1950

NEW ZEALAND

REPORT OF ROYAL COMMISSION APPOINTED TO INQUIRE INTO AND REPORT ON CLAIMS MADE BY CERTAIN MAORIS IN RESPECT OF THE WANGANUI RIVER

Laid on the Tables of Both Houses of the General Assembly by Command of His Excellency

Royal Commission to Inquire Into and Report Upon Claims Made by Certain Maoris in Respect of the Wanganui River

GEORGE THE SIXTH by the Grace of God, of Great Britain, Northern Ireland and the British Dominions beyond the Seas, King, Defender of the Faith:

To Our Trusty and Well-beloved SIR HAROLD FEATHERSTON JOHNSTON, Knight, of Opoutama, one of Our Counsel learned in the law, and sometime a Judge of Our Supreme Court of New Zealand: GREETING:

Whereas upon proceedings taken in the Native Land Court (now called the Maori Land Court) for the investigation of title to the portion of the bed of the Wanganui River between the tidal limit at Raorikia and the confluence of the Wanganui and Whakapapa Rivers the Court, on the twentieth day of September, one thousand nine hundred and thirty-nine, made a provisional or preliminary determination that the said portion of the bed of the Wanganui River was, at the time of the making of the Treaty of Waitangi, land held by Maoris under their customs and usages:

And whereas upon proceedings taken in the Native Appellate Court (now called the Maori Appellate Court) by way of appeal from the provisional or preliminary determination aforesaid, the Native Appellate Court, on the twentieth day of December, one thousand nine hundred and forty-four, dismissed the appeal so brought:

And whereas upon later proceedings taken in the Supreme Court it was, in effect, declared that by virtue of section 14 of the Coal-mines Act Amendment Act, 1903 (now represented by section 206 of the Coal-mines Act, 1925), the bed of the Wanganui River, so far as the same is navigable, is, and is deemed to have always been, vested in Us:

And whereas it is contended by or on behalf of certain Maoris that they would, but for the provisions of the said section 14 of the Coal-mines Act Amendment Act, 1903, be the owners, according to Maori custom

and usage, of the aforesaid portion of the bed of the Wanganui River, and that they have by the operation of that section been deprived of their right and title to that portion of the bed of the Wanganui River without their consent, and have suffered loss by reason of that enactment:

And whereas the Government in and for Our Dominion of New Zealand desires that inquiry should be made into the claims aforesaid to the end that, if those claims are well-founded and of substance, the General Assembly may be enabled to consider what relief, if any, should be accorded or granted to those so claiming:

Now know you that We, reposing trust and confidence in your impartiality, knowledge, and ability, do hereby nominate, constitute, and appoint you the said

Sir Harold Featherston Johnston

to be a Commission—

(*a*) To inquire and report whether it is established that, but for the provisions of the said section 14 of the Coal-mines Act Amendment Act, 1903, any Maori or any group or class of Maoris would have been the owner or owners, according to Maori custom and usage, of the aforesaid portion of the bed of the Wanganui River:

(*b*) To inquire and report whether it is established that any Maori or any group or class of Maoris has, by reason of the enactment of the said section 14, suffered such loss or deprivation in respect of the aforesaid portion of the bed of the Wanganui River as would, in equity and good conscience, entitle him or them to compensation:

(*c*) If it be reported that there has been any such loss or deprivation as aforesaid, then to recommend what compensation in money or money's worth should now be granted to the Maori claimants:

(*d*) If it be recommended that any such compensation should be so granted, then to report for whose benefit, that is to say, that of any particular Maori, hapu, tribe, or other group or class of Maoris, and in what manner, the amount of such compensation should be appropriated and applied:

(*e*) If it be recommended that any compensation should be so granted, then to report whether any terms or conditions, whether as to the abandonment or surrender of any rights or otherwise, should attach to the grant of such compensation.

And for the better enabling you to carry these presents into effect, you are hereby authorized and empowered to make and conduct any inquiry under these presents at such times and places as you deem expedient, with power to adjourn from time to time and place to place as you think fit, and so that these presents shall continue in force, and the inquiry may at any time and place be resumed although not regularly adjourned from time to time or from place to place:

And you are hereby strictly charged and directed that you shall not at any time publish or otherwise disclose save to His Excellency the Governor-General, in pursuance of these presents or by His Excellency's direction, the contents of any report so made or to be made by you or any evidence or information obtained by you in the exercise of the powers hereby conferred upon you except such evidence or information as is received in the course of a sitting open to the public:

And, using all due diligence, you are required to report to His Excellency the Governor-General in writing under your hand not later than the thirtieth day of September, one thousand nine hundred and fifty, your findings and opinions on the matters aforesaid, together with such recommendations as you think fit to make in respect thereof:

And, lastly, it is hereby declared that these presents are issued under the authority of the Letters Patent of His late Majesty dated the eleventh day of May, one thousand nine hundred and seventeen, and under the authority of and subject to the provisions of the Commissions of Inquiry Act, 1908, and with the advice and consent of the Executive Council of the Dominion of New Zealand.

In witness whereof We have caused this Our Commission to be issued and the Seal of Our Dominion of New Zealand to be hereunto affixed at Wellington, this twenty-fifth day of January, in the year of Our Lord, one thousand nine hundred and fifty, and in the fourteenth year of Our Reign.

Witness Our Trusty and Well-beloved Sir Bernard Cyril Freyberg, on whom has been conferred the Victoria Cross, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, Knight Commander of Our Most Honourable Order of the Bath, Knight Commander of Our Most Excellent Order of the British Empire, Companion of Our Distinguished Service Order, Lieutenant-General in Our Army, Governor-General and Commander-in-Chief in and over Our Dominion of New Zealand and its Dependencies, acting by and with the advice and consent of the Executive Council of the said Dominion.

B. C. FREYBERG, Governor-General.

By His Excellency's Command—

S. G. HOLLAND,

For the Minister of Maori Affairs.

Approved in Council—

T. J. SHERRARD, Clerk of the Executive Council.

To His Excellency the Governor-General of the Dominion of New Zealand.

MAY IT PLEASE YOUR EXCELLENCY,—

I, the undersigned Commissioner, appointed by Warrant dated the 25th January, 1950, have the honour to submit to Your Excellency my report under the following terms of reference :—

(*a*) To inquire and report whether it is established that, but for the provisions of the said section 14 of the Coal-mines Act Amendment Act, 1903, any Maori or group or class of Maoris would have been the owner or owners, according to Maori custom and usage, of the aforesaid portion of the bed of the Wanganui River :

(*b*) To inquire and report whether it is established that any Maori or any group or class of Maoris has, by reason of the enactment of the said section 14, suffered such loss or deprivation in respect of the aforesaid portion of the bed of the Wanganui River as would, in equity and good conscience, entitle him or them to compensation :

(*c*) If it be reported that there has been such loss or deprivation as aforesaid, then to recommend what compensation in money or money's worth should now be granted to the Maori claimants :

(*d*) If it be recommended that any such compensation should be granted, then to report for whose benefit, that is to say, that of any particular Maori, hapu, tribe, or other group or class of Maoris, and in what manner, the amount of such compensation should be appropriated and applied :

(*e*) If it be recommended that any compensation should be so granted, then to report whether any terms or conditions, whether as to the abandonment or surrender of any rights or otherwise, should attach to the grant of such compensation.

HAROLD JOHNSTON, Commissioner.

Wellington, 18th July, 1950.

The Royal Warrant setting up this Commission, after reciting that the Maori Land Court, upon proceedings taken in it, made a provisional or preliminary determination that the portion of the bed of the Wanganui River between the tidal limit at Raorikia and the confluence of the Wanganui and Whakapapa Rivers, was, at the time of the making of the Treaty of Waitangi, held by Maoris under their customs and usages, and that upon appeal that determination was upheld by the Maori Appellate Court, and that on later proceedings taken in the Supreme Court it was, in effect, declared by virtue of section 14 of the Coal-mines Act Amendment Act, 1903, the bed of the Wanganui River, so far as the same is navigable, is and is deemed to have always been vested in the Crown, directs this Commission, in the first place, to report whether it is established that, but for the provisions of the said section of the Coal-mines Act, any Maoris would have been the owner or owners according to Maori custom and usage, of the aforesaid portion of the bed of the Wanganui River.

