

all the rights under the existing laws, which they might have been entitled to if everything had been done in their favor which the law allowed.

I may now add, that in all our consultations we agreed that we ourselves would call for further evidence on these points before delivering any judgment, evidence which we would call and take ourselves, and regard as not produced by either side. We then proceeded to consider the case between the Crown and the loyal Natives, as if these Military Settlers were as well placed as they could possibly have been, supposing that everything had been done rightly, and according to the view of the case taken by the Crown Agent.

RIGHTS OF MILITARY SETTLERS AS AGAINST LOYAL OWNERS OF LAND ON WHICH THEY ARE LOCATED.

It then becomes our duty to try to discover whether it was the intention of the Legislature that the Government should oust Native owners who had remained loyal from their portion of the tribal estate, and place Military Settlers thereon.

It appeared to us that this point was since the passing of the Act of 1865, involved in the greatest obscurity and doubt.

Under the Act of 1863 the mind of Parliament was clearly shown. A tract of country was taken for settlement (*i.e.* for the purposes of the Act, not necessarily for military settlement, as agreed by Mr. Atkinson), and thereupon all titles of every sort became extinguished, and the only rights that loyal owners had was the right of obtaining compensation in money for the loss of their lands. The Court had no power to order land in compensation. The Act was clear and stringent. After the Act came into operation and land was taken thereunder, and the Compensation Court had held some sittings, the Government began to discover (at least this is our view of the matter) that the Act was unnecessarily and injuriously stringent not only as respects the Native claimants, but also as affecting the interests of the Crown; accordingly we find that in the Regulations made, of the 16th of May, 1865, for the disposal of the Confiscated Lands, an attempt was made to modify the stringency of the Act. Possibly the Government was moved to make this attempt either by the large money orders which had issued from the Compensation Court on account of the Pukekohe and other blocks, or possibly by the discovery that they were prevented by the strict letter of the Act from keeping the promises which they had entered into with the loyal Natives, and which had been expressed in the most solemn manner known to our form of administration, *viz.*, by Proclamations under the Great Seal of the Colony. We accept the latter reason as the more fitting for Courts of Justice to believe in on the strength of Lord Coke's great maxim: "The honor of the Crown is to be preferred to its profit." The attempt was made in the last clause of the Regulations in the following words: "Any agent of the Government duly authorized may agree with any person who may be entitled to compensation under the provisions of 'The New Zealand Settlements Act, 1863,' that such person shall receive such portion of the said suburban and rural land in lieu of money compensation as may be agreed upon between such person and agent." The great defect here is of course the absence of any judicial authority to intervene and decide between the Crown and the claimants, and we are not aware of any case in which this clause was acted upon.

Our view of the Act of 1863, and the regulations of May 1865 then is, that the rights belonging to or to be acquired by the undermentioned classes were to rank in the following order:—

1. The Crown, *i.e.* roads and public purposes; 2. Military Settlers; 3. Ordinary purchasers of superfluous lands. 4. Loyal owners who might take land in lieu of money.

A few months after this Order in Council of May, 1865, was made, still we find the change in the mind of the Government more marked. Several Orders in Council confiscating large blocks of land were made in the September following in which a new clause was introduced, by which the rights of the loyal Natives were absolutely protected as far as public safety would allow.

I will copy this new provision here, for it is very remarkable, and is of great assistance in the endeavour to make the Act of 1865 work with that of 1863, which can only be done by obtaining a broad and clear view of the intention of Parliament in the changes made by the former. "And (His Excellency the Governor) doth hereby further declare with the advice and consent aforesaid that no land of any loyal inhabitant within the said district (the district proclaimed in the previous part of the order) whether held by Native custom or under Crown Grant will be taken, except so much as may be absolutely necessary for the security of the country, compensation being given for all land so taken."

I must here pause for one moment to remark that the expression "land of any loyal inhabitant" cannot be held to mean land to which any loyal Maori may have a sole proprietary title, for all the Judges of the Court and also of the Native Land Court, after our experience, are firmly convinced that such a thing does not exist and that the idea of such a thing is contrary to the truth of Maori ownership.

A sole proprietary right could only exist when a tribe had become reduced to one man. The only meaning therefore that the above quoted words can be made to bear is the portion of the tribal estate which belongs to any individual of the tribe, that is to say, his share, dividing the number of acres of the tribal estate by the number of persons constituting the tribe.

Again "so much as may be absolutely necessary for the security of the country" cannot mean land for military settlements otherwise the limitation is reduced to nothing. A change was intended from the previous system of taking and using lands, and if these words are extended as above supposed, no change is effected and the limiting clause fails altogether.

But the rule of interpretation applied to Statutes (and an Order in Council is the exercise of a delegated power of legislation to which the same rules are applicable) is that effect must be given to a provision if possible, *let res magis valeat quam pereat*.

We must find then some new meaning in the words "absolutely necessary for the security of the country" so as to produce an effect which had not been produced in the previous orders, and this meaning we take to be land that may be required for roads, sites for fortresses, barracks, and other works of that character, absolutely necessary for the security of the country. As before stated if this idea is not contained in this limiting clause, no change is really effected, for the Government could at once as before take the whole block for military settlement.

This new form of confiscation then was first used in September, 1865, and simultaneously we find an