Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Te Teira Te Paea and Others v. *Te Roera Tareha and another from the Court of Appeal of New Zealand; delivered 9th November* 1901.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Lindley.*]

The question to be determined on this Appeal is whether a Maori chief named Tareha to whom certain lands known as the Kai Waka (or Kaiwaka) block were allotted by the New Zealand Government in June 1870 was entitled to those lands beneficially or whether he was a trustee of them for other natives.

Before stating the facts which have to be considered in this case it will be convenient to make a few remarks on the land laws of the Colony in force in January 1867 and on the Settlement Act of 1863 and 1865. The Native Land Act of 1865 was in force in 1867. In the land Acts of the Colony native lands mean lands owned by natives under their customs or usages; hereditaments mean land subject to tenure under title derived from the Crown. A land court was constituted with power to investigate claims to native lands and to grant certificates of title.

Act of 1865, section 2.

Sections 5 and 21–29, and Schedule, and 40–44.

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But no certificate was to be granted to more than 10 persons. The court was empowered to restrict alienation by the certificated owners. But natives might hold "hereditaments" as distinguished from native lands and it was an object to assimilate the law relating to hereditaments as nearly as possible to English law. Grants of lands were made by the Crown and power was given to restrict alienation; but unless alienation was prohibited a grantee of an hereditament could dispose of it. In case of the death of a grantee of an hereditament without having made a valid disposition the Court was empowered to ascertain "who according to law "as nearly as it can be reconciled with native "custom ought in the judgment of the Court to "succeed to the hereditaments;" and the Court was empowered to make orders having the effect of a valid will vesting the hereditaments of the deceased in such persons.

Act of 1865, section 30.

The New Zealand Settlement Act 1863 (amended in 1865) referred to the serious rebellion of the natives in the Northern Island and empowered the Governor in Council to declare any district in which lands of rebellious natives or tribes were situate to be a "district" within the provisions of the Act and to take out of such district lands for settlement and colonisation and these lands were to be Crown lands. Loyal natives having any interest in the lands thus taken were to be compensated. By the Act of 1863 this compensation was to be made in money: but by the amending Act of 1865 land might be granted by way of compensation and trusts might be declared either of the money or of the land given in compensation.

Act of 1863, section 2.

Section 3.

Section 4.

Sections 5 and 7.

Sections 13–15.

Act of 1865, sections 9 and 15.

Under the provisions of these two last-mentioned Acts the Governor in Council issued a proclamation dated the 12th January 1867 declaring

certain lands specified in the schedule to be a "district" within the meaning of the New Zealand Settlements Act 1863. By the same proclamation it was also declared that the lands within the said district not being the property of or held under grant from the Crown were reserved and taken for the purposes of settlements and that such lands were required for the purposes of the said Act and were subject to the provisions thereof as from the date of that order. It was also declared as follows "that no land of any "loyal inhabitant within the said district will be "retained by the Government and further that "all rebel inhabitants of the said district who "come in within a reasonable time and make "submission to the Queen will receive a suffi-"cient quantity of land within the district for "their maintenance."

The meaning and effect of this proclamation seems plain. None of the lands in the district continued to be native lands within the meaning of the Native Land Acts. All native titles by native custom were extinguished. But the Government was willing to grant out lands in the district to loyal natives and to others who should come in and submit within the time mentioned in the proclamation. Their title however to the lands granted to them would depend entirely on the terms of their grants.

The district formed under this proclamation was called the Mohaka and Waikare district or block.* It included the Kai Waka block which is in question in this Appeal. This block contained 31,200 acres or thereabouts.

Apart from the agreement of the 13th June 1870 which will be referred to presently there is no evidence before their Lordships to show who were regarded in 1867 as loyal inhabitants nor what rebel inhabitants came in and made their

* It is called Block in the letter of 18th November 1869 set out below.

submission so as to entitle themselves to the benefits of the proclamation.

What was done under the proclamation before 1869 does not appear; but on the 18th November 1869 the following letter of instructions was sent by Sir Donald McLean on behalf of the Government to Mr. Locke the resident magistrate for that part of the Colony:—

"Auckland,
"Sir, 18th November 1869.

"I have the honour to request that you will carry out "the settlement of the Waikare-Mohaka block.

"The Government do not expect or, indeed, desire to reap "any pecuniary or other advantage from the confiscation of "this block, or to incur any loss in connection therewith, but "it is most desirable that all questions connected with it "should be finally adjusted and disposed of. You will there-"fore endeavour to effect as equitable a settlement with the "natives as possible, taking care that large reserves are made "for their own use.