To grasp the scope and nature of this inquiry, the recitals need examination.

The Native Land Court provisional or preliminary determination (upheld by the Native Appellate Court) referred to was at the request of counsel for the Maoris and the Crown, preliminary to an application filed in the Maori Land Court for investigation of the title to the bed of the Wanganui River. On this preliminary point the decision was that at the time of the Treaty of Waitangi the bed of the Wanganui River from the tidal limit at Raorikia to its junction with the Whakapapa River, which it seems to have been conceded at the time of the passing of the Coal-mines Amendment Act of 1903, was navigable, was land held by the Natives under their customs and usages.

The subsequent proceedings in the Supreme Court consisted of a motion by the Crown to prohibit the Maori Land Court proceeding further to investigate and determine the particular owners of the bed of the river on the ground that from the date of the Treaty or, at least, from the passing of the Coal-mines Act, the bed of the river became vested in the Crown.

The Supreme Court decision while it adverted, with some approval, to the contention that from the treaty onwards the Crown was the owner of the bed of the river, turned on the effect of the Coal-mines Amendment Act of 1903.

In his judgment the learned Judge said :—

> The language of section 206 [which re-enacts section 14 of the Coal-mines Amendment Act of 1903], is to my mind plain and unambiguous as expressing an intention on the part of the Legislature that the beds of all navigable rivers are to be deemed always to have been vested beneficially in the Crown excepting in cases where such beds have been expressly granted by the Crown. Unless that interpretation is adopted, it is difficult to see what purpose was to be served by passing the legislation at all.

In the face of that interpretation of the Coal-mines Act, the Maoris can proceed no further in their application to the Maori Land Court to investigate the ownership of the bed of the river and ask issue of a freehold title thereto.

The question to be answered by this Commission is whether, apart from section 206 of the Coal-mines Act, 1925, which took the place of section 14 of the Act of 1903, the Maoris could proceed through the Maori Land Court with their application for investigation of title.

The learned Judge in the Supreme Court judgment found it unnecessary to determine the questions which have been advanced before this Commission. He rested his decision on the Coal-mines Act of 1903. The Crown, aware that a decision on this ground might invite compensation, has argued that the Maoris had never any title to the bed of the river and even if they once had, had abandoned or lost it. The proceedings in Maori Land Courts and in the Supreme Court and before this Commission are concerned solely with the bed of this particular river—that is, the Wanganui—and the particular natural features of this river and its use and manner of use by the Maoris can lead to conclusions which may not be applicable to other rivers of which Native use and possession may be quite distinct from the use and possession exercised over the Wanganui River. The river is now described as navigable despite a number of rapids; which seem to preclude the ordinary idea of navigation, the number in the stretch of river relevant to this inquiry being about 230. The most significant feature of the use to which the river was put by the Maoris was the very great number of eel-weirs and fish-traps for lampreys, erected in the river; the number of weirs in the relevant stretch being placed at about 442.

In the Native Land Court evidence was given as to the use of the river by the Maoris as a source of food and the permanent construction of the eel-weirs. The eel-weirs ran right out into the stream. The lamprey-traps seem to have been adjacent to the banks.

Evidence was given of passage on the river by canoes by tribal occupiers going from weir to weir and from settlement to settlement and records were put in of journeys up or down the river by European travellers or missionaries. Although I have had to examine these records, I think it unnecessary to include extracts from them in this report because the Judges of the Maori Land Court had reference to them, and their finding that the river was not a highway is, I think, incontestable.

The ponderable and learned judgments delivered by the Maori Land Court Judges when deciding that the bed of the river for the relevant stretch whether navigable or not, was held by the Maori owners under their custom and usage and was customary Maori land is, in my opinion, the only sure guide to the correct answers to the questions before me. Their judgments set forth, to my mind, in a way no other Judges could do, the foundations of Native title and its comprehensive implications. Before dealing with

them it is as well to set out the Crown contentions that were advanced at the hearing before Judge Browne in the Native Land Court and before the six Judges who sat in the Native Appellate Court. Judge Browne sets them out as :—

1. Native custom did not recognize exclusive ownership of the beds of rivers such as the Wanganui :
2. Native custom relates solely to rights of fishing, navigation, and ordinary domestic uses of waters :
3. These rights which are admitted by the Crown do not confer rights of ownership upon which freehold orders can be made :
4. At the time of the Treaty of Waitangi land meant land in the common acceptance of the term and not in the highly legal sense.
5. That the rights of sovereignty mean rights of ownership of access over country and its navigable water.

The evidence adduced by the Crown, Judge Browne said, referred to the use made of the river in recent years (the hearing before Judge Browne was in September, 1939) and but little referred to its use in 1840. Consequently, Judge Brown said, he was asked to infer—

1. That the conditions were at that time the same as in recent years.
2. That there was not, and never had been, any exclusive ownership of the river-bed.
3. That the river was in the nature of a main highway over which any one had a right to travel.

Before dealing in detail with the Crown contentions, Judge Browne said :—

There are two main facts, which, in the Court's opinion, cannot be disregarded in dealing with this case, namely :—

1. That the bed of a lake or the bed of a river is merely land covered with water.
2. That every foot of land in New Zealand at the time of the Treaty of Waitangi, apart from such as may have been alienated, belonged to some Maori tribe or hapu.

The boundaries of the land of each tribe or hapu were well defined and the members of that tribe or hapu had the exclusive right in common to everything within those boundaries including rivers and lakes. There were no rights-of-way or public roads through their territory either by river or in any other way, and if one tribe wanted to pass through the territory of another, permission had to be obtained, or if permission were not granted the tribe wanting to pass would be compelled to face the opposition of the owners and to force its way through.

Before the Native Appellate Court the grounds for the appeal on behalf of the Crown were :—

1. That prior to the Treaty of Waitangi custom and usage did not recognize exclusive Native ownership of beds of navigable rivers nor that the bed of a river or lake was land covered with water.

2. It is not a fact that every foot of land in New Zealand apart from such as may have been alienated belonged to some tribe or hapu.

At the hearing, however, Crown counsel's submissions were :—

1. That Native custom did not recognize ownership of the beds of rivers such as Wanganui.

2. That Native customs relate only to rights of fishing, navigation, and ordinary domestic use, and that these rights which are admitted by the Crown do not confer rights of ownership upon which freehold orders can issue.

3. That the right of navigation on the river was a right in common enjoyed by all Natives and not only the Wanganui Natives provided the right was exercised for peaceful purposes.

4. That not all land in New Zealand is customary land, even if the definition of land is extended to include river-beds.

5. The bed of the Wanganui River from the Crown purchases boundary in 1848, to Raorikia, was abandoned by claimants in this case.

It will be observed that the third contention that the right of navigation was enjoyed by all Natives and not only the Wanganui Natives and the fifth contention that the bed of the river from a Crown purchase boundary in 1848 to Raorikia, was abandoned, are questions dependent on facts.

I now give the extracts from Native Land Court Judges referred to :—

From Judge Browne :—

1. The Court disagrees with the first allegation of the Crown that Native custom did not recognize the exclusive ownership of the bed of rivers such as the Wanganui. The bed of the Wanganui River belonged to the Natives through whose territory it ran just as much as the land forming its banks did. The test is the fact that if one of the outside tribes had claimed to make use of the bed for the purpose of erecting patunas, on the ground as asserted by the Crown that it was public property, the claim would, without doubt, have been strenuously resisted by the local people and would probably have resulted in bloodshed.

