1945
NEW ZEALAND

THE NATIVE PURPOSES ACT, 1938

REPORT AND RECOMMENDATION ON PETITION No. 49 OF 1937, OF TEOTI TIMOTI KARETAI AND OTHERS, PRAYING FOR AN INVESTIGATION OF THE NATIVE RESERVE IN PRINCES STREET, DUNEDIN

Presented to Parliament pursuant to the provisions of section 23 of the Native Purposes Act, 1938

Native Land Court (Chief Judge's Office),
Wellington C. 1, P.O. Box 3006,
14th August, 1945.

Memorandum for the Hon. the NATIVE MINISTER.

PETITION NO. 49/1937, OF TEOTI TIMOTI KARETAI: PRINCES STREET RESERVE, DUNEDIN.

PURSUANT to section 23 of the Native Purposes Act, 1938, I forward to you the Court's report upon Petition No. 49 of 1937, of Teoti Timoti Karetai and others, praying for an investigation into the Princes Street Reserve, Dunedin.

The inquiry was conducted by me, and my conclusions are contained in the report. I recommend that no further action be taken in relation to the petition.

G. P. SHEPHERD, Chief Judge.

In the Native Land Court of New Zealand, South Island District.—In the matter of section 23 of the Native Purposes Act, 1938; And in the matter of Petition No. 49 of 1937, of Teoti Timoti Karetai and others, praying for an investigation of the Native Reserve in Princes Street, Dunedin.

REPORT OF COURT

PROCEEDINGS upon the inquiry into the petition were commenced in the Native Land Court sitting at Dunedin on the 19th October, 1939. The petitioners were represented by Mr. W. J. Meade; the Solicitor-General (Mr. H. H. Cornish, K.C.) appeared for the Crown; and Mr. D. Ramsay appeared for the Dunedin City Corporation.

Initially, Mr. Ramsay took the point that there was nothing to connect the land referred to in the petition as the Native Reserve, Princes Street, with the land comprised in the Crown grant mentioned in the proceedings in the action *Regina* v. *MacAndrew* (1 C.A. 172). Mr. Meade had stated that this was the land which was the subject of the petition, and although Mr. Ramsay was quite entitled to raise the question, it was not pressed unduly, and the hearing proceeded on the footing that the Crown grant area was the area upon which the controversy centred. The piece of land is that contained in a Crown grant issued on the 11th January, 1866, to the Superintendent of the Province of Otago. It is therein described as: "All that parcel of land . . . situate in the Town of Dunedin, being Reserve Numbered Eleven (11), containing . . . 1 acre 2 roods and 34 poles, more or less, bounded towards the west-north-west by Princes Street, 1290 links, towards the north-north-east by Reserve Numbered Ten (10), 118 links, and towards the south and west by area granted for harbour reclamation 1430 links." The *habendum* in the Grant runs thus: "To hold unto the said Superintendent of the Province of Otago and his successors in trust as a Reserve for Public Wharves and Quays and other purposes connected therewith of public utility to the Town of Dunedin and its inhabitants."

The position to-day is that a portion of the area is comprised in the soil of Princes Street and Police Street, and the balance is contained in land transfer certificates of title in favour of the Dunedin City Corporation. The land as originally granted was bounded by high-water mark, but, through reclamation works, considerable areas have been added to its frontage, with the result that the reserve is now no longer easily identifiable with the land contained in the grant.

At the hearing only one witness was called, and the proceedings virtually took the form of references to the lengthy official records relating to the land and submissions by counsel on the matter contained in those records, or the inferences to be drawn therefrom.

The history of the land starts with the purchase, in 1844, by Captain Symonds, on behalf of the New Zealand Company, of the Otakou Block, containing 400,000 acres. The Governor had waived, in favour of the New Zealand Company, the right of pre-emption over an area of 150,000 acres, and out of the 400,000 purchased the company engaged to select its portion, leaving the unappropriated residue to be dealt with by the Crown in such manner as it saw fit. By the deed of cession certain lands were reserved from the sale, but the Princes Street Reserve was not among them. The company made certain efforts in the direction of the settlement of the land, but in 1850 it surrendered its charter, with the result that the lands of the company became vested in the Crown subject to existing contracts.

It appears that towards the close of the year 1852 Mr. W. Mantell, the Commissioner of Crown Lands, Otago, made a recommendation that the piece of land in question, which for the sake of convenience is hereinafter referred to as the reserve, should be granted to the Maoris so that they could erect houses for their accommodation while on visits to Dunedin. A memorandum dated the 6th June, 1853, addressed to the Commissioner by the Civil Secretary states that the Governor had approved the reserve being made. No Crown grant was issued to the Maoris, nor does it appear that any other official steps in the direction of the completion of the reservation were taken.

