PAPERS

RELATIVE TO THE

LUNDON AND WHITAKER CLAIMS.

PRESENTED TO BOTH HOUSES OF THE GENERAL ASSEMBLY, BY COMMAND OF HIS EXCELLENCY.

WELLINGTON.

1872.

PAPERS RELATIVE TO THE LUNDON AND WHITAKER CLAIMS.

No. 1.

The Hon. W. Gisborne to His Honor Mr. Justice Johnston.

Colonial Secretary's Office (Judicial Branch),
Wellington, 14th November, 1871.

Sir,—

I have to forward to your Honor herewith a copy of an Act passed in the present session of the General Assembly.

The Government is desirous that your Honor should be appointed to be the Commissioner under this Act, and I shall be obliged by your informing me of your willingness to accept the appointment.

The time and mode of holding the inquiry is, as your Honor will find by the Act, left entirely under the direction of the Commissioner.

I have, &c.,
W. Gisborne.

His Honor Mr. Justice Johnston, Wellington.

No. 2.

His Honor Mr. Justice Johnston to the Hon. W. Gisborne.

Judge's Chambers, Wellington, 15th November, 1871.

Sir,—

I have the honor to acknowledge the receipt of your letter of the 14th instant, in which you inform me of the wish of the Government that I should be appointed Commissioner under the Act forwarded therewith.

In answer, I have the honor to say that I shall be prepared to accept the appointment, and to hold the inquiry at the earliest time at which the business of the Supreme Court will permit.

I have, &c.,
Alexander J. Johnston.

The Hon. the Colonial Secretary (Judicial Branch).

No. 3.

The Hon. W. Gisborne to His Honor Mr. Justice Johnston.

Colonial Secretary's Office (Judicial Branch),
Wellington, 2nd December, 1871.

Sir,—

Adverting to your Honor's letter of the 15th ultimo, I have the honor to enclose draft of Letters Patent, appointing you to be Commissioner under "The Lundon and Whitaker Claims Act, 1871," for your perusal and approval.

I have, &c.,
W. Gisborne.

His Honor Mr. Justice Johnston, Wellington.

No. 4.

His Honor Mr. Justice Johnston to the Hon. W. Gisborne.

Napier, 8th December, 1871.

Sir,—

I have the honor to acknowledge the receipt of your letter of the 2nd December, with which you enclose a draft of Letters Patent, appointing me to be Commissioner under "The Lundon and Whitaker Claims Act, 1871," for my perusal and approval.

I have perused the draft, and I believe its terms would probably be sufficient for carrying out the purposes of the Legislature.

The only questions which have occurred to my mind are, first, whether, as the Commission recites the provisions of section 3 of the Act, it might not be as well that it should also recite the provision of the 5th section, or might not omit the recital of section 3; and second, whether the word "*award*" in the 7th section must not mean "award of compensation," after a decision by the Commissioner on the preliminary question of "*right*," and if so, whether it might not be better that he should be directed to forward to His Excellency a written certificate of his decision (in case he should find that the claimants had no rights at law or in equity) or of his award (*i.e.*, of compensation in case he should decide that they had such a right).

I would, however, take the liberty of suggesting that the proposed terms of the Commission should be submitted to the legal representative of the claimants, for their approval.

I should be glad to be informed officially, at the earliest practical opportunity after the issuing of the Letters Patent, with whom I am to communicate as the representatives of His Excellency on the one side, and the claimants on the other, in order that I may ascertain, as soon as possible, whether they have agreed upon the facts, so as to be ready to submit the matter for my consideration in the shape of a special case, or whether it will be necessary for me to ascertain the facts "by such ways and means as I may think fit."

If the latter course must be adopted, I should desire to be able to conduct the investigation at some time during the vacation of the Supreme Court, (25th January to 10th March, inclusive,) so as not to interfere with the business of the Court, but to enable me to decide on the preliminary question of right in sufficient time to allow the parties, if dissatisfied with my decision thereon, time for submitting the question to the Court of Appeal at its sitting in the beginning of May. I have re-enclosed the draft sent.

I have, &c.,

The Hon. the Colonial Secretary (Judicial Branch). ALEXANDER J. JOHNSTON.

No. 5.

The Hon. W. GISBORNE to his Honor Mr. Justice JOHNSTON.

SIR,— Colonial Secretary's Office, Wellington, 6th January, 1872.

I have the honor to enclose a Commission, under the hand of His Excellency the Governor and the public seal of the Colony, appointing your Honor to be the Commissioner under "The Lundon and Whitaker Claims Act, 1871."

The amendments suggested in your Honor's letter of 8th December, have been introduced into the Commission.

In reply to your Honor's question, as to whom you should address in your capacity of Commissioner, I have to request that you will forward such communication as you may desire or feel called upon to make to His Excellency, under cover to myself.

Mr. McCormick, a barrister of the Supreme Court at Auckland, has been instructed to communicate with Messrs. Lundon and Whitaker, and to arrange, after communication with the Chief Judge of the Native Lands Court, for stating a case to be heard before your Honor here; and if a case cannot be agreed on, then to arrange for an early hearing of the matters in dispute.

Notice of this has been given to the parties.

I have not yet received any reply to the above-mentioned communication, but expect one by the mail now due. When it has been received, no time shall be lost in informing your Honor of the steps that are being taken.

I have, &c.,

His Honor Mr. Justice Johnston, Wellington. W. GISBORNE.

Enclosure in No. 5.

G. F. BOWEN, Governor.

To Our trusty and well-beloved ALEXANDER JAMES JOHNSTON, Esquire, a Judge of the Supreme Court of New Zealand, Greeting.

WHEREAS by an Act of the General Assembly of New Zealand, passed in the thirty-fifth year of the reign of Her Majesty Queen Victoria, the Short Title whereof is "The Lundon and Whitaker Claims Act, 1871," it is, among other things, enacted that the Governor shall, as soon as conveniently may be after the passing of the said Act, appoint one of the Judges of the Supreme Court of New Zealand to be a Commissioner under the said Act for the purposes and with the powers thereinafter mentioned: And by the said Act it is also enacted that the said Commissioner shall, by such ways and means as he may think fit, inquire into and determine whether John Lundon and Frederick Alexander Whitaker (in the said Act mentioned) possessed any rights, at law or at equity, in respect of certain lands situate at Grahamstown, in the Province of Auckland, which have been improperly or unconstitutionally taken away or prejudicially affected by the passing of "The Native Lands Act, 1869," or by the proceedings taken in the Native Land Court in pursuance of the said Act: Provided that the question thereinbefore referred to the Commissioner shall be submitted to him in the form of a special case, if the Governor on the one part, and the said John Lundon and Frederick Alexander Whitaker on the other part, can agree upon the facts to be stated: And whereas by the said Act it is further enacted that if it shall be determined that the said John Lundon and Frederick Alexander Whitaker had such rights as aforesaid, the Commissioner shall then proceed to determine the amount of compensation to which they are entitled by reason of such rights having been taken away or prejudicially affected by the said Act:

Now therefore, I, Sir George Ferguson Bowen, the Governor of the Colony of New Zealand,

in pursuance and in exercise of the authority vested in me by "The Lundon and Whitaker Claims Act, 1871," and reposing great confidence in your knowledge and ability, have appointed and by these presents do appoint you, the said Alexander James Johnston, Esquire, as such Judge of the Supreme Court of New Zealand as aforesaid, to be the Commissioner under the said Act, for the purposes and with the powers therein particularly set forth. And you are hereby required, so soon as conveniently may be after the receipt by you of these presents, to proceed in the matter of the said inquiry in the manner and form by the said Act prescribed, and that upon the termination or other disposal of such inquiry you do forward to me a written certificate of your decision of the award (if any) made by you under the powers in the said Act contained.

[L.S.] Given under the hand of His Excellency Sir George Ferguson Bowen, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Governor and Commander-in-Chief in and over Her Majesty's Colony of New Zealand and its Dependencies, and Vice-Admiral of the same; and issued under the Seal of the said Colony, at Wellington, this fifth day of January, in the year of our Lord one thousand eight hundred and seventy-two.

