A Parsonson

I 22

NEW ZEALAND SETTLEMENTS ACT 1863

Introduction

p 3 Primary purpose of Act is to examine position of land granted to Maoris

p 5 Effect various provisions of Rowell (MS), Whitaker (MS) & Fenton (Colonial Office) on right of Crown to take Maori customary land for roads or defence purposes.

Rowell Act could not be done by legislation (unless not given by Parliament) but could be by Crown as an "inherent exclusion of sovereignty" [Ely 25, Ely Case Parl. and Legislation]

p 7 Col Office 22.3.1863 sent stating no doubt Crown justified exercise of sovereign power could be regulated would & wish to exercise not. Maoris have been allowed to live on & enjoy lands, all dispositions not. They have been ~~allowed~~ subject to enactments respecting disposition of land.

NOTE Col. Office understood stating & view on legal power of Crown & object for a pragmatic solution not. old minimise possibility of law (and consequent offence to Maoris)

p 9 Whitaker (who succeeded Rowell as MS) considered Crown has a legal right to land over not. Native title has not been extinguished for purpose of making roads & for enabling ltg. The result of this was any conflict was a treaty & statute would prevail but such all rights & powers of sovereignty vested in Crown under act & thus right to make roads & enforce making roads were "inherent & necessary incidents

A.P.

to it severally, such rights were ceded to the Queen in a body. Waitangi and see ref to Article 2.

pp 11/13 Fenton - this phrase ceded treaty guarantee under Art 2. Have now agreed no waste lands of a Crown, & Native was recognised thereby has come to be regarded as Native Customary title but inalienable except from or to the Crown.
- Further proof and of Crown, having entered into a treaty, Courts upholding law has no ambit to carry out obligations, guarantee, necessary requisite power shall be conferred by legislature.
- Treaty which cancels & annuls necessary to taking of Native land by the authority, Native land can be taken compulsorily.
- Fenton referred to Art 3 guarantee
- Argues that - they have a right may not be deprived of his land "otherwise" by authority of Parl.
- Question has which ~~Parl~~ legislature had requisite authority. Found no restriction under 1852 Const. Act for power of the assembly to pass laws affecting Native land, & Parl. has power to make laws - question under S53 - power to make laws "for peace, order & good govt of NZ."

- Found Parl. may lawfully pass a law ~~to~~ & empowering Govt to take compulsorily land upon which Native or natives has legal or equitable title.

p13 (foot) A.P. refers to native tenure in Waikato
making reference to R v Symonds (1847) 3
p14 NZ. where the phrase "native customs
and rights" cannot be distinguished (at least
in times of peace) from the rights of
a civilized community.

NOTE Primary source for the passage in
NZ legislation cannot by statute override
common law rights of native title. Rex
contra.
This I believe is fallacious.
Part-frequently overrules common law rights
of PR

p16 Land Confiscation for Military Settlement.
Confiscation of land of persons guilty of rebellion
A military settlement of 5000 agreed on by Governor & members
of 4/5/1863. Agreed land between Counties of
Tauranga & Raglan to be confiscated fully entitled
- work of making survey of Tauranga Bay
Confiscation of land in Raglan was contemplated
also to the same general principles of "native
lands"

p 17-18 Concept of Treaty and C.O. despatch of 1858.
Treaty justifies confiscation of land for settlement
by military.

p 18/26 The draft despatches & memo by Merivale &
despatches by Treaty justifying wholesale confiscation
of Waikato & Tauranga land. Note Treaty
did not bind Domestic receiving memo. to C.O.

A-P. 4

p 26 Passage of 1863 Act thro' Parliament

Introduced 4.11.63 and assented to by Queen 3.12.1863 (See for ex pp 56-58 Constitution Act days between assent & coming into force known as "urgent measure" for immediate assent

p 30 Native Minister Fox moved 2nd reading - 2 hours In suppression of rebellion he said must be a final one, the campaign was not a simple military victory but a means of detaching Natives from any again resorting to establishment of law & N.Z. must be practically unincumbered in Reserves retained by British settlers who were capable of defending themselves from "native aggression" Men enlisted for short-term military service must be enabled by grants of land to stay in area when their services no longer required. ..... While disclaiming any wish to attempt to confiscate Maori land, by "driving them to the hills & extinguishing their rights", he did make it clear that depredations must be punished. Those who had been in rebellion were to lose their land without compensation, while "any natives who had not been in rebellion might receive compensation from the Crown just as a Britain-Govt could pay compensation to people whose land was wanted for railway

p 31 See Fitzherbert's strong criticism (a long one) including mocking Maori treaty rights

p 31' See also D'Oller - type of - ordinance - he has been present at Ruapuke on 6.2.1840 - says Parl. was about to "abrogate" the Treaty - as it was appear to Maori

p 38 Sir D. Maclean's removal from C. Act.
see long ltr pp 38-49 and Fds
rejoinder pp 49 - 51
Maclean's sympathies & Mann position:
critical of C. Ltg.

p 52 Col. Office re-action (marked)
C. Ltg
NB
See p 52 comment by one Rogers of Col Off -
regarding claims & powers of Ltg Sir Lands of individual
natives or native families for a purpose
of making them private property & inducing
settlers under C. laws of "enclosing settlement."

p 56 discusses Grey's despatch on C. Ltg
inducing Sewell's memo & deletes mis
with his own comments. see pp 56-60

p 60 NZ Sett. Act as C. Col. Office
criticisms of Act by Sir Fred. Rogers - Sec
W. C. O. under pp 60 C. Ltg. Def mis' office
explanation - private. Sir Frederick Rogers & Superior.
Concluded Re "on C. whole ... & Act
appears to me a thoroughly bad one." (p 66)
p 66 - Sir Charles Fortescue (Parly Under-Secy)
also wrote a long minute - also entirely
Sir Rogers misgivings
p 67 Fortescue decided to rely on a Governor's veto to
control any excesses (not Re forced) by C. local
Assembly
Re 2 Acts were referred by C. Off & C. Ltg
pp 68-9 R.G. & S.G. as to which they were not C.
compliance of C. NZ legislature.

(26.4.1864) Gregg

p 70 NB Cardwell (Sec. of State) – his memorial ~~[illegible]~~ Officers relief (Indian) The R Govt ought to exercise its own powers etc"

Specifically ... a boy regularly constituted Courts of Justice &c ... to permanently [embody them] – i.e. law of N-Z – forming a "standing qualification of the Courts of Londonyi"

See attach pp 71-73

Concluded by saying This is why he was opposed disapproval of the Govt should wish to weaken his hand at a critical moment – it was, it had been decided The R Ass might remain in operation for 5 years.

NOTE The despatch sent to Gregg before Co. read Law Officers opinion

The Govt, Gregg was told by Cardwell, to take particular care The Govt Lands were not engaged to be sold or alienated but to be first reserved. Gregg was to take the "unknown" persons into custody of Govt Lands yet Govt's will

p 74 Law Officers opinion of 2 Acts sent to Sec of State on 14-5-1864. Considered under Act 53 of 12 Const. Act on grounds of repugnancy was ultra vires of Legislature. Laws of Eng have repeatedly recognised necessity of explicit legislation to suppress a rebellion threatening the existence of the State

pp 76-81 CONCLUSION

NB

Boon

Wai 143 I 22

2 documents of supporting documents.

I 22 (a)
(b)

THE NEW ZEALAND SETTLEMENTS

ACT 1863

Evidence of Ann Parsonson

1993

THE NEW ZEALAND SETTLEMENTS ACT 1863

CONTENTS

SECTION		PAGE
1.	INTRODUCTION	3
2.	INITIAL GOVERNMENT DISCUSSION OF THE COMPULSORY TAKING OF MAORI LAND, AND THE COLONIAL OFFICE REACTION	4
3.	THE LEGAL OPINIONS OF WHITAKER AND FENTON ON THE GOVERNMENT'S RIGHT TO TAKE MAORI LAND COMPULSORILY	8
4.	LAND CONFISCATION FOR MILITARY SETTLEMENT	16
5.	THE NEW ZEALAND SETTLEMENTS ACT 1863: ITS PASSAGE THROUGH PARLIAMENT	26
6.	SIR WILLIAM MARTIN'S RESERVATIONS ABOUT THE SETTLEMENTS ACT	38
7.	GREY'S DESPATCH ON THE NEW ZEALAND SETTLEMENTS ACT (JANUARY 1864)	56
8.	THE NEW ZEALAND SETTLEMENTS ACT AT THE COLONIAL OFFICE	60
9.	CONCLUSION	76
	LIST OF REFERENCES	82

THE NEW ZEALAND SETTLEMENTS ACT 1863

1. INTRODUCTION

1.0 The primary purpose of this paper is to examine the reaction of the British government to the crucial piece of confiscation legislation passed by the New Zealand parliament, the New Zealand Settlements Act 1863. The Settlements Bill was, after all, reserved by the Governor for the "signification of Her Majesty's pleasure" once it had passed through both Houses, and might have been disallowed.[1] It seems important, therefore, to record the grounds on which it was decided at the Colonial Office (the department of State responsible for colonial welfare and administration) not to recommend the disallowance of the confiscation legislation. In addition, some comment will be made on the evolution of the New Zealand government's policy of Maori land confiscation in 1862-3.

1.1 The policy of confiscation of Maori land was a policy which grew out of war.[2] The compulsory taking of Maori land was first discussed in 1862, after the British had begun a war in Taranaki; hostilities had ceased for the time being, but no lasting peace had been made. The New Zealand Settlements Act which provided for the taking of Maori land as a punishment for "rebellion" was passed in December 1863, in the wake of renewed hostilities in Taranaki, and Governor Grey's military invasion of the

---

1 "The New Zealand Constitution Act 1852 (Imp.) recognised a residuum of Imperial interests through the power of reservation of Bills for the Royal assent. Section 56 empowered the Governor (subject to the provisions of the Act or his Instructions) to assent to Bills, or to refuse assent, or to reserve a Bill for Her Majesty's pleasure." Philip A. Joseph, Constitutional and Administrative Law in New Zealand (The Law Book Company, Sydney, 1993), p.87.

2 It had of course been earlier assumed by the British government, in the 1840s, that there must be "waste lands" in New Zealand to which the Maori could have no claim, and that such lands - beyond the limits of tribally-held lands - might be declared the royal demesne. This policy, which could have led to the confiscation of Maori land, was not however put into practice. By the 1860s, the lands proposed for confiscation were clearly recognised by the British as being Maori-owned lands.

Waikato. The British government thus contemplated the confiscation legislation in the light of its own concerns: the cost of keeping increasing numbers of British troops in New Zealand, the transference of responsibility for "management of the natives" to the settler government, in the hope that this would impel the government towards peace rather than prolongation of the war, and a continuous stream of despatches from the Governor alleging Maori hostility to the Crown and "plots" in both Taranaki and the Waikato, and detailing the progress of the troops from Auckland south into the Waikato and their engagements with "the enemy".

2. INITIAL GOVERNMENT DISCUSSION OF THE COMPULSORY TAKING OF MAORI LAND, AND THE COLONIAL OFFICE REACTION

2.0 Although confiscation of land as a punishment for rebellion was not considered by the New Zealand government till 1863, it had discussed the power of the Crown to take Maori land compulsorily, for roads and "purposes of defence", in 1862. As matters relevant to a consideration of both the British and New Zealand governments' position on confiscation were raised during this discussion, it seems useful to summarise here some of the arguments put forward in this context.

2.1 Governor Grey wrote a despatch to the Duke of Newcastle on 18 December 1862, drawing his Lordship's attention to the fact that "very serious consequences" might arise if the N.Z. Government attempted to "carry roads through lands over which the Native title has not been extinguished."[3] He feared that Maori might mount an armed resistance to the building of such roads.

2.2 Grey enclosed a copy of a memorandum from the Premier, Alfred Domett, to the Attorney General, dated 22 November 1862, seeking his opinion on the Government's legal right to take roads through land "over which the Native Title has not been

---

3 Grey to Newcastle, 18 December 1862, CO 209/170, pp.214-214b.

extinguished". Domett's note made it clear that the Government had a particular road in mind, namely one between the Omata and Tataraimaka blocks in Taranaki. But the Government was contemplating more than a road. Domett also wanted to know whether the Government had a legal right "to take similar land for permanent Military positions or other purposes of defence".[4]

2.3 The Attorney General, Henry Sewell, gave his opinion on 22 November; Grey enclosed it in his despatch. Sewell made several points in his opinion:

(a) Land over which native title had not been extinguished could not be dealt with as waste lands of the Crown. The Crown had guaranteed their "territorial possessions" to the Maori by the Treaty of Waitangi; parliament could not legislate in respect of "waste lands" until Maori had ceded the land to the Crown.

(b) The "right of passage", the right to construct roads through a country, was an "essential condition of Sovereignty"; yet in respect of native lands, only the Crown - not parliament - might exercise this power.

(c) The same principle governed the question as to land required for "purposes of Military protection or defence."

2.4 Sewell did not attempt to reach any conclusion on the nature of Maori land title in post-Annexation New Zealand, though he outlined two alternatives: either native land might properly be considered as lands of the Crown, subject to native rights of occupation, or it might be considered that Maori held "private proprietory rights by a kind of allodial tenure". But it was not necessary for his present purposes to decide the matter; whatever the case the Crown, by virtue of its eminent domain, had the right to make roads through such lands.[5]

---

4 A. Domett, 22 November 1862, encl. in ibid., pp.219-219b.

5 Henry Sewell, 22 November 1862, encl. in ibid., pp.220-222. The right of eminent domain is the underlying, paramount title which the Crown acquires to its territory.

2.5 In the Colonial Office a number of minutes were written on this despatch.[6] The most substantial, evidently written by Sir Frederic Rogers, the permanent under-secretary, also sidestepped the question of the relationship between the Crown's rights in respect of land in New Zealand, and Maori rights. The Colonial Office was preoccupied with the political realities. At the time Grey's despatch was written the fighting had ceased in Taranaki; there seemed a chance of a permanent peace. The British did not want to lose that chance; they wanted an outcome which would lead to a withdrawal of British troops within the foreseeable future.

2.6 The question therefore, in the view of the Colonial Office, was not to be decided on legal grounds, but in terms of policy. And policy should be regulated "with a view to the natural expectations of the Maories." If the cost of improved communications was a renewed war with the Maori then, the Colonial Office concluded, the cost was too high. The roads would have to be postponed.

2.7 Yet the Colonial Office was not prepared to go as far as issuing an instruction that the road should not be proceeded with. As the point was expressed:

> "If the recent controversies have led to any conclusion, they have led to this, that the Home Government cannot safely govern native affairs from home; - but that it is necessary to leave the responsibility of dealing with them upon the local government subject to the consequences and also to the control which a Governor

---

[6] Incoming despatches from Governors passed through a number of hands at the Colonial Office. A junior official might write a minute initially, explaining the content of and background to the despatch just received; it then passed to the parliamentary under-secretary and the permanent under-secretary for their comments. Either the permanent under-secretary or a junior official might draft a reply to the despatch, but all drafts passed through the permanent under-secretary. Sometimes the minister (the Secretary of State) made his comments before a draft was prepared; sometimes he annotated a draft, or altered its wording.

possesses from his influence in respect to military protection."[7]

2.8 The Secretary of State's final reply to Grey, based on Rogers' minute, dwelt on the importance of deciding the matter in terms of policy. A brief reference to the legal position revealed some Colonial Office qualms about the Attorney General's assumption that the land of any subjects might be taken by the Crown without the assent of the legislature. But what mattered were the present circumstances in New Zealand, when the country was poised between peace and war, and the Maori were in arms to defend their "supposed rights", more especially their land rights:

> "... policy not less than justice requires that the course of the Government should be regulated with a view to the expectations which the Maories have been allowed to base on the Treaty of Waitangi, and the apprehensions which they have been led to entertain respecting the observance of that treaty."

Given that the taking of land from the Maori without their consent would have to be justified "on principles, which, whether technically correct or not, are alike contrary to the principles of English and Native law", and given the distrust and resentment towards the British such a policy would provoke, the colony might well find itself at war again. A pragmatic approach was therefore in order. The colonists would have to forego their roads in the meantime, lest making them should lead to renewed hostilities. The British government did not forbid the building of roads, but strongly discouraged the policy - particularly by indicating that if the colonists persisted, they would have to fight any resulting war on their own, without British troops.[8]

2.9 It is interesting to compare the British view at this time - with its emphasis on government recognition of Maori understanding of the Treaty, as well as on cost - with

---

7 Colonial Office minute (evidently by Sir Frederic Rogers) on ibid., 16 March 1863, pp.216b-217. (The bulk of the minute is not in Rogers' handwriting, but he has added a couple of paragraphs and his own initials at the foot of it.)

8 Newcastle to Grey, 22 March 1863, IUP/BPP, vol.13, p.281.

later views expressed in different circumstances, when fighting had broken out again in New Zealand.

