

It follows from the argument, if sound, that Governor Fitzroy's Grant in completion of Commissioner Spain's *award and determination* was laid open to the objection stated by the Land and Emigration Commissioners.

The objections, that the Land awarded to Scott, formed part of a town site, and was within 100 feet of the seabeach, seem not to have been urged before Commissioner Spain, most likely they were not considered applicable, and probably the inconsistency suggested itself to the Company's Agents, if objecting to the Grant to Scott on these grounds, and then seeking to obtain a Grant of the same land to the Company and its purchasers, whose original Title I must say does not seem to rest on grounds one iota more meritorious than Scott's.

The rule against Grants of land suitable as town sites, was to be applied *in the discretion* of the Commissioners, not absolutely; its only object was, to prevent large spaces of land suitable for towns from being unemployed and shut up; but it does not follow, that it was meant to apply to the case of small plots of land, happening to be within the limits of townships: great injustice would have been done by so applying it. Even the Mission house would have been swept away. The rule against Grants of land within 100 feet of the sea-beach, is still more inapplicable; its object was to reserve land, *where required*, along the sea-beach for *public Roadways*, but it was not meant to exclude the possibility of erecting wharves, or water-side stores, in any part of the Colony; but if applied at all, it would equally have forbidden a Grant of the land, or indeed, of any land so situated, to the New Zealand Company or its purchasers.

Commissioner Spain therefore acting as he did, not under the authority of the Ordinance, but under direct authority from the Crown, and having in himself the full discretion of the Crown itself, would not hold himself obliged to observe rules, which were unsuitable to the circumstances, and which did not bind him.

Scott's Title, thus freed from technical objections, appears to me to stand on higher ground than the Land and Emigration Commissioners have assumed. The Crown by its instructions of the 14th August, 1839, declared that "no Titles should be recognised, which did not proceed from *or should not be allowed* by Her Majesty." Then Commissioner Spain was despatched from England with plenary authority *to investigate and determine* what Titles should be allowed. He investigated Scott's Claim and *determined* it in his favour. That *determination* has, I conceive, the effect of a *Royal allowance*, upon which the issue of the Crown Grant was matter of course.

But the Company complain of the Grant to Scott, and urge their right to indemnity, upon other ground. They say that it was issued in breach of an *express engagement* by the Crown to include the land in their Grant.

If the fact were so, their demand for indemnity might be independent of the question, or to the validity of the Grant to Scott, whether that Grant were valid or not, if the Crown had really pledged itself to grant the same land to the Company, they might have a case against the Crown for indemnity; though whether the blame, under such circumstances, rested with the Government at Home or in the Colony, is in my judgment material, in considering the question whether the loss should fall on the Imperial Government or the Colonial; what the Company say (in their 12th report) is that Lord Stanley's despatch to Governor Fitzroy was at variance with the true meaning of his, (Lord Stanley's) undertaking to the Company. They evidently lay the blame on Lord Stanley, not on the Governor. If the fact were that Lord Stanley wrongly instructed the Governor, or failed to instruct him as to the nature of the engagement with the Company, I do not think the Colony ought now to be required to make good Lord Stanley's mistake.

But, in truth, I am confident, that, fairly examined, it will be seen that the circumstances warrant no such charge against Lord Stanley. On the contrary, his instructions to Governor Fitzroy were very intelligible and consistent; and the whole course of proceeding adopted towards the Company by the Home and Colonial Governments was in perfect good faith, and in strict accordance with the engagements entered into. I do not think the Company's proceedings are marked with the same characteristics.

The Company first insist, on Governor Hobson's undertaking of 1841, whereby he engaged to include in the Grant to the Company,—“All land within the Town of Wellington validly purchased by any one from the Natives” (of course including Scott's claim), *the Company compensating all previous purchases according to a Scale to be fixed by a Local Ordinance.*” Col. Wakefield, (the Company's agent) assented to them. Governor Hobson proceeded to carry them into effect, by proposing a Local Ordinance to settle the terms of compensation; but the Company in England repudiated their liability to compensation, protested against the Ordinance, obtained its disallowance, and now insist that Governor Hobson's agreement has not been fulfilled by the Crown. The Company having rejected its essential condition, of course it fell to the ground. That is the view which the Land and Emigration Commissioners take, and it is the only just one. The Commissioners treat it as *superseded* by Lord Stanley's arrangement; it may, I think, be more properly treated as *annulled* by the Company itself.

However from that time down to May, 1843, a correspondence having a mixed character of controversy and negotiation, was carried on between the Crown and the Company, for the Settlement of their Land Claims; the Company on the one side insisting on their right to an *absolute* Grant of all the lands they claimed, without regard to any prior right of Native or European settlers; (the only adverse claim which they submit to recognise being that of the *Natives* to lands *in actual occupation*.) The Crown, on the other side, (through Lord Stanley) expressing its desire to assist the Company, by all means in its power, but declaring its intention to protect the rights of all their parties, whether *Natives or Europeans*, and referring the decision of those rights to the Commissioner of Land Claims.

Laws & Ordinances of N. Z. P.P. 28th Feb. 1842, p. 5.

P. P. 1844. App. 503.

Ibid p. 4—5.

Ibid p. 527—528.

See Appendix to P. P. 1844, 9.