W. GISBORNE.

No. 6.

His Honor Mr. Justice JOHNSTON to the Hon. W. GISBORNE.

Judge's Chambers, Wellington, 8th January, 1872.

SIR,—

I have the honor to acknowledge the receipt of the Commission, under the hand of His Excellency and the public seal of the Colony, appointing me the Commissioner under "The Lundon and Whitaker Claims Act, 1871," and your letter, with which it was enclosed.

I have to thank you for your information as to the communications between myself and the parties interested, and your promise to give me early intimation as to the steps which have been taken for bringing the subject matter of the Commission before me for decision.

I have, &c.,

The Hon. the Colonial Secretary (Judicial Branch). ALEXANDER J. JOHNSTON.

No. 7.

His Honor Mr. Justice JOHNSTON to His Excellency Sir G. F. BOWEN.

To His Excellency Sir George Ferguson Bowen, Knight Grand Cross of the most distinguished Order of Saint Michael and Saint George, Governor and Commander-in-Chief in an over Her Majesty's Colony of New Zealand and its Dependencies, and Vice-Admiral of the same.

I, *Alexander James Johnston*, a Judge of the Supreme Court of New Zealand, the Commissioner appointed, by Commission, under your Excellency's hand and the seal of the Colony, dated the 5th day of January, 1872, by virtue of the provisions of "The Lundon and Whitaker Claims Act, 1871," for the purposes and with the powers in the said Act mentioned, do respectfully report and certify as follows:—That I have inquired, in the manner and form prescribed in the said Act, into the question whether John Lundon and Frederick Alexander Whitaker, in the said Act and Commission mentioned, possessed any rights, at law or in equity. in respect of certain lands situate at Grahamstown, in the Province of Auckland, which had been improperly or unconstitutionally affected by the passing of "The Native Lands Act, 1869," or by proceedings taken in the Native Lands Court in pursuance of the said last-mentioned Act. That, by agreement between your Excellency on the one part, and the said John Lundon and Frederick Alexander Whitaker on the other, the question so referred to me as such Commissioner was submitted to me in the form of a special case. That, after hearing arguments on the part of your Excellency and of the said claimants upon the said case, I did, on the 15th day of April, 1872, decide and determine upon the said special case, that the said claimants, John Lundon and Frederick Alexander Whitaker, had not any such rights, at law or in equity, as in the said first-mentioned Act and Commission mentioned, and I gave reasons for such decision, of which a correct report is transmitted herewith, marked A. That the said claimants being dissatisfied with my said decision, the said question was submitted, upon the said case, to the Court of Appeal, at its next sitting thereafter, which commenced on the 13th day of May, 1872, for its opinion thereon. That the said Court of Appeal, after hearing arguments of Counsel on behalf of your Excellency and of the said claimants, did, on the 14th day of June, 1872, decide that the said claimants did not possess any right, at law or in equity, in respect of the lands above mentioned, which had been taken away or affected, as in the said first-mentioned Act and Commission mentioned, of which decision of the said Court of Appeal the document transmitted herewith, marked B, is a certificate. That a correct report of the reasons given by the Court of Appeal for such decision is transmitted herewith, marked C. All which I respectfully report and certify pursuant to the tenor of the said Act and Commission.

Given under my hand and seal, this 17th day of June, 1872. } (L.S.) ALEXANDER J. JOHNSTON, Commissioner.

A.

THE COMMISSIONER'S DECISION.

IN the matter of a Commission issued by His Excellency the Governor of New Zealand, in pursuance of the provisions of "The Lundon and Whitaker Claims Act, 1871;" and of a Special Case stated by agreement between the Governor on the one part, and John Lundon and Frederick Alexander Whitaker on the other part, under the 3rd Section of the said Act.

1. Having heard Counsel on behalf of the parties to the special case, I have come to the conclusion—although my mind is by no means free from doubt—that, on the whole, the claimants have not made out the existence of the right upon which their claim is based. I have arrived at this result upon the grounds and for the reasons following:—

2. The first duty I had to perform was to ascertain, as precisely as possible (according to the proper construction of the Act of 1871, the Commission, and the special case), the questions in dispute which I had to determine. The view which I took at the argument, and which I continue to entertain, is, that all I have to decide is whether, immediately before the passing of "The Native Lands Act, 1869," these claimants possessed any right at law or in equity—that is to say, any right cognizable and available in the tribunals of the Colony—in respect of the lands in question; and that if such right did then exist, there could be no doubt that the Act of 1869 prejudicially affected it, for it is plain that if Messrs. Lundon and Whitaker then had such a right, Messrs. Graham and De Hirsch could, upon the facts, have none; and therefore, the Act of 1869, by virtue of which the latter acquired a legal title through a Crown grant, did manifestly affect prejudicially, or take away, the right of the others. If the Act of 1869 was only declaratory of rights, such as Messrs. Hirsch and Graham had without it, then Messrs. Lundon and Whitaker had no claim which it could prejudice.

3. It was partly for this reason, and partly because I did not consider that the language of the Act of 1871 was capable of the suggested interpretation, that I refused at the hearing to go into the question, which I was with some urgency invited on the part of the opposition to the claimants to consider, namely,—"Whether the Legislature acted arbitrarily in passing the Act of 1869; and whether it was not their duty, under the circumstances, to pass an Act explanatory of the meaning of the former Acts?" I then stated that I could not believe the Legislature could have intended to empower a Commissioner to pronounce an opinion with respect to their duty, or to the political or moral propriety of their conduct, and that I never would have accepted a Commission which empowered me to censure the conduct of the Legislature. I considered that the words "improperly or unconstitutionally taken away," as applied by the Legislature to an act of their own, must mean "contrary to existing legal or equitable rights, or to the provisions of the statutory Constitution of the Colony." It is unnecessary to advert to these words for the purposes of my decision; but having been urged to take a note of my refusal to hear any arguments on this point, I deem it advisable that I should so far allude to it.

4. The claimants were content to rest their claim exclusively upon the existence of a legal or equitable right existing in them immediately before the passing of the Act.

5. The question at issue turns upon the interpretation and the construction of certain Imperial and Colonial Acts, which it is very difficult to harmonize in all respects, and in which the Legislatures have not always manifested their intention in the most perspicuous and unambiguous terms.

6. There are, as far as I am aware, no recorded decisions which can either directly or by analogy apply to the matter in question, except those which are illustrations of very general principles of interpretation and construction. Of such principles, those which seem most applicable to the case are—(1.) That words used in a Statute must have some meaning ascribed to them if possible; (2.) That where the interpretation of words is doubtful, the meaning of the Legislature must be arrived at by the intention manifested on due construction of the particular Act, and of others *in pari materiâ*; and (3.), That words occurring in an enabling statutory provision should be construed liberally, or extensively, in favour of the probable intention of the Legislature.

7. And here I think I may properly remark, that, in my opinion, there is no class of legal questions so embarrassing or difficult to deal with, as questions of interpretation and construction sometimes are;—and none for the determination of which it is so desirable to have the concurrence of more than one judicial mind. I am therefore glad to know that my present decision will probably be submitted for the consideration of the Court of Appeal under the provisions of the Act of 1871. Had this not been probable, I should have desired to postpone my decision for some time, in order that I might reconsider it with more leisure, and also might condense the statement of my reasons; but I am induced to come to a conclusion and express my reasons at once, in order that there may be an opportunity of appealing to the Court of Appeal at its next sitting, and that delay in the final settlement of the matter may thus be avoided.

8. In conducting the argument, and in forming my opinion on the case, I have assumed that, as Commissioner, I may take notice—as I should do when acting as a Judge of the Supreme Court—of all Imperial and Colonial Acts, charters, and treaties pertinent to the question, whether stated or referred to in the special case or not.