3. THE LEGAL OPINIONS OF WHITAKER AND FENTON ON THE GOVERNMENT'S RIGHT TO TAKE MAORI LAND COMPULSORILY

3.0 Before the British reply was received in New Zealand, Sewell was replaced as Attorney General by the Aucklander Frederick Whitaker. Grey then wrote again to the Colonial Office, enclosing Whitaker's opinion on the government's right to build roads through Maori land and to construct military works.[9]

3.1 According to Grey, Whitaker's opinion had been sought by his ministers after they had received a letter from the Assistant Law Officer (none other than F.D. Fenton, who would later become Chief Judge of the Native Land Court). This letter, addressed to the "Under Secretary", and dated 28 November 1862 - that is, within a week of Sewell's opinion - was also enclosed in Grey's despatch. Fenton stated that in his view Attorney General Sewell's opinion was "erroneous in law", and that it might be premature - in the Attorney General's absence from Auckland - to act upon his advice. Once Sewell returned, the matter should be reconsidered by him and the Government.[10]

3.2 Fenton's letter, it will be noted, was not enclosed in Grey's December 1862 despatch to Newcastle; instead he sent it early the following year, once a new Attorney General had written his opinion. It is even more interesting that a lengthy opinion by Fenton himself, also dated 28 November 1862, which was printed as an apparent enclosure in the February 1863 despatch in the Appendices to the Journals of the House of Representatives 1863, does not appear in the CO 209 series; nor is it printed with the

---

9 Grey to Newcastle, 24 February 1863, CO 209/172, pp.158-160.

10 Fenton to the Under Secretary, 28 November 1862, encl. in ibid., pp.162-162b.

despatch and enclosures in the British Parliamentary Papers of July 1863.[11] It seems, therefore, that Grey did not send it to the Colonial Office in February, and the question arises whether this was a deliberate omission. Fenton's opinion will however be cited below in section 3.6.

3.3 Whitaker's opinion, dated 21 February 1863, was that:

> "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."

Whitaker's view was based on a consideration of the nature of Maori land tenure in a British colony, and his reasoning is obviously important. He argued that since 1840 the Crown had never (so far as he was aware) recognised a "Title in the Aborigines Cognizable in a Court of Law." On the contrary the Crown, and the Legislature, had assumed - sometimes even distinctly stated - that "Native Lands are in Law Demesne Lands of the Crown." And he cited the 1841 Land Claims Ordinance which declared all "unappropriated" lands within the Colony, "subject to the rightful and necessary occupation and use thereof by the Aborigines", to be Crown lands.[12] The Crown, in his view, therefore had a right in law, as long as it did not interfere with the afore-

---

11 See IUP/BPP, vol.13, pp.244-5. Fenton's opinion ultimately reached the Colonial Office as a sub-enclosure in Grey's despatch to the Secretary of State of 6 January 1864, in which he sent copies of acts passed in the previous session, and enclosed a memorandum by his ministers on the Suppression of Rebellion Act 1863 and the New Zealand Settlements Act 1863. Fenton's paper was among a sheaf of printed papers enclosed with the memorandum. See encl. in Grey to Newcastle, 6 January 1864, no.10 (2349 New Zealand), (AJHR, 1863,E no.3, pp.13-16), pp.338-339b.

12 4 Vict., no.2. (The quotation above is from Whitaker's opinion, which varies only in minor ways from the wording in the Ordinance itself.) This ordinance has been described as "a declaration par excellence of the doctrine of aboriginal title". (P.G. McHugh, "The Aboriginal Rights of the New Zealand Maori at Common Law", D.Phil. thesis, University of Cambridge, 1987, p.232.) Whatever its place in colonial law, however, the statement of Maori rights embodied in the ordinance does not sit very comfortably with the guarantee to Maori in the Treaty of "tino rangatiratanga" over their lands. Whitaker's interpretation of section 2 of the Ordinance quoted above also demonstrates how easily it could be used to limit Maori land rights, rather than to protect them.

mentioned Maori rights, to use the land for roading and military purposes.

3.4 But might this not be objected to, Whitaker asked, on the grounds that it would be contrary to the Treaty of Waitangi? He himself did not think so, and in case of conflict a statute would of course prevail over the terms of the Treaty. But since "all the rights and powers of Sovereignty" were ceded to the Crown in the first article, and since the rights to make roads and construct military works were "essential and necessary incidents to the Sovereignty", such rights were ceded in the Treaty to the Queen. It is interesting that Whitaker explicitly reached his conclusions "without discussing the precise meaning of the 2nd Article."[13] In short, he examined the rights of the Crown under Article 1 of the Treaty, but ignored those of the Maori under Article 2.

3.5 This second despatch was dealt with summarily in the Colonial Office. The minutes were perfunctory, and the despatch in reply reflected the unwillingness of the Colonial Office to reopen the subject. Grey was simply referred to Newcastle's previous despatch of 22 March for an explanation of his Lordship's views on the subject.[14]

3.6 In section 3.2 above, reference was made to an opinion of F.D. Fenton on the Crown's right to build roads through Maori land. This opinion, dated 28 November 1862, was entitled "Right of Government to take lands in New Zealand compulsorily from aboriginal natives".[15] Though it was evidently not sent to the Colonial Office until 1864, and thus was not among the material which was considered in London at this time, it was clearly an influential document in New Zealand. Fenton concluded that the General Assembly had power to legislate for Native lands, and that the executive

---

13 Whitaker's opinion, 21 February 1863, encl. in Grey to Newcastle, 24 February 1863, CO 209/172, pp.163-164b.

14 Newcastle to Grey, 26 May 1863, IUP/BPP, vol.13, p.283.

15 Printed as encl. in Grey to Newcastle, 24 February 1863, AJHR, 1863, E no.3, pp.12-16. (But see s.3.2 above.)

government might not legally take compulsory possession of "any person's land" until parliament had passed enabling legislation. Fenton reached this conclusion by the following steps:

a. He first rehearsed the Crown's changing views of the "nature and extent of the rights or interests possessed by the Aborigines in the wild land of New Zealand", pointing out that initially Maori were regarded as an "independent and organised state, capable of forming a treaty". Citing the guarantees of the Treaty, he pointed out that it nevertheless did not deal with the question of the nature of chiefly rights or the amount of territory over which they extended.

b. Fenton went on to cite the Charter of 1840, and concluded that the assumption embodied in this document was that "all the waste lands were held to be in the Crown, with the exception of such land as might be reserved for the uses and in manner specified, and such lands as were actually used by Natives."

c. Again in the Royal Instructions of 1846, he stated, it was directed that all lands not claimed by Maori on the basis of labour expended thereon, or by settlers, and registered accordingly, were to be considered as demesne lands of the Crown, that is Crown lands. But Maori objected to the Imperial government's view of their rights, and it was never carried into practice.

d. After 1846 the view of the English authorities as to Maori territorial rights began to change, and the Constitution Act (1852) made it clear that lands where customary title had not been extinguished were no longer considered "waste lands" of the Crown. Indeed, since that time "the unoccupied territory of the Colony in the hands of the Aborigines has come to be regarded as their distinct and admitted property, but inalienable to any person other than the Crown...".

e. To Fenton, such an interest in land "must be considered of a high character", so that "if the Crown having entered into a treaty to acknowledge and protect this

interest ... finds the existing law does not enable it to carry out its treaty and guarantee, it is absolutely necessary that the requisite power should be conferred by Legislation, so that the Crown may fulfil its obligations."

f. How, then he asked, might the Natives be deprived of their interest, should their land be needed for important works in the public interest, without their consent? And by what authority could their land be taken compulsorily?

g. Fenton stated that the Treaty had admitted Maori in the Empire as British subjects with all their rights and privileges. These rights guaranteed Maori under the "sanctions and guarantee of the law of England" included the right of private property", which could not be interfered with by any authority except the "Sovereign power of the Empire". The Imperial parliament had "sovereign and uncontrollable authority" in the making, repealing and revising of laws. In English law, "a subject may not be disseized of his land" except by authority of an act of parliament. Even where the public good might necessitate interference with individual property rights, the consent of the owner ought to be obtained, or at least a reasonable price paid him in return for his possession.

h. If land required for a public work could only be taken compulsorily by authority of parliament, whether the owner be Native or European, and whatever the nature of his title or interest, the only question remaining was whether the Imperial parliament had bestowed power on the local legislature to make laws affecting lands over which customary title had not been extinguished.

i. It could not be argued that it was a prerogative of the Crown to take lands compulsorily from the Maori, since to exercise such a power would be "in derogation of the honour of the Crown and in contravention of its own promises, contained in the treaty".

j. Did the colonial legislature, then, have the authority? Fenton could not find any

section in the Constitution Act which specifically conferred such a power on parliament, but he argued that there was no "restriction" in the Act on the power of the General Assembly to pass laws affecting Native land, therefore the power must be included in the general delegation to the General Assembly in section 53 to make laws "for the peace, order and good government of New Zealand".

k. The point was proved, Fenton argued, by the fact that the provincial legislatures were expressly forbidden to legislate in respect of Crown lands, and native lands (section 19). Since the General Assembly had not been so forbidden, it followed that the power to make such laws had passed to it with the general legislative authority bestowed in section 53.

l. Thus parliament must pass a law

> "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."

3.7 Fenton thus placed considerably more emphasis than did Whitaker on the force of Maori land rights in post-Annexation New Zealand. In extending his account of the official British views of those rights beyond 1846, he gave a more accurate picture of them than had Whitaker. Maori rights, he stated, had been recognised by the Crown both in the Treaty and - after an initial period when a more restrictive view was taken of them - in subsequent years. Maori had rights under both Articles 2 and 3 of the Treaty, which the Crown must scrupulously uphold; nevertheless, their property rights like those of all British subjects might (if absolutely necessary to the public good) be infringed, so long as this were done constitutionally.

3.8 Neither Fenton nor Whitaker, it may be noted, made any reference to the judgment in R v. Symonds (1847), nor to the judgments of Chief Justice Marshall in the Supreme Court of the United States which "recognised aboriginal title in the strongest of terms",

and on which the New Zealand decision drew. By the common law doctrine of aboriginal title the legal right of tribes to ancestral lands was recognised as surviving the acquisition of sovereignty by a European government, except that a restriction was placed on the alienability of tribal title. Henceforth it could only be alienated to the new government.[16] It is thus particularly noticeable that Fenton, who seemed to be searching for precedents or parallels to draw on, and who was struck by the apparent contradiction in the Crown's recognition of Maori property rights except that of free alienation - a matter which had been discussed at length in the United States cases and in R v. Symonds - still failed to consider colonial case law. Yet in R v. Symonds, Chapman J had stated:

> "Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly stated that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it."[17]

At a crucial moment in our history, then, the Attorney General and his staff failed to draw on colonial legal precedent.[18] Were they unaware of it?

---

16 See P.G. McHugh, "Aboriginal title in New Zealand courts", Canterbury Law Review, 1984, vol.2(2); Paul McHugh, The Maori Magna Carta (OUP, Auckland, 1991), ch.5.

17 NZPCC 387 (SC) at 390.

18 Chapman J. it may be noted, was not in New Zealand at this time; he had left Wellington in 1852 to take up an appointment in Hobart, later moving to Victoria. He did not return to New Zealand until 1864, when he secured permanent appointment as a judge, and took up residence in Dunedin. Martin C.J., who had also delivered judgment in R v. Symonds, had resigned his position in 1857, though he continued to take a deep interest in Maori rights.

3.9 The apparent emphasis in Fenton's opinion on the importance of recognising Maori land rights should not mask the fact that he laid the groundwork here for parliament's assumption of the right to legislate to destroy those rights. Whereas Sewell had argued that Maori land could only be taken compulsorily by executive decision, Fenton argued that the executive could only act if the legislature empowered it to do so. The key was section 53 of the Constitution Act and, moreover, the absence of any restriction in the Act on the power of the General Assembly "to affect Native lands by legislation". These crucial arguments would later stand the government in good stead when it came to decide how to effect confiscation.

3.10 The significance of Governor Grey's failure to send Fenton's opinion to the Colonial Office at this time must also be noted. The Colonial Office had no opportunity to comment on Fenton's arguments as to the right of the settler parliament to pass laws providing for the compulsory acquisition of lands in customary title in certain circumstances. Did Grey think it preferable that the Colonial Office should not be given the opportunity to take issue with Fenton's opinion? (It had not, after all, been convinced by Sewell's or Whitaker's arguments as to the right of the Crown to make roads through Maori land, and in advising against such a course of action had cited Maori understanding of the Treaty of Waitangi.) In any event, by the time the Colonial Office was presented early in 1864 not with a mere opinion as to parliament's powers, but with an actual Act passed by both Houses of the General Assembly empowering the New Zealand Government to take Maori land compulsorily, circumstances in New Zealand were very different from what they had been when Grey's despatch enclosing Whitaker's opinion had been written nearly a year earlier. By 1864 war had broken out again in New Zealand; and Colonial Office views of the Act were shaped by concern at the crisis.

4. LAND CONFISCATION FOR MILITARY SETTLEMENT

4.0 The confiscation of land to punish Maori, and to facilitate the establishment of a military settlement, was first agreed upon by the Governor and his Ministers on 4 May 1863. It was agreed that land between Omata and Tataraimaka should be confiscated, after a small British force suffered casualties in the wake of the military occupation of the Tataraimaka Block. Confiscation of the land at Waitara was also contemplated by Ministers, should Te Ati Awa give any assistance to the "southern tribes". Grey enclosed Domett's memorandum recording his agreement with Ministers, in a despatch to the Colonial Office dated 9 May 1863. His despatch, however, focussed on the "very serious state of things" in the North Island, and in particular on the New Zealand government's anxiety for more troops - one European regiment and two Sikh regiments. Colonial Office minutes thus dealt largely with the request for Sikh regiments, though Chichester Fortescue also commented that the measures described in the Memorandum appeared "judicious".[19] The Secretary of State, in his reply to several of Grey's despatches, including that of 9 May, regretted the fate of the British soldiers, and hoped that a "fitting punishment" would be exacted for the "crime".[20]

4.1 A further military engagement took place at Katikara on 4 June 1863. Thereafter, however, the British military effort was switched to the Waikato. Grey had been preparing for an invasion of the Waikato for some time, for he was anxious to destroy the power of the Kingitanga. After the British reoccupation of Tataraimaka block, Grey alleged that the soldiers had been killed at Oakura at the instigation of the Kingitanga, and that there was also a plot to attack Auckland. On 11 July he ordered the invasion of the Waikato, and the British imperial and colonial troops fought their

---

19 See Domett, Minute addressed to His Excellency..., 5 May 1863, AJHR, 1863, E no.2, pp.20-1. Also enclosed in Grey to Newcastle, 9 May 1863, CO 209/173, pp.64-70b. The British government decided not to send Sikh regiments.

20 Newcastle to Grey, 25 July 1863, IUP/BPP, vol.13, p.446.

way as far south as Orakau, by April 1864.

4.2 It was against this background that the Colonial Office received its first official intimation of the New Zealand goverment's intention to confiscate Maori land on a much larger scale, in a despatch of 29 August 1863 from Governor Grey to the Duke of Newcastle. The despatch enclosed a memorandum from Grey's Ministers about their plan to import 5000 men into New Zealand to take up 50 acre farms on "military tenure" once they had performed military duties for a certain period.[21] It was based, Grey noted, on his own scheme adopted in British Kaffraria.[22] And it explained the notion of confiscation to the Colonial Office as follows:

> "The land upon which it is proposed to locate these Military Settlers it is intended ultimately to take from the territories of those tribes now in arms against the Government."[23]

Grey's wording made it clear that the Government was already taking steps to implement the plan, despite the fact that no enabling legislation had yet been passed. Men were already being enrolled under conditions which had been gazetted. But the General Assembly had not yet met to pass

> "the laws necessary to give legal validity to the proposed measure"[24]

though Ministers were certain that it would pass such laws "without hesitation". The Assembly had been summoned for 19 October; in the meantime Grey had given his consent to the plan to the extent of raising 2000 men for active service in Auckland

---

21 Grey to Newcastle, 29 August 1863, CO 209/174, pp.226-256. Printed in AJHR, 1863, A No.8, pp.1-7. This despatch was received in the Colonial Office on 16 November 1863.

22 For a discussion of this claim of Grey's see Hazel Riseborough, Background Papers for the Taranaki Raupatu Claim, Wai 143, #A2, pp.13-15.

23 Grey to Newcastle, 29 August 1863, CO 209/174, p.227.

24 ibid., p.227b.

province.

4.3 Grey also introduced the Colonial Office to the arguments in favour of confiscation: the warlike intentions of Waikato chiefs, the need to ensure the "permanent security" of the country, to punish the chiefs so as to deter others from carrying out similar aggressive actions. Grey was fully in support of the proposed plan to locate

> "large bodies of European settlers, strong enough to defend themselves, in those natural positions in this Province which will give us the entire command of it..."[25]

Moreover he considered that

> "By taking the land on which this European population is to be settled, from those tribes who have been guilty of the outrages detailed in my various despatches to Your Grace, a punishment of this nature will deter other tribes from committing similar acts, when they find that it is not a question of mere fighting... but that such misconduct is followed by the forfeiture of large tracts of territory which they value highly - whilst their own countrymen will generally admit that the punishment is a fair and just one, which the Waikato chiefs have well deserved."[26]

4.4 The enclosed memorandum from Grey's ministers, signed by the Premier Alfred Domett and dated 31 July 1863, dwelt on the determination of the powerful Waikato tribes

> "to drive out or destroy the Europeans of the Northern Island and to establish a Native Kingdom under a Native King."[27]

In these circumstances, and without additional military forces, the colony faced the

---

25 ibid., p.229.