"The Chief Tareha, who is becoming dispossessed of most "of his landed property, should have reserves secured upon "him within that block.

"I need not supply you with more detailed instructions, as "you are already acquainted with the history of this block, "and I feel satisfied that you are fully competent to deal with "it in such a just and equitable manner as will meet the "requirements of the case.

"You will, of course, in this as in all other cases confer "with his Honour Mr. Ormond, who represents the general "Government at Hawkes Bay, and act in accordance with his "views in carrying out of these instructions.

"I have, &c.,
DONALD MCLEAN.

"S. Locke, Esq.,
"R. M. Napier, Hawkes Bay."

The Waikare-Mohaka block here referred to is evidently the whole district of that name mentioned in the proclamation of the 12th January 1867.

In accordance with these instructions a meeting of natives was held and a formal agreement was come to with them on the 13th June 1870. This agreement commences by reciting the proclamation of January 1867; it then describes

the lands forming the Mohaka and Waikare district, and proceeds as follows :—

" At a meeting of the loyal claimants of the said district " and the Government agent for the East Coast, D. McLean, " Esquire, an agreement was entered into in which it was " arranged that certain portions of the above-mentioned block " should be retained by the above-mentioned loyal claimants " and other portions should be retained by the Government. " And whereas a final settlement of the question has now been " made in accordance with letter of instructions from the " Honourable the Defence Minister, dated 18th November " 1869.

" It is now agreed between the Government and the loyal " claimants that the Government shall retain all the blocks " and pieces of land hereinafter described and shown in the " plan attached hereto.

Here follow descriptions of blocks retained by Government with reservation of timber for road, &c. purposes.

" With the above exceptions, the whole block described in " the proclamation before cited, shall be conveyed to the loyal " claimants under the following conditions :—

" The whole block shall be subdivided into several portions " as shown by the tracing annexed.

" The Government shall grant certificates of title for the " several portions to the natives mentioned in the following " schedule.

" That the whole of the land shall be made inalienable both " as to sale and mortgage, and held in trust in the manner " provided or hereinafter to be provided by the General " Assembly for native lands held under trust.

" [Signed

[Here follows 32 native names.]

" Schedule

" Of blocks to be retained by natives in Waikare Mohaka " block, with names of persons whose names are to be inserted " in Crown Certificates."

The expression "held in trust, &c." has given rise to much controversy and this Appeal will be found ultimately to turn on its real meaning.

The schedule containing the names of the blocks and of the persons to whom certificates were to be given is very important. These details do not appear in the record but their Lordships have been furnished with a full copy of the agreement and schedule. Thirteen blocks are named; Kai Waka being one of them. The names to be inserted in the crown certificates in respect of each block

are given under the name of the block. The total number of persons so named greatly exceeds 32; from which it is plain that provision was made for many more persons than the 32 natives who signed the agreement. No block except Kai Waka has only one name under it. That block has only the name of Tareha. His name also appears but with others under the names of seven other blocks. No tribe is referred to as entitled to any block or land. One block has as many as 40 names under it; another has 39; another 38; another 35; none except Kai Waka has less than 13. The letter of the 18th November 1869 shows that Tareha having lost most of his lands was intended to have others secured upon him. This letter furnishes the only light their Lordships have to show why Tareha should have a large block to himself; but that letter (which is referred to in the agreement) favours the view that this block was allotted to him beneficially rather than the view that he took it as a trustee for others.

By the Mohaka and Waikare District Act 1870 the foregoing agreement was declared binding on the Government and all the persons whose names are stated in the said agreement and in the schedule thereto (Section 2); and provision is made for defining the lands to be retained by the Government and to be granted out (Sections 3 and 4) and for issuing Crown grants in favour of the persons who in pursuance of the said agreement are entitled to the said pieces of land in fee simple subject to the following limitations and restrictions—then follow restrictions against alienation charging or encumbering in any way except by lease for 21 years and all deeds wills and other instruments purporting to transfer charge or incumber the lands except by lease are declared ineffectual (Section 5, Clause 1, 2, 4). In the event of the

death of any person named in the agreement as entitled to a certificate the Native Land Court is empowered to ascertain who ought to succeed him as Crown grantee (Section 5, Clause 3).

What was actually done under this Act does not appear. It was repealed by the Repeals Act 1878 and the natural inference would be that it had been carried out and was no more wanted. But the Native Lands Amendment Act 1881 which will be referred to hereafter shows that grants had not even then been issued to all the persons entitled to them under the agreement of the 13th June 1870. The Act of 1870 although repealed is very important as throwing light on that agreement.

