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A PRAISEWORTHY DEVICE FOR  
AMUSING AND PACIFYING  
SAVAGES?

WHAT THE FRAMERS MEANT BY THE ENGLISH TEXT OF  
THE TREATY OF WAITANGI

Ned Fletcher

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## **ABSTRACT**

The thesis addresses the meaning of the English text of the Treaty of Waitangi to those who had a hand in framing it. By “English text” is meant the English draft from which the Treaty in Maori was translated.

Despite all the scholarship concerned with the Treaty, the English text has been comparatively neglected. Its meaning has variously been treated as self-evident or irredeemably ambiguous, and therefore unrewarding as an object of study in itself. Most recent writing has taken the view that the Maori and English texts differ significantly. That has led to some focus on whether the differences were the result of deliberate mistranslation to make the Treaty acceptable to Maori.

This thesis is concerned with the anterior question of the meaning of the English text to its framers. It therefore begins by identifying the framers and reconstructing the English text, which has been treated by some historians as lost and unknowable. The meaning of the English text requires consideration of the text itself (itself a neglected topic) but also of the context in which it was drawn up. That context includes the backgrounds and motivations of the framers and the wider experience of Empire and the currents of thought of the time.

The thesis concludes that the English and Maori texts of the Treaty appear to reconcile. It takes the position that the principal framers, William Hobson, James Busby, and James Stephen, understood the Treaty in much the same way and that such understanding was one generally shared by contemporaries. That shared understanding was in part because the Treaty followed British imperial practice elsewhere, and in part because the Instructions given to Hobson in the name of the Secretary of State for the Colonies, but almost entirely the work of Stephen, were clear and were faithfully carried out in the English text.

The principal conclusions of the thesis are that British intervention in New Zealand in 1840 was to establish government over British settlers, for the protection of

Maori. British settlement was to be promoted only to the extent that Maori protection was not compromised. Maori tribal government and custom were to be maintained. British sovereignty was not seen as inconsistent with plurality in government and law. Maori were recognised as full owners of their lands, whether or not occupied by them, according to custom.

*To my parents*



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biography. Her commitment to accuracy in facts and precision in expression when commenting on drafts saved me from many errors.

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The gruesome task of proof-reading was undertaken by David Griffiths and my father, Hugh Fletcher.

Natalie, Matilda, Harriet and Henry shared the whole journey and have my love.

The thesis is, however, dedicated to my parents who encouraged and supported me in it.







## PREFACE

What did the English text of the Treaty of Waitangi mean to those who had a hand in framing it? That is the question addressed in this thesis.

By the “English text” is meant the English draft from which the Treaty in Maori, first entered into by the British Crown and Maori chiefs at Waitangi on 6 February 1840, was translated. Although later regarded as equally authoritative and fully equivalent to the Maori text, the English text was preparatory to the agreement entered into<sup>1</sup> and the translation which became the Treaty was not exact. The Maori text, therefore, is properly regarded as the authoritative Treaty.

Even acknowledging that the English text was a draft only, it is an important object of study because it was the only text accessible to non-Maori speakers. Assessment of British understandings of the compact must therefore start with the English text and what it meant to those who framed it.

In the English text, Maori chiefs ceded to Queen Victoria the sovereignty of New Zealand and an “exclusive right of preemption” should they wish to sell their land. In return, Queen Victoria promised Maori “Her Royal protection”, the “rights and privileges of British subjects”, and the “full exclusive and undisturbed possession” of their properties. The framers’ understandings of these undertakings are part only of the Treaty story which includes, in addition to Maori understandings of the Maori text, the understandings of the translators of the English draft into Maori, and the understandings of others who were not directly engaged in the treaty-making. Some overlap between these different parts to the Treaty story is inevitable. The Maori translation itself may shed light on what the framers of the English text meant by it (depending on its own meaning, something only touched on here). How Maori and other contemporaries understood the Treaty and the

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<sup>1</sup> Later, 39 Maori chiefs at the Waikato Heads and Manukau signed a treaty using the English text (although the Maori text is likely to have been read out and discussed). Between February and September 1840, however, more than 500 chiefs entered into the Treaty in Maori as first signed at Waitangi.

explanations of it given at the time may provide a cross-check for the understandings of the framers of the English text.

Those who contributed to the framing of the English text included not only those who wrote it, but also Ministers and officials in London and Sydney who provided them with instructions and advice. Those principally responsible for drafting the Treaty in English were William Hobson, the Consul sent to negotiate with Maori for a cession of sovereignty to the British Crown, and James Busby, the British Resident in New Zealand since 1833. They were acting on the Instructions given to Hobson by the Marquess of Normanby, the Secretary of State for the Colonies, but almost entirely the work of James Stephen, the Permanent Under-Secretary who headed the Colonial Office. Further influence on the shape of the English text may be attributed to George Gipps, the Governor of New South Wales, to whom Hobson was initially made subordinate and to whom he reported in Sydney on his way to New Zealand.

Although much has been written about the meaning of the Treaty, the understandings of those who framed the English text have been largely neglected. A number of reasons for this neglect may be conjectured. Early New Zealand scholarship may have been hampered by the paucity and inaccessibility of source material. While accessibility was greatly improved in the mid-twentieth century by the microfilming of overseas records, particularly those of the Colonial Office, the historical record remains thin, especially in relation to Hobson and Gipps. Even where the Treaty featured in the political histories of the 1950s onwards, it was generally as part of larger narratives more concerned with the reasons for and consequences of British assumption of sovereignty in New Zealand than with the instrument through which it was achieved.

From 1972, with the publication of Ruth Ross's influential essay on the Treaty texts, scholars came to focus on the Treaty itself but in a way which contributed to continuing neglect of the English text and its meaning. Ross considered that the English text from which the Maori translation had been made was lost and could

not be reconstructed with certainty. Only the Maori text was properly regarded as the Treaty. Ross highlighted the differences between the Maori text and official texts in English and described the Treaty as “hastily and inexpertly drawn up, ambiguous and contradictory in content, chaotic in its execution”. Most of the Treaty scholarship since has adopted Ross’s view that the implications of “sovereignty” as ceded by Maori to the British Crown in the English text were inadequately and misleadingly conveyed by the choices of language used in the Maori text. In this, the meaning of the English text is treated as self-evident. The focus has been on the differences between the two texts and whether they were the result of deliberate mistranslation undertaken to make the Treaty acceptable to Maori. Ross’s view that the Treaty “says whatever we want it to say” may also have struck a chord with those historians who continued to be interested in British intervention in 1840 and the early years of colonial administration. For them, the meaning of the Treaty in English was uncertain in 1840 and had to be worked out through political processes over time.

Neglect of the English text may also have resulted from a shift from political to social history from the 1970s. Government actors became of less interest. The Colonial Office record, the principal source for the framers’ understandings of the Treaty, was less picked over. No biographies of Hobson or Busby have appeared since the Second World War.<sup>2</sup> The biographies and other studies of Hobson, Busby, Gipps and Stephen are all inadequate. In itself, this absence of helpful biographical information may have deterred scholars of the Treaty linking its meaning to the understandings held by the framers.

In recent years, much of the original scholarship about the Treaty has arisen in connection with litigation in the courts and Treaty of Waitangi Tribunal claims. Lawyers and legal historians have been to the fore. An important strand of this scholarship has suggested that the terms of the English text of the Treaty were relatively standard for British treaties of the time and were largely declaratory of

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<sup>2</sup> Paul Moon’s 1998 book on Hobson does not claim to be a full biography and does not add significantly to the information to be obtained from Guy Scholefield’s 1932 biography.

the common law. The effect of these views may have been to make the Treaty less interesting to historians. The understandings of the framers may also have seemed less important in the New Zealand legal context because of the orthodox view that the Treaty has, of itself, no effect in domestic law. Lawyers, too, have emphasised the primacy of the Maori text in cases of conflict with the English text (in application of a rule of construction, that agreements should be interpreted against the drafter). The legislation under which the Waitangi Tribunal operates (echoed in other legislation since) has led to an emphasis on the “principles” of the Treaty. The work of the Tribunal in settling the meaning of the Treaty in its two texts—and the historical research it has given rise to—has tended to date to glide over the English text in describing a Treaty that fuses the two texts and even transcends both by emphasising the spirit in which it was made.