26 ibid., pp.229b-230b.

27 Memorandum for His Excellency, 31 July 1863, ibid., p.234.

prospect of a long, indecisive and expensive war. Such a circumstance would never have arisen, but for the settlers' small numbers.

"Had the Settlers been more numerous - a wholesome respect for their power and consequently that of the Government would have prevented these outbreaks."[28]

And the memorandum went on to contrast the situation in the South Island, where there were only a "handful" of Natives, "no war, no quarrels, and few complaints", and the Maori possessed considerable property! "A similar relation between the two races in this Island", they suggested, "would produce a similar result".[29] But the "determined hostility of the Waikato tribes" had made an increase in settler numbers a matter of urgency. Fortunately the goldfields of Australia and Otago had brought to the Southern hemisphere an abundance of suitable hardy men who might easily be enticed by a suitable offer to make their permanent home in the North Island. Fortunately, too, the "rebellion of the Waikato tribes" placed within the power of the Government an eminently suitable district which could be offered as such an inducement to prospective settlers, since it was to be "taken from the enemy".[30] Only by bringing in extra men could the present stress on the male population of Auckland province be alleviated, and their proper civilian contribution to the war effort - in the form of supplying the troops - be restored. Military settlers would be able to relieve the General's troops of garrison and escort duties, and of the necessity to protect his rear, thus releasing them for active combat. Moreover the settlers could "scour" the forests between Auckland and Waikato, now "infested" with hostile "natives".

4.5 Eventually, it was hoped that the native people could be "civilised and improved" - a

---

28 ibid., p.235.

29 ibid. By this time the Crown had completed its purchases of South Island land, leaving Maori confined to small reserves.

30 ibid., p.236.

matter, it was argued, of great importance. But first, Maori had to be disabused of the notion that the British had tried to help them only because they needed a peaceful cession of land for their settlements - and that British settlements existed only on Maori sufferance. An example must be made of the Waikato tribes; their punishment would mean an end to Maori uprisings. Punishment meant loss of land, since otherwise Maori would go on believing that

> "by war they have everything to gain and but little or nothing to lose".[31]

Yet it was not proposed to deprive the Waikato tribes of all their land "however just such a measure might be". There would be plenty of land left for them - perhaps even hundreds of thousands of acres. And Maori not implicated in the rebellion would be kindly treated.

4.6 The memorandum went on:

> "After the settlement of the present difficulty with the Waikato tribes a similar plan, suitable to the nature of the country, must be carried out with the rebellious tribes of Taranaki."[32]

Thus all other tribes would be warned by the example of the Waikato and Taranaki tribes:

> "The present will be the first occasion in which an aboriginal Native of New Zealand will be deprived of a foot of land against his will, and we feel assured that it will be the last."[33]

One disadvantage of their scheme occurred to the ministers, namely the importation of exclusively male settlers. To counteract this, they had reached an understanding with

---

31 ibid., p.240b.

32 ibid., p241b.

33 ibid., p.242. This glib misstatement should be noted; it demonstrates how easily the Government could pass over the facts when it suited.

the Auckland Provincial Government to make a financial investment in the introduction of female immigrants into the province.

4.7 The memorandum was accompanied by a signed statement from Governor Grey (dated 5 August 1863) recording his acquiescence in the plan of the ministry, and his decision

> "in the present emergency... to give them all the aid in my power in carrying out that plan upon which they may determine."[34]

4.8 It was also accompanied by a copy of the Gazette issue of 5 August 1863 setting out conditions on which land in the Waikato district would be awarded to Volunteer Militia Settlers, to Military and Naval Settlers, and to Settlers Generally (who were prepared to perform military service). The conditions indicated that settlements would be surveyed and marked out at the expense of the Government, each with a town of 100 1-acre allotments, a stockade, and 100 farm sections to be laid out around the town. The size of the farm sections to be allotted to each settler would depend on his rank, according to a published formula.[35]

4.9 The Colonial Office's internal reaction to this despatch was - with one important exception - rather matter-of-fact. Officials were evidently already aware of the goverment's plan to attract military settlers, because of items which had appeared in the newspapers. One minute noted that the ministers' memorandum appeared

> "to establish conclusively the expediency of the plan which they recommend"[36]

and noted that the cost would probably be borne entirely by the colonial government. There seemed no great concern that the scheme had not yet been approved by parliament, though the following comment was made:

> "...until the Secy. of State has been informed that the measure has received the

---

34 Grey, 5 August 1863, ibid., p.247b.

35 New Zealand Gazette, 5 August 1863, enclosed in ibid., pp.245-246b.

36 C.O. minute on Grey to Newcastle, 29 August 1863, dated 16 November, ibid., p.231.

sanction of the Legislature it would be premature to give general publicity to the conditions..."[37]

4.10 A further Colonial Office minute, by T.F. Elliot (dated 17 November) disclaimed any knowledge of the subject at all:

"I am so little conversant with New Zealand questions, that I can do no more than forward this despatch, with Mr Dealtry's remarks."[38]

And the despatch somehow missed the Parliamentary Under-Secretary, Chichester Fortescue, altogether: a later note from him, dated 14 January 1864, recorded that it hadn't been sent to him in November.

4.11 It was in fact the Secretary of State himself who devoted most thought to the New Zealand proposal. In his minute, the Duke of Newcastle expressed the view that the policy of confiscating Waikato land was

"upon the whole... right, provided that it is exercised with justice and with a scrupulous desire not to involve the innocent with the guilty. - It is not however free from danger. If the other Tribes are persuaded that it is a new and flagrant proof of the greediness of the Settlers for land and not adopted as a just punishment for murder and rebellion it may make them desperate and aid the efforts of the King Party to effect a general rising. - "

Newcastle approved of the military settlement scheme, though he considered that it would not long retain its character, as the need for it would disappear; within a "very few years" the Maori would become an "insignificant minority". The scheme should be sanctioned, but responsibility for it must rest with the colonial government,

"for all depends upon the spirit in which it is carried out."[39]

---

37 ibid., p.232.

38 ibid., p.232b.

39 Newcastle's minute, 19 [November 1863], ibid., p.233b.

4.12 This final message was conveyed strongly to the New Zealand goverment in the official reply, dated 26 November 1863. The Secretary of State wrote:

> "I do not disapprove of the principle of this measure; I think that any body of natives which takes up arms against Her Majesty, on such grounds as those which are alleged by the Waikatos, may properly be punished by a confiscation of a large part of their common property...
>
> But, while I acquiesce generally in the principles which you have adopted, I must add that the application of those principles is a matter of great danger and delicacy, for which the Colonial Government must remain responsible. It will be, evidently, very difficult to control within wise and just limits that eagerness for the acquisition of land which the announcement of an extended confiscation is likely to stimulate among old and new settlers, and which, if uncontrolled, may lead to great injustice and oppression. Still more evidently is it possible that the natives who still remain friendly to the Government may view this measure, not as a punishment for rebellion and murder, but as a new and flagrant proof of the determination of the colonists to possess themselves of land at all risks to themselves, and at any cost, as thus furnishing the true explanation of the past and present policy of the Government."[40]

The Secretary of State's main concerns were that "the property of innocent persons and tribes" should be respected, and that the policy would not, in fact, "extend and intensify the spirit of disaffection" and thus prolong the war. The British government would view such an outcome "with the gravest concern and reprehension."

This final phrase replaced one in the draft despatch which read:

> "... these consequences will be viewed by Her Majesty's Government as a reason

---

40 Newcastle to Grey, 26 November 1863, printed in IUP/BPP, vol.13, pp.452-3.

not for increasing but for reducing the number of troops now in New Zealand, and for leaving a war which will then be carried on for the acquisition of land, to be supported by those who are interested in that acquisition."[41]

Newcastle however wrote in the margin beside this passage: "I think such a threat at this moment inopportune [&] would be very irritating", and the passage was struck out of the final version.

4.13 By 5 October 1863 Domett prepared a lengthy "Memorandum on Roads and Military Settlements in the Northern Island of New Zealand."[42] He stressed the need for the government to secure "material guarantees for the prevention of future wars" - not just military victories - and stated that the most obvious such guarantees were roads (which troops could use) and armed populations formed into "defensive settlements" in key areas, to deal with possible Maori "incursions". He suggested a detailed plan for the construction of 1000 miles of road in South Auckland, Waikato, Taranaki, from north Taranaki along the west coast to Wellington, and from Napier south through 40-mile Bush and Wairarapa to Wellington. He suggested a distribution of 20,000 men (most of them to be new immigrants, preferably married, from England) in settlements throughout the provinces of Auckland, Taranaki, Wellington and Hawke's Bay. The total cost of the immigration, settlements and roads schemes would be about £2,300,000, to which should be added the expenses of the war, bringing the cost overall to £3,500,000. This amount (indeed, up to £3,800,000 would be guaranteed, it was hoped, by the imperial government. The debt would be repaid by an expected increase in customs revenue (as the European population increased) and an increase to the land revenue which would be produced "by the sale of lands forfeited by the Natives at war against us". A total of 2,792,000 acres should be available to the government in

---

41 Draft despatch, Newcastle to Grey, 26 November 1863, CO 209/174, pp.255b-256.

42 Printed in AJHR, 1863, A no.8A, pp.1-12.

Waikato and Taranaki, minus 1,300,000 acres for post-war Maori and European settlement. The balance available for sale would be 1,492,000 acres, which might be expected to raise at least £2,192,000.

4.14 Domett concluded his memorandum with some general comments on his plans. It was

> "only just and reasonable that all the lands of the Waikato and Taranaki tribes that are best adapted for European settlement should be taken for that purpose, leaving them the valleys and plains further up in the interior."

The tribes had been unnecessarily aggressive; the settlers had now to take measures for their own self-preservation.

> "It is equally right and fair to take for sale and settlement so much of their lands, utterly waste and useless for the most part in their own hands, as will to some extent idemnify us for the losses their wilfulness and barbarity have entailed and are entailing upon us."

4.15 Domett was aware that his plans might be thought to be "based solely on the idea of force", but considered that it was essential to establish a "basis of physical power" on which a "superstructure of moral sway" might be erected.

> "Power first - as the only thing that naturally commands the respect of these undisciplined men; after it, the humanising institutions ... Until you get rid of the rank growths of savagery, how can you rear the plants of civilisation? ... Cut down the towering notions of savage independence so long nursed by the Maoris - stately, imposing, even attractive though they be - root up their ill-concealed passion for lawless self-indulgence."

Once Maori were brought "beneath the sway of law and order" they would have a chance of escaping inevitable doom.

4.16 Domett's memorandum clearly reflects a total lack of respect for Maori custom, Maori political authority, and Maori commitment to preserving both. Indeed, he was simply

hostile. By holding "aggressive tribes" solely responsible for the wars, he provided a justification not just for taking Maori land, but for taking the best lands of Waikato and Taranaki for British immigrants, and confining the Maori to the interior, to lands which he evidently conceived of as useless to the settlers. The memorandum is a stark expression of the then Premier's view of relations between Maori and the New Zealand government. His reference to "material guarantees" to prevent future wars seems to indicate uncertainty as to the government's ability to handle relations with the Maori, and a belief that resulting Maori "unrest" would lead to further hostilities - unless the Maori were properly subjugated.

4.17 The Governor did not send this memorandum by his Premier to the Colonial Office at this time. (Was he wary of the Colonial Office reaction to such a bald statement on Maori land confiscation?) Before the month was over, however, Domett (whose colleagues were disgruntled with his leadership, preferring Whitaker) resigned.[43] A new ministry, a coalition between William Fox and Whitaker, was formed on 30 October 1863; Whitaker became Premier. Domett's proposals for military settlements became the basis of the policy of the new ministry.

5. THE NEW ZEALAND SETTLEMENTS ACT 1863: ITS PASSAGE THROUGH PARLIAMENT

5.0 In the wake of the New Zealand government's discussions of the merits of confiscation of Maori land, legislation was introduced into the Pakeha parliament - no Maori sat in

---

[43] When Rogers later discovered Domett's paper, he complained about Grey's failure to forward it officially: "It seems to me astonishing that with such a means of enlightening the Secy. of State, Sir G.G. should keep him so much in the dark as to what is really being put to the Colonists, as the practical meaning of their Legislation." Fortescue's reply to Rogers indicates that the Colonial Treasurer, Reader Wood, who was in London in April 1864 when the Colonial Office was considering the Settlements Act, sought to explain away Grey's omission by stating that Domett's paper was a "private production", not an official one, and was disowned in the Assembly by Fox. It is clear, however, that the new ministry merely altered some aspects of Domett's scheme. See minutes on Grey to Newcastle, 6 January 1864, no.10, CO 209/178, pp.240-241.

the legislature before 1868 - to enable such a scheme to be lawfully put into operation.[44]

5.1 The New Zealand Settlements Bill was first read in the House of Representatives on 4 November 1863; the second reading was the following day, and the third reading (after the Bill had been considered by the House in Committee on 10 November) on 11 November, when the Bill was passed. In the debate on the second reading of the Bill in the House there were four speakers, one of whom opposed it. On 12 November the Bill was read for the first time in the Legislative Council, on 16 November for the second time, and on 17 November for the third time, when it was passed. In the second reading debate there were five speakers: one opposed the Bill, while two others expressed reservations. On 20 November the House agreed to some amendments made to the Bill by the Council. On 2 December Whitaker advised the Governor to assent to the Bill "without a clause suspending its operation", because of the importance of bringing it "into immediate operation".[45] The Governor assented to the Act in the name and on behalf of the Queen on 3 December 1863.[46] Thus the Bill was read

---

44 It will be noted that the Secretary of State, at this time, had not yet replied to Grey's despatch of 29 August; indeed he did not do so until 26 November.

45 Memorandum encl. in Grey to Newcastle, 6 January 1864, no.10, CO 209/178, p.298.

46 Le 1 1863/200, no.8. (National Archives). Grey's assent is recorded at the foot of the certified copy of the Act. See also Journals of the House of Representatives, 3 December 1863. As noted above in footnote 1, the New Zealand Constitution Act 1852 (Imp.) empowered the Governor, subject to the provisions of the Act or his Instructions, to assent to a bill passed in parliament, or refuse his assent, or reserve a bill for the "Signification of Her Majesty's Pleasure thereon". When the Governor assented to any bill in the Queen's name, he must send a copy of it to a Secretary of State, and it was "lawful at any Time within Two Years after such Bill shall have been received ... for Her Majesty, by Order in Council, to declare her Disallowance of such Bill", so that the bill was made void. Nor could any bill reserved for the signification of Her Majesty's pleasure have any force within New Zealand until the Governor signified in parliament that the Queen had assented to it. 15 and 16 Vict., c.72, s.56-59. Grey's Instructions of August 1861 allowed him some flexibility, however. These directed that when bills of particular classes were presented to him for the royal assent, he should - unless withholding assent - reserve them for "the signification of Our pleasure", "subject nevertheless to your discretion, in case you should be of opinion that an urgent necessity

three times in both houses in just over a fortnight, having been introduced into parliament two weeks after the beginning of a new session on 19 October 1863, over a year after the previous session had been prorogued.

5.2 In the end, then, the government decided that it was necessary for parliament to pass legislation before Maori land was taken compulsorily; Fenton's opinion had obviously carried weight. The New Zealand Settlements Act 1863 ("An Act to enable the Governor to establish Settlements for Colonization in the Northern Island of New Zealand") conferred remarkable powers on the Governor in Council. The justification for these powers, laid out in the preamble, was the

> "insurrections amongst the evil - disposed persons of the Native race"

to which the North Island had been subject, leading to

> "the great injury alarm and intimidation of Her Majesty's peaceable subjects of both races and involving great losses of life and expenditure of money in their suppression."

"Outrages upon lives and property", past and potential, were also cited, and it was further stated that

> "a large number of the Inhabitants of several districts of the Colony have entered into combinations and taken up arms with the object of attempting the extermination or expulsion of the European settlers and are now engaged in open rebellion against Her Majesty's authority."

To prevent "future insurrection or rebellion" and to establish the Queen's authority, and

---

exists requiring that such Bill be brought into immediate operation; in which case you are authorized to assent to such Bill in our name, transmitting to Us by the earliest opportunity the Bill so assented to together with your reasons for assenting thereto...". Among the 'classes' of bill specified was "any Bill, the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty." See Draft Instructions to Sir George Grey..., 12 August 1861, CO 380/125, pp.37b-40. The Colonial Office view subsequently was that the Act had come into operation, but that its disallowance might still have been recommended. (See s.8.29 below.)

law and order throughout the country, numbers of settlers were to be introduced to "preserve the peace of the Country".

