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By His Excellency's Command,
ANDREW SINCLAIR, *Colonial Secretary.*

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NOTICE.

Colonial Secretary's Office,
Auckland, 6th July, 1847

HIS Excellency the Lieutenant-Governor has been pleased to give directions for the publication of the following decision of the Supreme Court, in the case of M'Intosh *v.* Symonds, for general information.

By His Excellency's command,
ANDREW SINCLAIR,
Colonial Secretary.

JUDGMENT OF MR. JUSTICE CHAPMAN.

This case comes before the Court upon demurrer to a declaration in a suit upon a writ of *Scire Facias* —whereby the party suing out the writ seeks to set aside a grant from the Crown, made under the public seal of the colony to the defendant, on the ground that the claimant has a prior valid title to the same land, by virtue of a certain certificate, whereby it is alleged, the late Governor waived, in the present claimant's favour, the Queen's exclusive right of acquiring the land in question from the natives.

The question which this Court has to determine is, did the claimant Mr. C. Hunter M'Intosh acquire by the certificate and his subsequent purchase (admitted to have been in all respects fair and bona-fide,) such an interest in the land, as against the Crown, as invalidates a grant made to another, subsequently to the certificate and purchase?

As this question involves principles of universal application to the respective territorial rights of the Crown, the abcriginal natives, and the European subjects of the Queen; as moreover its decision may affect larger interests than even this court is up to this moment aware of, I think it is incumbent on us to enunciate the principles upon which our conclusion is based, with more care and particularity than would, under other circumstances, be necessary.

The intercourse of civilized nations, and especially of Great Britain, with the aboriginal natives of America and other countries, during the last two centuries, has gradually led to the adoption and affirmation by the Colonial Courts, of certain established principles of law, applicable to such intercourse. Although these principles may at times have been lost sight of, yet animated by the humane spirit of modern times, our colonial courts, and the courts of such of the United States of America, as have adopted the common law of England, have invariably affirmed and supported them; so that at this day, a line of judicial decision, the current of legal opinion, and above all, the settled practice of the colonial governments, have concurred to clothe with certainty and precision, what would otherwise have remained vague and unsettled. These principles are not the new creation or invention of the colonial courts. They flow not from what an American writer has called the "vice of judicial legislation." They are in fact to be found among the earliest settled principles of our law; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own colony; and from the letter of treaties with native tribes, wherein those principles have been asserted and acted upon.

It is a fundamental maxim of our laws, springing no doubt from the feudal origin and nature of our tenures, that the King was the original proprietor of all the lands in the kingdom, and consequently the only legal source of private title, [2 Bl. Com. 51, Co. Litt. 65, a.] In the language of the year book, [M. 24, Edw. III,] "all was in him, and came from him at the beginning." This principle has been imported, with the mass of the common law, into all the colonies settled by Great Britain; it pervades and animates the whole of our jurisprudence in relation to the tenure of land; and so *protective* has it been found, that although strictly a prerogative rule, the Republican States of America, at least all those states which recognise the common law as the origin and basis of their own municipal laws, have found it expedient, if not necessary, to adopt it into their jurisprudence. [Kent's Comm. vol. iii., part vi., lecture 51.]

As a necessary corollary from the doctrine,—"that the Queen is the exclusive source of private title,"—the colonial courts have invariably held (subject of

course to the rules of prescription in the older colonies,) that they cannot give effect to any title not derived from the crown, (or from the representative of the crown, duly authorised to make grants,) verified by letters patent. This mode of verification is nothing more than a full adoption and affirmation by the colonial courts, of the rule of English law: "that (as well for the protection of the crown, as for the security of the subjects, and on account of the high consideration entertained by the law towards Her Majesty,) no freehold, interest, franchise, or liberty, can be transferred by the crown, but by matter of record." [Viner Abr. Prerog.; Bac. Abr. Prerog.]:—that is to say, by letters patent under the great seal in England, or (what is equivalent thereto in the colony,) under the public colonial seal. In the instruments delegating a portion of the royal authority to the Governors of colonies, this state of the law is without any exception, that I am aware of, universally and necessarily recognised and acted upon. In some cases the authority and powers of the Governor are set out in his commissions; (Quebec Commissions by Baron Mazeres, 4to., 1772); but in this colony the Governor derives his authority partly from his commission, and partly from the royal charter of the colony, (Parl. paper, 11th May, 1841, p. 31), referred to in and made part of such commission. In this charter, we find the invariable and ancient practice followed: the Governor, for the time being, being authorised to make and execute in her Majesty's name, and on her behalf, *under the public seal of the colony*, grants of waste lands, &c. In no other way, can any estate or interest in land, whether immediate or prospective, be made to take effect; and this court is precluded from taking notice of any estate, interest, or claim, of whatsoever nature, which is not conformable with this provision of the charter; which in itself is only an expression of the well ascertained and settled law of the land.