2. The general use made of the river in recent years without any proper agreement or arrangement was, in the Court's opinion, largely due to the fact that the Maoris living on its banks, owing to their want of unity and the absence of a powerful and influential leader, were not strong enough to offer an effective resistance and also to the mistaken assumption on the part of the Crown and on the part of Europeans generally that the river was a main highway accessible to every one. The local Natives used the bed of the river from time immemorial for the erection of eel-weirs and other fish-traps yet these were indiscriminately and, as far as the Court can see, without any right or justification, destroyed or done away with to provide a passage for river steamers. Any protest by the unfortunate people who owned the eel-weirs remained unheeded.

3. In the Court's opinion, so far as the Maoris are concerned, these rights, in the case of this river, follow as a matter of course and are incidental to the ownership of the bed of the river and cannot in any way be separated from that ownership. This Court in all its experience of Native land and the investigation of the titles thereto, never once heard it asserted by any Maori claimant that the ownership of the bed of a stream or river, running through or along the boundaries of the land the subject of investigation, whether that stream or river was navigable or not, was in any way different from the ownership of the land on its banks. Nor has it ever heard it denied that the tribes or hapus that owned the land on the banks of a stream or river had not the exclusive right to construct eel-weirs or fish-traps in its bed or exercise rights of ownership over it. The river-bed, being a source of food in ancient times, would be looked upon as a highly important asset to any tribe and the right to it would be very jealously guarded by the members of that tribe.

From Chief Judge Shepherd :—

1. The nature of the inquiry to which the Court is required to direct its mind in ascertaining whether land covered by water is or was Native customary land or not has been indicated by the Court of Appeal in *Tamihana Korokai* v. *the Solicitor-General*, (1913) 32 N.Z.L.R., 321, with respect to Lake Rotorua, where the particular subject of consideration was whether Natives were the owners or whether they had merely fishing rights. The judgment of Mr. Justice Edwards in that case, so it seems to me, makes it clear that it is not enough that Natives show with respect to navigable rivers and lakes that they had exclusive rights of fishing. What they must show is that Native custom recognized a separate and distinct property in the bed of the river or lake ; that is to say, that there was some rule in native custom by which land covered by water was accounted as such and therefore was subject to Native proprietary rights in the same way that land in the ordinary sense was.

2. There are, of course, many rivers and streams included in titles to Native lands issued out of the Native Land Court simply as part of the countryside comprised in such title orders. In these cases the Court has necessarily recognized the ownership of the Natives in the bed of such rivers and streams as flow through the land affected, and it is only a question of the degree as between rivers sufficiently deep to be considered navigable (by our thought) and those not capable of being described as navigable.

3. The Natives, in my view, owned immediately before and at the making of the Treaty of Waitangi so much of the North Island of New Zealand as had not at that time been alienated by them. The Crown has not shown that at the date material to this judgment the Natives had alienated the bed of the Wanganui River. Neither do I understand the Crown to allege any such alienation as part of its case.

(The learned Chief Judge, as indeed did Judge Browne, no doubt relied upon opinions of Bishop Selwyn and Sir William Martin, at one time Chief Justice of New Zealand, as authority for the statement that all land in New Zealand, apart from such as may have been alienated, belonged to some Maori tribe or hapu.)

From Judge Carr :—

1. It must be conceded that the pre-treaty Maori never concerned himself with that abstruse question as to whether or not a river or lake was land covered by water. In many ways the mind of the Maori works inversely to that of the European. The Courts of the latter have laid it down to him that to possess the exclusive use of a lake or river he must own the bed thereof. To the

Maori the water would be the predominating factor and the exclusive use of that water would carry with it everything below. If the land was below, then that land. If a taniwha was below, then that taniwha; and the Wanganui River was not an exception to the widely held belief as to fabulous reptiles inhabiting unfathomable depths and acting as tribal guardians. The water and the land underneath it are to the Maori indivisible, but in the changing of his title from that recognized under Maori custom to the English fee-simple a corresponding change in prospective position of the factors must follow.

It was a recognized feature of the ancient customs of the Maori that all land within the boundaries of the tribe belonged to the members of that tribe and to no one else. Woe betide any outsider who trespassed on track or on water without permission. It mattered little whether the water was stationary or whether it was running. The tribe through their Chiefs, may barter or gift away the whole of a defined part of land within the rohepotae but that would only illustrate the ancient custom of tribal right.

2. It was established to the satisfaction of the lower Court that the Wanganui Tribe did exercise an exclusive right of ownership over this body of water and over its bed of land below and that this exercise of ownership was in accord with customs and usage existing at the date of the Treaty of Waitangi.

3. The tribe owned all there was to own within its tribal boundaries and it has not been proved that this part of the river is not within the territory of the Wanganui Tribe. The right to fish came through or under the general right of ownership of everything within the tribal boundaries. The tribe had no limited right. The right was an absolute one and an all inclusive one. Whatever it may have subsequently become, the river in 1840 was not a main highway and its use for passage was in no way different from the use of recognized tracks over land and then only by leave or sufferance of the dominant tribe.

From Judge Harvey:—

1. Unchallenged possession of the land at the time of the making of the Treaty of Waitangi under a *prima facie* "take" has always been regarded as evidence of rights under Native custom until and unless the contrary is proved, and it is the very framework of the Native Land Acts that the Natives are clothed with a statutory privilege to have their claims to land investigated by the Native Land Court and to a freehold title from the Crown if and when the Court determines in their favour.

2. The Court [referring to the lower Court] upon evidence before it, came to a conclusion that the area in question was, at the time of the making of the Treaty of Waitangi, land held by the Natives under their customs and usages. Such a decision carried with it grave implications for the reason that, unless it can be shown that such customary title has been lawfully extinguished, a body of Natives later to be ascertained may be entitled to a freehold order which will give them rights against the Crown and a title against the world.

3. It appears to me that the evidence before the lower Court proved that a section of the Maori people in New Zealand had occupation of the bed of the river under ancestral rights preserved against all other sections of the Maori people of New Zealand by means of the strong arm and that such occupation and ancestral rights justified the preliminary decision appealed from. For the foregoing reasons I am unable to accept the Crown's contention that Maori custom could not envisage ownership of a river of the magnitude of the Wanganui River. In my opinion the appeal should be dismissed.

Judge Beechey found himself in some difficulty in regard, so far as I understand his judgment, to the legality of a claim in the river other than, and wider than, a claim *ad medium filum* attendant on ownership of the banks. On the other hand, considering Maori methods of fishing, and without relying on Judge Carr's pregnant dictum, that in many ways the mind of the Maori works inversely to that of the European, a restriction *ad medium filum* seems inconsequent. There can be separate fisheries or common fisheries and it can be admitted that various presumptions and indeed conflicting presumptions can arise but amongst these presumptions is one that the ownership of the bed of a river attendant upon the erection of eel-weirs, is independent of riparian ownership. Such weirs establish a right to the soil quite apart from general rights of fishing in the river.

If authority is wanted, it can be found in *Coulson and Forbes on Waters*, 5th Edition, at page 97:—

There are two presumptions with regard to the ownership of the bed of non-tidal waters: One, that the riparian owners own half the bed of the river *usque ad medium filum aquae* and consequently the right of fishing thereover. The other—that the owner of the right of fishing in the river is owner of the soil and this displaces the presumption that would otherwise arise in favour of the riparian owners being the owners of the bed of the river *usque ad medium filum aquae* (page 98). Ownership of the bed of non-tidal rivers can be established in the same way as the title to dry land. It can be proved by showing possession of a fishery over the *locus in quo* or the exercise of acts of ownership in the bed sufficient to establish a title by possession.

On English authority, an exclusive fishery is usually called "several" sometimes "free," and a right in common with others is usually called "common of fishery" sometimes "free." A several fishery is usually a corporeal hereditament the owner being entitled to the soil under his fishery. It is not necessary that the fishery should be described as a several fishery. If it was a weir or something of that kind, it sufficed. In the absence of evidence to the contrary the owner of a several fishery is presumed to be the owner of the soil. In *Attorney-General* v. *Emmerson*, 1891 Appeal cases, page 649, a several fishery was established over a foreshore of the Naplain Sands in the estuary of the Thames. In that case a claim was made by the Crown to part of the foreshore of the sea against the Lord of the adjoining manor who was also in possession of a several fishery exercised *inter alia* by Kiddells. The House of Lords held that such a right raised the presumption that the freehold of the soil was in the owner of the several fishery.

