

As I have, decided to order a rehearing in this matter I shall not express any opinion as to what the final determination of the case ought to be.

I shall confine myself in the few remarks I intend to make to a general statement of the points upon which further enquiry seems desirable.

In the first place it now appears that much of the evidence that was laid before the Court on the first hearing was untrue and has been admitted to be untrue by the witnesses who gave it.

I shall not at this stage attempt to determine on whose shoulders the responsibility for this state of things ought to rest. It argues a disregard for truth on the part of the witnesses which, on moral grounds; is much to be regretted; although I do not suppose that an appeal made to them on moral grounds would be of much avail. The belief is daily gaining strength that the great bulk of the testimony given in the Native Land Court by natives is altogether untrust-worthy, and the disclosures that have been made in the course of this enquiry will not change that belief. If those natives who so readily adopt their testimony to what they believe to be advantageous to themselves or to the parties on whose behalf they are called could realize the injury they are doing to their own interests by the distrust they give rise to, I believe we should soon cease to hear the complaints now so frequently made of perjury in this Court. I shall say no more on this point at present. There is another matter on which I must say a few words. The Court has been asked to lay down certain rules with regard to the principles by which the Court ought to be guided in its investigations on native titles. There is in my opinion no reason why the principles which guide other Courts should be disregarded in this. On any investigation of title like that now before us, the first question that naturally arises is, Who are the persons in possession at the present time? Where there are persons actually residing on the block they are undoubtedly in possession of those portions of the land on which their houses and other buildings are standing and presumably in possession, also of all such other portions as have been fenced in by them or over which their sheep or cattle are running. Now possession is always prima facie evidence of ownership (see Pollock and Wright, 'Possession in the common law' pp. 25.) If it is shown that the present possession is recent in its origin the presumption arising from it is only a slight one and may be [unclear: rebutted] by comparatively slender evidence of ownership in other persons, but the presumption gathers strength as the evidence discloses a continuance of uninterrupted enjoyment. If it is shown to have commenced before the year 1840, the presumption that the persons who have enjoyed such possession are the owners according to native custom, is of so cogent a nature that nothing will be sufficient to rebut it short of the clearest proof that the possession began under circumstances such that occupation for any length of time would not be regarded, in accordance with native custom, as vesting any right of ownership in the occupier. Apart from such exceptional, cases as those just referred to the principle that should guide the Court is in my opinion this:—The persons now in possession are prima facie the owners. Possession of recent origin raises only a slight presumption, while possession extending continuously over a considerable period raises a strong presumption in favor of ownership. Possession commenced before 1840, and continued without interruption to the present time, raises a presumption of so strong a character that it will require the clearest evidence to rebut it. So far the scope of the enquiry is capable of definition with a considerable degree of accuracy and extensive excursions into the myths and traditions of so-called Maori history are unnecessary. It does not, however, necessarily follow as a matter of course that the persons entitled by virtue of their possession, or to speak more accurately, whose title is evidenced by their possession, are exclusively entitled. The Court has also to enquire whether there are any persons who though not occupying the land at the present time have formerly lived on it or exercised other rights of ownership over it which rights have not become extinguished by lapse of time, but are, as it were, lying dormant. In such enquiry some account must be taken of the action of ancestors of the present owners or claimants, and the Court must receive and weigh evidence of the traditional reports that have been orally transmitted from one generation to another. Such evidence is from its nature necessarily unsatisfactory. It affords scope for the play of imagination, which is too frequently taken advantage of and cannot be submitted to those tests by which the value of the evidence of alleged eye witnesses may be ascertained. A tradition generally accepted and acted on, and of which the several accounts do not materially differ from one another, may, with considerable confidence, be regarded as an authentic record of actual fact. A disputed tradition on the other hand will, in the majority of cases, be entitled to very slight authority. It would not be advisable, even if it were possible, which is open to question, to attempt to lay down rules of rigid definition as to what will not be regarded as sufficient evidence of truth of an alleged traditional event. Each case must be determined by its own circumstances, and by the weight of evidence which, as Lord Blackburn has pointed out, "depends on the rules of common sense." It seems to me, however, that one unequivocal act of ownership and "a portion," a series of such acts, is of far more importance in determining on which side the balance of testimony lies, than any amount of traditional lore that may be brought forward for the purpose of leading the Court to a different conclusion. It is to a large extent, because it seems to me that the Court in its judgment has not given sufficient weight to the possession of this land by Ngai Te Aeokoiri and those persons who have been called in the application of [unclear: Noa]