Here, under ordinary circumstances, I think we might stop. On the one hand, the defendant has a grant from his Excellency the Governor, complying in all respects with the law, which grant is not impeached upon this record on any one of the grounds upon which grants are liable to be repealed. There is no allegation, on the part of the adverse claimant, of any illegality, uncertainty, mistake, mis-description, mis-information or deception, [2 Bl. Comm. 348, Co. Lit. 5, 6, Gladstanes, v. the Earl of Sandwich, 4 Man. and Gr. 995.] On the other hand, the claimant founds his title on an instrument not under the seal of the colony, having none of the features of a patent, and therefore not complying either with the common law, or with the charter of this colony, framed evidently with especial reference thereto.

But the peculiar character of the instrument under which Mr. M'Intosh claims, being the act of the late Governor of the colony, whose acts ought to be supported, if not repugnant to the law of the land, and issued in conformity with a proclamation, with which it is admitted the claimant has faithfully complied, demands that we should go further, and examine the validity of his claim upon its own intrinsic merits.

It seems to flow from the very terms in which the principle—that the Queen is the only source of title,—is expressed, that no subject can for himself acquire new lands by any means whatsoever. Any acquisition of territory by a subject, by conquest, discovery, occupation or purchase from native tribes, (however it may entitle the subject, conqueror, discoverer, or purchaser, to gracious consideration from the crown), can confer no right on the subject. Territories therefore, acquired by the subject in any way, vest at once in the Crown. To state the Crown's right in the broadest way; it enjoys the exclusive right of acquiring newly found or conquered territory, and of extinguishing the title of any aboriginal inhabitants to be found thereon. Anciently private war was not unusual. The history of Sir Francis Drake is an instance of a subject acquiring territory for the Queen, by a mixture of conquest and discovery, without a commission. In like manner an accidental discovery is taken possession of, not for the benefit of the discoverer himself, but for that of the Crown. The rule, therefore, adopted in our colonies, "that the Queen has the exclusive right of extinguishing the native title to land," is only one member of a wider rule,—that the Queen has the exclusive right of acquiring new territory, and that whatsoever the subject may acquire, vests at once, as already stated, in the Queen. And this, because in relation to the subjects, the Queen is the only source of title.

As to the practical consequence that the Queen may lawfully oust any subject who attempts to retain possession of any lands he has acquired, it is a power which has often been exercised. The settlement of New Haven, (now part of Connecticut) is an early case. Connecticut had originally been colonized under a royal grant to Lord Say and Sele. New Haven was settled by people from Connecticut, who purchased from the Indians; yet that title was not recognised, and a new charter was obtained from Charles II., incorporating New Haven with Connecticut. The early settlements of Port Philip are equally in point. The opinions of eminent lawyers were without exception, against the claims of the purchasers, and as in New Zealand, the claimants were glad to take a crown grant of a portion of their acquisitions, leaving a large portion of territory in the hands of the crown. To say that such purchases are absolutely null and void, however, is obviously going too far. If care be taken to purchase of the true owners, and to get in all outstanding claims, the purchases are good as against the native seller, but not against the Crown. In like manner, though discovery followed by occupation, vests nothing in the subject, yet it is good against all the world except the Queen who takes. All that the law predicates of such acquisitions is that they are null and void as against the crown: and why? because, "the Queen is the exclusive source of title."

The practice of extinguishing native titles by fair purchases is certainly more than two centuries old. It has long been adopted by the government in our American colonies, and by that of the United States. It is now part of the law of the land, and although the courts of the United States, in suits between their own subjects will not allow a grant to be impeached under pretext that the native title has not been extinguished, yet they would certainly not hesitate to do so in a suit by one of the native Indians. In the case of the Cherokee nation, v. the State of Georgia, the Supreme court threw its protective decision over the plaintiff-nation, against a gross attempt at spoliation, calling to its aid, throughout every portion of its judgment the principles of the common law as applied and adopted from the earliest times by the colonial laws. [Kent's Comm. vol. iii., lecture 51.] Whatever may be the opinion of jurists as to the strength or weakness of the native title, whatsoever may have been the past vague notions of the natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished, (at least in times of peace), otherwise than by the free consent of the native occupiers. But for their protection, and for the sake of humanity, the government is bound to maintain, and the courts to assert, the Queen's exclusive right to extinguish it. It follows, from what has been said, that in solemnly guaranteeing the native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the charter of the colony, does not assert either in doctrine or in practice, any thing new and unsettled.

