

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

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 ceded 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 subsequently, in the arrangements contemplated between the Crown and the Company, the Crown indicated its intention to 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 thereafter 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

New Munster by the New Zealand Company's Colonization Act (passed in July, 1847), until the 5th of July, 1850, when they again came into operation. But meanwhile the demesne lands in that Province being vested in the Company, the Company itself was, by section 3 of the last-mentioned Act, restrained from disposing of any of those lands except either by sale, at not less than 20s an acre, or by conveyance thereof (section 4) in trust for public purposes, sanctioned by the Governor-in-Chief, or by one of Her Majesty's Principal Secretaries of State. Throughout these legislative provisions, no express mention is made of reserves to be made for the exclusive benefit of Natives. The Australian Land Sales Act (5 and 6 Vict., c. 36) did indeed include a provision for that purpose. After enacting that no waste lands of the Crown should be alienated except by way of sale, the Act provides that nothing therein contained should extend to prevent Her Majesty from excepting from sale and reserving to Her Majesty, or disposing of, in such manner as for the public interest might seem best, such lands as might be required (*inter alia*) for the use or benefit of the aboriginal inhabitants. But that Act was in force only for a short time, viz.: from November, 1842, till 1846; and it is not pretended that any claim to this *scire jacias* arises out of it. This review of the early legislation affecting the demesne lands of the Crown in New Zealand so far as that legislation provides for creating reserves, whether for the general public or for Native purposes, appeared to us desirable, as a means by which to test the degree of significance which the Court ought to attribute to the acts of the officers of the Crown as found upon the issues. It appears therefrom that the creation of Native reserves was not one of the objects especially provided for in the statutes, charters, instructions, and ordinances by or under which the management or disposal of the demesne lands of the Crown was regulated. It seems, indeed, in the subsequent legislation of the Colony, that lands were from time to time appropriated, or reserved, and set apart, for the exclusive benefit of aboriginal natives, including, probably, lands ceded by the native owners to the Crown itself for some especial purpose lands forming part of a tract ceded to the Crown, under a contract, promise, or engagement with the Crown itself, that a certain part, or proportion thereof, should be so reserved and set apart, and even perhaps lands given by European purchasers to the Crown for Native purposes, the management of all such lands remaining with the officers of the Crown, until provided for by special legislation. But the lands comprised in the grant of 1851 belonged to none of these categories. Neither is it found that the Crown has by any solemn act, whether by grant, or even by proclamation, declared the lands themselves to be Native Reserves. The only solemn and valid act in which any officer of the Crown is upon these findings shewn to be dealing with the Native owners themselves in respect of lands described generally as "certain lands situate in a bay in the harbour of Port Nicholson, New Zealand, on which a town has been laid by the New Zealand Company," and being portions only of the lands described in the deed of 1839, is that which formed part of an arrangement with the Pa Taranaki Natives of 29th August, 1840, signed by Willoughby Shortland, Colonial Secretary. The Natives executing that agreement do indeed thereby agree to assign and yield up to Mr. Shortland, on behalf of Her Majesty, all their interest in the lands described as above. And, connected therewith is a receipt or release signed by seven Natives, of whom three only appear to have signed the document of the 29th August, 1840. The release is executed with much solemnity, the signatures of the Natives being witnessed by Mr. Commissioner Spain, George Clarke, jun., Protector of Aborigines; Thos. S. Forsaith, also Protector and Interpreter; Samuel Ironside, Minister of Te Aro Pah; Arthur T. Holroyd, Barrister, Wellington; and Thomas Fitzgerald, Assistant Surveyor, attached to Commissioner.

The receipt thus signed is for £300, in full satisfaction and absolute surrender of all title and claims of the Natives parties thereto, in the lands written in the document affixed to the receipt, viz.:—"All the places at Port Nicholson, and in the neighborhood of Port Nicholson." But, in this receipt or release, the Natives declare that the paha, cultivations, sacred places, and the places reserved, will remain alone to us. Much reliance was placed by the prosecutors on these documents, containing, as they are said to do, an admission by the Crown that lands had been "reserved," including those comprised in the grant now impeached, and an agreement with the Crown by the Natives, parties to the document of 29th August, 1840, to yield up to the Crown all their rights and interests in those lands *except the reserves*.

