Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Manu Kapua and others v. *Para Haimona and another, from the Native Appellate Court of New Zealand (Privy Council Appeal No. 24 of 1913); delivered the 1st July 1913.*

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD SHAW.
LORD DE VILLIERS.
LORD MOULTON.
SIR SAMUEL GRIFFITH.

[DELIVERED BY THE LORD CHANCELLOR.]

This is an Appeal from a Judgment of the Native Appellate Court of New Zealand and from a Partition Order which followed on the Judgment, by which Order directions were given for the partition of a block of land known as Te Akau, between two tribes of natives by whom the land was held in common ownership. The two tribes are known as the Tainuis and the Tahingas, and the Appeal is brought by or on behalf of the former against the latter. The Attorney-General of New Zealand has been made a Respondent because, since the date of the Judgment, which was given in 1907, the land awarded to the Tahingas has been purchased from them by the Crown. The area in dispute is one of some 11,236 acres.

[29] A J 239. 80.—7/1913. E. & S.

The facts have been agreed and stated in a special case settled between the parties for the purpose of this Appeal, and it has been further agreed that the Appeal is to be confined to questions of law only.

The history of the case is as follows. In 1863 the natives of New Zealand were in armed rebellion. Among other steps taken to bring the rebellion to an end the New Zealand Settlements Act, 1863, was passed. By section 2 of this Act the Governor-in-Council was empowered to declare that any district within which there was situated land which was the property or in the possession of natives who had been in rebellion since the beginning of the year 1863 should be a district within the provisions of the Act. He was further empowered to define and vary the boundaries of such a district. By section 3 the Governor-in-Council was further empowered to set apart within any such district eligible sites for settlements for colonisation, and to define and vary their boundaries. By section 4 a third power was conferred on the Governor-in-Council. He was enabled from time to time to reserve or take any land within such a district for the purposes of such settlements, and such land was to be deemed to be Crown land, freed and discharged from all title, interest or claim of any person whomsoever, as soon as the Governor-in-Council had declared such land to be required for the purposes of the Act and to be subject to its provisions. Section 5 contained provisions for compensating persons who should have any title, interest or claim to any land taken under the Act, exclusive of persons who had been concerned in the rebellion. Section 8 established a Compensation Court.

By an amending Act of 1865 certain alterations were made in these compensation provisions, and power was taken to make agreements for giving land instead of money.

Orders in Council were made under the Act of 1863 by the Governor in 1865. By one of these, dated 16th May 1865, the Governor declared certain territory, of which the Te Akau block, which is the subject of this Appeal, formed part, to be a district within the provisions of the Act of 1863. By another Order in Council, dated 2nd September 1865, he declared that territory, including what had come under the provisions of the earlier Order, which comprised the Te Akau block, should be a district within the provisions of the Act. He further declared that these lands were required for the purposes of the Act, and were subject to the provisions thereof, and he ordered that such lands should be "set apart and reserved " as sites for settlements for colonisation " agreeably to the provisions of the Act." The Order, however, went on to qualify this by providing that "no land of any loyal " inhabitant within the said district, whether " held by native custom or under Crown grant, " will be taken, except so much as may be " absolutely necessary for the security of the " country, compensation being given for all land " so taken; and, further, that all rebel inhabi- " tants of the said district who come in within " a reasonable time and make submission to " the Queen will receive a sufficient quantity " of land within the said district under grant " from the Crown."

It was argued for the Appellants that the effect of this Order in Council was to extinguish all native title in the whole of the land referred to, and reliance was placed on

the decision of this Board in the case of Te Teira Te Paea *v.* Te Roera Tareha (1902, A.C. 56), where it was held that an Order in Council made under the Act had this result. But in that case the wording of the particular Order in Council differed materially from the wording in the present case. Here, although the land is "set apart "and reserved as sites for settlement and "colonisation," the declaration which immediately follows shows that this was a proceeding which was not to become operative so far as the land of loyal inhabitants was concerned. In the case relied on, the words of the Order were not "set apart and reserved," but "reserved and taken," and although there was a qualifying declaration as to loyal inhabitants, it was simply that their land would not be "retained by the Government." Their Lordships are of opinion that the Order in Council of 2nd September 1865 did not extinguish the native or other title of any loyal inhabitant. In so holding, they agree with the Judgment under review on what, for reasons which will appear, they consider to be the only question of law that arises in the Appeal.

In 1866 a Compensation Court sat under the provisions of the Act of 1863 and the amending Act, to investigate claims by loyal natives in respect of the district referred to. The loyal male members of the Appellant and Respondent tribes made claims in regard to an area of about 158,000 acres forming part of the territory dealt with by the Orders in Council.

