

1908.
NEW ZEALAND.

NATIVE LANDS AND NATIVE-LAND TENURE :

INTERIM REPORT OF NATIVE LAND COMMISSION, ON THE ORAKEI NATIVE RESERVE.

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

Native Land Commission, Wellington, 30th July, 1908.

To His Excellency the Governor.

MAY IT PLEASE YOUR EXCELLENCY,—

We have the honour to report on what is known as the Orakei Native Reserve.

The title to this land was investigated in the year 1869 by the Native Land Court, and an important judgment dealing with the history of what may be termed the peninsula, of which it is a part, was given. It is the only land on the peninsula owned by the remnants of the once-powerful tribes who occupied the territory between the Manukau Harbour and the Hauraki Gulf.

It is plain that at the time of the investigation of the title it was thought only fitting and proper that this small remnant of land should be preserved for the ancient Tribes of Nagoho, Te Taou, and Te Uringutu, more generally known as Ngatiwhatua. By the certificate and order issued by the Native Land Court it was made inalienable, and the Crown grant that was issued on the 8th July, 1873, followed the Court's order, for it said, "Provided that the land shall be absolutely inalienable to any person in any manner whatsoever."

Further, the grant was not issued directly to the people entitled, but to Apihai te Kawau, the chief of the Taou, Ngaho, and Uringutu Tribes, and his heirs, upon trust for Apihai te Kawau, Arama Karaka te Matuku, Warena Hengia, Reweti Tamahiki, Eruera Paerimu, Paora Tuhaere, Paramena Nganahi, Reihana, Terewai, Wiremu Watene, Ngawaka, Tautari, Te Ratu Utakura, Te Waka Tuaea, and Taierau, and their heirs, as from the 10th day of February, 1869; and so this land remained Native land in Maori occupation down to the year 1882. In that year a private Act was passed entitled "The Orakei Native Reserve Act, 1882." This statute gave powers to the said trustee, and his successors to be appointed by the Native Land Court, "with the consent of all the beneficial owners, testified as hereinafter mentioned, to lease the Orakei Native Reserve, or from time to time any part or parts thereof, upon such terms and conditions as he may see fit," limited, however, as follows: "Provided that no lease shall be made for any period exceeding forty-two years. No fine, premium, or foregift shall be taken upon any lease." And the statute expressly provided as follows: "The consent of the beneficial owners shall be testified by their being parties to and executing the leases to be made under this Act, and no such lease shall be valid or of any effect which is not so executed." Up to 1898 no leases save perhaps grazing-leases for a year or less were granted. In that year the Native Land Court, purporting to act, we suppose, under subsection (2) of section 14 of "The Native Land Court Act, 1894," which empowers a Native Land Court to "determine the relative interests in any land of the persons entitled thereto, and to partition any land among such persons," partitioned the land. It may be a question whether the Native Land Court had any

jurisdiction to destroy the trusteeship that existed, but the Court did do so, and partitioned the land amongst the owners, specifying them. It did not appoint a trustee in place of Apihai te Kawau, who had died, and it varied the restrictions on the alienability of the land. The Court by its orders stated that "so much and such part of the share of each owner as is set out in the third column of the said schedule is inalienable, except by a lease for a period not exceeding forty-two years. Provided that no fine, premium, or foregift shall be taken upon any lease, and that no part or parts of the said Orakei Sections . . . shall be leased without the consent of all the owners thereof." That is, the owners of each lot or subdivision could alienate their lot or subdivision without the consent of the owners of the other subdivisions or lots. By section 52 of "The Native Land Court Act, 1894," the Court had not power to vary the restriction in the grant. Section 52 reads as follows:—

"Any land heretofore or hereafter to be rendered inalienable may be rendered alienable, subject to the provisions of this Act; and any restriction on the alienation of any land heretofore or hereafter to be imposed, or recommended to be imposed, may be removed or varied, either absolutely or in respect of any particular alienation, by the Court, as to the whole of such land or as to any part or parcel thereof, or as to any estate, share, or interest therein respectively, with the assent of the owner, or of one-third in number at least of the owners, of such land, part, parcel, estate, share, or interest, and on proof that every such owner has sufficient land left for his support: Provided that restrictions on alienation existing prior to the thirtieth day of August, one thousand eight hundred and eighty-eight, may be removed or varied only by the Governor, on the recommendation of the Court and in accordance therewith."