The terms of the agreement itself show that the persons to whom lands were to be granted were to derive their title from the Crown; the Act says the grants were to be to them in fee simple, an expression quite inapplicable to lands held by native custom. All the blocks except Kai Waka were to be granted to more than 10 persons. There is no reference to any native custom and the trust referred to in the agreement does not point to any definite class of persons but to "the manner provided or to be "provided by the General Assembly for native "lands held under trust." The trusts therefore must be found in some Act of the General Assembly and cannot be got at by reference to native customs or to enactments relating to native lands generally. As will be seen presently trusts of lands are recognized in New Zealand but their Lordships have not been furnished with any materials for coming to the conclusion that the General Assembly has ever declared that the lands mentioned in the agreement are subject to any trusts in favour of the Appellants. The Act of 1870 plainly treats the persons named

in the schedule to the agreement and if dead then their successors as entitled to grants in fee simple but subject to the restrictions mentioned in Section 5.

In 1880 the Chief Tareha died leaving a will devising his lands to the Respondents and four other natives.

In 1881 a Colonial Act called the Native Land Acts Amendment Act 1881 was passed to supply certain omissions in the Acts relating to native lands. Sections 7 to 9 relate to the Mohaka and Waikare district. Section 7 refers to the Order in Council of the 12th January 1867 and the formation of the said district and to the agreement of the 13th June 1870 and the Act of 1870 already mentioned and states that the lands to be retained by the Government had been surveyed and were by that Act vested in the Crown and that the Act of 1870 had been repealed; the section then proceeds as follows: "And whereas "it is expedient to make provision for enabling "the Governor to issue grants in favour of the "persons who in pursuance of the said agreement "are entitled to the residue of the said lands "be it therefore further enacted—on the appli- "cation of the Native Minister the Land Court "may in its ordinary form of procedure inquire "and determine who are the persons entitled as "aforesaid and may issue certificates in ac- "cordance with such determinations and may "fix therein the dates on which the legal estate "therein should respectively vest." Section 8 provides for the issue of Crown grants in accordance with the certificates. The grants are to be issued "in favour of the persons therein "respectively named their heirs and assigns as "tenants in common and may therein fix the "date at which the legal estate therein shall "vest as set forth in the several certificates

"subject nevertheless to the following re-
"strictions and conditions." Then follow restrictions against alienation except by lease and provisions making deeds and wills affecting the same invalid and against charging or incumbering in any way whatever and against taking the lands in execution under any judgment or other process.

It appears to their Lordships plain that the persons to whom certificates were to be given and grants made under this Act were the persons named in the schedule to the agreement of the 13th June 1870 and the successors of those of them who might be dead. The idea that the grantees were to hold in trust for an unascertained and practically unascertainable class of natives who were loyal in the old rebellion or who came in and submitted within a reasonable time after the 12th January 1867 appears to their Lordships too extravagant to require serious comment. The mere fact that the grantees were to hold as tenants in common goes far to negative any such idea and would be conclusive to an English lawyer. Grants by the Crown to several persons under the Native Lands Acts repealed in 1873 made the grantees tenants in common and not joint tenants (*see* the Native Land Act 1873 Section 79). The Maori Real Estate Management Act 1867 provided for the appointment of trustees of the hereditaments of native infants lunatics and others under legal disability; and for the management of such hereditaments by the trustees. Trusts are also referred to in several other Land Acts; and the reference to the legal estate in the Act of 1881 merely indicates that the grantees or some of them might be trustees of their shares for other persons and that the Legislature was only dealing with the legal title.

After this Act was passed viz. on the 6th July 1882 an order was made for the issue of a certificate to the Chief Tareha in respect

of the Kai Waka block. The order was made in the presence of a chief who alleged that there were many loyal natives not named in the agreement of the 13th June 1870 who claimed to be interested in the lands mentioned in it. The order was as follows:—

"'The Native Land Court Act 1880,' and 'the Native "Lands Act Amendment Act 1881.'

"Provisional District of Hawkes Bay.

"Fee charged 1*l*. Mohaka and Waikare Districts.

"At a sitting of Native Land Court of New Zealand held at "Napier in the said district on the 6th day of July 1882 before "F. M. P. Brookfield, Esquire, Judge, and John Gage, "Assessor.

