A.—No. 14.

OPINION

OF

THE ATTORNEY-GENERAL

AS TO

THE LEGAL STATUS OF THE MAORIS NOW IN ARMS

AS REGARDS THEIR RIGHTS AS "BELLIGERENTS."

PRESENTED TO BOTH HOUSES OF THE GENERAL ASSEMBLY, BY COMMAND OF HIS EXCELLENCY.

WELLINGTON.

1869.

OPINION OF THE ATTORNEY-GENERAL AS TO THE LEGAL STATUS OF THE MAORIS NOW IN ARMS.

THE opinion of the Attorney-General was requested, by direction of the Hon. the Colonial Secretary, on 23rd June, 1869, in the following terms:—"The concluding paragraph of Earl Granville's despatch "No. 30, of 26th February, 1869, implies that the Maoris now in arms against the Government are a "foreign enemy, or, at all events, 'belligerents,' with whom 'the usual laws of war' must be observed. "The Attorney-General is requested to state his opinion how far this is true, and to define the legal "position of the Maoris according to the existing law."

I am required, as I understand, to state whether, in my opinion, the Maoris now in arms are to be treated as belligerents, with whom the usual laws of war must be observed; or whether they are to be treated as criminals guilty of treason in levying war against the Sovereign; and secondly, to define the legal position of the Maori inhabitants of New Zealand, particularly with a view to the question, whether they are bound to obey the laws of the land, and are liable to punishment for the infraction of such laws equally with the white population of New Zealand?

The second question seems to be properly considered before the first. There can be no doubt that Her Majesty the Queen is Sovereign over the whole of New Zealand. Questions were at one time raised on this subject, even by those whose opinions were undoubtedly entitled to great consideration. I do not think it necessary or expedient to argue this question. It seems to me that I shall best serve the object with which the question is put to me, if I state what the doubts were which at one time were raised, and the manner in which those questions have, for all practical purposes, been disposed of.

In the years 1842 and 1843 this question was much debated. Mr. Swainson, the then Attorney-General for New Zealand, argued that only those Maori tribes which had actually acknowledged the Queen's sovereignty over them, could be deemed British subjects, or be held amenable to our law. At page 474 of House of Commons Papers on New Zealand, vol. iv., is printed a copy of an opinion by Mr. Swainson on a matter in which he considered that this question arose. He says, "I have elsewhere "given my opinion that those tribes only which have acknowledged the Queen's sovereignty can be "deemed British subjects, and are amenable to our laws. Whether the Native Tangaroa is so amenable "for any act he may have committed depends upon the circumstance whether the aggressor and the "suffering party belong to tribes acknowledging the Queen's authority, and whether the scene of action "was within the British Dominion."—(27th December, 1842.)

The opinion the Attorney-General refers to as having been given by him elsewhere, is referred to in the Minutes of the Executive Council of New Zealand, held at about the same period (29th December, 1842), and the opinion is said to be annexed and marked J. K. That opinion is not, I believe, to be found; but the Attorney-General, at that meeting of the Executive, was called upon by the Officer administering the Government to express his opinion on the subject, and did so. The Minutes, so far as they bear directly on the question, are as follows:—

His Excellency requested that the Executive Council would give their opinions on the following questions:

1. "Are the Islands of New Zealand British territory?"

The Colonial Treasurer: "I consider the whole of the Islands of New Zealand British Terri-"tory."

The Attorney-General: "No."

"2. Whether the whole of the aboriginal race of New Zealanders are British subjects and amenable "to British law?"

The Colonial Treasurer: "I consider they are all British subjects, and amenable to British "law."

The Attorney-General: "I consider that the title of Great Britain to the sovereignty of New "Zealand rests partly upon discovery, partly upon cession, partly upon assertion, and partly upon "occupation: that from these sources conjointly, as against all other nations, and as to British sub-"jects, I think Great Britain has a title to the sovereignty over the whole of New Zealand, and that she "possesses the right of pre-emption of territory from the Natives, and has the power to regulate "trade and commerce with other Nations; but as to those tribes who have never ceded the sovereignty "and who refuse to acknowledge the Queen's authority, I think that Great Britain has not the right, "nor would it be consistent with good faith, to impose upon them her penal code."

In acknowledging the Despatch communicating these opinions, the Secretary of State, Lord Stanley, writes as follows:—"It appears to me, however, indispensable to advert, with the least possible "delay, to the opinions maintained by the Attorney-General of New Zealand regarding the extent of "Her Majesty's dominion in the Island of New Ulster.