A case was stated for the opinion of the Supreme Court as to the action of the Court, the questions being, "1. Is 'The Orakei Native Reserve Act, 1882,' impliedly repealed by 'The Native Land Court Act, 1894'? If this question be answered in the negative, the following questions are submitted: 2. Had the beneficial owners named in the several partition orders of the Native Land Court power (a) to lease the said land in terms of 'The Orakei Native Reserve Act, 1882,' without the intervention of any trustee? (b) Or are the beneficial owners named in the said partition orders thereby impliedly appointed trustees for themselves? (c) Or should the Native Land Court, when partitioning the land, have appointed a trustee in respect of each partition made in succession to Paora Tuhaere, deceased? 3. (a.) Does 'The Orakei Native Reserve Act, 1882,' enable the Native Land Court to grant confirmation under 'The Native Land Court Act, 1894,' notwithstanding that otherwise the said leases apparently contravene section 117 of the said Act, as amended? (b.) Or is any confirmation necessary of leases under 'The Orakei Native Reserve Act, 1882'?" And the answers given were as follows:—

CONOLLY, J.—"I am of opinion that 'The Orakei Native Reserve Act, 1882,' is not repealed by 'The Native Land Court Act, 1894.' The former Act applies specially to the Orakei Native Reserve, and authorises leases of the whole or any part thereof for any period not exceeding forty-two years, thus altering the Crown grant by which the land had been held inalienably. The Native Land Court Act, section 117, applied to Native lands generally, and therefore does not affect those which have been the subject of special legislation. The maxim, *Generalia specialibus non derogant* applies. With regard to question 2, (a), 'Had the beneficial owners named in the several partition orders of the Native Land Court power to lease the said land in terms of "The Orakei Native Reserve Act, 1882," without the intervention of any trustee?' my answer is in the affirmative. The Native Land Court has awarded them the land as owners, subject to certain restrictions, and has therefore apparently held that the intervention of trustees was unnecessary. Question 2, (b), requires no answer. Question 2, (c): It does not appear to be necessary, or even desirable, that a trustee should have been appointed under the circumstances. As to question 3, I think that the leases should be confirmed by the Native Land Court, and that the Court has full power to confirm them. I have already explained why section 117 of 'The Native Land Court Act, 1894,' does not apply."

It will be observed that the important questions whether the order was a variation of the restrictions and whether the Court had power to make such an order were not stated.

It has been argued before us that as a partition has been made the maxim *Redendum singula singulis* applies; that if the consent of the owners of the lot leased is given, that fulfils the statute, and that the consent of the owners of other lots is not required. It was urged that much inconvenience would result were that interpretation not adopted.

We are of opinion that the orders made were going beyond the provisions of the 1882 Act, and were therefore illegal and void. The words of the statute were not followed, and if it is said the intention must have been to provide that only those interested in the subdivision should be asked for their consent, there seem to us to be two answers to such a contention :—

(1.) If the terms of the Act are not complied with, the power to lease cannot be duly exercised. It may be that the partition made under the 1882 Act was useless or inoperative. If so, that would only prevent leases being granted under the Act.

(2.) It must be remembered that this is Native land and communal land, and meant to be preserved as a dwelling-place for the remnant of a tribe.

It may well be that the Legislature meant that no single owner should be permitted to bring a European into a Maori settlement without the consent of all the owners or residents. This would be in accordance with Maori law or custom, and it might be calamitous to the life and good order of a Maori pa that Europeans not approved of by the Maoris should be allowed to settle on such communal land. The fact that the land was given to the chief as trustee, and that he had to execute leases together with all the owners, shows that the land was not treated even as ordinary Native land was treated.