This area included the Te Akau block. Upon investigation it was held by the Court that there were 77 loyal and 44 rebel male natives interested in the area. Although according to Maori custom the rights of women in tribal lands

are not less than the rights of men, no women appear to have claimed, and in the result no claims of women were investigated or recognised. An arrangement was come to and approved by the Court that the loyal natives should receive 94,663 acres out of the area.

On the 30th June 1869 the Agent of the Crown, Mr. James Mackay, gave a certificate for the issue of a Crown grant of these acres to 14 of the loyal natives in trust for the others. The grant was, however, not then issued because, as the result of negotiations with the authorities, the number of grantees was increased from 77 to 88. On the 23rd October 1874 a Crown grant of the Te Akau block was made to these 88 natives, all claiming as male members of the Appellant and Respondent tribes, with the exception of one Honana Maioha, who belonged to another tribe. Prior to the grant and the antecedent proceedings the land in question had been held by the natives under their customs and usages, and these appear not to have been investigated. As the land had never been granted by the Crown, the radical title was, up to the date of the grant, vested in the Crown subject to the burden of the native customary title to occupancy. The grant was expressed to be made to the 88 grantees classified according to their tribes, to hold as tenants in common, but with a declaration that their estates or interests were not to be deemed to be equal or of an equal value.

In 1891 the Native Land Court ordered a partition of the block into nineteen parcels and determined the relative interests of the respective owners. In 1893, on the application of the Tainuis, a rehearing of these partition proceedings was directed. The rehearing took

place in 1894 before Judge O'Brien and Judge von Stürmer, and, as the result, the block was ordered to be divided into three parts. One of these, consisting of 600 acres, was awarded to Honana Maioha, already mentioned; another, comprising 28,152 acres, was awarded to the Tainuis; and a third, comprising 61,608 acres, was awarded to the Tahingas. The Order took no account of any ancient tribal boundary between the two tribes, but proceeded on the footing of dividing the block between the members of the Appellant and Respondent tribes irrespective of the original extent or boundaries of these tribes, and of giving equal shares to the grantees who were of full tribal blood, and smaller shares to grantees who were not of full blood. The shape of the original block of 158,000 acres was roughly rectangular, one boundary being the sea coast, and the whole block was owned by the two tribes, the tribal boundary, as was found later on by the Judgment now appealed from, running inland approximately at right angles to the coast, at least as far as the eastern boundary of the land comprised in the Crown grant. The Te Akau block, which was the subject of the partition order made by the Native Land Court in 1894, was that portion of the 158,000 acres which lay upon the sea coast, the inland portion having been retained by the Crown.

The Judgment of 1894 made no reference to any question of tribal boundary, and appears to have proceeded on the assumption that the Crown grant of 1874 had been made without reference to any previous native title or tribal boundary. If the effect of the Order in Council of 2nd September 1865 had been to extinguish the title of the loyal natives this might well have been so. But, as their Lordships have

already stated, they do not consider that the Order disturbed the rights in the land of the loyal members of the two tribes. It follows that the grant only did what such grants are often used to accomplish in such transactions in New Zealand. It appears simply to have conveyed the legal estate out of the Crown and transformed the native customary title into a freehold title, the relative interests of the grantees remaining equivalent in value and extent to what they were before. Petitions were presented to the New Zealand Parliament complaining of the partition of 1894, and in 1904 the Government appointed a Commission to investigate the question. In June 1904, after taking evidence, the Commission reported that the partition order should be varied. The effect of the partition order had been to award to the Tainuis, not only their own land as occupied and owned by them prior to the Order in Council of 1865, but in addition 11,236 acres lying to the northward of what was said to have been then the tribal boundary, and forming part of the land occupied and owned by the Tahingas. This is the territory in dispute in the present proceedings. The Commission recommended that these 11,236 acres should be restored to the Tahingas, on the footing that the proper mode of partitioning the Te Akau block was to adopt as the line of division the ancient ancestral boundary which had divided the territories of the two tribes. An Act was in consequence passed in 1904, under the title of the Maori Land Clauses Adjustment and Laws Amendment Act of that year, which directed that the matter should be referred to the Chief Judge of the Native Land Court to inquire in open court, with power to confirm or disallow or vary the recommendations of the Commission.

The Chief Judge held the inquiry directed by the statute, and in April 1905 delivered judgment declining to give effect to the recommendations of the Commission, and confirming the partition made in 1894. The fundamental point in his reasoning was that he considered the native title to have been extinguished by the Order in Council of 2nd September 1865, and that the recommendations of the Commission, which proceeded on a contrary assumption, were therefore vitiated. He stated that in his opinion the boundary line proposed by the Commission was arbitrary and inapplicable to the actual circumstances, and was probably wrong. He therefore in effect confirmed the partition made in 1894. For reasons already given their Lordships are unable to agree with the fundamental assumption of the Chief Judge's conclusions.

