1889.

NEW ZEALAND.

LAND TAKEN FOR DEFENCE PURPOSES AT POINT RESOLUTION, AUCKLAND

(REPORT OF ROYAL COMMISSION APPOINTED TO INQUIRE INTO THE MATTER).

Presented to both Houses of the General Assembly by Command of His Excellency.

To His Excellency Sir William Francis Drummond Jervois, K.C.M.G., Governor and Commander-in-Chief in and over Her Majesty's Colony of New Zealand, and Vice-Admiral of the same.

MAY IT PLEASE YOUR EXCELLENCY,— Auckland, 20th October, 1888.

We have the honour now to report upon the matters referred to us by your Excellency's Commission bearing date the 27th September, 1888, in connection with the taking by the Government for purposes of defence of certain land at Point Resolution, and with the subsequent conveyance in fee of a portion of the land so taken to the previous lessee of the property.

The circumstances of this transaction have been frequently stated for the purpose of revision and inquiry, but, briefly summarised, the acts complained of are the following: That the Government knowingly and deliberately took by Proclamation, under the pretence of requiring it for public purposes, an area of land largely in excess of what was so required, and that this was done in pursuance of a private agreement made with the lessee of the property that the part not so required should be conveyed to her in fee; that this agreement was in direct contravention of the law relating to such transactions, which plainly requires that any land so taken in excess shall be first offered to the original owner, and then to adjacent owners at a valuation, and if declined by them shall be then sold at auction; finally, that the Government, being unable to convey the land in pursuance of this illegal agreement, persuaded the Legislature to empower it to effect this object by a special authority contained in an Act of Parliament. The uneasy feeling produced in the public mind by the belief of these facts was doubtless aggravated by the circumstance that the freeholder who had thus been deprived of the right of pre-emption was a Board of Trustees holding the trust for the purposes of a public charity, and that one of the members of this Board was a near relative of the lessee who had thus acquired the right which by law belonged to the Board.

It certainly is no matter for surprise if the suspicions of the public, often easily excited without much reason, were strongly aroused on this occasion, or if rumour, always so easily set in motion, in this case appeared to have some substantial grounds for its activity. It is indeed difficult to see how, upon such a statement of facts, it was possible that some suspicion of jobbery and corruption could be avoided. No other view could at the time readily present itself, for it would not be obvious to many that persons representing the Government of the country had displayed that extreme degree of ineptitude which consists in going out of the way to do wrong without any adequate motive. But we think that the evidence which we have taken, together with the official papers, showing the successive steps of the transaction, which have been put into our hands, will leave little doubt as to the nature and motives of all that was done, however surprising the adoption of such a course may appear.

We may begin our review with the state of things existing in the month of July, 1885, at which time an action for trespass had been entered in the Supreme Court at the suit of Mrs. Kissling, the lessee of the land, against the men, or some of them, belonging to the military forces who were the actual trespassers. The Government, finding that it had no legal defence to this action, because the Public Works Act of 1882 gave no power to enter upon private lands and take them for the construction of forts and batteries, prepared an Amendment Act ("The Public Works Act 1882 Amendment Act, 1885") to give the necessary power and to defeat the action then pending. In the meantime Mr. Thomas Mackay was sent to Auckland for the purpose of arriving at some agreement with the plaintiff, or, if that were not possible, then to endeavour by negotiation to protract the business until the new Act could be put in as a bar to further proceedings. At this time Mrs. Kissling was occupying under lease an area of 4 acres 1 rood 17 perches, of which only 3 roods 17 perches had been marked off, at the instance of the Defence Department, as required for the purposes of a battery. Mr. Mackay, however, very soon formed the opinion that it would be better to take the whole of the land occupied by Mrs. Kissling. He gives this advice, together with his reasons, in a telegram to Mr. C. Y. O'Connor, Under-Secretary for Public Works, on the 21st July,

1885. The principal reason given for this recommendation was that a railway-line would probably have to be taken across the land in question, and this would involve a second claim for compensation. This consideration, together with the general complications of the case, determined Mr. Mackay's mind to the opinion that it would be better and simpler to take the whole of the land, and lease that portion which was not required, by which means Mr. Mackay thought the Government might obtain a rent of £100 a year. In his evidence Mr. Mackay says that a further reason which influenced his opinion was that he doubted whether the area originally proposed to be taken would prove sufficient for defence purposes. The reason why he did not mention this in his telegram may have been that that part of the question was outside his proper business. Mr. Mackay's idea seems to have been that the land might be taken as for railway purposes, which might be done at once without the necessity for further legislation. This plan was disapproved by reason of the probability of claims to compensation by adjoining owners. It was, perhaps, with a view to this contingency that it was thought necessary to insert the special provision in the proposed Bill which will be found in section 6 of the Amendment Act of 1885. Nevertheless, Mr. Mackay's suggestion that the whole instead of a part of the land should be taken was approved, and a Proclamation was prepared and was ready to be issued in the month of October, when its publication was delayed by other arrangements.

