

1873.

NEW ZEALAND.

LETTER FROM HON. W. MANTELL,

FORWARDING COPY OF JUDGMENT OF COURT OF APPEAL IN THE CASE OF
REGINA v. FITZHERBERT.*Presented to both Houses of the General Assembly by command of His Excellency.*

No. 1.

The Hon. W. MANTELL to the Hon. the NATIVE MINISTER.

SIR,—

Wellington, 20th August, 1873.

I have the honor to enclose for the information of the Government a copy of the judgment of the Court of Appeal in the case of Regina v. Fitzherbert, as printed in the *New Zealand Mail*, after correction, as I understand, by order of their Honors the Judges.

I have, &c.,

WALTER MANTELL.

The Hon. D. McLean, C.M.G.,
Minister for Native Affairs.

Enclosure in No. 1.

REGINA V. FITZHERBERT AND OTHERS.

These are cross rules, obtained by the prosecutors and the defendants, claiming respectively to enter judgment upon a *scire facias*, to repeal the Crown Grant of the 6th November, 1851, set forth in the writ and declaration.

The issues of fact having been tried before the learned Judge without a jury, we have to apply the issues as found by him to the pleadings, and make order that judgment be entered for the parties whom we shall declare thereto entitled. The ground upon which the prosecutors ask the Court to repeal this Crown Grant is that the same was made in prejudice of the rights of certain aboriginal Natives, the former owners, and their descendants, of lands in that grant described. The efficacy of the grant cannot be disputed on the ground that the Crown was deceived in its grant; although the declaration, as amended, does seem to suggest also that the Crown granted that which it had not to grant.

The case for the prosecutors, as originally presented by the writ and declaration, was substantially as follows, viz.: That the lands described in the grant of 1851 were, on 27th September, 1839, purchased by the New Zealand Land Company, and were ceded to the Company subject to a covenant that a portion of the land ceded, equal to one-tenth part of the said lands, should be reserved by the Company, and by them held in trust for the future benefit of the chiefs parties to the deed of September, 1839, their families and heirs; that the purchase of that part of the ceded lands comprised in the deed of 1839, which was subsequently comprised in the grant now impeached, was duly allowed by the Queen; that in pursuance of the covenant, certain lands, including the lands in the grant of 1851 mentioned, were in August, 1840, selected and set apart by one W. Mein Smith, an agent of the Company, for the benefit of the said chiefs, their families and heirs, for ever, which lands were, in October, 1841, placed under the management of one Halswell (an agent appointed by the Company for that purpose) as reserves for the benefit of the said chiefs, &c.; that by subsequent arrangements made between the Company and the Crown, and by virtue of the New Zealand Company's Colonisation Act (10 and 11, Vic. c. 112) all the lands acquired from the Natives by the Company, including the lands comprised in the grant now impeached, became vested in the Queen, as part of the demesne lands of the Crown in New Zealand, subject, nevertheless, to any contracts which should then be subsisting in regard to any of the said lands. "By virtue of which premises the lands comprised in the deed of September, 1839, were, prior to and at the date of the issue of such grant, affected with a trust in the hands of the Crown for the benefit of the said chiefs, their families, and heirs."

Two material amendments were afterwards made in the declaration. By the first of these amendments it is alleged that after the setting apart and reserving of the lands (now in dispute) by W. Mein Smith, such reservation and setting apart was approved by the Queen; and that the Queen, up to the time of the issuing the grant of 5th November, 1851, always, by her officers and servants, admitted and declared that the lands were, and ought to be, held as reserves for the said Native chiefs, &c.

By the second amendment it is alleged that the lands themselves never were mediately or immediately ceded to the Queen by the aboriginal Native owners, but still remain lands in respect of which the Native title has never been extinguished. And we understand that one of the questions to be determined by this Court is, whether those amendments, or either of them ought to have been made. We are of opinion that neither of these amendments was admissible. As to the first, it is not indeed inconsistent with the case originally set up by the declaration, that the Crown accepted and held the land as a trustee for the