Acting under what we believe to be the illegal orders of the Native Land Court, certain lots were leased to Europeans prior to the passing of "The Maori Land Settlement Act, 1905"—namely, the following leases :—

Block.	Area.	Lessee.	Approved.	Term.
	A. R. P.			
Orakei 1A No. 1 ..	11 0 0	Thomas Coates ..	19/6/07	21 years from 7/6/01.
„ 1A (part) ..	10 0 0	„ ..	15/3/00	21 „ 17/10/99.
„ 1A No. 2 ..	9 0 0	„ ..	18/5/03	21 „ 1/6/20.
„ 3A (part) ..	15 0 28	„ ..	15/3/00	21 „ 14/7/99.
„ 3A and 3A 2 ..	31 3 28	„ ..	18/5/03	21 „ 2/6/05.
„ 1C ..	17 0 0	„ ..	15/3/00	21 „ 28/11/98.
„ 3C ..	29 0 24	G. P. Hawke ..	15/3/00	21 „ 1/2/99.
„ 3C ..	29 0 24	E. Coates ..	9/7/04	27 „ 1/2/20.
„ 1E ..	20 0 0	T. Coates ..	19/6/01	21 „ 17/6/98.
„ 1F ..	23 1 0	„ ..	19/6/01	21 „ 1/10/98.
„ 1F ..	23 1 0	„ ..	18/5/03	21 „ 12/8/19.
„ 1G and 3G ..	46 0 24	G. P. Hawke ..	15/3/00	16 „ 10/8/98.
„ 2 (part) ..	30 1 18	T. Coates ..	19/5/01	21 „ 23/6/99.
„ 2B ..	6 0 0	„ ..	19/6/01	21 „ 14/6/01.
„ 4C and part 4C 2 ..	39 2 17	J. Biddick ..	14/1/03	42 „ 7/6/01.
„ 4C 1 and part 4C 2 ..	32 2 23	J. E. and W. J. Biddick ..	2/7/04	21 „ 25/4/04.
„ 3F 1 ..	23 0 12	G. P. Hawke ..	13/7/00	15 „ 1/6/98.
„ 4B ..	46 0 24	J. Biddick ..	15/3/00	15 „ 2/12/98.

Of these leases only one has been registered, as follows : No. 1F, 23 acres 1 rood, lease to Thomas Coates, confirmed 18/5/03, for twenty-one years commencing from the 12/8/1919; rental of £34 17s. 6d. per annum.

In 1905 there was enacted a Native Land Act, the Maori Land Settlement Act, and section 16 provided,—

“(1.) Except as hereinafter provided, all restrictions, conditions, or limitations against the alienation by lease of any lands owned by Maoris, whether such restrictions, conditions, or limitations are contained in any Act or any instrument of title, shall, immediately upon coming into operation of this Act, be deemed to be removed :

“ Provided that no lease of any share or interest in land owned by Maoris shall be valid unless there is indorsed thereon the approval of the Board of the terms thereof.

“(2.) Such approval shall not be granted unless and until the Board is satisfied—

“(a.) That the rent proposed is adequate (where the capital value of the land has been assessed under ‘ The Government Valuation of Land Act, 1896,’ a rent on the basis of not less than five per centum per annum on such capital value shall be deemed adequate) :

“ Provided that the Board may, if it considers such assessment excessive, having regard to any circumstances affecting the land, require that a revaluation of the land be made :

“(b.) That the Maori alienating has a papakainga, or sufficient other land for the purposes of a papakainga, or (with the rent payable under such proposed lease) an income sufficient for his support :

“(c.) That the proposed lease is for the benefit of the Maori lessor :

“(d.) That such lease takes effect in possession and not in reversion.

“(3.) No lease of any land owned by Maoris shall be for a term exceeding fifty years, nor for an area exceeding that specified for the respective classes mentioned in section eight hereof.

