

1934.
NEW ZEALAND.

THE NATIVE PURPOSES ACT, 1933.

REPORT AND RECOMMENDATION ON PETITION No. 49,
OF 1932, OF H. McCLUTCHIE,

PRAYING FOR RELIEF IN CONNECTION WITH THE WILLS OF THE LATE
POTENE TUHIWAI AND TURUHIRA TUHIWAI.

Presented to Parliament in pursuance of the Provisions of Section 27 of the Native Purposes Act, 1933.

Chief Judge's Office, Native Land Court, Wellington, 14th August, 1934.

The Hon. Native Minister, Wellington.

PETITION NO. 49 OF 1932.—WILL OF TURUHIRA TUHIWAI (DECEASED).

PURSUANT to section 27 of the Native Purposes Act, 1933, I transmit herewith the report of the Court upon this petition.

As the matter affects the construction of the will of the above-named deceased, I recommend that the Chief Judge be authorized to state a case for the opinion of the Supreme Court as to the proper interpretation of the will under the provisions in that behalf contained in section 71 of the Native Land Act, 1931, with power to carry out the decision of that Court.

R. N. JONES, Chief Judge.

In the Native Land Court of New Zealand, Tairāwhiti District.—In the matter of the estates of Turuhira Tuhiwai (deceased) and Potene Tuhiwai (deceased); and in the matter of Petition No. 49 of 1932, of H. McClutchie, praying for relief, and referred to the Court pursuant to section 27 of the Native Purposes Act, 1933, for inquiry and report.

At a sitting of the Court held at Te Araroa on the 14th day of April, 1934, before HAROLD CARR, Esquire, Judge.

THE Court begs to report that—

All parties were present and represented.

The petitioner seeks a review of the findings of the Appellate Court (14th April, 1931), where it was decided that the interests obtained by Potene under Turuhira's will were held in trust for the latter's next of kin. A copy of this decision is attached.

No facts not already known to the Appellate Court were recorded before this Court. The petitioner claims that the gift by Turuhira to Potene was absolute; the respondents are equally emphatic that a trust does exist.

The grounds set out in the petition were submitted in argument, and these points are referred for your consideration.

The Chief Judge, Native Land Court, Wellington.

For the Court.
H. CARR, Judge.

POTENE TUHIWAI (DECEASED).

Decision.

In this case the question is raised whether certain interests derived by him from Turuhira Tuhiwai (deceased) pass by Potene Tuhiwai's will. This depends upon the true construction of Turuhira's will, which is written in the Maori language. Turuhira, who was the wife of Potene, predeceased him,

leaving to him certain interests in land in terms absolute and other lands to a grandchild. Then follows a clause the exact rendering of which into English is the subject of a difference of opinion among persons of knowledge of both the Maori and English languages. The weight of such opinion, however, is in favour of translating the clause as—

Let Potene Tuhiwai [or Potene Tuhiwai must] consider on the approach of death the returning of the interests in land hereby given to him to my *uri tata* (rightful successors).

The will then concludes with a devise of the whole of the land of deceased not otherwise disposed of by the will and the whole of her personal estate to Potene Tuhiwai. The question then is whether the provision as to returning the lands creates a trust in favour of the successors of Turuhira Tuhiwai, or does it merely leave to Potene Tuhiwai a discretion to do as he pleases with the land. Upon the answer to this question depends whether the lands referred to pass or do not pass by the will of Potene Tuhiwai who died on the 13th August, 1928. This will, which was proved on the 18th April, 1929, conferred no benefit on any of the successors of Turuhira Tuhiwai, and made no specific reference to interests derived under her will. It is, therefore, plain that Potene Tuhiwai failed to consider or ignored the injunction laid upon him by his wife's will. We have consulted a number of authorities dealing with the subject of implied trusts, and the principles on which the Court is to proceed are well settled. While it is true that in all the modern decisions the Courts lean strongly against declaring a trust, yet if it is clear from the language of the instrument that a trust was intended it must be given effect to. The testator's meaning must be gathered from the whole will. No particular words are necessary if the intention is clear. As has been pointed out in several other cases, the testatrix in this case could readily have avoided any doubt by stating clearly what she desired, but, having stated it in her own way, it remains for the Court to attempt to discover her meaning. Two of the attributes necessary to create a trust are clearly present in this case—namely, the subject or the land affected and the objects or beneficiaries. The third attribute is that the words relied on are to be read on the whole as imperative. In the present case the words used, if correctly translated, can scarcely be described as precatory, but may be mandatory. The devisee Potene is explicitly directed or required to consider returning the interests in land devised to him. This he is to do when death is approaching him, presumably by will. It would appear clear, then, that, although the testatrix had apparently made an absolute gift of the lands to Potene, she expected him to retain them till his death, and placed upon him the duty of considering the taking of a specified course with regard to these particular lands. In *Comisky v. Bowring-Hanbury* ([1905] (A.C.) 84) the Lord Chancellor was of opinion that the testator contemplated that certain property would remain in the devisee's hands during his lifetime, and treated that as an important factor in ascertaining the testator's intentions. The residuary clause in the will would appear to show a distinction in the mind of the testatrix between the interests specifically given and any land which may be covered by the residuary clause.

While by no means free from doubt, mainly owing to the use of the word "consider," if that is indeed the true meaning of the Maori expression used in the will, we have come to the conclusion that the clause under review was intended by the testatrix not merely as a suggestion or reminder of the claims of her successors, but as amounting to a direction that the devisee should return the lands to them, and thus creating a trust in their favour.

The appeal is therefore upheld, and the orders of the Native Land Court appointing successors to Potene Tuhiwai must be cancelled so far as they relate wholly to any interests in land acquired by him under the will of Turuhira Tuhiwai and covered by the clause directing return of such interests to her rightful successors according to Native custom, and be varied so far as they relate to cases where Potene Tuhiwai had interests of his own in addition to those derived by him under the specific devises of Turuhira Tuhiwai's will so as to exclude the latter. The persons claiming to be the rightful successors of Turuhira Tuhiwai will be entitled to apply to the Native Land Court for succession orders in respect of the last-mentioned interests. The deposit (£10) may be refunded to the depositor.

Approximate Cost of Paper.—Preparation, not given; printing (390 copies), £1 12s. 6d.

By Authority: G. H. LONEY, Government Printer, Wellington.—1934.

Price 3d.