given before me by the petitioner Tare Mete (*vide* minutes of proceedings hereto attached) that he has quite misunderstood the position.

In my opinion, Judge Barton's restriction order is valueless, and if it were not so Tare Mete could not in any case be said to have any merits in his favour, as he acted for the beneficiaries under the will, and without their knowledge induced the Court, no doubt unintentionally, to alter the original restriction so as to deprive them of their legitimate rights.

I therefore respectfully recommend that no steps be taken to interfere with the operation of the restriction imposed by original title for Te Mahanga No. 2 Block.

JACKSON PALMER,
Chief Judge, Native Land Court.

Wellington, 31st August, 1915.

Approximate Cost of Paper.—**Preparation, not given; printing (650 copies), £1 2s. 6d.**

By Authority: JOHN MACKAY, Government Printer, Wellington.—1915.

Price 3d.