SESSION II.

1923.

NEW ZEALAND.

NATIVE LAND AMENDMENT AND NATIVE LAND CLAIMS ADJUSTMENT ACT, 1922.

REPORT AND RECOMMENDATION OF NATIVE APPELLATE COURT ON PETITION No. 21/1921, BY RANGIHAWE TE KAHO AND OTHERS, RELATIVE TO THE IDENTITY OF THE PERSON NAMED RAHO IN GRANT No. 3749 OF THE OKAHU BLOCK, WEST COAST SETTLEMENT RESERVES.

Presented to Parliament in pursuance of Section 51 of the Native Land Amendment and Native Land Claims Adjustment Act, 1922.

THE NATIVE APPELLATE COURT, NEW ZEALAND.

SIR,— Wanganui, 15th March, 1923.

We have the honour to state that, sitting as the Native Appellate Court, we have at Wanganui this day inquired, as directed by section 51 of the Native Land Amendment and Native Land Claims Adjustment Act, 1922, into the claims and allegations made by the petitioners in a petition to the House of Representatives, No. 21 of 1921, by Rangihawe te Kaho and four others, respecting the identity of the person named as "Raho" in Grant No. 3749 of the Okahu Block, and report thereon as follows:—

Mr. R. C. Sim appeared for the petitioners, and Mr. Currie for the children of Te Raho.

As the petition and records show, the question is whether the name of "Te Raho" in the Crown grant is a clerical error for "Te Kaho."

Mr. Sim satisfied us that Te Kaho was a person who on an investigation of title by the Native Land Court would probably have been held entitled to an interest in the Okahu Block, and who, no doubt, if living (and if dead, his issue) might properly have been included in the grant. He was, in fact, dead at the time the recommendation for the grant issued. There are no doubt other persons also entitled who were omitted. That, however, is clearly not the question we have to consider, which is one of identity merely.

The allegations of the petitioners have been the subject of a previous inquiry and report by the Native Land Court, which is dated 7th July, 1922, and is attached to the Native Department file 1922/402. This report recommends legislation. In forwarding the report to you on the 15th September, 1922, the Chief Judge expressed himself as not convinced that the Native Land Court had come to a correct conclusion, and gave certain reasons. Subsequently section 51 above referred to was passed, directing this Court to inquire and report.

It was properly admitted by Mr. Sim, and it is quite plain, that the burden of proof is on the petitioners to establish that an error in the name has occurred. The Court is not entitled to presume anything of the kind. The presumption of law is entirely the other way.

It will be convenient to discuss the inquiry and report of the Native Land Court and the Chief Judge's comments thereon.

Clauses 1 and 2 of the Native Land Court's report are, in our opinion, entirely correct. They show that Te Kaho, a man, died about 1879 (some three years before Sir W. Fox's recommendation for the Crown grant), leaving issue; that he was quite distinct from Te Raho, who died in 1914, and also left issue; that Te Kaho drew rent from Okahu while alive, and that the chief witness and conductor for Te Raho's family admits that Te Kaho should have been in Okahu Block, but was omitted with many others.

It is to be noted, however, that one of the witnesses for the petitioner—namely, Tonga Awhikau—makes a statement which discloses a fact that possibly had some bearing on subsequent proceedings. He states that Te Kaho received £100 in rent about 1879 from one Caverhill, but did not share it with the other persons interested. Owing to this the others had a grievance against Te Kaho, who died shortly after. This witness says the Crown grant for Okahu was issued in 1866 or 1867; subsequently, in cross-examination, that it was issued in 1869. Sir W. Fox's recommendation for the grant was dated 11th January, 1882, and the grant itself, of course, issued later, on the 22nd May, 1882. This witness had a good deal to say as to the age of Te Raho. We will refer to this point later.

The Native Land Court's report, paragraph 3, says: "The Court file for Okahu contains a *copy* of the grant, but the copy shows an alteration in the name, either from 'Raho' to 'Kaho,' or from 'Kaho' to 'Raho'—it is not clear which." It is quite plain, however, that the alteration is from "Raho" to "Kaho." But we must confess ourselves entirely unable to understand why this copy is referred to. It has no probative value whatever in regard to the question at issue. No one knows who made the copy or who made the alteration, and certainly there is nothing to show any authority for the alteration.

In the second part of paragraph 3 the Native Land Court appears to have fallen into a misapprehension. It says, after referring to the copy grant, that "An original list of owners, however, in the handwriting of the Clerk to the Court gives the name clearly as 'Kaho.' This list must have been written not later than 1887—probably considerably before that." Later on, in reply to a memorandum from the Chief Judge of 1st August, 1922 (on file 402), the Judge says on the 5th August, 1922 (memorandum also on file 402), "The Clerk who wrote out the original lists made his K's very like R's, and the Court is strongly of the opinion that in copying out the name for the Crown grant and recommendation the name was altered from 'Kaho' to 'Raho.'"