Mr. Bartley contends that all that the natives convey to the Queen by the Treaty of Waitangi, is a right to have the first offer of the land, or say in one word, the refusal;—a conclusion which he draws from the etymological structure of the word pre-emption. There can be no doubt that according to the strict meaning of the word, the right of "buying before" others, connotes the existence of a right residing in others, to buy after refusal by him who has the pre-emptive right. But the right which resides in the crown is, as we have seen, the exclusive right of extinguishing the native title. Mr. Bartley's criticism is therefore rather philological than legal. It amounts to this, that the crown's right is loosely named; that the word pre-emption is not the one which ought to have been chosen. Be that as it may, the court must look at the legal import of the word, not at its etymology. The word used in the treaty is not now used for the first time. If it were so, it perhaps might be contended that a limited right being expressed, the larger right is excluded. But the fra-

mers of the Treaty found the word in use with a peculiar and technical meaning, and as a short expression for what would otherwise have required a many-worded explanation, they were justified by very general Practice in adopting it. No one now thinks of objecting to the use of the word syco-phant, in its secondary meaning, because its true meaning is a "shower of figs."

The legal doctrine as to the exclusive right of the Queen to extinguish the native title, though it operates only as a restraint upon the purchasing capacity of the Queen's European subjects, leaving the natives to deal among themselves, as freely as before the commencement of our intercourse with them, is no doubt incompatible with that full and absolute dominion over the lands which they occupy, which we call an estate in fee. But this necessarily arises out of our peculiar relations with the native race, and out of our obvious duty of protecting them, to as great an extent as possible, from the evil consequences of the intercourse to which we have introduced them, or have imposed upon them. To let in all purchasers, and to protect and enforce every private purchase, would be virtually to confiscate the lands of the natives in a very short time. The rule laid down is, under the actual circumstances, the only one calculated to give equal security to both races. Although it may be apparently against what are called abstract or speculative rights, yet it is founded on the largest humanity; nor is it really against speculative rights in a greater degree than the rule of English law which avoids a conveyance to an alien. In this colony, perhaps, a few better instructed natives might be found, who have reduced land to individual possession, and are quite capable of protecting their own true interest; but the great mass of the natives, if sales were declared open to them, would become the victims of an apparently equitable rule; so true it is, that "it is possible to oppress and destroy under a show of justice." (Hawtress.) The existing rule then contemplates the native race as under a species of guardianship. Technically, it contemplates the native dominion over the soil as inferior to what we call an estate in fee: practically, it secures to them all the enjoyments from the land which they had before our intercourse, and as much more as the opportunity of selling portions, useless to themselves, affords. From the protective character of the rule then, it is entitled to respect on moral grounds, no less than to judicial support on strictly legal grounds.

In order to enable the court to arrive at a correct conclusion upon this record, I think it is not at all necessary to decide what estate the Queen has in the land previous to the extinguishment of the native title. Anciently, it seems to have been assumed, that notwithstanding the rights of the native race, and of course subject to such rights, the crown, as against its own subjects, had the full and absolute dominion over the soil, as a necessary consequence of territorial jurisdistion. Strictly speaking, this is perhaps deducible from the principle of our law. The assertion of the Queen's pre-emptive right, supposes only a modified dominion, as residing in the natives. But it is also a principle of our law that the freehold never can be in abeyance; hence the full recognition of the modified title of the natives, and its most careful protection, is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects. This technical seisin against all the world except the natives, is the strongest ground whereon the due protection of their qualified dominion can be based. This extreme view has not been judicially taken by any colonial court that I am aware of, nor by any of the United States' courts, recognizing the principles of the common law. But in one case before the Supreme Court in the United States, there was a mere naked declaration to that effect, by a majority of the judges. One of the judges however, differed from his brethren, he considering the natives as absolute proprietors of the soil, with the single restriction arising out of the incompetency of all but the sovereign power to buy, and he treated what is commonly called the pre-emptive right as "a right to acquire the fee simple by purchase when the proprietors should be disposed to sell.

