OPINION

OF

THE ATTORNEY-GENERAL

ON

QUESTIONS RAISED BY THE HON. NATIVE MINISTER

IN RELATION TO

THE CLAIM OF MESSRS. WHITAKER AND LUNDON.

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

WELLINGTON.

1871.

OPINION OF THE ATTORNEY-GENERAL ON QUESTIONS RAISED BY THE HON. NATIVE MINISTER IN RELATION TO THE CLAIM OF MESSRS. WHITAKER AND LUNDON.

REFERRING to the Whitaker and Lundon case, will the Attorney-General be good enough to advise concerning it, and especially—

1st. Would Messrs. Whitaker and Lundon's title have been invalidated by the 73rd section of the Constitution Act?

2nd. Were Messrs. Whitaker and Lundon prejudicially affected by the retrospective legislation contained in the 8th section of "The Native Land Act, 1869"?

The Attorney-General's attention is directed to the proceedings before the Select Committee, and to the two pamphlets, one on either side, referred to therein.

Wellington, 30th October, 1871. DONALD MCLEAN.

(1.) I think that the provisions of the 73rd section of the Constitution Act did not apply to the land in question after the issue of the certificate of title. These provisions apply only to land owned or used by the Natives as tribes or communities.

The certificate of title in this case had been issued certifying that certain individual Natives, four or five in number, were owners of the land as tenants in common according to Native custom.

This is the usual form of certificate where the certificate is to be followed by a Crown grant of the fee-simple to the individuals named in the certificate. The certificate that a tribe is entitled would so state.

The 23rd section of "The Native Lands Act, 1865," provides that any individual Native may make his claim, and for bringing it before the Court for investigation he is to state what tribe or what persons are interested with him.

The Court is then to investigate and to certify the names of the persons or of the tribe who, according to Native custom, are interested in the land.

I have not seen the application in this case; but the certificate did not find that any tribe or community was interested in the land, but, on the contrary, that certain persons named owned the land as tenants in common.

The Court therefore did not find that the land was tribal. That finding is decisive as to the operation of the 73rd section of the Constitution Act.

But even if the land had been tribal land, if the Court granted a certificate in the names of the individual Natives interested, I think that the provisions of the Native Lands Acts are such as to convert the tribal title into title in the individuals as joint tenants, or, if the Court so found, as tenants in common, and to enable the individuals to deal with the land before Crown grant. It is to be remembered that the Native Lands Acts being later than the Constitution Act, and the General Assembly having the power to repeal, and therefore to alter, the 73rd section, the 73rd section must be read subject to the Native Lands Act; and that so far as the Native Lands Acts are inconsistent with the 73rd section of the Constitution Act, the 73rd section must yield.

In this case the Court certified that the Natives named were owners as tenants in common.

I think it clear that the operation of the Native Lands Acts is to enable Natives who are certified to be the owners of land according to Native custom to deal with the land before Crown grant.

This was so under the Act of 1862, and I think the 47th, 55th, 58th, and 75th sections of the Act of 1865, and the 17th section of the Act of 1867, show that it is so under those Acts. It is true that the 74th section requiring interpretation mentions only conveyance of lands "granted" under the Act; but that cannot be held to limit the interpretation and effect of the express provisions contained in the sections above referred to.

(2.) Mr. De Hirsch admits in his pamphlet that Messrs. Whitaker and Lundon had the law on their side. That was so; and it is certain that the decision of the Native Land Court under the Act of 1869 deprived Messrs. Whitaker and Lundon of the position which the law gave them under the Act of 1865.

For Mr. De Hirsch's contract having been made before the issue of the certificate, was void under the 75th section of "The Native Lands Act, 1863."

If, as appears to be the case, Messrs. Whitaker and Lundon's contract was the first after the issue of the certificate, that contract was the first one binding on the Natives, and the negotiations or contracts of Mr. De Hirsch prior to the issue of the certificate, though confirmed after the issue of the certificate, but subsequently to the contract with Whitaker and Lundon, did not affect Whitaker and Lundon's contract; it was quite immaterial whether Messrs. Whitaker and Lundon knew of the prior contract or not.

The 8th section of the Act of 1869 enabled Mr. De Hirsch to obtain an order of the Court, the effect of which was to validate the contract of Mr. De Hirsch, and consequently to render ineffective the contract of Messrs. Whitaker and Lundon.

JAMES PRENDERGAST.

October 30, 1871.