It seems very desirable to consider for a moment how far the Government could rightly and legitimately adopt this recommendation of Mr. Mackay's, judicious as it undoubtedly seems, if it be once granted that the only business of the Government was to make the best bargain it could. No doubt it was a perfectly proper thing to take into account the probability of the railway-line being required, but we cannot think that the general complications of the case or the difficulty of the negotiations could justify the Government in taking as for public works land which was known not to be required for that purpose. Mr. Mackay points out, in one of his communications to the Government, that the fear of having the whole of the land taken, and of thus losing a desirable residence, would prove a potent means of causing Mr. Kissling (whose name is constantly used throughout the transactions instead of his wife's) to moderate his demands. It may have been strictly within Mr. Mackay's duty to present the matter in this light to the Government, but we scarcely think that it was a recommendation fit for the Government to adopt. It certainly was not the intention of the Legislature that land should be taken from private owners ostensibly for public works, but really to constrain the owners into conceding more favourable terms to the Government for the land really required, or that the Government might obtain a good rent by leasing the land. There does not appear on the papers any other reason for approving Mr. Mackay's suggestion to take the whole of the land than those given by him, and we therefore suppose that these (except the proposal to lease the surplus land, which was rejected) were the true reasons, in which case, and in view of the remarkable measures which were afterwards adopted, we have thought it right to endeavour to put our finger upon the point where the first deviation from sound principle appears to have been made. At the same time, if the arrangement thus proposed by Mr. Mackay, and approved by the Public Works Department, had been carried out, it is probable that no complaint would ever have been heard of, especially as it appears that the Public Works Office had determined to sell the surplus land by auction (failing, we presume, the acceptance of it by the original owners at a valuation), instead of leasing it, as suggested by Mr. Mackay. This part of the business, however, although involving, as we think, a question of principle, falls into a very subordinate position when compared with the subsequent transactions which we have now to consider.

The publication of the Proclamation taking the land was delayed in consequence of a telegram received by Mr. C. Y. O'Connor from Mr. H. M. Brewer, dated the 19th November, 1885, and sent from Auckland. Mr. Brewer at this time was engaged in settling a number of land-claims in the Auckland District, and it appears that he had once or oftener had a personal interview with the Hon. Mr. Ballance, then Defence Minister, at which the Point Resolution business was discussed. But the first specific evidence of what took place is found in a telegram from Mr. Brewer to the Defence Minister, dated 17th November, 1885, in which he stated that some £500 would be saved to the Government if all the land occupied by Mr. Kissling could be taken, and asking whether there was power to do this under the Act lately passed, and, if so, whether the Minister would authorise him (Mr. Brewer) to act in the manner he might think most conducive to the interests of the Government. It will be observed that there is not a hint in this telegram of what was to be done with the surplus land. The question submitted was simply whether the surplus land could be taken under the new Act. The telegram was immediately referred by Mr. Ballance to Sir George Whitmore to "ascertain at once if this can be done." Thereupon the question is referred by Sir George Whitmore to the Solicitor-General to pronounce "as to legality," and Sir George Whitmore proceeds to express his own opinion that the legality is "unquestionable," it being "clearly the intention of the Act to enable Government to secure the fire all round a work, and if necessary to take this land, as it is within very close range." It will thus be seen that the question submitted to the Solicitor-General was not whether it was lawful for the purpose of saving £500 to the Government to take, under the pretence of defence purposes, land which was not required for such purposes, but whether it was lawful to take for defence purposes land which was so required. The answer of the Solicitor-General is, of course, in substance, that it is lawful to take for defence purposes land really required, either directly or indirectly, for such purposes. Sir George Whitmore thereupon telegraphs to Mr. Brewer that the Law Officers advise "that we have full power under the Act," and that Mr. Brewer is authorised to act in the manner suggested by him. Now, Sir George Whitmore, when he referred the question to the Solicitor-General, either believed or he did not believe that the land was really required for defence purposes. If he did not believe this, the reasons he placed before the Solicitor-General were nothing more than a pretext, under cover of which the Government was to do what it wanted for the purpose of saving money on a compensation claim. But if he did believe that the additional area was necessary in order "to secure the fire all round," then it certainly seems

