MA 85/11

WELLINGTON,

23rd February, 1927.

NATIVE LANDS CONFISCATION COMMISSION.

MR. TAYLOR : May it please the Commission, I purpose in the first place to offer some observations on my learned friend's construction of Question (1) of the Order of Reference. My friend contends that the Commission is not bound, in considering the question of the justice and principle of the confiscations, by the proviso that the Commission must not accept any contention that the rebel natives are entitled to the benefit of the provisions of the Treaty of Waitangi, and he says that Question (1) assumes the justice of the Confiscations, and that it merely directs the inquiry as to the fairness and justice of the extent of the confiscations. He says that Question (1) does not raise the question of the fairness of the confiscations as a whole or in principle. He pointed out that the Commission was directed to inquire into the allegations contained in the petitions, and he says that the petitions do raise the question of the justice or otherwise of the confiscations, and this question not having been raised under Question (1) is not subject to the proviso as to rebel natives and the Treaty of Waitangi. I have already made a submission in connection with that, and I now wish to supplement that. It is submitted that Question (1) does raise the question of the justice or otherwise of the confiscations. It is true that the question which is asked is, in effect, whether such confiscations or any of them exceeded in quantity what was fair and just, but it is submitted that the Commission, under Question (1) would be entitled to find, if the evidence satisfied it, that all the confiscations exceeded in quantity what was fair and just. It is clear that it could find, with respect to any one confiscation, that only one acre, or, say one-hundredth part of an acre, should have been taken, and if it can find that surely it can find that no confiscation at all was justified. Perhaps I could state the case in another way : suppose a certain hapu had owned 5,000 acres of land of which the Crown had confiscated 2,000 acres, the Commission under Question (1) is clearly entitled to find that the confiscation was excessive to the extent, say, of 1,999 acres. It is quite clear that you could say that, and then it is clear that you could find that the confiscation was excessive to the full extent of 2,000 acres - that is to say that no confiscation was justified. If it is permissible for the Commission to find that, then the question of whether confiscation was just or otherwise in principle is raised by Question (1). In such case what the Commission would find would be that the confiscation was fair and just. My submission is therefore that in considering the justice of the

AKATOHEA MAORI TRUST BOARD
P.O. BOX 207, OPOTIKI.

principle of the confiscations the Commission is bound by the proviso that provides that you shall not have regard to any contention that Natives who denied the sovereignty of Her then Majesty and repudiated Her authority could claim the benefit of the provisions of the Treaty of Waitangi. It is submitted therefore that the question of the justice or injustice of the x act of confiscation cannot be raised under the petitions because by the Order of Reference the Commission is authorised to inquire into the claims and allegations in the petitions only insofar as such claims are not covered by the preceding terms of the commission : "You are further authrorized to inquire into the claims and allegations made by the respective petitioners in the terms referred to in the Schedule hereto so far as such claims and allegations are not covered by the preceding terms of this Commission." And it is submitted that the preceding terms of the Commission do raise the question of the justice or otherwise of the act of confiscation. Therefore, since that question is covered by Question (1) it cannot be raised to the petitions except subject to the proviso. Mr. Smith's argument on the construction of Question (1) really involves a very strict and literal construction of the question. It is submitted that it seems almost absurd to make Question (1) subject to the proviso in the case of any confiscation say, of one acre only being justified, and yet not subject to it if none was justly confiscated. There is no substantial difference between the case of the justification for one acre being ~~justified~~ confiscated and that of the justification for none at all being confiscated. My final submission is therefore that the question of whether the confisca tion was justified in principle is raised under Question (1) and is subject to the proviso. Coming to deal with Question (1) itself, as dealt with by Mr. Smith, he submitted that the Commission had to deal with two classes of Natives, the loyal and the disloyal. In respect of the loyal Natives he says no restriction is placed upon the Commission in considering their rights. With that contention I agree, subject, of course, to the proviso to Question (1). With respect to the disloyal natives, the Commission is not allowed to have regard to the provisions of the Treaty of Waitangi. But Mr. Smith contends that the rights of the natives are the same jure gentium as they are under the Treaty of Waitangi. He referree to the case of Wi Parata v. The Bishop of Wellington, where Pre ndergast, C.J., in delivering the judgment of the Court, said that as far as the proprietary rights of the natives are concerned, the so-called treaty merely confirms the rights which jure gentium fall upon the Crown under the circumstances of the case. My submission is that, even if those rights of the Maoris jure gentium were the same as those conferred by the Treaty