9. Before proceeding to a necessary though cursory review of the policy and provisions

adopted by the Legislature with regard to the alienation of lands by aboriginal natives, I would state that, as I assume it to be the duty of the claimants (Messrs. Lundon and Whitaker) to make out, affirmatively, the existence of their rights immediately before the passing of the Act of 1869, I think it would not be sufficient for them to show that Messrs. Graham and Hirsch had no right to the land in question. As the facts stand, Messrs. Lundon and Whitaker could have no right, if Messrs. Graham and Hirsch had acquired by their leases a right, which were prior in time to those of the claimants.

10. I understand the real position of the parties to be this:—The claimants say that just before the passing of the Act of 1869 they were in possession of leases from Native proprietors, granted by the latter after a certificate of the Native Lands Court of their title to the land had been issued; and that, as the law then stood, the Native owners were entitled to Crown grants, antevesting their legal title to the date of the certificate, and thereby making the claimants' titles under their leases complete; and that they thus had an existing "right" as against the Native owners.

11. To this it is answered by the Counsel for the Governor, on behalf of the public, that the claimants had no such rights; because, as the law then stood, the leases granted to Messrs. Graham and Hirsch were valid, because the title of the Natives under the Crown grant would antevest to the date of the *order* for the certificate, and *their* leases, being prior in time, must override the claims of Messrs. Lundon and Whitaker.

12. This being the state of the case, it becomes necessary to follow the current of legislation affecting the question, and to observe the policy and intention which it manifests.

13. The Treaty of Waitangi, which has been assumed by the Imperial Parliament and the Legislature of the Colony as the basis of the policy and legislation of both respecting the aboriginal inhabitants of New Zealand, granted to the Natives the undisturbed possession of their lands, and provided that the Crown should have the right of pre-emption of all portions of such lands as the Natives might desire to alienate. The object of this compact, on the part of the Imperial Government, seems to have been twofold—first, to protect the Natives against improvident alienations to Europeans; and next, to provide for the introduction of a uniform and consistent system of titles to land in the Colony, based on cession by the Natives to the Crown, and grants from the Crown founded thereon.

14. In pursuance of this policy, "The New Zealand Constitution Act" (15 and 16 Vict. c. 71) enacted, by section 73, that it should not be lawful for any person but Her Majesty to purchase or acquire from the Natives any land occupied by them in common as tribes or communities, or to accept the release or extinguishment of rights in such land; and further, that no absolute or conditional transfer of such land should be valid, unless entered into and accepted by Her Majesty.

15. It may be remarked here, that, while this enactment continued in full force, it might have been said to be sufficient to prevent any one from getting a title in fee or obtaining a lease even from aboriginal inhabitants who had already got Crown grants,—which could scarcely have been deliberately intended.

16. But although it was not competent for the General Assembly of New Zealand in the first instance, or even by virtue of "The Constitution Amendment Act, 1857," to repeal or amend section 73 of the Constitution Act, power was given to the Assembly, by the Imperial Act 25 and 26 Vict. c. 48 (passed in 1862), section 8, to alter or repeal all or any of the provisions contained in that section of the Constitution Act. And it was *further provided thereby, that no Act or part of an Act passed by the General Assembly should be deemed invalid by reason of its being repugnant to any of such provisions.* It must therefore be taken, that every statutory provision of the General Assembly at variance with the 73rd section of the Constitution Act must be held so far to repeal it.

17. The first Colonial Act passed after the Imperial Act of 1862, referring to the matter, was "The Native Lands Act, 1862," (amended in 1864,) to which, although repealed and replaced by "The Native Lands Act, 1865," it is desirable to refer for the purpose of tracing the policy of the Legislature.

18. The preamble of that Act recites the Treaty of Waitangi and the stipulation for pre-emption by the Crown, and that it would greatly promote the peaceful settlement of the Colony if the rights of the Natives to land were defined, and then assimilated as much as possible to ownership of land according to British law; and further, that Her Majesty might be pleased to waive, in favour of the Natives, so much of the treaty as gave her the rights of pre-emption; and to establish Courts for defining the rights of the Natives, and otherwise giving effect to the provisions of the Acts.

19. The Act then went on to direct a mode of proceeding by which the rights of Natives to land were to be ascertained, and a Court appointed for the purpose. That Court was bound, on confirmation of its finding by the Governor, to issue a certificate of title in favour of the tribe, community, or individual who had applied to it; and it was provided by section 16, that the persons mentioned in the certificate might dispose of their interest anyhow and to any person (a provision not repealed in the substituted Act), and that the certificates might be delivered up and exchanged for Crown grants, as if the lands had been ceded by the Natives. The 30th section enacted that every contract for Native land made before the issue of the certificate should be absolutely void, and that the consideration money should not be recovered back.

20. This Act, therefore, showed the intention of the Legislature, at that time, that the 73rd section of the Constitution Act should not remain in full force, though it confirmed its annulling power as to contracts made before the issue of the certificate. Moreover, it appeared from its provisions that the obtaining of a certificate under them was to be equivalent to a cession by the Natives, and that the issue of the Crown grant implied the extinction of the Native title and the applicability of English law—(section 18.)

21. But this Act was repealed and superseded by "The Native Lands Act, 1865"—an Act which was not disallowed by Her Majesty—which was not suggested in argument to have been *ultra vires*,—and which was in force at the time when the leases were granted to the claimants and to Messrs. Graham and Hirsch. The terms of the preamble of this Act deserve notice. It recites that it is expedient to consolidate the laws as to land still subject to Maori proprietary customs, and to provide for the ascertainment of the owners, to encourage the extinction of the Maori proprietary customs, and further to provide for the conversion of such mode of ownership into titles derived from the Crown.

22. It may therefore be inferred that it was the intention of the Legislature by this Act further to facilitate the transfer of lands, and to enable the Natives, by getting Crown titles without sale or direct cession to the Crown, to overcome the inconveniences which must arise from the strict use of the Crown's right of pre-emption. In order to carry out this object, the Act provides for the establishment of a Court for the investigation of Native titles, the settlements of descents, and for dealing with Native lands in cases of intestacy.

23. The proceedings under this Act, so far as they are relevant to the present case, are as follows:—

(1.) Any Native claiming to be interested in any piece of Native land (*i.e.*, land with respect to which the Native title has not been extinguished) may make an application to the Court, containing certain particulars, in order to have a Crown title issued to him (s. 21); (2) and after certain notices, the Court is to ascertain the title or interest of the applicant and of all claimants (s. 23); (3) and to refuse or order a certificate of title to be made and issued (specifying certain matters) to the claimant or to other persons; (4) and such certificates (s. 44) are to be conclusive in all courts of law, and they may be registered in the Registry of Deeds. (5.) The certificates so made having been issued to and received by the Governor, he is empowered (s. 46) to cause a Crown grant to be issued to the persons, and for the estates or interests, mentioned in the certificates; (6) and in case any person has by deed, attested as provided by the Act, purchased the interest of any Native owner in the land comprised in the certificate (if there be no limitation therein), the Crown grant *may be issued to such purchaser* on his delivering up his deed (s. 47). (7.) The Act then specially provides (s. 48), that the Crown grants issued under it shall be as valid as if the lands were waste lands of the Crown, and had been ceded by the Native proprietors to the Crown. (8.) The 75th section of the Act provides that "Every conveyance, gift, transfer, contract, or promise affecting or relating to any Native lands in respect of which a certificate of title shall not have been issued by the Court, shall be absolutely void."

24. Stopping now for a moment to contemplate the policy and intention of the Legislature, as manifested by the provisions of this Act, following on the repealed Act of 1862, it seems to me evident that the intention was to give further facilities for the acquisition by the Natives of titles which would enable them to dispose of lands of which they had been ascertained by the Native Land Court to be owners, to any one, whether European or Native, under a title available in all the tribunals of the Colony, without any preliminary sale or direct cession to the Crown, as stipulated for by the Treaty of Waitangi; and that the certificate of title should be treated as the authoritative instrument which should free the Native land from the impediment upon its transferability.

25. Now it is necessary, for a reason which will afterwards appear, to notice that the *issue* of the certificate, and not the *date* which it bears, is the point of time from which, by this Act, the impediment is to be taken as removed.