strange that the Defence Office should, the moment it was proposed, have acquiesced in the relinquishment of this land, and in handing it over to a private person as a freehold. For, on the 7th December, 1885, Mr. Brewer telegraphs to the Defence Office to say that he has settled the matter on the following terms: "Government to buy the whole of the property for £6,000. £1,750 will be accepted by Kissling and Church Trustees in full of all damages. Kissling will retain balance of property, paying Government £4,250 for it. As Kissling's first claim was £2,500, Government will save £750 by this arrangement. Trust this will be satisfactory." Upon this telegram, Mr. Ballance promptly notes that "this is satisfactory," and Major Gudgeon informs Mr. Brewer by telegram that Mr. Ballance "strongly approves" his action. We must now briefly consider what that action was, and who were the parties to the settlement made by Mr. Brewer.

Mr. Brewer appears to have considered the case from the first as a rather "awkward" one for the Government, regarded as a compensation claim; but he was not long in ascertaining that if any means could be found by which Mrs. Kissling could obtain the freehold of the area not required for defence purposes the claim for compensation would be so modified as to be easily dealt with. This was the object of the bargain ultimately made, and we may at once say that we see no reason for imputing to Mr. Brewer any corrupt or improper motive, or for supposing that he acted otherwise than with a *bonâ fide* desire to make the best terms he could for the Government. This is the opinion of the Select Committee of the House of Representatives, with whom we quite agree in this, as well as in the further opinion that the course adopted "was not justifiable." But it is necessary also to consider the attitude taken by the Church Trustees during these negotiations, as well as the question whether, and to what extent, they were kept in the dark or misled by Mr. Brewer and Mr. Kissling. This matter involves two questions—(1) Whether the trustees received adequate compensation for their interest; and (2) whether they were wrongfully deprived of their right of pre-emption in case of the land not being all retained by the Government. The trust land in question was at this time under a lease to Mrs. Kissling with forty-eight years of the term yet unexpired, and the annual rent received by the trustees was £17. The interest of the trustees therefore comprised the two items of the present value of the reversion and the present value of the rent for the rest of the term. The data assumed were that the value of the freehold was £6,000, payable at the end of forty-eight years, money being at 6 per cent. Upon this basis the present value of the reversion was estimated at £366, and of the rent at £266, making a sum of £632, which was offered to and accepted by the trustees. With respect to the adequacy of this compensation, there is no doubt that the trustees accepted it without any demur at all. They knew the basis of the computation, and some of them made the calculation for themselves. It is perfectly clear that they thought at the time that they were getting a fair price for their interest; that they knew that the whole of that interest was being alienated, and believed that the whole of their right and title in that land was being entirely extinguished. It may, however, be questioned whether the trustees got as good a price for their interest as would have been awarded to a private owner. The sum of £6,000 having been estimated as the then present value of the whole estate in the land in question, it may fairly be asked whether a larger sum ought not to have been taken as the probable value at the end of forty-eight years. This is a difficult question to determine; but we think a private owner would probably have maintained that view. Again, it becomes a question whether 6 per cent. was not too high a rate of interest to reckon for forty-eight years to come, and, considering the necessity of seeking perfectly safe investments for trust-money, it would seem reasonable that a somewhat lower rate should have been fixed upon. These questions are very much matters of opinion and conjecture; but they seem to have presented themselves rather forcibly to the mind of Mr. C. Y. O'Connor when the subject was brought under the notice of the Public Works Department. He says, "It was at once seen that the bargain was not a good one for the trustees," and he refers to a memorandum of his own on the subject, dated the 16th December, 1885. In this memorandum—which displays much scepticism as to the merits and advantages of the arrangement made by Mr. Brewer—Mr. O'Connor says that the trustees "have not made much of a bargain for themselves;" and elsewhere he says that "Mr. Kissling has got completely the better of the Church Property Trustees," and he estimates their interest at the sum of £1,350. This appears to have been based on the computation that the estate would be worth £20,000 at the end of the term. The interest also was reckoned at 4 per cent. We have, however, had no evidence before us which even suggests that such a valuation as £20,000 could have been sustained, and we feel obliged to set it aside as very much too high. The fact is that the whole question of prospective value is too uncertain a matter to allow us to say anything definite, and in the face of the unreserved approval by the trustees of the terms offered, and of their reiterated assertion in evidence that the terms were fair, it is impossible to assert that an adequate payment was not made, and futile to put forward such a suggestion as a reason for revising what has been done. The question whether the trustees were wrongfully deprived of their pre-emptive right of the surplus land is one that can be much more easily answered, and it must be answered distinctly and emphatically in the affirmative. This conclusion could only be avoided if it were shown that after their attention had been drawn to the right of pre-emption which the law gave them they had expressly and formally waived it. But nothing of this sort ever occurred. What was really done seems to have been as follows: As early as the 23rd September, 1885, we find the proposal matured in Mr. Kissling's mind that the trustees should be bought out altogether, and the land not required by the Government conveyed to him in freehold, for on that date a letter was written to him by Mr. J. Waymouth giving him an estimate, on the basis of £6,000 total value, of the present worth of the trustees' interest, including rent and reversion. The letter sets out with the assumption that Mr. Kissling was to buy the trustees out at £6,000, the Government paying him £1,500 for "their one-fourth thereof." On the 19th November Mr. Kissling wrote to the trustees informing them that the Government was taking the whole of the land, and asking them in what manner they would wish their interest to be valued. To this the trustees replied that they would prefer that the compensation to be awarded them should be named by