In 1862 Mr. W. H. Cutten, who had succeeded Mr. Mantell as Commissioner of Crown Lands, sent forward to the Secretary of Crown Lands a petition addressed to His Excellency by John Jones and others praying that they might be allowed to rent the Government reserves abutting upon the harbour until the reserves were required by the Government. One of the grounds of the petition was

that the gold discoveries had caused a large influx of population and the space in Dunedin available for business purposes had become limited and was not commensurate with the necessities of trade and the wants of the inhabitants. Mr. Cutten said :—

> "The land referred to by the petitioners was in the original survey of the Town of Dunedin laid off in sections, and ran some distance into the water below high-water mark. But as it was deemed advisable by the New Zealand Company that there should be no exclusive privilege to the water frontage, but that it should be made a public quay, the sections were withdrawn from the map and marked as reserved. Subsequently, Mr. Mantell . . . selected a portion of the reserve and recommended that it should be appropriated to the use of the Natives on their visits to Dunedin, an arrangement which I believe was sanctioned by His Excellency Sir George Grey. The Natives, however, never made use of the place, it being not suited to the purpose, but continued to land their produce at a small bay where the water is deeper, and upon which latter spot a stone house for their use has been erected by the General Government. A portion of the frontage reserve has been used by the Provincial Government for the erection of immigration barracks, and for police barracks and offices. In all probability the whole of the reserve will be required by the Government for public purposes, as but few reserves have been made in Dunedin."

The Commissioner went on to make the recommendation that the reserves should be let in sections not exceeding an eighth of an acre, and for a period not exceeding one year.

The upshot was that the reserve was let in accordance with Mr. Cutten's recommendation. Reporting on what had been done, Mr. Cutten, in a memorandum dated the 24th January, 1863, stated that he was decidedly of the opinion that the reserve ought to form a part of the trust for the improvement of the harbour. He was not certain that this disposition of the land could not be enforced by application to the Supreme Court were there any corporate body in the Province which could legally maintain the claim.

From this time onward the reserve bulked more largely in Dunedin affairs, and eventually, on the 13th April, 1865, the Superintendent of the Otago Province set forth his views to the Postmaster-General. The Superintendent stated that he was not prepared to say whether His Excellency the Governor did or did not have the legal right to grant the reserve to the Maoris, but there were strong grounds for believing that, were equity consulted, no such act would be effected. The grounds for his opinion were :

(*a*) On the original survey plans of the Town of Dunedin, signed by the Chief Surveyor in 1846, the reserve was shown as divided into sections :

(*b*) That, through instructions from the Chief Agent of the New Zealand Company, the sections forming the reserve, together with other sections possessing frontages to the harbour, were reserved from sale :

(*c*) That some of the early settlers, who had intended to make choice of some of the sections so reserved, felt aggrieved that their rights of selection had thus been restricted :

(*d*) That the reserve was said to have been provisionally reserved by Mr. Mantell for the Natives' use during the time he held the office of Commissioner of Crown Lands, and that His Excellency had confirmed the Commissioner's act :

(*e*) That the reservation, if made, was made without the knowledge or sanction of the local authorities :

(*f*) That a similar misappropriation of a public reserve (the octagonal reserve) in the Town of Dunedin was attempted in the year 1853, but the attempt having come to the knowledge of the members of the Provincial Council before the Governor's sanction could be obtained, the evil was averted :

(*g*) That had the Government or Provincial Council of the day believed that the grant would ever have been likely to take practical effect, such an alienation of public property would have been strenuously opposed :

(*h*) That the withdrawal of the reserve from sale, making it a public reserve, and afterwards withdrawing that reserve and granting it, without the knowledge and consent of the local authorities, to private persons, whether Natives or Europeans, would have been an act, if carried into effect, liable to be stigmatized as unjust to the original land purchasers in Otago, and to the general public also.

In the same year—*i.e.*, 1865—a Select Committee of the Provincial Council was constituted to go into the pros and cons. This Committee reported that it had examined all the existing documents bearing on the topic and had heard the evidence of several of the longest residents in the province. Its conclusions, which were set forth at length, substantially confirmed the views which had been expressed by the Superintendent. The Committee's report ended with a recommendation that the facts, as found by it, be communicated to the Government under the full assurance that not only would the Crown grant for the reserve forthwith be issued in terms of the original destination, but also that the money which had been derived from it would be restored to the province as its rightful owner.