The owner of a fishery has not of necessity a right to land on the shore above high-water mark without the consent of the owners of the freehold. In cases of grants to individuals it is often a question of construction whether the right to use the bank for the purpose of the fishery is impliedly granted and it appears to depend on whether it is necessary to the exercise of the fishery such banks should be used. The open enjoyment of a right of landing and drawing nets and of occasionally sloping and levelling the shore for twenty years has been held sufficient to warrant a Judge directing a jury to presume a grant of such right.

In the *Duke of Devonshire* v. *Pattinson and the Mayor, Aldermen, and Citizens of Carlisle* it is said that:—

> The fishery was then as now known and treated as a tenement distinct from the closes adjoining the river and the fact that the corporation had never for more than a century after the grant of 1767 set up any title to fish under this Deed or exercised any such right is a strong confirmation of our conclusion.

The conclusion was that grants of the land did not pass any interest in the bed of the river. In general, it can be said that in the conveyance of land bounded by river the *ad medium filum* presumption may be rebutted by proof of surrounding circumstances in relation to the property in question which negative the possibility of any conveyance boundary having been the intention and in that case it was held that, under the circumstances, the conveyance ought not to be construed as passing any portion of the river to the grantees.

Considering the use of the river by the Maoris, considering the river itself with its rapids and its numerous eel-weirs, it is, in my opinion, clear there should be no presumption that the bed of the river passed to the transferees of the land and that the owners of the weirs lost their right to the bed of the river. I wish it to be quite clearly understood, that I think that no other than a right recognized in English law need be claimed by the Maoris in their claim to the bed of the river as I think it clear that if Europeans had used the river in the same way and ownership were in European hands they would have made the same claim as now made by the Maoris. I set out, therefore, a statement by Mr. Justice Buckley in *Hanbury* v *Jenkins*, citing Lord Hale:—

> Fishing may be of two kinds ordinarily—namely, the fishing with the net, which may be either as a liberty without the soil, or as a liberty arising by reason of and in concomitance with the soil or interest or propriety of it; or otherwise it is a local fishing, that ariseth by and from the propriety of the soil.

And then later on, referring to weirs, he cites Lord Herschell in *Attorney-General* v. *Emerson*, as saying:—

> I think they all have this in common that they are constructions or erections by which the soil is more or less permanently occupied and that it is this occupation of a portion of the soil which leads Lord Hale to say that they are "the very soil itself."
>
> Dealing first with the use of the word "wears," I should, from those authorities, come to the conclusion that the grant of the weirs is a grant, not of a mere right of fishing, but of a corporeal hereditament consisting of the soil on which the weir is constructed.

Then later :—

Therefore, when you find the grant of a weir, the grant of the place where you take the fish, and the grant of the bed of the river there, it seems to me that is of wider import ; and that from it you are to infer, if there is nothing to the contrary, that the grant of the soil is not the grant of the soil merely where the weir is situated, but is the grant of the soil over which the river runs, and upon which there is the right to construct weirs for the purpose of taking fish.

There is a second ground, and that is this : What are the apt words apart from the use of the word " weirs " to create a several fishery ? Do you want the word " several " ? Do you necessarily look for that word ? I think the answer is no. Mr. Neville has shown me from the case of *Malcomson* v. *O'Dea* and *Neill* v. *Duke of Devonshire*, that in neither of those cases do you find the word " several " used. You find a grant of the right of fishing or the grant of the weir or something of that kind and from that there follows the inference that what is granted is a several right.

Before leaving this case and turning for a moment to any supposed loss of rights through absence of manifest acts of ownership, I think it appropriate to cite words used by Lord O'Hagan on another occasion, which are relevant to another branch of this inquiry :—

" An interruption may have been permitted through the absence of the proprietor ; or through his ignorance, partial or complete, or the acts relied on ; or through his neglect or indifference to them as not vitally affecting, in his own case, his interest or position ; or as requiring from him, for the purpose of resistance, effort, or expense unjustified by the necessity of the case ; or as allowed from kindly or benevolent motives to humble people for a great length of time. And it would not seem just, as it would not be legal, on the ground of such an interruption, so tolerated, to pronounce the forfeiture of his vested estate."

It appears to me that I can entirely give effect to these various acts of goretting, gravel getting, and cattle fencing by referring them to an absence of objection, by the owner of the bed of the river, to an act which did him no harm, and which was reasonably convenient, or necessary if you will, for the protection or enjoyment of the property of the riparian owner.

A finding that prior to the treaty, Maori custom and usage established that the Maoris held the bed of the river necessitated a factual finding that such usage was exclusively exercised by the particular tribe claiming. That the tribe used the river for the coming and going of their canoes and for fishing by means of eel-weirs and other traps is beyond question as is also the permanent nature and construction of the weirs. The Crown set out to show that the use to which the river was put was open to all Maoris and not the exclusive privilege of a certain tribe or a constituent group of a tribe. Mr. Prendeville, counsel for the Crown, in the Maori Appellate Court submitted :—

> " In the light of differences of opinion amongst jurists as to the nature of the ownership of beds of rivers, it is impossible, I submit, to say with confidence that the Maori had such a high legal conception as to claim or hold ownership rights of the bed of the river."

That inferences or presumptions of title from the use to which the river was put should be the same whether exercised by Maoris or Europeans, can, I think, in this case, be conceded. Consequently, if it could be shown the river was of necessity or by use, a highway for Maoris for any tribe or hapu in New Zealand and not merely a private road for the use of a particular tribe, no particular tribe would be entitled to claim ownership of the bed without proof of right in the bed of the river superior to any right-of-way or passage. The evidence that the river was open to passage by others than the claimant tribe was but slight, and, in my opinion, quite insufficient to disturb the finding of the Maori Courts that the use of the river as a right-of-way was confined to the Maoris of the tribe and no right of passage to the general public was established.

The Crown contention that the river was a highway and must be held by the Crown for the public was, as I have stated, in my opinion, on the evidence rightly rejected by the Native Land Court.

(In Mr. Justice Hay's judgment in the Supreme Court, he set out a quotation from a judgment of Mr. Justice Edwards and it appears from the quotation that Mr. Justice Edwards said the Wanganui River was navigable, but it is a misprint. What Mr. Justice

Edwards really said was that the Wanganui River was certainly "*not*" navigable, so that Mr. Justice Edwards' opinion supported the Maori Land Court judgment that the river was not a highway and did not conflict with it as might appear to any one reading Mr. Justice Hay's judgment without knowledge of the printer's or typist's error.)

The erection and use of the eel- and lamprey-weirs were undoubtedly as an ordinary function of tribal organization confined to the members of the tribe who erected them and claim ownership of the bed of the river.

From a paper read by T. W. Downes of Wanganui before the Wanganui Philosophical Society, on the 17th December, 1917, set out in Volume L of the "Transactions and Proceedings of the New Zealand Institute" for the year 1917, it is stated :—

> In olden days the patuna (eel-weir) was an elaborate as well as an exceedingly strong piece of work often adorned by carvings and always made to stand years of flood-timber buffeting; occasionally it required repairing but it was never quite destroyed. To-day, on several of the upper Wanganui rapids there are the remains of old patuna though the huts of the adjoining villages have long since been obliterated by time.

The erection of weirs in English rivers in English law predicates the title to the soil of the river-bed in which they are erected to the owners of the weirs. The headnote to *Hanbury* v. *Jenkins* (reported (1901) 2 Chancery Division, page 401) sufficiently sets forth propositions which I think govern the position in this case :—

> 1. A several fishery may exist either apart from or as incident to the ownership of the soil over which the river flows, but where a several fishery is proved to exist the owner of the fishery is to be presumed in the absence of evidence to the contrary to be the owner of the soil whether it is a navigable river or a river neither public nor navigable.
> 2. The grant of weirs is a grant not of the mere right of a fishery but of a corporeal hereditament consisting not only of the soil on which any particular weir is constructed but of the soil over which the river runs and upon which there is the right to construct weirs for the purpose of taking fish.