The Charters of the Stuarts certainly assumed the fee to be in the Crown, and they were never impeached on the ground that the King had conveyed a larger estate than he had in him, though attempts were often made to get rid of them. In spite of this assumption, the native outstanding title was usually got in by purchase. The charter to the New England Puritans in 1620, granted the land in fee, leaving it to the grantees to extinguish the native title. In the case of William Penn, usually cited as a model of humanity and fair dealing, the charter was granted in 1681; then Penn proceeded to settle the land; and lastly "the settlers having made and improved their plantation to good advantage, Penn, in order to secure the plantation from the Indians, appointed commissioners to purchase the land, &c." (Encyclop. Brit. article 'Penn.') It was not until 1683 that Penn reached the colony. Vattel sees no violation of law in this course. He and the writers before his time seem to have attached little weight to the native title; and he cites the cases of Penn and the New Englanders as evidence of their moderation—rather than as fulfilling a condition necessary to the completion of their title and precedent to its full enjoyment.—[Book 1, C. xviii, § 209.]

But for more than a century certainly, neither in the British American colonies nor subsequently in the United States, has it been the practice to permit any patent to pass the public seal of the Colony or States previous to the extinguishment of the native title [Collection of Indian Treaties, Washington, 1837]: a practice certainly far more conducive to the security of native rights than the ancient practice. To part with the Crown's interest during the existence of the native title, leaving it to the grantee to acquire that title, is obviously fraught with evil to both races, and with great inconvenience and perplexity to the colonial governments.

Such are the principles in conformity with which, I conceive, this court is bound to view the rights of the Crown, the Queen's European subjects, and her Majesty's new subjects, respectively; and guided by their light, we are enabled to decide the question raised upon this record. Even abstaining from regarding the Queen's territorial right, pending the title of the natives as of so high a nature as an actual seisin in fee as against her European subjects, and regarding it in the view most favourable to the claimant's case, as the weakest conceivable interest in the soil—a mere possibility of seisin, I am of opinion that it is not a fit subject of Waiver either generally by proclamation, or specially by such a certificate as Mr. Mc Intosh holds.—Both by the common law of England (now the law of the colony in this behalf,) and by the express words of the charter, such an interest can only be conveyed by letters patent under the public seal of the colony.

I am also of opinion, after very carefully considering the statement of Mr. Bartley, and the apparent admission of the Attorney General, that the want of compliance with the Australian Waste Lands Act, until lately in force in this colony, would, even in the absence of a grant to the defendant, be a fatal defect in Mr. McIntosh's claim, and this on two grounds:—First, notwithstanding the words "waste lands of the Crown" may seem to import lands the title to which was complete, I think the language of the 5th section extending the formalities prescribed by the Act to "any less estate or interest," would be sufficient to include that interest which the Crown has in all the lands of the colony; and that, consequently, a proclamation made in evasion of the Act of parliament cannot legally be acted upon: Secondly by Mr. McIntosh's purchase, (assuming it to be a complete extinguishment of the title of all native claimants,) the land vests in the Crown, and so becomes part of the Waste Land of the Crown, even in contemplation of the Attorney General's distinction; and as such could only be alienated (so long as the 5 & 6 Vict. c. 36 was in force here) in strict compliance with its provisions.

For these reasons I think the Judgment of the Court upon this record must be for the defendant.

His Honor the Chief Justice then proceeded to deliver his own Judgment as follows:—

THE QUEEN *v.* J. J. SYMONDS.

The facts admitted in this case are the following: First, that a complete and honest purchase of the land now in question was effected by the claimant, Mr.

Motutoh; and, secondly, that the purchase was made under and in conformity with a certificate issued by Governor Fitz Roy, as set forth on the Record. Upon these two facts the claimant's case rests.

It may make the whole matter clearer to consider, in the first place, the legal effect of such a purchase, viewed by itself and apart from the certificate or alleged authority.

Now the general law of England, or rather of the British colonial empire, in respect of the acquisition of lands, such as those which are comprised within the claimant's purchase and defendant's grant, has from very early time stood as follows: Wherever, in any country to which (as between England and the other European nations) England had acquired a prior title by discovery or otherwise, there were found land lying waste and unoccupied, and the same came to be occupied and appropriated by subjects of the British Crown it was holden that such subjects did not and could not thereby acquire any legal right to the soil as against the Crown. And this rule was understood to apply equally, whether the country was partially peopled or wholly unpeopled and whether the settlers entered and obtained possession with or without the consent of the original inhabitants. Accordingly, colonial titles have uniformly rested upon grants from the Crown. This was the case in the oldest British colonies in America; and it is notorious that the same rule has been acted upon without deviation or exception in the more recent colonization of Australia.

