New Zealand Lost Cases Project

The Queen v Clarke

24 June 1848

Supreme Court, Auckland, Martin CJ and Chapman J

Keywords: Land; Real Property; *Scire facias*; Crown grants; missionaries; prerogative; Royal Instructions; Land Claims Ordinances; Land Commissioners.

Primary Source: *New Zealander*, 28 June 1848, p2

Additional Sources: 'Auckland civil minute book', 1844-1856, pp.143-146, BBAE 5635/1a, Archives New Zealand, Auckland. A printed version of the decision entitled 'Report of Proceedings in Queen v Clarke 24 June 1848' is also reproduced in the *Southern Cross* of 8 July 1848. The *New Zealand Spectator and Cook's Strait Guardian* reprinted the version recorded in the *New Zealander* dated 28 June 1848. A fuller 'Report of the Proceedings of a Trial in the Supreme Court at Auckland, on a writ of *Scire Facias* – The Queen v George Clarke', (containing a record of the arguments of legal counsel) was printed by R Stokes at the 'Spectator Office, Te Aro' in Wellington in 1848.

Significance: The decision of *The Queen v Clarke* is, of course, relatively well-known on account of it having been successfully appealed by the Crown *ex parte* to the judicial committee of the Privy Council, the report of which can be located in (1849-1851) 7 Moo PC 77; 13 ER 808 (as well as [1840-1932] NZPCC 516), yet the decision of the Supreme Court has remained relatively inaccessible. The defendant, George Clarke senior (1798-1875), a member of the Church Missionary Society (serving as a catechist and lay missionary), was the Chief Protector of Aborigines from 1840 until 1846. According to his notebook, the proceedings were heard before Chief Justice Martin, principally on 4 and 7 March 1848 [refer to 'The Queen (by Her Majesty's Attorney General for New Zealand) ag[ains]t George Clarke of Waimate[,] Settler[,] Defendant', 7 March 1848, 'Auckland civil minute book',1844-1856, pp.143-146, BBAE 5635/1a, Archives New Zealand, Auckland].

The decision is of interest in that represents a relatively extended discussion of Chief Justice Martin's understanding of the royal prerogative relating to the granting of lands in a colony and how the prerogative power related to ordinances, the royal instructions to a governor and the Charter of the Colony of New Zealand. As noted in Mark Hickford, '"Settling some very important principles of colonial law": Three "forgotten" cases of the 1840s', xxxv, 1 (2004), *Victoria University of Wellington Law Review*, pp.1-71, 25 (footnotes omitted): 'Strictly speaking, the Privy Council left open the vexed question of whether the authority of the Governor could be exercised to make grants outside of the provisions of land claims ordinances. Nevertheless, it would seem implicit from the Privy Council's comments that "this is not a grant professing or intended to be made, as a matter of bounty or grace from the Crown, but it is only intended as a confirmation of that report, which was made under the authority of the ordinance", that their Lordships held the view that the Governor's authority under the Charter of 1840 for New Zealand was not affected. More precisely though, their Lordships did not feel any need to give an opinion'. For a brief account of the Supreme Court

case and the appeal in the Privy Council, refer to J Rutherford, *Sir George Grey KCB, 1812-1898: A Study in Colonial Government* (Cassell, London, 1961), 138-139.

Transcript of the Decision[i]

[Reporter's note: Legal counsel were William Swainson, the colonial Attorney-General for the Crown and Merriman for the defendant, George Clark Senior.]

The Chief Justice attended this morning, and delivered judgment as follows, in the cause The Queen against George Clarke.

This is a suit of *scire facias* to annul a Grant made, in the name of the Crown, by Governor Fitzroy to the Defendant. The Grant is in the usual form, and comprises 4000 acres of land, of which the boundaries are set forth in the Grant. This piece of land was claimed by the defendant as having been purchased by him from certain of the natives of this country before the proclamation of the Queen's sovereignty over these lands. The claim was examined by Commissioners Godfrey and Richmond; who reported upon the same, recommending that a Grant of 2560 acres should be made to the defendant. Their report was confirmed by the officer administering the government, and the confirmation was publicly notified in the Government *Gazette* of 21st June, 1843. Subsequently Governor Fitzroy referred the defendant's claim to Mr. Commissioner Fitzgerald, who reported upon the same on the 2nd of May, 1844, and recommended that the defendant should receive a Crown Grant to the full extent of his claim. In pursuance of Mr. Commissioner Fitzgerald's report, this Grant was made on the 16th of May, 1844. The question now before the Court is raised upon a demurrer to the defendant's plea. It is therefore incumbent upon the Court to examine the pleadings upon both sides, and to give judgment according to the right of the case, as it appears upon the whole record taken together.

