aboriginal Native owners, and consequently that the grant of 1851 was made in breach of that trust, and in derogation of their beneficial interest in the lands. But an obligation created by the covenant of the New Zealand Company, and devolving upon the Crown, to hold lands for the benefit of the covenantees is one thing; the duty to manage Native Reserves for the benefit of the Natives in whose favor these reserves were created, is another. And if those who seek to repeal the grant of 1851 relied on the fact that the Crown had turned these lands into Native Reserves, they should have alleged that fact as a primary fact, and should have shown in their declaration by what solemn act of the Crown such reserves had been created; in which case any acts by the officers of the Crown, done by authority of the Crown, and which were relied upon as admissions binding the Crown, might have become evidentiary facts to prove such admissions.

In regard to the second amendment, its allegations are inconsistent with, and repugnant to the claim set up by the declaration. For, consistently with those allegations the lands cannot have become, as it is alleged they have become, vested in the Crown, subject to the covenant contained in the deed of 1839, nor can they be now held by the Crown upon any trust whatever.

But as these amendments in favor of the Native claimants have been made, and some of the most important findings are returned upon issues arising out of the amendments, it is desirable to test the rights of the claimants as against the Crown, by applying the findings on the issues, to the record as it now stands.

The right then to this *scire facias* is based on two grounds. It is suggested, first, that the Crown at the date of the grant of 1851 held the lands comprised in that grant subject to a trust for the benefit of the aboriginal Native owners; and

Secondly, that the Crown by that instrument assumed to dispose of land, which had never mediately or immediately been ceeded to the Crown, and over which the Native title has never been extinguished.

(1.) Now, the trust is assumed to have been impressed on the lands by two different means, viz.: by the covenant of the Company, subject to which the lands became vested in the Crown and by the action of the Crown itself, in adopting the acts of the Company's agents, and itself virtually constituting those land reserves for the exclusive benefit of the Native owners. It was indeed urged by the Attorney-General that no precedent could be found for proceeding by *scire facias* to enforce a mere equity, and that the writ was applicable only where the result of a judgment thereon might be to establish in the prosecutor a strictly legal right. However this may be, it is clear, and was admitted upon the argument that, in order to establish a trust in the Crown founded upon the covenant of the Company, it was necessary to prove, as alleged in the declaration, that the purchase of the lands by the Company from the Natives was duly allowed by Her Majesty. But it is expressly found (finding No. 11) that the purchase of these lands was never at any time directly allowed according to the terms of the deed of September, 1839. And, although true it is, that subsequeutly, in the arrangements contemplated between the Crown and the Company, the Crown indicated its intention te give grants to the Company out of the lands fairly purchased by the latter from the Natives, proportionate to the amount of the consideration paid by the Company, it is expressly found that in such Crown Grants no title was to be given by the Crown to the Company in respect of the very lands which were subsequently included in the grant now sought to be repealed. There is nothing, then, in the findings upon the issues, which amounts to a finding that the purchase of these lands by the Company was duly allowed by Her Majesty. Then, is it found, that the lands were ever constituted reserves for the exclusive benefit of the Native owners? It is found (No 23) that Her Majesty never expressly declared any such trust in writing; but reliance was placed by the counsel for these Native claimants on the acts, negotiations, and correspondence by and with the officers of the Crown—those especially disclosed in the findings Nos 11, 12, 13, 21, and 23—as amounting to a virtual reservation of the lands in question for the exclusive benefit of the Natives, parties to the deed of the 27th September, 1839, their tribes and families. The finding most favorable to the present claimants is No 23, wherein it is declared that the officers of the Crown and of the Colonial Government had frequently, before the date of the grant of 1851, in the discharge of their official duties, treated the sections in question as having been, and being, reserved, dedicated or available for the Natives only: and that no claim or action of the Crown, at variance with the right of the Natives to the exclusive benefit of such sections, had been made or done, except the erection in 1847, on a portion of one of the sections, of a hospital for the use of all Her Majesty's subjects. But in estimating the legal import of this finding, and of this action of the officers of the Crown, it is necessary to bear in mind what were the powers of the Crown itself, and especially what powers had been delegated to the officers of the Crown or the Colonial Government gratuitously to reserve and dedicate *ad libitum* portions of the lands of the Crown to the exclusive benefit of particular Native families. During the period to which the finding No 23 relates, the Crown held its waste lands for purposes of its sale; and although by the Royal Charter of 1840, made in pursuance of the Imperial Act of Parliament, 2 and 3 Vict., c. 62, Her Majesty delegated to the Governor of this Colony power to make grants under the public seal of the Colony of waste lands, either to private persons for their own use and benefit. or to any persons, bodies politic or corporate, in trust for the public uses of the subjects resident in New Zealand, or any of them; still this power was subject to Royal Instructions, and by the Instructions of 1840, section 43, the public purposes, to and for which the waste lands might be dedicated and reserved, are enumerated and defined; subject to which, by section 44, all the waste lands within the Colony belonging to the Crown which should remain, after making the reservation before mentioned for the public service, it was provided, should thereafter be sold. The Charter and Instructions of 1840 followed in the like direction, the well-known chapter 13 of those Instructions declaring, by section 12, that the Crown would in future hold its demesne lands in trust especially for the future settlers in New Zealand, prohibiting, by section 14, all alienation of those lands gratuitously, and except under the regulations thereinafter contained, prescribing, by section 17, the public purposes (including "hospitals"), for which, by section 18, lands might be gratuitously conveyed, but enjoining, by section 24, that no part of the demesne lands should be alienated until after they had been put up to auction, upon proclamation made for that purpose, at (by section 25) a minimum upset price.

These Instructions of 1840 were, indeed, in some of these particulars suspended in the Province of