26. Section 75, which says that contracts shall be absolutely void that affect land in respect of which a certificate had not been issued, may be only declaratory of the law already laid down in the Constitution Act, s. 73, as far as land held by Natives *in common* is concerned; but at all events it was conclusive with regard to transactions, whether with tribes or with individuals, entered into before the issue of a certificate.

27. Now, although the language of this section (75) seems to imply that transactions after certificate may be legitimate, I think it hardly could be contended that it would be sufficient of itself to make such transactions legal, in spite of the 73rd section of the Constitution Act, and so far to repeal or alter that section.

28. The Act of 1865 does not expressly provide, as the repealed Act of 1862 did, in section 16, that the persons mentioned as owners in a certificate may dispose of the land as they may think fit; but the 47th section contemplates the case of a person who has purchased or otherwise acquired the estate of a Native owner of land comprised in a certificate (not subject to limitation) as entitled to a Crown grant in his own name; and it does not clearly indicate that the purchase, &c., must have taken place after the certificate.

29. But the provisions of the Act of 1865 would probably not have been sufficient to enable the purchasers or lessees of Native lands, even after certificate issued, to get available legal titles, referring back to the date of their purchase or lease, even in cases under section 47. And supposing the obstacles presented by the 73rd section of the Constitution Act to have been removed, the purchasers and lessees would not have had complete titles as from the date of their purchases or leases, if the Crown grants to be issued under the Act bore date and were operative only at and from the time of their execution.

30. In this respect, persons entitled to Crown grants otherwise than through the operation of "The Native Lands Act, 1865," were exposed to similar difficulties, as there probably was, in many cases, a considerable interval between the purchases from the Crown and the actual issuing of the grants.

31. To meet this inconvenience, the principle of antevesting dates was adopted by "The Crown Grants Act, 1866."

(1.) The preamble of that Act referred to the provisions made for the preparation and issue of Crown grants, the payment of fees thereon, the vesting of the legal estate in grantees, and other matters connected therewith; and the Act does not appear to have been specially addressed to cases of title acquired through "The Native Lands Act, 1865."

(2.) The antevesting sections of "The Crown Grants Act, 1866," are sections 26 to 33.

Section 26 is as follows:—

"And whereas it is expedient that the legal estate in lands comprised in grants from the Crown should in certain cases and to a certain extent be deemed to have been in the grantees prior to the dates of such grants: Be it therefore enacted, that all deeds heretofore or hereafter to be executed by grantees of Crown lands, their heirs and assigns, after the dates at which they have or shall become entitled respectively to Crown grants of the said lands, but before the dates of the Crown grants by which the same have been or shall be subsequently granted, shall, for the purpose of completing the titles of parties to such deeds, but for no other purpose, be deemed to have the same force and effect as though the Crown grants respectively in which such lands are comprised had been executed immediately upon the grantees named therein having become or becoming entitled to receive such Crown grants respectively."

(3.) The 27th section goes on to give a statutory declaration of the date at which grantees shall be deemed to have become or to become entitled; and it mentions six classes of cases, none of which includes the case of grants by Natives of lands for which they had got certificates from the Native Lands Court.

32. If, therefore, the law had remained as it was under "The Crown Grants Act, 1866," it could scarcely have been suggested that the antevesting principle would apply, so as to give validity to transactions which were invalidated by the 73rd section of the Constitution Act, or the 75th section of the Native Lands Act of 1865.

33. But "The Crown Grants Act, 1867," imported fresh definitions of the time at which the grantees referred to in the 26th section of the said Act (the Act of 1866) shall be deemed to have become or to become entitled to receive Crown grants; and the first of five classes of cases enumerated is that of grantees of land the title to which has been decided in the Native Lands Court, in which cases the dates are to be "the dates of the certificate or *interlocutory orders* issued by such Court with reference to such lands respectively."

34. Putting, therefore, the Act of 1866, section 26, and the Act of 1867, section 7, sub-section 1, together, the result will be—It is enacted that "all deeds heretofore or hereafter to be executed by grantees of Crown lands, their heirs and assigns, after" [*in the case of lands the title to which has been decided in the Native Lands Court*] "the dates of the certificates or interlocutory orders, but before the dates of the Crown grants, by which the same have been or shall be subsequently granted, shall for the purpose, &c., be deemed to have effect, &c., as though the Crown grants, &c., had been executed immediately upon (*i.e.* after) the dates of the certificates or interlocutory orders."

35. This, then, is substantially the enactment which is to determine the right of the claimants. If upon the true interpretation of its words, and a proper construction of its language so interpreted, along with the other statutory provisions affecting the case, the dates of the orders made on the 27th and 28th of June, for the issue of certificates for the lands in question, are to be taken as the dates at which the Native owners were entitled to a grant, the rights of Messrs. De Hirsch and Graham must prevail as prior to those of the claimants, unless the invalidating operation of the 75th section of "The Native Lands Act, 1865" still exists, notwithstanding the Crown Grants Acts of 1866 and 1867.

36. Now, it seems quite clear that the policy and intention of the Legislature in the passing of the Crown Grant Acts was to give further facilities for transactions between Natives and Europeans in respect of the lands of the former, the ownership of which had been duly ascertained by the Native Land Court, and to remove the impediments created by the previous enactments respecting such delays. And it is, moreover, to be observed, that while it might be deemed desirable still to keep up the prohibition against dealings between Natives and Europeans before the title of the Natives had been investigated in the Native Lands Court, there seems to be no good reason for making the date of the issue of the certificate the *terminus à quo* the right should be recognisable, rather than the date of the certificate, (which from the case appears to have, sometimes at least, been different from the date of issue,) or the date of the order for the

issuing of the certificate, inasmuch as the essential and cardinal thing was the ascertainment by the Court of the title, which was completely ascertained at the time of the order. The Act of 1869, indeed, which does not affect the present case for this purpose, expressly provides for vesting at the date of the *order;* and it may be, therefore, as has been argued, only declaratory in this respect.

37. There seems, therefore, to be no reason, as far as the apparent general policy and intention of the Legislature are concerned, which should make it inconsistent or improbable that they should finally adopt the date of the *order* as the time at which the owner should be deemed entitled to a Crown grant, and the time at which the legal estate should vest for the purpose of giving complete titles to grantees under subsequent deeds from the Native owner. Indeed, it would seem much more reasonable and consistent with the enabling policy manifested in the course of legislation, that the date of the order should be adopted rather than the date of the issue of the certificate; and it is to be particularly noticed, that while the date of *issuing* the certificate was fixed in the Act of 1865 as the time before which transactions were to be void, the ante-vesting provisions of the Crown Grant Acts of 1866 and 1867 make the date of the certificate itself the time for the vesting of the grantee's title: and it appears from the case that certificates have usually not been issued on the day of their date.

38. And now comes the last important question, viz., whether the words in "The Crown Grants Act, 1867," section 7, subsection 1—"*or interlocutory orders*"— mean or include orders under the 23rd section of "The Native Lands Act, 1865," for the issue of a certificate of title, such as had been made before the lease to De Hirsch and Graham.

39. It was argued, against the claimants, that the orders made by the Native Lands Court respecting the lands in question were final, and had the same effect as a certificate; but it seems to me that, unless the orders can be treated as "interlocutory" under this subsection, they can give no prior right to Messrs. Hirsch and Graham which would defeat the claimants' right.

40. I cannot find that any legal (*i.e.* statutory) interpretation is given to the words or term "interlocutory order." In the course of the legislation on the subject, the only occasion in which I find this term used is in the 27th section of "The Native Lands Act, 1865," which provides that "in any case the Court may make any *interlocutory* or *final* order which in its judgment may be necessary and just."

41. Now, do the words "interlocutory" and "final" in that Act apply to orders for a certificate? I think it can hardly be held that they can do so, after the provision of section 23, which had already enacted that, on ascertaining the title, the Court "shall order" a certificate. It would rather seem, that these words must apply to other matters within the cognizance of the Courts. But at all events it cannot well be suggested that the "interlocutory orders" in the Crown Grant Act of 1867, mean only such interlocutory orders as are mentioned in section 27 of the Act of 1865.