The objections, which are assigned as grounds of demurrer, correspond in substance with the objections stated at the close of the declaration. The only difference is this — that they are applied in the one case to the report of Mr. Commissioner Fitzgerald; in the other, to the Grant itself. This furnishes a natural and clear division of the whole matter. I will therefore follow it, and consider, in the first place, whether the report was irregular or illegal; and secondly, how far any irregularity or illegality in that report would affect the validity of the Grant to the defendant. The first objection, then, to the report is the following— "That the said Commissioner R. A. Fitzgerald was not nor was any single Commissioner, authorised by the provisions of the Land Claims Amendment Ordinance (Sess. 3, No. 3), to *rehear* claims or to *reverse* reports already duly heard, investigated, and reported upon by two Commissioners, pursuant to provisions of the Land Claims Ordinance, Sess. 1 , No. 2." In order to estimate the force of this objection, it is necessary to consider the two reports which are referred to in the pleading, and also to advert to certain facts, of which though not stated on the record, the court is bound to take judicial notice. The first Land Claims Ordinance (passed 9th June, 1811 [*sic*; 1841]) directs (Sec 6) that "the said Commissioners shall in every case inquire into, and set forth, so far as it shall be possible to ascertain the same, the price or valuable consideration, with the stirling value thereof, paid for the lands claimed- and shall also inquire into, and set forth the number of acres which such payment would have been equivalent to, according to the rates fixed in a schedule annexed to this Ordinance." That schedule, marked B, was framed to comprise all purchases made between 1st January, 1815, and 31st December, 1839; and the rates fixed therein ranged from 6d. an acre to 8s, an acre. It was further "provided that no Grant of land shall be recommended by the said

Commissioners, which shall exceed in extent two thousand five hundred and sixty acres, unless specially authorised thereto by the Governor, with the advice of the executive council." In the second session of the legislative council, another Land Claims Ordinance was passed (Sess. 2, No. 14). It enacted (s.4) that "Whenever it shall be reported by any Commissioner or Commissioners of land claims that any person is entitled, under the provisions of the said Ordinance (meaning the original Land Claims Ordinance) to a Grant of land in respect of his alleged purchase, such person shall, on the report being confirmed by his Excellency the Governor, be entitled to a Grant from the Crown out of the land validly sold to such person of four times as many acres as he shall be found to have expended pounds sterling, in manner and for the purposes hereinbefore mentioned." Those purposes included, not only the purchase of the land, but also various heads of expenditure, connected with the conveyance of emigrants to the land, and their settlement thereon. By this second Ordinance so much of the former Ordinance as restricted the recommendations of the Commissioners to 2560 acres, and generally so much of that Ordinance as was inconsistent with the new arrangement, was repealed. This second Ordinance was passed 25th February, 1842. It came into operation at once; and whilst it continued in operation, Commissioners Godfrey and Richmond made their report, dated 30th May, 1843. They reported that they were of opinion that George Clarke made a bona fide purchase from the native chiefs on the 4th of March und the 26th of September, 1836. They estimated the payment made for the land at £476 18s.; and they recommended that a Grant for 2560 acres, with certain exceptions, should be issued. It is to be observed, that there is nothing in the report to show that any monies had been expended by the defendant in the manner or for the purposes mentioned in the Ordinance then in force, save only the purchase money given to the natives for the land itself. Now according to the new rate fixed by that Ordinance, the defendant was entitled, in respect of that purchase money, to only 1908 acres; and I see that, in the confirmation of the report referred to by the record (Government Gazette, 21st June, 1843), the quantity to be Granted is stated accordingly at "1908 acres, with certain exceptions". It does not appear, then, in what way the Commissioners conceived the defendant to be entitled to 2560 acres, but it is important to bear in mind that the number of 2560 was not fixed upon as being an absolute limit set by law. As the law then stood, there was no restriction at all upon the quantity which the Commissioners might recommend to be Granted, except so far as a restriction was implied in the rule that the claimant should receive, *out* of the land validly sold to him, a Grant of four times as many acres as he should have expended pounds sterling. By the Government Gazette of 6th September, 1843, it was notified to the public that the Ordinance just mentioned had been disallowed by her Majesty. The necessary consequence of this was the revival of the original enactment of June, 1841. In the case, then, of this defendant a revision of the report made by Commissioners Godfrey and Richmond became necessary. The difference between the effects of the two Ordinances was to him very considerable. Under the former Ordinance (even supposing the calculation to be made in the manner least favourable to the defendant, by taking, in Schedule B, the highest sum per acre get against the year 1836, in which the defendants purchase was made — namely, 2s. per acre), the consideration money would have covered 4769 acres, if the defendant's claim had included so many. Subsequently to the disallowance of the second Land Claims Ordinance, and on the 13th of January, 1844, a third Ordinance was passed, intitled [sic] "An Ordinance to amend the Land Claims Ordinance, Sess. 1, No. 2." This third Ordinance, after reciting the original Ordinance, enacts as follows:— "All the powers of hearing, examining, and *reporting on* claims to land, and *all other the powers* and authorities given by the said recited Ordinance to any two Commissioners, may be exercised as fully and effectually by any single Commissioner, as the same have heretofore been exercised by two Commissioners." Under this Ordinance Mr. Fitzgerald was acting as a single Commissioner when he made his report of 2d May, 1844.