It is manifest that any list of names written in 1887, or at any time subsequent to the 11th January, 1882, could not possibly be the original list from which the names for the recommendation and grant were copied. We do not know what Clerk to the Court is referred to. There is a list on the order file for Okahu in the Native Land Court here (N.P. 87), purporting to be a list of owners of Okahu, and giving the name of No. 8 as Te Kaho. This list, however, manifestly was written *after* the issue of the Crown grant, because it sets out the date of the grant and the Land Transfer volume and folio in which it is recorded. We can find no other list to which the Judge might be referring. If this is the one, it is clearly valueless for the purpose of this inquiry. It is a mere abstract of the grant for the Court purposes, and incorrect as to this particular name, which is clearly set out in the grant as "Raho." The only *original* list we can discover is that attached to the recommendation for the grant. This list is initialled by Sir W. Fox, and the name is written very clearly "Raho." There is no resemblance between K and R in this list.

Paragraph 4 of the Native Land Court report refers to a succession order for Te Kaho (deceased) dated 6th December, 1887. This order is one of the material features in the case, and it will be necessary to discuss it at some length. The order was made on the evidence of Rangiwhetu, father of Te Raho, who gave evidence that the deceased died in 1886, and was the daughter of Rangiwhetu's wife, Motuhanga—that is to say, Rangiwhetu's stepdaughter. On the 28th October, 1910, as stated in the report, Chief Judge Jackson Palmer wrote across the above order, "As the deceased is still alive, this order is a nullity." The report proceeds: "Apparently the Chief Judge was under the impression that the name should have been 'Te Raho,' who was still alive in 1910. There is nothing on record to show on what evidence the Chief Judge arrived at this conclusion."

But though there is on record no evidence in the strict sense of the word, there is on record the material in which the Chief Judge founded his minute. This is on the correspondence file of Okahu N.P. 87. It consists of memoranda from Mr. T. W. Fisher, then Under-Secretary for Native Affairs, and previously Reserves Agent at New Plymouth for a number of years, whose knowledge of the Natives of the district was very extensive. The first memorandum (undated) was received in Wanganui Native Land Court Office on the 27th September, 1910, and states that Raho "had all along and was still drawing the rents." Mr. Mackay, the Registrar, replied by telegram that in copy of grant name appears as "Raho," amended to "Kaho." We have already referred to this copy.

Mr. Fisher, in a further memorandum to the Registrar, dated 6th October, 1910, says: "I also notice on the copy of grant on your file the name the present trouble is over—'Raho'—has been altered to 'Kaho.' The first name, 'Raho,' is the correct one, and is shown in the Crown grant, and that person is still alive, so that the order made by Judge Wilson on the 6th December, 1887, is a nullity."

The Registrar referred the matter to the Chief Judge by memorandum dated 18th October, 1910. This memorandum is noted as received by the Chief Judge on the 27th October, 1910, and on the next day, 28th, he minuted the order as already stated, obviously considering himself justified in so doing on the information given by a man of such recognized knowledge as Mr. Fisher. It may be pointed out that Chief Judge Palmer does not cancel the order, but records his opinion that it is a nullity. It was still open for any person to test that opinion in Court, but no one did. We agree that the order in question was a nullity, but not for the same reasons as Chief Judge Palmer.

Before discussing further this succession order it will perhaps be well to refer to a letter on the Native Department's file, 1922/402, dated 29th September, 1922, from Mr. Barnes, District Public Trustee at Hawera, to the Registrar, Wellington. Mr. Barnes's letter, which appears to have been written without access to records, is clearly erroneous. He says he *remembers* that Te Kaho drew rents. That is a manifest impossibility, as Te Kaho admittedly died in 1879. As already pointed out, Mr. Fisher stated in 1910 that Te Raho drew them, and the petitioners do not dispute that Te Raho drew the Okahu rents to the day of his death.

To revert to the succession order of the 6th December, 1887: The Native Land Court was obviously greatly influenced by the evidence given in the Native Land Court by Rangiwhetu, and states that it seems clear that he gave false evidence. We, however, are not convinced of that, mainly because of facts brought out before us that were not before the Native Land Court so far as the minutes show. It is to be borne in mind that Rangiwhetu was the father of Te Raho. The Native Land Court says that even if Rangiwhetu thought "Kaho" was a mistake for "Raho" his evidence would still be false. It certainly would, but we can conceive no plausible motive for Rangiwhetu committing perjury in order to deprive his own child of its interest.

Before us Mr. Currie stated that his instructions were that Motuhanga, wife of Rangiwhetu, had a child Kahu, and that Rangiwhetu must have confused the names. He stated that petitioners had admitted the existence of Kahu. Mr. Sim, who was apparently taken by surprise, did not feel himself able to admit this. As petitioners had been permitted to call evidence as to a point they wanted cleared up, we permitted Mr. Currie to call Motuhanga herself to give evidence only as to the names of her children. Though apparently not a person of much intelligence, or at all events of knowledge of past happenings in regard to these lands, she satisfied us that she correctly gave the names of her children. They were—by her first husband (Toi), Kahutomokia (f.), Ngahinu (f.); and by Rangiwhetu, six children, including Te Raho. She was not cross-examined. Natives notoriously abbreviate personal names, and this girl would doubtless be usually known as "Kahu."