42. There being, therefore, no statutory interpretation of the term for the purposes of the Act of 1867, it is necessary to inquire what meaning can be assigned to it. Had the Act been a penal or disabling one, it might, on the strict and narrow construction which ought to be adopted for such enactments, have been proper to hold that the intention of the Legislature to make the words applicable to an order for a certificate was not sufficiently clearly manifested; but as this is, undoubtedly, an enabling statute, for the benefit of both races in the Colony, and for the removing of pre-existing disabilities, it would be the duty of a court of law—and I therefore, consider it my duty also as Commissioner, (appointed to investigate into a claim of right at law or equity)—to give the words an interpretation of which they are capable, and which will make them of some effect for the purpose of carrying out the apparent intention of the Legislature.

43. Now, I am unable to see what kind of orders the words of the Act of 1867 can refer to, other than orders affecting the certificate of title. I have already pointed out that it is not inconsistent, but, on the contrary, in consonance, with the manifested intention of the Legislature that the ante-vesting date should refer back to the *order* for the certificate.

44. But it is now to be ascertained whether the word "interlocutory" in the Act of 1867 can be applicable to the order under section 23 of the Act of 1865; and it seems to me that, according to the principles of liberal and extensive construction to which I have referred, the order for the certificate may well be called "interlocutory."

45. The proceedings in the Native Lands Court commence by application, proceed by notice and investigation, to order for certificate, the making of the certificate, and the issuing of the same to the Governor; all being preliminary steps to the issue of the Crown grant; and it seems to me, therefore, that it may properly be said that the order for the certificate is an "interlocutory" proceeding in the Lands Court.

46. It may be urged that if it had been intended to refer the title back to the date of the order for the certificate, it would have been unnecessary to mention the date of the certificate itself; and this may be so; but in the absence of any other kind of orders to which the enactment could reasonably be applied, I think it must be taken that the date of the antevesting is to be either that of the certificate (not of the issue of it), and if the date of the certificate should be posterior to that of the order, then the date of the order.

47. There remains to be disposed of the contention that, even if the Acts of 1865, 1866, and 1867 did give the Native owners a good title from the date of the order for certificate, yet the 75th section of the Act of 1865 made void all transactions before the issue of the certificate.

To this I answer, that the very purpose of the antevesting provisions in the Acts of 1866 and 1867, taken together, was to complete the titles of persons who were parties under deeds from Native proprietors, executed between the time at which they were statutorily to be deemed to have been entitled to Crown grants and the issuing thereof.

48. It was argued by Mr. Travers, for the claimants, with much ingenuity, that the provisions of the Crown Grants Acts are to be taken as passed only for conveyancing purposes, and cannot be taken as conferring new rights, or removing previously existing disabilities. But I think it can hardly be argued that the Legislature was deliberately providing a conveyancing scheme for completing titles which were to continue null and void under the previously existing law.

49. I think, therefore, that the provisions of the Crown Grants Acts, taken together, must be deemed to have repealed the 75th section of the Act of 1865, as far as it affects transactions after an order for a certificate, and before the issue of the certificate; and with regard to the anulling power of the 73rd section of the Constitution Act, I think there is no doubt that it has been repealed so far as it is at variance with the enabling Acts of the Colonial Legislature.

50. This result, no doubt, is arrived at by a very liberal interpretation of words, and construction of enactments, for it is tantamount to holding that the Legislature has enacted that purchases and leases of Native lands from Native owners, after an order for a certificate under "The Native Lands Act, 1865," are to be valid notwithstanding the 75th section of that Act and the 73rd section of the Constitution Act; and that, in order to give them full force and effect, the title of the Native owners under the Crown grants shall date from the date of the order.

51. In conclusion, I would repeat the expression of my opinion that the decision of a single individual on a question so narrow yet so important cannot be very satisfactory, and that I feel in some degree relieved from responsibility by the consideration that there will probably be an appeal.

52. For the present, I must hold, for the reasons above mentioned, that the claimants have not conclusively established a right to the land in question, at law or in equity, taken away or prejudicially affected by "The Native Lands Act, 1869," because they have not satisfied me beyond doubt that the prior leases to Messrs. Hirsch and Graham were void.

Wellington, 15th April, 1872.

ALEXANDER J. JOHNSTON,
Commissioner.

B.

In the Court of Appeal of New Zealand. In the matter of "The Lundon and Whitaker Claims Act, 1871."

I HEREBY certify that, at a sitting of the Court of Appeal of New Zealand, held at Wellington on Friday, the 14th day of June, 1872, at which I was presiding Judge, the said Court, after reading and hearing arguments on a special case stated by agreement between His Excellency the Governor on the one part, and John Lundon and Frederick Alexander Whitaker of the other, under the provisions of "The Lundon and Whitaker Claims Act, 1871," which case had been submitted to and decided by His Honor Mr. Justice Johnston, one of the Judges of the Supreme Court, appointed Commissioner under and for the purpose of the said Act, and which was thereafter submitted to the said Court of Appeal under the 4th section of the said Act, did decide and determine that the said John Lundon and Frederick Alexander Whitaker did not possess any rights, at law or in equity, in respect of the lands in the said Act mentioned, which were improperly or unconstitutionally taken away or prejudicially affected by the passing of "The Native Lands Act, 1869," or by the proceedings taken in the Native Lands Court in pursuance of the last mentioned Act.

Given under my hand, and under the seal of the said Court, at Wellington, this 14th day of June, one thousand eight hundred and seventy-two. } (L.S.) GEORGE ALFRED ARNEY, C.J.

ALEX. S. ALLAN,
Registrar.

C.

In the matter of "The Lundon and Whitaker Claims Act, 1871."

DECISION of COURT of APPEAL, delivered 14th June, 1872.

THIS is a special case stated by agreement between the Governor on the one part, and John Lundon and Frederick Alexander Whitaker on the other part, pursuant to the 3rd section of "The Lundon and Whitaker Claims Act, 1871."

The case having been originally heard by Mr. Justice Johnston, the Commissioner appointed under the Act, his decision was adverse to the claimants, Messrs. Lundon and Whitaker; and they have exercised the right, conferred upon them by the 4th section of the Act, of submitting the question at issue to the decision of this Court. The question stated in the words of the Act is, "Whether John Lundon and Frederick A. Whitaker possessed any rights, at law or in equity, in respect of certain lands situate at Grahamstown, in the Province of Auckland, which have been improperly or unconstitutionally taken away or prejudicially affected by the passing of

'The Native Lands Act, 1869,' or by the proceedings taken in the Native Lands Court in pursuance of the said Act."

2. We understand that we are not called upon, in answering this question, to do more than determine whether any vested right in the persons named has been taken away or prejudicially affected by the Act of 1869; for of this alone are we competent to judge. As to the words "improperly or unconstitutionally," we think it most respectful to understand that the Legislature thereby has intended itself to characterize its own act, in case it should appear that the Statute in question has interfered with the rights of the claimants.

We are not asked whether the Statute is *ultra vires*. That is not here the meaning of the term "unconstitutional." Were the Act impeachable as contrary to the Constitution of the Colony, or as repugnant to some Imperial Statute affecting the Colony, we should, in the exercise of our ordinary jurisdiction, be able to take cognizance of the matter. But we cannot as Judges undertake to decide whether the General Assembly did rightly or wrongly in enacting a law which is not in excess of its own statutory powers. The question of right or wrong in such a case is one of State policy, and not a matter of law. The Superior Courts are, indeed, continually called upon to criticise the form of Acts of Assembly, nor is it unusual or improper in a Judge to suggest, from the Bench, amendments of the law with a view to avoid or rectify some practical inconvenience or injustice. But it is outside the functions, and beyond the competency, of any judicial body within the Colony, formally to condemn a legal Statute as an improper exercise of legislative power. We cannot, therefore, suppose that we are called upon to do so in the present case. We entirely agree with what has been said upon this subject by Mr. Justice Johnston.

3. The question directly raised by the Act of 1871 is as to the validity of certain leases made by individuals of the Native race to the claimants and to a person from whom they derive title.

