1917.

NEW ZEALAND.

NATIVE LAND AMENDMENT AND NATIVE LAND CLAIMS ADJUSTMENT ACT, 1916.

REPORT AND RECOMMENDATION ON PETITION No. 116 of 1913, RELATIVE TO TE HAKA No. 7 AND TE TAPUAE BLOCKS.

Presented to both Houses of the General Assembly in pursuance of Section 24 of the Native Land Amendment and Native Land Claims Adjustment Act, 1916.

Native Land Court (Office of Chief Judge), Wellington, 29th August, 1917.

The Hon. Native Minister, Wellington.

Petition No. 116 of 1913, Waireti te Aohinga Tackata and Others.

PURSUANT to the provisions of section 24 of the Native Land Amendment and Native Land Claims Adjustment Act, 1916, I have the honour to transmit herewith the report of the Native Land Court (Judges MacCormick and Wilson) on petition No. 116 of 1913, of Waireti te Aohinga Tackata and others, praying that rents retained by the Government *re* Te Haka No. 7 and Te Tapuae Blocks be paid to them; and to recommend that the sums of £125 14s. 6d. and £87 14s. 6d., plus interest from the 16th October, 1917, computed at the rate which each sum respectively would have produced if it had lain in the Public Account for that period, be paid to such persons as the Native Land Court shall by a further and final order determine, and in such relative shares or proportions as the Court shall by such final order further determine.

The total amount payable under this recommendation is found to be £559 5s., computed as follows: Twenty-eight years, 16th October, 1889, to 15th October, 1917, at 3½ per cent. compound interest:—

		£ s. d.	£ s. d.
Te Haka No. 7—Principal		125 14 6	
Interest		203 13 6	
			329 8 0
Tapuae— Principal		87 14 6	
Interest		142 2 6	
			229 17 0
			£559 5 0

JACKSON PALMER,
Chief Judge.

Rotorua, 17th July, 1917.

SIR,— *Te Haka No. 7 Block; Te Tapuae Block.*

We have the honour to report that in terms of your reference to the Court under section 24 of the Native Land Amendment and Native Land Claims Adjustment Act, 1916, directing the Court to inquire and report as to the allegations contained in petition No. 116 of 1913, of Waireti te Aohinga and others, we held the inquiry at Rotorua on the 27th and 28th June, 1917. Mr. G. Urquhart appeared of counsel for the petitioners, and Mr. Meredith of counsel for the Crown. The lands the subject of the petition are parts of the Pukeroa-Oruawhata Block. The boundary of that block cuts Te Tapuae Block and Te Haka No. 7 Block into two parts. Separate titles are issued to the petitioners for the parts outside that boundary. Titles have also issued for the parts within that boundary in manner which we will hereafter explain.

At the commencement of the hearing Mr. Urquhart, for the petitioners, abandoned any claim to rent-moneys payable in respect of the lands in question subsequent to the date of the deed of

sale to the Crown of Rotorua Township. That deed is dated the 16th October, 1889. The history of the matter is as follows :—

On the 26th November, 1880, Mr. Fenton, Chief Judge of the Native Land Court, on behalf of the Government, made an agreement with Native chiefs to hand over to the Crown the control of certain land. An agreement in writing was entered into. The land the subject of the agreement appears to be that which became subsequently known as Pukeroa-Oruawhata, excluding therefrom the Native village of Ohinemutu. The title of the land had not been investigated, and one of the clauses of the agreement provided for that being done at once.

Clause 3 of the agreement declared "that the site of the present Maori village between Pukeroa and the lake be left as it is—a kainga Maori—but the present road is to be widened if necessary and carried on into the town. The persons who own pieces of land in Te Pukeroa are to be compensated by allotments in the town." ("Town" here means the contemplated town of Rotorua, not the village of Ohinemutu.)