Of the three objections to this report, the first, which 13 now under consideration, refers to the *nature* of the power exercised by the Commissioner in this report. The objection is, that no single Commissioner could "*rehear* claims or *reverse* reports already duly heard, investigated and reported upon by two Commissioners." As to the way in which this report did interfere with or modify that made by the two Commissioners, the only evidence is the report itself. Now, upon inspection of the report, it is plain that more claims than one are included therein, and more Grants than one are recommended; but the report does not specify or distinguish the claims in detail. Grants to the amount of 5500 acres are recommended. Taking the report as I find it, and combining with it the admitted fact that the Grant now impeached was issued in pursuance of it, I infer that this report did not differ from that of the two Commissioners in any other point than this, namely, that Commissioner Fitzgerald recommended a Grant of 4000 acres, in lieu of the 2560, recommended by the two Commissioners. Now in this I see no rehearing or reversal of the former report. The Commissioners, in calculating the number of acres to be recommended to be Granted, had proceeded upon a rule which was then law, but was now no longer so. The restoration of the old rule had made it necessary to have those calculations reconsidered and revised, before Grants could be issued. The single Commissioner did nothing more than review a calculation, the principle of which, in all the reports made under the disallowed Ordinance, was inconsistent with the revived law. I do not see that the substance and merits of the original report were affected; or that anything therein was unsettled, which had been settled in conformity with the law us it now stood. It appears to me that (so far at any rate as this claim is concerned) Mr. Commissioner Fitzgerald did not, in making this report, exercise any powers but such as were given to him by the words of the Ordinance under which he acted. I come now to the second ground of demurrer, which runs thus; "that the said Commissioner, R. A. Fitzgerald, was not, nor was any single Commissioner, authorised to report upon claims to land under Land Claims Ordinance (Session 1, No. 2) which he had not heard and examined in manner prescribed by the said Ordinance." This is an objection to the person of the Commissioner. It is contended (if I rightly apprehend the argument of the learned Attorney General) that no report could lawfully be made upon any claim except by the very Commissioners who heard and examined the claim. The objection is grounded on the words of the Land Claims Ordinance, which enacts (section 3) that it shall be lawful for the Governor of the colony of New Zealand to appoint Commissioners, who shall have full power and authority to hear, examine, and report on all claims to Grants of land, &c.; and in the 6th section, that "the *said* Commissioners shall in every case inquire into and set forth, so far as it shall he possible to ascertain the same, the price or valuable consideration, with the sterling value thereof, paid for the lands claimed — and shall also inquire into and set forth the number of acres which such payment would be equivalent to, according to the rates fixed in a schedule annexed to this Ordinance. And if the *said* Commissioners, or any of them, shall be satisfied that the person or person claiming such lands or any part thereof is or are entitled according to the declaration of Her Gracious Majesty as aforesaid to hold the said lands or any part thereof they the said Commissioner's shall report the same and the grounds thereof to the said governor accordingly. "Now it may be fairly conceded that it was the intention of the legislature that, as a general rule, the recommending Commissioners should be the hearing and examining Commissioners. Such would be the natural and reasonable course. But it is argued that the rule is absolute and imperative in all cases. Now, in the first place, no rule of law can be imperative, unless it be at the same time practicable. No act can be pronounced illegal on the ground of noncompliance [presented as "non-compliance" in the *Spectator* version of the report] with a condition required by law, unless it appear that compliance was possible. It could never be held that, if the Commissioners died after

investigating the claim but before any report had been made, no report at all should be made in such a case, Therefore, if this construction of the words were clearly the true one, it would be necessary to show that it was practicable to refer this particular claim back again to the Commissioners who originally heard it for their revised and final report thereon. But on this record, there is no averment to that effect. For any thing which appears in this record, the original Commissioners may have ceased to hold their office, may have become incompetent to perform the duties of it, or may have died in the interval. But, if such a restriction was ever intended, it was abandoned and repealed by the Ordinance under which the single Commissioner acted, which says "all the powers of hearing examining and reporting on claims to land, and all other the powers and authorities given by the said recited Ordinance to any two Commissioners may be exercised as fully and effectually by any single Commissioner, as the same have hitherto been exercised by two Commissioners." Whatever power the word "said" may have to specify and to restrict, the word "any" seems to have equal power to generalise and to extend. I consider therefore that this ground of demurrer also is insufficient. I proceed to the third and last ground "that it is not alleged in the said plea, that the said Commissioner, Robert A. Fitzgerald, was specially authorised by the governor in Council to recommend a greater quantity than 2560 acres of land to be Granted to the said defendant. Now it is admitted upon the record that "the recommendation of Mr. Commissioner Fitzgerald in the pleading motioned was not *preceded by* or made in *pursuance of* any special authority given for that purpose by the Governor in Council as required by the Land Claims Ordinance." The terms of the Ordinance clearly require that, before the Commissioner shall recommend an extended Grant, he shall be in possession of a special authority enabling him thereto. The words are "Provided that no Grant of land shall be recommended by the said Commissioners, which shall exceed in extent two thousand five hundred and sixty acres, unless specially authorised thereto by the governor with the advice of the executive council." In this case, the Commissioner, at the time of making the recommendation, had not received any such authority. He assumed to exercise a power which the law had witholden [sic] from him. The recommendation then was illegally made and the report was, so far at any rate, vitiated. It remains to consider the effect of this admitted illegality in the Commissioner's report upon the Grant subsequently made to the defendant in pursuance of that report.