The lands comprised in these leases had been brought by the Native owners under the operation of "The Native Lands Act, 1865," and they had submitted their claim to the land for investigation by the Native Lands Court, under section 21, in order to obtain a Crown grant. By orders dated 26th and 27th June, 1868, the Court directed certificates of title to be made out and issued in favour of the Native claimants. There were three separate parcels of land. The certificates for two parcels were dated and issued on 22nd July, 1868; the certificate for the remaining parcel on 13th October in the same year. The leases to Messrs. Lundon and Whitaker, and also a lease to Mr. Eicke, under whom Lundon and Whitaker claim a portion of the land by assignment, were all executed in the course of the year 1869; consequently, after the issue of the certificates. But subsequently to the dates of the several orders, and prior to the issue of the several certificates, the same Natives had executed leases of the same lands to Messrs. De Hirsch and Graham; such leases bearing date respectively 30th June, 1868, and 9th and 10th July in the same year. Lundon and Whitaker, and Eicke also, had notice of the leases to De Hirsch and Graham before they obtained their leases. Under these circumstances, the claimants, Messrs. Lundon and Whitaker, contend that they acquired a valid estate and interest in the lands in question, the prior leases being, as they assert, void and illegal.

4. The claimants complain that the supposed valid estate and interest thus acquired has been defeated, and the title of De Hirsch and Graham set up, by or by virtue of "The Native Lands Act, 1869," and the proceedings taken thereunder. Our inquiry is to be whether this complaint is or is not well founded.

5. In the argument before us, the opposition to the claim, offered on behalf of the Colonial Government, was wholly founded upon the assertion of the original validity of the prior leases; and it was not attempted to be denied that, but for these earlier transactions, Lundon and Whitaker would have obtained a good title. As, however, in the course of the proceedings under the Act of 1869, an opinion to the contrary was expressed by the Native Lands Court, it is as well to say that we have satisfied ourselves upon the point, and that we hold the purchase of Messrs. Lundon and Whitaker to have been in itself good, under "The Native Lands Act, 1865;" and we proceed shortly to state the reasons for our conclusion.

6. As the Act of 1865 provided for the issue of Crown titles to lands comprised in certificates under section 23, such lands would, as a matter of course, in the absence of special restrictions on alienation, become alienable to Europeans so soon as the commutation of tenure was affected. On the issue of a Crown grant, if at no earlier stage of the process, the right of alienation would be conferred. As regards lands comprised in certificates in favour of tribes or hapus, or in certificates issued to individual claimants under section 43, we find no indication of a purpose to legalize alienation which could be supposed to over-ride the prohibitions of the common law and of the Constitution Act.

The absolute repeal of the Ordinance of 1846, (Session VII. No. 19,) affords some ground for the inference of such a purpose, but clearly, we think, no adequate ground. In the case of tribal certificates and certificates under section 43, the tenure is, by the Act of 1865, neither commuted, nor in course of commutation; and commutation of tenure has apparently been looked to by the framers of the Act as the means whereby the Crown right of pre-emption should be got rid of.

But as regards lands comprised in certificates under section 23 the case is different, and it seems plain that it was meant to permit the alienation of such lands by the Native owners, even prior to the issue of the Crown grant. Section 47 appears to be conclusive upon this point; and there are numerous other provisions which it is impossible to understand in any other way. We refer more particularly to sections 55–58–59–63–74 and 75.

It appears very doubtful whether the prohibition contained in section 73 of the Constitution Act could apply to alienation by individual Natives whose title has been affirmed by order under section 23. Supposing the prohibition to apply, it seems clear that section 73 must be considered as partially repealed by the provisions we have just referred to. It is necessary to find some operation for them, and the narrowest effect which it is possible to attribute to them is to suppose them applicable to that class of Native lands which we have just indicated.

7. It follows that the leases held by the claimants, having been made after certificate issued, and so not coming within the restriction imposed or continued by section 75, were valid transactions, subject, however, to the objection arising out of the prior leases to De Hirsch and Graham.

8. This brings us to consider the validity of the last-mentioned leases, which is contested by the claimants on the ground that they were made prior to the issue of the certificates, and are therefore void, under section 75 of "The Native Lands Act, 1865."

9. It will be convenient, in the first place, to consider how this question would have stood under "The Native Lands Act, 1865," without reference to subsequent legislation.

10. It was contended before us by Mr. Brandon, that, under the Act of 1865, the tenure was commuted as from the date of the order for a certificate under section 23; so that from the date of the order the lands ceased to be "Native lands," within the meaning of section 75. This in itself would be a highly reasonable view of the matter. The order is indubitably the true basis and commencement of the right of the Natives to the fee-simple.

It may well be contended, also, that the order creates a vested right to a Crown grant, notwithstanding that section 46 is in terms permissive. If the Native owners alienate, under section 47, to a European purchaser, it would seem impossible that a grant should be withheld, and it would be anomalous that the Native owners should be able to confer on a stranger a larger right than they themselves possessed.

The language of the Act is, however, at variance with this view. The terms of the certificate do not consist with the notion that the tenure has been converted by the order under which the certificate issues.

Then again the various provisions relative to alienation by Natives before grant issued, which we have above cited, all purport to relate to "Native lands." (See sections 47–55–58–59–63 and 74.)

These provisions can only refer to lands comprised in orders under section 23, for tribal lands and lands comprised in certificates under section 43 are unalienable. Similarly, by the term "Native lands," in section 75, nothing else can be meant than lands comprised in orders snder section 23; the lands to which the provision relates being lands alienable after certificate usued.

We are therefore of opinion that, under the 75th section of "The Native Lands Act, 1865," uncorrected by subsequent legislation, the leases to De Hirsch and Graham would have been void.

11. We now approach the question which, with Mr. Justice Johnston, we hold to be the true turning point of the case, namely, whether the Crown Grants Acts, 1866 and 1867, did so modify the then existing laws restraining alienation of Native land, as to authorize the leases to De Hirsch and Graham.

12. But before we deal with the construction of the provisions on which this question ultimately hinges, we must discuss the preliminary objection, which has been strongly urged, that these Acts are wholly inapplicable to the subject-matter.

13. The leading provision to be considered, namely, the 26th section of "The Crown Grants Act, 1866," applies, it is said, only to "Crown lands;" and "Native lands" are not "Crown lands." No doubt there is a sense in which "Native lands" are not "Crown lands." The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it. But the fullest measure of respect is consistent with the assertion of the technical doctrine, that all title to land by English tenure must be derived from the Crown; this of necessity importing that the fee-simple of the whole territory of New Zealand is vested and resides in the Crown, until it be departed with by grant from the Crown. In this large sense, all lands over which the Native title has not been extinguished are Crown lands. There is a sense in which lands parted with by the Crown to its European subjects, under the land laws of the Colony, cease to be Crown lands from the time of sale Such lands, supposing the purchase money paid, and the other conditions of purchase duly fulfilled, are no more "Crown lands," within the meaning (for example) of the various Ordinances and Acts to regulate the management of Crown lands, than are Native lands. They are, to all practical intents and purposes, private property. Yet, when it is a question of fulfilling the contract for sale by the issue of a grant, no one hesitates to speak of the lands to be granted as "Crown lands," or of the grantee as a "grantee of Crown lands." Lands which it is proposed to include in a grant from the Crown may, with perfect technical propriety, be spoken of, *quoad hoc*, as Crown lands. Indeed, there is no more correct way of speaking of them. The argument so much insisted upon involves the absurdity of supposing that the Crown is granting what does not belong to the Crown. If nothing passed by grants from the Crown to Natives of lands already owned by themselves under Native custom,

it would be an idle ceremony to issue such instruments. But something does pass: the whole legal fee passes; and in respect of this legal fee remaining vested in the Crown down to the time when the grant passes the seal of the Colony and receives the Governor's signature, every such instrument may, with absolute propriety, be termed a grant of Crown lands. If, then, it appears from the provisions of "The Crown Grants Act, 1866," or of "The Crown Grants Act, 1867," that it was intended, under the general designation of "grantees of Crown lands," to include Natives receiving grants from the Crown of lands previously owned by them under Native custom, there is no difficulty whatever in adopting such a construction; and the circumstance that in other Acts and Ordinances of the Colony, and even in the Constitution Act itself, the term "Crown lands" is used in a narrower sense, is nothing to the purpose.