5.3 The Act empowered the Governor in Council, once satisfied that "any Native Tribe or Section of a Tribe or any considerable number thereof" had been "in rebellion against Her Majesty's authority" since 1 January 1863, to declare Districts within which the land of the tribe or section or "considerable number thereof" was situated, and to define the boundaries of such Districts as he chose.

Within the Districts the Governor in Council might set apart "eligible sites for settlements for colonization", again defining his own boundaries. Such lands required for settlements were to be deemed to be Crown Land.

5.4 Persons with "any title interest or claim to any Land taken under this Act" were to be granted compensation, but certain persons were specifically excluded from entitlement to compensation. These included persons who had since 1 January 1863 made war or carried arms against the Queen, or who had assisted or advised others to make war, or who had committed "outrages" against persons or property, or who had failed to give up arms in their possession if a government proclamation should require them to do so. Section 6 of the Act provided that it was lawful for the Governor to call on tribes or individuals engaged in specified "offences" to "come in and submit to trial according to law" by a named day; those who did not come would not be entitled to compensation.

5.5 Remaining sections of the Act outlined the procedures for granting compensation: the establishment by Compensation Courts, the powers of the judges, the obligations of claimants to submit claims in writing to the Colonial Secretary within a certain period, the duty of the judges to hear such claims and determine the amount of compensation payable, recording the amount in a Certificate which would entitle the claimant to payment from the Colonial Treasurer.

5.6 The Governor was empowered to lay out towns and farms on part of the new Crown

land so that military settlers who had already entered into contracts (or who might do so in future) could be provided for in terms of those contracts. Once enough land had been set aside for persons entitled under their contracts, the Governor in Council might lay out towns, survey and sell town, suburban and rural allotments. The money this raised was to pay for government costs incurred in "suppressing the present insurrection", the costs of forming settlements and the costs of compensation.

5.7 In short, the Act provided a mechanism for implementing a plan that some British policy-makers had wanted in the first years of Annexation, and others had firmly resisted: the declaration of Maori land as Crown demesne. As Fenton had pointed out, the plan had finally been abandoned in the early years of the Colony as unworkable. But with the outbreak of conflict between Maori and Crown it was resurrected, and the firm casting of Maori in the role of "rebels" provided the justification for their legal dispossession.

5.8 The Native Minister William Fox, moving the second reading of the Bill in the House, stressed the crucial importance of the Bill to the government's policy of "suppressing ... the existing rebellion".[47] The "suppression" must be a final one; what was required was not a simple military victory, but a means of deterring the Natives from ever again resisting "the establishment of law in the Northern Island". Maori must be "practically outnumbered" in their own districts by British settlers, who were capable of defending themselves from "native aggression". So it was no good enlisting men from Otago or Australia for short-term military service: they must be induced by grants of land to stay, in areas where the government needed them. Fox did not carefully address the question of the future of Maori in these districts, as the government saw it. While disclaiming any wish to ultimately dispossess the Maori, by "driving them to the hills and extinguishing the race", he did not make it clear how dispossession was to be avoided.

---

47 NZPD, 5 November 1863. Echoes of Domett's memorandum recur in Fox's speeches.

Those who had been in rebellion were to lose their land without compensation, while "any section" who had not been in rebellion might receive compensation from the Court, just as the British government would pay compensation to people whose land was wanted for a railway.

5.9 The only expressed opposition to the Bill in the House came from the member for Ellesmere, James FitzGerald, a leading figure in the Canterbury settlement. In a long speech, FitzGerald complained of the lack of opportunity for members to discuss government policy, and thus to make up their minds

> "as to how far the Government itself has been the cause of the evils under which this colony now lies".[48]

5.10 FitzGerald attacked the Bill as

> "a repeal ... of every engagement of every kind whatsoever which has been made by the British Crown with the Natives from the first day when this was a colony of the Crown... [It] professes to give absolute and arbitrary power to the Government of the colony to enter upon all Native lands whatsoever in this colony ... It gives power to the Governor ... advised as he may be by any Ministry sitting on that bench, to violate every engagement which has ever been made with those Natives, and to confiscate their lands upon any imaginable or conceivable wrong."

It was, said FitzGerald, an "enormous crime" which was to be perpetuated against a

---

48 NZPD, 5 November 1863. FitzGerald's views on Maori policies have been variously interpreted. Alan Ward has cast doubt on FitzGerald's concern for Maori rights, pointing to his expressed aim of undermining the Kingitanga in various ways; David McIntyre however has described him as "an outspoken advocate of Maori rights, race assimilation and peace." See Alan Ward, A show of justice (AUP/OUP, Auckland, 1973, pp.153-4), and W. David McIntyre, "James Edward FitzGerald", in The Dictionary of New Zealand Biography, vol.1 (Allen and Unwin/Department of Internal Affairs, Wellington, 1990, pp.126-8).

race who were refused representation in parliament,[49] who knew nothing of what was being planned against them, and who could not speak in their own defence. How were the colonists to defend themselves when the Bill got to England, from charges that all the settlers wanted was to get hold of Maori land?

> "It will go Home that we have proposed one entire and enormous confiscation of the whole lands of the Natives..."

he continued. He objected to the section empowering the Governor to declare native lands to be Crown lands on the grounds that it was contrary to the Treaty of Waitangi,

> "which has distinctly guaranteed and pledged the faith of the Crown that the lands of the Natives shall not be taken from them except by the ordinary process of law - that is, taken within the meaning of the Treaty."

(A most interesting qualification; FitzGerald appears to be saying that the law should not be used to override the guarantees in the Treaty.) Moreover he considered that that section was in contravention of the provision in the Constitution Act that prohibited parliament from passing a law repugnant to the law of England. Surely a general law like this which provided for the "acquisition of private estate", in the absence of the owners, with no provision for their pleading their case to parliament, was repugnant to the law of England.

5.11 FitzGerald went on to express amazement at the power given a judge of the Compensation Court - a judge appointed by the governor, who need not even be a lawyer, was to have power to decide whether individuals were guilty of treason, were to forfeit their property, or were entitled to compensation.

> "A greater, a more monstrous farce, by way of constructing a Court of justice I

---

[49] Maori were not specifically excluded from voting by the provisions of the New Zealand Constitution Act 1852, but were effectively excluded because they were deemed not to meet the small property qualification by virtue of occupation of customary land; only the freehold or leasehold of land in Crown title qualified a man to vote.

never heard of in my life."

His only hope, he added, was the final section of the Bill, which provided that the Bill should not come into operation until the Queen assented to it, for he was convinced that She would never be advised to give Her assent to the measure.[50] In concluding his criticism of the government's policy, he moved that the Bill be read a second time in six months. Only one other member spoke before Fox replied briefly, and the Bill was in fact read a second time that day.

5.12 In the Legislative Council the second reading of the Bill was moved by Mr Whitaker, who pointed to two principles in the Bill: the first was the right of the government to take land for public purposes (here he harked back to his Opinion expressed earlier in the year); the second was that those engaged in rebellion should not be entitled to compensation. The Natives were either subjects of the Queen in rebellion (as he thought they were), or were not subjects, in which case they could be held to have violated their side of the Treaty of Waitangi. And in Vattel's Law of Nations it was laid down that

"when one side of a treaty was violated the other party was discharged from all obligation..."

5.13 In the Council three speakers expressed reservations about the Bill, though two of them ultimately voted for it. Opposition was most forcibly expressed by William Swainson, formerly Attorney General, who had been the first member appointed to the Council in 1854. Even Swainson, however, considered that it was essential for the welfare of both peoples that

"we should teach them unmistakably that we were the stronger"

---

[50] This section did not survive; it was evidently negatived when the Bill was considered by the House in Committee on 10 November.

so that the country might never again "be cursed with another Maori war..."[51]

5.14 Swainson's objections to the Settlements Bill were twofold: first to the taking of land from Maori who were not in "rebellion", and second to the subsequent sale of their land which was not required for military settlements. To pass a bill with such objects would amount to a violation of public faith on the part of the Crown, and he did not think the General Assembly had the power to pass such a piece of legislation.

5.15 Swainson cited article two of the Treaty, maintaining that the Crown could not seize the land of "peaceable Maori subjects" without their consent, when it had offered Maori such a guarantee. Nor could parliament pass such a bill, because it could not set aside a Treaty entered into by the Crown; nor did the Constitution Act give it power to dispose of Maori lands.[52] At the very least the Bill must contain a proviso delaying its operation until it was confirmed by the Crown, since the Governor had expressly been instructed under the authority of the Constitution Act to reserve for the signification of the Queen's pleasure (except in cases of great emergency) "any Bill the provisions of which shall appear inconsistent with obligations imposed on us by treaty."[53]

5.16 Swainson turned then to questions of government policy, urging on his colleagues the Duke of Newcastle's exhortations that the Government must take heed of the expectations of Maori arising from the Treaty.

"The exercise of the highest statesmanship was needed to rescue the colony from

---

51 NZPD, 16 November 1863.

52 Here Swainson cited section 72 of the Constitution Act which authorised parliament to make laws for regulating the sale, lease and disposal "of the waste lands of the Crown in New Zealand". (Emphasis added)

53 Swainson was quoting here from Grey's Instructions of 12 August 1861, which required the Governor to reserve bills in certain "classes" for the "signification of Her Majesty's pleasure"; Swainson referred to bills specified in the seventh "class". See Draft Instructions to Sir George Grey..., 12 August 1861, CO 380/125, pp.37b-40. See also footnote 46 above.

its present difficulties."[54]

And the Maori for their part should abandon their "vain hope of maintaining a separate nationality" and hold fast instead to the Treaty of Waitangi and to the rights and privileges guaranteed to them therein.

5.17 The second speaker who expressed reservations about the Settlements Bill was the Hon. Dr. Daniel Pollen of Auckland. Pollen had no objection to trying to solve "the Native difficulty" by "judicious settlement of the province with well-selected immigrants". But he objected to using the necessity for military settlements as a cloak to "confiscate the whole land of the Native people."

> "This Bill went beyond the necessity; it was, in fact, a Bill for the confiscation of the Native lands of the province, that object being veiled by a specious form of words."[55]

So much was clear to Pollen from a speech of the Colonial Treasurer in support of the New Zealand Loan Bill, also introduced into parliament in November, to enable the government to raise £3 million for the cost of the war and the settlement schemes: the government intended to keep a large amount of the land which it took from Maori, simply in order to sell it. The Treasurer had expressed a hope that £3 million would be raised by the sales to repay the loan.[56]

5.18 Pollen considered that such a policy was politically "immoral", as well as financially unsound, and he expressed his "insurmountable objection" to it. He had himself been present at Waitangi on 6 February 1840 when the Treaty was discussed, and he went on

---

54 ibid.

55 ibid.

56 The Treasurer had calculated that of 4,250,000 acres of land belonging to "rebels" in Waikato and Taranaki, 1,500,000 acres would be available for sale after provision was made for military settlers and "loyal Maori". This land could be sold at an average price of £2 per acre.

to give the Council his impressions of what had passed on that occasion.

> "He heard Her Majesty's representative arguing, explaining, and promising to the Natives; pledging the faith of the Queen and of the British people to the due observance of it; giving upon the honour of an English gentleman the broadest interpretation of the words in which the treaty was couched: and he could assure the Council that, definite and clear as the terms of that treaty appeared to us now, they bore about the same relation to the picture which it was made to present to the eyes of the Natives on that day as the skeleton did to the living and breathing human body."[57]

5.19 Dr Pollen argued that British actions in New Zealand had seemed to Maori to show that they had come for the purpose of obtaining possession of Maori lands. The Crown had not discharged its obligations to Maori people, and though there had been some useful legislation it had been "without beneficial practical result." Now parliament was about to proceed to "abrogate" the Treaty - as it would appear to Maori. An attempt at "wholesale confiscation" would increase Maori exasperation.

5.20 In conclusion, Pollen regretted that the Council would not (in his view) give the policy the dispassionate consideration it deserved, and hoped that the "statesmen of England would stand between us and the Natives", and that the "administration of the law would be better than the law itself", and would "be guided only by the dictates of justice, good faith, and public honour."

5.21 A third speaker, Robert Stokes of Wellington, expressed doubts as to whether the Bill would actually achieve what was hoped for, namely the end of the war on such terms as

---

[57] ibid., 16 November 1863. Pollen, of Irish descent, studied medicine, migrated to New South Wales in the late 1830s, and crossed to North Auckland just before the signing of the Treaty. He was a member of the Auckland Provincial Council for various terms, in the late 1850s/early 1860s, and showed "strong sympathy for the Maori" in this period. Later however he held the post of commissioner of confiscated lands (among other appointments). He served many years in the Legislative Council.

would prevent all further disturbances. When he looked at the extent of confiscation proposed in the Waikato, he feared that

> "the effect would be to drive some thousands of armed Natives from their lands, as outcasts and wanderers into the interior, to be dependent on the bounty of inland tribes, or as marauders on the southern provinces of this Island, to obtain a precarious existence by predatory habits."

5.22 Stokes urged the need for such "extensive and extraordinary powers" to be exercised with the "utmost moderation", lest "the Natives now in rebellion" be rendered "reckless and desperate". The important thing was to gain Maori confidence, not to "enforce their submission".[58]

5.23 At the conclusion of these speeches, Frederick Whitaker made a brief reply. He trusted that the Ministry would never advise the Governor to "unjust or unmerciful proceedings". Parliament had already passed bills dealing with Maori lands, which had been assented to. Land would only be sold to pay for the expenses of the "rebellion", which was fair. There was to be no general confiscation, for no land north of Auckland would be taken, nor at the East Cape. Maori in any case understood the principle of conquest of land very well; it was well recognised among themselves. He believed the "northern Natives" would in fact benefit from the Bill, "for they would be led to see that obedience was the first essential to their living in peace, as well as that those who go to war must pay its expenses."

5.24 When the vote was taken, only Sewell and Swainson voted against the second reading of the Bill; fourteen members voted in support of it. After the second reading the Bill was committed to a Committee of the whole Council. Swainson successfully moved one amendment to section 2, namely the insertion of the date: "since the first day of January 1863". Sewell failed to carry a further amendment to the same section. He

---

58 ibid.

had sought an insertion in the 5th line after the world "Council" which read:

> "to issue and publish in such manner as he shall think fit, a Proclamation in the Native language, calling on such tribe, section, or number so engaged in such Rebellion as aforesaid, to leave such Rebellion, and to lay down their arms, failing which, after a day to be fixed in such Proclamation, not being less than one month from the date thereof, it shall be lawful for the Governor in Council to declare" [i.e. that the District - be a District within the provisions of this Act.][59]

Sewell tried, in other words, to insure that confiscation was not automatic, once the Governor in Council was "satisfied" that a Tribe or part of it had been "engaged in rebellion"; he tried to ensure that the government gave "rebels" what he must have seen as a last chance, by giving them an ultimatum before confiscation was proceeded with.

5.25 On 17 November two further amendments to the Bill were agreed to by the Council in Committee, including the addition of a new section, section 20, which provided for the Governor and Governor in Council to exercise the powers vested in him authorising the formation of Settlements for colonisation in respect of any land "obtained by cession or purchase" or set apart by a Superintendent. The Bill was then read a third time, and passed, and on 20 November the House of Representatives agreed to the amendments to the Bill made by the Council.

6. SIR WILLIAM MARTIN'S RESERVATIONS ABOUT THE SETTLEMENTS ACT

6.0 The confiscation legislation itself came officially to the attention of the Colonial Office in two separate despatches from Governor Grey, each dated 6 January 1864 (received 14 March 1864). The first (no.9/2343 New Zealand) enclosed a lengthy paper by Sir William Martin, the former Chief Justice, objecting to the legislation, along with a memorandum by the Colonial Secretary on Sir William's paper.

6.1 The second despatch (no.10/2349 N.Z.) transmitted copies of 40 statutes passed by the

---

[59] Journals and Appendix to the Journals of the Legislative Council, 16 November 1863.

General Assembly during the session of 1863, and of bills which the Governor had reserved for the "signification of Her Majesty's pleasure"; included among them were the New Zealand Settlements Act and the Suppression of Rebellion Act.[60] Grey's despatch will be examined below (see s.7).

6.2 The Colonial Office had already been alerted to the passing of the New Zealand Settlements Act not only by reading it in the newspaper, but also by Martin himself, in a letter which he sent to Sir Frederic Rogers dated 7 December 1863, which arrived on 18 February 1864.[61] Martin explained that the Act had passed rapidly through both houses, and that it seemed open to objection and "more likely ... to protract our troubles than to heal them." He had accordingly sent his views on the Act to the colonial government, asking that they be sent also to the Secretary of State, but had been informed that no member of the government could read his paper before the end of the session; nor could it be sent to England unread. Fox invited Martin to send his paper direct to England if he wished, but Martin preferred to wait until ministers had the opportunity to comment on it should they wish to do so, and simply informed the Colonial Office that the statements would arrive by the next mail.

6.3 The Colonial Office minutes on Martin's letter noted that the Act had not arrived by the same mail, but that it had been printed in a recent newspaper (which they circulated among themselves). Chichester Fortescue commented on the "large discretion" given the Governor in Council by the Act, which "may vary immensely in the degree of its severity, according to the spirit in wh.[sic] it shall be acted upon." He concluded that the "district" within which land might be confiscated could not contain the lands of a whole tribe, if only a "section" had been in rebellion.