"It is ordered that a Certificate of Title to a parcel of land "portion of the said district being called or known by the "name of Kaiwaka containing by estimation 31,200 acres "should issue to Tareha Te Moananui and that the said party "should be entered in the register as the owner according to "native custom of the said parcel of land as from the 12th "day of September 1870 subject nevertheless to the several "restrictions set forth in the Native Lands Act Amendment "Act 1881 and that such certificate of their title be issued "when a properly certified plan is sent in to the Native Land "Court.

"Witness the hand of F. M. P. Brookfield, Esquire, Judge, "and the seal of the Court the 6th day of July 1882.

"F. M. P. BROOKFIELD, Judge."

On the 10th July 1882 a minute of this order was made for the issue of a certificate in favour of Tareha and title to vest from the 12th September 1870.

Statutes existed authorising grants to be made out in the names of the persons originally entitled to them although they might be dead. *See* Crown Grants Act 1866 Section 34.

The Judge who made this order wrote to the Native Minister giving a report of the proceedings before him and stating the reasons for his Judgment and what he told the Chief who addressed the Court. The Judge's report says: "I told him that the agreement of the "13th June 1870 was entered into between the "Government of the Colony and the natives "named in it and that it had twice been declared "to be valid by Acts of Council and that the

" Court could not now go behind it so as to " inquire whether any error had crept into it " and that the only persons who could now be " recognised as having interests in the land were " those named in the agreement or the successors " of any who might now be dead." The native chiefs protested and were told they must petition Parliament if they were advised to do so. They declined to assist the Court in any way. The names in the agreement were then read out and orders were made for the issue of certificates to them the estates to be vested as from the 12th September 1870 when the above-mentioned Act came into operation.

It is to be observed that the order last referred to directed that Tareha should be entered in the Register " as the owner according to native " custom." This looks as if the land was to be treated as native land (*see* the Native Land Act 1873 Section 3). But it is plain that the Judge who made the order did not suppose that the above words created any such trust as is asserted by the Appellants.

On the 20th May 1885 an order (called a succession order) was made by the Native Land Court in the matter of the deceased Chief Tareha and of the application of certain natives claiming to be interested in his estate. This order is as follows: " The Court having proceeded to inquire " and ascertain who ought to succeed to the " lands and hereditaments for the estate therein " whereof the deceased died possessed and having " made valid disposition thereof by will and " having determined thereon it is hereby certified " that so far as the deceased died possessed of an " estate in severalty or tenancy in common in " all that parcel of land situate at Kaiwaka and " containing 31,200 acres or thereabouts and " known by the name of Kaiwaka the boundaries " and descriptions whereof are more particularly

" set out in the certificate of title thereof the " persons who are entitled to succeed are "— then follow six native names including the names of the two Respondents—" by virtue of the said " will bearing date the 19th December 1880 all " aboriginal natives of New Zealand and that " they became so entitled on the 19th December " 1880 being the day of the death of the " deceased."

This succession order is contended by the Appellants to be invalid; but it is unnecessary to consider its validity; for unless Tareha was a trustee for the Appellants as they allege the succession order may be passed over as unimportant on the present appeal.

On the 10th day of June 1890 an Order in Council was made by the Governor giving the Native Land Court jurisdiction to determine the ownership of the said Kai Waka block and other blocks mentioned in the agreement of June 1873 but on the 7th day of May 1891 the Governor stayed proceedings thereunder by notice to the Chief Judge.

The Defendants allege that on the 12th July 1894 a certificate of title was issued for the Kai Waka block in the name of Tareha and that on the 13th November 1895 a grant of the said block to Tareha was issued. The certificate is not before their Lordships. The grant is set out in the Record at p. 23. The grant is to Tareha his heirs and assigns to hold to him his heirs and assigns for ever as from the 12th September 1870 subject to the several restrictions set forth in Section 8 of the Native Lands Act Amendment Act 1881. There is no reference to any trust or native custom.