In this thesis the view is taken that the English text and the understandings of those who framed it deserve close study. They are an important part of the full story of the Treaty. The understandings of the framers are likely to have shaped their implementation of the Treaty, at least until overtaken by other understandings or agendas arising from changing circumstances. In addition, even though the Maori text is rightly treated as authoritative, its origins in the English draft make that text relevant when considering the meaning of the Treaty in Maori. Nor should it be assumed that the meaning of the English text is either too plain or too ambiguous to repay study. Apart from the meaning of its terms in 1840, it is important to have a sense of how matters not expressly addressed in the text were expected to be dealt with. Both meaning and expectations require more context than can be gleaned from a 21st century analysis of the text alone.

To focus on the meaning of the English text to its framers is not to elevate the status of the English draft or to diminish that of the Maori text. Nor is it to depreciate modern efforts, particularly those of the Waitangi Tribunal, in developing an understanding of the Treaty that reconciles and transcends its texts. Still less is it to promote “original intent” as controlling Treaty interpretation, as is familiar from interpretations of the United States Constitution by reference to the

understandings of the Founding Fathers. This thesis is not concerned with the Treaty as a “living” force in New Zealand law and society. It is concerned with history. Although the meaning of the Treaty to its framers inevitably must deal with legal concepts and understandings in 1840, the argument made here is not a contemporary legal argument. It may, however, suggest that some of the historical assumptions which have been starting points for contemporary legal argument should be revisited.

How the framers understood the English text cannot be divorced from their own experiences and the currents of thought of the day. It became clear in the course of research that the meaning of the English text to its framers is a topic involving biography and engagement with the history of ideas. The framers themselves did not record at the time either their understandings of the Treaty or the ideas they drew on. What influenced them has to be reconstructed from their actions and writings over a timeframe much longer than the period in which instructions and advice were given and the English text was drafted. Nor can the assessment be confined to materials left by the framers that bear directly on New Zealand and the options for British intervention. It is in the nature of ideas that their influence is often not explicitly acknowledged and may not even be appreciated.

Ideas that can be seen at work in the Treaty include those resulting from experiences of Empire (including lessons of what to avoid as well as what to apply) and experiences beyond Empire (including the dealings of the United States with its Indian nations). Other general ideas may be more difficult to see in the record but are likely to have been at work because they were so widely diffused at the time. Because of this, the influences likely to have affected the framers of the English text need to be looked for more broadly than by looking for direct connections or within a narrow timeframe. It is as important to look to the ideas to which the framers were being exposed and to what was being said around them.

Because all ideas evolve, and because the mid-nineteenth century was a period where many ideas competed against a background of rapid change in society and

knowledge, a snapshot of thinking at 1840 is difficult. It is necessary to have some sense of the source of ideas, how they were received and developed (a process in which chance, misunderstanding and agendas could all be significant), and their influence over time. In considering understandings of the English text, it is necessary to be careful about shifts in thinking which may have influenced the later recollections of the framers and the assessments of others. In relation to the Treaty, some shifts in thinking may have been underway in 1840, others may have arisen later as a result of developments that could not have been foreseen. Careful attention to chronology is required to guard against seeing later thinking which becomes mainstream as having been immanent or inevitable at an earlier point. On the other hand, post-1840 statements about the meaning of the English text cannot be ignored because they may accurately reflect views held in 1840, even if not previously expressed (perhaps because their expression was not thought necessary until challenged by later arguments). It is also important to acknowledge that there may never have been one common understanding of the meaning of the English text. It is necessary to consider whether, even among the framers, there were different views in 1840.

Sorting out the meaning of the Treaty in English to its framers raises directly whether the views later most forcibly put by the New Zealand Company reflect the understandings of the framers or represent new views which came largely to eclipse those original understandings. The Company said that it was difficult to see the Treaty “as any thing but a praiseworthy device for amusing and pacifying savages for the moment”. It argued that Maori did not have sovereignty to cede and that Britain had obtained sovereignty with Captain James Cook’s discovery of New Zealand and not through the Treaty. Drawing on the case-law of the United States Supreme Court, the Company maintained that Maori did not own land but had merely a right of use or occupancy that was limited to land actually occupied or under cultivation. The ultimate ownership of land in New Zealand belonged to the Crown by reason of sovereignty, but subject to the right of use or occupancy by Maori in relation to occupied or cultivated land. By reason of sovereignty too, and independently of the cession of the “exclusive right of preemption” in the Treaty,

the Crown had the exclusive right to purchase occupied or cultivated land from Maori (meaning that pre-Treaty purchases by Europeans from Maori were invalid). These arguments were put forward not only by the New Zealand Company. Governor Gipps advanced similar views in July 1840 in a debate in the New South Wales Legislative Council on the validity of pre-1840 European land purchases in New Zealand. His views in turn were picked up by the Company and, later, by officials and courts in New Zealand.

These arguments of the New Zealand Company and Gipps continue to resonate in the historiography of the Treaty and in New Zealand law today. Since Gipps had some input into the development of the Treaty, it might be thought that his views shed light on what was understood by its framers. It is the position taken in this thesis, however, that Gipps's views in July 1840 did not represent the approach taken in the Treaty by those more directly responsible for framing it. Indeed, Gipps was challenged directly in his arguments in the New South Wales Legislative Council debate by James Busby. The New Zealand Company arguments were similarly rejected by James Stephen and the British Government throughout the period 1840–46. Although the Treaty itself and original understandings of its effect came to be eclipsed in politics and law after 1846, it is here suggested that the predominant New Zealand historiography has been misled by the later history into a mistaken view about what the Treaty meant in 1840, including in relation to the implications of British “sovereignty” for Maori society.

The first two chapters introduce the topic of the thesis. Chapter 1 describes how the English text (from which the Maori translation was made) was arrived at. It identifies those who had a hand in the drafting and explains the sequence and relationship of the different drafts that survive in arriving at a reconstruction of the final text. In Chapter 2, the historiography of the Treaty is surveyed. From this survey are derived the questions about the meaning of the English text addressed in the balance of the thesis.

The imperial context in which the Treaty was made is the subject of Chapters 3-5. Chapter 3 deals with the structure of Empire, its administration, and the ideas and forces that shaped it. It introduces James Stephen, the Permanent Under-Secretary for the Colonies, and the politicians who developed the policy that led to British acquisition of sovereignty over New Zealand. Chapter 4 is concerned with the implications of British sovereignty for native societies and their governments in different parts of Empire. Chapter 5 addresses how native land was treated under British sovereignty in the Empire and in the United States, especially in the case-law of the Supreme Court which was later drawn on by the New Zealand Company, Gipps, and ultimately in the New Zealand courts.

Chapters 6-11 focus on the principal framers of the English text, James Busby, James Stephen and the British Government Ministers, William Hobson and George Gipps. Because their understandings of the Treaty are likely to have been affected by their own backgrounds, including their New Zealand experience, it is necessary to address some of the deficiencies in the existing biographies. Chapter 6 deals with James Busby and his Residency, largely as necessary background to understanding his ideas for British intervention put forward in the 1830s, which are the subject of Chapter 7. Chapter 8 describes the Marquess of Normanby's Instructions to Hobson, which express British objectives in treating with Maori for sovereignty. This chapter precedes Chapter 9, which explains the history behind the Instructions, so that the points of interest in how British policy was ultimately settled can be shown more clearly. Chapter 9 describes the competing aspirations for New Zealand of the New Zealand Association (later the New Zealand Company), the Church and Wesleyan missionary societies, and the Colonial Office. Chapter 10 traces the career of William Hobson, including his visit to New Zealand as captain of HMS *Rattlesnake* in 1837, and describes the background to his appointment as Consul and prospective Lieutenant-Governor of New Zealand and his involvement in Colonial Office decision-making about New Zealand in 1839. Chapter 10 ends with Hobson's departure from England. Chapter 11 picks up the story on Hobson's arrival in Sydney and covers his dealings with Gipps and

Australian purchasers of New Zealand land, in which controversies relating to Maori sovereignty and property emerged.