Nor is this the rule and practice of England only, but of all the colonizing states of Europe, and (by derivation from England) of the United States of America. The very full discussion of this subject in the judgment of my learned brother, Mr. Justice Chapman, renders it superfluous for me to enter further upon the question. I shall content myself with citing two passages from the well known "Commentaries on American Law," by Mr. Chancellor Kent, of the State of New York. I quote this book, not as an authority in an English Court, but only as a sufficient testimony that the principle contained in the rule of law above laid down—and which same principle, with no other change than the necessary one of form, is still recognised and enforced in the courts of the American Union, is understood there to be derived by them from the period when the present States were Colonies and Dependencies of Great Britain. "The European nations, (says Mr. Chancellor Kent, Vol. 3, p. 379,) which respectively established Colonies in America, assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil, subject only to the Indian right of occupancy.—The natives were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it and to use it according to their own discretion, though not to dispose of the soil at their own will, except to the Government claiming the right of pre-emption." Again in p. 385, after speaking of the "several local governments both before and after" the American revolution, he says "Those governments asserted and enforced the exclusive right to extinguish Indian titles to lands inclosed within the exterior lines of their jurisdictions, by fair purchase, under the sanction of treaties; and they held all individual purchases from the Indian, whether made with them individually or collectively as tribes, to be absolutely null and void. The only power that could lawfully acquire the Indian title was the State, and a government grant was the only lawful source of title admitted in the courts of justice. The *Colonial* and *State* governments, and the government of the United States, uniformly dealt upon these principles with the Indian nations dwelling within their territorial limits."

Now, at the very commencement of the colonization of this country, the same principle was distinctly enunciated. The 2nd section of the Land Claims Ordinance of June 1841 (Sess 1, No. 2) declares and enacts that "the sole and absolute right of pre-emption from the aboriginal inhabitants vests in and can only be exercised by Her Majesty, her Heirs and Successors and that all titles to land in the said colony of New Zealand which are held or claimed by virtue of purchases or gifts or pretended gifts, conveyances or pretended conveyances, leases or pretended leases, agreements or other titles, either mediately or immediately from the chiefs or other individuals or individual of the aboriginal tribes inhabiting the said colony, and which are not or may not hereafter be allowed by her Majesty, her Heirs and Successors are, and the same shall be, absolutely null and void:" and, as if to carry the principle which I have mentioned to the extreme length, it is by section 6, provided that even after the Commissioners acting under that Ordinance, shall have reported in favor of any claimant, yet "nothing herein contained shall be held to oblige the said Governor to make and deliver any such grants as aforesaid, unless his Excellency shall deem it proper so to do." In fact, if we pass in review the various provisions of this Ordinance, both as to the limitations and restrictions under which grants are to be made in any case, and as to the express directions that lands of certain descriptions shall not be proprosed to be granted to any claimant whatsoever, we see throughout the Ordinance, a distinct recognition and assertion of the doctrine just now stated. It is every where assumed that where the native owners have fairly and freely parted with their lands, the same at once vest in the Crown, and become subject wholly to the disposing power of the Crown. This ordinance whilst it asserts the Crown's absolute right of control and disposal over the purchased lands, and is careful to show that the recognition of the claims was not to be taken as an acknowledgment of any right in the purchasers as against the Crown, does at the same time clearly intimate the object with reference to which that power of control and disposal is to be exercised. It points to subjects of the Crown other than those purchasers, and whose interests would likewise demand consideration. The 3rd section recites that "Her Majesty hath been pleased to declare Her Majesty's gracious intention to recognize claims to land, which may have been obtained on equitable terms from the chiefs or aboriginal inhabitants or inhabitant of the said colony of New Zealand, and which may not be prejudicial to the present or prospective interests of such of Her Majesty's subjects who have already resorted, *or who may hereafter resort* to and settle in the said colony." Moreover, the Ordinance close with an express proviso "that nothing in this Ordinance contained shall be deemed in any way to affect any Right or Prerogative of Her Majesty, Her Heirs or Successors."