Clause 14 of the agreement says, "No land within the Native village excluded shall be let or sold hereafter to the pakeha. . . . This provision is not to affect in any way the supposed rights of Europeans now settled in Ohinemutu. The provisions of this agreement also shall not apply to those pakehas on that piece of land."

The petitioners say that it was promised by Judge Fenton that if the proposal to hand over the block to the Crown was carried unanimously the right given to the Crown would not operate over the blocks leased by the petitioners' predecessors to Mrs. Morrison and Mr. Kelly until the terms set out in the leases had expired. These blocks were Te Haka No. 7, leased to Mrs. Morrison, and Tapuae, leased to Mr. Kelly.

In the following year the Thermal Springs Districts Act, 1881, was passed. This Act appears to have been partly for the purpose of giving statutory effect to Mr. Fenton's agreement. Section 11 of the Act has some bearing upon the question now in issue. It provides for the validation by the Native owners of certain invalid leases where the lessee was in actual occupation on the day of Mr. Fenton's agreement. It provides, however, that the section shall apply only to the land in Ohinemutu situated between Lake Rotorua on the north and the road from the Utuhina River to Mrs. Morrison's house on the south, and between the Utuhina River on the west and a line from Mrs. Morrison's house due north to the said lake on the east. This is the area which is excluded from Pukeroa-Oruawhata Block—that is to say, from the land handed over to the Government to manage in terms of Judge Fenton's agreement. But it does not appear to us to cover the whole of the land excepted by the agreement. That agreement excepted the village of Ohinemutu between Pukeroa and the lake. Mrs. Morrison's house or hotel and Mr. Kelly's hotel were both on the south side of the road, but we think would certainly be considered to be covered by the expression "the village of Ohinemutu." Judge MacCormick himself has a recollection of seeing Mrs. Morrison's hotel (then occupied by Mr. Falloona) in the year 1894, and it would certainly, in his opinion, be covered by the description "the village of Ohinemutu." He, however, has no special recollection of Mr. Kelly's hotel. But it would no doubt be in the same position as Mrs. Morrison's: the locality-plan itself shows that.

The next step was the investigation of the title of the Pukeroa-Oruawhata Block, and a certificate of title issued on the 27th April, 1882, to a large number of persons. The boundary of the land comprised in this certificate of title followed the road mentioned in the Thermal Springs Districts Act. The relative interests of the owners were not defined. Thus the southern portion of Tapuae Block and the southern portion of Te Haka No. 7 Block, on which were situated these two hotels, became included in the Pukeroa-Oruawhata Block, and subject to the control of the Crown on behalf of the Native owners.

Early in 1883 Judge Henry Tacy Clarke made a further agreement with the Natives slightly modifying Judge Fenton's agreement. An important modification was to cancel the clause relating to the exchange of rights on Pukeroa Hill for other sections in the proposed new town. Clause 3 of this agreement provides that the moneys accruing from rents of the town shall be spread over the whole block called or known as Pukeroa-Oruawhata Block, excepting that part of it called Tarewa, awarded by the Court to Ngati Ara and Ngati Hea. Tarewa, we may explain, has nothing to do with the questions now in issue. Clause 4 prescribes that all the hapus or individuals who shall be found to be owners within the above block shall receive a share of the money so accruing in proportion to their ascertained claims within the block. Clause 5: The money for rent for the town now in the hands of the Government shall be given to the six hapus of Ngati Whakaue. The persons who are to receive this money are the persons in the list hereto affixed—each respective hapu its own receivers. Clause 6: The above section is only intended as a temporary arrangement. Clause 7: When the claims to the land within the block have been investigated, then will be known the proportionate claims of hapus or individuals.

It will be observed that this agreement refers to rents received from the town. Pukeroa Hill itself was, by Mr. Fenton's agreement, set apart as a reserve: it was not to be leased as were the town sections. We understand from both sides before us that in pursuance of this agreement the moneys then in the hands of the Commissioner of Crown Lands, being the rents paid on the allotments leased at the first sale of Rotorua Township, were distributed in the manner provided for in the agreement. Those moneys, however, did not include the rent-moneys paid in respect of Morrison's hotel and Kelly's hotel. Those moneys, in the years 1881 and 1882, were collected by the Native owners themselves, notwithstanding the arrangements made with the Crown.