of Waitangi and it is not clear that they were. Yet it is clear that those who resisted by force of arms the troops of the Crown forfeite any rights which they may have had to their lands jure gentium, and that therefore they are no more entitled to rely on their rights jure gentium than they can rely upon their rights under the Treaty of Waitangi. It is submitted that no rights which the Maori may have had to land jure gentium help him in this case since the Crown was morally and justly entitled to take the lands of these rebel natives as punishment for their resistance to the forces of the Crown. In view of what was said by the Chief Justice in the case of Wi Parata v. The Bishop of Wellington, it is submitted that it is far from clear that jure gentium the Maoris had such a right to the whole of the North Island of New Zealand as barred the Crown from taking their land, large portions of which they were unable to use, and were not making any use of, - that is, apart from the Treaty of Waitangi. I say it is not clear that an uncivilised race such as the Maoris had such a right to the whole of New Zealand as barred the white settlers who came here from taking from them such parts of the land as they were not using. Mr. Smith has referred to the position of the North American Indians, and it is quite true that in a very great number of cases the whites in America, as they did in New Zealand, bought large tracts of land from the Indians. It is not clear, however, that they admitted that the Indians had the right jure gentium to all the lands over which they happened to roam. On that point I refer to Kent's Commentaries, 12th edition, Vol.3, page 386, where Kent, speaking of colonisation in America, says :-

"There has been considerable diversity of opinion and much ingenious speculation, on the claim of right to this country by the ~~Indians~~ Europeans, founded on the title by discovery. We have seen that with respect to the English colonists in America, the claim was modified, and much of its extravagance destroyed, by conceding to the native tribes their political rights and privileges, as independent allies, and their qualified title to the soil. As far as Indian rights and territories were defined and acknowledged by the whites by treaty there was no question in the case, for the whites were bound by the moral and national obligations of contract and good faith; and as far as Indian nations had formed themselves into regular organized governments, within reasonable and definite limits necessary for the hunter state, there would seem also to be no ground to deny the absolute natüre of their territorial and political rights. But beyond these points our colonial ancestors were not willing to go. They seem to have deemed it to be unreasonable, and a perversion of the duties and design of the human race, to bar the Europeans, with their implements of husbandry and the arts, with their laws, their learning, their liberty, and their religion, from all entrance into this mighty continent, lest they might trespass upon some part of the interminable forests, deserts, and hunting-grounds of an uncivilised, erratic, and savage race of men. Nor could they be brought to entertain mush respect for the loose and attenuated claim of such occupants, to the exclusive use of a country evidently fitted and intended by Providence to be subdued and cultivated, and to become the residence of civilised nations

It was part of the original destiny and duty of the human race to subdue the earth, and till the grounf whence they were taken. The white race of men. as Governor Pownall observed, have been 'land-workers from the beginning;' and if unsettled and sparsely scattered tribes of hunters and fishermen show no disposition or capacity to emerge from the savage to the agricultural and civilised state of man, their right to keep some of the fairest portions of the earth a mere wilderness, filled with wild beasts, for the sake of hunting,

becomes utterly inconsistent with the civilisation and moral improvement of mankind. Vattel did not place much value on the territorial rights of erratic p races of people, who sparsely inhabited immense regions, and suffered them to remain a wilderness, because their occupation was war, and their subsistence drawn chiefly from the forest."