It may well be presumed that a rule so strict and apparently severe, and yet so generally received must be founded on some principle of great and general concernment. And this presumption would be strengthened by observing, that not only in England but also in the United States of America,—not only in a country which retains many traces of the old feudalism, but also in a State which sways all things by the will of the majority of its individual citizens, and in which, too, the business of colonization—the disposing of the public domain for the benefit of the nation,—is made a regular and distinct branch of public Administration—this rule is yet most strongly recognised and enforced.

The principle is apparently this; that colonization is a work of national concernment—a work to be carried on with reference to the interests of the nation *collectively*; and *therefore* to be controlled and guided by the Supreme Power of the nation.

This rule may have had its origin in the feudal doctrine which vested the supreme dominion and ultimate ownership of all land personally in the Sovereign; but in modern times, and especially since the Domain of the Crown passed under the control of Parliament, it has acquired an enlarged significancy and importance. It is now understood that the waste lands of the Crown are to be administered for the national behoof upon an impartial and (so far as may be) a uniform system. This is expressed or implied in all the Statutes, Ordinances, and Instructions which have had reference to this colony. Now, the Sovereign right of control without which no uniform or general system would be possible, is secured by this rule. If a subject of the Crown could by his own act, unauthorized by the Crown, acquire against the Crown a right to any por-

tion of the lands of a new country, it is plain that he might, acting upon that right, proceed to form a colony there. Now, the law of England denies to any subject the right of forming a colony without the license of the Crown. And when we consider the complicated responsibilities which flow out of the existence of a colony, and which may seriously affect the Power to which the settlers owe allegiance, and from which they expect to receive protection, and when we, also, estimate the means and appliances needed for successful colonization, that denial can scarcely fail to appear reasonable and necessary.

So soon, then, as the right of the native owner is withdrawn, the soil vests entirely in the Crown for the behoof of the nation. To borrow the words of a very learned judgment recently pronounced by the Supreme Court of New South Wales, (Attorney-General v. Brown, Feb. 1847).—"In a newly-discovered country, settled by British subjects, the occupancy of the Crown with respect to the waste lands of that colony is no fiction. If, in one sense, these lands be the patrimony of the nation, the sovereign is the representative and the executive authority of the nation; the 'moral personality' (as Vattel calls him, Law of Nations, bk. 1, chap. 4) by whom the nation acts, and in whom, for such purposes, its power resides. Here is a property depending for support on no feudal notions or principle."

It is true that the colonization of New Zealand has differed from the mode pursued in many of the older colonies. As was said by the learned Attorney-General, it has been distinguished by a practical advance of the doctrine that "Power has duties as well as rights." But the adoption of a more righteous and a wiser policy towards the native people, cannot furnish any reason for relinquishing the exercise of a right adapted to secure a general and national benefit. This right of the Crown, as between the Crown and its British subjects, is not derived from the Treaty of Waitangi; nor could that Treaty alter it. Whether the assent of the natives went to the full length of the principle, or (as is contended) to a part only, yet the principle itself was already established and in force between the Queen and Her British subjects. The Treaty of Waitangi was made in February, 1840. The Land-Claims Ordinance, on which I have already commented, was passed in June of the same year. There is no indication, then, of an abandonment of the principle.

This rule then does in substance and effect assert, that whenever the original native right is ceded in respect of any portion of the soil of these Islands, the right which succeeds thereto is not the right of any individual subject of the Crown, not even of the person by whom the cession was procured, but the right of the Crown on behalf the whole nation, on behalf of the whole body of subjects of the Crown:—that the land becomes from the moment of cession not the private property of one man, but the heritage of the whole people:—that accordingly no private right shall be recognized as interfering with the public and national right:—that no single member of the nation shall have any power to impede in any way the progress and working of the plan ordained by the Supreme Authority of the nation for the nation's benefit. It is a rule which excludes all private interest, in order to maintain and vindicate a general and public good. It does not forbid a careful and equitable regard to the circumstances of particular cases, (as in the instance of the original Land Claims), but it reserves the entire discretion to the Sovereign Power. It says nothing of the fitness or unfitness of the regulations or conditions under which the State may from time to time allow this properry to be distributed and appropriated to individual citizens, but only that to the State shall belong the management and responsibility of such distribution. In general, it asserts nothing as to the course which shall be taken for the guidance of colonization, but only that there shall be one guiding Power.