The matter was laid before Mr. Sewell, the Attorney-General. Mr. Sewell, in a memorandum dated the 29th June, 1865, confirmed an opinion which he had formerly given viz., that the area was duly reserved as a Native Reserve, and was under the operation of the Native Reserves Act, 1856. He did not see any ground upon which either the Provincial Government, or any municipal body constituted in Dunedin, or any private individual could impugn such an appropriation of the land. Mr. Sewell, however, recommended that nothing should be done to preclude the Provincial Government from submitting any case it might have to the judgment of the General Assembly. I interpolate to say that an opinion contrary to that of Mr. Sewell was given by Mr. Prendergast, Attorney-General, in August, 1866.

A Select Committee of the House of Representatives made inquiry. In its report dated the 25th August, 1865, the Committee set forth certain instructions which had been issued by the Principal Secretary of the New Zealand Company in London to Colonel Wakefield, the company's agent in New Zealand, and which indicate pretty clearly that, in the settlement schemes, water frontages were to be reserved to the public use. The Committee's conclusion was that, the land forming the Dunedin reserve having been reserved from sale for a specific public purpose, it was wrongfully set aside for the use of the Natives. It recommended that a Crown grant be issued in favour of the Municipality of Dunedin, as trustees and representatives of the local public, as was evidently the intention of the company conveyed in the instructions to Colonel Wakefield.

In intended pursuance of this recommendation, a Crown grant for the reserve was made to the Superintendent of the Otago Province on the 11th January, 1865. This gave rise to talk of legal proceedings and so forth. The Maoris were given permission to use the name of the Crown for the purpose of taking proceedings for the repeal of the grant of the land, by *scire facias* or otherwise, and the Government guaranteed to find a sum up to £200 for the Maoris' legal costs. This guarantee was later withdrawn when it was found that another arrangement had been made whereby the Maoris were to be advanced, out of Native Reserve moneys, an amount up to £400 for the costs and expenses of the action.

In the meantime John Topi Patuki petitioned Her Majesty and also the House of Representatives. It was alleged in the petition that at the time when negotiations for the sale and purchase of the Otakou Block were under way the chiefs demanded, amongst other things, that there should be made certain small reserves, including two at Dunedin—namely, one near the stream which crosses Princes Street, near Rattray Street, and the other fronting a small sandy cove to the eastward of a site afterwards occupied by the Manse and the land adjoining. That on the refusal of the company's agent and of the Government's agent to accede to these moderate demands, the chiefs declined to have anything further to do with the matter and departed, but, after some days, on being assured that these reserves would be made for them, the chiefs returned, and the purchase was concluded. That, during the existence of the company, the petitioner and his tribe were not molested in such occupation as they desired of these spots; but, on the demise of that body, being unable to find written record of the making of any special town reserves, the Commissioner of Crown Lands, at the request of the chiefs, laid their application before the Governor, who thereupon set apart for the petitioner and his tribe, a reserve in the Town of Dunedin, and one in the Town of Port Chalmers, from lands which the petitioner was advised were freely at the disposal of the Crown for that purpose.

The petition to the House of Representatives was reported on by a Petitions Committee on the 23rd August, 1867. The Committee stated that the prayer of the petitioner was to the effect that the House would refrain from passing a Bill relative to the Dunedin Princes Street Reserve or its rents or any other law of similar principle and tendency. It had examined Mr. John Jones and he had confirmed the statements contained in the petition (as set out in the preceding paragraph). Mr. Jones had stated that the reserve subsequently made by the Governor contained an area more than four times the area of the two reserves specified in the petition and which were originally reserved by the Natives and agreed to by the New Zealand Company's agents in 1844. Mr. Jones had also suggested a plan by which the matter in dispute might be amicably, satisfactorily, and justly disposed of. The Committee was of opinion that the object of the petitioner would be obtained if a clause were inserted in the Bill, then before the House, to the effect that nothing contained in the Bill was to be held to affect or prejudice the claim and title of the petitioner and his tribe. At the same time, the course suggested by Mr. Jones appeared to the Committee to be the best way of settling this complicated affair.

The Committee's report sets forth pretty accurately the substance of the evidence of Mr. Jones—evidence which, so far as I am able to judge, is that of a witness for truth. Mr. Jones stated that he had spoken to Mr. MacAndrew, who was then Superintendent of the Otago Province, and he had informed Mr. Jones that he was prepared either to give the Natives a site on the reclaimed land, or he would purchase for them a site in Pelichet Bay, close to the water, and erect a brick building, to the value of £500, for their use and that of the Natives of the Middle Island.