I think in the circumstances of this case no more imaginative concept of ownership is needed to establish the Maori title arising from the erection of their eel-weirs than is in accord with English presumption in like cases.

The Crown contention that the ownership in navigable water is presumed to be vested in the Crown, is only true if limited to the tidal waters of navigable rivers. It is quite clear the law of England is that in navigable rivers beyond the tidal limit the soil of the bed is not vested in the Crown but in adjoining owners, and in this case the relevant stretch of river is not tidal water although it may now be navigable, in fact, or by a statutory definition of "navigable." The contention of the Crown that the Maori possession whatever its incidence could not support a freehold title because the possession was not exclusive is on the evidence quite untenable and contrary to Maori custom and tribal law and administration. There was sufficient proof of exclusive right of passage, exclusive right to use the river for fishing, and the implication of tribal ownership of the bed arising from the erection and use of the weirs. The Maori claim to the bed of the river rests, in my opinion, on facts sufficient to support a claim to the bed of the river quite apart from the presumption *ad medium filum* arising from riparian ownership.

While it is true that an incorporeal right-of-way along both banks of the river may be appendant to an incorporeal right of fishing, the one being capable of union with the other without any incongruity, it might in the circumstances, if it were necessary, be easier for the owners of the weirs to establish a right in the banks than it is for the owners of the banks to establish a right in the soil occupied by the weirs.

The Maoris having sold large areas of land bounding the river, mainly to the Crown, the claim of the Crown to the bed of the river *ad medium filum* is natural enough although inconsistent with its claim to the whole of the bed as a public highway.

In English law a title to the bed of a river following on the erection of eel-weirs, is not destroyed by even a public right of passage. A public right of passage may demand from the owners of eel-weirs room for passage but it does not destroy the ownership in the soil incident to the weirs.

The fact that the river was the " larder " of the Maoris settled on the banks of the river, the natural features of the river, and the fact that the settlement as a whole depended upon the river, and that the pursuit of fishing demanded weirs results in an accumulation of circumstances more significant than those that have been held sufficient to raise the presumption of ownership to the beds of English rivers.

In English law if, on the sale of riparian lands, the vendor reserves fishing-rights that accompanied his right *ad medium filum* of a stream, the reservation could rebut the presumption that his purchaser acquired the bed of the river *ad medium filum*. If such an owner had erected weirs while he was the owner and reserved the right to use those weirs, the ownership of the soil would still remain with him, and such a presumption must be held in this case in favour of the Maoris since they establish the ownership and use of the weirs they had erected.

Taking into account the presumptions and counter presumptions that can arise in the circumstances of each case, I think it abundantly clear that the ownership of the bed of the Wanganui River held by the Maoris under their usages and customs despite control by the Trust Board or River Board, could no more be said to be abandoned or lost to them than would be the case in respect of other large and practically unoccupied areas held by them. Earlier conveyances by Maoris to the Crown can be cited as showing that at the time they were drawn Maori ownership of the land covered by water was generally recognized and that the erection of eel-weirs carried the soil of the bed of the water in which they were erected and constituted a corporeal hereditament. For instance, the parcels relating to the Waitotara-Okehu Blocks, for which the Crown paid some £2,000, are described as " All that piece of land situated between the Okehu Stream the boundaries whereof are set forth at the foot of this deed and a plan of which land is found on the back of this deed with its rivers, trees, minerals, lakes, streams, waters, and all appertaining to the said land or beneath the surface of the said land and all our right, title, claim and interest therein."

A Conveyance of 1863 seems to be of the land in which the eel fisheries were situated in streams. It is as follows : —

TRANSLATION

This deed written on this first day of October in the year of our Lord one thousand eight hundred and sixty three, is a full and final sale conveyance and surrender by us the Chiefs of the Ngapairangi tribe whose names are hereunto subscribed and witnesseth that on behalf of ourselves our relations and descendants we have by signing this deed parted with and transferred to Victoria the Queen of England Her Heirs and Successors in consideration of the sum of thirty five pounds (£35) paid to us by I. E. Featherston Esq. Land Purchase Commissioner all our rights title and interest in the eel weirs and Manga Fisheries situated in the streams in the Okui District, *i.e.* in the Matarawa, Kaukatia, Puwharawhara, Matakarohe, Mangamouku, Mangamuutu, Mataongaonga Streams, and their tributaries as set forth and shewn on the map attached to the back of this deed.

A true copy of original deed and translation.

H. HANSON TURTON.

Wellington, February 7th, 1876.

The Crown claim that the Maoris abandoned the bed of the river, if they once had it, is said to be supported by the effect of control and use of the river authorized by legislation. I think it is clear that before the Maori title can be regarded as extinguished by legislative action or control and use under legislative action, it must be apparent that expropriation of the Maori title was intended. It is well, therefore, to bear in mind the quotation and approval by the Privy Council of what is regarded as the classic declaration of the sanctity of Maori title set out by Mr. Justice Chapman in the *Queen* v. *Symonds* :—

Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake

of humanity, the Government is bound to maintain and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled.

The first authoritative statement of Chief Justice Martin and Bishop Selwyn that, apart from such lands as may have been alienated, every foot of land in New Zealand belonged to some Maori tribe or hapu, and the decision of the Privy Council in *Nireaha Tamaki* v. *Baker*, approving the above statement of Mr. Justice Chapman shows that the fact that land is held by the Natives under their customs and usages, carries with it, as Judge Harvey puts it, grave implications for the reason that, unless it can be shown that such customary title has been lawfully extinguished a body of Natives later to be ascertained may be entitled to a freehold order which will give them rights against the Crown and a title against the world.

Under the Wanganui Trust Act of 1891 the Upper Wanganui River district was constituted a River Board, the district comprising all the area within one mile of the bank of the river for the whole of its length from the southern boundary of the Raorikia Native Reserve to a point four miles from the source of the river and the trust was given power to do all things necessary for opening up or improving any navigation of that part of the river within its jurisdiction and for the removal of all obstructions impeding or preventing such navigation; power also was given with the sanction of the Governor in Council for the erection of jetties and landing-places in the banks and maintaining ferries and to impose fees or tariffs in the use of shipping or landing either passengers or goods. Nothing, however, was to interfere with the full and free navigation of the river in canoes or boats. It has never been suggested that the area within a mile of each bank of the river if held by the Natives was expropriated, and I think if the bed of the river was in the Natives no such expropriation was intended.

By an Amendment Act in 1893 the Trust received power to remove earth, stone, boulders, or sand from the river notwithstanding that the removal was from or used upon land owned by Natives under their customs and usages. The Natives were given the right to compensation in respect of material taken from or deposited on their lands. By an Amendment Act of 1920 the Trust was declared to be entitled to all gravel and shingle in that portion of the river under its control, and by an Amendment Act of 1922 the Trust was reconstituted with enlarged powers, but the actions subsequent to the Coal-mines Act of 1903 are of no importance since by that Act the Supreme Court has determined that the title to the bed was vested in the Crown. But section 11 of the River Trust Act of 1891 provided that nothing in the Act was to affect any rights conferred upon the Natives by the Treaty of Waitangi or to confer upon the Trust any jurisdiction over private lands. While this statute may be suggestive of an assumption that the ownership of the river was in the Crown, yet it is not expropriation in itself.

The Crown has not, I think, paid sufficient regard to the principles of tribal administration and organization which are matters of history and can be gleaned from the Native Land Court judgments already quoted. Having adverted to the contentions raised on behalf of the Crown and taking into consideration the fact that the question has been simmering for a great number of years without a clear rejection of the Maori claims, I have come to the conclusion that it was not until the Coal-mines Act of 1903—a matter which was not raised in the Maori Land and Appellate Courts—that legislation vested the title of the bed of the river in the Crown. That being so, I answer the first question by saying, but for the Coal-mines Act, the bed of the river would be owned by the Wanganui Maoris, as it was at the time of the signing of the Treaty of Waitangi. In my opinion, there are no circumstances sufficient to justify a finding that the Maoris abandoned their rights and no argument was advanced that compensation should not follow (as it almost invariably does on compulsory taking of European land) the taking

of this particular land if it was expropriated. Section 11 of the 1891 Act exempting Native land from its provisions and section 3 of the 1893 Amendment Act providing for compensation for boulders taken from Native land, indicate a general intent to grant compensation in the event of any expropriation.