Huke "the allied hapus" a possession which has been practically continuous and uninterrupted since the year 1857, and for the origin of which a reasonable explanation has been offered notwithstanding its commencement since 1840, and on the other hand that while rightly rejecting much of the evidence of tradition that was adduced, the Court has apparently attached too much weight to the evidence, that I feel compelled to allow a rehearing.

A re-hearing will therefore [*unclear*: be] ordered on all the applications, except those of Matenga Tekapeka and Hamana Taiki-wai.

The order will be made subject to the following conditions, viz., 1. That the several parties who intend to claim a share in the land must deposit in the office of the Registrar in Wellington on or before Monday, 1st February next, a statement in writing giving particulars of the grounds upon which the claim is based, the portion of the block over which the claim extends, and the names of all the persons on whose behalf the claim is made; and 2. That the minutes of evidence given on the first hearing shall be read as evidence on the re-hearing, each party being at liberty to adduce such further evidence as he thinks fit to explain or add to that already given.

On the application of Mr Rees, assented to by Mr Lewis, it was ordered that the notes of evidence taken on the application for re-hearing should also be taken as evidence at the re-hearing.

I runga i te mea kua tau i taku whakaaro kia whakaputaina he Oota hei whakaara i te whakawa tuarua mo tenei keehi Ekore au e whakaatu i taku whakaaro mo runga i nga tikanga o te tino whakaotinga o tenei keehi. Ka waiho e au aku kupu ki runga anake i nga kupu whakamarama torutoru nei i whakaaro ai au kia meingatia mo nga korero nui tonu e pa ana ki nga putake i whakaarohia he mea tika kia whakawakia ano tenei keehi. Ko to mea tuatahi ekitea ana inaianei he nui nga korero i whakaina kite aroaro o te kooti i te whakawa tuatahi, e hara i te korero pono, a e whakaetia e hara i te korero pono aua korero enga kaikorero ano na ratou nei aua korero i whaki. I runga i tenei ahuatanga e kore au e tahuri ki te kii hei runga i awai he taunga mo toimahatanga o enei tu mea. Ko enei tu mea e whakaputa ake ana i nga tikanga e kore ai e whakaarohia te pono o te taha ki nga kaikorero. Mo te taha ki te ahuatanga ki te whakaaro tika o te tangata, kanui rawa te ahua pouri. Ahakoa ra kaore ano au e whakaaro ana tera e whai painga te whakaatu atu kia ratou i te ahuatanga o te whakaaro tika o te tangata. Kei te kaha haere te whaka pono i nga ra katoa mo te nuinga o nga whakaaturanga e kore-rotia ana e nga Maori i roto i te Kooti Whenua Maori, he whakaaturanga kaore rawa e tika kia whakaarohia, a ko nga korero kua whakaturia mai nei i roto i tenei uiuinga kaore e whakarereke ana i taua whaka pono. Mehemea aua Maori e hohoro tonu nei ki te hanga korero ma ratou mo nga mea e whakaarohia aua e ratou ka puta mai he painga kia ratou, ki nga tangata ranei i tu