In transmitting John Topi Patuki's petition to His Grace the Duke of Buckingham, the Governor, in a despatch dated the 8th October, 1867, stated that His Grace would find from the enclosed memorandum that his responsible advisers had, at a meeting of the Executive Council, inadvertently advised him to sign a Crown grant by which the reserve was granted to the Superintendent of the Otago Province, and which grant His Excellency had signed in ignorance of what he was doing.

Amongst other papers sent to His Grace three days later was a memorandum prepared by the Hon. J. C. Richmond in which Mr. Richmond stated that the allegations contained in the petition were for the most part correct. There was good evidence that the Native owners at the time of the first negotiations for the sale of land at Otakou objected to giving up a part of what then formed the reserve, and, in consequence of that objection, the negotiations were broken off. In the subsequent deed of sale, no specific reservation of the land was made, but a general understanding was indicated that some lands were to be surveyed by the Governor for the sellers, and the vague terms of the deed might have been meant to include *inter alia*, a portion of the reserve in question. After setting forth the short facts of the case, Mr. Richmond went on to say that in 1865 the matter was pressed to an issue on the Legislature, and a resolution of the House was passed declaring that a grant to the Superintendent ought to be issued under the Public Reserves Act. The Government of the day proposed that an amicable suit should be instituted to try the questions of authority, on one side or the other, that had been raised. The Provincial Government had never acquiesced in this proposal. The Colonial Secretary was advised that, to bring the matter into Court, a grant must issue to one party or the other, and he had intended to recommend a grant; but in the meantime, inadvertently as regards His Excellency and the Colonial Secretary, a grant which had been prepared on the authority of the resolution of the House was presented for signature and issued. Since then the accrued rents, amounting to above £6,000, which had been impounded pending the settlement of the claim had been handed to the Province, on the undertaking to refund should the ultimate legal decision upset the grant.

Continuing, Mr. Richmond said that a suit had been instituted by the Native claimants, since the commencement of which an offer of £1,000 and a reserve of equal area on another part of the reserved frontage had been made by the Superintendent, but not accepted by the Native claimants in satisfaction of their claims. The suit was going forward. The Bill referred to by the petitioner was an authority to the Treasurer to pay over the rents to the grantee, but expressly saved the legal question, and in no way validated the grant. The Bill had since been withdrawn, and the money advanced on the terms stated. It was doubtful whether, in case of a decision adverse to the Natives, any power existed to carry out the intention of His Excellency in 1853 in any other way.

In the suit brought by the Natives in the name of the Crown against the Superintendent, they failed both in the Supreme Court and in the Court of Appeal: see *Regina* v. *MacAndrew* (1 C.A. 172). The Natives thereupon obtained leave to appeal to the Privy Council, the Government having agreed to a further advance of £500 being made from Native reserve funds for costs. But while the Privy Council proceedings were being put in train, suggestions about a compromise came forward. Somewhere towards the end of 1872 Sir Julius Vogel wrote a memorandum in which he stated that Mr. Izard, counsel for the Natives, and himself had conferred together with a view to agreeing to a

compromise which Mr. Izard could recommend to his clients and to Mr. Mantell, and which Sir Julius could recommend for acceptance to the Superintendent of Otago, and others concerned, on behalf of the Province. It was agreed between them to recommend the following compromise: out of moneys paid to the Provincial Government, the Superintendent was to pay to the Hon. Mr. Mantell and the Hon. Mr. McLean, or some other person (as trustees for the Natives), the sum of £4,650, and the sum of £500 to the General Government to refund an advance lately made to Mr. Mantell. No refund to be made by Natives in respect of advances made to them for the purposes of the suit. In consideration of the Superintendent making these payments, all proceedings on behalf of the Natives were to be stopped and the action discontinued; each side to pay its own costs; Mr. Izard to telegraph to England to stop the appeal on payment of the sums mentioned.

Acting upon the advice of their counsel (Mr. Izard), the leaders of the Natives agreed to the compromise, or purported so to do. In accordance with the arrangements, the sum of £4,650, with interest thereon, and, later, the unexpended balance of the £500 paid over to Mr. Mantell for legal costs—in all a sum of £5,044 19s. 3d.—was paid to the trustees for distribution to the people and was disbursed. Another sum of £500 was paid by the Government into the Native Reserves Account.

