

Was it intended by the Imperial Legislature that lands to which land orders related should be subject to equitable estates charges or liens, notwithstanding the provisions of the Conveyancing Ordinance to the contrary?

It might be contended that the object and intention of the Legislature in using the words in the said fifty-first section here referred to, and above set out in full between inverted commas, was only to keep alive equitable estates charges and liens, although a deed of conveyance from the Company had been executed, and notwithstanding any rule of law or equity giving to such a conveyance a conclusive or barring operation.

Such may be and perhaps is the true construction; and it is borne out by the concluding paragraph of that part of the fifty-first section. "And the rights and interests of the parties interested shall remain unaffected thereby," that is, "that notwithstanding any rule of law or equity to the contrary, such interests shall remain unaffected by the Company's deed, leaving such interests to be affected by the ordinary law of the Colony, but unaffected by the Company's deeds, whatever peculiar effect they might by law have." So construed, the Land Registry Act would not be repugnant to the Imperial Acts, and if this construction were undoubted, no Imperial legislation would now be required. As, however, much doubt is entertained in New Zealand as to the meaning of the words in question, it appears necessary that the Imperial Legislature should be asked—either to remove the doubt by declaring that the meaning above suggested is the true one, or to make such provision as will enable Crown Grants of such lands to be accepted as conclusive evidence of title either at once or after some period, or after notice given—or to provide that the equitable estates, charges, and liens kept alive by the fifty-first section should for the purpose of the Land Registry Act be barred either immediately on issue of grant, or after a lapse of some fixed period of time from issue of grant, or after a lapse of some fixed period from registration under the Registry Act. For instance, two years, as is provided in the Registry Act generally, as to interests of persons non-resident in New Zealand at the time of registration.

It still remains to refer to an Ordinance passed by the New Zealand Legislature for the purpose of removing the difficulties which the transfers of and dealings with the Company's land orders gave rise to.

August 2, 1851.

The 15 Vict. Session XI., No. 15, an Ordinance of the Governor and Legislative Council (The New Zealand Company's Land Claimants Ordinance) makes provision for investigation being made by Commissioners into such dealings, and for issue of Crown Grants to the persons appearing to such Commissioners to be the persons entitled, and provides that such grant shall give a valid title against all persons whatever.

In cases of land orders, investigations by Commissioners have always been made, and if the provisions of the Ordinance making the title created by the grant good against all the world were valid, there would be now no difficulty, because other equitable estates, liens, or charges (if any) would be defeated by such a grant. But if the Imperial Act (9th and 10th Vict., c. 382) enacts that the equitable estate, charges, and interests shall (irrespective of any peculiar effect which a Company's conveyance might by law have) continue notwithstanding any rule of law or equity to the contrary, is not the provision in the Colonial Ordinance giving to a Crown Grant made under it a conclusive operation repugnant to the fifty-first section of the Imperial Act, (9th and 10th Vict., c. 382), and so far as it is repugnant, void? It cannot be doubted that it is so. However, this Ordinance has been deemed invalid on another ground. On the 21st July, 1852, Sir John Pakenham, in a Despatch to Governor Grey, points out to him the invalidity of this Ordinance, in so far as it is repugnant to the provisions of the 10th and 11th Vict., c. 112, section 19, above referred to. The Ordinance provides that proceedings under it and grants made thereunder shall be deemed, both at law and equity, a full and complete performance by the Crown, on behalf of the Company, of the contract or obligation contained in or resulting from any land order, contract, or scrip, and shall be deemed a good, valid, and effectual conveyance of the land purported to be conveyed by such grant as against Her Majesty, her heirs and successors, and against all other persons whatsoever. The Ordinance was deemed invalid as conflicting with the 10th and 11th Vict., c. 112, which imposed on the Crown the fulfilment of the Company's contracts. It is not suggested, in the Despatch above referred to, that the Ordinance, where it enacts that the Crown Grant made under it shall be a good conveyance against not only the Crown, but also "against all other persons whatsoever," was invalid as conflicting with the fifty-first section of the 9th and 10th Vict., c. 382, in connection with the tenth section of the 14th and 15th Vict., c. 85. It is true that the only question necessarily under consideration was the Crown's liability and its exoneration therefrom, and that it was not necessary to consider the effect of the Crown Grant under the Ordinance. But, as it appears from the ninth paragraph of the Despatch, that the tenth section of the 14th and 15th Vict., c. 86, taken in connection with the fifty-first section of the 9th and 10th Vict., c. 382, was under consideration, and as it appears from other parts of the Despatch that the Ordinance had been submitted to the Law Advisers of the Crown in England for their opinion, and as no objection is made to the Ordinances as being in conflict with the fifty-first section of the 9th and 10th Vict., c. 382, it may not improperly be inferred that the Law Advisers of the Crown were of opinion that the Ordinance, in so far as it enacts that the Crown Grant made under it should be a good conveyance against all persons whatsoever, was not invalid or as coupled with the said fifty-first section, where it provides that notwithstanding any rule of law or equity to the contrary prevailing in New Zealand or elsewhere, the lands comprised in the conveyance should continue and be subject to such equitable estates, charges, and liens, if any created, by the purchaser named in the land order, or any person deriving title from, through, or under such purchase. If this inference is supported by the fact, if the Law Advisers were of this opinion, it is probable that the construction to be put upon the said fifty-first section, suggested in a former part of this Memorandum, is the one then adopted by the Law Advisers. Even should this be so, as there would still be a doubt, it is submitted that this is clearly a case for a declaratory Act.

(Signed)

JAMES PRENDERGAST.

22nd April, 1867.