

he shall give up his lease or license over such parts, or in case of refusal shall pay a specified sum as liquidated damages to the Board. On the other hand, the covenant contains a proviso that nothing in the deed "shall be construed to abridge, limit, or interfere with the rights and powers of the Governor of New Zealand, of the said James Macandrew, or such Superintendent, &c.," under 'The Otago Waste Lands Act, 1866,' or 'The Gold Fields Act, 1866,' or any law in force within the Colony, "unless such rights and powers shall be contrary hereto."

The question is, whether the Superintendent by this agreement has precluded the possibility of the declaration of Hundreds on the runs to which the above covenants apply?

Legal effect of covenant.

In the first place it will be remarked, that there is no *express* covenant in the deed that the land leased shall not be made a Hundred. The power of making Hundreds is vested (or supposed to be vested, for even this is not without question) in the Governor, and therefore no covenant between a Superintendent and any other person could deprive the Governor of the powers given him by law. The Superintendent might have bound himself, legally or otherwise, not to recommend the Governor to declare any run into a Hundred; and as the practice has invariably been, that lands before being declared Hundreds by the Governor should be recommended as such by the Superintendent, such a covenant, if made, might have been effectual. But this was not done. On the contrary, there is an express provision saving all the powers of the Governor (supererogatory altogether) and of the Superintendent.

Nevertheless, the words at the end of the proviso, limiting its saving powers to rights and powers not "contrary" to the covenant, necessarily imply that there were or are some rights and powers held by the Superintendent, which were, are, or might be supposed to be, "contrary" either to the letter or spirit of that covenant. The right which from the nature of the case suggests itself first as likely to be alluded to, is that of recommending the leased land for a Hundred. The Commissioners endeavoured in vain to discover, by examination of the gentleman who held the office of Superintendent when the covenants were first entered into or resolved upon, and of the then Provincial Solicitor who drew the covenant, what other right or power could be alluded to.

Does an equitable engagement exist.

Moreover, it is alleged by many of the runholders who entered into the covenant, that they *did* consider this as an engagement on the part of the Superintendent, that the remainder of the run, after selection of the blocks agreed to, if given up without compensation, should not be made a Hundred. It is true that the engagement, if made, is based upon the vaguest inference; a right is held to have been abandoned, because, by implication only, supposed to be omitted from a body of rights expressly saved. But the runholders who assert the engagement argue, that this was their only consideration or *quid pro quo* for their abandonment of their right to compensation for land taken for sale. The Government party, on the other hand, reply that the consideration was the grant of the lease, which the covenant expressly recites that the Superintendent had power to refuse. To this the runholder retorts, that the grant of the lease was only a consideration for the greatly increased rental demanded of him under it, amounting to from seven to ten times as much as he paid under the license he exchanged for the lease.

The Commissioners, as stated, took a large amount of evidence on this point. Evidence, No. 91. In particular, Mr. ex-Superintendent Dick produced a minute of the Provincial Executive Council, dated 27th February, 1867, expressly written to record "the precise position in which the question of granting leases stood prior to the (then ensuing) election" (of Superintendent). This minute, after narrating the arrangements to be made with the runholders to secure land for agricultural leases and for sale, records as part of a resolution come to, that "such consent" (of the runholder, to land being taken without compensation) was "in no case to be held as an abridgment of the powers of the Superintendent under the Land Act." But the principal resolution, to explain the action taken under which was the main object of the minute, is thus worded:—"Resolved, To recommend the Waste Lands Board to grant leases over all runs, excluding such land as will be required for agricultural leases within gold fields, and also blocks which