On the 17th July 1896 the Plaintiffs (and Appellants) commenced this action against the Defendants (and Respondents). By their original and amended claims the Plaintiffs prayed *inter*

alia that it might be declared that the lands called Kai Waka were held by Tareha as a trustee for the loyal owners thereof according to native custom and usage the natives beneficially entitled to the said block: that an inquiry might be had as to who such persons were and for that purpose if necessary a reference might be had to the Native Land Court: that it might be declared that the Order of the Native Land Court of the 6th July 1882 declaring Tareha to be the sole owner of the said lands according to native custom was null and void and that the said certificate of title and the grant to the Defendants were null and void: that the proceedings of the Native Land Court appointing successors to Tareha might be declared to have been without jurisdiction and void. The Respondents filed a Statement of Defence admitting most of the facts but denying all the trusts alleged by the Plaintiffs. In October 1896 the Plaintiffs moved to have the issues of law argued prior to the trial of the action. The following were the material issues of law so raised: (1) Did the agreement of the 13th June 1870 create Tareha a trustee of the Kai Waka block and if so a trustee for whom? (2) Was Tareha beneficial owner of the said Kai Waka block or was he a trustee for any person or class of persons under any express or resulting trust or otherwise howsoever by virtue of the facts appearing from the Statements of Claim and Defence? By consent of the parties these issues of law were ordered to be argued and were removed for argument into the Court of Appeal of New Zealand without any decision of the Supreme Court and were argued before the Court of Appeal. The Court of Appeal on the 20th October 1896 answered the above issues in favour of the Respondents. On the fifth July 1898 the action

came on for hearing in the Supreme Court of New Zealand and upon the answers given by the Court of Appeal to the above issues judgment was given by the Supreme Court for the Respondents.

From this judgment the Plaintiffs have appealed to His Majesty in Council having obtained special leave to do so without giving any security.

The judgment of the Supreme Court was based upon two grounds viz. (1) that all the lands comprised in the Mohaka and Waikare District were forfeited to the Crown by reason of the rebellion and could be retained by the Crown or granted out by it as it pleased and that such lands were not native lands within the meaning of the Native Land Acts after the proclamation of 12th January 1867 was made; (2) that the title of the Plaintiffs or other natives to such of the lands comprised in the District as were not retained by the Crown must be decided by the terms of the agreement of the 13th June 1870; and (3) that notwithstanding the use of the word trust in that document no such trust as is contended for by the Appellants was created by it. Having come to this conclusion it was unnecessary to consider any of the other questions raised.

Their Lordships concur with the Supreme Court on both the above points. Counsel for the Appellants referred at considerable length to the New Zealand Native Land Acts and other Acts connected with them viz. those of 1862, 1863, 1865, 1867, 1873, 1880, 1881 and 1886 but their Lordships are unable to see anything in them which can assist the Appellants unless they succeed in first establishing the creation in their favour of the trust on which they rely. Their ability to do this turns entirely on the clause in the agreement of the 13th June 1870 in which the word "trust" occurs. Their Lordships have already pointed out serious difficulties in

construing this clause in the manner contended for by the Appellants; and their Lordships have only now to add that they are convinced by the careful judgments of the members of the Supreme Court that the construction so contended for cannot be judicially supported.

The agreement says distinctly enough who are to receive certificates of title. Grants would follow and would be issued in accordance with the certificates. The lands were be made inalienable both as to sale and mortgage and were to be held in trust in "the manner provided or here-"after to be provided by the General Assembly "for native lands held under trust." What was meant by this is somewhat obscure; but the language does not of itself create the Appellants and the other natives who were loyal in the rebellion beneficial owners of the lands which were to be allotted to the persons named in the Schedule. The General Assembly have created no trust in favour of the Appellants and other loyal natives and the Appellants have absolutely nothing to rely upon except the clause now referred to. The Appellants' Counsel felt the difficulty of establishing any such trust on the numerous allottees of all the blocks; but they contended that there was such a trust in the case of the Kai Waka block. Their Lordships see no reason for drawing any distinction in this respect between one block and another. The allottees of each block must be treated as the only persons entitled to them under the agreement.

The use of the word trust on which the Appellants so strongly rely is not always sufficient to create an equitable right or obligation which can be enforced by legal proceedings. This was pointed out by Lord Selborne in *Kinloch* v. *The Secretary of State for India in Council* (L.R.

7 App. Ca. 619, *see p.* 625) where some booty was granted by the Crown to the Secretary of State "in trust" for the officers and men of certain forces. That case has no bearing on the present except that it affords a striking example in which the position of the parties and the nature of the subject matter showed that even such an expression as to be held in trust for a definite class of persons did not create any equitable interest in their favour in the property so to be held. In this case the expression in the agreement of the 13th June 1870 appears to their Lordships to mean no more than that if any of the lands are subject to any trust they are to be held subject to the laws regulating the conditions and trusts on which native lands are held.

Their Lordships will therefore humbly advise His Majesty to dismiss the Appeal and the Appellants must pay the costs but the Respondents must bear the costs of their abandoned petition praying for the discharge of the order of 14th July 1899 giving the Appellants leave to appeal without finding security.