I answer the second question by saying that in my opinion a Court endowed with power to determine questions according to equity and good conscience would find the claimants entitled to compensation for loss of their right to the bed of the river, there being no set-off shown in the way of increased value to other property of the claimants by reason of the expropriation.

My answers to the prior two questions being that the Maoris have suffered loss or deprivation of their title to the bed of the river and in equity and good conscience are entitled to compensation, the next question is, what compensation in money or money's worth should now be granted to the Maori claimants? The burden of showing the amount to be paid rests upon the claimants, and their counsel, Mr. Spratt, has said that he finds great difficulty owing to the lapse of time in bringing evidence of loss which he anticipated may have been caused to the generation using the river in the early years of authorized control and use of the river. He puts forward two grounds only upon which a loss in money can, he submits, be estimated. First, the loss of the source or supply of an essential food and the incidental eel-weirs; second, royalties for gravel taken from the bed of the river. In respect of loss on the first head, one of the Native witnesses gave evidence of the number of Maori families on the Wanganui River and also of the value of the fish diet to them. Mr. Spratt supplied the figures thus appearing to Mr. Frederick Harris, a member of a firm of public accountants in Wellington, and asked him to make certain calculations. Mr. Harris, who was called before the Commission, admitted, in effect, the difficulties inherent in such calculations which were summarized in this way:—

Maori population stated to be equivalent to 1,500 families of four people.
Estimate of value of fish consumed per family per week in 1905: 10s.
Labour necessary to obtain fish estimated to be 75 per cent. of value of fish consumed.
Therefore, on this basis value of patrimony in this regard amounted in 1905 to 2s. 6d. per family per week.
By 1950, it is submitted that the value of this patrimony may have fallen to as low as 1s. per family per week.
Therefore the mean of these two figures, 2s. 6d. and 1s.—viz., 1s. 9d.—has been taken for the whole period 1905 to 1950.
Estimate of value of patrimony for period of 45 years, 1905–1950:—
1,500 families at 1s. 9d. per week = £6,825 per annum.
For forty-five years = £307,125.
Estimate of future value of patrimony:—
1,500 families at 1s. per week = £3,900 per annum.

The evidence does not show exactly when the Maoris ceased to depend upon the river for its supply of food, but it can be safely assumed that it was many years prior to 1903, the date of the Coal-mines Act. Nor beyond some evidence of interference with eel-weirs by work in the river to improve the passage of steamboats is there any evidence that the Maoris could not, in substance, have continued obtaining their supply of eels from the river if the use of eel-weirs had continued as formerly. The inevitable result of the passage of time and impact of European standards was the diversion of Maori energy and labour into channels from which they could obtain a currency enabling them to exchange the results of their labour for the goods and products common to European life. The Maoris soon recognized their needs of food and clothing could not be secured by labour devoted to a non-marketable product. Money or money's worth could not be obtained from the labour involved in eeling. Economically the wage-costs must have far exceeded any possible profit.

A suggestion that the Maoris did not, from very early times, realize that in order to obtain the benefits and advantages that were open to them and under their observation they must of necessity divert their energies to remunerative work, is, I think, insupportable. The fact is they did devote themselves to pursuits which would enable them to

offer something in return for their new needs. I see no more reason to assume the Maoris were blind to the prospect of economic and social betterment and the need of remunerative work to achieve it than to assume that during these years they did not require flour, tobacco, or clothing.

Mr. Rufus Oxley, a member of the Ngatipoumoana tribe, who was called by Mr. Spratt deposed that he remembered that a lot of younger men did not want to leave the area and that they were more or less compelled to go out by the older people. They made them go out. They wanted them to go and work because there was no living on the river for them. He also said that as time went on the Maori was gradually dropping his fern-root food and getting used to European foods—flour, sugar, tea, and so forth—and they found out that unless they had the money to buy these things they simply went without. This made the younger people go out to work.

Mr. T. W. Downes in his paper (*sup. cit.*) of the 17th December, 1919, said:

> To-day on several of the upper Wanganui rapids there are the remains of old patuna though the huts of the adjoining villages have long since been obliterated by time.

The abandonment of the villages, the consequential excursus of the Maoris, are, I think, only consistent with the breaking in and progress of the district. Non-remunerative pursuits were inevitably and naturally abandoned for those sufficiently remunerative to support changing habits, deeds, and requirements. The Maori change to economic labour in place of uneconomic labour was to the benefit and advantage of the race, and the economic advantage, in my opinion, far outweighed any loss. I see no cause for compensation for a change over from an uneconomic way of life to an economic one or for a change of diet to a great extent voluntary. Nor can I attribute to their fishing any assessible potential value in 1903. Actual damages caused to their eel-weirs might, if claimed at the time the steam service was inaugurated, have been recoverable, but it is now too late for such claims and in any event, on the representations of Mr. Ballance, then Prime Minister, the Maoris agreed to this service as being of advantage to them and some disturbance of eel-weirs may well have been contemplated as necessary for a clear passage.

The loss of gravel is quite a different question and for this loss I think compensation is due to the Maori owners.

This second ground for compensation, does not, according to Mr. Spratt, present the difficulty he experienced in finding a money value for alleged loss on the first ground. He asks for compensation under two headings: first, for gravel taken over past years; second, for future royalties. If, however, this claim has been brought immediately after the passing of the Coal-mines Act, the claim would have been for the potential value of the gravel in the bed of the river as a marketable asset. Compensation must be assessed as at the time of taking—that is, the date of the passing of the Coal-mines Act, 1903—and if at that time no gravel had been taken from the river and marketed or sold on a royalty basis, it would have been difficult to assess the value of the asset save on a very speculative basis.

A statement extracted from the books of the Wanganui River Trust shows that the amount received by the Trust from royalties for gravel taken from 1918 to November, 1940, came to £1,383 14s. The actual royalty per yard is given only in three or four cases and varies from 3d. to 6d. and 1s. The minute-books of the Trust between 1924 to 1940 refer to rates of royalty in 1924 as 1s. per cubic yard, in 1925 and 1926 as 6d. per cubic yard to local bodies and at 1s. per cubic yard to others.

From the minute-book it appears that the Taumarunui Borough Council were allowed to take road metal free up to a royalty of £250 and in 1927 took 2,000 yards free for use on the Te Maire Road. In 1930, 4d. per cubic yard was charged to local bodies, 6d. per cubic yard to others, and no charge was made for metal supplied to the

Taumarunui Borough Council during the currency of a loan of £6,000 for river-protection works. In 1931 the charge was 3d. per cubic yard and the Taumarunui County Council was allowed to take 10,000 yards for a royalty of £5. In 1934, 3d. per cubic yard was charged excluding that supplied to the Public Works Department and the Taumarunui County Council. Since 1940 the following compilation from records in the Lands and Survey District Office, Wellington, shows payments received :—

(1) Payments received in respect of rights in existence in 1940 and extended thereafter. These were collected by the Taumarunui Borough Council and half the proceeds paid to Lands and Survey Department in accordance with an agreement between the Wanganui River Trust and the Taumarunui Borough Council, dated 27th July, 1939. Amount of royalty in these cases was :—

3d. per cubic yard for gravel supplied to local bodies.

6d. per cubic yard for gravel supplied to others.

Name.	Amount Received by Lands and Survey Department. (Half Share). £ s. d.
Spencer and Smith, Taumarunui	92 19 7
R. F. Beautrais, Taumarunui	59 8 0
Laykold Ltd.	22 17 6
K. Kallil, Taumarunui	30 10 0
	£205 15 1

No figures as to the quantities held by Lands and Survey Department.