“(4.) The minute of approval of the Board upon any lease shall have the same force and effect as confirmation of the Native Land Court.

“(5.) The provisions of this section shall not apply to lands owned by Maoris in the Middle Island or Stewart Island, or lands vested as Native reserves in the Public Trustee.”

On the assumption that this section destroyed the original restriction, and set aside or repealed the Act before named—namely, “ The Orakei Native Reserve Act, 1882 ”—certain leases have been executed by the owners of sections, or lots, or subdivisions. Of these, the Maori Land Board has dealt with them as follows :—

Block.	Area.			Lessee.	Approved.	Term.
	A.	R.	P.			
1B	20	0	0	W. R. Holmes ..	7/1/07	50 years from September, 1906.
3A BA West ..	17	2	38	T. Coates	16/2/06	42 years from 2/6/05.
3F 1	23	0	12	John Peach	8/10/07	42 years from (no date given). (Not signed.)
4A	37	0	24	J. Brodrick	9/5/07	21 years from 16/11/98.
2A 2	23	1	13½	A. Southey Baker ..	..	42 years from 30/3/08. (Not approved ; objection lodged.)
3A and 3A 2 East ..	14	0	30	T. Coates	23/11/05	42 years from 2/6/05.
1C	17	0	0		15/12/05	42 .. 2/6/05.
2B	42	1	18	A. Southey Baker ..	..	42 .. 30/3/08. (Not approved ; objection lodged.)
1G and 3G	46	0	24		..	42 years from 30/3/08. (Not approved ; objection lodged.)

It will be noticed that the said section 16, subsection (d), provided that leases made by virtue of that section took effect in possession and not in reversion. The following leases did not take effect in possession :—

Orakei 1A 2, 9 acres, to Thomas Coates; 21 years from 1/6/1920.

Orakei 1F, 23 acres 1 rood, to Thomas Coates; 21 years from 12/8/1919.

Orakei 3C, 29 acres and 24 perches, to E. Coates; 27 years from 1/2/1920.

Notwithstanding this, one of such leases has been registered under the Land Transfer Act—namely, Orakei 3C, of 29 acres and 24 perches, to Elizabeth Coates, for twenty-seven years from the 1st February, 1920.

There are other leases that have been executed by the owners of the subdivisions or lots purporting to be leased, but without the consent of all the beneficial owners in the block, namely,—

Block.			Area.			Lessee.	Approved under	Term.
1D	..	..	A.	R.	P.	T. Coates	Section 55	50 years from 18/12/07.
2A 1	..	..	16	0	0	G. S. Kent	..	42 .. 1/4/08.
3D	..	..	46	2	26 $\frac{2}{3}$	Mrs. Wright and Miss Hawke.		
			12	3	15			

There are leases of parts of this land purporting to be leased by these instruments already existing. It appears to us that no Maori Land Board could be expected to confirm such leases, and clearly it is not for the benefit of the Maori lessors that what is practically suburban land should be so dealt with, though it is even assumed that the leases were otherwise legal and in accordance with law.

No objection has been made by the Maori owners to the leases of Mr. Coates, Mr. Holmes, Mr. Biddick, and Mrs. Coates. In most of these leases the tenants have made improvements. In our opinion it is much to be regretted that the land should be leased in the way in which it has been leased. This is suburban land, and it should have been leased in smaller parcels. The way in which Europeans have dealt with land less accessible to Auckland may be seen in the suburb of St. Helier's Bay. The Orakei Settlement should have been so arranged that there should have been ample reservations made for Maori occupation, and then the allotments not required for this purpose should have been leased in areas of from $\frac{1}{4}$ acre up to 2 acres, or perhaps land furthest removed from the sea up to 5 or 10 acres. This would have made better provision for settlement than has been done, and would have been of greater advantage both to Europeans and Maoris.