It is true, despite this view taken by the early settlers of America that, as Kent points out, the European settlers did buy large tracts of land from the Indians : it is also true that, following upon the wars, large tracts of land were taken from them. Kent continues at page 398 :-

"The causes of warwith the Indians were inherent in the nature of the case. They arose from Indian jealousy of the presence and location of white people, for the Indians had the sagacity to perceive, what the subsequent history of this country has abundantly verified, that the destruction of their race must be the consequence of the settlements of the English and their extensionover the country. And if wars with them were never justly provoked by the colonial governments or people, yet they were, no doubt, stimulated on the part of the Indians by the consciousness of impedning danger, the suggestions of patriotism, and the influence of a fierce and lofty spirit of national independence. In all their wars with the whites the means and the power of the parties were extremely unequal, and the Indians were sure to come out of the contest with great loss of numbers and territory, if not with almost total extermination."

But it is submitted further that, whatever the writers on national law may say upon the matter, that, apart from the Treaty of Waitangi, the Maoris had no such moral and equitable right to the whole of the land of New Zealand as to entitle them to demand payment therefor from the white settlers. Justice and good conscience demanded no more, it is submitted, than that the Maoris should have been allowed to retain enough land as, in the altered circumstances of civilisation, would have maintained them in the same state of comfort as they were prior to the coming of the white people; that, of course, is apart from the Treaty of Waitangi. The Treaty of Waitangi placed us under a special obligation to them, but apart from that treaty, I say that justice and good conscience did not demand that the white settlers should pay the Maoris for all the land in New Zealand. If the Maoris were left sufficient to maintain them in the same circumstances of comfort as before, justice was satisfied, and in justice and good conscience the white settlers from the overcrowded portions of the world were entitled to take and use the rest of the land for their own purposes. It is

submitted, therefore, that, apart from the Treaty of Waitangi, the Maoris had no moral claim to the ownership of the whole of New Zealand. Any moral rights which they may have had, apart from the treaty, were certainly never attacked by the Colonial Government, because at no time have we suggested that the Maoris should not have sufficient land to keep them. It is submitted, therefore, that under the proviso, the rebel natives cannot claim the benefit of the provisions of the Treaty of Waitangi, and that, apart from the treaty, they had no moral or equitable claim to all the land of New Zealand, and that, apart from the treaty, the Colonial Government were quite entitled to take such part of the land as the Maoris were not effectively occupying, for the benefit of the white settlers. In dealing with Question (1) Mr. Smith further contended that the only land which could be justly confiscated under the New Zealand Settlement Acts was land which was required for military settlement, and he suggested that the actual land upon which military settlers were put was all the land which the Government was justified in taking under those Acts. It is clear that there is no justification for this view, and that the number of military settlers put on the land, or the amount of land they occupied, has not the slightest bearing on the amount of land the Government was justified in taking. The recital of the New Zealand Settlements Act, 1863 certainly refers to protection by settlement and to the introduction of a sufficient number of settlers able to protect themselves and to preserve the peace of the country. It also says :-

> "Whereas it is necessary that some adequate provision should be made for the permanent protection and security of the well disposed inhabitants of both races and for the prevention of future insurrection or rebellion and for the establishment and maintenance of Her Majesty's authority and of law and order throughout the Colony."

But it then goes on, in Section 3, to say that the Government may set apart eligible sites for settlement for colonization, and Sections 16, 17 and 18 make it quite clear that the Act contemplated that land was going to be taken that was not required

for military settlements. Section 16 is as follows :-
"On part of the land subject to the provisions of this Act the Governor shall cause to be laid out a sufficient number of towns and farms around or as near as conveniently may be to the same to give full effect to the provisions of the several contracts heretofore or hereafter to be entered into by or on behalf of the Government of New Zealand with certain persons for the granting of land to them respectively in return for military service on the terms and subject to the conditions of the said contracts," etc.

Section XVII : "After setting apart sufficient land for all the persons who shall be entitled thereto under the said contracts, it shall be lawful for the Governor in Council to cause towns to be surveyed and laid out and also suburban and rural allotments."

Section XVIII : "All such town suburban and rural lands shall be let sold occupied and disposed of for such prices in such manner and for such purposes upon such terms and subject to such regulations as the Governor in Council shall from time to time prescribe for that purpose."