(2) Payments received under rights granted by Wellington Land Board since 1940 on terms similar to (1).

Name.	Amount Received by Lands and Survey Department (Half Share). £ s. d.
J. W. Rudzits, Taumarunui	31 16 6

No figures as to quantities held by Lands and Survey Department.

(3) Payments received in respect of rights granted by Wellington Land Board since 1940 other than (2). Royalty in these cases was 6d. per cubic yard and whole payment was made to Lands and Survey Department.

Name.	Amount Received. £ s. d.	Quantity. Cubic Yards.
Metal Supplies, Taumarunui, Ltd.	85 19 9	3,443
L. G. Spencer, Taumarunui	171 0 9	6,841½
Rudzits Bros., Taumarunui	189 19 5	7,600
	£447 0 0	

Summary of amounts received :—

	£ s. d.
1	205 15 1
2	36 16 6
3	447 0 0
	£689 11 7

In addition to these statements, evidence was also given to the effect that the District Engineer for Wanganui (Railway Department) on being asked for information concerning gravel obtained from the Wanganui River, had stated that there was at present a contract which had been let to a private firm, Rudzits and Co., for 25,000 yards of gravel for each of the next three years, and that at the expiration of that period further tenders would be called for for a similar contract and so on from period to period. That information was given on the 1st May of this year.

Mr. Oxley, who is employed by the Ministry of Works as a highways overseer for the Wanganui River road, deposed that he has been engaged as an overseer of that road since 1935. The river road was started about 1931. It is a clay road and has to be metalled. The bulk of the metal—about 95 per cent.—came from the Wanganui River. There are two crushing-plants in his area under the control of the Ministry of Works.

There is another crushing-plant at Jerusalem, which is operated by Bullock and Co., private contractors, who supply most of the metal to the Ministry of Works, the Wanganui County Council, and the Department of Maori Affairs for roading and for concreting various houses that have been built in that area recently. The crusher at the Pitangi Plant has been operating since about 1931. The Jerusalem crusher has been used for three years, the coming season will make its fourth year. Asked whether the demand for metal was petering out he said the demand was much greater, but it was a matter of finance. The metal is definitely wanted. There are other spots where metal is being obtained from the river. He says that on occasions the royalties have varied from 6d. to 2s. 6d. per yard dependent on the locality and the scarcity of the commodity but he did not want to create a false impression. The royalty would be nothing like 2s. 6d. per yard, possibly they might get 3d. per yard—that might be the value. Metal will always be required on these roads. The river metal is first class both for roading and sealing.

From certain of the figures which came out in the evidence, Mr. Spratt asked Mr. Frederick Harris, who made the calculations in relation to the loss of the fish-supply, to make an estimate of the value of gravel taken over past years and of the probable future value of the gravel to be taken. Mr. Harris put in the following statement :—

	£
Wanganui–Jerusalem section—25,000 cubic yards per annum at 6d. per cubic yard : 16 years at £625 per annum	10,000
Taumarunui – Railways Department—25,000 cubic yards per annum at 6d. per cubic yard : 17 years at £625 per annum	10,625
Public Works—5,000 cubic yards per annum at 6d. per cubic yard : 16 years at £125 per annum	2,000
Local bodies, Taumarunui Borough, Kaitieke County, Taumarunui County, and Ohura County—3,000 cubic yards per annum at 6d. per cubic yard : 25 years at £75 per annum	1,875
	£24,500

Estimate for Future Quantities

Based on the estimates given it would appear that the minimum yearly requirements are—

	Cubic Yards.
Wanganui–Jerusalem section	25,000
Taumarunui–Railways	25,000
Public Works	5,000
Local bodies	3,000
Private users	2,000
	60,000

Royalty at 6d. per cubic yard on this estimated quantity amounts to £1,500 per annum.

However, as indications point to the probable increased use of this metal for concrete work—buildings, bridges, piles, fence-posts, &c., and other uses—it is conceivable that this estimate may fall very short of the quantities actually used and therefore the following figures are supplied merely as a memorandum of royalties computed on larger quantities :—

Royalty at 6d. per cubic yard = £250 per 10,000 cubic yards.

Cubic Yards.	Royalty Per Cubic Yard. d.	£
70,000	.. 6	1,750
80,000	.. 6	2,000
90,000	.. 6	2,250
100,000	.. 6	2,500
120,000	.. 6	3,000
150,000	.. 6	3,750
200,000	.. 6	5,000

I have set out the evidence and computations in detail as a matter of record for a reason which will hereafter appear. It is always difficult to estimate the potential value of property, and especially is that so in this case where the potential value has to be

ascertained at so great a distance in point of time from the happening which gave rise to the right to compensation. To attempt to assess such valuation on the material placed before me and which I have set out would be, I think, to enter the realm of almost pure speculation. It is of the essence that there should be evidence of quantity, locality, accessibility, and cost, as well as market price. There appeared to me to be such an absence of evidence on these factors, and may be on other factors, such as the cost of providing access by road to localities from which gravel could not otherwise be economically obtained. Accordingly, in an endeavour to get something more satisfactory, I asked counsel what further evidence could be obtained, and as a consequence the Valuation Department, after some weeks of investigation, have sent forward the following report :—

Valuation Department,
P.O. Box 3016, Wellington,
30th June, 1950.

Memorandum for :
The Valuer-General,
Valuation Department,
Wellington.

WANGANUI RIVER COMMISSION

1. I refer to your memo. of the 29th May enclosing copies of memoranda from the Director-General of Lands dated the 23rd May and from the Crown Solicitor dated the 19th May.

2. The Crown Solicitor's memo. requests : "Assuming the bed of the Wanganui River between Raorikia and its junction with the Wakapapa Stream to be capable of furnishing a supply of shingle sufficient for all probable demands, what would, on the 23rd November, 1903 (the date of the passing of the Coal-mines Amendment Act, 1903), be the value of the bed of the river regarded as a fee-simple, such value being supposed to consist in its availability as a source of shingle ? (By 'shingle' is intended material for metalling roads, for other road construction and road maintenance, for concrete structures, for railway-track ballast, and for any other purpose for which a demand might at that time be presumed to exist.) The valuer would be expected to take into account any potential value that should fairly be assumed, at that date, to exist, by reason of apprehended future demand, in accordance with the usual principles of valuation applicable to such a case."

3. Exhaustive inquiries were made by Messrs. Moore and Fletcher, district valuers, in control of Taumarunui and Wanganui districts respectively. I personally interviewed Mr. Henry Rothery, of Otorohanga, who was the first road contractor to operate in and around Taumarunui. Also I sought information from Mr. Spencer, a contractor of Taumarunui, Mr. John Wood, late Engineer-in-Chief P.W.D., Mr. Turnbull, at one time on the engineering staff of the P.W.D., and Mr. P. Keller, New Plymouth, retired District Engineer, P.W.D. These last three mentioned persons were employed in and around Taumarunui for some years immediately subsequent to 1903. It was thought that they might have been in a position to advise whether any Wanganui River shingle was used for ballasting the Main Trunk Railway. No information of value was gleaned from these sources. I might mention that Mr. Keller was a cadet in the P.W.D. in that district from 1903 to 1908, and although his recollection was not too clear he thought that the material used for ballast was too soft to have come from the Wanganui River.

4. The General Manager of Railways, in a memo. dated the 2nd June, 1950, 16/4753/6, when asked if he could give any information on the subject, replied that :—

(1) "The Main Trunk Railway between Poro-o-tarao and Taumarunui was taken over by this Department from the Public Works on the 1st December, 1903."

(2) "Any shingle used for railway purposes up to the 23rd November, 1903, would be taken by Public Works Department."

The latter Department which had also been communicated with replied, under date of the 16th June, 36/3, that Mr. Fletcher of the Valuation Department had been searching the Department's records of this area which are filed at Wanganui.

The engineer went on to say that the records gave no information regarding the taking of any metal from the river during the period in question.