"Mr. Swainson, if I rightly recollect his meaning, draws the following distinction:—He appears "to hold that the Queen's sovereignty over the New Zealand Islands cannot be controverted on behalf "of any foreign country, or by Her Majesty's subjects of British birth, but that it is impossible to assert

" that sovereignty against any chief who has not acknowledged it, or in relation to any district belonging " to him or to his tribe. I cannot say that this distinction is perfectly intelligible to me. But it is my " duty to deny, in the most unequivocal terms, the accuracy of any opinion, whosoever may be the " author of it, which may deny Her Majesty's sovereign title to any part of the territories comprised " within the terms of the Commissions issued under the Great Seal of the United Kingdom for the " government of New Zealand.

" Throughout the whole of his discussion on this subject, Mr. Swainson makes no allusion to the " terms of those instruments. The omission is very remarkable. If accidental and inadvertent, it is " not creditable to Mr. Swainson's accuracy. If he omitted all allusion to those commissions, as being " irrelevant or unimportant to the question in debate, then the omission is hardly reconcileable with " his possession of a just view of the history and constitution of the British Colonial Settlements.

" I regard the Royal Commissions for the Government of New Zealand as ascertaining beyond all " controversy the limits of Her Majesty's sovereignty in that part of the world; that is, I hold that it " is not competent for any subject of the Queen's to controvert the rights which in those Commissions " Her Majesty has solemnly asserted.

" I do not think it necessary or convenient to discuss with Mr. Swainson the justice or the policy " of the course which the Queen has been advised to pursue. For the present purpose, it is sufficient " to say that Her Majesty has pursued it. All the territories comprised within the Commissions of the " Government of New Zealand, and all persons inhabiting those territories, are and must be considered " as being to all intents and purposes within the dominions of the British Crown. Mr. Swainson must " be apprised that neither he nor any other person who shall oppose this fundamental principle of your " Government can be permitted to act any longer as a public officer under the Queen's Commisssion." (21st June 1843. House of Commons Papers on New Zealand, vol. iv., page 475.)

On the same subject (13th July, 1843) Mr. Swainson refers to his former opinion in the following terms (see House of Commons Papers on New Zealand, page 167):—" With reference to a former " transaction, my opinion was requested as to how far the New Zealanders were amenable to British " law. It was given to the effect that, as to all other nations, the Sovereignty of Great Britain over " the whole of these islands is absolute and entire, but that, as to the Natives, keeping in view the " solemn and repeated disclaimers of Her Majesty's Government of every pretension to seize on the " islands of New Zealand, or to govern them as part of the dominion of Great Britain, unless the free " and intelligent consent of the Natives should be first obtained; that those chiefs and tribes who were " not parties to the treaty, and who had always refused to recognize Her Majesty's sovereign authority " over them, could not be deemed British subjects and amenable to our laws."

On the 10th February, 1844, Secretary of State Lord Stanley refers to this reiteration of Mr. Swainson's opinion in the following terms (see H.C. Papers, N.Z., page 173): " To the Colonial " Attorney-General's renewed expression of his opinion, that the Queen's sovereignty of the New " Zealand Islands cannot be admitted, because, in his judgment, those conditions have not been fulfilled " which Her Majesty declared must precede the assertion of any such right, I answer by calling " your attention to my Despatch of the 21st June, 1843, No. 37, and by observing, that in this case the " judgment of the Colonial Attorney-General is overruled, and must henceforward be silenced, by the " opposite judgment of the Queen and Parliament. Her Majesty is satisfied, and Parliament is satis- " fied, of the fulfilment of the preliminary conditions in question. In that conviction the Queen has, " by the most solemn acts, asserted Her own sovereignty over the whole of New Zealand, and has, with " equal distinctness, announced and asserted it to all foreign States. Parliament, by their enactment of " the Session of 1842, have affirmed the same principle. I repeat, therefore, that the most implicit " acquiescence in it is the indispensable condition of the tenure of any public office in the Colony."

It will be seen that the ground taken by the Secretary of State is, that the Queen, by Her Charters and Commissions, and the Queen in Parliament, by Act, has assumed sovereignty over the whole of New Zealand, and none can be admitted to question her sovereignty.