ai ratou kai whaki korero, ka mohio ki te mate e mahia nei e ratou ano ki o ratou ake panga i runga i ta ratou whakaputa ake i nga tikanga e kore ai ratou e whaka ponohia, ki taku mahara tera e hohoro whakahe, te mutu o ta tatou whakarongo ki nga korero whakahe e rangona tonutia nei inaianei mo to mahi korero teka i roto i tenei kooti. Ka mutu aku kupu mo runga i tenei putake me tenei wa. Tera ano tetahi putake e tika ana kia whai kupu torutoru nei ahau. Kua tonoa ki te kooti kia whakatakatoria etahi huarahi mo runga i nga tikanga hei arahi i te kooti i roto i nga whakawakanga mo nga take Maori. Tera ia, ki toku whakaaro, kaore he take, e kore ai nga tikanga e arahi nei i era atu kooti e tangohia mai ki roto i tenei kooti. I runga i nga whakawakanga take katoa penei me tenei e takoto nei i o maua aroaro inaianei, ko te patai tuatahi e ara ake ana koia tenei:—Kowai nga tangata kei runga i te whenua e noho ana inaianei? I te mea he tangata kei runga i te Poraka e noho ana kaore he ruarua o te mohiotanga kei te nohoia e ratou nga wahi o te whenua kei reira nei o ratou whare, me era atu whare e tu ana, me te whakaaro iho ano kei a ratou nga wahi o te whenua kua oti nei te taiepa e ratou me nga wahi e haera ana e a ratou hipi me a ratou kau. Na, ko to nohoanga i runga i te whenua. Ekitea tonutia ana ko te mea tua tahi tena hei whakaatu i te tika ki te whenua (see Pollock and Wright on "Possession in the Common Law," page 25.) Mehemea e whakaaturia mai ana ko to nohoanga o te whenua e nohoia nei inaianei he mea hou tona timatanga heoi ko te whakaaronga atu mo taua noho he mea mania noa, a tera e taea te patu e nga korero ngoikore noa mo te take tika o era atu tangata:—Otiia kei te kaha haere te whakaaronga mo taua noho i te mea ko nga korero i kererotia ki te kooti e whakaatu ake ana he noho pumau tonu a kaore hoki i whakararururua taua noho. Mehemea e whakaturia mai ana i timata taua noho i mua atu i te tau 1840 ko te whakaaro mo nga tangata nana taua noho ko ratou nga tangata whai take i runga ano i nga ritenga Maori e tino kaha ana te ahua o taua whakaaro ko te mea hei turaki mo taua whakaaro, ma tetehi whakaatu tino marama rawa i kiia ai ko taua noho i timataria i raro i tetehi tikanga e mea ana ko te noho i runga i te whenua mo te takiwa roa e kore a manaaki tia e nga tikanga Maori e whai take ai te tangata i runga i te noho. I waho atu o ena tu ritenga kua whakahaerea ake nei, ko nga tikanga hei arahi i te kooti, ki toku whakaaro koia tenei. Ko nga tangata kei runga i te whenua e noho ana nga tangata tuatahi e kiia no ratou te whenua, he mama noa te whakaaro mo runga i nga noho hou tona timatanga. Otiia ko te noho i pumau tonu mo te takiwa roa rawa e puta ake ana te tino kaha o te whakaaro kua whai take taua noho. Ko to nohoanga i timata i mua atu i te tau 1840 a i mau tonu, kaore i whakararururua tae mai ana ki inaianei e puta ake ana te tino kaha o te whakaaronga mo taua noho. A, ma nga korero tino marama rawa e whakahe taua noho. Ko