the Government. No further communication took place between Mr. Kissling and the trustees, and this therefore seems to be the place to consider Mr. Kissling's position and conduct in the matter. If Mr. Kissling, knowing that the bargain he had made with Mr. Brewer was illegal, had tried to keep the trustees in the dark as to what was proposed to be done, with the view of getting what he wanted without their knowledge, he would, of course, have been perpetrating a palpable fraud, but a fraud of which the iniquity, as it seems to us, would have been almost obscured by its fatuity, for on this supposition Mr. Kissling must have reckoned not only on getting the connivance of a Government officer, but on being able to make his scheme run the gauntlet of various Government offices and a host of officials, to obtain the approval of a Cabinet Minister, and finally to be ratified by an Act of the Legislature. It is quite safe, therefore, to dismiss the assumption that Mr. Kissling knew that the proposed arrangement was contrary to law. There can be no doubt that he supposed that the Government, having approved of the terms, would be able to carry them into effect, and on this supposition the question is only whether Mr. Kissling tried to keep the trustees in the dark until the land should have been conveyed in fee to his wife. The opinion that he did so seems to us to be disproved by the evidence. In the first place it is certain that Mr. Kissling showed Mr. Waymouth's letter, before referred to, to Mr. Upton, a leading member of the Church Board, and the one who has since the most strongly expressed his disapproval of what has been done. Mr. Kissling discussed this letter with Mr. Upton, and the latter had full opportunity to make himself acquainted with its contents. The evidence is doubtful on the question whether this letter was before the Board at the meeting which dealt with Mr. Kissling's letter of the 19th November. It may have been in the hands of some one of the members, but, whether it was so or not, there is no reason to doubt that it was generally known that such a letter had been written, and that its contents had been talked about outside the Board-room. Now, the trustees generally deny to the best of their recollection that they had at that time any knowledge of the intention to convey in fee to Mrs. Kissling, and Mr. Upton makes this denial perhaps more strongly than any one else. Mr. Kissling, on the other hand, maintains that no one who had read Mr. Waymouth's letter sould plead ignorance of what was intended, since that letter expressly refers to the price which the Government was to pay for their one-fourth of the land. To this Mr. Upton replies that the letter only contained a suggestion of Mr. Waymouth's; that this suggestion was founded on a mistaken assumption—viz., that the trustees had the power to sell to Mr. Kissling—and that he therefore dismissed from his mind, as a matter with which the trustees had nothing to do, all that part of the letter, and confined his attention to the valuation made by Mr. Waymouth, which he satisfied himself was sound and fair. In discussing this letter with Mr. Upton it was mentioned by Mr. Kissling as a thing of course known to both of them that the trustees could not sell as Mr. Waymouth had supposed, and Mr. Kissling told Mr. Upton that it would be necessary for the Government to take the land, but he did not go into particulars about the intended conveyance of the freehold, supposing, as he says, that this point was sufficiently understood. We do not see much difficulty in reconciling Mr. Upton's evidence with Mr. Kissling's. It is quite possible that the part of Mr. Waymouth's letter referring to the intention that the Government should only have one-fourth of the land to pay for did not make much impression on Mr. Upton's mind; but we think the reason of this was that at the time it had never occurred to him that the Board had any further concern with the land after it had been bought and paid for. On the other hand, if Mr. Kissling wished to suppress the fact that the freehold was to be conveyed to his wife, it is quite inconceivable that he should have placed Mr. Waymouth's letter in the hands of Mr. Upton, for from the terms of that letter it was an unmistakable inference that Mr. Kissling did not expect the Government to keep more than one-fourth of the land. Again, although Mr. Kissling's letter to the Board of the 19th November disclosed nothing of the contemplated arrangement, yet at that time Mr. Kissling could not have thought otherwise than that the contents of Mr. Waymouth's letter were well known to the Board; and the very fact that he was busying himself at all in ascertaining the Board's interest was enough to show that he had some concern in the matter more than that of an outgoing tenant who had nothing to do but to make his own claim for compensation. And after the Board's intimation to him that they preferred to deal with the Government it was not necessary for him to have any further communication with them. We cannot see, therefore, that any blame is fairly attributable to Mr. Kissling. He did not deceive or mislead the Board, and if he is now enjoying something which ought never to have come into private hands, the wrong was not done by him but by the Government, who, instead of telling him that his proposal could not legally be accepted, assured him, on the contrary, that it could be carried out, and that they quite approved of its adoption.