Chapter 12 looks at how British officials explained the Treaty to Maori and their recorded understandings of its effect in the period February-September 1840, when the Treaty was first entered into at Waitangi and was then taken around the country for signature.

Chapters 13 and 14 deal with developments in London and Sydney before news of the Treaty was received. In London, the subject of chapter 13, the New Zealand Company attacked the Colonial Office for its decision to treat with Maori for sovereignty, drawing on American law in its arguments that Britain already had sovereignty by Cook's discovery. The Company secured appointment of a Parliamentary Select Committee to inquire into the policy adopted by the Colonial Office in sending Hobson to treat for sovereignty. Chapter 14 turns to developments in Sydney while news from New Zealand was awaited. The controversies relating to Maori sovereignty and property continued, fuelled by publication of a proclamation affecting the validity of European land purchases in New Zealand. Arguments began as to the applicability of the legal doctrine of "pre-emption" applied in the United States as an incident of sovereignty acquired by discovery. Chapter 14 also deals with the unsuccessful attempt by Governor Gipps to have some visiting Maori chiefs sign a form of treaty.

Chapters 15-19 deal with post-Treaty developments. They are important for what they disclose about both the original understandings of the Treaty and how they came to be eclipsed. Chapter 15 picks up from Chapter 13 the story of the 1840 Select Committee on New Zealand and the Colonial Office rejection of the argument of the New Zealand Company that the United States Supreme Court case of *Johnson v M'Intosh* represented British imperial law and practice. Chapter 16 deals with the almost simultaneous debate in the New South Wales Legislative Council in mid-1840 over the New Zealand land claims legislation. In this debate, Gipps and Busby were on opposing sides. Gipps relied heavily on the same United

States case-law that was being invoked by the New Zealand Company in London. The debate was closely reported by the Sydney and nascent New Zealand press, with some of the papers (including, ironically, the New Zealand Company paper at Port Nicholson) rejecting the American legal approach as inconsistent with English law and inapplicable to New Zealand circumstances. Both Chapters 15 and 16 are concerned with the increasing attention given to the nature of Maori property in land and the existence of Maori sovereignty before 1840. The arguments about Maori sovereignty and property did not end in 1840. Chapter 17 shows how, in the period 1840–47, the Colonial Office initially held to its 1840 position but retreated from it at the end, as the times and political leadership changed. Chapter 18 deals with the eclipse of original understandings of the Treaty in the now separate colony of New Zealand in the period 1840–77, a process which was strongly contested all the way.

Chapter 19 is concerned with indications after 1840 that British sovereignty was not inevitably seen as incompatible with continued Maori self-government under customary law. Those of particular interest are statements made by the framers of the Treaty. They point to a path not taken, but which might have been.

The Conclusion attempts to answer the questions, identified in Chapter 2 from the survey of the historiography, about the meaning of the English text of the Treaty to its framers. These answers turn on the text and its drafting, the framers' backgrounds and intentions, the context of Empire and the current of ideas, and the evidence provided by the historical record.

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## ABBREVIATIONS EMPLOYED IN FOOTNOTES

AML	Auckland War Memorial Museum Library
ANZ	Archives New Zealand, Wellington
APL	Auckland Public Library, Sir George Grey Special Collections
ATL	Alexander Turnbull Library, National Library, Wellington
<i>BiM</i>	Phil Parkinson & Penny Griffith <i>Books in Maori, 1815–1900: Nga Tanga Reo Maori</i> (Reed Publishing, Auckland, 2004)
CMS	Church Missionary Society Archive, University of Birmingham
CO	Colonial Office Papers, The National Archives, Kew, London
CTS	Clive Parry (ed) <i>The Consolidated Treaty Series</i> (Oceana Publications, Dobbs Ferry, New York, 1969–1986)
DUL	Durham University Library, Archives & Special Collections
FO	Foreign Office Papers, The National Archives, Kew, London
GBPD HC	Great Britain Parliamentary Debates, House of Commons
GBPD HL	Great Britain Parliamentary Debates, House of Lords
GBPP	Great Britain Parliamentary Papers
MNZA	Museum of New Zealand Te Papa Tongarewa Archives, Wellington
NA	National Archives, Wellington
NSWPA	New South Wales Parliamentary Archives, Sydney
SLNSW	State Library New South Wales (Mitchell & Dixson collections), Sydney
SRNSW	State Records New South Wales, Kingswood, Western Sydney
TNA	The National Archives, Kew, London
UoA	University of Auckland, General Library, Special Collections







## CHAPTER ONE

### DRAFTING THE TREATY

This chapter concentrates on the text of the Treaty in English. Only the essential background necessary for understanding how it was drafted is dealt with here, leaving the context for further development in subsequent chapters.

By 1838 the British Colonial Office had come to the view that some assumption of responsibility for New Zealand could no longer be avoided. The hope that the appointment of James Busby as British Resident at New Zealand in 1832 would protect Maori from the misconduct of British nationals had not been fulfilled. British settlement was increasing rapidly and there was rampant speculation in land. The New Zealand Association was promoting organised immigration. The Association, keen for Government backing for its scheme, exploited reports of disorder on the New Zealand frontier, including those from Busby and missionaries at stations established by the Church Missionary Society and the Wesleyan Methodist Missionary Society. The Colonial Office was concerned about the effects on Maori of unregulated European contact but did not have faith that the Association could provide a remedy. In August 1839, after agonising over the terms of its intervention for many months, the British Government resolved to add New Zealand to its colonial possessions. It dispatched Captain William Hobson of the Royal Navy as Consul to negotiate with the Maori chiefs for the transfer of the sovereignty of their country to the British Crown.

The starting point for the Colonial Office was that Maori would have to give their consent to such transfer of sovereignty. The Secretary of State for the Colonies, the Marquess of Normanby, in his Instructions to Hobson, emphasised that Britain “disclaim[ed] ... every pretension to seize on the islands of New Zealand ... unless the free and intelligent consent of the natives ... shall be first obtained”.<sup>3</sup> Britain “acknowledge[d] New Zealand as a sovereign and independent state”. The decision

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<sup>3</sup> Normanby to Hobson, 14 August 1839, GBPP 1840 [238] XXXIII.587, 37-42 at 38.

## Chapter One: Drafting the Treaty

to take this step was said to have been made “with extreme reluctance” and in the knowledge that it was “essentially unjust”:<sup>4</sup>

[T]he increase of national wealth and power, promised by the acquisition of New Zealand, would be a most inadequate compensation for the injury which must be inflicted on this kingdom itself, by embarking in a measure essentially unjust, and but too certainly fraught with calamity to a numerous and inoffensive people, whose title to the soil and to the sovereignty of New Zealand is indisputable, and has been solemnly recognized by the British Government. We retain these opinions in unimpaired force; and though circumstances entirely beyond our control have at length compelled us to alter our course, I do not scruple to avow that we depart from it with extreme reluctance.

The necessity for the interposition of the Government has, however, become too evident to admit of any further inaction.

A principal reason given for the acquisition of sovereignty in the Instructions to Hobson was the need to establish settled government in order to protect Maori from what was acknowledged by Normanby as the “rapidly” expanding British settlement. It was acknowledged that the history of European colonisation had demonstrated that unless settlers were “protected and restrained by necessary laws and institutions, they will repeat, unchecked, in that quarter of the globe, the same process of war and spoliation, under which uncivilized tribes have almost invariably disappeared as often as they have been brought into the immediate vicinity of immigrants from the nations of Christendom”:<sup>5</sup>

To mitigate and, if possible, to avert these disasters, and to rescue the emigrants themselves from the evils of a lawless state of society, it has been resolved to adopt the most effective measures for establishing amongst them a settled form of civil government. To accomplish this design is the principal object of your mission.

