

# OPINION

OF THE

## ATTORNEY-GENERAL ON LEGAL QUESTIONS RAISED IN EARL GRANVILLE'S DESPATCH

No. 121, OF 4TH NOVEMBER, 1869.

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

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WELLINGTON.

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1870.

REPORT

UNITED STATES DEPARTMENT OF AGRICULTURE  
BUREAU OF PLANT INDUSTRY

Washington, D. C.

1910

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Wellington, September, 1870.

OPINION of the ATTORNEY-GENERAL of NEW ZEALAND on the legal questions raised in the concluding paragraph of Earl Granville's Despatch, No. 121, of 4th November, 1869, for the Hon. the Colonial Secretary.

I HAVE been directed to peruse and consider the concluding paragraph of a Despatch from the Right Honorable the Secretary of State for the Colonies (Earl Granville) to His Excellency the Governor, dated the 4th November, 1869, in which His Lordship observes upon the explanation offered by His Excellency in his Despatch to the Secretary of State, dated the 7th July, 1869, in the following terms:—"I do not clearly understand how you justify this notice as a matter of law. I understand you to disclaim the application of martial law, and viewing Titokowaru merely as a notorious, but untried and unconvicted, rebel and murderer, I am not aware of any Colonial enactment which would make it lawful for any chance person to shoot him down."

As I understand, my consideration of this matter has been requested inasmuch as the explanations referred to were, to some extent, based on an opinion of mine.

I venture to submit that the observation of His Lordship on His Excellency's Despatch is scarcely called for by the explanations offered by His Excellency, and seems intended to raise a somewhat different question to that raised in the Despatch to which His Excellency's Despatch of July, 1869, was in reply. It was not sought to justify the proceedings referred to upon the ground that they were authorized by the provisions of any Colonial enactment. The propriety of the proceedings had been questioned as inconsistent with the usages of war. It was urged, in reply, that the persons to be affected were not entitled to the observance towards them of the usages of war: first, by reason of their being rebels in arms, and that such rebellion was not of such an extent or character as to make it expedient or proper to treat the rebels otherwise than as persons guilty of a breach of the municipal law; secondly, by reason of the hostilities being carried on in such a manner as would have disintituled even foreign enemies to such observance.

The justification of the proceedings was based on the universal and supreme law of necessity and preservation of the State. It is by this universal and supreme law that the exercise of the so-called martial law, when applied by the State to its subjects in arms against its authority, is sanctioned.

To the objection now raised, an answer in the words that there is a "Colonial enactment" which makes it lawful for any chance person to shoot down a notorious, but untried and unconvicted, rebel and murderer, would be literally correct. "The English Laws Act, 1858," declares and enacts, that the laws of England in force in 1840 shall, so far as applicable, be in force in New Zealand. The law of England on the subject, is as follows:—"If a person having actually committed a felony will not suffer himself to be arrested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a Magistrate, he may be lawfully slain by them."—*Hawker's Pleas of the Crown*, c. 28 s. 11; *Burns' Justice*—"Homicide."

To the same effect is the following passage from *Foster's Crown Law*, p. 271:—"When a felony is committed, and the felon fleeth from justice, or a dangerous wound is given, it is the duty of every man to use his best endeavours for preventing an escape; and if in pursuit the party fleeing is killed, where he cannot be otherwise overtaken, this will be deemed justifiable homicide; for the pursuit was not barely warrantable, it is what the law requireth, and will punish the wilful neglect of. I may add, that it is the duty of every man in these cases quietly to yield himself up to the justice of his country."

I have already stated that the safety of the State and necessity is the reason for the exercise of such rigorous measures. This appears to be the opinion of Sir Michael Foster, (*Crown Law*, p. 270):—"Homicide in advancement of justice may likewise be considered as founded in necessity; for the ends of government will be totally defeated, unless persons can, in a due course of law, be made amenable to justice."

I suppose that the expression "chance persons," is intended to mean a person without a warrant from a magistrate, or in aid of an officer of police. The authorities above cited show that any person, though not an officer of police, or aiding one, and though without a warrant, may, and indeed is bound, to pursue and bring to justice, a person guilty of felony, though unconvicted. I suppose, also, that by the expression "to shoot down" is meant, at the most, "to shoot down when the malefactor stands to resist, or because he flies and cannot be otherwise overtaken." The authorities above cited show, that this is not only "not barely warrantable, but what the law requireth."

If the observation of the Right Honorable the Secretary of State is meant to imply that the shooting down of a felon for sport, or in the indulgence of any evil feeling towards the felon, is not warrantable, then I am of opinion that the implication cannot be controverted. But I cannot conceive that such meaning was intended to be conveyed.

The expression is, no doubt, indefinite. I should, however, consider it disrespectful to the Secretary of State to construe his observations as intending to imply that the Government of New Zealand, in taking the proceedings referred to, were inciting on any of the people subject to its rule to an indulgence in an appetite for blood or needless cruelty. It seems to me that it is proper to construe the passage in the Despatch referred to as assuming that the law does not authorize a private member of the community, without warrant from a Magistrate, in pursuing an unconvicted murderer and in shooting him down when he cannot otherwise be overtaken.

The Hon. Colonial Secretary.

JAMES PRENDERGAST.

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