14. Looking however to the terms of the special preamble to section 26 of "The Crown Grants Act, 1866," that "it is expedient that the legal estate in lands comprised in grants from the Crown should, in certain cases and to a certain extent, be deemed to have been in the grantees prior to the date of such grants"—followed, as it is, by the specification, in section 27, of what purports to be an exhaustive list of the cases to which the general provision of section 26 was meant to apply, it is certainly difficult to say that the case of grants under the Native Lands Acts is met by "The Crown Grants Act, 1866," as it originally stood.

Alienation by a Native, who as yet holds according to Maori custom, to a European, who can only hold by English tenure, is an anomalous transaction; and the intent retrospectively to clothe with the legal estate interests created by such a transaction, ought to be clearly manifested.

15. But assuming, as we do, that the case of grants under the Native Lands Acts was not originally within the scope of section 26, we conceive it to be quite clear that the "The Crown Grants Amendment Act, 1867," section 7, subsection 1, enlarges the provision of section 26 so as to reach the case. We have already expressed our opinion that Natives who accept such grants are, in a perfectly intelligible and proper sense of the term, "grantees of Grown lands," just as a copyholder taking a conveyance from the lord of his own customary tenement, is a grantee of parcel of the manor. Besides which it is apparent, on the terms of section 26, that the "grantees of Crown lands" therein referred to, are identical with the grantees named in the preamble to the clause, and there termed grantees of "lands comprised in grants from the Crown." For we may say, in passing, that the 2nd section of "The Crown Grants Amendment Act, 1870," made, in our opinion, no alteration in the law, and cannot affect our interpretation of the earlier Statute. There is, then, nothing in the 26th section of the original Act, to which the addition made to it in 1867 is repugnant. Were there any such conflict, the later Statute would of necessity prevail, and would enlarge the meaning of the earlier one; but there is no such conflict. The several subsections of section 7 of the later Act, simply supply omitted cases in the former Act.

16. Next comes the difficult question of the construction and effect of "The Crown Grants Amendment Act, 1867," section 7, subsection 1. On this point we have come to the conclusion, agreeing with that arrived at by the Commissioner, that the effect has been virtually to authorize sales and leases made by individual Natives at any time after an order in their favour under section 23 of "The Natives Lands Act, 1865."

17. The enactment we are construing is to be read continuously with section 26 of "The Crown Grants Act, 1866," and as giving effect, in a particular case, to the general purpose of that section.

The terms, if ambiguous, should be construed in subservience to that general purpose; a purpose in itself rational, equitable, and in accordance with legal principle. That general purpose manifestly is to clothe with the legal estate transactions—valid transactions, it is of course implied—intermediate between the issue of the grant and the date at which the grantee became entitled to receive a grant. But the time at which the Native owners do so become entitled, is at and from the date of the order of the Native Lands Court. The Statute supposes that there is a time prior to the issue of the Crown grant at which the title to receive a grant accrues.

This time can be no other than the date of the order.

In cases where the certificate bears even date with the order under which it issues, the title may, of course, be said to commence at the date of the certificate. It is in each such case indifferent which of the two is named—order or certificate—as the date of title commencing.

But if the dates differ, then the title really commences at the date of the earlier and more important instrument, the subsequent issue of the certificate being a Ministerial act, no wise significant, done in obedience to the order. The general purpose, therefore, of section 26, points at the adoption, if possible, of a construction which shall ante-vest the legal estate at the date of the order.

18. How far, then, are the terms of section 7, subsection (1), capable of such a construction?

The enactment is as follows:—"In all the following cases, the dates at which the grantees referred to in section 26 of the said Act ("The Crown Grants Act, 1866,") shall be deemed to have become or to become entitled to receive Crown grants for their lands shall be—

(1.) "In the case of grantees of land, the title to which has been decided in the Native Lands Court, the dates of the certificate or interlocutory orders issued by such Court with reference to such lands respectively."

The whole controversy turns upon the meaning of the term "interlocutory orders." As the class of orders really meant must of necessity be orders which conclusively ascertain the title, it is at once apparent that interlocutory orders, in the sense of section 27 of "The Native Lands Act, 1865," cannot be intended. "Interlocutory" orders are there properly opposed to "final" orders. But, of necessity, the orders referred to by subsection (1) must be, in substance, final, and fit to form a basis of title.

19. Mr. Whitaker, as counsel for the claimants, has pointed out that there exists a class of cases in which orders, virtually final as regards the ascertainment of title, may need to be followed by other judicial proceedings in the Native Lands Court. He has satisfied us that the words "subject as hereinafter is mentioned," with which the 25th section of "The Native Lands Act, 1865," begins, have reference to the provision of section 71, under which an order for a certificate may be made before survey of the lands which are the subject of the claim. As, under section 26, no certificate can issue without an accurate plan of the land which it comprises, drawn thereon or annexed thereto, he contends that an order ascertaining title under section 71 is correctly styled "interlocutory," and that the words "or interlocutory orders," in subsection (1), should be deemed to have reference exclusively to this class of cases.

20. But it appears to us that this construction is open to insuperable objections.

In the first place, the provision that the dates at which grantees shall be deemed to have become entitled, shall be "the dates of the certificate or interlocutory orders," is quite general in its terms. The alternative appears meant to apply to every case, the language supposing that in every case there is, besides the certificate, some anterior proceeding, referred to as an interlocutory order, and that the vesting of the legal estate will relate sometimes to the date of the certificate, sometimes to the date of the anterior proceeding referred to. There is nothing whatever to indicate that the orders referred to are of a special character, issued only in certain exceptional cases. Had such a class of exceptional cases been really in view, the Legislature would have particularly mentioned them. Secondly, it being admitted, on all hands, that by interlocutory orders it is necessary to understand some kind of order which finally ascertains the title, this construction supposes a particular class of interlocutory orders to be singled out as determining the date of ante-vesting, on the specific ground that, notwithstanding their interlocutory form, they are virtually final.

Why, then, it may be asked, should not orders final in form as well as in effect be equally taken as the commencement of the legal title? They possess the very quality of finality, which is the supposed ground of selection in the case of the former class; and that they are final, not interlocutory in form, can constitute no rational ground for their exclusion, but, on the contrary makes them better *termini*. No answer can be given except that such orders, not being interlocutory in form, are excluded by the letter of the law; and the Statute is supposed to have most absurdly made the interlocutory quality which might be a ground for rejecting these orders as the date of ante-vesting, the very ground for their selection.

We are bound to reject, if we can, a construction which, whilst it unduly limits the language of the provisions to an exceptional case, evidently never contemplated, imputes to the Legislature the creation of an irrational distinction; and we are of opinion that a preferable construction is open to adoption.

21. It has already appeared that, in the ordinary course of business in the Native Lands Court, there is a proceeding which definitely ascertains the title, and forms its actual root. This proceeding is the order for a certificate; and if, in any probable or even possible sense, this order can be regarded as interlocutory, albeit not such in any proper sense, nor treated as such in the Native Lands Acts, this it must be which is really meant by the clause under consideration. Brought to this point, there is little difficulty in the matter. Orders for a certificate, as has already been observed by Mr. Justice Johnston, may be regarded as interlocutory in reference to the whole course of proceeding, which begins by claim under section 21, and ends in the issue of a certificate, or, it may be said, of a Crown grant.

We decide, therefore, that these are the orders referred to by subsection (1).

22. To this construction it may still be urged as an objection, that if in every case the date of the order for a certificate were meant to be the date of ante-vesting, the mention of the date of the certificate itself is meaningless. It must be granted that, on the construction which we adopt, the words in question are redundant, and it is an acknowledged principle in the construction of Statutes, that distinct meaning must if possible be found for every word. It is not, however, a fatal objection to a suggested construction, that certain words appear to be superfluous.