It was envisaged that priority in acquiring sovereignty would be given to areas of British settlement, although the acquisition of the whole country was not ruled out. In relation to the South Island, it was acknowledged that Colonial Office knowledge of the circumstances was insufficient to enable full instructions.

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<sup>4</sup> Ibid 37.

<sup>5</sup> Ibid.

## Chapter One: Drafting the Treaty

“[A]ided by the advice which you will receive from the Governor of New South Wales”, Hobson would have to assess whether the native population was indeed so “savage”, as reports had it, as to be “incapable of entering intelligently into any treaties with the Crown”. In that case, “the ceremonial of making such engagements with them would be a mere illusion and pretence which ought to be avoided”. Hobson would then have to use his own discretion whether to assert sovereignty by reason of Captain James Cook’s 1769 “discovery” of New Zealand, if the danger from British settlement rendered “the occupation of the southern island a matter of necessity, or of duty to the natives”.<sup>6</sup>

Hobson sailed to Sydney, arriving on Christmas Eve, 1839. There he consulted with Governor George Gipps of New South Wales. It is likely that they discussed the terms of the treaty Hobson hoped to conclude. Notes of its terms may well have been prepared while Hobson was in Sydney in January 1840. Certainly after the Treaty of Waitangi was entered into, but before a copy had been received in Sydney, Gipps prepared a “memorandum of an agreement” for the signature of some chiefs who visited Sydney in early February. The agreement was not signed. But its language and effect has similarities with the treaty drafts.

The new territory was to be attached to the colony of New South Wales, with Gipps as its Governor. Hobson brought with him a new Commission for Gipps, extending the boundaries of New South Wales to include “any territory which is or may be acquired in sovereignty by Her said Majesty” in New Zealand. Gipps swore Hobson in as Lieutenant-Governor “of such parts of the ... territory [of New South Wales] as is or may be acquired in sovereignty [in New Zealand]”. He appointed four officers to accompany Hobson to New Zealand: George Cooper (Collector of Customs and Treasurer), Felton Mathew (acting Surveyor-General), Willoughby Shortland (police magistrate) and James Freeman (clerk). Freeman was to act as secretary to Hobson.

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<sup>6</sup> Normanby to Hobson, 15 August 1839, GBPP 1840 [238] XXXIII.587, 44-45 at 44.

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Gipps also issued three proclamations, which were not, however, made public until Hobson had left for New Zealand, forestalling news of them reaching the settlers there ahead of his arrival. The proclamations dealt with the extension of the boundaries of New South Wales and the appointment of Hobson as Lieutenant-Governor for the New Zealand territories, and declared that all future purchases of land in New Zealand would be “null and void”, with all existing purchases subject to investigation.<sup>7</sup> Gipps supplied Hobson with two further proclamations to be made to British subjects on his arrival in New Zealand. They announced that measures were being taken for “the establishment of a settled form of civil government”, and advised that new purchases of land were prohibited and that the titles of land earlier purchased would be investigated.<sup>8</sup>

Hobson and his officers sailed for New Zealand on 18 January 1840 in HMS *Herald*, under the command of Captain Joseph Nias. They had a charmed passage across the Tasman Sea and arrived at the Bay of Islands on 29 January.<sup>9</sup>

### Preparations

The Bay of Islands was the natural place to start the business of settling a treaty with the Maori chiefs. It was the area of greatest European settlement and where Busby’s Residency was located. The chiefs of “the Confederation of the United Tribes” of the North were the obvious Maori grouping with which to start dealing. They had declared sovereignty over their territories in 1835 at the suggestion of James Busby.

Although Hobson was not given the draft of a treaty with his Instructions, they indicated in general terms what should be included. In particular, he was to stipulate for a cession of sovereignty from the chiefs to Queen Victoria and he was to secure the agreement of the chiefs that their lands were not to be alienated in the

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<sup>7</sup> See Gipps to Russell, 9 February 1840, GBPP 1840 (560) XXXIII.575, 1-3.

<sup>8</sup> See below n 15.

<sup>9</sup> Diary of Felton Mathew, 18, 26, 27 & 29 January 1840, MNZA X112 (manuscript & typescript) (pp 1-2 of the typescript).

future except to the Queen. Hobson was told that he must “frankly and unreservedly” explain to the chiefs why they should sign the treaty. In making the case for the treaty to Maori, he was also advised to seek the assistance of the missionaries and the long-term British residents “who have studied their character, and acquired their language”.<sup>10</sup> In the event, the principal sources of information for Hobson in New Zealand would be James Busby, the British Resident, and the missionaries, especially the Reverend Henry Williams, head of the Church Missionary Society mission at Paihia.

On the arrival of the *Herald* in the Bay of Islands, Busby immediately went on board.<sup>11</sup> The arrival of Hobson as Consul meant that Busby’s office as British Resident was terminated, a change he had already been apprised of.<sup>12</sup> It seems that Hobson had hoped that the chiefs of the Confederated Tribes could be assembled in a few days and that a treaty with them might be speedily concluded. Whether drafting of the treaty had begun on the voyage is a matter of conjecture. Hobson was disappointed to be told by Busby that assembling the chiefs of the Confederation of the United Tribes would take 10 days,<sup>13</sup> although in the event the invitations apparently dispatched on 31 January named 5 February as the date of the meeting.<sup>14</sup>

The Commissions extending the boundaries of New South Wales to cover New Zealand and appointing Hobson Lieutenant-Governor, together with the proclamations provided to Hobson by Gipps, were read on 30 January 1840 at Christ Church, Kororareka.<sup>15</sup> Once the Commissions and proclamations were

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<sup>10</sup> Normanby to Hobson, 14 August 1839, GBPP 1840 [238] XXXIII.587, 37-42 at 38.

<sup>11</sup> Journal of Felton Mathew, 30 January 1840, APL NZMS 88 (manuscript) & ATL MS-1620 (typescript) (p 19 of the typescript). Note that the typescript page numbers to Mathew’s Journal given in this chapter are to those in hand in the top right-hand page corners.

<sup>12</sup> Hobson to Gipps, 29 January 1840, SRNSW NRS 905, 4/2540 (also ANZ Micro-Z 2713 & UoA Microfilm 09-006 Reel 7).

<sup>13</sup> Journal of Felton Mathew, 30 January 1840, APL NZMS 88 (manuscript) & ATL MS-1620 (typescript) (p 19 of the typescript).

<sup>14</sup> See Busby to Colenso, 31 January 1840, ATL MS-Papers-4622; and example of invitation (annotated by Busby) at ATL MS-Papers-0032-1009.

<sup>15</sup> Hobson to Gipps, 4 February 1840, GBPP 1840 (560) XXXIII.575, 7-9. See Chapter 11, text accompanying ns 125-129.

published, the finalisation of the terms of the treaty and its translation became pressing for Hobson.

### **Who had a hand in the drafting?**

There are no extant contemporary records of the manner in which the English text of the Treaty, from which the Maori translation was taken, was put together. Hobson did not describe the process that was followed in his despatches. Of Hobson's officials, only the diary and journal of Felton Mathew survive, and they contain no details of the drafting, suggesting he was not directly involved.<sup>16</sup> While the journals of others present in the Bay of Islands are helpful in providing clues as to the timing and sequence of events, they do not touch on the drafting of the text.

Much later, both James Busby and Henry Williams wrote of their involvement with the Treaty. Busby in 1860 wrote:<sup>17</sup>

When it became necessary to draw the Treaty Captain Hobson was so unwell as to be unable to leave his ship. He sent the gentleman who was to be appointed Colonial Treasurer [Cooper] and the Chief Clerk [Freeman] to me with some notes, which they had put together as the basis of the Treaty,<sup>18</sup> to ask my advice respecting them. I stated that I should not consider the propositions contained in those notes as calculated to accomplish the object, but offered to prepare the draft of a treaty for Captain Hobson's consideration. To this they replied that that was precisely what Captain Hobson desired.