The conduct of the trustees in this business has already been in great part described. If it has ever entered any one's mind to suspect that the trustees were disposed to sacrifice the interests of their trust for the purpose of conferring a benefit on Mr. Kissling, such a notion may be dismissed as unworthy and unsupported by a particle of evidence. The view taken by the trustees was that, if the Government desired to resume a portion of the land which had been given as an endowment, it was not for them to offer any opposition; and, further, that it became them to trust the Government entirely to do them justice in the matter of compensation. We think, as we have before said, that some surmise of the intended destination of the land must have existed in the case of, at all events, some of the trustees, but they had no idea that what was intended was illegal, or that the Government would wish to do anything it had no right to do, still less that it was intended by Act of Parliament to take from them the right to the first offer of any land not required by the Government. It is not to be wondered at that some of them felt indignant when they found that this had actually been done, and we see no essential inconsistency between this feeling on their part and their previous tacit acquiescence—supposing this to be proved—when they never suspected that the Government was contemplating anything illegal. There is one more point which we must mention before dismissing the part taken by the trustees in the matter. It has been mentioned in an earlier part of this report that Mr. Kissling had a relative who was a member of the Board. This was his brother, Mr. Theophilus Kissling, and this relationship has doubtless tended to intensify the suspi-

cions which have attached to this transaction. Mr. Theophilus Kissling knew that his brother wished to get the freehold, but he seems to have refrained from forwarding this object in any way. Whether he ought to have gone further, and to have told his colleagues that it would be right for them to consider whether the object which his brother had in view was likely to involve any injury to the trust, is a question which is probably easier to answer now by the light of subsequent events than it was at the time when it might be supposed to have presented itself to Mr. Kissling. We think it is to be regretted that he did not say something of the sort, but at the same time it is to be remembered that it is not certain that he knew much, if anything, more than some of his colleagues, and that there is not the slightest reason to suppose that he more than any one else knew the proposal to be illegal or considered it improper.