In the same year, 1883, Judge H. T. Clarke appears to have been instructed to report on the position of the leases to Mrs. Morrison and Mr. Kelly. His reports do not mention any such

arrangement as averred by the petitioners, but he does say this: "At the time the agreement was made with the Government Mrs. Morrison was assured by Mr. Fenton that her lease would not be interfered with. This is confirmed by witnesses. The boundaries set forth in the agreement—that is, Mr. Fenton's agreement—of the Native village are very vague and uncertain. The boundaries of the Native village are more particularly laid down in the 11th section of the Thermal Springs Districts Act, 1881. One of the points on that boundary is Mrs. Morrison's house. I have no doubt in my own mind that it was never the intention to include Mrs. Morrison's house in the Pukeroa Reserve."

This shows to our minds conclusively that an error was made in laying down the boundary as the road. Judge Clarke draws a distinction in his report between the case of Mrs. Morrison and that of Mr. Kelly, the ground of the distinction being that Mr. Kelly did not build his hotel until after the signing of the agreement with Judge Fenton.

We, however, are unable to agree with Judge Clarke on this point. These leases had been in existence at that time for a considerable number of years, and substantial rents were paid to the Natives thereunder, and we are of opinion that the whole of the facts disclosed show that it was not intended that either of these sections should be included in the Pukeroa Reserve.

In the year 1884, presumably in consequence of Judge Clarke's report, what purported to be leases of these two pieces within the Pukeroa Reserve were granted by the then members of the Rotorua Town Board, to Mrs. Morrison for the portion of Te Haka No. 7, and to Mr. Kelly for the portion of Tapuae. We have not been referred to any authority of the Board to grant such leases, and it would appear that they had none; but the documents would no doubt operate as an admission by the Crown of the occupation of the tenants for the terms mentioned in the documents. Up to that time, as we have said, the Native owners of these sections had been permitted to collect the rents themselves, notwithstanding Mr. Fenton's agreement and the Thermal Springs Districts Act, 1881. After that the Town Board collected the rent-moneys. It is admitted that at the time of the deed of sale to the Crown in 1889 the Town Board had collected and held in a separate account rent-moneys amounting in the case of Te Haka No. 7 to £125 14s. 6d., and in the case of Tapuae to £87 14s. 6d. It is also admitted that on the 12th May, 1890, subsequent to the sale to the Crown, there was paid to the Board a sum of £40 for rent due by Kelly for the two years ending the 31st January, 1890. The bulk of this rent, it will be seen, was due, though not paid, at the time of the sale.

In the year 1885 Judge Clarke divided the block into a large number of small sections. Amongst these sections was Lot 92, or Haka No. 7 South, being the portion on which is situated Mrs. Morrison's hotel, which was awarded to Whakarato Rangipahere and others, predecessors in title of some of the present petitioners, and Te Tapuae to Taekata te Tokoihi and others, predecessors of others of the present petitioners. These partition orders are still on record uncancelled, signed by the presiding Judge, though they do not bear upon them a diagram of the land affected by them. It is stated by Mr. Meredith for the Crown—though he is unable to give us any authority for the statement except some departmental notes—that this scheme of partition was found to interfere with the satisfactory disposal of the town sections owing to overlapping and necessity for streets, and he says the orders were practically ignored, though he admits they were not cancelled.