The draft of the Treaty prepared by me was adopted by Capt. Hobson without any other alteration than a transposition of certain sentences, which did not in any degree affect the sense.

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<sup>16</sup> Journal of Felton Mathew, APL NZMS 88 (manuscript) & ATL MS-1620 (typescript); Diary of Felton Mathew, MNZA X112 (manuscript & typescript).

<sup>17</sup> James Busby *Remarks Upon a Pamphlet Entitled "The Taranaki Question, By Sir William Martin, D.C.L., Late Chief Justice of New Zealand"* (Philip Kunst, Southern Cross Office, Auckland, 1860) ["Busby *The Taranaki Question*"] 3-4. See also James Busby "Occupation of New Zealand, 1833-1844" (c. 1865), AML MS 46, Box 6, Volume 1 (typescript) ["Busby 'Occupation of New Zealand'"], 87.

<sup>18</sup> It should not be assumed that Cooper and Freeman had put together the "notes" simply from this reference. As indicated below, it seems likely that Freeman was merely an amanuensis for Hobson and that Cooper was not sufficiently in Hobson's confidence to have been entrusted with a significant role.

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In 1859, Busby said that the document usually regarded as the official English translation of the Maori text of the Treaty was, in fact, “merely a copy of the original draft of the intended treaty, which was drawn up in English and given to one or two gentlemen having a knowledge of Maori to translate into that language”.<sup>19</sup> In a letter written to the *Southern Cross* newspaper in 1858, Busby claimed that “I, myself, drew that Treaty” (and therefore that he understood it “as well as most people”).<sup>20</sup> Earlier, in 1844, in a letter to *The Times*, he claimed to have written article 2.<sup>21</sup>

Henry Williams spoke of his role in translating an English text supplied to him by Hobson, but did not claim to have participated in the drafting of the English text itself. In his “Early Recollections” which, although written some time earlier, were not published until 1877 (when they were included in the biography of Williams written by his son-in-law, Hugh Carleton), Williams said:<sup>22</sup>

On the 4th of February, about 4 o’clock p.m., Captain Hobson came to me with the Treaty of Waitangi in English, for me to translate into Maori, saying that he would meet me in the morning at the house of the British Resident, Mr. Busby; when it must be read to the chiefs assembled at 10 o’clock. In this translation it was necessary to avoid all expressions of the English for which there was no expressive term in the Maori, preserving entirely the spirit and tenor of the treaty ... .

On a careful examination of the translation of the treaty by Mr. Busby, he proposed to substitute the word *whakaminenga* for *huihuinga*, which was done and approved of. A fair copy being made by myself, I was requested by Captain Hobson to read and explain the same to the meeting of chiefs ... .<sup>23</sup>

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<sup>19</sup> Submission of James Busby in the case of *Busby v White* (1859), reproduced in Supplement to *The Southern Cross*, Auckland, 1 November 1859, at 2, col 3.

<sup>20</sup> *The Southern Cross*, Auckland, 25 June 1858, at 4, col 1.

<sup>21</sup> *The Times*, London, 27 December 1844, at 3.

<sup>22</sup> Hugh Carleton *The Life of Henry Williams, Archdeacon of Waimate* (vol 2, Wilsons & Horton, Auckland, 1877) [“Carleton Henry Williams ”] 12.

<sup>23</sup> Neither the “fair copy” nor the draft of the Maori translation survives. The Maori text written onto parchment and signed at Waitangi is Henry and Edward Williams’s translation copied in the hand of Rev Richard Taylor, another missionary. See Ruth Ross “Te Tiriti o Waitangi: Texts and Translations” (1972) 6:2 *New Zealand Journal of History* 129-157 [“Ross ‘Texts and Translations’”] at 133.

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A footnote (probably added by Carleton) explained that, in translating the treaty, Williams had the assistance of his son Edward, described as “*facile princeps*,” among Maori scholars, in regard to the Ngapuhi dialect,—generally admitted, except in Waikato, to be the Attic of New Zealand”.<sup>24</sup>

These are the only direct statements available to us of those who participated in the drafting of the Treaty.

What was “the Treaty of Waitangi in English” translated by Henry and Edward Williams, and who had a hand in producing it? Four sets of draft notes of the Treaty survive.<sup>25</sup> Three were in the archives of the colony from 1840, although they were forgotten or presumed lost for many years before being rediscovered in the 1870s<sup>26</sup> and published in 1877.<sup>27</sup> A fourth draft was found in Busby’s papers in

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<sup>24</sup> Carleton Henry Williams, above n 22, 12.

<sup>25</sup> The four draft notes I refer to do not include the so-called “Littlewood Treaty”, sometimes identified as the lost final English draft of the Treaty. See, for example, Martin Doutré *The Littlewood Treaty: The True English Text of the Treaty of Waitangi Found* (Dé Danann Publishers, Auckland, 2005). Phil Parkinson and Donald Loveridge have convincingly shown that this document (discovered in 1989 and now in Archives New Zealand) is an English back-translation of the Maori text, although the translation is influenced by the translator’s knowledge of the text of the English draft. Parkinson attributes the handwriting of the “Littlewood Treaty” to Busby (and is not challenged in this by Loveridge). See Phil Parkinson “‘Preserved in the Archives of the Colony’: The English Drafts of the Treaty of Waitangi” (2004) 11 *Révue Juridique Polynésienne/New Zealand Association for Comparative Law, Special Monograph* [“Parkinson ‘Preserved in the Archives’”] at 60-63; and Donald Loveridge “The ‘Littlewood Treaty’: An Appraisal of Texts and Interpretations” (2006) Stout Research Centre <[www.victoria.ac.nz/stout-centre/research-units/towru/publications/Littlewood-Treaty.pdf](http://www.victoria.ac.nz/stout-centre/research-units/towru/publications/Littlewood-Treaty.pdf)> [“Loveridge ‘Littlewood Treaty’”]. My own view is that it is not written by Busby: first, the handwriting does not seem to me to be Busby’s; and secondly, it contains at least one misspelling (“sovereignty”) which is unlikely to have been made by Busby. Nevertheless, it is entirely possible that the translation was one that Busby contributed to.

<sup>26</sup> In 1869 the Legislative Council of New Zealand directed that the English draft of the Treaty “as may have been prepared for translation by Governor Hobson or by his authority” was, “if procurable”, to be laid upon its table. The answer was returned by the Colonial Secretary that “[t]he original draft (if any) is not on record in the Native Office or Colonial Secretary’s Office”. See (1869) *Journals of the Legislative Council of New Zealand* 260-261; and “Copy of the Treaty of Waitangi, in English and Maori and Mr Baker’s Annotations Thereon” [1869] Appendix to the *Journals of the Legislative Council of New Zealand* 67-78 at 67.

<sup>27</sup> [H Hanson Turton] *Fac-similes of the Declaration of Independence and the Treaty of Waitangi* (George Didsbury, Government Printer, Wellington, 1877) [“Turton *Facsimiles*”] (most recently reprinted by AR Shearer, Government Printer, Wellington, 1976). As to fate of the English drafts and Treaty sheets after 1877, see Guy Scholefield *Historical Sources and Archives in New Zealand* (Bulletin No. 1, Archives Division, Department of Internal Affairs, Government Printer, Wellington, 1929) 5-6; Michael Bassett *The Mother of All Departments: The History of the Department of Internal Affairs* (Auckland University Press, Auckland,

1933.<sup>28</sup> In the drafts, the handwriting of Hobson, Freeman and Busby can be recognised. From them, some attempt to reconstruct the course of the drafting and who had input into it can be made.