Sir Frederic Rogers however was more hesitant:

---

60 For a summary of the provisions of the Suppression of Rebellion Act, see s.7.2 below.

61 Martin to Rogers, 7 December 1863, CO 209/177, pp.348-348b.

"The Act places the Maories very much at the mercy of the Government [whenever] 'a considerable number' have engaged in rebellion. -"[62]

But they would have to wait until the next mail arrived before proceeding further.

6.4 Sir William Martin's paper on the New Zealand Settlements Act, which Grey sent to the Colonial Office on 6 January 1864, was enclosed in a letter Martin wrote to William Fox, the Native Minister, dated 16 November 1863.[63] Martin apologised for the amount he had written, and for the fact that he had been unable to submit his views to the General Assembly as he had intended, because there had not been time. Instead, he now laid them before the Government, and asked also that the Governor forward them to the Secretary of State.

6.5 Martin's paper was entitled "Observations on the Proposal to take Native Lands under an Act of the Assembly"; it was an extensive treatise on the history of relations between Maori and the Crown since 1840 (but more especially since 1853), and a plea for a more enlightened British policy than that which the Government proposed to adopt.[64]

6.6 Martin began by considering the various ways in which land might accrue to the Crown, and noted that there were three ways in which the Crown might acquire land from subjects by operation of law: by forfeiture after conviction of treason, by Act of Attainder, or by statute, authorising the executive to take land for some "national purpose" on payment of compensation. Finally, land might be ceded to the Crown by a subject (or a foreign State). Which mode, then, was applicable in this case? Were Maori to be considered as subjects or foreigners?

6.7 Martin approached the question in the way which Fenton and Whitaker had not. He

---

62 Colonial Office minutes on ibid., p.348b-349.

63 Martin to Fox, 16 November 1863, encl. in Grey to Newcastle, 6 January 1864, no.9 (2343 New Zealand), CO 209/178, pp.144-144b.

64 encl. in ibid., pp.145-211.

drew directly on the British experience in North America, citing Chancellor Kent's Commentaries on American Law.[65] In North America, Martin stated, the British had recognised the right of the "natives" to their lands, and to govern themselves, imposing only such restrictions on the Indians' right to deal freely in their lands as were necessary to assure the British right of colonisation (as opposed to that of other nations), and Crown control of it. In other words, they assumed the external dominion. The internal dominion was acquired gradually over time, by a series of treaties with individual tribes which defined the relationship between the governing power and the tribe henceforth, and assumed both the dominion of each tribe over its land and its right to cede such lands as were described in the treaty, on terms agreed on by buyer and seller.

6.8 This policy was disregarded in New South Wales, and the "evils" which followed led the British parliament to reconsider the whole question of its relations with "native races" dwelling within the Empire, and to revert to earlier "sound and just principles".

6.9 But the Maori could not be dealt with as North American Indians had been, because the Crown had already specifically recognised the independence of New Zealand, and had thus abandoned any rights which it might have based on discovery. It was thus considered that the proper course of action was to gain express Maori consent to British colonisation and the establishment of English government, in a treaty. And at the same

---

65 James Kent, appointed professor of law at Columbia College in 1793, later became Chancellor of the State of New York in 1814. Subsequently, between 1826 and 1830, he published his notable 4-volume treatise Commentaries on American Law, which ran into many editions. Part 6 (Vol.3) dealt with the "Law concerning Real Property", and included a discussion of the title of European nations by discovery, and of Indian rights in the new colonial territories. "The natives were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it and to use it according to their own discretion, though not to dispose of the soil at their own will, except to the government claiming the right of preemption." James Kent, Commentaries on American Law, vol.3, (Little Brown and co, Boston, 1873; F.B. Rothman and co, Littleton, Colorado, 1989), p.380. Kent went on to discuss Supreme Court decisions on Indian rights and title.

time, Maori should be brought "within the protection of that Government and the dominion of law."[66] In other words, the Crown attempted in New Zealand to assume the internal and external sovereignty by one treaty.

6.10 Martin suggested that it would not in fact have been practicable in a small country like New Zealand - as it had been in North America - to recognise the independence of numerous tribes who might well be intermixed with scattered bodies of colonists. Moreover, the Imperial government was preoccupied with humanitarian concerns, and wished to be in a position to protect the Maori from the effects of colonisation. He quoted the entire preamble to the Treaty of Waitangi to prove his point, as well as Article 3, and concluded that it was plain that the framers of the Treaty

> "desired to bring all the Natives of these Islands into the position of Subjects of the Crown"[67]

But Martin made an important qualification:

> "it is not to be conceived that they contemplated the introduction at once amongst the New Zealanders of the minute and technical forms of English Law. They regarded only the substance of the Law, - the substantial fruits of settled Government, - legal protection for life; - legal protection for property."[68]

Rather, it was hoped that the Maori would gradually come to appreciate the benefits of English law, and the protection it offered, and that this would facilitate the extension of the new system. The authority of the Crown would "quietly grow in the land".[69]

6.11 Martin argued that this process had in fact gone smoothly up until Sir George Grey's

---

66 Martin to Fox, 16 November 1863, encl. in Grey to Newcastle, 6 January 1864, no.9, CO 209/178, p.150b.

67 ibid., pp.153-153b.

68 ibid., p.153b.

69 ibid., p.156b.

departure from the colony in 1853. Grey had been conciliatory towards the tribes, Martin suggested, but had also embarked on "active government", sending Resident Magistrates, for instance, into Native districts.

6.12 Even then, however, "the sense of nationality" was beginning to stir among the people; a king was proposed in 1852. But the idea did not find strong support at that time, because of the policies Grey had pursued. Indeed it came to be believed that the British had succeeded in acquiring internal as well as external dominion. The executive government made public statements to this effect and, Martin asserted, the judges of the Supreme Court supported them. The Maori were now regarded as subjects of the Crown. Therefore they were "subject to some Law ... But to what Law?"[70] There was, after all, no one system of law under the Queen's sovereignty; the Scottish system, for instance, differed from the English.

6.13 In New Zealand, he suggested, the original idea was that the criminal law was to be enforced, but that in other respects "the Natives were to be left to their own usages." How then was the central question now at issue to be answered? How far were Maori holding their lands "according to Native Tenure" subject to the English rule of forfeiture to the Crown?

6.14 Martin then summarised the legal and political position of Maori. They could not, he said, "enforce any right of ownership or occupation of land, held by the Native Tenure, in the Courts of the Colony." (How, then, did he interpret the judgments in R v. Symonds?) They could not vote because their own tenure was not recognised as constituting a property qualification. Thus:

> "The Native owner receives in respect of such lands from our Legal System no protection: - from our political system no privilege. Is he subject to the severest

---

[70] ibid., p.162.

penalty imposed by our system, that of forfeiture?"[71]

6.15 And given that Maori were not represented in the legislature, could that body deal with their lands? The Imperial legislature in practice exercised its right of taking subjects' land for purposes of national concern very cautiously - even though subjects were directly represented in parliament. Now the General Assembly claimed a similar right over the lands of those who were unrepresented therein, and claimed moreover

> "to exercise such a power in an unlimited and discretionary way not only for the establishment of military posts or villages, but generally for the dispossession of the Natives and the location of Immigrants, whereever the Government may please, within such Districts, as the Government may have pronounced to be in a state of Rebellion."[72]

For the first time, the colonial parliament claimed the right to take land without the consent of its "native owners" - and this not only in cases where "treasonable acts" might be proved, but also in cases where no such acts might be proved.

6.16 Martin also considered it of great importance that the whole matter of the relations between Maori and the Crown be considered not just in terms of "strict Law", but in terms of broader considerations. Sovereignty over the Maori had been acquired only recently and "exercised ... imperfectly"; it was not as if the Maori were

> "...Hereditary Subjects of an Ancient Monarchy rising against a Government which has been long recognized and established."[73]

6.17 However the relation between sovereign and subject was defined in the New Zealand case, it must be a mutual one. The sovereign power had rights as well as duties, and it was necessary to enquire if the sovereign had fully performed those duties. If it had

---

71 ibid., p.163b.

72 ibid., p.164b.

73 ibid., p.166b.

not, "it should deal less rigidly with its subjects. This is a principle of natural Equity, which, I suppose, all will admit."[74]

6.18 Martin thus launched an enquiry into the "practical discharge of the duties involved in the undertaking to be Sovereign" in the years after Sir George Grey's departure in 1853. In particular he drew attention (citing, in different contexts, the recorded comments of Governor Gore Browne, and of government ministers) to the failure of the government during the 1850s to send officers to many North Island tribes, and to firmly establish institutions for the benefit of the "Native Race". He slated the land purchase activities of the government in this period - the only government activities vigorously carried out and easily visible in Maori territory. Martin drew attention to the ease with which a system of less than careful or scrupulous land purchase could exasperate and disquiet the Maori, especially when the entire point of the system seemed to be to colonise the country, while making no provision for their own "improvement".

6.19 Turning then to the course of events during those years in Taranaki and the Waikato, the "principal seats of disaffection and disturbance", Martin dwelt on the role of the government in exacerbating tensions among Te Ati Awa by its purchase policies from the early 1850s, and thus arousing alarm more generally among the iwi, who feared their impending dispossession. Yet the government stood aside from the fighting among the people which followed the implementation of its policies; how then was the Queen's sovereignty manifest? Not until the dispute at Waitara (1859-60) was a military force sent by the government.

> "The Queen's power which had not interfered to save mens lives or their property, did interfere to take possession of a piece of land."[75]

And when the fighting ceased, the Government retained possession of land "outside the

---

74 ibid., p.167.

75 ibid., p.185.

disputed Block" which was not even claimed by purchase, and which was to cause more trouble than the original block itself, for the tribes "appear to have regarded [its retention] as an indication of the purpose of the Pakeha to take land by force."[76] Hence they too retained a portion of English land, the Tataraimaka Block.

6.20 Turning then to the Waikato, Martin stressed the views of William Thompson and other "authors" of the King Movement who wanted "order and laws", which the government had not provided, but also a future of their own in New Zealand, and the right to protect those of their customs they wished to maintain. He dwelt also on the deteriorating relationship between Waikato and the Government, and its causes as he perceived them, notably the May 1861 Manifesto calling on the people to surrender.[77]

6.21 Martin's concluding section began with a plea for understanding:

> "If we could put ourselves in some degree in the place of the Maori, and regard from his point of view the course of things which I have briefly reviewed, we should have less difficulty in understanding how it is that amongst a people, not less shrewd than ourselves, there has grown up a conviction that our policy is selfish and one sided and that their only safe course is to have as little as possible to do with us beyond trading in our markets."[78]

Much "good work" had been done for the Maori, but much remained undone. Above all, the government had failed to provide for the "material comfort and wealth" of the Maori, their economic well-being. And did not all subjects judge a government on this

---

76 ibid.

77 This is a reference to Governor Gore Browne's Declaration "to the Natives assembled at Ngaruawahia", which "amounted to an ultimatum." The Governor demanded submission to the Queen's sovereignty, restoration of plunder and compensation for settler losses. The reply of Wiremu Tamihana (William Thompson) was not conciliatory. See W.P. Morrell, British Colonial Policy in the Mid-Victorian Age (Oxford, Clarendon Press, 1969), pp.263-4.

78 Martin to Fox, 16 November 1863, encl. in Grey to Newcastle, 6 January 1864, no.9, CO 209/178, p.190.

basis?

6.22 Settlers must understand that Maori distrust of British power was natural, especially since they could only estimate British intentions towards them.

6.23 Even so, fighting in Taranaki had not been renewed till the British reoccupied the land at Tataraimaka, which had upset Rewi Maniapoto and his people, and led them to contemplate hostilities against the British. Though there was no general support for Rewi's plan, British nervousness about an attack had led to their invasion of the Waikato.

6.24 Martin believed that the British position had changed since 1860, and was stronger; that Maori "public opinion" did not support the King Movement as strongly as it had supported Wiremu Kingi. In Martin's view Rewi and "his section" of Ngati Maniapoto were the "local adversary", but the "general adversary is the distrust, so widely spread in the mind of the native population."[79]

6.25 If, then, "the Natives have not fallen short of their part in the original contract more than we (who understood it better) have of ours" the course to be followed by the British was plain. While the "folly of resistance" must be made clear, the British must show that their power would not be used vindictively or selfishly; but as befitted a great enlightened Christian nation. War would not dispel distrust and fear, and no policy must be adopted which would merely sow the seeds of another civil war. All over the country Maori were watching to see how the British behaved, and what their real motives were. And if more land were taken than seemed necessary to hold as military positions, and if land were also taken from those "who have done us no wrong", the British would merely cause further troubles. The Maori must be reassured, and the British must not throw away the opportunity they had now to do so.

6.26 "The example of Ireland may satisfy us how little is to be effected towards the

---

[79] ibid., p.193.

quieting of a country by the confiscation of private land; how the claim of the dispossessed owner is remembered from generation to generation; and how the brooding sense of wrong breaks out from time to time in fresh disturbance and crime."[80]

6.27 Martin went on to argue for a government policy in dealing with the supporters of the King which distinguished between those who were "rebellious or treasonable" and those who were not; clearly he identified the "real source of our trouble" as lying within Ngati Maniapoto. There were many within the Waikato however who wished for peace and who had turned away from confrontation until troops entered their territory.

6.28 In conclusion, Martin noted that his statement was in some sense one-sided. But it was necessary, he thought, to set out the side of the case that was constantly lost sight of, while the other was always prominent. If the troubles of the Island were to be healed, both sides must be considered. And most settlers knew little of the history of the colony, had little personal acquaintance with the Maori, and no way of evaluating misstatements about Maori disaffection.

6.29 He was willing however to admit that "the folly of Waikato should be checked and crime be punished" (as he put it); but "checked and punished as may become a Government which has not fulfilled its own purpose nor performed its own duty."[81] Government policy must not reflect local interest or "popular clamour" but must be "just and reasonable" and in the interests of all the Queen's subjects. Then "we shall prove ourselves worthy of the power which England has entrusted to us."[82]

6.30 Along with Martin's paper, Grey's despatch enclosed a "Memorandum by the Colonial Secretary on Sir W. Martin's 'Observations on proposal to take Native Land &c'"; it

---

80 ibid., p.197b.

81 ibid., p.203.

82 ibid.

was signed by William Fox and was undated.[83]

6.31 Fox indicated at the outset that he could accept much of Sir William's argument - "many of his premises may be admitted more or less unreservedly" - but that he disagreed with his conclusion.

6.32 Martin, Fox implied, was contemplating the whole question as an abstract one. The government however did not have that luxury.

> "We have to deal with a people in actual rebellion, the largest and most powerful tribes being openly committed, and three fourths of the whole Maori population sympathising to an extent which renders the enforcement of law by the ordinary tribunals exceedingly difficult, and as regards large sections of the race absolutely impossible."

Fox spoke of the "magnitude of the emergency" facing the government; the thousands of troops which were needed in the field; the closeness of the "rebels" to the capital Auckland; their "devastation" of part of the province of Auckland; their destruction of settler property; the "massacre" of unarmed men and women and children; the alarm and insecurity throughout the whole North Island.

6.33 The problem for the government however was not just to put down the existing "rebellion"; it was to prevent its recurrence. Maori, he suggested, had virtually nothing until now to lose by hostilities; therefore military defeat was only a temporary setback.

6.34 The only two alternatives open to government to achieve this end were the continued maintenance of a large military and naval force in the field, or the introduction of "so large" a settler population that it would deter Maori insurrection, or be able to suppress it easily "should they be mad enough to attempt it."[84]

---

[83] ibid., pp.212-218b.

[84] ibid., p.214b.

6.35 Fox drew a fine distinction between the confiscation of land (which he defined as taking land without compensation) and the taking of other lands for which "full compensation", assessed by a tribunal, would be paid. Only the lands of those engaged in "open rebellion", or actually "aiding and abetting it by overt Acts" would be confiscated. The government was however also empowered by the Act to take other lands "for public purposes such as the establishment of military villages or the like" on payment to the owners (whether Maori or European).

6.36 Fox asserted that the idea of confiscation was not new to Maori, or "in any way abhorrent to their moral sense." He equated confiscation with "the law of the victor among themselves". He even suggested that land confiscation was based on "principles of natural justice", whether seen as punishment for rebellion, an indemnity for the cost of suppressing that rebellion, or a "material guarantee for the future". Such a penalty was necessary to deter other tribes from rebellion, especially those sympathetic to the "rebels", who must not be allowed to draw strength from the encouraging sight of "rebels" in full possession of their lands at the cessation of hostilities.