In 1906, the New Zealand Parliament again took the matter up, and passed the Maori Land Claims Adjustment and Laws Amendment Act of that year. By Section 26 a further enquiry was directed to be undertaken by the Native Appellate Court. This section confers the statutory authority under which the Judgment now appealed from was delivered, and its terms are important. They are as follows :—"The "Appellate Court is hereby authorised and "directed to review the Report of the Royal "Commission in connection with disputes "affecting the title of the Te Akau block" . . . . "and the subsequent decisions of the Chief "Judge under the provisions of Section 14 "of the Maori Land Claims Adjustment and "Laws Amendment Act, 1904, thereon, in so "so far as questions in dispute between the "native owners as to tribal or hapu boundaries "are concerned, and to confirm or if necessary "amend in accordance with the equities of

" the case any order heretofore made by the " Court, the Appellate Court, or the Chief " Judge." In February 1907, in accordance with this enactment, the Native Court, consisting of Judge Brown and Judge Mair, reconsidered the question of the partition. No fresh evidence was taken, but counsel were heard on behalf of the Tainuis and the Tahingas, and the record of the evidence on previous hearings and other records and documents were before the Court. Judgment was given on the 27th February 1907, and this is the Judgment now appealed from. By this Judgment the 11,236 acres were taken from the Tainuis and restored to the Tahingas, in agreement with the recommendation of the Commission of 1904. The Judgment also disposed of further questions of minor importance. On the 17th of April 1907 the Court made a formal partition Order, giving effect to it.

The principles on which the Native Appellate Court have based their conclusions are twofold. In the first place they consider that the land of the loyal natives was never confiscated under the New Zealand Settlement Acts or the Order in Council of 1865. With this opinion their Lordships have already intimated their agreement. The areas and boundaries, as the Judgment points out, had not at that time been defined and were left for future enquiry. The Court thought that this being so, it was impossible to adopt any other course than that of taking the native title into consideration, even if simply on the ground that experience had shown this to be the only equitable mode of dealing with such cases. They went on, however, to say, as a second ground of judgment, that " apart from the legal aspect of " this case, and even if it were held to be

" Crown land granted to the natives, we cannot " under the circumstances think of any other " equitable way of dealing with the matter " than by adhering as far as possible to native " custom. We cannot imagine for a moment " that it was intended that natives who remained " loyal to the Crown and resisted the temptation " to go into rebellion with their friends and " relatives should be placed in any different or " in a worse position than they would have " been in had there been no rebellion at all. " And it is sought to place one section of the " loyal natives in a worse position."

Their Lordships are of opinion that the wide words of the section giving the Court power to take into account what are termed " the equities of the case " would have justified the Court in considering the original native title, even if it had been held to be extinguished, as well as the other matters referred to. A conclusion come to on this question would not, in their Lordships' opinion, be one on which it is desirable that the Judicial Committee should express an opinion. The prerogative of the Crown would no doubt in theory enable a review to be made of a judgment of an ordinary Court based on such a conclusion if it were obviously contrary to the ordinary principles on which justice ought to be administered throughout the British Empire. But in a case in which it appears from the language of the Statute that the Parliament of New Zealand desired to entrust the tribunal named in the Statute with a wide discretion, and in which it is far from obvious that the judgment of the local tribunal so chosen, with its special facilities for getting at the truth and with its special experience, was otherwise than right, their Lordships are unwilling to review the conclusion come to on what is almost, if not entirely, a

question of fact. Moreover, by the concluding paragraph of the special case the parties have agreed that the questions referred to the Sovereign in Council should be exclusively questions of law. The only real question of law in the case is that as to the extinction of the native title, as to which their Lordships have already intimated an opinion adverse to the Appellants. Taking this view, they think that there were materials on which the Court below might properly find, as they did, the fact of the ancient boundary between the two tribes. Having regard to the history of the case and to the terms of Section 26 of the Act of 1906, they do not consider that any admissions made by the male grantees at the Compensation Court of 1866, or the receipt of rent in subsequent years, should, as the Appellants argued in their printed Case and at the Bar, have furnished the tests to be applied by the Court below. Nor do they think that the "equities" directed by Section 26 to be taken into account were confined to these or any other particular facts or to apparent acquiescence by the grantees or their representatives in a supposed basis of equal rights. Indeed the history of the case displaces the inference of such acquiescence.

They will therefore humbly advise His Majesty that the Appeal should be dismissed with costs.

In the Privy Council.

MANU KAPUA AND OTHERS

v.

PARA HAIMONA AND ANOTHER.

DELIVERED BY
THE LORD CHANCELLOR.

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