

the waste lands of the Crown, and defines waste lands to be (*inter alia*) all lands wherein the titles of the Natives shall be extinguished, as thereafter mentioned. The aftermention is in clause 73.

Clause 73 is in the following words:—"It shall not be lawful for any person other than Her Majesty, her heirs and successors, to purchase, or in any wise acquire or accept from the aboriginal Natives land of or belonging to, or used or occupied by them in common as tribes or communities, or to accept any release or extinguishment of the rights of such aboriginal Natives in any such land as aforesaid, and no conveyance, or transfer, or agreement for the conveyance or transfer of any land, either in perpetuity or for any term or period, either absolutely or conditionally, and either in property or by way of lease or occupancy, and no such release or extinguishment, as aforesaid, shall be of any validity or effect unless the same be made to, or entered into with and accepted by, Her Majesty, her heirs or successors." Then follows a power of delegation.

I must here again notice the omission of the remarkable proviso to the clause in the 13th chapter of the Royal Instructions of 1846, making an exception in favor of the Natives holding in severalty:—"Whether any aboriginal Natives do hold in severalty will be a matter of subsequent enquiry." Before considering the effect of this provision of the Constitution Act upon our case, I will continue my cursory review of the legislation affecting the wild lands of the Colony, for the meaning of words and phrases in a statute must be ascertained from the statute itself and previous decisions of the Courts, and the use made of such words and phrases in statutes *pari materia*. *Com: Dig: tit. Parliament R. 15, Regina v. Leeds and Liverpool Canal Company, 7 A. and E. Jones v. Smart, 1 T. R., 45. In Rex v. Hall, 1 B and C., 123, Abbot, Chief Justice, said:—"The meaning of particular words in Acts of Parliament is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object which is to be obtained."*

To proceed, then. "The Land Claims Act, 1865," repeats the phrase, "the extinguishment of the Native title," several times, but without any reference to individual or communal holdings; and in clause 39 very clearly recognises the law as already stated:—"In any case of claim or grant, heard or examined by the Commissioners, in which the Native title shall not be proved to have been extinguished over the lands comprised in such grant, it shall be lawful for the Governor, on behalf of Her Majesty, on payment by the claimant of the estimated cost of extinguishing the Native title to such lands, to extinguish such title and obtain a cession of such lands to Her Majesty, and thereupon to make a grant of the same, in like manner as if the Native title had been proved to have been extinguished."

The "Native Reserves Act, 1856," several times uses the same phrase, and contains a provision, which as it will, considered with a subsequent amendment, bear upon a point which seemed to trouble Mr. Hesketh, I will quote in full:—

"14. Where any lands shall have been set apart or reserved for the special benefit of aboriginal inhabitants, or where upon any sale of lands by Natives, a certain portion of the district sold shall have been or shall be specially excepted out of such sale, but on which land so reserved, set apart, or excepted, the Native title shall not have been extinguished, it shall be lawful for the Governor, with the assent of such aboriginal inhabitants, to declare such land to be subject to the provision of this Act, and to appoint Commissioners for the management thereof in like manner as if such Native title had been extinguished."

"Any set of Commissioners appointed under this Act or with the assent of the Governor may make a conveyance or lease in severalty of any lands within the limits of their jurisdiction to any of the aboriginal inhabitants for whose benefit the same may have been reserved."

"Section 17. Provided always that whenever such assent shall have been ascertained as aforesaid, the land to which the same shall relate shall be conveyed to Her Majesty, her heirs or successors, and shall then become subject to the provisions of the Act."

Several Acts affecting Native lands followed, which have no bearing upon this question, and are only remarkable in the use of the phrase "extinguishment of Native title," which seems to have been generally adopted since 1849, and lasted till 1865. These Acts I will no more than name—"The Land Claims Settlement Extension Act, 1858;" "Native Circuit Courts Act, 1858;" "The Native Districts Regulation Amendment Act, 1862;" "The Public Works Lands Act, 1863;" and "The Outlying Districts Police Act, 1865."

In 1862, "The Native Reserves Amendment Act" was passed. This, as far as I am aware, is the first statute which introduced the system which formed Mr. Hesketh's difficulty in understanding how the Governor could make grants of Native lands which had never been ceded to the Crown. It will be remembered that the previous Native reserves Act provided that land should come under its operation when ceded to Her Majesty for the purpose by its owners, and it was doubtless to prevent the trouble and inconvenience which had been found to arise from the necessity of getting a deed executed in every case that the Legislature enacted that such cession should be made by operation of law as effectually as if deeds had been made and executed. I will quote the provision, for it is strictly *in pari materia* with the 48th section of the "Native Lands Act, 1865":—

"Where, under the provisions of the said Act (1856) the assent of the aboriginal inhabitants is required to bringing land under the operation of the Act, the Governor may, by order in Council, declare such assent to have been ascertained, and thereupon the title of the above inhabitants to the land to which the same shall relate shall be deemed to be extinguished, and the land shall from the date of such order in Council vest in Her Majesty for the purposes and subject to the provisions of the said Act as altered by this Act, and that as effectually as if the same had been ceded and conveyed by such aboriginal inhabitants to Her Majesty."

There can be no doubt that the Native title in lands thus operated upon would exist as fully as it ever did until the making of the order in Council, notwithstanding that an enquiry must have been previously made into the ownership, and the proper owners ascertained and their consent obtained in a manner strictly analogous to the proceedings under the "Native Lands Act". In the same year, 1862, was also passed the "Native Lands Act, 1862", the consideration of which I will defer.