Later on Judge Clarke drew up a scheme of definition of relative interests, but he does not appear ever to have done this as a Native Land Court order in open Court. There is no record of it except his own report, and it consequently is not an order of any judicial tribunal. He himself refers to it as a "report" in his letter to the Under-Secretary, Native Department, of the 29th February, 1888. He divided the block into 1,100 shares. There is nothing to show that the Natives were represented in any way before Mr. Clarke, and this definition of relative interests is therefore merely Mr. Clarke's opinion of what ought to be the shares in the block. This was done in February, 1888. It is admitted for the Crown that this scheme of Mr. Clarke's is not a judicial finding.

In July, 1888, Mr. H. W. Mitchell, on behalf of the Native owners of Te Haka Block, applied to the Under-Secretary for Native Affairs for payment of the moneys received under Mrs. Morrison's lease. Correspondence ensued. On the 27th September the Under-Secretary wrote to Mr. Mitchell referring to this matter, and stating that the Chairman of the Rotorua Town Board had been instructed to hand over the sum of £110 14s. 6d. (the amount of rents then in hand) to Mr. R. S. Bush for payment to the Native owners of the block. On the 19th November of that year Mr. Bush minutes this letter, which had evidently been produced to him by Mr. Mitchell, as follows: "The instruction referred to in this letter countermanded, the money to remain in the hands of the Board for the present." The reason for this countermanding is disclosed in a letter to Mr. Mitchell from the secretary of the Town Board (Mr. Dansey), dated the 9th October, 1888, in which he says, "*Re* Te Haka rents, further hitches have cropped up. First hitch—A subsequent memo. from Elliott (the Under-Secretary) instructing that money be spent in tree-planting and improvements to Pukeroa. Second hitch—Hamuera Pango now states that these rents when paid to Mr. Bush must be included in rents to be divided among the whole Whakaue Tribe, as the owners of Te Haka were compensated for the loss of their rents by extra shares in the township."

As to the first of these points comment seems needless. There was no possible authority by which Mr. Elliott or anybody else could direct the Town Board to spend money, admittedly belonging to the Natives and not the Crown, in planting and improvements to Pukeroa. The second hitch arises out of the terms of the agreement made by Judge Clarke with the Natives, which it has been suggested meant that all rent-moneys, including the rent-moneys of these hotels, were to be divided amongst the whole body. We are not inclined to think that that was the arrangement with regard to these particular moneys, but we shall refer to this matter again

later. There is, however, no proof whatever of the assertion that these owners of Te Haka were compensated for the loss of their rent by extra shares in the township. It may be so, but there is absolutely nothing to show it. It is common ground that at this period the moneys collected by the Rotorua Town Board for the rents of these two pieces of land were the property of Natives and not of the Crown. Mr. Meredith fully admitted this; and indeed the matter is unarguable. Whether the moneys belonged to the present petitioners or their predecessors, or whether they belonged to the whole of the owners of Pukeroa-Oruawhata, they certainly did not belong to the Crown. Further correspondence ensued. But up to the time when Mr. T. W. Lewis came to Rotorua to purchase the Rotorua Township these rent-moneys remained in the hands of the Town Board—placed, however, in a separate banking account—the sole reason for their not being paid out, so far as we can see, being the dispute as to which particular Natives the moneys belonged to, a dispute which could and ought to have been settled forthwith.

The deed of sale to the Crown presents some extraordinary features. It recites the history of the title of the land, and in particular recites that from time to time certain portions of the said piece of land had been demised by deeds of lease for certain terms of years in accordance with the provisions of the Thermal Springs Districts Act, 1881, and the Amendment Act, 1883, and that sums of money have from time to time been paid or have accrued due as and for the rent reserved by the said several deeds of lease. It further recites that on the 29th February, 1888, Henry Tacy Clarke, Judge of the Native Land Court, upon due inquiry, determined the relative interests of the certain persons certified to be owners by the certificate of title. The purchase-money, £8,250, was divided in accordance with this scheme of relative interests devised by Judge Clarke.

The deed then conveyed and assured the land to Her Majesty, and the final clause in the deed is as follows: "And the said vendors do and each of them doth for the consideration aforesaid as to the relative share or shares of each of them hereafter assign unto the said purchaser all the rents and profits *which have accrued due* under and by virtue of any such deeds of lease as aforesaid of the said piece of land or any part thereof."