If that argument was sufficient in those early times, it certainly must be at the present day. Not only has the Queen since then granted other charters and commissions for the government of the whole of New Zealand, but she has in Parliament passed many laws for the government of New Zealand, and the regulation of various matters relating to it. Reference may especially be made to "The Constitution Act," sections fifty-three, seventy-one, and eighty-one.

If it is established, as most undoubtedly it is, that the whole of New Zealand is subject to the sovereignty of the Queen, what is the condition of the Maori inhabitants thereof? Are they subjects or aliens? What, if any, allegiance do they owe?

There can be no doubt that the rights of sovereignty extend to all persons within the territory over which the sovereignty extends; they extend to all strangers resident therein; not only to those who are naturalized and to those who are domiciled therein, but also to those whose residence is transitory. It is true that, for some purposes not material to the present question, there is a distinction in the jurisdiction which the sovereign has over naturalized and natural-born inhabitants on the one hand, and foreigners who are for the time dwelling herein on the other. The latter owe a local and temporary allegiance only, the former a natural allegiance.

It is, I think, clear that those of the Maori race now inhabiting New Zealand, who were born before the assumption of sovereignty over the land by the Queen, became naturalized subjects of the Queen, whether the sovereignty was ceded or not; it is clear that all former dominion, if any such existed, must be taken to have been extinguished by the Queen's assumption of sovereignty, and that such persons are now, for all purposes, naturalized subjects of New Zealand, and equally bound by the same laws, and owe the same allegiance as natural-born subjects, whether born of the British, or Maori, or any foreign race. Indeed, so far as relates to the question of obligation to obey the municipal laws of the land, and to the amenability to the punishments provided by them for infraction of their provisions, there is no distinction between natural-born and naturalized subjects and alien inhabitants.

In concluding this branch of the question, I beg to refer to the Act of the General Assembly passed in the Session of 1865, entitled " The Native Rights Act, 1865." That Act recites that doubts

had been raised whether certain persons of the Maori race were natural-born subjects of Her Majesty, and whether the Courts of the Colony had jurisdiction in all cases touching the persons and property of the Maori people, and by that Act it is declared and enacted in the second section that "Every "person of the Maori race within the Colony of New Zealand, whether born before or since New "Zealand became a dependency of Great Britain, shall be taken and deemed to be a natural-born "subject of Her Majesty, to all intents and purposes whatsoever."

I am not well aware of the circumstances that gave occasion for the passing of this Act. So far as I have been able to learn, the principal reason for the measure was that it was deemed expedient that there should be a legislative declaration on the subject, rather for the purpose of declaring that the Maori race would, for the future, be treated as entitled to the rights, and as subject to the obligations, of natural-born subjects, than for quieting any doubt in the minds of those whose opinions on the subject were entitled to consideration.

Moreover, an opinion had been given by the Law Officers of the Crown in England (inferentially at least) by questioning whether the Maoris, in respect of land over which the Native title had not been extinguished, could bring any action of trespass or ejectment in the Queen's Courts in New Zealand, or whether the Queen's Courts would ever exercise jurisdiction over real property in Native districts. From this inferential expression of opinion it is possible that an impression may have arisen, though certainly without reason, that the Queen's Courts would not redress personal wrongs when suffered by Maoris. The language of the Act seems rather to convey the notion that the Legislature intended to confer rights than to create liabilities. However, the Act does undoubtedly put beyond all question the status of the Maori inhabitants of New Zealand, whether born before or after the Queen's assumption of sovereignty.

If it be granted, as no doubt it must, that the Queen is Sovereign over all the territories within New Zealand, and that the Maori people are natural-born or naturalized subjects of the Queen, the next question for consideration is, whether, in dealing with the Maoris now in arms, the usual laws of war are to be observed.

It has been already shown that not only natural-born and naturalized citizens, but also aliens dwelling in New Zealand, are alike subject to the municipal law of the land, and alike liable to punishment for the breach of these laws. It follows from this that, in suppressing a rising against the constituted Government, the same measures may be taken against those who are citizens and those who are aliens only for the time dwelling in the land. Indeed to both classes of persons the term "rebels" may justly be applied; they both owe allegiance to the Crown in return for its protection. If the Maoris were the subjects of a foreign State at war with the Queen, then, no doubt, such persons could not be considered as rebels: but the Maoris are not the subjects of a foreign State; they are subjects of Great Britain, and are now in arms against the Sovereign.