But first, having noticed all the objections made to the Commissioners report, I pass to the reasons urged by the learned Attorney-General for setting aside the Grant itself. The first is: "because the said Grant was made contrary to the said Commissioners report (meaning the report of Messrs. Godfrey and Richmond) so made and confirmed as aforesaid." This objection involves two assumptions: one of law, and the other of fact. The first is, that a Crown Grant to a land claimant made contrary to the Commissioners' Report upon the claim, the report having been confirmed, is necessarily void. The second assumption is that, at the time of making the Crown Grant to the defendant, the Commissioners' Report was a Report "made and confirmed." The question of law resolves itself into the one main question, to which I shall address myself presently, namely, how far a Crown grant is connected with or dependent upon, the Commissioners' Report preceding it? But could the Report of Commissioners Godfrey and Richmond be regarded as being, in fact, a Report "made and confirmed," at any time after the disallowance of the Ordinance upon which it was based? Certainly it was once confirmed, but the disallowance of the Ordinance necessarily (as it appears to me,) opened the case again, and did away with the confirmation. The claimants were remitted to the larger bounty and more liberal scale of the first Ordinance and it was needful that every report which had been made upon the footing of the 2nd Ordinance, should be reconsidered and revised. The report had now lost its character of finality. It appears to me

that no Grant could in any wise be void for contrariety to a Report which was based upon a principle that was itself in contrariety to the revived law. The other reason for annulling the Grant is stated thus: “Because no greater quantity than 2,560 acres of land could or can be Granted to any claimant under the provisions of the said Land Claims’ Ordinance, except upon the recommendation of the Commissioners who heard and examined the claim in manner prescribed by the said Ordinance, being specially authorized thereto by the Governor, with the advice of the Executive Council.” This reason comprises two distinct objections: the former derived from the fact that the report in pursuance of which the Grant was toned, was not made by the Commissioners who originally examined the claim, the latter from the want of legal authority in the Commissioner who made that report. As to the former, I have already indicated my opinion in the remarks which I have made upon the same objection when applied to the report itself. If the report could not be pronounced illegal merely on this ground of a diversity in the persons of the Commissioners, still less could the Crown Grant which followed it. The latter objection remains. The Commissioner no doubt exceeded his powers. The Land Claims' Ordinance imposed a condition precedent to the recommendation of an extended Grant, and that condition had not been fulfilled when the recommendation in this case was made. The recommendation then being illegal, in the Grant, made in pursuance of that recommendation, illegal also? Thus the one main question recurs, upon which the Court has to decide, and to which I now proceed.

Our first business is to look to the words of the Ordinance itself. Now there is certainly no express enactment in the Ordinance that a Grant such as thus shall be void by reason of its being preceded or made in pursuance of an irregular or illegal recommendation. Of course I do not mean that express words of avoidance are necessary for the purpose of avoiding a Grant, in any case where the Grant is plainly contrary to the meaning and intent of the law. For example, if the Grant had laid down a positive and absolute limit to the number of acres to be Granted in any case without saying more, there would be no hardship in holding a Grant of a greater number of acres void. For the Grantee would be bound to take notice of the law, and a comparison of the terms of the law with the terms of the Grant would bring home to him at once a knowledge of the illegality. But it is not contended that this Grant purports to convey more than under this ordinance the Grantee might lawfully receive. We have nothing lime to do with any question of intrinsic illegality. There is in the whole Ordinance no enactment avoiding any titles, except the general enactment (in session 2) that “all titles to land which are held or claimed by virtue of purchases from the chiefs or other individuals of the aboriginal tribes, and which are not, or may not hereafter be allowed by her Majesty, her heirs and successors, are and the same shall be absolutely null and void:” words which naturally suggest the inference that the legislature intended all titles so confined to stand good, unless indeed the Grants were in themselves contrary to law. The words relied on as having the effect of invalidating this Grant refer (it will be seen) to the recommendations to be made by the Commissioners, and not at all to Grants to be made by the Governor. The words are “Provided that no Grants of land shall be *recommended by the said Commissioners*, which shall exceed in extent 2560 acres, unless specially authorised thereto by the Governor, with the advice of the executive council.” Here is a direction given by the legislature to the Commissioners, but none at all given to the Governor, nor is there one word respecting the making of a Grant or the effect of a Grant when made. Is this court, then, to imply an enactment not expressly made? Certainly the court is bound to do so, if the intention of the legislature be otherwise plain and beyond doubt. But it behoves the court to consider well before it says what the legislating has not said. If an implication of law is to oust a man of his freehold, it behoves that implication to be clear and inevitable. It is laid down amongst the rules to be observed in the construction of statutes, that “a statute shall never have an

