

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

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

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

*Vide*, paras. 40 to 55.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Vide*, paras. 25 to 38.

Para. 105.

Para. 115.

Paras. 56 to 61.

Para. 70.

Paras. 114 to 121.