None of the four documents is a full draft of a treaty. If a fair copy of the English text for translation derived from these drafts was provided to Henry Williams, it no longer exists. But, for reasons explained in this chapter, even if there once was a fair copy, now lost, it would not seem to have differed materially from the aggregation of two of the four extant draft documents, with their marked-up amendments. Henry and Edward Williams may indeed have worked directly from these documents without a fair copy draft, later returning them to Hobson for his files. Alternatively, the extant drafts may have been retained by Hobson as his file copy of a fair copy (since lost) provided to Henry Williams. Either possibility could explain inconsistencies (further discussed below) between copies of the Treaty in English sent by Hobson to Sydney and London and signed at the Waikato Heads and Manukau in March–April 1840. The important point, however, is that through the extant drafts as amended and the surviving copies, and by reference to the Maori translation, it is possible to be confident about the text provided to Henry Williams for translation.

Until Ruth Ross began this branch of scholarship in 1972, no historian focused on the development of the Treaty texts.<sup>29</sup> They were overlooked as evidence of the meaning of the Treaty to those directly involved. Ross did look at the documents and was the first to identify that one draft is in the writing of Freeman.<sup>30</sup> She considered that it is impossible to know what the final English text translated by Henry and Edward Williams was, and took the view that there is a missing final

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1997) 103-104 & 126-127; and Paul Moon & Peter Biggs *The Treaty and its Times: The Illustrated History* (Resource Books, Auckland, 2004) 215 & 219.

<sup>28</sup> See Eric Ramsden *Busby of Waitangi: H.M.'s Resident at New Zealand, 1833–40* (AH & AW Reed, Wellington, 1942) [“Ramsden *Busby of Waitangi*”] 238.

<sup>29</sup> Ross “Texts and Translations”, above n 23. See Rachael Bell “‘Texts and Translations’: Ruth Ross and the Treaty of Waitangi” (2009) 43:1 *New Zealand Journal of History* 39-58 [“Bell ‘Ruth Ross and the Treaty’”], especially 46-47.

<sup>30</sup> Ross “Texts and Translations”, above n 23, 133 n 24 and accompanying text. See also Parkinson “Preserved in the Archives”, above n 25, 19-21.

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English language text which, consistently with the Maori text signed, omitted reference to “forests” and “fisheries” in article 2.<sup>31</sup> Ross also identified the inconsistencies between the Treaty sheet signed at the Waikato Heads and Manukau and the varying English language texts sent by Hobson to Sydney and London, inconsistencies she thought substantiated her view that the final English text was unknowable.<sup>32</sup> She emphasised that the Maori text differed significantly from the officially published English renditions. The published English texts were “neither a translation of the Treaty of Waitangi [which Ross identified as the Maori text signed at Waitangi], nor is the Treaty of Waitangi a translation of [the published] English text[s]”.<sup>33</sup> In any event, Ross expressed the forthright opinion that it is only the Maori text “which is the Treaty of Waitangi”—“how can the English text be thought to have any validity at all?”<sup>34</sup> The drafts in English “were merely drafts”.<sup>35</sup>

The insight that the Maori text of the Treaty, being that signed by most Maori, is the more important text was a watershed.<sup>36</sup> But the proper focus it brought to the Maori text, together with the dismissal of the validity of English texts, may have given new reason to neglect the English drafts. Since Ross, most historians have

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<sup>31</sup> Ross “Texts and Translations”, above n 23, 141-142. See also Ruth Ross “The Treaty on the Ground” in *The Treaty of Waitangi: Its Origins and Significance* (Victoria University of Wellington, Wellington, 1972) 16-34 [“Ross ‘The Treaty on the Ground’”] at 21. Claudia Orange considers it “quite probable” that “the absence of forests and fisheries from the Maori translation can be explained by an accidental omission from the English draft given to Williams”. Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987) [“Orange *The Treaty of Waitangi*”] 40-41. Ross did not indicate whether in her view the omission was deliberate or accidental. See also Ranginui Walker “The Treaty of Waitangi as the Focus of Maori Protest” in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 263-279 at 264; and Bruce Biggs “Humpty-Dumpty and the Treaty of Waitangi” in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 300-312 [“Biggs ‘Humpty-Dumpty’”] at 307.

<sup>32</sup> Ross “Texts and Translations”, above n 23, 134-136.

<sup>33</sup> Ibid 129. See also ibid 134 n 31 and accompanying text.

<sup>34</sup> Ibid 133 & 136. The Waikato Heads and Manukau Treaty is glossed over by Ross on the basis that the Maori who signed it could not have understood its meaning. Ibid 136.

<sup>35</sup> Ibid 133. See also Ross “The Treaty on the Ground”, above n 31, 16.

<sup>36</sup> Judith Binney has written that “Ruth Ross’s essay highlighted (effectively for the first time) the fact that the Treaty was a Maori-language document but one written in ‘Protestant missionary Maori’”. Judith Binney “Introduction” in Judith Binney (ed) *The Shaping of History: Essays from the New Zealand Journal of History, 1967-1999* (Bridget Williams Books, Wellington, 2001) xiii. See also Bell “Ruth Ross and the Treaty”, above n 29.

accepted, often uncritically, her severe verdict on the process by which the Treaty was drafted and the result—that it was “hastily and inexpertly drawn up, ambiguous and contradictory in content, chaotic in its execution”.<sup>37</sup> For the most part, they have also been content to accept Ross’s view that Busby’s claims to have drawn up the Treaty were “a considerable exaggeration”<sup>38</sup> and that he tried to turn the meeting at Waitangi into one of the chiefs of the Confederation only, contrary to Hobson’s wishes.<sup>39</sup> Although Claudia Orange describes the drafts in detail,<sup>40</sup> and

<sup>37</sup> Ross “Texts and Translations”, above n 23, 154. See, for example, Peter Adams *Fatal Necessity: British Intervention in New Zealand 1830–1847* (Auckland University Press, Auckland, 1977) 158; JMR Owens “New Zealand Before Annexation” in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2nd ed, Oxford University Press, Auckland, 1992) 28–53 at 51; and Parkinson “Preserved in the Archives”, above n 25, 28. Earlier, Trevor Williams had described the Treaty as “rough hewn, like its author [Hobson]”. Trevor Williams “The Treaty of Waitangi” (1940) 25:99 *History* 237–251 at 246. Compare Robin Cooke (ed) *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (AH & AW Reed, Wellington, 1969) 21 (“Busby’s English draft of the Treaty reads well. It is short, simple, and dignified. Not surprisingly, however, the smooth phraseology is full of ambiguities”); and Alan Ward *An Unsettled History: Treaty Claims in New Zealand Today* (Bridget Williams Books, Wellington, 1999) 13 (“While it contained some ambiguities, the Treaty was not a shoddy, amateurish document, as is sometimes suggested”).

<sup>38</sup> Ross “Texts and Translations”, above n 23, 135 (“Busby’s claim to have ‘drawn’ the treaty is thus a considerable exaggeration even if applied to the various English versions”); Phil Parkinson “‘Preserved in the Archives’”, above n 25, 25 (“his influence was actually rather minor”); Loveridge “Littlewood Treaty”, above n 25, 14 n 58 (“Busby’s claims to have been the principal author of the final English draft ... are more or less a complete fabrication”). Other scholars have been more generous to Busby. See Orange *The Treaty of Waitangi*, above n 31, 37 (“the essentials of the English text of the treaty came from Busby and ... his claim that he ‘drew’ the treaty is not altogether an exaggeration. Perhaps he should be forgiven the proprietary pride with which he discussed the treaty in later years”); Brian Easton “Was There a Treaty of Waitangi; and Was it a Social Contract?” (1997) *Archifacts* 21–49 [“Easton ‘Was There a Treaty of Waitangi?’”] at 23 (“Busby had a considerable input into the final English draft”); and Paul Moon *Hobson: Governor of New Zealand, 1840–1842* (David Ling Publishing Ltd, Auckland, 1998) [“Moon *Hobson*”] 93 (“Busby later admitted ... to having effectively written the Treaty himself, and considering the extent of his entanglement in its drafting, this claim could be made with some substance”). Although it does not explicitly refer to Busby’s role in drafting the Treaty in English, it should be noted that Hobson provided a testimonial for Busby in which he wrote that “through your disinterested and unbiased advice, and to your personal exertions I may chiefly ascribe the ready adherence of the Chiefs and other Natives to the Treaty of Waitangi”. Hobson to Busby, 1 September 1840, enclosed in Hobson to Gipps, 10 September 1840, SRNSW NRS 905, 4/2540 (also ANZ Micro-Z 2713 & UoA Microfilm 09-006 Reel 7).