According to Tonga Awhikau, one of the petitioner's witnesses who has been already referred to, the Natives had difficulty in ascertaining the names of the grantees. If Rangiwhetu's evidence

referred to Kahu (*i.e.*, Kahutomokia), it was absolutely correct. ' It is, in our opinion, a very much more probable and reasonable assumption that such was the case than that Rangiwhetu committed perjury in such a barefaced manner. His evidence can in no particular relate to Te Kaho, who was a man, and died in 1879, while Te Kahu was a girl, and died in November, 1886, only a year before the order was made.

It is a leading principle of law that fraud is not to be presumed: it must be proved. To our minds it certainly is not proved in this case.

The Native Land Court twice refers to Te Raho as "she," whereas it is beyond doubt or dispute that Te Raho was a man. This again tends to show that Rangiwhetu's 1887 evidence could not refer to Te Raho, at all events.

There was a suggestion that, as Te Raho was admittedly a young child at the time, he would not have been awarded so many as thirty shares in the block. To this it is answered that Karere and Pipi, also minors, each received thirty shares. Rangimahu, a child of Rangiwhetu, also included in the grant, got also thirty shares, to which Rangiwhetu succeeded on the former's death. But not much importance can be attached to this point. Our diligent search and inquiry has failed to discover when or how these relative interests were defined, and we conclude that they were defined in the manner prescribed by section 15 of the West Coast Settlement Reserves Act 1881 Amendment Act, 1884, and that the record of the inquiry and definition has gone astray.

The Native Land Court was mistaken in saying that Te Raho was "put into the grant for thirty shares." No shares were fixed in the *grant*, but at some subsequent period, as we have said.

It was suggested by petitioners that Te Raho was not born in time to be included in the grant. The Native Land Court does not decide this, but expresses itself as somewhat doubtful. We have gone carefully into this question, and have come to the conclusion that Te Raho was born probably not later than 1880—possibly a year or two earlier. We do not place great reliance on the contradictory statements of the Native witnesses on the respective sides. Native statements as to dates, however honest they may be, are, as a rule, entirely unreliable. But the chief witness for the petitioners on this question, Tonga Awhikau, is clearly wrong both as the date of birth and as to the order in which the children of Te Raho's parents were born. The witness on the other side says the child preceding Raho was born in 1877, and this may be correct.

The Chief Judge, in his memorandum of the 15th September last to yourself, refers to succession order to Te Raho in 1914, pointing out that there were four children all shown as adults, and therefore Te Raho must have been more than a mere infant in 1882. But reference to the minutes shows that this order was wrongly drawn up. The minutes apparently show that three of the four children were minors in 1914, inasmuch as trustees were appointed for them, though no ages were given. The eldest child, Te Warena, was described as a male adult, in which case he would be born not later than 1893. But before us evidence was given on behalf of petitioners that Te Warena was now about twenty-three, and a certificate of baptism produced giving his birth as 15th July, 1900. This baptism did not take place till 30th April, 1910, and there is, of course, nothing to show how the date of birth was arrived at. A mistake might readily have occurred after so long a period since birth. The grandmother of Te Warena, Motuhanga, stated in her evidence that Te Warena was married before he went to the war, and is now married a second time. It certainly would not be a safe assumption on the evidence that Te Raho was not born in 1882, or even earlier. But he clearly was a young child.

This, however, does not affect the matter to any extent. It would be quite in accord with Maori ideas to include even a new-born child in the list of names of owners of a block of land. And Rangiwhetu certainly included another child of his—namely, Rangimahu. It is not at all improbable that Rangiwhetu, who is alleged by the Te Raho side to have been the person who took the most prominent part in settling the list of names, took advantage of the fact that Te Kaho was dead, and his family not represented, to leave them out, as well as others who might have had a claim to inclusion, and to give his own family an unduly large share—or he may have been moved by the grievance against Te Kaho previously referred to. All this, however, is mere surmise.

The petitioners' claim appears to rest entirely upon a series of assumptions. We are decidedly of opinion that they have not discharged the burden of proving that an error has been made in the names of the persons in the grant. It is possible that this has happened, but much more than that is needed. There is no actual proof of any kind. Short of that, it would be a most dangerous precedent to divest people of rights which have been asserted and acted upon, as in this case, for many years, and which on the face of the records belong to them.

The most that can be said in this case is that the petitioners *may* be right—certainly not that they *are* right. Their real grievance, if they have one, is not so much this alleged error in the names as the exclusion of Te Kaho from the title. On this question we are not called upon to express our opinion.

We therefore recommend that no action be taken in the direction of passing legislation to settle the identity of the person named "Te Raho" in Grant No. 3749 of Okahu Block.

We have, &c.,
CHAS. MACCORMICK, Judge.
W. E. RAWSON, Judge.

The Hon. Native Minister, Wellington.

Approximate Cost of Paper.—Preparation, not given; printing (475 copies), £3 10s.

By Authority: W. A. G. SKINNER, Government Printer, Wellington.—1923.

Price 3d.