6.37 Clearly punishment was not all Fox had in mind however. He was also convinced that it was undesirable, in fact "prejudicial" to the Maori - whether rebel or not - to retain possession of vast tracts of land "which they neither use nor allow others to use", and which allowed them to remain separate from Europeans and - he suggested - unassimilated. Such a condition was

> "highly conducive to the prevalence of evils, social and physical, which contribute to the rapid decay and extinction of the Race."[85]

6.38 If the colonisation of the North Island were to continue, and the Maori were not to be exterminated by repeated collision with a "superior power", confiscation must be carried out. Such "technical difficulties" as the need to confer political franchise before

---

85 ibid., p.217b.

enforcing submission to the law were interesting matters for discussion, but irrelevant to a government responsible for "saving to the British Crown a dependency in imminent peril", and ensuring that such crises did not arise again.[86]

6.39 In the end, then, Fox's argument did not rest just on the duty of a government to govern, to punish "rebels", to bring lasting peace to the country. Underlying confiscation, after all, was the long-standing settler wish to part Maori from their land because land held on their own terms in accordance with their own customs allowed Maori to remain independent. Too much land was bad for them, and it was for the government to decide how much was too much.

6.40 Governor Grey himself made some remarks on Martin's paper in his covering despatch. Grey stressed the crises in Taranaki and the Waikato in 1863: the killing of eleven soldiers in Taranaki, which he asserted had been "ordered" by some Waikato chiefs, the existence of "plots" by the same people for an attack on Auckland.[87] Was it not the duty of the government in such circumstances, he asked, to take steps to move troops to protect peaceable families? And if the troops did cross into the Waikato at this point, this did not justify the "turbulent" in "attacking" Her Majesty's forces. Grey's answer focused on what he described as the hostile intentions and movements of Waikato "natives"; he did not comment on the government policy of land confiscation.[88]

6.41 The initial Colonial Office minute on the despatch of 6 January (written by Mr Cox on 15 March) noted that

---

86 ibid., p.218b.

87 For a discussion of the Oakura ambush, see Heather Bauchop, The Wars and Iwi Losses, Taranaki 1860-1870: A Summary, Wai 143, #H11(1992), pp.54-9. It is not intended to discuss in this paper Grey's allegations as to "plots" to attack Auckland, but Dalton has shown that Grey had no evidence of actual "plots" before he decided to invade the Waikato. See B.J. Dalton, War and Politics in New Zealand 1855-1870 (Sydney University Press, 1967), pp.175-7.

88 Grey to Newcastle, 6 January 1864, ibid., pp.126-134.

"Confiscation to a certain extent has been admitted - whether the new Settlements Act gives an excessive power remains to be considered when the Act is dealt with."[89]

6.42 The main Colonial Office comment came in two later minutes written by Frederic Rogers and Chichester Fortescue. Rogers, in a lengthy communication to Fortescue, summarised Martin's aims as:

"1. To establish the principle that in all their dealings with the settlers the Maories are to have the protection of English Law and of the ideas which regulate its application.

2. To show the obligation under which we lie to deal generously with them."[90]

Rogers had some trouble with the first of Martin's propositions. He considered it "impossible and unfair strictly to enforce English Law upon the Maories", since they could not understand it or thus obey it. And if Maori were not to be expected to obey the law, neither did he see that the full protection of the law could be afforded them. In such a case, people like the Maori must be dealt with "in a more or less anomalous tentative and transitional way."[91]

6.43 Rogers thus considered constitutional or legal arguments out of place. Legislative interference with property, be argued, was ex hypothesi above law, and took place only when law was "insufficient for its purpose"; such interference had to be carefully considered, and if possible "controlled by rule" - But clearly he thought the case in New Zealand was different.

"... in such an emergency as the present it appears to me that arguments of pure

---

89 ibid., p.135.

90 Rogers minute, 8 April, ibid., p.136.

91 ibid., p.136b.

law or constitutional form are beside the purpose."[92]

6.44 Rogers entirely agreed however with Martin's arguments "from policy, good faith and natural justice", and he noticed that William Fox did not deal with these arguments at all in his memorandum. He decided to hold back his own comments on policy until the Act itself came under scrutiny. But clearly Fox's reply did not impress Rogers at all. He wrote rather tersely:

> "I will only here observe 1. That he seems to contemplate no other mode of keeping the natives quiet than by fear - 20,000 troops (Imperial or Colonial) or else 20,000 military settlers.[93]

Even making allowances for the fact that Fox was writing at a time when active military operations were under way, Rogers did not detect much interest on his part in addressing development schemes to "improve the position of the natives" - among which, it is interesting, he included "allowing them to lease their lands".

6.45 Rogers also had grave doubts about the military settlers scheme, which he thought likely to fail. Why should an Englishman prefer a dangerous existence in New Zealand to a quiet one in Australia?

> "A free passage will no doubt tempt many a man to New Zealand. But 50 acres of land will hardly keep him there."[94]

The government could not know whether the scheme was going to work, and might end up needing troops not only to protect the colony, but also new "exposed out settlements" created under the Act, which might attract Maori hostility but be too small to defend themselves.

6.46 Rogers was even more direct in his comments on Fox's justification for taking land

---

92 ibid., p.137.

93 ibid., p.137b.

94 ibid., p.138b.

(with compensation) for public purposes - and his inclusion among public purposes of "the establishment of military settlements". Rogers wrote:

> "This appears to me the announcement of tyranny."

It was not lost on Rogers that Maori were not represented in the legislature, and that a legislature of settlers was in practice claiming to exercise

> "the power of taking the Lands of individual natives or native families for the purpose of making them the private property of individual settlers, under the cover of "Military settlement-"

6.47 Rogers turned finally to consider the Treaty of Waitangi; in his view the "extra-legal intervention of the Legislature" was controlled by the Treaty - "The Native Charter as it may be called." Clearly the Treaty should not preclude parliament from taking land (with compensation) for such public purposes as a road or a post office. But this was not what was involved here. And,

> "it is plainly the intention of the Treaty to preclude the Government from taking lands for purposes of settlement."

6.48 Chichester Fortescue, however, took a different view of the matter from Rogers. In his own substantial minute he began with the proposition that the Treaty could not be an obstacle to the confiscation of the lands of "rebel" natives.[95] He considered Martin's paper "creditable" but one-sided. While prepared to admit the weaknesses of government policy towards the Maori, he also considered that the government had been inhibited by "want of power", and that the Maori had contributed to the difficulties which had arisen, because of a refusal "to accept the condition of subject, with all its duties of obedience."[96]

---

[95] Chichester Fortescue, minute on ibid., 16 April 1864, p.141. Rogers appears to indicate his agreement with this particular proposition in a marginal note, though the note is barely legible.

[96] ibid., p.141b.

6.49 Fortescue considered it inconsistent to argue that Maori must not be treated as ordinary rebels because they were not ordinary subjects, while at the same time to hold that Maori must be scrupulously protected in ownership of their lands because they were subjects. Nor would he allow the force of Martin's reasoning on Ngati Haua resistance to the invasion of the Waikato, because Martin (in his view) had first proved that all Maori were subjects, and then proceeded to argue as if Ngati Maniapoto and Ngati Haua were "two independent neighbouring nations", one of which was being made to suffer for the sins of the other. In the end, Fortescue considered that Thompson and his tribe must expect to suffer, "& cannot justly complain of injustice, if they do suffer".[97] They had thrown in their lot with Rewi Maniapoto and the "war party", from the time that British troops crossed the Mangatawhiri. Fortescue expressed considerable sympathy with Grey's view that - given that runanga were discussing whether or not to attack a "civilized people", who were concerned to protect their families and properties - imperial troops must be moved "into any part of her possessions, for the protection of the quiet and peaceable, against the armed and turbulent". And if the troops crossed "a certain stream" to attain this end, it hardly justified the "turbulent" in committing hostile acts.

6.50 The final Colonial Office reply to Grey's despatch no.9 of 6 January was a brief one, written only after the Secretary of State had reached a conclusion on the New Zealand Settlements Act. Grey was asked to thank Sir William Martin for his "able paper". And he was referred to Newcastle's despatch no.43 (26 April 1864), which he was assured had been written after a very careful consideration of Martin's paper and "other documents bearing on the Native question" which Grey had sent in various despatches.[98]

---

97 ibid., p.142b.

98 Draft reply, Newcastle to Grey, 7 May 1864, ibid., p.221-221b.

7. GREY'S DESPATCH ON THE NEW ZEALAND SETTLEMENTS ACT (JANUARY 1864)

7.0 The New Zealand Settlements Act was despatched to the Colonial Office by Governor Grey in a second despatch dated 6 January 1864 (no.10), which arrived there on 14 March.[99] By the despatch Grey sent copies of all acts passed by the General Assembly during its late session, and of bills which had passed through both Houses, but which he had reserved for the Queen's pleasure.[100]

7.1 Grey recommended that the Bills reserved for "the signification of Her Majesty's pleasure" should receive the "Royal Assent".

7.2 In the despatch he enclosed memoranda on the legislation written by his Ministers. The comments on the Suppression of Rebellion Act and the New Zealand Settlements Act (written by Frederick Whitaker, the Attorney General, were bracketed, since both (he explained) were designed to "deal with the present Native Rebellion".[101] (The Suppression of Rebellion Act, passed on 3 December 1863, empowered the Governor in Council to issue orders for the suppression of "Rebellion" in any part of the country, for the detention and trial by courts martial of all persons rebelling or "assisting in the said Rebellion" or suspected of doing so, and for the execution of the sentence of the courts, whether of death, penal servitude "or otherwise". Absolute indemnity was given for all acts carried out under such orders. The preamble of the Act referred to "a combination for the subversion of the authority of Her Majesty and Her Majesty's Government" which had "for some time existed amongst certain Aboriginal Tribes" and had "now manifested itself in Acts of open Rebellion".)

---

99 Grey to Newcastle, 6 January 1864, no.10 (2349 New Zealand), CO 209/178, pp.222-230b.

100 In fact the Acts did not arrive with the despatch, but two weeks later.

101 Frederick Whitaker, 4 January 1864, encl. in ibid., p.269.

7.3 The Suppression of Rebellion Act, wrote Whitaker, was a "strong" measure simply because circumstances demanded such a measure; it was similar to that passed in 1798 for suppression of the Irish Rebellion. Admittedly there had been some differences of opinion in the House as to what form the measure should take. The first reading was passed by a majority of 26 to 10, and at the second reading Mr Sewell had proposed a set of Resolutions as an amendment to the Bill, which was however carried 15 to 4. Thereafter the Bill completed its passage through both houses.

7.4 Sewell's nine Resolutions, enclosed in the despatch as an Appendix to Whitaker's memorandum[102], had been put before the Legislative Council on 13 November 1863, when Sewell indicated his intention to move that the Council consider them in Committee. They dealt with the principle of Confiscation of lands, as well as with "suppression of rebellion". They affirmed the Council's support for the use of military force against "armed Natives... in open resistance to Her Majesty's forces" in the Waikato, and between Taranaki and Wanganui. They supported the construction of roads through these districts, and the establishment of military posts as precursors of European settlements there. But they also stated that in pursuing such aims,

> "strict regard ought to be had to the territorial rights of the Natives, as guaranteed to them by the honour of the British Crown, by their constitutional privileges as subjects of Her Majesty, and by the eternal laws of justice and right".

Such rights, however, should be "justly forfeited" by Maori who failed to comply with the requirements of a specially passed statute that after a certain day they should cease to be in arms against the Crown.

7.5 Whitaker went on to argue in his memorandum that the "complete defeat of the Rebels"

---

102 ibid., pp.293-296. The resolutions are also printed in Journals of the Legislative Council, 13 November 1863. Whitaker dismissed them in debate as an expression of opposition to the Government, and the Bill proceeded that day to a second reading. See NZPD, 13 November 1863.

could not secure the permanent peace of the country, citing the failure of the government in "former wars" to punish the natives. How then should "Native wars" be prevented in future? In their own wars Maori had most dreaded slavery and the permanent loss of land; clearly the Government should focus now on Maori lands, to deter tribes from future "rebellion", and to secure "rebellious districts against future outbreaks". Hence the New Zealand Settlements Act.[103]

7.6 Three thousand men had already entered on military service; it was intended to increase their number to twenty thousand. The Act would enable the government to meet its obligations both to those already enlisted, and to those expected to enlist.

7.7 Whitaker placed particular emphasis on the reasons why the lands of those who had not "rebelled" could not be excluded from the operations of the Act. Otherwise, he argued, portions of a tribe might "rebel", leaving "a few behind them, in some instances with the avowed object of preserving the Tribal Land from forfeiture."[104]

7.8 Compensation, however, would be granted to all those entitled to it, in accordance with the "recognised principle" that the property of individuals might be taken in the "public interests". Moreover,

> "it is undoubted natural justice that those who violate the fundamental principles of the Government, under which they live, justly forfeit their right to the advantages which they derive from that Government."

The "rebellious Natives" had now placed themselves in that position.[105]

7.9 The principal objections made against the two Acts, had been that they were beyond the powers of the New Zealand legislature. Whitaker submitted that such objections had

---

103 Whitaker, 4 January 1864, encl. in Grey to Newcastle, 6 January 1864, no.10, CO 209/178, pp.273-7.

104 ibid., p.279.

105 ibid., pp.280-2.

"no solid foundation", but did not attempt to answer the charge (which he referred to) that parliament could not pass a law affecting Native Lands. Instead he focused on a "more plausible objection", that the Settlements Act contravened the New Zealand Loan Guarantee Act 1857 passed by the imperial parliament.[106] If in fact this "technical" objection was valid, the government hoped the imperial parliament would take steps to remove it.

7.10 The two Acts, Whitaker concluded, were "absolutely essential to the safety and security of the Colony".

7.11 In his despatch Grey commented on his Ministers' observations. It is perhaps not surprising that he turned first to their comment that Maori had not been punished after fighting "former Wars", and that some more effective means of dealing with those who "created Native wars" must be found if peace were to be maintained. Grey had entered on his first term of office in 1845, and had therefore made the decisions about the aftermath of the fighting in the Hutt and in the Bay of Islands; he clearly felt the need to defend his own position. In the Hutt, he said

> "much land was taken from Natives which they claimed, although the [Land Claims] Commissioner appointed by the Crown, had decided against them."[107]

Several important chiefs were "retained in confinement" for their conduct (the most

---

106 For details of this matter see ibid., pp.284-7; also Enclosure no.3, pp.297-297(b). Whitaker had first raised this matter in his Opinion on the Bill (given in his capacity as Attorney General) dated 2 December 1863, in which he also stated that "There is not, in my opinion, any other legal objection to the Bill." In his memorandum of 4 January Whitaker cited section 3 of the imperial act (20 and 21 Vict. c.51): "No Act passed by the Legislature of New Zealand in anywise discharging or varying the security expressed to be given by the said recited Act of Assembly, upon the revenue arising from the duties of import and export, and from the disposal of waste lands of the Crown, for the repayment of the sums of money borrowed under such Act, and the interest thereon, shall be valid, unless such Act contain a clause suspending the operation of the same until Her Majesty's pleasure shall have been taken thereon, and the same shall have been confirmed by Her Majesty ...". The Settlements Act, Whitaker pointed out, did not contain such a clause.

107 ibid., p.225.

notable of these was Te Rauparaha).

7.12 Grey went on, however, to state that he believed it better to treat "subjects after a rebellion" very generously, rather than severely. This was what had happened in the 1840s, and no land had been confiscated. In his view this policy had borne fruit in that those who had fought the British then had not fought them again in the recent hostilities, and had even offered their assistance.

7.13 But Grey did not consider that "generosity" was now a policy that would have the same effect. The Maori were too well-armed. "The war has become more a war of races"; it had lasted longer, more tribes were drawn into it, and because of its origin (as Maori perceived it) in government attempts to establish "a new principle in procuring Native lands", a "widespread distrust and dislike of the Government" had developed. Moreover they had been emboldened by early successes in the fighting. Grey thus considered it necessary to

> "take lands from the Natives who have been in arms, and to locate an European population upon them."

But he did not think the system should be carried "too far".

7.14 In conclusion, Grey fully supported the urgent request of his ministers that the imperial government guarantee the large loan (£3 million) they wished to raise under the New Zealand Loan Act.

8. THE NEW ZEALAND SETTLEMENTS ACT AT THE COLONIAL OFFICE

8.0 Initial Colonial Office minutes on this despatch were brief, because the Acts had not in fact arrived with the despatch. One official noted that the debates in the House, as recorded in newspapers received by the last mail, seemed to indicate more opposition to the two Bills than indicated in the government's justification of them.[108]

8.1 Sir Frederick Rogers, also awaiting the arrival of the Acts, made only a couple of

---

108 Cox, minute on ibid., 14 March 1864, p.231.

comments. His concern was with the implementation of confiscation. If the principle were admitted, he wrote,

> "I think that tribal property cannot be exempt from it because a few members of the Tribe have remained loyal".

But great care should be taken to satisfy these people, to avoid introducing any new principle in dealing with lands not belonging to rebellious tribes and,

> "after the confiscation has been effected to replace even the rebels in a position in wh. they will recover their prosperity (wh. is after all the real guarantee for peace)."[109]

Finally, he reiterated his doubts about the military settlers scheme.