If that were all the matter would be a simple one. The moneys in hand were not rents accrued due, but rents which had actually been paid and reduced into possession, and they clearly would not pass by the language of the deed. But on turning to the Maori translation of the deed endorsed thereon we find imported into this translation words which cannot possibly be derived from the language of the deed itself. We do not quote the Maori itself, but we have caused a translation to be made by one of the most experienced Interpreters of the Court, which translation is as follows: "And in consideration of the sum mentioned above for each vendor's share or shares we give and transfer to the purchaser all rents and other moneys *already paid* to the Government in accordance with the terms of the aforesaid leases, and all other moneys *which are to be hereafter paid* as rents for the said piece of land or for parts of it."

According to the attestation on the deed it was this Maori statement which was explained to the vendors. The moneys received in respect of Te Haka and Tapuae, however, are not moneys received from leases granted in terms of the Thermal Springs Districts Act: they are the proceeds of special arrangements, and they have always been treated separately from other moneys. In our opinion it is at least doubtful whether they would pass even under the provisions of the deed as stated in Maori. Certainly they would not pass under the provisions of the deed as stated in English. In view of this material discrepancy certain correspondence becomes important. There is on record a memorandum by Mr. T. W. Lewis himself, dated the 11th October, 1889. He says the agreement by himself with Ngati Whakaue for the purchase by the Crown of the Rotorua Township includes the following:—

> "1. The land purchased is Pukeroa-Oruawhata Block, of 3,020 acres, as contained in the certificate of title.
>
> "2. The Natives sell all their right, title, and interest in this land or any division thereof, or any lease made under the Thermal Springs Districts Act of any portion, to the Queen for the sum of £8,250.
>
> "3. The purchase-money to be divided according to the division made by H. T. Clarke, Esq., into 1,100 shares at the rate of £7 10s. per share.
>
> "4. The amount of rent which has been collected by the Crown and which is now in the hands of Mr. Bush, R.M., to be paid to the owners according to Mr. Clarke's list above mentioned.
>
> "5. All rents uncollected, and all rights in any lease or rents thereunder, are made over to the Queen, so that the vendors transfer with the land every right, title, and claim they have of any nature whatsoever to the land comprised within the said block, or any profit from any lease of any portion thereof."

It will thus be seen that Mr. Lewis's own statement of the bargain is in direct conflict of the terms of the Maori translation endorsed on the deed, and in accord with the English version. The statement, therefore, contained in the Maori version that the rents collected by the Crown were to be assigned by the deed is an obvious error, and we are of opinion that a Court of equity would order the deed to be rectified. Now, the moneys derived from the leases to Morrison and Kelly, though not in the hands of Mr. Bush, were moneys that had been collected by the Crown, and the only reason that they had not been paid into the hands of Mr. Bush for distribution was a dispute between the Natives themselves.

It is admitted that, notwithstanding the conflict in the terms of the deed, of which we may say neither counsel for the Natives nor counsel for the Crown was aware, not being Maori linguists, until the Court itself pointed them out, the moneys which had been collected by the Crown were distributed amongst the Natives, but the moneys produced by these particular leases to Morrison and Kelly were expended by the Town Board in the improvement of Pukeroa in the manner incorrectly suggested by the Under-Secretary (Mr. Elliott) some time before. It was conceded by Mr. Meredith during the argument before us, basing his view, of course, upon the English

of the deed, that the moneys actually collected from these leases did not pass to the Crown by the assignment contained in the deed.