The words in question, though redundant, are not meaningless. We adopt, on this point, the suggestion of the Attorney-General. The Legislature must be supposed to have, in the first place, contemplated the date of the certificate as the true date at which the title vested, and this it would be whenever the certificate bore even date with the order. In the latter branch of the alternative, the Statute must be considered as providing for the relation of the legal title to the date of the order in all cases in which the order bears an earlier date than the certificate.

The dates of two documents being named, the general intention of the Legislature, indicated by section 26 of the "Crown Grants Act, 1866," must entitle the persons interested to have the title carried back to the date of the earlier document, in those cases in which the dates do not coincide. The construction thus put on the Act is, no doubt, highly artificial; yet it does as little violence to the words as any which has been, or can be, suggested. And

inasmuch as it refers back the title to its true commencement, it has the merit of conforming to the general intent of the statutory provisions, whereof the words in question form a part. That general intent gives, we conceive, the best, indeed the only, key to the interpretation of language confessedly incorrect and obscure.

23. It remains to be considered what was the operation of "The Crown Grants Amendment Act, 1867," section 7, upon section 75 of "The Native Lands Act, 1865," and the other laws (if any) which still restricted or prohibited the alienation of this particular class of Native lands.

Read as we construe it, the enactment in substance is, "That all deeds executed by Native grantees after the dates of the orders in their favour shall, for the purpose of completing the titles of parties to such deeds, but for no other purpose, be deemed to have the same force and effect as though Crown grants had been executed at the dates of the orders."

Alienation between the date of the order and that of the certificate thus appears to be recognized; the clause operating to this extent as an implied repeal of section 75 of "The Native Lands Act, 1865." If this be the correct view, the leases to De Hirsch and Graham were valid instruments.

24. But to this view it is objected that the enactment had a totally different object, the provisions of which it forms part being a mere conveyancing device to obviate technical difficulties, caused by delay in the issue of Crown Grants, and by no means intended to effect substantial changes in other branches of the law. It is only a question of vesting a dry legal estate. The words "for the purpose of completing the titles of the parties to such deeds, but for no other purpose," are relied on in support of this objection. It is further objected that, at all events, the effect of the 7th section could not be to sanction transactions which as the law then stood were illegal; or even to validate transactions which as the law then stood were void.

25. To each of these objections there is a satisfactory answer. It cannot be said that the provision is *alio intuitu*.

Subsection 1 refers by name to the Native Lands Court, and expressly deals with the subject which it is said not to affect. The sole purpose of the subsection is to give legal validity to transactions entered into by *Native* grantees prior to the issue of their Crown grants. True it is that, in the case of grantees of European race, the provisions in question deal only with a dry legal estate, complete property, in equity, being already vested in the grantees or their assigns. But the case of Native grantees is wholly different. There the right of alienation depends upon the issue of a Crown title. In appointing the time from which the Crown title of a Native shall date, the Legislature is determining the commencement of his power to sell and lease to Europeans.

26. The validity of alienations prior to the issue of the Crown grant being thus within the purview of the clause, a date is taken for the ante-vesting of the Crown title, which is inconsistent with the maintenance of the restrictions contained in section 75 of "The Native Lands Act, 1865." This result, it will be observed, is independent of the construction put by us upon the term "interlocutory." Whatever meaning is given to that word in subsection (1), it will still appear that transactions prior to the issue of a certificate are, in some cases, recognized and made valid. We might, indeed, have been slow to admit the effect of the subsection as an implied repeal of section 75, had it appeared that such a construction would introduce any important change in the policy of the law concerning a most important subject. A clause of this kind is no fit or probable instrument of a great innovation. Were the issue of the certificate, under "The Native Lands Act, 1865," the cardinal point in the change to English tenure, as it was under the Act of 1862, it might be believed that a question of policy was involved; but it is not so. Certificates under the Act of 1865 are of a merely formal character. There is no reason for making a difference between transactions before and after certificate issued. As suggested by the Chief Judge of the Native Lands Court, the provision in section 75 was doubtless taken, unthinkingly, from section 30 of the previous Act. Section 7 of "The Crown Grants Amendment Act, 1867," corrects this mistake, thereby effecting no change of policy, but merely the abolition of a senseless and inconvenient distinction.

27. The reasons for implying a partial repeal of section 73 of the Constitution Act, are much the same as those adduced in favour of a partial repeal of section 75 of the Native Lands Act; always supposing that the prohibition contained in section 73 be not confined to tribal property, but would include transactions such as are now in question.

Assuming such transactions to be within the terms of the prohibition, it has to be considered that the policy of section 73 was not *res integra* when the Crown Grants Act of 1867 was passed. That policy had already (on the supposition just made) been broken into by "The Native Lands Act, 1865."

The innovation introduced by section 7 was a trivial one, merely removing an anomaly in the provisions for giving effect to the new Colonial policy. Under the circumstances, there is no difficulty in implying, if necessary, a further partial repeal of the Imperial Statute.

On the whole, we arrive at the conclusion that the leases to De Hirsch and Graham, made in 1868, were valid instruments at and from the time of their execution, and the title of those persons actually needed no aid from the enactment of "The Native Lands Act, 1869," section 8.

28. We say that the title of De Hirsch and Graham needed no aid from the Act of 1869;

and this brings us to the one important point which yet remains to be noticed. During the course of Mr. Whitaker's ingenious and elaborate argument, he urged upon us the terms of "The Native Lands Act, 1869," as implying that, in the opinion of the Legislature, the construction of "The Crown Grants Act, 1867," section 7, is not what this Court has now pronounced it to be.

Undoubtedly the provisions of the Act of 1869, and of section 8 in particular, imply that where the certificate bears a date subsequent to that of the order of Court in pursuance of which it is issued, the date for the vesting of the legal estate was, as the law then stood, in the opinion of the framers of the Act, the date of the certificate, and not the date of the order.

In accordance with this view, the concluding proviso of the section seems to assume that transactions before the date of the certificate would be void, as contrary to section 75 of "The Native Lands Act, 1865." All this may be granted to Mr. Whitaker's argument. Or, let us suppose that the case was even stronger in his favour than it is. Let us suppose that the Act of 1869 had contained a recital that the leases to De Hirsch and Graham, and others in the same predicament, were void, but ought to be made good.

The question is, whether such an indication of a bare opinion of the Legislature respecting the construction of previous Statutes is binding upon the Courts of the Colony. No doubt it would have been competent to the General Assembly to enact that the leases in question should *be deemed* to have been void.

That would have been an expression of legislative will, to which the Courts would be bound to give effect; but here there was no intention to make void these leases, but, on the contrary, an intent to make them good.

Are we, then, bound by the expression, not of *will*, that the leases should be void, but of *opinion* that they were void?

On general principle, this is, to say the least of it, very doubtful.

The Imperial Parliament is not only the supreme legislative power within the Empire, but is also the supreme interpreter of the laws;—judicially supreme.

On principle, it would seem that the Parliament of a Dependency cannot, even within the limits of the Dependency, occupy an analogous position. Passing by the general question, we are at all events of opinion that the very terms of the Act of 1871, under which this case is stated, plainly require this Court to determine how the rights of the parties would have stood if the Act of 1869 had never been passed. The legal questions involved are to be looked upon as unprejudiced by any view of the matter which the Legislature itself may be supposed to have taken when it was passing the Act of 1869.

That enactment bears, indeed, upon its face the stamp of *ex post facto* legislation. The Legislature, at the time, doubtless conceived it to be such. Were that opinion binding upon us, this case need not have been stated. The Act tacitly assumes that De Hirsch and Graham, without its provisions, had no title. The only real question for us has been, whether that assumption was, or was not, well-founded. The General Assembly itself calls upon us, by the Act of 1871, to express our opinion upon that point.

Clearly, therefore, notwithstanding the Act of 1869, we are free to declare that the leases to De Hirsch and Graham were valid *ab origine*.

That being so, it follows that John Lundon and Frederick A. Whitaker possessed no rights, at law or in equity, which have been taken away or affected by the passing of "The Native Lands Act, 1869," or by the proceedings taken in the Native Lands Court in pursuance of that Act.