We do not undervalue the importance of this transaction. Substantially, however, it appears that the officer of the Crown was acting rather as a mediator between the New Zealand Company and the Natives, than as representing the Crown in the transaction with those Natives. The dispute was already between the Natives and the Company; the £300 was paid as an additional compensation by the Company to certain of the Natives, in consideration whereof those Natives promise in their receipt or release "to write their names, if asked, to a land-conveying document" (not to the Queen, but) "to the directors of the said Company," of all their claims, except the places reserved. The transaction thus seems only, at most, to amount to proof, that the Colonial Secretary brought about an arrangement between the Natives and the Company, whereas he was well informed that the Natives claimed certain lands as reserved for their exclusive use, thereby also, it may well be, quieting the possession of the Company, and indirectly providing by anticipation for the ultimate quiet possession of the Crown. But neither this, nor any other Acts found upon record, are shown to have been acts done in pursuance of any statutory power to create Native Reserves, nor even with the intention of creating them; although such conduct may indicate that the officers of the Crown believed the lands to have been legally set apart for Native purposes, and acted on that behalf. It is found in terms that the Queen never has expressly declared any trust in writing, constituting the disputed lands Native Reserves; and we think we are not at liberty to declare that the acts of the officers of the Crown and Colonial Governments, so far as they are made to appear on these findings, bind the estate of the Crown in those lands, so as to compel the Crown to hold the lands impressed with a trust as Native Reserves.

(2.) The allegation that the lands have never been ceded to the Crown, and that the Native title thereto has never been extinguished, may be shortly disposed of. No formal act of cession to the Crown was necessary. From and after the purchase of these lands by the Company from the Natives, they became by virtue of the alienation itself part of the demesne lands of the Crown; insomuch that even if the purchase by the Company had been investigated by Commissioners under the Land Claims Ordinance

No. 1, and the same had been approved, and the Commissioners had recommended grants, or a grant, to the Company accordingly, it would have remained at the discretion of the Crown to make or refuse such grant. This title the Crown has always asserted; and although, after the selection of the officers by the Company of the land in question, as reserves for the benefit of the Native chiefs, the Crown forebore to interfere with the lands thus selected, it has done no solemn act to encumber, much less to alienate its estate, but in 1847 the Crown asserted its title by building an hospital on one of the sections, and in 1851 made the grant now impeached, and has continued to maintain its title till the present time.

Upon the construction of the findings upon the issues in this case, we are of opinion that the facts as found do not establish any right in the prosecutors which can be recognised and enforced by *scire facias*.

In disposing of this case, as by law we are bound to do, we cannot be insensible to those facts by which the expectations of the Native chiefs and their descendants may have been encouraged and kept alive. It is possible that the original vendors to the Company would have demanded and obtained a higher price for their lands had they not relied upon the covenant that one tenth of those lands would be held and improved by their European purchasers for their benefit. In the arrangements with the Pah Taranaki Natives, it is shown that some of the Natives still counted upon these lands as reserves in estimating the additional compensation which they should accept; and it appears that those Natives entered, or some of them, into an agreement on that occasion to cede their interests to the Crown. The subsequent correspondence and negotiations between the Company and the Secretaries of State, if known or explained to the Native owners, may have led them to rely even upon the officers of the Crown, as the advocates and protectors of their interests. The grant of the 27th January, 1848, under the public seal of the Colony, upon the back whereof the sections in dispute were indicated, by an officer appointed by the Crown, as Natives Reserves, although the grant itself was issued four days too late to give it statutory validity, this and other acts certified by the finding on the 23rd issue, if known to the Natives interested, may have been by them accepted as guarantees of their supposed rights. If so, the natives have slept upon those rights apparently until the present suit. We have not the evidence on which to form an opinion, nor is it any part of the duty of this Court to decide upon such questions in the present case. If the Natives have any claim upon the favorable consideration of the Crown, it may be presumed that those claims will be respected, when properly represented. We can only, on this *scire facias*, order that judgment be entered of record for the defendants. The rule obtained by the defendants is made absolute, and that obtained by the prosecutors is discharged.

Mr Izard applied for and obtained leave to appeal to the Judicial Committee of the Privy Council.

No. 2.

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

Native Office,

SIR,—

Wellington, 20th August, 1873.

I have the honor to acknowledge the receipt of your letter of this day's date, enclosing for the information of the Government copies of the judgment of the Court of Appeal in the case of Regina v. Fitzherbert, as printed in the *New Zealand Mail*, and to express to you my thanks for the same.

I have, &c.,

The Hon. W. Mantell,
Wellington.

DONALD M'LEAN.

By Authority : GEORGE DIDSBUY, Government Printer, Wellington.