We have thus brought the matter to this inevitable conclusion: that for the wrong that was done in this matter—and unquestionably wrong was done—the Government was solely and wholly responsible—at all events, up to the time when the Legislature deemed it right to validate the wrong done by Act of Parliament. We have already expressed our belief that Mr. Brewer acted in good faith; but, at all events, he acted in ignorance or forgetfulness of the provisions of the law, with which, as a land-purchasing officer of the Government, he should have been fully conversant. But Mr. Brewer seems never to have looked beyond the object of making a good bargain for the Government, and to have assumed as a matter of course that the Government would be sure to find some means of bringing about whatever might be necessary to this end. If these were Mr. Brewer's views he certainly was justified by the event, for they were shared and adopted by the Government to the fullest extent. We have already related how, in respect of the taking of an excess of land, the reply of the Solicitor-General to one question was made to do duty in answer to another, and how the bargain with Mr. Kissling was instantly approved without taking any legal opinion at all. If Mr. Brewer did not know the law, the Government, or, at all events, the Defence Department, was in the same plight, and it does not even seem to have occurred to any one that this was a matter worth considering at all. It is, however, only fair to say that this was not the case with the Public Works Department. It is true that they also were prepared to take more land than was required, but assuredly for better reasons than had been suggested by Mr. Brewer, and, at all events, without the slightest design of carrying out an illegal compact with a private person. The intended action of this department is explained by Mr. C. Y. O'Connor in a memorandum, already quoted, of the 16th December, 1885, in which he plainly points out that the agreement to reconvey to Mrs. Kissling is against the provisions of the law. It seems rather surprising that when this illegality was pointed out the Government did not reconsider the matter; but, just as Mr. Brewer had rightly presumed that the Government would adopt his recommendation, whether legal or not, so the Defence Department presumed, with equal accuracy, that the Legislature would sanction the arrangements which it had thought fit to make.

The prime cause of all this mischievous action seems to have been the failure of the Government to look further than the immediate question of money compensation, and to think that any course is sufficiently recommended when it is shown that it will have the effect of abating or reducing a troublesome compensation claim. But, if private lands may be taken under the pretence of public works when they are not wanted for that purpose, and if a right of pre-emption expressly given by law may be taken away by a sidewind, then it is difficult to say to what extent private rights may not be trampled upon.

It is not for us to criticize the acts of the Legislature, but we cannot help thinking it a matter of much regret that Parliament should, in "The Special Powers and Contracts Act, 1886," have authorised the conveyance of this land to Mrs. Kissling. It is a remarkable fact that no discussion of this clause seems to have taken place, although other clauses were criticized, and a powerful and telling attack upon the principle of the Bill was made by Sir Frederick Whitaker. It was enough for him to deal with principles, but it might have been expected that this clause, in passing through the Waste Lands Committee and both Houses, would have excited some curiosity, and that some member would have asked why the Government could not convey to Mrs. Kissling, if it was "desirable" to do so, or why it should be thought "desirable" if it was not lawful. If these questions had been asked it might perhaps have been found that it was not only unlawful but highly undesirable to do anything of the kind, unless the thing could be done in conformity with the provisions of the 14th section of "The Public Works Act, 1882."

Our opinion upon the whole question is in substance as follows: We attribute no wrongdoing to any party but the Government and its agents; and we think the Government acted wrongly in two respects: first, in taking by Proclamation, under pretext of requiring it for public works, land which was never intended to be used for such a purpose, but had been already bargained to a private person, in order to save a few hundred pounds on a compensation claim; secondly, in making a private bargain, and applying to the Legislature for special authority to defeat the right of pre-emption which the law had expressly given to the previous owner of land taken by the Government and not required for public purposes; and, further, in refraining from sending to the Church Trustees formal notice of what was intended, or a copy of the Bill introduced into Parliament. It must be added that these wrongs were expressly ratified and confirmed by the Legislature.

The question what action, if any, is now desirable in order that substantial justice may be done to all parties concerned is no easy one to answer. We have already said that we do not think that the Church Trust has sustained a wrong by reason of inadequate compensation, because nothing could be more deliberate than the acceptance by the trustees of the sum offered, which they still assert was fair and adequate. Then, if it be argued that the original taking was itself illegal and therefore a wrong, this may be granted; but it is obvious that this wrong would have been effectually remedied if the Government had simply followed the provisions of the law in disposing of the surplus land, as was intended until the matter was taken out of the hands of Mr. O'Connor.

The wrong, therefore, that remains to be remedied, if remedy be required, is simply this: that the trustees have been deprived of their pre-emptive right. Now, it is quite uncertain whether

the trustees would have exercised this right if the opportunity had been offered them, and therefore it is possible that the wrong done may be only of that class in which a legal right has been invaded without substantial damage (*injuriâ sine damnô*) and for which Courts of justice award nominal compensation. Now, although it is always desirable, if possible, to remedy a wrong, however slight, it is necessary to be very careful that no greater wrong is perpetrated in the process, and therefore we think it best to mention briefly the several modes of dealing with this matter which occur to us, with such remarks upon each as most obviously suggest themselves.