<sup>39</sup> Ross “Texts and Translations”, above n 23, 131–132; Parkinson “Preserved in the Archives”, above n 25, 23; Moon *Hobson*, above n 38, 90–91. See also T Lindsay Buick *The Treaty of Waitangi: How New Zealand Became a British Colony* (3rd ed, Thomas Avery & Sons Ltd, New Plymouth, 1936) [“Buick *The Treaty of Waitangi* (3rd ed, 1936)”] 101–102. But see Orange *The Treaty of Waitangi*, above n 31, 35–36 & 55.

<sup>40</sup> Orange *The Treaty of Waitangi*, above n 31, 36–38.

does express a different view to Ross on Busby's contribution,<sup>41</sup> she does not suggest that further focus on the English drafts would yield insight as to the meaning of the Treaty. Nor does she subject Ross's work on the sequencing of the drafts to critical analysis<sup>42</sup> (although she provides more detail about the events which assists in understanding the roles played by different individuals<sup>43</sup>). The general neglect of the draft texts and their sequencing has recently been partly redressed in the writings of Brian Easton and Phil Parkinson.<sup>44</sup> Until Easton, it seems to have been assumed that the order of preparation of the three drafts published in 1877 was the order in which they were presented in the publication.<sup>45</sup> Easton and Parkinson correct that view.<sup>46</sup>

### The four surviving English drafts

What are the four English drafts extant? The three published in 1877 (in a collection put together by the Reverend Henry Hanson Turton, who provided a preface for the first edition) were (in the order in which they were included in the publication): a preamble in the handwriting of Hobson;<sup>47</sup> a draft of a preamble and three articles in the handwriting of Freeman;<sup>48</sup> and a draft of three articles and a subscription in the handwriting of Busby.<sup>49</sup> The Hobson preamble contains

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<sup>41</sup> See above n 38.

<sup>42</sup> Orange *The Treaty of Waitangi*, above n 31, 36-37.

<sup>43</sup> Ibid 35-39, especially 38-39.

<sup>44</sup> Easton "Was There a Treaty of Waitangi?", above n 38; Parkinson "Preserved in the Archives", above n 25.

<sup>45</sup> See "Preface" to Turton *Facsimiles*, above n 27, 5; T Lindsay Buick *The Treaty of Waitangi; or How New Zealand Became a British Colony* (S & W Mackay, Wellington, 1914) 88-89 and Buick *The Treaty of Waitangi* (3rd ed, 1936), above n 39, 109; Guy Scholefield *Captain William Hobson, First Governor of New Zealand* (Oxford University Press, Oxford, 1934) 86-87; Ramsden *Busby of Waitangi*, above n 28, 234; Ross "Texts and Translations", above n 23, 132-133 & 135; and Orange *The Treaty of Waitangi*, above n 31, 36. But compare Claudia Orange *An Illustrated History of the Treaty of Waitangi* (Bridget Williams Books, Wellington, 2004) 24; and Moon *Hobson*, above n 38, 92.

<sup>46</sup> Easton, "Was There a Treaty of Waitangi?", above n 38, 23; Parkinson "Preserved in the Archives", above n 25, ch 3.

<sup>47</sup> Turton identified the handwriting as Hobson's in 1877. Turton *Facsimiles*, above n 27, 5. Compare handwriting on Appendix 4 with, for example, Hobson to Labouchere, [1] August 1839, CO 209/4, 151a-156b.

<sup>48</sup> Ross identified the handwriting as Freeman's in 1972. See above n 30.

<sup>49</sup> Turton, who regarded all three drafts as comprising one document, identified Busby's handwriting on "the latter portion of the draft" (and Hobson's handwriting "as to the former

alterations in Hobson's own hand.<sup>50</sup> In the Freeman draft there are changes made in Freeman's hand and also alterations which appear to be in Hobson's handwriting. The Busby draft has changes in his own hand and also some that appear to have been written by Hobson. The fourth document, found in Busby's personal papers in 1933, is a draft of three articles and a subscription in Busby's handwriting with considerable corrections in his own hand only.

Of the draft documents, the first in time is the Freeman draft (reproduced in **Appendix 1**). It has not always been so identified. The sequence adopted in the Turton publication seems to have been taken to be the chronological order until Easton wrote about the drafts in 1997. The next in sequence is the unpublished Busby draft discovered in 1933 (**Appendix 2**). It picks up material from the Freeman draft and builds on it. The published Busby draft (**Appendix 3**) is a fair copy of the first Busby draft, which he clearly retained in his records while passing on the fair copy to Hobson. On the retained earlier draft found in his papers, Busby wrote in the margin, "draft of the Articles of a Treaty with the Native Chiefs submitted to Capt Hobson 3<sup>rd</sup> Feb<sup>y</sup> 1840".<sup>51</sup> The Hobson preamble (**Appendix 4**) is the last in sequence, although formerly it had been assumed to be the first.<sup>52</sup>

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part of it"). He appears not to have compared the handwriting on Appendix 3 with other documents known to be in Busby's hand and bearing his signature. Rather Turton's statement that Busby wrote "the latter portion of the draft" follows from his acceptance of Busby's 1860 claim that he had prepared the draft of the Treaty for Hobson (see text accompanying n 17 above). In fact, Turton seems to have mistaken Freeman's handwriting on Appendix 1 for Busby's. He implied that both Appendix 1 and Appendix 3 were in Busby's hand, which is not correct. See Turton *Facsimiles*, above n 27, 5. Other historians seem to have avoided making the same mistake (even prior to Ross's identification of Freeman's handwriting on Appendix 1). See, for example, Buick *The Treaty of Waitangi* (3rd ed, 1936), above n 39, 109-110; and Ramsden *Busby of Waitangi*, above n 28, 234-235 & 238. The handwriting on Appendix 3 is clearly Busby's as a comparison of Appendix 3 with Busby's despatches at CO 209/1-3 indicates (for example, Busby to Colonial Secretary of New South Wales, 16 June 1837, CO 209/2, 333a-352b).

<sup>50</sup> Easton wrongly attributes the corrections to Busby. Easton "Was There a Treaty of Waitangi?", above n 38, 23, 25 & 39-40.

<sup>51</sup> See Appendix 2.

<sup>52</sup> Parkinson was the first to make the argument that Hobson's preamble comes last in the sequence. Parkinson "Preserved in the Archives", above n 25, 19, 21 & 28-30. Easton had assumed that it came before Busby's drafts although after the Freeman draft. Easton "Was There a Treaty of Waitangi?", above n 38, 23.