On the 6th January, 1890, Taekata Tokoihi, one of the owners of Tapuae, wrote to the Native Minister asking that the rents of the Palace Hotel (Kelly's) should be paid to him. On the 2nd May, 1890, Mr. Lewis wrote a memorandum to the Hon. the Native Minister. Mr. Lewis says in this memorandum, "Taekata is one of the principal owners in Rotorua, and he asserted that he owned the whole or a large portion of the site of the Palace Hotel, and was in point of fact Mr. Kelly's landlord before Mr. Fenton's agreement was entered into. During my negotiations he wished to claim certain accumulated back rents of the hotel. I told him that was a matter with which *I had nothing to do, and could not mix it up with my purchase.* If he accepted payment and signed by deed he would relinquish all his claims to back rents within the block. He signed, so that under his agreement with me he has no claim. If there is any special arrangement or understanding in the Crown Lands Department which gives him any equitable claim outside the deed I have no knowledge of it. This question of rents is entirely within the Crown Lands Department." We do not quite understand what Mr. Lewis meant to convey by this memorandum. But it is plain from Mr. Lewis's previous memo. that it was not part of the agreement and was not intended that the Native owners should lose any rents that had actually been collected. Taekata's assertion that he was in point of fact Mr. Kelly's landlord is borne out by Judge Clarke's report already referred to, and by the same Judge's partition orders of 1885.

In the same year (1890) Taekata Tokoihi, and also some of the owners of Te Haka No. 7, petitioned Parliament praying for redress. So far as Taekata's petition is concerned, the Native Affairs Committee reported that in their opinion the petition should be referred to the Government for inquiry, and that the Board (Rotorua Town Board) be instructed not to spend any of the rents of the two hotels until the inquiry takes place. The inquiry did take place, but the tribunal directed to hold it was the Rotorua Town Board, the very body that had persistently been attempting to obtain, and had at this period actually obtained, the rents in question, and expended them upon Town Board purposes. From such an inquiry, under the circumtances, the Natives would be extremely unlikely to obtain any redress. We do not propose to refer at any length to the report sent in by the Rotorua Town Board, because under the circumstances we attach no value to it. But we may point out that the view of the Board was, as set out in its report, that by the deed of purchase all arrears of rent within the block were relinquished by the Natives. In our opinion these moneys were not arrears of rent. They were moneys actually collected by the Rotorua Town Board as agents for the owners. They could and should have been distributed long before the Crown purchased the land. We are of opinion, then, that the rents actually collected and held by the Rotorua Town Board from these two hotels up to the time of the purchase by the Crown were in natural justice and in law the property of the Natives; that it was not intended that they should pass to the Crown by virtue of the deed of purchase, and even if the deed can be construed so as to pass those rents, that technicality ought not to be taken advantage of.

We think that too much importance should not be attached to the fact that the actual language of the deed covers only leases granted under the Thermal Springs Districts Act, and therefore we are of opinion that no part of the £40 paid in respect of Kelly's lease after the sale should go to the Natives. But we do consider that the two sums of £125 14s. 6d. in respect of Te Haka No. 7, and £87 14s. 6d. in respect of Te Tapuae, should be paid to the Natives entitled thereto, plus such reasonable interest as would seem equitable. As to the Natives entitled, we are of opinion, having regard to the whole of the circumstances of the case, that the proper persons to receive the moneys are the persons respectively declared to be owners of these pieces of land by Judge Clarke's partition orders of 1885; but, seeing that the general body of the owners of Pukeroa-Oruawhata Block have not been heard except indirectly through the Crown Solicitor, it would be as well, if our recommendation as to payment of these moneys be adopted, to refer the question of the individuals to whom payments should be made to the Native Land Court for a final order.

We would like to express our appreciation of the very complete and impartial manner in which the whole of the facts of this complicated matter were laid before us by counsel for the Crown.

We have, &c.,

CHARLES E. MACCORMICK, Judge.
T. H. WILSON, Judge.

The Chief Judge, Native Land Court, Wellington.

Approximate Cost of Paper.—Preparation, not given; printing (650 copies), £3 5s.

By Authority: MARCUS F. MARKS, Government Printer, Wellington.—1917.

Price 6d.]