equitable construction in order to overthrow an estate." [Bac. Ab. Statute I. 461] And this, rule flows from the very nature of the law, which has for one of its man objects to give quiet to titles and permanence to property. Most of all must it be the duty of the court to reject such an equitable or extended construction, where the estate to be overthrown is founded upon a purchase for valuable consideration. The Defendant is admitted to be a purchaser in good faith and for valuable consideration. It is on this ground alone that he receives a Grant. The Crown has Granted nothing to him but what he had previously acquired for the Crown. It was by the act, and at the cost of the Grantee, that the very power of Granting accrued to the Crown. It is laid down in 6 Bac. Ab., *Prerogative*, F. 516, "That when the King's Grants, are upon a valuable consideration, they shell be construed favourably for the patentee for the honour of the King." This maxim is not, in its terms, precisely applicable to the present case: but it is on instance and illustration of a general and settled principle of law. But over and above the general principle just stated, It appears to me that there is enough in the Ordinance itself to show that such an extended construction can have no place here; and also that the distinction which I have adverted to, as apparent in the language of the Ordinance, between a recommendation by the Commissioner and a Grant by the Governor, is not a verbal distinction only, but a very substantial one. After a number of particular regulations have been prescribed in the body of the 6th section, for the guidance of the Commissioners in framing their reports, the section concludes with the following words, "Provided also that nothing herin contained shall be held to oblige the said governor to make and deliver any such Grants as aforesaid, unless, his Excellency shall deem it proper so to do." There is, then, so little necessary connection between a report from the Commissioners and a Grant from the governor of the lands recommended by the Commissioners to be Granted, that after due and full inquiry has been made by the Commissioners, and after a favourable report has been made, and that in the most exact conformity to the regulations of the Ordinance, yet it is, after all, left wholly in the discretion of the governor, whether to issue a Grant or not. The report however complete and regular, gives to the claimant in whose favour it is made no legal right to a Grant. This being so, — the claimant deriving no legal benefit from the report though made in most exact compliance with the requirements of the Ordinance, can it be fairly held that a non-compliance with one of those requirements shall operate not simply to his prejudice, but to the defeating of his claim even after it has been confirmed by a Crown Grant? I cannot think that the Legislature intended to lay down a rule so greatly wanting in mutuality, as between the Crown and the claimant, as that the connection between the report and the giant should be broken off when it might operate in favour of the claimant, and should subsist when it might operate against him.

Hitherto I have confined myself to these points; first, that Crown giants are not within the words of the proviso, or of any prohibitory enactment, in the Land Claims Ordinance; and 2ndly, that this Court cannot lawfully extend those words so as to include them. And those two considerations appear to me to constitute a complete answer to all the objections urged against this Grant. I wish however carefully to guard myself against being understood to imply that if Crown Grants had been within the words— if it had been expressly provided that no extended Grant should be made without a special authority from the Governor and Executive Council — that therefore a Grant, if it happened to be made without that special authority, would be void in the hands of the Grantee. On the contrary (although the question does not directly arise here) I conceive that, even then, it would be necessary, in older to avoid the Grant to shew that the non[-]compliance with the requirement of the Ordinance was procured by, or at least known to the Grantee.

From the notes collected by C.B. Comyns, of old cases in which the validity of Crown Grants came in question, it is plain that one chief test, by which it was decided whether errors, false recitals or misdescriptions, contained in a deed of Grant were sufficient to avoid the deed, was this: if they were such as to create a presumption that the King had been deceived by misrepresentation, or false suggestion or concealment, on the part of the Grantee, then the deed was void: but otherwise, not— (Comyn's Digest, *Grant*. G. 4—9. and Bacon's Ab. *Prerogative*—F.514.) And in one of the few modern cases in which the same question has arisen, Tindal, Chief Justice, in delivering the judgment of the Court, said—"We think the present case is to be governed by the principle laid down in the case *Rex et Regina v. Kempe* (1 Lord Raymond 49) that where the King is not deceived in his consideration, nor otherwise to his prejudice, by any suggestion on the part of the Grantee, but the intent was to pass the interest expressed in the Grant, only the King has been mistaken in the law, there he shall not be said to be deceived, to the avoidance of the Grant." — (*Gledstanes v Earl of Sandwich*, – 4 Mann and Grang 1029.) The same principle pervades the judgment of the Court of Common Pleas, in *Alcock v Cook* — 5 Bing, 316. It is unnecessary to trace this branch of the subject further. It suffices to observe, that on this record there is no averment that the defendant was party to, or cognizant of the illegality of the recommendation made by Mr. Commissioner Fitzgerald. This remark applies equally to the other objections urged against the Grant. The same is to be said of nearly all the remarks I have made upon the third objection. In terms they are confined to that, as being the only one which appears to me of any weight, but, in substance, they extend equally to the others. Looking then at the whole case, I find, on the one hand, that the Grant is good in form— that it purports to convey to the defendant nothing but what the Governor in the name of the Crown, could lawfully convey to him – that it interferes not with any right of any subject of the Crown—that there is no misrepresentation or misconduct of any kind imputed to the Grantee; on the other hand, I find that, in a proceeding preliminary to the issuing of the Grant, an act was illegally done by an agent, not of the Grantee, but of the Crown — an act affecting, not the Grant itself, but a document distinct from the Grant—and that the Grantee is not alleged to have been connected in any way with that act or even to have had any knowledge of it. Under these circumstances, and for the reasons already stated, I am of opinion that this Grant is good in law.