8.2 The next minute written at the end of March 1864 recorded the arrival of the acts (some forty of them); four were detached for special consideration, including the Suppression of Rebellion Act and the New Zealand Settlements Act. But at this point the Duke of Newcastle had to resign because of ill health, and early in April Rogers minuted that the new Secretary of State, Edward Cardwell, wished to see the papers and to "take over the whole question [of confiscation] with little loss of time".[110]

8.3 Rogers wrote a brief minute on the Suppression of Rebellion Act, which he evidently did not approve of, though he noted that it was only to remain in operation until the end of the next session of the Assembly.

8.4 He wrote at great length, however, on the New Zealand Settlements Act (no.8), which he described as the most important of the Native Acts. Its purpose was

> "to confiscate so much of the lands of the Rebels as may be requisite in order to show the Maories [sic] that rebellion is really a losing game - and to enable the Government to plant in the heart of the disaffected country a population (20,000)

---

109 Rogers, minute on ibid., pp.231-231b.

110 Rogers, minute on ibid., p.235.

of military settlers."[111]

He outlined the major provisions of the Act, adding a few comments of his own as he proceeded. He noted, for instance, the proposal to pay compensation "to certain parties", but added:

> "... it is positively declared that no compensation whatever shall be given to any person (inter alios) 'who shall have adhered to, aided, assisted or comforted' any rebels" [etc etc].

He further noted that the "Governor in Council" meant the Ministry -

> "subject in extraordinary cases - or in questions affecting Imperial interests to the Governor's veto."[112]

8.5 He drew attention to the fact that the land to be confiscated was not land "belonging in the main to any insurgent tribe or family", but any district within which such land may be -

> "which may be half or the whole of the Northern Island."
>
> The legal power to take land is thus unlimited - The legal power to compensate is strictly confined."[113]

Nor was it stated what proof was necessary of "comforting" a rebel, or "secreting" a weapon; perhaps it was to be left to the discretion of the Ministry.

8.6 Rogers rehearsed Sir William Martin's objections to the law, and reiterated his own reaction to Fox's memorandum on Martin's paper, namely that the Ministry, having convinced themselves that they had no obligations to the Maori under English law, seemed also to suppose that they were subject to "no other rules of justice", and were thus set to disregard the rights of Maori, whether they be indirectly implicated in the

---

111 Ibid, p.239.

112 ibid., p.239b.

113 ibid., pp.239b-240.

"rebellion", or not implicated at all. His own view was that if it was right that "insurgent savages" should not have the protection given the Queen's subjects by British usage,

> "it is the more necessary to take care that the proceedings of the Government with regard to the whole disaffected party should be so based upon substantial justice, and so accommodated to the more reasonable notions of the natives themselves as to impress the whole Maori race with the belief that the European conquerors were at once careful and severe."[114]

This seemed to Rogers a crucial time to take such care.

8.7 Rogers' own views of "legitimate objects" to be kept in mind were:

> "1. The sensible punishment of natives who were engaged in the late rebellion - that punishment being such as to affect their imagination and immediate comfort, rather than their permanent well-being.
>
> 2. The reimbursement, by means of that punishment (i.e. by confiscation) of a large part of the expenses of the war - ...
>
> 3.The settlement of a large part of the confiscated territory - " [which he considered a "legitimate object", but one very likely to fail]
>
> 4. Careful distinguishing between the promoters of active and violent rebellion - those who were unwillingly drawn into it - by circumstances connexion or otherwise, - and those who steadily adhered to us" [only the first, in his view, should be "punished" so as "for the moment severely to injure and discredit them-"]
>
> 5. Developing as far as possible those elements of order and material progress which seem to invite development in the Waikato, at least in the Ngatihaua part of it.

---

114 ibid., pp.241-241b.

6. Impressing all those who are not concerned in the conflict with the idea that the above objects are real objects and that we have no general designs on the land of the Maori race."[115]

Finally, Rogers thought that the "punishment" should be "once for all", and not be left hanging over the heads of the Maori.

8.8 He went on to suggest a course of action which seemed suitable to him: the sitting of a special commission, comprising the Governor and some "persons of character" to inquire into the circumstances of the "rebellion", and report on which tribes or "sections" had been concerned in it, and on the extent of territory belonging to each tribe or "section". On the committee's recommendation the territory

"might ... have been divided once for all in a large and sweeping way into land confiscated for the purpose of settlement and land not so confiscated."

Lands should only be confiscated or assigned by the Governor in Council on the report of the Commission, and "the whole operation should be performed within a certain period."

8.9 There should be provision for Maori who wished to retain small blocks of land near the new settlements, but (whether such "amalgamation" worked or not), "rebel natives" ought to be able to retire into "assigned districts",

"with the power to live upon them in their own way and with the certainty that except for renewed misbehaviour they would not be dispossessed without their own consent."[116]

The people should have certainty of this kind about their future if they were to progress, and progress in their own way, rather than that of the British.

8.10 Rogers emphasised that he was not offering a blueprint for confiscation, but trying to

---

115 ibid., pp.242-244.

116 ibid., pp.245b-246.

capture the "spirit" in which the matter ought to be dealt with, which seemed to him rather different from the "spirit" of the settlers' law.

8.11 He was clearly unhappy at the powers the ministry might assume over Maori land, and at the large numbers of people who might be excluded from receiving "compensation" by the definitions in the act; few, he thought, could be wholly guiltless of "comforting rebels".

> "The only excuse for thus placing a whole population at the foot of a despotic power is that the power is sure not to be abused."[117]

But what were the guarantees against abuse in this case? In practice, the Governor was unable to refuse what was placed before him by the colonial ministry; it was established principle that the colonists were responsible for native policy, and this made it difficult for the Governor to interfere.[118] If he were to resist successfully

> "it would seem to be on the introduction of a large and obnoxious principle - not in its successive applications of detail."[119]

In the first case he could be supported by the imperial government, but in the second the position of that government would be more difficult, since it could not be sure it received enough information on which to base a sound judgment.

8.12 Rogers went further in his criticism of the location of power under the act in the "Governor in Council". It was, he said, a settler council:

> "A large and the most active portion of the Settlers always have been and always

---

117 ibid., p.248b.

118 As indicated earlier, the question of responsibility for Maori affairs was not easily settled during this period. But at this time, in response to the Secretary of State's prodding, the Colonial Office had just received a resolution - adopted by both the House of Representatives (6 November 1863) and the Legislative Council (9 November) - assuming "responsibility for the management of Native affairs in this colony." See Grey to Newcastle, 7 November 1863 and 3 December 1863, and enclosures, CO 209/175, pp.84-89b, and pp.245-249b.

119 Rogers, minute on Grey to Newcastle, 6 January 1864, no.10, CO 209/178, p.249b.

must be desirous to obtain land by the quickest and cheapest method. And after the passing of this Act the cheapest mode of obtaining land will be by confiscating the lands of those who have been or whose neighbours have been in rebellion already, by goading into something which may be called rebellion those who have hitherto been peaceable."[120]

Rogers simply did not trust the settlers to resist such a temptation; still less the military settlers, newly imported to "keep down the Maories [sic]". Even if the "better class of settlers" were able to resist the "cupidity of the worst sort for years together", there was always the danger that "a few cases of inconvenience or Maori turbulence" might excite public attention, with the result that all Maori rights were extinguished, at considerable expense.

"On the whole therefore the Act appears to me a thoroughly bad one."[121]

8.13 Sir Chichester Fortescue, the Parliamentary Under-Secretary, also wrote a long minute on the despatch for the Secretary of State. He did not entirely share Rogers' misgivings, even though:

"There can be no doubt of the sweeping and despotic nature of this Act, nor of the opportunities which it supplies for an oppressive treatment of the Natives, if the N.Z. Govt. is so disposed, and is not controlled."[122]

8.14 Fortescue thought that the realities facing the settlers when they passed the Act must be allowed for. A war was being fought in the Waikato, and it was not clear how far it might spread; the Act, therefore, could not be confined to districts "then actually in rebellion". Nor did he think it possible to define in advance the lands to be confiscated.

---

120 ibid., p.250b.

121 ibid., p.252b.

122 Chichester Fortescue, minute on ibid., 16 April 1864, p.253.

8.15 Fortescue considered the "hostile Natives" to be "standing virtually towards the N.Z. & Imperial Govts. in the relation of foreign enemies." But since in law this was not the case, the Governor on behalf of the Crown could not confiscate their lands; such a power had to be conferred by legislation. The powers given by the Act, however, were less wide than those possessed by the conqueror "at the end of a war between independent nations". While regretting the lack of securities within the Act "for the just and moderate use of the powers ... it gives", Fortescue placed his hopes in the imperial government's ability to secure moderation and justice "through an able Governor, known to take a deep interest in the Maori race" backed by an imperial force which was under his orders.[123] He admitted moreover that the Maori were also the Queen's subjects, and should thus be treated with more consideration than a foreign enemy.

8.16 To Fortescue, "the mode & spirit" in which the Act was carried out were crucial. If confiscation was not excessive, and was "discriminating", he believed it would be "a justifiable and wise measure".[124] Like Rogers, however, he could not entirely trust the New Zealand ministry to ensure that confiscation would in fact be careful. They would have to be "watched & controlled". Fortescue decided to rely on the Governor's veto, and to instruct him

> "to satisfy himself of the justice & propriety of every proceeding taken under this Act (as well as the Suppression of Rebellion Act) and to refuse his consent to any particular confiscation &c of which he could not personally approve."[125]

8.17 Fortescue also hoped that confiscation could be effected "once for all, at the time when the insurgent Natives shall submit", and thought Governor Grey should be instructed to

---

123 ibid., p.254b.

124 ibid., p.255. Rogers minuted his agreement with this proposition in the margin.

125 ibid., pp.255b-256.

require Maori assent to the "surrender" of certain defined lands,

> "with conditions of compensation to persons not compromised, and restoration of a liberal amount of land to all."[126]

Such a speedy settlement of the matter would be far more likely to secure peace.

8.18 The taking of land of "innocent Natives, with compensation" - which Professor Goldwin Smith and others had vigorously condemned[127] - was admittedly "a startling provision of the law", but Fortescue considered that the tribal ownership of land might have made it necessary. Provision had after all been made for compensation, to be adjudged by a court.

8.19 Fortescue concluded by agreeing strongly with Rogers "as to the mode & spirit in wh. [sic] this Act ought to be worked, so as to get good out of it, and not evil".[128]

8.20 At the Colonial Office it was decided to refer these two statutes along with Whitaker's memorandum to the Attorney General and the Solicitor General. Initially a lengthy letter was drafted - evidently by Sir Frederic Rogers - to accompany the statutes. This draft however did not survive the scrutiny of the Secretary of State, and ultimately a much shorter letter was sent.[129]

---

126 ibid., p.256b.

127 Goldwin Smith was Regius Professor of Modern History at Oxford; from 1862 he wrote a series of letters to the Liberal paper, The Daily News, attacking Britain's colonial connection as expensive, as well as weakening of the colonies. In February 1864 he wrote a scathing letter to the Daily News about confiscation of Maori land: "In rapacity and atrocity we have had many equals - perhaps not a few superiors; in pious rapacity and sanctimonious atrocity we may look through history for our peers in vain." Cited in W.P. Morrell, British Colonial Policy in the Mid-Victorian Age, pp.304-5.

128 Fortescue, minute on Grey to Newcastle, 6 January 1864, no.10, CO 209/178, p.257(b).

129 Cardwell may have been influenced by a minute of Rogers on the draft letter which read: "As I do not myself entertain these doubts, at least as to the Settlements Act, I may not have done justice to the grounds on wh. they rest. But I do not see what more is to be said." (27 April 1864, ibid., p.391). Had Rogers been convinced by Fenton's arguments? (See s.8.22, and footnote 132 below.)

8.21 Cardwell's minute (on which the final letter of 5 May was based) was to the effect that doubts had been raised in the Colony as to whether the two statutes were "within the competency of the Colonial Legislature" and asked the Law Officers to give their opinion on this point. Their attention was particularly drawn to the 1852 Constitution Act, especially sections 53 and 71 and the following sections; to section 3 of the New Zealand Loan Guarantee Act (1857); and to Whitaker's question whether the Settlements Act did not interfere with the security for the loan contracted under the New Zealand Loan Guarantee Act.[130] Section 53, it will be remembered, authorised the General Assembly to make laws "for the peace, order, and good government of New Zealand, provided that no such laws be repugnant to the law of England"; section 71 allowed the Queen to set apart districts in which native "laws, customs, and usages ... should for the present be maintained for the government of themselves...". Sections 72 and 73, referred to by implication in the Colonial Office letter, are outlined in s.8.22 following.

8.22 (The original draft Colonial Office letter to the Law Officers had rehearsed various sections of the Constitution Act at length, raising the point that the Settlements Act enabled the Governor and Council to confiscate lands to which the native title had not been extinguished, which therefore fell within the scope of section 73 of the Constitution Act ("It shall not be lawful for any person other than her Majesty ... to purchase or in anywise acquire or accept from the aboriginal natives land of or belonging to or used or occupied by them in common as tribes or communities ..."); the section had however been repealed by a section of a subsequent imperial act (25 and 26 Vict.c.48).[131] Section 72 of the Constitution Act, it was pointed out, authorised the

---

130 Cardwell, minute, 4 May 1864, ibid., pp.398-398b.

131 This was a reference to s.8 of the Establishment and Government of Provinces in New Zealand Act, which empowered the General Assembly to "alter or repeal all or any of the provisions" of s.73 of the Constitution Act. Subsequently the General Assembly passed the Native Lands Act 1862; s.17 allowed "owners" to sell or lease land to any person, once their title had been defined by a Court specially constituted to determine

General Assembly to make laws respecting the disposal of Crown lands in New Zealand "which are expressly declared not to include land to which the Native Title had not been extinguished." The letter had gone on to ask the opinion of the Law Officers as to whether the 53rd section of the Act would invest the General Assembly with power to legislate in respect of native lands and with power to authorise the Governor and Council to confiscate lands. And if so, whether the legislative power was limited by section 73, viewed together with sections 71 and 72 of the Act? And what was the effect of the repeal of section 73?)[132]

8.23 Cardwell was anxious to send some reply to Governor Grey by the mail which left for New Zealand on 26 April; he therefore wrote to Grey by that mail without waiting for the Law Officers' reply on the subject of three statutes: the New Zealand Settlements Act and two statutes relating to the raising and repayment of a loan for the conduct of the War.[133]

8.24 The Secretary of State singled out the Settlements Act as the most important, explained that it had been submitted to the Law Officers along with the Suppression of Rebellion

---

Native titles, and certificates of title granted to them.

132 Draft letter to Attorney General and the Solicitor General, 5 May 1864, ibid., pp.391-397. It is tempting to suggest that the approach taken in the letter was shaped by a section in Fenton's Opinion of November 1862 - among the printed papers enclosed in Grey's despatch no.10 - which commented at length on the relevance of certain sections of the Constitution Act to an assessment of the power of the New Zealand parliament to legislate for "Native lands". Neither Rogers nor Fortescue had dwelt on this matter in their minutes on the acts, and Whitaker, though referring in his memorandum of 4 January to objections against the statutes on the grounds that they were beyond the powers of parliament, gave no details of these grounds. It is possible that the Colonial Office may have drawn on the parliamentary debates (available in the newspapers), where FitzGerald had argued confiscation was "repugnant" to the law of England, and Swainson that parliament could not dispose of Maori lands because the Constitution Act gave no such power. But Fenton's Opinion (although argued to different effect) had examined various sections of the Constitution Act in relation to one another.

133 Cardwell to Grey, 26 April 1864, ibid., pp.399-433b. A printed copy of the despatch may be found in AJHR, 1864, Appendix to E no.2, pp.20-3. The two statutes were the New Zealand Loan Act and the Loan Appropriation Act.

Act, but went on to give his own views on the policy of confiscation.

8.25 Cardwell placed considerable emphasis in his reply on objections which might be urged against the Act. He noted that the government's plans for confiscation had been greatly expanded since they were first raised with the Colonial Office, so that the number of settlers, and the amount of confiscation, had quadrupled. He noted the limits to the right of compensation, and he noted that the government sought to exercise the new powers not

> "exceptionally ... or by regularly constituted courts of justice, but ... to permanently [embody them] in the law of New Zealand", forming a "standing qualification of the treaty of Waitangi."[134]

8.26 It might thus be objected that the Act rendered "permanently insecure the tenure of native property throughout the Islands", which would alarm Maori friends of the government; that it did not distinguish between "leaders ... of rebellion" and those who were "but half our enemies". Finally:

> "The proceedings by which unlimited confiscation of property is [sic] to take place may be secret, without argument and without appeal; and the provision for compensation is as rigidly confined as the provision for punishment is flexible and unlimited."[135]

8.27 Cardwell took the view that Maori "insurgents" must be "dealt with by methods not described in any law book, but arising out of the exceptional circumstances of a most anomalous case." Their position was anomalous because on the one hand they had acknowledged the Queen's sovereignty and had the responsibilities and rights of British subjects, and on the other they had "been allowed to retain their tribal organisation and native usages ... thus occupying, in a great measure, the position of independent

---

134 Cardwell to Grey, 26 April 1864, AJHR, 1864, Appendix to E no.2, p.20.

135 ibid.

communities." In the circumstances it was "doubly necessary" that an omnipotent government should "weigh dispassionately the claims which the insurgent Maoris have on our consideration." And he went on:

> "In the absence of those legal safeguards which furnish the ordinary protection of the vanquished, the Imperial and Colonial Governments are bound so to adjust their proceedings to the laws of natural equity, and to the expectations which the Natives have been encouraged or allowed to form, as to impress the whole Maori race at this critical moment with the conviction that their European rulers are just, as well as severe, and are desirous of using the present opportunity, not for their oppression, but for the permanent well being of all the inhabitants of New Zealand."

