

in order that such instructions in relation thereto, may be issued for my guidance, as your Grace may judge to be necessary and expedient.

I have &c.,

G. GREY.

His Grace the Duke of Newcastle, K.G.

Enclosure to No. 5.

The opinion of the Attorney-General is requested on the following point:—

What legal right the Government has to make roads through lands over which the Native Title has not been extinguished? Can they take possession of the land actually required for the road, with complete legal right so to do?

This question is put in general terms; but the position of the Government on this point with reference to the block of Native Land at Taranaki, lying between the Omata and Tataraimaka Blocks is the particular object to be ascertained at the present moment.

Also, what legal right the Government has to take similar land for permanent military positions, or other purposes of defence?

ALFRED DOMETT.

22nd November, 1862.

OPINION OF THE ATTORNEY-GENERAL.

These questions cannot be answered by reference to ordinary rules of Law. Land over which the Native Title is not extinguished, cannot be dealt with as Waste Lands of the Crown or Private Lands, with a view to the formation of Roads or the maintenance of Military positions. In Great Britain, as in all civilized countries, there are special laws providing for these exigencies of Government. In this Colony, provision is made for the same objects in the various General and Provincial Laws and Regulations relating to Waste Lands, and in local Acts relating to Highways, &c. But these Laws and Regulations do not affect Land over which the Native Title is not extinguished. By the Treaty of Waitangi the Crown guaranteed to the Natives their territorial possessions; the Natives on their part ceding to the Crown the Sovereignty. The power of the General Assembly, under the Constitution Act to legislate in respect of the Waste Lands does not arise, until the land has been ceded to the Crown by the Natives.

But, in my opinion, the right of passage through a country, and *ex necessitate*, the right of using and constructing all the ordinary means of passage, such as Roads, Bridges, &c., is an essential condition of Sovereignty. It belongs to and is exercised in fact by all Sovereign Powers. Property is held by private persons subject to this and other conditions of a like kind. It is a power constantly exercised by our own Legislatures which, for this purpose, are the Sovereign Power.

But as regards Native Lands, (until they become subject to the power of the General Assembly by cession to the Crown,) the Crown is in my opinion the sole Sovereign Power. And whether we consider, (as is sometimes done) the lands of the Natives as properly *lands of the Crown*, subject to the occupational right of the Natives, or as Lands over which the Natives hold *private Property rights*, by a kind of allodial tenure; in either point of view, the Crown as *Sovereign*, by virtue of what is termed its *Eminent Domain*, has in my opinion the right of making roads through such lands, in order to enable it to exercise its functions of Sovereignty.

It is scarcely necessary to consider the question of possible damage to private property. The Government, of course, only proposes to carry roads through uncultivated Land. If a possible case of damage should arise, it will be one for compensation.

The same principle, in my opinion, governs the question as to land required for purposes of Military protection or defence.

I do not find any express authority on these questions, which are out of ordinary course, but see

Vattel Book 1. cap: 20 Sec: 112 et seq:

Book 2. cap: 9 Sec: 180.

Book 3. cap: 10 Sec: 183, 184.

HENRY SEWELL.

November 22nd, 1862.

No. 6.

COPY OF DESPATCH FROM GOVERNOR SIR GEORGE GREY, K.C.B., TO HIS GRACE THE DUKE OF NEWCASTLE, K.G.

No. 5.

Government House,
Auckland, 6th February, 1863.

MY LORD DUKE,—

Upon the 31st of December last, Despatch, No. 132, I reported to your Grace that I had received information that a plot had been formed by some of the Natives of the Waikato District for the destruction of the European out-settlers. Subsequently the Government received two letters, one from the North of this Island, the other from Port Nicholson, its extreme South point, both dated the 13th December, stating that information had been received at each of those places, of this plot, which was a very general one and had extensive ramifications. The act that was to cause the breaking out of this plot was the entrance of a steamer into the Waikato river.