The Chief Justice then proceeded to read the judgment of Mr. Justice Chapman,[ii] as follows:

This is an action of *scire facias* brought for the purpose of trying the validity of a deed of Grant, made by the late Governor, Captain Fitzroy, to the defendant, under the Public Seal of the colony, and bearing teste the 16th day of May 1844. The circumstances disclosed by the pleadings are these: Mr. Clarke was a claimant of a considerable parcel of land, as a purchaser from the aboriginal natives, before the establishment of the Queen's authority in these Islands. In due course, Mr. Clarke preferred his claim, which was referred by the then Governor, Captain Hobson, to two Commissioners under the provisions of the Land Claims' Ordinance (Session 1. No.2) The Commissioners reported in favour of a portion of Mr. Clarke's claim only, recommending a Grant of 2500 acres. This report was confirmed by Mr. Shortland, the officer administering the government at the time; but notwithstanding such report and confirmation, a Grant of 4000 acres was afterwards made to Mr. Clarke by Captain Fitzroy. This Grant the Attorney-General, in his declaration, says is void on two grounds. 1st — because the Grant itself is contrary to the recommendation of the Commissioners and, 2nd, the governor had no power to Grant more than 2500 acres, except after a recommendation of the Commissioners, specially authorised by the Governor, with the advice of the Executive Council. Mr. Clarke's plea is in substance: that after the making of the report by the Commissioners, and before the issuing of the Grant to him the defendant, his claim was

referred by his Excellency the then Governor under the provisions of the Land Claims Amendment Ordinance (Sess. iii. No. 3) to a single Commissioner, who, on the 2nd May, 1814, reported, recommending a Grant of 5500 acres less certain exceptions. The plea contains no averment that the recommendation was made in accordance with a special accordance with the governor. To this plea the Attorney-General demurs, assigning for causea of demurrer: 1st, that the said Commissioner in the plea mentioned was not authorised by the last recited Ordinance, to reverse a report already made by two Commissioners under the Land Claims' Ordinance (Session 1 No. 2.) 2ndly, that he was not authorised to report on claims which he himself have not heard in the manner prescribed by the said Ordinance. Upon the state of the pleadings the court is to consider the whole record, not merely confirming itself to the point raised by the demurrer, and is to give judgment for the party, who upon the whole appears to be entitled to it [Bacon Abr: Pleas (A N 3.) Petcrsd. Vol.8. 12, and cases there collected.]

The broad question for the court to determine is this: — Had his Excellency Governor Fitzroy legal authority to execute a Grant to a land claimant under the Ordinance (Session 1 No. 2), embracing quantity of land exceeding the amount recommended by the Commissioners, as well as the amount prescribed by the Ordinance. I confine myself to this simple point; because, if the Governor had such power, the second reference to the single Commissioner was wholly unnecessary: and if the Governor had not such power, his wrongful act could not be cured by Commissioner Fitzgerald's recommendation, made, as it appears, contrary to the express provisions of an Ordinance, (binding at all events on him) without being "specially authorised by the Governor and Executive Council to make such recommendation." The learned Attorney General draws a distinction between "a Grant made by the Crown itself" and "a Grant made by the Governor in the name of the Crown:" which seems to me to be merely verbal, and to be fraught with no legal consequences whatever; and this I think will appear when we have ascertained the nature and extent of the power under which the Governor makes and executes Grants of land. That portion of the Queen's prerogative which relates to the making of Grants of land, is conferred upon the Governor by a clause of the Charter of 1840, under the Great Seal, and is couched in these words: — "And we do hereby give and Grant to the Governor of our said colony of New Zealand for the time being full power and authority in our name and on our behalf— but subject nevertheless to such provisions as may be in that respect contained in any instructions which may from time to time be addressed to him by us for that purpose— to make and execute in our name and on our behalf, under the public seal of the said colony, Grants of waste land to us: belonging within the same, to private persons, for their own use and benefit, or to any persons or bodies politic or corporate in trust for the public uses of out subjects there resident or any of them." It may seem that the Governor's legal power under this clause is restrained and limited by the sentence relating to future instructions. I am aware that some persons of learning and experience have adopted that view; but I conceive that such an opinion involves a misapprehension of the distinction between Letters Patent under the Great Seal, and instrument under the Signet and Sign Manual. The Royal Prerogative is of such a nature that at Common Law, no portion of it can be communicated or transferred except under the Great Seal; nor does the 3 & 4 Vic. c. 62, under which the Charter of 1840 was Granted, break in upon the ancient rule. Within the realm of England indeed, the prerogative is, for the most part, "incommunicable" (Bro. Abr. Patents) meaning of course in an executory state; and it is only *ex necessitate* that the power of delegation to colonial Governors has grown up. It is only by matter of record that the Queen can Grant any franchise privilege, power, honour, or dignity which she has authority to Grant (Lane's Case, 2 Co. 16 b.); and it is even said by Lord Coke (2 Inst. 18 b.) that the Queen being a body politic, can only command by matter of