(*a.*) The plan recommended by the Select Committee of the House of Representatives, and embodied in a Bill to amend "The Special Powers and Contracts Act, 1886," which Bill fell through in the Legislative Council. This measure provided for the cancelling of the Proclamation by which the land was taken, vesting in Her Majesty the part required for defence purposes, and making the remainder revert to its original position of a trust estate with a term of years carved out of it. All financial adjustments were to be made by a tribunal appointed for the purpose. This is a very drastic remedy. Our objections to it are—(1.) That it seems to be quite inapplicable in case the land should have been alienated before the Act could come into force. It is quite possible that the land may pass through half a dozen hands before anything can be done, and we certainly think that to take away by statute the unimpeachable title of a *bonâ fide* purchaser for value would be a greater wrong than any that has yet been committed. (2.) The adjustment of payments, especially if there were a mortgage upon the property, would be intricate and difficult. (3.) The remedy is in excess of what is required, being made obligatory on all parties without any reference to the opinion of the party wronged—namely, the trustees. If any remedy of this kind is to be adopted we would suggest the following as an alternative:—

(*b.*) The trustees to be authorised, if they wish, within a given time to give notice, in some way to be determined, that they wish to buy back the reversionary interest in the land. Such interest to be determined by valuation and the amount paid to Mrs. Kissling or to any mortgagee, Mrs. Kissling to retain the leasehold for the remainder of the term free from rent, because the trustees have already been paid in full for the rent. This would leave it to the trustees to move or not as they might choose. It would be simpler than (*a*), and would renders matters of account easier to deal with. (See note at end.) But it is open to the same objection as (*a*) in respect of the possible alienation of the land.

(*c.*) The Government to make such an offer to Mrs. Kissling for the reversionary interest at the end of any term of years that might be fixed upon as would induce her to sell it, and the Government then to sell this to the trustees at a valuation if they wished to buy it. This scheme involves no compulsion, and could only be carried out if the owner were willing. The price to be paid would probably be in excess of what would be fixed by valuation; but in the present condition of the land-market in Auckland owners are mostly open to a fair offer, and if the thing could be done in this way it would be eminently satisfactory—the Government paying something more than the market-price to remedy the wrong they have done, and no one being left with any grievance.

(*d.*) Compensation to be made to the trustees for any wrong they may have sustained, by giving them land elsewhere. The objection to this is the difficulty of determining what is the amount of damages to which the Trust might be entitled; but the Government might ascertain the views of the trustees upon this point, and this method if agreed upon would be simple and effectual.

We think that the importance of the questions which have been referred to us lies rather in the principles which are involved in what has been done, and in the danger of further violation of private rights by Government action, than in the actual magnitude of any injury done in the present case. Nevertheless, the Trust Board has been deprived of a legal right which it ought to have had the opportunity of exercising. If this wrong can now be redressed without doing more harm than good by upsetting a title solemnly given by an Act of the Legislature, we think it desirable to do it, and with that view we submit for consideration the four schemes above set forth. Our own opinion is in favour of (*c*), and next to that of (*d*); but if it is determined to interfere with the present title in spite of the difficulties arising from possible alienation, we think that (*b*) would be a simpler and better method of doing this than (*a*).

We have, &c.,

(L.S.) JOSEPH GILES,
(L.S.) JOHN ROBERTS, } Commissioners.

NOTES ON SCHEME (*b*).

IN the purchase of the reversion, if the whole of the purchase-money is paid to a mortgagee, he has a better security in the term of years for the balance of his money than he had before in the whole estate for the entire sum. For,—

Let V be the value of the whole estate, of which l represents the value of the leasehold and r of the reversion. Then $l+r=V$.

Let M be any sum, less than V, secured by mortgage on the estate, and let l' be that part of M which may be considered as secured by l, and r' by r respectively. Then $l'+r'=M$.

Then $\frac{M}{V}=\frac{l'}{l}=\frac{r'}{r}$.

If the mortgagee receives r' he receives all that part of his money which was secured by the reversion, and is therefore not injured; consequently, if he receives r, which is greater than r', the sum represented by $r-r'$ goes in diminution of the sum l' which is secured by the leasehold, and therefore he is in as much better a position as l is a better security for $l'-(r-r')$ than it is for l'.

[*Approximate Cost of Paper.*—Preparation, nil; printing (1,325 copies), £3 14s. 6d.]

By Authority: GEORGE DIDSBURY, Government Printer, Wellington.—1889.