

thereof, is authorised to make a Grant from the Crown to the persons mentioned in the certificate of the lands comprised therein; and it is provided in section 48 that such grants shall be as valid to all intents and purposes as "grants made by the Governor of waste or demesne lands of the Crown, and as if the land comprised therein had been ceded by the Native proprietors to Her Majesty, and shall bar all estates, rights, titles and interests of all persons whomsoever therein, except the grantees, their heirs, &c." I here state broadly my opinion that it is on the execution of the Crown grant that the Maori proprietary customs become extinguished. The issue of the certificate to the Governor is an act of no public significance whatever. If any intermediate change in the legal quality of the land were affected by any operations previously to the issue of the Crown grant, the most important and significant operation is surely the enquiry in open Court, and the order then made, by which the owners are ascertained and published to all persons interested, who are there to question and contest any point they think fit. On the other hand, the issue of the certificate to the Governor by the Chief Judge, is a private administrative act, of which the public has no knowledge, and which indeed would be scarcely necessary at all if boundaries could be perfectly set out and plans in all respects completed at the sitting of the Court. But, again, if it is urged that some difference in the character of the land after the issue of the certificate must exist, or section 75 would not have been enacted, I would ask what is the difference? What legal change is effected by the certificate? I can discover no intermediate, or purgatorial state. The Act speaks of two classes of land, viz., Native land or land before grant from the Crown, and hereditaments or land after grant from the Crown. I am quite clear that if this land does not come under one of these two classes, it must come under the other. In my judgment, land passing through the Court possesses all the characteristics and attributes of Native land, until a Crown grant, under clause 48, has extinguished the Native title. The true idea of Parliament in passing clause 75, had no reference to the legal aspect of the question. Parliament was simply influenced by convenience, or rather by the physical impossibility of making a conveyance or lease, or any other final instrument, until a plan of the land, accurately showing its metes and bounds had been completed; and that is the period when a certificate is made and issued. I would here notice that the "Native Land Act, 1866," contained a provision to the effect that section 75 of the "Native Land Act, 1865," shall not apply in the cases of conveyances or transfers made to, or contracts made with, the Superintendent of any Province. But objection being made that clause 73 of the "Constitution Act" would still prevent such transactions, the objections were admitted, and the clause has never had any operation.

There is no doubt that section 75 of the Act of 1865 cannot be held inferentially to repeal the 73rd clause of the Constitution Act, so as to destroy its operation on transactions after the issue of the certificate. Indeed, Mr. Rees very properly admitted that he could not contend that such repeal was effected. He doubtless remembered what Lord Denman said in *Haworth v. Ormerod*;—"If the Legislature intended more, we can only say that according to our opinion they have not expressed it."

Another rule of law should here shortly be noticed. The sole right of Her Majesty to acquire lands from the aboriginal inhabitants of the Colony, or, as it is phrased, to extinguish the Native title, has already been shown to be an ancient prerogative right of the Crown, part of the common law of England. We have also seen that this right was judicially maintained by the Supreme Court in *Regina v. Symonds*; it has been upheld by this Court in *Heremia Mautai v. Regina*, and the Colonial and Imperial statutes, with one exception, which was repealed by the Constitution Act, have been strict and constant in affirmance of it.

If any doubt remains upon the mind of any person who has followed the reasoning I have endeavored to state, it must be removed by the recollection of the rule that the Crown is bound by no statute unless expressly named.

Plowden lays it down, p. 109 Rep.:—"It is most convenient that things appropriated to the Crown and to the Royal prerogative should tarry with the Crown, and not be severed from it without special word." (See Brown's Leg. Max. Tit.; "*Roy n'est lie per aucun statute siil ne soite expressement nosme*, p. 60, Com: Dig. R. 21, tit, Parliament, Pl.: Com: 11 A., 3 co. Rep 327, Chitty Prerog., cr. 381).

"But as to the King, nothing shall ever be taken by equity against him in the construction of a statute," Pl: Com: 11 A. On this ground also the rights of Her Majesty, not only under section 73 of the Constitution Act, but at common law, remain as they were before the passing of the Act of 1865, except when affected by section 48, authorising the issue of Native grants. I am, therefore, of opinion that the leases to Messrs. Whitaker and Landon, having been made before the extinction of the Native title, are contrary to the common law, and in disobedience of the Constitution Act, and therefore void; and as the claim of these gentlemen for consideration rests entirely on the assumed legality of their position, their right to interfere with the consideration of the application now before the Court cannot be allowed. But that application must rest simply on its own merits, and must be determined according to "justice and the circumstances of the case." What now remains for consideration, therefore, is very simple. The lease made by Mr. De Hirsch was a fair and complete transaction, but was invalid from misapprehension or ignorance of the law, though I believe that at the time the transaction was entered into, none of the parties to it were aware of its invalidity. And in construing the 8th clause of the Act of 1869, I think it is the intention of the Legislature that, in the absence of cogent objections, this Court shall validate all such transactions made in good faith and according to justice. And indeed much that has been urged as a reason for upsetting Mr. De Hirsch's lease would, if I could have considered the question as between Mr. De Hirsch and Messrs. Whitaker and Landon, have operated in my mind in a contrary direction to what was intended. For instance, when the Natives came to Mr. Landon and complained of an alleged non-payment of rent by Mr. De Hirsch, I cannot avoid thinking that it would have been more just and proper, not only on private but public grounds, for Mr. Landon to have advised them that the true course to be taken was to sue Mr. De Hirsch, when the question of validity of the lease and covenant to pay could have been properly determined, rather than for him to propose that a new lease should be made to himself. The Maoris are a people who, as to their territorial rights, are