Record. It is, clear therefore that an Instrument under the Signet and Sign Manual is insufficient to create powers affecting the prerogative. Royal Instructions are undoubtedly morally binding on Governors, as an expression of the Royal Will; to some extent they may also create legal responsibility; but an act of a Governor contrary to such instructions is not absolutely void as regards the Queen's subjects, and is only voidable where the Crown retains the power of disallowance. The true nature of Royal instructions is that of private directions to the Governors of colonies as to the manner in which they shall use and excise the powers created by the more solemn and binding instrument under the Great Seal. As such, they are entitled to the highest respect and obedience; but to a certain extent they must be deemed to be addressed to the discretion of Governors, and not as intended to takeaway any portion of the powers once given under the Great Seal. I believe I am correct in saying that instructions have not been recorded in any colony: their character as a private instrument between the Crown and the Governor being carefully kept in view, the Crown retaining in its own hands the sole remedy in the rare case of infraction. As such an instrument cannot create, so it cannot abridge or revoke powers once validly created by Commission or Charter under the Great Seal. The modifying or revoking instalment should be of at least as high and solemn a nature as the creating instrument. In support of this view, I venture to cite the opinion of one of the ablest colonial constitutional lawyers among those by whom such subjects have been treated — the late Mr. Francis Maseres, the last of the Cursitor Barons of the Exchequer, and Attorney General in Canada after the conquest (about 1768-9). This opinion, although not a judicial decision, and therefore not of binding force, is nevertheless entitled to great respect, as well on account of the writer's colonial experience, as from the many years he afterwards devoted to the investigation and elucidation of such subjects. After having treated, at great length, of clauses in the Governor’s Commissions under the Great Seal, similar to that in the cited passage of the Charter of 1840 referring to Royal instructions, he concludes in these words:—“Thus if the King in his Commission under the Great Seal, gives the Governor a general power to Grant any lands in the province upon the usual conditions, and in his private instructions under his Signet and Sign Manual, direct him to forbear making Grants of such and such particular tracts of land which his Majesty chooses to reserve to himself, and the Governor notwithstanding such instructions makes a Grant in the said exempted tracts, such a Grant is valid by virtue of the general power of Granting contained in the Commission under the Great Seal, notwithstanding the exception of those particular tracts of land contained in the private instructions” (Canadian Freeholder Vol 2, 232) The view here taken of the superior binding force of the instrument under the Great Seal (whether Commission, or Charter, or both) is strengthened by the clause usually inserted in such instruments, but never to be found in Royal instructions, to this effect, “And we do hereby require and command all officers, civil and military and all other the inhabitants of our said colony of New Zealand to be obedient, aiding, and assisting to you, the said A. B. in the execution of this our Commission, and of the powers and authorities herein contained.” (Parl. Papers, May, 1841, p.33.) Commissioners and Charters have always been proclaimed and published in the official *Gazette*, as well as recorded; whereas it is only under the more liberal and candid policy of recent time, that Royal Instructions have been permitted to meet the public eye at all. Moreover, the Act of 9 and 10 Vic, c.103 “to make further provision for the government of the New Zealand Islands,” by enabling her Majesty to execute the powers contained in the act, and delegate the same to the Governor, not by letters patent, but by Royal instructions under the Signet and Sign Manual, is pregnant with the admission that such an enabling clause was necessary, that the power it conveys did not exist under the 3 and 4 Vic, G2, or at common law, and that it could not be exercised without an Act of Parliament.

I think, then, that although a Governor be morally bound by Royal Instructions, yet his legal power under the Charter of 1840 was saved whole.[iii] The proper legal view to take of his authority under the clause already cited is, that he was thereby endowed with so much of the Royal prerogative as relates to the making and executing of Grants of waste land within the colony of New Zealand, just as by another clause he was fully clothed with the prerogative of mercy within the same territorial limits. The deed of Grant runs in the Queen's name. Within the colony it has the same force and effect as a Grant under the Great Seal has in England. A Crown Grant in England is no doubt affected by certain Statutes from which a colonial Grant is free; but, on the other hand, a Crown Grant within the colony is affected by certain Statutes and Ordinances from which an English Crown Grant is free. These, however, constitute a local law in nowise affecting the nature of the instrument, which is really and truly what it is commonly called, namely, a Crown Grant; concluding the Crown, at once, without further confirmation by the Queen herself; and not subject to her Majesty's disallowance. Although it is not pretended that this case is affected by any "instruction," I have nevertheless thought it necessary (on account of what has fallen from the learned Attorney General, supported by other learned authority) to examine into the nature of the authority by which the Governor makes and executes giants of land.