It is not easy, nor perhaps possible, to lay down any general rule which ought to guide the Sovereign in dealing with those of his people who take up arms against him. It may be sufficient to say that when rebellion has assumed such proportions that those who are in arms against the Sovereign would be able, if forced to do so by the conduct of the Sovereign towards them, to take such reprisals upon those who adhere to the Sovereign as to insist upon the observances of the usages of war, then probably those in rebellion should be treated as enemies with whom the usages of war should be observed. The adoption of such a course is forced upon the Sovereign with a view to confining the effects of war to narrower limits. Acting from such motives, prisoners taken by the Sovereign would not be put to death as rebels, whether with or without trial, lest those prisoners who should be taken by those in rebellion should in reprisal be put to death. The reason for the observance of the usages of war fails (whether the war be a civil war or between State and State) if those in arms on the opposite side violate the laws of war. No doubt, in such a case, the consequences of such violation of the rules of war ought to be confined to those who are responsible for and have taken part in them, and ought not to be extended to those who, taking no part in them, are nevertheless implicated in the rebellion.

The Maoris now in arms have put forward no grievance for which they seek redress. Their object, so far as it can be collected from their acts, is murder, cannibalism, and rapine. They form themselves into bands, and roam the country seeking a prey.

In punishing the perpetrators of such crimes, is the Sovereign to be restrained by the rules which the laws of nature and of nations have declared applicable in the wars between civilized nations? Clearly not. Even if those now in arms had not been guilty of such enormous atrocities, it does not appear to me that the insurrection or rebellion is of such a character, or has yet reached such proportions, as to enable it to be said that those who, having taken part in it, are captured, ought to be treated as prisoners of war. I see no reason why they should not be treated as persons guilty of levying war against the Crown. No doubt, in so treating them, the Crown would exercise its power with mercy: the numbers of those in arms, and who have been and are likely to be captured, and the fact that the men are of a savage race, afford sufficient reasons for confining the highest penalties of the law to those who are the leaders of the revolt, or have actually participated in the atrocities that have been committed. Unfortunately, however, the revolt has been carried on in defiance of all the laws of nature, and there can be no doubt that all who have taken part in it have forfeited all claim for mercy: certainly, all title to the observance towards them of the usages of war, if they ever had such title.

Nevertheless, the measures taken to suppress such revolts as those that have occurred, and no doubt will continue to occur amongst the Maoris, should be such as are calculated to suppress, and not to extend or exaggerate them; and with this view, no doubt, the Government will, as it has always done, treat those who have taken part in such revolts with no greater severity than the circumstances of the case may seem to require.

Reference is made, in the questions put to me, to the Despatch of the Secretary of State, Lord Granville, of the 26th February, 1869. In this he says, "I see it stated in the newspapers that you "have offered a reward of £1,000 for the person of the Maori chief Titokowaru (I infer alive or dead),

" and £5 for the persons of Maori rebels brought in. I do not pronounce any opinion at present as " to the propriety of these steps; but I must observe that they are so much at variance with the usual " laws of war, and appear, at first sight, so much calculated to exasperate and extend hostilities, that " they ought to have been reported to me by you officially, with the requisite explanation, which I " should now be glad to receive."

The Secretary of State uses language from which it may be implied that those who have and are still perpetrating such atrocities as have been perpetrated here, ought, in his opinion, to be treated as enemies carrying on "hostilities" according to the usages of war, and that such hostilities may be exasperated and extended by the offering of rewards for the apprehension of such enemies.

This measure does not seem open to any objection in the case of a Government engaged in the suppression of a revolt, accompanied, as such revolt has been, with all the unrelenting cruelty of savage nature. The object of the Government is self-preservation. The peaceful citizens must be protected at all costs. Even in the case of a foreign enemy who violates the laws of nature and the usages of war, the utmost severities are permitted as a punishment for his crimes. According to *Vattel* (book iii. ch. viii.), " There is one case in which we may refuse to spare the life of an enemy who " surrenders, or to allow any capitulation to a town reduced to the last extremity. It is when that " enemy has been guilty of some enormous breach of the law of nations, and particularly when he has " violated the laws of war. This refusal of quarter is no natural consequence of the war, but a " punishment for his crime,—a punishment which the injured party has a right to inflict. But, in " order that it may be justly inflicted, it must fall on the guilty. When we are at war with a savage " nation, who observe no rules, and never give quarter, we may punish them in the persons of any of " their people whom we take (these belonging to the number of the guilty), and endeavour, by " this rigorous proceeding, to force them to respect the laws of humanity."

30th June, 1869. JAMES PRENDERGAST.