

It appears very doubtful whether the prohibition contained in section 73 of the Constitution Act could apply to alienation by individual Natives whose title has been affirmed by order under section 23. Supposing the prohibition to apply, it seems clear that section 73 must be considered as partially repealed by the provisions we have just referred to. It is necessary to find some operation for them, and the narrowest effect which it is possible to attribute to them is to suppose them applicable to that class of Native lands which we have just indicated.

7. It follows that the leases held by the claimants, having been made after certificate issued, and so not coming within the restriction imposed or continued by section 75, were valid transactions, subject, however, to the objection arising out of the prior leases to De Hirsch and Graham.

8. This brings us to consider the validity of the last-mentioned leases, which is contested by the claimants on the ground that they were made prior to the issue of the certificates, and are therefore void, under section 75 of "The Native Lands Act, 1865."

9. It will be convenient, in the first place, to consider how this question would have stood under "The Native Lands Act, 1865," without reference to subsequent legislation.

10. It was contended before us by Mr. Brandon, that, under the Act of 1865, the tenure was commuted as from the date of the order for a certificate under section 23; so that from the date of the order the lands ceased to be "Native lands," within the meaning of section 75. This in itself would be a highly reasonable view of the matter. The order is indubitably the true basis and commencement of the right of the Natives to the fee-simple.

It may well be contended, also, that the order creates a vested right to a Crown grant, notwithstanding that section 46 is in terms permissive. If the Native owners alienate, under section 47, to a European purchaser, it would seem impossible that a grant should be withheld, and it would be anomalous that the Native owners should be able to confer on a stranger a larger right than they themselves possessed.

The language of the Act is, however, at variance with this view. The terms of the certificate do not consist with the notion that the tenure has been converted by the order under which the certificate issues.

Then again the various provisions relative to alienation by Natives before grant issued, which we have above cited, all purport to relate to "Native lands." (See sections 47-55-58-59-63 and 74.)

These provisions can only refer to lands comprised in orders under section 23, for tribal lands and lands comprised in certificates under section 43 are unalienable. Similarly, by the term "Native lands," in section 75, nothing else can be meant than lands comprised in orders under section 23; the lands to which the provision relates being lands alienable after certificate issued.

We are therefore of opinion that, under the 75th section of "The Native Lands Act, 1865," uncorrected by subsequent legislation, the leases to De Hirsch and Graham would have been void.

11. We now approach the question which, with Mr. Justice Johnston, we hold to be the true turning point of the case, namely, whether the Crown Grants Acts, 1866 and 1867, did so modify the then existing laws restraining alienation of Native land, as to authorize the leases to De Hirsch and Graham.

12. But before we deal with the construction of the provisions on which this question ultimately hinges, we must discuss the preliminary objection, which has been strongly urged, that these Acts are wholly inapplicable to the subject-matter.

13. The leading provision to be considered, namely, the 26th section of "The Crown Grants Act, 1866," applies, it is said, only to "Crown lands;" and "Native lands" are not "Crown lands." No doubt there is a sense in which "Native lands" are not "Crown lands." The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it. But the fullest measure of respect is consistent with the assertion of the technical doctrine, that all title to land by English tenure must be derived from the Crown; this of necessity importing that the fee-simple of the whole territory of New Zealand is vested and resides in the Crown, until it be departed with by grant from the Crown. In this large sense, all lands over which the Native title has not been extinguished are Crown lands. There is a sense in which lands parted with by the Crown to its European subjects, under the land laws of the Colony, cease to be Crown lands from the time of sale. Such lands, supposing the purchase money paid, and the other conditions of purchase duly fulfilled, are no more "Crown lands," within the meaning (for example) of the various Ordinances and Acts to regulate the management of Crown lands, than are Native lands. They are, to all practical intents and purposes, private property. Yet, when it is a question of fulfilling the contract for sale by the issue of a grant, no one hesitates to speak of the lands to be granted as "Crown lands," or of the grantee as a "grantee of Crown lands." Lands which it is proposed to include in a grant from the Crown may, with perfect technical propriety, be spoken of, *quoad hoc*, as Crown lands. Indeed, there is no more correct way of speaking of them. The argument so much insisted upon involves the absurdity of supposing that the Crown is granting what does not belong to the Crown. If nothing passed by grants from the Crown to Natives of lands already owned by themselves under Native custom,