These sections make it quite clear that the land was to be taken to provide for those people who were engaged under military contract and that the remaining land that was confiscated was to be surveyed and sold. The people who had entered into military contracts would not buy the land but land was to be set apart for any purchasers who came along, colonists who, of course, even though they were not armed, by their mere presence in the country, would no doubt help to prevent any future risings. As to the actual amount of land that it was contemplated would be required for the military settlers, it was suggested by Mr. Domett in 1863 (Appendices 1863, A.-8A) (Annexure 101) that 20,000 men would be required for settlement in New Zealand, and he suggested that within the Taranaki confiscated area 6,000 settlers were required, and he made an estimate as to the amount of land which he thought was necessary for those men at that time. His estimate came to considerably less than 100 acres for each man, but it is submitted that it is not unreasonable to assume that the military settlers with his family would require at least 100 acres, and that therefore on that basis the Government required at least 600,000 acres for military settlers quite apart from the land required for ordinary colonization In the whole of the Taranaki district the Crown confiscated between 400,000 and 500,000 acres, and it is clear therefore that

the Crown did not, even on Mr. Smith's basis of land for military settlement, take more than was necessary, so that the mere fact that the military settlers who were put on the land in Taranaki occupied a much smaller area does not afford any light to the Commission as to what amount of land it was contemplated would be required under the New Zealand Settlements Act.

THE CHAIRMAN : Upon what standard do you suggest the Commission is to decide as to whether the confiscations were excessive or not ?

Mr. TAYLOR : I have already made some submissions upon that point. I propose, further, to give an estimate of the value of the land which was finally confiscated, and to suggest that, in view of the expense to which the Government was put in connection with the war, and in view of the fact that whatever blame may have been attachable to the Government some blame must have attached also to the Natives, that the estimated value in money of the land that was taken, cannot be said to be excessive.

THE CHAIRMAN : Have we got anything to do with the cost of the war ? The confiscations were not authorised for the purpose of paying for the cost of the war.

Mr. TAYLOR : The Commission is asked to take into consideration whether they were excessive as a penalty for rebellion, and the penalty necessarily includes the payment for damage done, and I think I am entitled to refer to the cost of the war under that heading.

THE CHAIRMAN : Before you leave the subject of proviso (1) : that says : "You shall not have regard to any contention that Natives who denied the sovereignty of Her then Majesty and repudiated Her authority could claim the benefit of the provisions of the Treaty of Waitangi." Does that apply to any Native who at any time has denied the Queen's sovereignty, or does it mean any Native who had denied the sovereignty at the time the proclamation was made, or when ? How do you construe it ?

Mr. TAYLOR : I do not contemplate that it refers to

any period later than the date of the proclamation. It appears to me that it must have refence to a period anterior to the date of the proclamation.

THE CHAIRMAN : Then that means that a Native who had at any time taken up arms could not claim the benefit of the provisions of the Treaty of Waitangi, although he was living peaceably at the time the proclamation was made.

Mr. TAYLOR : That ismy view - at any time during the period from 1st January 1863 to the date of the proclamation.

THE CHAIRMAN : Then you would say that any Native who had denied sovereignty on or after the 1st January 1863 was denied the benefits of the provisions of the Treaty of Waitangi. ?

Mr. TAYLOR : Yes, the Government was clearly prevented from making confiscations for any act committed prior to that date because the Act fixes that date.

THE CHAIRMAN : Then you hold that it applied to any Natives who on or after 1st January 1863 denied the sovereignty of the Queen ?

Mr. TAYLOR : Yes. I do not desire to extend it before 1st January 1863, because the Government were not entitled to make the confiscations for acts committed before that date. There is one contention which Mr. Smith made that I have had some difficulty in understanding. He said that the title of disloyal natives in Taranaki was not destroyed in the Ngatiawa coast or Ngatiruanui coast districts by the proclamations taking the land. As far as I could understand, his authority was the ruling in the case of Manua Kapua.

THE CHAIRMAN : It is curious that the Privy Council in one case held that the title was destroyed, and in the second case, with but a slight difference in language they held that the title had not been destroyed.