5. At this stage it may be fitting to mention that Mr. Fletcher reported that from his inquiries he learned that the first use of metal from the area of the river in question in his district appears to have begun in 1931 when the metal was used solely for metalling the new road to Pipiriki which was finally completed in 1936.

6. Mr. District Valuer Moore's investigations of the northern reaches are shown by the following extracts from his report :—

"That portion of the Wanganui River which lies in my district runs from its junction with the Wakapapa Stream, near Kakahi Township for some seventy miles to the south-western corner of Kaitieke County. This latter point lying between Retaruke and Pipiriki.

"It has proved practically impossible to obtain any accurate figures for the period in question but a certain amount of information has been received from early settlers, the *Taumarunui Press*, and N. A. Winter's 'Taumarunui—old and new' (Taumarunui Press, Ltd., 1913). Unfortunately, all these publications giving the early history of the district are out of print and I was unable to secure a copy.

"The local bodies bordering on this area which are in existence to-day comprise Taumarunui Borough, Taumarunui County, Kaitieke County, Mananui Town Board, and Ohura County. The following extracts from local history present a fair picture of this locality from 1900 onwards:—

"1900. Main Trunk reached Ongarue and formation work had advanced as far as Taumarunui.

"1901. Early photographs show about a dozen buildings in what is now Taumarunui.

"1902. A small accommodation house set up in Taumarunui.

"1904. Extract from 'River History' by A. Hatrick. *Taumarunui Press* Supplement, 21/12/1916.)

"Twelve years ago (1904) it was decided to extend the (river) service right up to Taumarunui (from Pipiriki) and this was done. *At that time there was not one single white person living on all that long stretch of ninety miles.*"

"In this year the first sections were offered by the M.L.B. in Taumarunui.

"1906. First Town Council formed. Town still very small.

"1907. Railway there but still very few buildings according to photographs.

"1911. Taumarunui Borough came into being.

"1912. Kaitieke County formed.

"1921. Taumarunui County formed. It was not till after this that the present 'river roads' were constructed, apart from a short portion which had been roughly formed as, a fine-weather road some years previously.

"From this it is fairly obvious that the district was very much in its infancy in 1903 apart from work being carried out by the P.W.D. and N.Z.R. The only areas where any development had been carried out, or even contemplated, seems to have been in the immediate vicinity of Taumarunui itself. The river below here was merely a scenic attraction and means of transport (from 1904). Apart from the main highway few or no roads were formed and any that did come into existence were mere tracks, unmetalled.

"It is most unlikely that any shingle was taken out of the Wanganui River by local bodies in this district prior to 1910. The majority of these local bodies were not even in existence at that date. Even as recently as 1919 the main street of Taumarunui seems to have been the only metal road in the town, and that very rough. Even in comparatively recent years most road metal came from the Taringamotu and Pungapunga streams—Wanganui River shingle only being used to any extent after the introduction of tar-sealing. No royalties were paid as far as can be ascertained.

"There were apparently no private contractors operating at that time. Certainly no evidence of such was found.

"There were no local authorities in 1903. It can be considered doubtful if road developments involving much use of shingle were contemplated.

"There were no lorries. Cartage was confined to horse and dray.

"Finally, to summarize, it is my opinion that there was no demand for shingle for local bodies or private purposes from the Wanganui River for a distance of seventy miles from the junction of the Wakapapa Stream as at 23rd November, 1903, and in view of the transport and local development position at that date any anticipated demand must have been negligible."

7. The person found most able to supply worth-while information was Mr. Henry Rothery. He went to Te Kuiti in 1908 as foreman for the Roads Dept. (now P.W.D.) until 1911, when he started contracting on his own account.

His knowledge of Taumarunui dates back to 1911 when the town was very small with no properly formed or metalled roads.

He first took out metal in the Taumarunui district from the Taringamutu Stream in 1918 and later when he metalled the main road from Taumarunui to Raurimu, he took metal from the Pungapunga Stream. All cartage was done by horses and drays.

Metal from the Wanganui River was not used at that time as it was too round and coarse and no crushers were in operation in the district until he set one up about 1920.

Metal from nearby streams was preferred to the river metal as the latter was considered too "lively" and unsuitable for road construction unless crushed.

He states, "Metal in those days had no sale value—it was a case of help yourself and take as much as you liked. Never at any time did I pay any sum for royalty."

Mr. Rothery's statement that no metal was taken out until about 1920 is supported by the schedule submitted by the Lands and Survey Department, Wellington, which shows the small amount of £9 2s. 9d. paid in royalties up to that year.

8. Mr. Spencer who is a more recently established contractor and operating in the Taumarunui district at present told me when interviewed that he preferred the metal from the local streams but had been forced by the P.W.D. to use the river metal as its hardness was more suitable for crushing into chips for tar-sealing roads.

It is evident from the information set out above that there was no commercial demand for metal in the Wanganui River on the 23rd November, 1903.

With the whole of the Taumarunui district more or less in a virgin state no one could envisage any demand for shingle within a reasonable period of time and this has certainly been borne out by the fact that it was not until some seventeen years later that any demand at all was established.

Summary

Specifically answering the request of the Crown Solicitor as set out in paragraph 2 above, I therefore am of opinion that as at the 23rd November, 1903, the bed of the Wanganui River between Raorikia and its junction of the Wakapapa Stream was, on the basis of the return to be derived from supplies of shingle as stipulated in paragraph 2 above, of nominal value only and any value attaching to it was, in my opinion, incapable of being assessed.

(Sgd.) W. A. GORDON,
Inspecting District Valuer.

Many of the statements in the report which are more or less matters of opinion need examination, and, as a whole, even when combined with the previous information laid before me, do not provide a sufficiently secure foundation for any valuation or provide a satisfactory substitute for evidence that should be forthcoming from surveyors, contractors, and valuers who can speak with some authority as to the accessibility of certain parts of the river for the purpose of taking gravel, the quantity available, and the cost of obtaining it. The area that could be economically served with gravel from this river and the needs of the area for gravel could perhaps be supplied by Public Works and local-body officials who could also advise of the possibilities of competition from gravel in minor streams and tributaries of the Wanganui River. Without evidence from those really qualified to speak on all these points, I think no valuation can be made of the potential value of the gravel in 1903 which would be satisfactory if any large sum is involved. I have, therefore, to advise that compensation under this heading should be ascertained by a body of three—*i.e.*, a chairman and two assessors, one to be appointed by the Crown and one by the claimants, who should sit and determine the compensation payable in the manner adopted by an ordinary Compensation Court. As it is probable that the claimants have not funds to meet the proper costs necessarily incurred if their case is to be adequately represented, I think that funds should be provided to them to meet the solicitor and client costs incurred for such purpose.

Finally, before any such proceedings are started, I think it essential, if the whole matter is to be disposed of once and for all, that the Maori owners of the bed of the river at the time of the passing of the Coal-mines Act of 1903, or their successors, should be ascertained by the Maori Land Court. Without such a determination of ownership, I think in the future further questions may arise. At the present moment the Maori Land Court is prohibited by an order of the Supreme Court from entering upon an investigation of that sort. It may possibly be that the order for prohibition could be withdrawn by the Crown so as to permit the investigation to be undertaken for the purpose I have mentioned. If that cannot be done or if the Maori Land Court itself raised an objection on the ground that as the bed of the river is vested in the Crown and there is, therefore, nothing for it to investigate, Parliament would need to consider the enactment of legislation permitting to be done whatever is required.

In the light of these suggestions, I think it unnecessary to make any further answer to questions (*c*) and (*d*) of the order of reference. Till the owners entitled to compensation are determined and the amount payable ascertained, it is premature, I think, to lay down conditions as to the method of payment. Counsel for claimants suggests the amount should be paid to a Trust Board set up to administer the fund for the welfare of the Maoris. That may be considered later.

I am told by counsel that there is no need for me to make any order as to the costs of this inquiry.

Approximate Cost of Paper.—Preparation, not given; printing (928 copies), £46

By Authority: R. E. OWEN, Government Printer, Wellington.—1950.
Price 9d.]