The doctrine now laid down was not denied by the learned Counsel for the claimant: rather, by the ingenuity spent in endeavouring to trace an authority for the issue of the pre-emption certificate, it appeared to be indirectly admitted. Therefore, in what I have said, I have gone beyond what it was strictly necessary to say; but this I have done partly because the rule appeared not to have been clearly understood, and partly because a previous comprehension of its meaning may be useful in the considerations to which we now pass.

he claimant, McIntosh, acquired then no title by the purchase alone? Did he acquire any by the purchase in connexion with the certificate?

The claimant says he has purchased this land with the Queen's authority; that he has expended his money with her sanction; and, therefore, has a legal right to have the land so purchased granted to him. This he says, without alleging any objection to the grant, or to the conduct of the grantee, without suggesting any illegality or irregularity at all. Leaving the Court to assume (as in this state of things must be assumed) that the grant is in itself good and unimpeachable, he calls on the Court to set aside that grant upon such grounds alone as are disclosed on this record. Now, when any loss or injury has arisen to any subject from any breach of any contract or undertaking on the part of the Crown, the law prescribes a mode in which the wrong done to the subject may be (not of course enforced against the Crown) but brought under the consideration of the Crown to the end that justice may be done. But the claimant's proceeding is quite a different one. He asks that the defendant's property, which (for all that is now shown) has been rightfully acquired, be taken from him.

Now, as the case stands, the defendant has the best and highest title upon which a subject can rely, and that wholly unimpeached. What is the title which Mr. McIntosh opposes to this? It is the certificate set forth upon the record. Now this certificate, though purporting to convey a right or interest in respect of certain lands within the colony, is not only not under the colonial seal, but it does even bear the signature of the Governor. It is really a certificate by the Colonial Secretary that the Governor had consented to waive the Queen's right of pre-emption in respect of certain lands. Strictly speaking, it is not a waiver, but only evidence of a waiver having been made. It is quite plain, that such a paper cannot convey anything which can be called a legal right or title to the land mentioned therein. Such a title did not arise by the purchase alone, as we have seen; neither could it arise by virtue of this certificate.

Here, then, the claimant's case fails. But as the waiver is admitted to have been in fact the act of the Governor, and as the remaining question is, in several respects, an important one, I proceed to consider it.

Was there any authority in the Governor to make such a waiver, so as to bind the Crown? This, indeed, is the point on which the main stress of the argument was laid.

I premise, that with the questions raised as to the true meaning of the Treaty of Waitangi as it stands in the native language—whether it does or does not speak of "the exclusive right of pre-emption," or of "pre-emption" at all, or only and simply of "purchase"—we have obviously no concern. Nor, indeed, is it material to inquire whether the word "pre-emption," which is found in the English copy, be used in the sense now contended for—that is to say—as indicating merely a prior right in the Crown upon the non-exercise whereof a subsequent right would, as of course and without anything further, accrue to the subjects of the Crown; or whether it was intended to express that superior right which the law recognizes in the Crown overriding and controlling all purchases of native lands by subjects of the Crown. For the plaintiff stands upon the Crown's right as it is in the Crown, and upon nothing else. He bases his claim, not upon any right accruing to himself subsequently to, or independently of, that right, but upon a transfer of that very right to himself. The certificate purports to be something more than a mere waiver. A mere waiver or relinquishment of a Crown-right would leave to all the Queen's subjects equally whatever benefit might arise therefrom. Whereas, this document purports to convey that right to one individual to the exclusion of all others; and to him, for a time undefined.

That there was no express authority for the issue of certificates of this kind is acknowledged. If there was an implied authority, it must be gathered from the acts and dealings of the Crown, the laws which have been made, and instructions which have been issued in respect of this colony. Now, among the first instructions given by one of Her Majesty's Principal Secretaries of State to the first Governor of New Zealand, we find the following passage:—"It is not, however, to the mere recognition of the sovereign authority of the Queen that your endeavours are to be confined, or your negotiations directed. It is further necessary that the chiefs should be induced, if possible, to contract with you, as representing Her Majesty, that henceforward no lands shall be ceded, either gratuitously or otherwise, except to the Crown of Great Britain. Contemplating the future growth and extension of a British colony in New Zealand, it is an object of the first importance that the alienation of the unsettled lands within its limits should be conducted from its commencement upon that system of sale of which experience has proved the wisdom, and