MR. TAYLOR : In the second case in 1913 they did clearly distinguish it from the earlier case. In the one case the word "take" was not used. I think Mr. Smith was under some misapprehension, because it is clear that in reference to the whole of

the Taranaki lands the word "take" was used. There is no doubt that the whole of the Taranaki land was taken.

THE CHAIRMAN : In both proclamations was it ?

Mr. TAYLOR : Yes, the whole of the land in Taranaki was covered in these proclamations, but I understand that Mr. Smith relies on the proviso wherein, after saying they take the land, they add that the land of no loyal inhabitant would be taken.

THE CHAIRMAN : Is that the proclamation that was under consideration in the 1913 case ?

Mr. TAYLOR : No, this is the second proclamation : it had nothing to do with the Taranaki case, but the proclamation is to be found in Gazette 1865, page 266. It says that the Government doth reserve and take such land, and the same word is used in the earlier case " ...... doth declare that no land of any loyal inhabitant shall be taken except so much as is absolutely necessary for the security of the country." I understand that Mr. Smith relies upon that case, but after saying they "take" it they say the land of no loyal inhabitant would be taken. That meant that they wouldnnot retain the land of any loyal native. I submit that a reasonable construction of that word "take" is "retain". It says none will be taken except such as may be absolutely necessary for the security of the country, and that was in accordance with the New Zealand Settlements Act. The Act contemplated that the land of loyal natives would be taken, but it also contemplated that the land would be returned to them, or part of it. The land was taken and the loyal natives were informed that they would be given back their land which was not necessary for the protection of the country.

Mr. COOPER : Is there a difference in the Te Akau case ?

Mr. TAYLOR : Yes, in the Te Akau case they reserved the land and set it apart, and the proviso held that the title had not been destroyed by that proclamation. In any case it is difficult to see that the argument of Mr. Smith has any bearing

on the justice of the case. The Government thought it had taken the land, the Maoris acted upon the assumption that it had taken it, and the subsequent proceedings were on the assumption that the land had been actually taken by the Crown, and it is submitted that whatever the legal position is the equitable ~~pozikkx~~ position was quite clear, that the Crown had taken it and acted upon the assumption that it had taken it. I now desire to deal specifically with the Taraaki confiscations. I understood my friend to admit that apart from his general argument as to the injustice of the confiscations as a whole, the Government had grounds for confiscating the lands in the Ngatiruanui and Middle Taranaki district. He did not admit this in regard to the Ngatiawa district. He contended that thenatives in the Ngatiawa proclaimed district were loyal during the period from 1st January 1863 to 2nd September 1865, the date when the proclamation over their land was issued. Now, the only evidence which he produced in support of that statement was the opinion of Mr. Skinner, that during that period the natives of the Ngatiawa district were, as a whole, loyal. Mr. Skinner was, as he admitted, only 6 years of age at the date of the confiscation, and he admitted that his opinion was only the result of reading and of study. Against the opinion of Mr. Skinner we have this fact to begin with, that by the proclamation which proclaimed the land the Governor in Council declared that, in pursuance of the Act which entitled him, where he was satisfied that any native tribe or any number thereof, had, since the 1st January 1863, been engaged in rebellion against his authority, he took or proclaimed the Ngatiawa coast land. At this distance of time it may be difficult to know on what facts the Governor in Council acted, but there is some evidential value in the proclamation itself. One must assume that the Governor in Council had some means of knowledge, and of knowing whether the natives in that district were disloyal or loyal. It is not to be assumed that a proclamation of that sort was made on no grounds at all, and in defiance of the express provisions