nga mea e taea i runga i te ahua o tenei uiuinga te whakamarama, i runga i te whainganga atu ki te tino tika a me te nui hoki te haerenga atu ki roto i nga korero, [unclear: e]nga tikanga tuku iho a nga tupuna ga mea e rite ana mo runga i nga orero onamata a te iwi Maori. Ehara te mea e whai tonu ana i runga i enei hei tikanga ara ko nga tangata whai take nei i runga i te noho, ara o te kupu tika rawa. Na runga nei te noho to ratou tiki, ka kiia ko [unclear: atou] anake e tika ana ki te whenua. [unclear: [e] rapu ano hoki e te Kooti mehe-[unclear: iea] tera atu ano etehi tangata, hako kaore ratou e noho ana i [unclear: mga] i te whenut inaianei engari i ohon ratou i runga i te whenua mua, me te whakahaere i nga mahi nga tangata whai take ki runga i [unclear: tua] whenua a ko to ratou take kaore [unclear: no] i ngaro i runga i te mahuetanga o whenua mo te takiwa roa, engari o taua take kei te takoto paimarire. runga i te rapunga o enei tu take me [unclear: ngo] marire nga korero mo runga nga whakahaere a nga tupuua o nga ngata e kiia nei, no ratou te whenua nainei ara o nga tangata nana te [unclear: ereeme.] A, me tango e te kooti me [unclear: a]weeti hoki nga korero katoa mo [unclear: nga]i nga korero a nga tupuna, he [unclear: ea]tuku iho nei e tetahi whakatu-[unclear: aranga] ki tetahi whakatupuranga. o aua tu korero ia i runga tona ahuatanga e hara i te korero arama, ko aua tu korero e awahina [unclear: na] i te mahi whakaaro kau a he [unclear: atuputu] tonu te tangohia o taua tu ahi, e kore e taea te tuku atu hei hatete ki te tika o nga korero a nga ai korero i kite tonu nei o ratou [unclear: anohi] i nga mea e whakina ana e [unclear: tou.] Ko nga korero tuku iho a nga [unclear: puna] e whakatikaia ana, a e whakatia ana hoki nga tikanga o aua [unclear: orero] kua ia nga tikanga o roto i [unclear: aa] korero e tino nui te rereketanga o tehi i tetehi; i taea ano i runga i te hakaaro nui, te ki he korero tika na mo nga tino mea tuturu. Tetahi [unclear: o] nga korero tuku iho a nga tupuna whakahengia ana ko te nuuinga o aua korero kaore e mana nui ana.

Ekore e pai ahakoa ano mehemea tera e taea no te mea kei te awangawangatia ki te tahuri ki te whakatakoto tikanga e tino rite ai te whakamaramatanga o nga mea hei whakaarohanga o nga mea ranei kua whakaarohia o nga korero e kitea ai te pono o nga mea e korerotia ana i roto i nga korero tuku iho a nga tupuna. Me whakaata ai keehi, ia keehi i runga i ona ake tikanga me te taimahatanga o nga korero katoa pera me ta (Lord Blackburn) i whakaatu ai "Okiki ki runga i nga tikanga o tou ake mohiotanga." Mo reira ki taku mahara kotahi mahi e tino mohiotia ana te tika mo te whai taketanga me te roa e whakahaerea ana taua mahi he tino mea nui rawa tena hei tirohanga i runga i te mea e rapu ana kei tewhea taha te toimahatanga o nga korero e takotoano. Nuiatu tena i nga mea i puta mai i roto i nga korero tupuna e kawea mai nei hei arahi i te kooti kia rereke ai ta ratou whakaotinga. E pena ana te nuuinga no te mea, ki taku titiro i roto it te whakatau a te kooti. Kaore i hoatu te weeti e rite ana mo to noho a Ngati Te Upokoiri i runga i tenei whenua, me te noho hoki o nga tangata i roto i te tono a Noa Huke (ara nga hapu o Ngai Te Upokoire). Ko taua noho, he noho pumau tonu, a kaore hoki e whakararuraru mai ana i te tau 1857 a kua oti ano te whakamarama mai o te timatanga o taua noho kaore he tikanga o tona timatanga i muri mai o te tau 1840 tetehi ahakoa he tika te whakakahoretanga a te kooti i te nuuinga o nga korero tuku iho a nga tupuna i korerotia nei ki tona aroaro, he nui rawa te weeti i apitiria e te kooti mo te [unclear: mahuatanga] o aua korero, no reira ahau i akiaki kia whakaaetia he whakawa tuarua. Mo reira ka whakaputaina he Oota kia ara ano he whakawa tuarua i runga i nga tono whakawa tuarua katoa, haunga i nga tono a Matenga Pekapeka raua ko Hamana Tiakiwai.

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