

lative functions. If, however, any doubt could exist that Parliament contemplated the exercise of such a power by the General Assembly, it must be removed by reference to the nature and extent of the functions given to the Provincial Legislatures, and the manner in which the gift is made. Thus sec. 18 empowers the Superintendent, with the advice and consent of the Provincial Council, "to make and ordain all such laws and ordinances (except and subject as hereinafter mentioned) as may be required for the peace, order, and good government" of the Province, provided that the same be not repugnant to the law of England. The empowering words are precisely the same as those used with reference to the General Assembly. But amongst the subjects upon which the Provincial Legislatures are forbidden to legislate, is "land of the Crown, or lands to which the title of the Aboriginal Native owners has never been extinguished." "*Expressio unius est exclusio alterius et e converso.*"

Nothing can more unquestionably demonstrate the mind of the Imperial Parliament that the power to legislate for Native lands was included in the words "to make laws for the peace, order, and good government," &c., than that it thought it necessary thus specially to except such a power by express words. "*Argumentum a simili valet in lege.*" (Co. Lith.) No such reservation having been made with respect to the General Assembly, the power has undoubtedly passed to that body, and must be exercised by them before the Executive Government of the Colony can legally take compulsory possession of any person's land, or, without consent, interrupt any person in his enjoyment or occupation of land. *Id possumus quod de jure possumus.*

The question of an easement or right of way over Native lands is different, and of greater obscurity; but I do not understand that this is raised.

FRAS. D. FENTON,
Assistant Law Officer.

November 28th, 1862.

Enclosure 2 to No. 10.

OPINION OF THE ATTORNEY-GENERAL.

In my opinion the Crown has a legal right to use land, over which the Native title has not been extinguished, for the purpose of making roads and for military defence.

In order to arrive at a correct conclusion on the point, it appears to me to be essential to determine what is the nature of the native tenure of land, and in relation thereto, what are the relative positions of the Crown and Aborigines.

From the year 1840 to the present time I am not aware of an instance in which either the Crown or Legislature, Imperial or Colonial, has recognised a title in the Aborigines cognisable in a Court of Law. But, on the contrary, it has throughout been assumed both on the part of the Crown and by the Legislatures, and in some instances distinctly declared that Native lands are in law Demesne Lands of the Crown. The Ordinance of the Legislative Council of New Zealand (Sess. I., No. 2, 1841) which declares and enacts that all unappropriated lands within the colony, subject to the rightful and necessary occupation and use thereof by the Aborigines, are, and remain Crown or Demesne Lands, especially may be referred to.

Assuming then the land over which the Native title has not been extinguished to be Crown lands, subject to the above mentioned qualification, it follows of course that the Crown has a right in law, so long as there is no interference with the *rightful and necessary occupation and use thereof by the Aborigines*, to use the land for the above purposes.

It may be objected that this would be contrary to the Treaty of Waitangi.

To this I answer that a positive enactment of the Legislature would prevail over the terms of the treaty if there were any conflict, but, without discussing the precise meaning of the second article, it appears to me that such is not the case.

Under the first article all the rights and powers of sovereignty which the ceding parties then exercised or possessed, or may be supposed to exercise or possess over their territories, were ceded to Her Majesty; and it appears to me that a right of road through those territories, and of constructing the necessary conveniences for the exercise of that right, as well as a right of constructing works necessary for Military defence, are essential and necessary incidents to the Sovereignty, and were therefore ceded to Her Majesty.

FREDERICK WHITAKER.

21st February, 1863.

No. 11.

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

Taranaki, New Zealand,
30th March, 1863.

No. 32.

MY LORD DUKE,—

I have the honor to transmit herewith copies of papers detailing the facts of a recent outrage which has been committed by the Natives at Kohekohe, on the lower part of the Waikato river, as well as copies of the letters which show the steps the Government have taken in regard to this matter.

I need not at present trouble your Grace with any statement in relation to this outrage, but I have thought it desirable you should see the enclosed papers which throw much light on the present state of the country, and which relate to an affair from which it is probable that some trouble may hereafter arise.

I have, &c.,

G. GREY.

His Grace the Duke of Newcastle, K.G.