of the statute. I am, however, able to reinforce this assertion by certain direct evidence. Compensation Courts were set up under the New Zealand Settlements Act to deal with the claims of loyal natives, or natives who alleged they were loyal, to lands in the confiscated areas, and we have obtained from the records of the Lands Office at Auckland a list of rebels in the Ngatiawa coast district. I shall produce that list to the Commission, and put in a copy. It contains a list of 398 rebels who are said to have been rebels in the Ngatiawa coast district. I have not the evidence on which the Commission ~~txx~~ came to the conclusion that they were rebels. The only thing available is the list which is headed "List of Rebels in the Ngatiawa coast district." This list in itself seems to show clearly that the assertion of the proclamation of 1865, that certain tribes or considerable sections of tribes, had been in rebellion, was correct. I desire also to refer to references showing that certain natives in the Ngatiawa proclaimed district were disloyal during the period from 1863 to 1865. I shall have to leave the actual citations for a few minutes as I have not got the references, but I will proceed to refer to certain references which I have extracted from the Taranaki Herald of the period from 1863-1864 - references to acts of rebellion among the Ngatiawa tribes during that period, expressions of opinion of natives which show they were not loyal. I refer first to an extract from the Herald dated 16th May 1863 :-

> "Several Mataitawa natives in town to-day who seem much elated about the abandonment of Waitara. Paora, in answer to our questions whether he and Wi Kingi's natives would not now become loyal, replied : 'No, we are still Kingi's natives and we shall continue to work the works of the King at Waitara."

Then an Extract from the Taranaki Herald, June 24, 1863 :-

> "It is said that a red flag has been flying to-day at Mataitawa As their flag is never hoisted excepting as a signal for war we may expect some news soon of Wi Kingi's people to the effect that they have determined to commence hostilities."

Taranaki Herald, June 25th :-

> "A native from Waitara came in this morning with intelligence that Haupurona had decided upon fighting against the pakeha. Subsequently Wetera of Mokau, owner and master of the

Pirininihi schooner, came into town from Mataitawa and informed us that the Mataitawa natives decided yesterday to commence hostilities."

I have references in the Herald of June 26th., as to Haupurona's challenge to the British. He challenged them to come out and fight. This was in 1863, and he was later on engaged in fighting them himself. Haupurona was described as Wiremu Kingi's fighting chief. On June 29th we have the following reference :

"Ihara from Waitara informed Herald that there will be a general rising. He says he has heard that Ihara Te Wharepa and Te Patukakariki urge an attack upon Taira and his people, while Haupurona, Paora, Eruara (Kingi's son) and Epiha (from Onaeia) insist upon a hostile movement at Bell Block."

Taranaki Herald, July 1st 1863 :-

"Natives inform us that Hapurona is building a pah at Kairau, the Mataitawa people assisting."

Taranaki Herald, Sept. 26th. 1863, has a leading article referring to a skirmish near Sentry Hill, and mentions the names of several wounded, and continues :-

"These all belonged to Mataitawa. Enoko's wound is a dangerous one. He is the only surviving brother of Wiremu Kingi."

Taranaki Herald, 23rd January 1864 referring to a skirmish in the valley of Mangiraka gives a list of eleven enemy casualties, and continues :-

"All these natives belong to this neighbourhood. Some are Puketapus and some are Wiremu Kingi's own people."

Taranaki Herald, April 2nd 1864, under the heading "The Mataitawa Natives," says :-

"Another chance has been given to Wiremu Kingi and his people of making peace. On Wednesday last three ambassadors, or rather three pairs of ambassadors, were sent up to Manutoki one after the other to invite the people of that place to come down to talk about peace. The invitation was declined. They wanted to know whether peace had been concluded with Waikato and Taranaki. When the last pair of envoys went up they found the trenches all manned, the people with their guns in fighting costume, and among them some Ngatiruanuis."

Then, the Taranaki Herald of May 7th 1864, referring to the defeat of the natives at Sentry Hill, says :-

"Among the natives killed were recognised eight of the Ngatiawa tribe. After the defeat a man with a flag of truce was sent to the native pah at Manutahi to say they might bury their dead and saw Tamati Hone Oraukawa of Ngatiruanui and a large assemblage of Taranakis, Ngatiruanui, Pakutapus and Wi Kingi's people."

These are just a number of references from a newspaper circulating in the district, showing the ~~xxxxxx~~ numbers of the Atiawa people were not