This, however, did not put an end to the matter, for in 1874 claims were preferred by the Natives to the back rents from the reserve. The claims culminated in a petition which was heard by the Native Affairs Committee in 1877 (see I-3B, 1877). The Chairman of the Committee reported that there appeared to have been a misapprehension as to the full extent of the compromise effected by the payment of £5,000 to the Natives, and the two parties understood the agreement differently. That, under all the circumstances, it was highly desirable to remove grounds of complaint, and that the Committee was of opinion that a further payment should be made to the Natives of the rents which had accrued prior to the issue of the Crown grant, or a reserve should be made of land to that value for the benefit of the Natives interested.

From this report Sir William Fox and Mr. MacAndrew dissented. Sir William stated that, having been personally and intimately acquainted with all the circumstances of the case from the date of the Otago purchase to that time, including those particulars in connection with Mr. Mantell's mission to Otago when he advised the reserve of the land in question, and having heard and read all the evidence taken before the Committee, he begged respectfully to enter his protest against the decision of the majority of the Committee, believing that the payment of £5,000 was intended by Sir Julius Vogel and Mr. MacAndrew to be final; and that if the agents for the Natives did not intend it so to be, they should not have concealed that fact, as was stated in Mr. Izard's evidence that they did; and that their clients were estopped by their action from any further claim beyond that which the Government understood to have been settled by the payment. Mr. MacAndrew concurred in Sir William's view.

What transpired after this is shown in the Journals of the Legislative Council, 1885, No. 23, p. 257. It discloses that an appropriation of £5,000 was made in 1877 "in final settlement of Native claims to Princes Street Reserve." The amount voted was remitted to the Resident Magistrate, Kaiapoi, for immediate distribution to the Natives. Taiaroa refused to sign the receipt required of him before the payment of the amount, because it expressed that the amount of £5,000 was to be in final settlement, whereas Taiaroa claimed £6,000 in round figures. The money remained for nearly two years in the bank, during which time Taiaroa persisted in his refusal. After this long resistance, the receipt was signed under threat from the Native Minister, Mr. Bryce, that the money would be recalled by the Government, and the moneys were distributed. Interest had accrued on part of the money—£1,000 having been distributed in 1878—and the Government claimed this.

In respect of the accrued interest—an amount of about £406—Taiaroa petitioned Parliament in 1880. The Native Affairs Committee, in reporting on the petition, stated that, according to his own evidence, the delay in the payment of the £4,000 arose entirely from the refusal of the petitioner to get from the Natives interested a receipt in full settlement of the claim as agreed upon, and that, as acknowledged by him, this delay was with the view to forcing the Government to pay another £1,000. The Committee could not therefore recommend that the prayer of the petition be granted. Petitions on the same topic came forward for a number of years thereafter, but without result.

Such are the main features of the history of the reserve. A recital of them appears to the Court to make unnecessary any detailed consideration of the submissions ably put forward by counsel for the Maoris. In refinement, those submissions amount to this: that the Maoris were not adequately compensated for the land which was agreed to be set apart as a reserve for them.

The Solicitor-General, on behalf of the Crown, on the other hand, in his submissions, advanced the view, in effect, that the compromise entered into in 1872 was for the purpose of quieting once and for all whatever claims the Maoris concerned might have had to the reserve or to a portion of the land embraced by the reserve. If the payment made to them was not for that purpose, then for what purpose was it made? Certainly not for the abandonment of any rights of action they might have had. To have paid to them the sum of £5,000 for abandoning the appeal before the Privy Council, leaving it open to them thereafter to come forward and claim to be entitled to compensation for the reserve, would have been the height of absurdity.

But the people at the time concerned to extract all they could secure from the authorities responsible for any failure to set apart the reserve for them had accepted as full and final settlement of any claim therefor the payments referred to in this report as having been made to them for that purpose, and the file shows that they acted upon the independent advice of eminent counsel. Their acceptance of the payment seems to me to estop the petitioners from claiming that the Maoris were not paid that to which they were entitled. But the sum of £5,000 was not all that was paid—they were given another sum as for the back rents deriving from the reserve.

It is difficult to escape the conclusion that the view urged by Sir William Fox on the claim for the back rents was absolutely right, and even were I disposed to think that there had been an omission to treat the Maoris fairly in the compromise, I should be driven to conclude that that omission was rectified when the payment of the second amount was made. In the result, therefore, I have no recommendation to make.

For the Court,

[L.S.] G. P. SHEPHERD, Chief Judge.

Approximate Cost of Paper.—Preparation, not given; printing (488 copies), £7)

By Authority: E. V. PAUL, Government Printer, Wellington.—1946.

Price 3d.]