If the view I have taken be incorrect in point of law — if we are not to treat Crown Grants within the colony as proceeding from an exercise of the Royal Prerogative under the express words of the Charter, I know not in what light to view them; nor do I know of any certain rules of law to which we can resort in order to direct us in construing and giving them effect. I assume it, therefore, as an indisputable principle, applicable to the colonial possessions of the Crown, that in construing Crown Grants under the colonial seal, the colonial courts are bound to resort to the law of England applicable to Grants of the Crown under the Great Seal, "so far as the same is applicable to the circumstances of the colony"

It may be laid down as a principle asserted in numerous cases, that the Queen's prerogative shall not be bound by a statute, except by express words naming the Queen (or King). In *King v. the Archbishop of Armagh* (reported 8 Mod. 8). It was held to be "clear that the King cannot be divested of any of his prerogatives by general words in an Act of Parliament; but that there must be *plain and express words* for the purpose; though all his other rights be no more favoured in the law than the rights of his subjects." The case of *Magdalen College* (11 Co. 76 b.) goes further, and seems even to protect rights of the Crown, other than prerogative rights. But certainly "in the most minute cases of the King's prerogative it cannot be taken away by general words in an Act of Parliament." (Viner citing the *Case of the College of Physicians* I Mod 13). An Ordinance of the Legislative Council of a colony, until disallowed by the Queen, has, within the colony, the same force and effect as an Act of Parliament hath within the realm of England and Wales, but it can hare no greater force. Hence in order to deprive the Crown of any of that portion of the prerogative which is wielded and exercised by the Governor by means of an Ordinance, such Ordinance must employ words which would be sufficient in an act of Parliament to bind the prerogative in England. That the wording of Acts of Parliament which have been held by the courts of law to restrain or limit the prerogative, is always precise and unambiguous, the examples I shall cite will shew. The 1 Ann. (Stat. 1.) c.7, enacts "that all and every Grant which shall be Granted by her Majesty, her heirs and successors any person shall be utterly void and of no effect unless such Grant, &c, be made for some term not exceeding one and thirty years or 3 lives." The operative words of the Australian Land Sales' Act are equally clear and express, "The waste lands of the Crown in the Australian colonies shall not, save as hereinafter is excepted, be conveyed or alienated by her Majesty, or by any person or persons acting on behalf or under the authority of her

Majesty, unless such conveyance or alienation be by way of sale." If the framers of the Land Claims Ordinance intended to restrain the exercise of the prerogative by the Governor, I am of opinion they have not employed words legally sufficient for that purpose. By that Ordinance; the Governor is authorised to refer claims to Commissioners appointed under the authority of the Ordinance. The Commissioners are restrained from recommending Grants in several cases, and the restraining words which it is contended bear on this case are these: "that no Grant shall be recommended by the said Commissioners which shall exceed in extent 2560 acres, unless specially authorised thereto by the Governor, with the advice of the Executive Council." In this Ordinance all words which could be construed in restraint of the prerogative are avoided, as it seems, with studious care; and after this strict abstinence from restraining words, assurance is rendered even more sure, or rather more patent, by a clause expressly saving the Prerogative. The object of the Ordinance seems to have been, to secure to the Crown full information as to all the circumstances of each claim, and to leave it to the Governor to deal with each, according to the spirit of the Ordinance, and according to her Majesty's instructions, in full faith that he would not lightly depart from either.

The chain of principles, then, by which, as it seems to me, this case must be governed, consists of these: — 1. The Charter of 1840 places in the hands of the Governor (among other things) so much of the Royal Prerogative as relates to the making of Grants of waste land 2. That prerogative can only be taken away or restrained within the colony, by the express words of an Ordinance (or statute). 3. The Land Claims' Ordnance not only contains no such express words, restraining the exercise of the prerogative, so vested in the Governor, but contains a clause expressly saving the prerogative. 4. Hence Governor Fitzroy, even if he departed from the spirit of the Ordinance in making a Grant of more than 2560 acres, could (in the absence of any fake suggestion by the Grantee himself) legally make such a Grant.

In conclusion: Although, speaking technically, 1 think the defendant's plea bad on the third ground of demurrer at least, I am of opinion that he ought, nevertheless, to have judgment; inasmuch as the declaration, for the reasons I have given, discloses no sufficient legal ground for avoiding this Grant.

Judgment for Defendant.[iv]

For further details please contact Mark Hickford.

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[i] *New Zealander*, 28 June 1848, p2

[ii] Chapman reported to his father in May 1848 as follows: 'I have another case to consider from Auckland: One of the Missionary grants which the Government is very anxious to set aside; but it cannot be done. I have written as learned a judgment as in the case last year [*Symonds*]. That was in favour of the Government view and Lord Grey spoke in high terms of it: - this [*Clarke*] is against the Government view as much as Scott's case is against the views of the Company'. (Chapman to Chapman senior, 20 May 1848, qMs-0419, Alexander Turnbull Library, Wellington.) The *Scott* case is considered in Hickford, '"Setting some very important principles of colonial law": Three "forgotten" cases of the 1840s', at 5-13 in particular.

[iii] This point, for Chapman, was a key legal issue suffusing a number of cases he had heard, including *R v Taylor* (16 July 1849), and *Scott v Grace* (13 May 1848), for instance (these cases are reprinted in Hickford, '"Setting some very important principles of colonial law"', at 31 and 66 respectively).

[iv] As discussed in Hickford, '"Settling some very important principles of colonial law": Three "forgotten" cases of the 1840s', the colonial government under George Grey promoted a political resolution of the issues raised in *Clarke* (before the advice on the Privy Council was received) in the form of an An Ordinance for Quieting Titles to Land in the Province of New Ulster, 25 August 1849, session X, no. 4. Also refer to Chapman to Chapman senior, 26 October 1849, qMs-0420, Alexander Turnbull Library, Wellington, at 758-759.