Our recommendations appear in the schedules hereto, and may be summarised as follows :—

	A.	R.	P.
1. For Maori occupation	85	0	21
2. Leases to be validated	472	2	4 $\frac{2}{3}$
3. Area for cutting up and settlement	86	0	8 $\frac{1}{3}$
Total	643	2	34

We further recommend that the Chief Judge of the Native Land Court be asked to see that the law is carried out in reference to the orders, and that if he has any doubts as to the validity of the orders the opinion of the Supreme Court should be taken.

It is with much hesitation and regret that we have recommended that some of the lessees' leases should be validated. The history of the legislation dealing with Maori land shows that the validating of illegal sales and leases of Maori land is continually going on. We hope that there will be no need for considering validation in future if the recommendations we have made in our other reports are carried out and the existing laws not altered—that is, that all selling and leasing is in future to be made by the Maori Land Board of the district by public auction. There have been no doubt thousands of transactions between Europeans that have not been enforceable by law, but Europeans have not asked for the aid of legislation to validate or carry out their illegal contracts. It is only when the transactions are between Europeans and Maoris that the aid of Parliament has been sought. A precedent has been set in many past Native Land Acts, and as we believe the lessees in this settlement have been acting *bona fide* and the lessors are anxious that the leases should be given effect to, we have, though we generally disapprove of validations, made the recommendations above set out.

We have the honour to be

Your Excellency's obedient servants,

ROBERT STOUT, } Commissioners.
A. T. NGATA, }

SCHEDULES.

SCHEDULE 1.

LANDS TO BE RESERVED FOR MAORI OCCUPATION, UNDER PART II OF "THE NATIVE LAND SETTLEMENT ACT, 1907."

Block.	Area.		
	A.	R.	P.
Orakei No. 1	38	3	16
„ No. 3B 1	16	0	0
„ No. 3F (part)	11	1	5
„ No. 4A (part)	19	0	0
Total	85	0	21

SCHEDULE 2.

LEASES TO BE VALIDATED.

Block.	Area.			Lessee.	Term.
	A.	R.	P.		
Orakei No. 1A (part)	11	0	0	T. Coates	21 years from 7/6/01.
„ No. 1A (part)	9	0	0	„	21 „ 17/10/99.
„ No. 1C	17	0	0	„	21 „ 28/11/90.
„ No. 1D	16	0	0	„	50 „ 18/12/07.
„ No. 1E	20	0	0	„	21 „ 17/6/98.
„ No. 1F	23	1	0	„	21 „ 1/10/98.
„ No. 2 (part)	30	1	18	„	21 „ 23/6/99.
„ No. 2B	6	0	0	„	21 „ 14/6/01.
„ No. 3A and 3A 2	31	3	28	„	21 „ 2/6/05.
„ No. 1B	20	0	0	W. R. Holmes	50 „ Sept., '06.
„ No. 2A 1	46	2	26½	G. S. Kent	42 „ 1/4/08.
„ No. 4A	27	0	24	J. Biddick	21 „ 16/1/98.
„ No. 4c and part 4c 2	39	2	17	„	42 „ 7/6/01.
„ No. 4B	46	0	24	„	„ 2/12/98.
„ No. 4c 1 and part 4c 2	32	2	23	J. E. and W. J. Biddick	21 „ 25/4/04.
„ No. 3c	29	0	24	G. P. Hawke	21 „ 1/2/99.
„ No. 3F 1	23	0	12	„	15 „ 1/6/98.
„ No. 1g and 3g	46	0	24	„	16 „ 10/8/98.
	475	0	20½		
Less area taken for drain, 4c	2	2	16		
Total	472	2	4½		

SCHEDULE 3.

LANDS FOR GENERAL SETTLEMENT.

(To be cut up, surveyed, and leased through the Maori Land Board by Public Auction.)

Block.	Area.		
	A.	R.	P.
Orakei No. 3E	26	0	14
„ No. 3D	12	3	15
„ No. 3B 2	10	0	34
„ No. 5	7	2	12
„ No. 2A 2	23	1	1½
„ No. 2B (part)	6	0	0
Total	86	0	8½

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