8.28 Cardwell urged restraint on the New Zealand government, and the need to avoid inflicting "a recurring sense of injury" even on the "most culpable tribes". Moreover, the British government, which had mainly borne the expenses of the war, had the right to require that

> "the cession or confiscation of territory shall not be carried further than may be consistent with the permanent pacification of the island and the honour of the English name."[136]

And he added that there were considerable difficulties with the plan of forming successful military settlements.

8.29 Given that New Zealand was at present defended by an Imperial force, the Secretary of State considered he would have been

> "justified in recommending the disallowance of an Act couched in such sweeping terms, capable therefore of great abuse, unless its practical operation were restrained by a strong and resolute hand, and calculated, if abused, to frustrate its

---

136 ibid., p.21.

own objects, and to prolong, instead of terminate war."

But as Grey had not expressed his disapproval of it, and as the government did not wish to weaken his hand at a crucial moment in the war, it had been decided that the Act might remain in operation for the present.[137] It was made clear to the Governor that the imperial government was confident that he would exercise his judgement carefully in agreeing to confiscations.

8.30 Cardwell concluded by issuing Grey with instructions as to the steps he ought to take to secure the peace of the North Island, once military success allowed him to do so. First, the imperial government wished that the land of the "conquered tribes" should be appropriated "in the form of a cession imposed by yourself and General Cameron" made to the Queen, in return for the Queen's clemency. Such a settlement would have obvious advantages. Only if it were found impossible to effect it might Grey agree to bring the Settlements Act into operation, subject to certain "reservations". These were: that the duration of the Act be limited to two years, that the extent and position of lands to be forfeited be made known at once, that a commission be constituted to inquire "what lands may properly be forfeited", and that Grey make it clear to his ministers that he would withhold his consent to any confiscation he did not consider "just and moderate". The Governor was to take particular care that the best lands were not assigned to the colonists, and the Maori "driven back to the forest and morass".

8.31 Great care was to be taken that "innocent persons" were not deprived of their lands against their will. Even in cases where they were "joint owners" with rebels, or their lands were required for some particular public purpose like defence, their case should be very carefully examined. The compensation court was approved, but the 5th section of the Act should be modified to allow the Court more freedom to deal justly with the

---

137 It should be noted that the Secretary of State placed considerable weight on Grey's own opinion of the Act.

claims of innocent people or to extend "reasonable consideration" to the less "guilty".

8.32 Finally when all necessary cessions of land had been received, a general amnesty should be announced, except for those who had committed certain heinous offences.[138]

8.33 It has been suggested that this despatch was written "with one eye on the House of Commons," where some hostility to the confiscation policy, and sympathy for the Maori people, surfaced at this time. Despite the personal advocacy of Reader Wood, the Colonial Treasurer, who travelled to England to put the government's case for the loan it wanted, Cardwell knew that the imperial parliament would not oblige. He wrote privately to Grey to warn him of this on 26 April. In the end Reader Wood was offered a guarantee of £1 million, with certain conditions attached. And the New Zealand Loan Guarantee Bill had "a rough passage" through the House of Commons, where the charge was led by Conservative M.P. Arthur Mills, a barrister, who asked why a well-endowed self-governing colony should come to the mother country for a loan "to carry on a war, as to the righteousness of which the people of this country had serious misgivings."[139]

8.34 The Law Officers sent their opinion on the Suppression of Rebellion Act and the New Zealand Settlements Act to the Secretary of State on 14 May 1864.

8.35 They reported as follows:

> "That, we are of opinion, that neither of the Acts in question is void under s.53 of the New Zealand Constitution Act, on the ground of its being repugnant to the Law of England: for the Laws of England have repeatedly recognized the necessity for exceptional legislation, to suppress a rebellion threatening the existence of the State. We, of course, assume the Colonial Acts to be considered,

---

138 ibid., p.23.

139 This speech, delivered on 14 July 1864, is cited in W.P. Morrell, British Colonial Policy in the Mid-Victorian Age, p.303. See also ibid., pp.299-305. The Loan Guarantee Act (27 and 28 Vict.c.82) was passed on 29 July 1864.

by the Legislature which passed them, necessary and proper for this purpose."[140]

8.36 They went on to state that the Settlements Act was, in their opinion, open to the other objection suggested, namely that it contravened the provisions of The Imperial Loan Guarantee Act (20 and 21 Vict. c.51.s.3), (the New Zealand Loan Guarantee Act 1857). In their view the "security" mentioned in that section meant "the hypothecation of the revenue arising from ... the disposal of the waste lands of the Crown"; they were worried that the operation of the Settlements Act was not confined to native lands, but might include all Crown lands situated within any district which might be brought under the provisions of the Act. Imperial legislation might be necessary to obviate this objection.

8.37 Rogers at the Colonial Office, in his minute on this letter, made no comment on the first part of the opinion (cited in s.8.35). Instead his comments focused on the Law Officers' opinion on the relationship between the Settlements Act and the Imperial Loan Guarantee Act 1857, which he found difficult to follow.[141]

8.38 The Secretary of State, however, considered that a clause inserted in the proposed new Loan Guarantee Bill would meet the difficulty. (Subsequently, this was done: s.7 of the Act provided that nothing in the New Zealand Settlements Act "shall be or be deemed to have been void or inoperative on account of any Repugnancy to any of the Provisions of the ... [Loan Guarantee Act 1857] or of this Act.")[142]

8.39 Once the Law Officers' opinion had been received, Cardwell wrote a final reply to Governor Grey as follows, on 26 May 1864:

> ".. I am advised that there is in their [the Officers'] judgment no reason to doubt the legality of the former of the two Acts, and that the only reason for questioning

---

140 R. Palmer and R. Collin to Cardwell, 14 May 1864, CO 209/186, pp.219b-220.

141 Rogers, minute on ibid., 18 May 1864, pp.222-223b.

142 27 and 28 Vict. c.82 (1864).

the legality of the latter arises from its repugnancy to the third section of the Imperial Loan Guarantee Act ..."[143]

He would, when submitting the proposed loan to parliament, also submit a provision calculated to remove this doubt.

8.40 In this second despatch Cardwell added a warning to the colonial ministers. If their opinion as to the terms of peace should be different from Grey's, the Governor was to act on his own judgement, and remind them that 10,000 imperial troops were in New Zealand for imperial, not for local objects. He would therefore

" not continue the expenditure of blood and treasure longer than is absolutely necessary for the establishment of a just and enduring peace."[144]

9. CONCLUSION

9.0 The compulsory taking of Maori land was considered in the early 1860s in both New Zealand and in Britain by British law officers, parliamentarians, and ministers of the Crown; it was also considered by Colonial Office officials.

9.1 When the compulsory taking of Maori land was first put forward to the Colonial Office late in 1862, for roads and "purposes of defence", the Colonial Office strongly discouraged the policy in the hope that further hostilities would not break out. The importance of government consideration of Maori expectations under the Treaty of Waitangi was emphasised.

9.2 Subsequently the situation in New Zealand changed. In the months from May to July 1863, hostilities did break out in both Taranaki and in the Waikato, and Governor Grey mounted a full-scale military invasion of the Waikato. From this point on the New Zealand Government justified plans to confiscate Maori land and plant armed settler

---

143 Cardwell to Grey, 26 May 1864, AJHR, 1864, D no.5, p.7. This despatch was published in the New Zealand Gazette for "general information" on 5 September 1864.

144 ibid.

communities in terms of the need to "punish rebels", to secure the security of the country against further possible uprisings, and to deter other tribes from rebellion so that peace would finally be established.

9.3 Evidently taking account of a legal view that legislation would be necessary to effect confiscation, and that the New Zealand parliament was competent to pass such legislation affecting Maori lands, the government introduced the New Zealand Settlements Bill into parliament in November 1863. The Bill passed rapidly through both Houses. It conferred extraordinary powers on the Governor in Council over customary land, which could arbitrarily be declared Crown land on the basis of a decision by the Governor in Council that any tribe or part of a tribe had been "in rebellion". The case against "rebels" was regarded as proven at the outset; blame for the hostilities was laid squarely in the Preamble on "evil-disposed persons of the Native race". Condemned without a hearing, Maori had no way of protecting their lands once the Bill was passed.

9.4 In these new circumstances Colonial Office views of confiscation were rather different. While still expressing concern that the confiscation of Maori land might reflect mere settler anxiety to acquire it, and might be unjustly carried out, the British view now was that Maori who "took up arms" against the Crown might properly be punished by confiscation of their property.

9.5 Opposition to the confiscation legislation was expressed in parliament both in New Zealand and in Britain. In New Zealand a few parliamentarians objected to the Bill on various grounds. Not all of them were opposed to all aspects of the scheme; some were prepared to admit the need for the demonstration of superior British strength, or the introduction of settler communities in certain areas. They did object, however, to the broad powers which were enshrined in the Bill. They objected to the Bill as being contrary to the guarantees to Maori in the Treaty of Waitangi (though one speaker was

concerned about breaking faith only with "peaceable" Maori). In the House of Commons there were speakers prepared to attribute the war to colonial land hunger, and to British failure to fulfil their part of the Treaty of Waitangi.

9.6 The Colonial Office was well aware of opposition in the House of Commons and in New Zealand. In particular, it was presented with a strongly argued case against the Bill prepared by Sir William Martin, the former Chief Justice. Martin's paper was particularly interesting because he did not simply focus on the Bill, but set it in its historical context, as he understood it. In particular he stressed the need to understand the evolution of government policies towards Maori, and the ways in which Maori themselves viewed those policies. The failure of government policies to provide for Maori economic wellbeing was obvious. And in neither Taranaki nor Waikato had the Government given the tribes any reason to trust or have confidence in its policies. Martin was not sympathetic to Rewi Maniapoto and his people, and not averse to some "punishment", though he considered that the government should tread very carefully, mindful that its own shortcomings had contributed to the present unfortunate state of affairs.

9.7 Martin's reasoning was not totally persuasive at the Colonial Office; he converted Rogers to some extent, but not Fortescue. Rogers disliked the principle of confiscation, and the fact that it flew in the face of the Treaty, which was designed to prevent the taking of Maori land for settlement. Fortescue however tended to focus on the unwillingness of Maori to accept the duties of subjects, and to respect the power of the Crown.

9.8 It is difficult to avoid the conclusion that in the end the Colonial Office accepted the arguments of Whitaker and of Governor Grey as to the necessity for "punishment" if peace was to be achieved. In particular, it was noted that Governor Grey expressed no disapproval of the Act; Grey's opinion may well have been crucial. Rogers might still

dislike the powers available to the government under the Act, and criticise the Act as "thoroughly bad", but he also accepted that it was "legitimate" to punish "rebels", and to settle a large part of the confiscated territory. Similarly Fortescue thought the Act "sweeping and despotic", and potentially oppressive of the Maori; but against his misgivings he set the realities of the war.

9.9 The Secretary of State's final despatch to Governor Grey about confiscation clearly reflected the concerns of both Rogers and Fortescue that the powers available to the government under the Act might perhaps be abused. But it also reflected the view that the war must be won by the British, who would then be in a position to enforce a peace on "conquered tribes". A cession of land to the Crown by such tribes was preferable, but land nevertheless might properly be "forfeit". Great care of course should be taken lest innocent persons be deprived of their lands against their will. And great faith was placed in Governor Grey's ability to protect Maori, if necessary, from settler excesses.

9.10 Finally, then, the rights of Maori under the Treaty of Waitangi were lost sight of. It cannot be maintained that the Colonial Office was unfamiliar with arguments based on Maori Treaty rights. In the papers before them, the importance of the Treaty land guarantee had on occasion been stressed, as well as the importance of the Crown's taking seriously its responsibilities to Maori. But although officials wondered about the competence of the New Zealand parliament to pass laws affecting customary land, and suggested that the Law Officers of the Crown should consider this matter, this does not seem to have been a primary concern at the Colonial Office.

9.11 The Law Officers evidently did not grapple with this question either. In their Opinion on the Settlements Act they did not consider the extent of the powers of the colonial legislature over Maori land. They took for granted the fact of Maori "rebellion", and therefore - in one sentence - approved "exceptional legislation" to deal with it. They devoted most of their attention to what seems today an insignificant matter (which

Whitaker however had highlighted in his comments on the Act) - the relationship between one section in the New Zealand Settlements Act, and another in the imperial New Zealand Loan Guarantee Act 1857.

9.12 The fate of the iwi of Taranaki was thus initially decided by a parliament in which they were not represented, by a Governor who had never been noted for his restraint in acquiring Maori land for settlement, by ministers who were anxious for a show of government strength, and for an end to Maori "independence" and control of land, and by far - distant officials in London. In the end, confiscation of iwi land was approved because of their "rebellion", their "evil disposition" and "aggressive actions". The iwi of Taranaki deny that they "rebelled" against the Crown, and challenge the right of the Crown to have labelled them "rebels" and thus subjected them to the penalties of the New Zealand Settlements Act. No consideration was given to the role of the Crown in beginning the war, or to Crown "aggression".

9.13 The iwi of Taranaki learned from the Settlements Act the full extent of state power that could legally be mustered against them. Military power was one thing; and it had doubtless not come as a surprise that the newcomers would fight to secure what they wanted. But legal power - backed by troops - was more insidious, and its potential would have been less easily discerned at the time the Treaty was signed. The danger only became apparent as governors and government officials began to exercise power over Maori affairs - and when the settlers gained their own parliament, and later achieved "responsible government", control through their ministries over the internal affairs of the country. The hopelessness of Wiremu Kingi's stand against the Crown in 1859 - to protect Maori communities from Crown attempts to undermine their control over their own affairs, and their land - was revealed in 1863, when parliament passed the Settlements Act to destroy that control. It was an arrogant, self-serving, punitive attack on Maori rights. Ultimately the guarantees to Maori in article two of the Treaty

of Waitangi were of no help to them at all in the face of the powers available to the colonial parliament under the Constitution Act to legislate for the "good government" of the country. What protection, then, did Maori have? The British government, while mistrusting the colonists, offered Maori very little, and trusted to Governor Grey to see the Settlements Act administered in a "proper spirit". How far this was done may be judged from other evidence presented in these hearings. But the iwi of Taranaki say simply that parliament had no right to pass the New Zealand Settlements Act - given the Treaty guarantees; nor should their lands have been declared subject to it.

LIST OF REFERENCES

PRIMARY SOURCES

Great Britain. Colonial Office. New Zealand. Original Correspondence. CO 209/170-178; CO 209/186

Great Britain. Colonial Office. Colonies (General). CO 380/125 (N.Z. 1860-1866, Commissions, Instructions and Warrants)

_____ Irish University Press Series of British Parliamentary Papers, vol.13 (Shannon, 1970)

Legislative Department Archives (National Archives). Series 1: Papers brought before Parliament, Select Committees, 1854-1969

New Zealand. Appendices to the Journals of the House of Representatives, 1863-4

New Zealand Government Gazette, 1863-4

New Zealand. Journals and Appendix to the Journals of the Legislative Council, 1863

New Zealand. Journals of the House of Representatives, 1863

New Zealand. Parliamentary Debates, 1863

New Zealand Reports: New Zealand Privy Council Cases, 1840-1932
— — (Butterworth and co, Wellington, 1938)

The Statutes (Revised edition), vols.13-14 (Eyre and Spottiswoode, London, 1877)

SECONDARY SOURCES

Bauchop, Heather — The Wars and Iwi Losses, Taranaki 1860-1870: A Summary, Wai 143, #H11 (1992)

Dalton, B.J. — War and Politics in New Zealand 1855-1870 (Sydney University Press, 1967)

_____ — The Dictionary of New Zealand Biography, vol.1 (Allen and Unwin/Department of Internal Affairs, Wellington, 1990)

Joseph, Philip A. — Constitutional and Administrative Law in New Zealand (The Law Book Company, Sydney, 1993)

Kent, James — Commentaries on American Law, vol.3 (Little, Brown and

co, Boston, 1873; F.B. Rothman and co, Littleton, Colorado, 1989)

McHugh, P.G. "The Aboriginal Rights of the New Zealand Maori at Common Law", D.Phil. thesis, University of Cambridge (1987)

McHugh, P.G. "Aboriginal title in New Zealand courts", Canterbury Law Review, 1984, vol.2(2)

McHugh, Paul The Maori Magna Carta (Oxford University Press, Auckland, 1991)

Morrell, W.P. British Colonial Policy in the Mid-Victorian Age (Oxford, Clarendon Press, 1969)

Riseborough, Hazel Background Papers for the Taranaki Raupatu Claim, Wai 143, #A2 (1989)

Ward, Alan A show of justice (Auckland University/Oxford University Press, Auckland, 1973)