the disregard of which has been so fatal to the prosperity of other British settlements." [Parliamentary Papers, 1840, page 38.] Now, these directions appear to have been in no way confined to the Governor to whom they were personally addressed. They were clearly indicative of a *policy* to be steadily pursued by successive Governors, whilst the colonization of the country should be proceeding. These instructions were carried out first, by the Treaty of Waitangi; and, afterwards, by the Land Claims Ordinance, upon which I have already commented. Moreover, in respect of all lands which should in consequence vest in and become disposable *on* behalf of the Crown, strict rules were laid down; they were contained, at first, in Royal instructions, and afterwards embodied in an Act of Parliament, which was in force at the date of this certificate. Under either form, the rules were in substance the same. The two main points were common to both: namely, the provisions for raising an emigration fund, and the provisions for securing fair competition among purchasers. Now, doubtless. we may imply in the agent all authorities necessary for carrying into execution these two expressed purposes of his principal: but how can we imply an authority *to do* acts which tend directly to defeat them?

I pass by various topics which were strongly urged by Mr. Bartley, for two reasons, viz., because they cannot be properly raised upon this record, which does not contain one word referring to them; and, further, because they are directly negatived by the terms of the Proclamation under which this certificate was issued. In fact, Governor FitzRoy appears to have been careful to put all persons who might be disposed to act under that Proclamation upon their guard, and to give them to understand that, if they purchased at all, they would do so at their own risk. The concluding words of the Proclamation are these—"The public are reminded that no title to land in this colony, held or claimed by any person not an aboriginal native of the same, is valid in the eye of the law, or otherwise than null and void, unless confirmed by a grant from the Crown."

These same words are found at the close both of the earlier Proclamation of March, and the later one of October, under which Mr. McIntosh claims.

Upon the whole, then, Mr. McIntosh is simply a purchaser from the natives, without authority or confirmation from the Crown. He cannot possibly stand in a better position than did the original Land Claimants. He cannot possess any more than they did a title against the Crown or the Crown's grantee.

Of course, we, in this place, have nothing to do with any question except the bare legal question of the existence or non-existence of a legal right and title in the claimant.

It may also be proper to remark, that this Judgment does not affirm the absolute validity of the grant to the defendant. It decides this only, that that grant cannot be set aside on the grounds which are set forth on the Record.—Judgment for the Defendant.

Colonial Secretary's Office,
Auckland, 6th July, 1847.

HIS Excellency the Lieutenant-Governor directs that the following Extract from the Minutes of the Executive Council, be published.

By His Excellency's command,
ANDREW SINCLAIR,
Colonial Secretary.

EXTRACT FROM THE MINUTES OF THE EXECUTIVE COUNCIL OF NEW ZEALAND, HELD ON MONDAY, THE 5TH JULY, 1847.

"The Lieutenant-Governor having laid on the table a letter from Capt. Graham, the Senior Naval Officer, dated the 4th instant, communicating to the Lieutenant-Governor the fact of his having received orders from His Excellency the Commander-in-Chief on this Station to proceed to England immediately with Her Majesty's Ship under his command, it was resolved by the Lieutenant-Governor and Council that the following resolution should be recorded in the Minutes of Proceedings of the Executive Council.

"His Excellency and the Members of the Executive Council cannot allow Captain Graham to leave this Colony without recording their acknowledgments of his cordial and zealous co-operation on all occasions when active operations were necessary for the purpose of quelling rebellion, and of expressing the high sense they entertain of the warm interest displayed by him at all times in promoting the welfare of the Colony and of its inhabitants, of both races; by which he has not only greatly promoted the interests of the European population, but has also, in many instances, secured the confidence, and confirmed the loyalty, of the natives.

"His Excellency and the Council avail themselves of this opportunity to request Captain Graham to make known to the Officers and crew of Her Majesty's Ship *Castor* the sense the Lieutenant-Governor and Council entertain of their gallantry and exemplary conduct upon all occasions,—qualities which have gained for them the gratitude and best wishes of the Colonial Government and of the Colonists."

A true extract.

FREDERICK THATCHER,
Asst. Prvt. Sety.,
Acting as Clerk of Council.

CAUTION.

THE PUBLIC are hereby cautioned against purchasing any of the undermentioned Properties, or from removing any timber or other material from the same, they having been purchased by the Undersigned from the official assignee of James Stuart, of George street, Sydney.

Claim—known as No.	218	(100 acres)
do. do.	218 *a*	(1850 acres)
do. do.	218 *b*	(10 acres)

GEORGE THORNE,
(By his Attorney)
JNO. I. MONTEFIORE.

July 2nd, 1847.

Auckland:—Printed by JOHN WILLIAMSON, for the New Zealand Government.