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The preambles in the Freeman draft and the Hobson draft provide an explanation of British purpose in seeking agreement to the treaty. The Busby draft did not contain any preamble. The Hobson preamble, unlike the Freeman preamble, picks up on the content of the Busby articles and subscription and provides a more fulsome explanation of British intent.<sup>53</sup>

### **The Freeman draft (Appendix 1)<sup>54</sup>**

The Freeman draft may not be the first draft of the Treaty attempted. It seems likely that, at the very least, Hobson and Gipps had discussed the terms of a treaty in Sydney in January 1840, and there may well have been notes of that discussion. The Freeman draft is, however, the earliest surviving draft. Freeman was the sole clerk in Hobson's retinue in February 1840 and was effectively Hobson's secretary. It seems probable that Freeman simply acted as amanuensis to Hobson. He had only recently been promoted from third-class clerk in the office of the Colonial Secretary of New South Wales to second-class clerk in the New Zealand administration. It seems unlikely that the task of settling the terms of a treaty in draft would have been entrusted to him. It was the "principal object" of Hobson's

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<sup>53</sup> The Hobson preamble is noted at the top of the first page with a heading, "Papers relating to the Treaty of Waitangi". Between that heading and the text of the preamble is the further notation "45/522 Original Treaty of Waitangi & other Papers relative thereto". A similar notation appears sideways in the margin on the last page of the Busby fair copy, "522/45. Original Treaty of Waitangi". The numbers and accompanying descriptions are in a different hand to the heading at the top of the Hobson preamble. They are later additions to the drafts, indicating that the documents were received in the Aborigines Protection Department in 1845 and registered as the 522nd piece of incoming correspondence that year (in accordance with the Department's "annual single number" system). Because they are later additions, the notation that the documents are the "Original Treaty of Waitangi" cannot be treated as conclusive. It is also unclear in whose hand the Hobson preamble's heading is and when it was written. It must have been written before the 1845 notation (which is squeezed into the remaining space) but may have been added soon after the Treaty was signed. The Hobson draft preamble, the Freeman draft, and the Busby fair copy draft are, in that sequence, numbered in pencil from pages 1 to 12. This would appear to be a later attempt to order the drafts, possibly for Turton's 1877 publication. The pencil notation "Done at Victoria in Waitangi" at the bottom of the last page of Busby's fair copy draft may have been added at the same time as the numbering. It does not appear to be original not only because of the pencil and handwriting but also because none of the five 6 February copies of the English text of the Treaty created in the months after its signing (discussed below) refer to "Victoria". Instead they are signed off as "Done at Waitangi" or "Done in Waitangi".

<sup>54</sup> ANZ ACGO 8341, IA9 9/10, 3f, 3b, 4f & 4b.

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mission, as his Instructions made clear.<sup>55</sup> The assignment was too important for Hobson's future prospects for him to have planned to delegate the treaty drafting before he became ill and was forced to leave it to others to progress. Hobson was in the best position to carry out his Instructions given his exposure to Colonial Office thinking during the period when they were framed. But Freeman's involvement indicates that this draft was not begun before Hobson and his officials left Sydney on HMS *Herald* on 18 January 1840.

It is possible that George Cooper and Willoughby Shortland assisted Hobson, although neither is known to have later claimed involvement. Of the two, it is perhaps more likely that Shortland, who was a friend of Hobson's and had travelled out from England with him, may have had some involvement. But Hobson does not seem from Felton Mathew's accounts to have sought Mathew's advice.<sup>56</sup> And the evidence suggests that the officials were short on ability and, in the cases of Cooper and Mathew, of a venal stamp.<sup>57</sup> It is perhaps indicative of Hobson's opinion of their competence in the matter that when he became ill he entrusted the further drafting to Busby rather than to his officials.

It has been generally assumed that the draft was not started before the *Herald* reached the Bay of Islands on 29 January and then probably not until 31 January or 1 February. The 29th is known to have been taken up with receiving visitors on the *Herald* and planning the programme, and much of the 30th with the business of

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<sup>55</sup> See text accompanying n 5 above.

<sup>56</sup> Journal of Felton Mathew, APL NZMS 88 (manuscript) & ATL MS-1620 (typescript); Diary of Felton Mathew, MNZA X112 (manuscript & typescript). As an example of how little in Hobson's confidence Mathew was, Hobson did not tell him of his plan to take the *Herald* around the islands collecting signatures for a treaty until 26 January, eight days after they had left Sydney. Journal of Felton Mathew, 26 January 1840, APL NZMS 88 (manuscript) & ATL MS-1620 (typescript) (p 10 of the typescript).

<sup>57</sup> Mathew wrote in his journal:

I never knew a man so sanguine as Cooper is, of the success of our New Zealand undertaking. He says it is the tide in our affairs which is sure to lead on to fortune—and has embraced his present situation with precisely the same feeling as myself—namely to hold no faith with the scoundrel Gov<sup>t</sup> which has used us so vilely, but to make use of them for our own purposes and throw them off as soon as it suits our convenience. For my own part ... I shall feel perfectly independent, and will cut them in a moment if they do not behave well. I have made up my mind to buy as much land as I can possibly find money to pay for, and if that do not prove a fortune to me in four or five years time I am much mistaken.

Journal of Felton Mathew, 28 January 1840, APL NZMS 88 (manuscript) & ATL MS-1620 (typescript) (pp 15-16 of the typescript).

publishing the proclamations at Kororareka. Lindsay Buick has suggested that Hobson had not begun the draft before he fell ill on 31 January or 1 February.<sup>58</sup> There is, however, no evidence for the view that the Freeman draft had not been started on the voyage from Australia. Hobson seems to have hoped before his arrival in New Zealand that a meeting with the chiefs of the Confederated Tribes could be held within a matter of days. When advised on arrival by Busby that this was not practical, he then planned to visit Waimate and the Hokianga from 31 January. Both the expectation of a speedy meeting and the subsequent plan to travel may suggest that matters as to the drafting of the treaty were in hand. In the event, first rain and then Hobson's illness prevented the visit to Waimate and the Hokianga.<sup>59</sup> And Hobson, confined to the *Herald*, sent Cooper and Mathew to Busby, clearly with the Freeman draft and possibly with other notes.

Busby did not later suggest that he had been involved in the discussions that produced the Freeman draft. He wrote that he had been given "notes" as the basis of a treaty.<sup>60</sup> These must at least have comprised the Freeman draft. Busby, who was not greatly impressed, told Cooper and Freeman that the notes were not "calculated to accomplish the object". It is possible that Busby's criticism (which is of a piece with his character<sup>61</sup>) may mean that advice he had given after the arrival of the *Herald* was not picked up in the draft. But the other circumstances already discussed, Busby's criticisms, and the absence of anything in the Freeman draft to suggest it had been shaped with input from those in New Zealand, in combination,

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<sup>58</sup> Buick *The Treaty of Waitangi* (3rd ed, 1936), above n 39, 109. See also Donald Loveridge "The 'Declaration of the Independence of New Zealand' of 1835, and The Confederation of United Tribes, 1835–40" (unpublished, Wellington, 1998) ["Loveridge 'The Declaration of Independence'" ] 28: "The document was probably drawn up on the 1st or 2nd of February".

<sup>59</sup> Journal of Felton Mathew, 30 & 31 January 1840, APL NZMS 88 (manuscript) & ATL MS-1620 (typescript) (pp 22-23, 25 & 27 of the typescript); Henry Williams *The Early Journals of Henry Williams, Senior Missionary in New Zealand of the Church Missionary Society, 1826–40*, ed. by Lawrence Rogers (Pegasus Press, Christchurch, 1961) 477 (30 & 31 January 1840); Henry Comber *Tour of Duty: Midshipman Comber's Journal Aboard HMS Herald on the East Indies Station—Australia, New Zealand & China, 1838–42*, ed. by W David McIntyre & Marcia McIntyre (Macmillan Brown Centre for Pacific Studies, University of Canterbury, Christchurch, 1999) 115 (1 February 1840); Richard Davis *A Memoir of the Rev. Richard Davis, for Thirty-Nine Years a Missionary in New Zealand*, comp. by John Coleman (James Nisbet & Co, London, 1865) 247.

<sup>60</sup> See text accompanying n 17 above.

<sup>61</sup> See Chapters 6 and 7.

is more consistent with the Freeman draft having been prepared on the voyage from Sydney.<sup>62</sup>

The Freeman draft consists of a preamble and three articles. The preamble expresses the Queen's "deep solicitude [about] the present state of New Zealand, arising from the extensive settlement of British Subjects therein" and her concern "to avert the evil consequences which must result both to the Natives of New Zealand and to Her Subjects from the absence of all necessary Laws and Institutions".<sup>63</sup> It explains that the Queen had "empower[ed] and authorize[d]" Hobson, described as "Consul and Lieutenant Governor", "to invite the Confederated Chiefs to concur in the following articles and conditions". The preamble in the Freeman draft is less elaborate than the preamble of the text that Henry and Edward Williams translated into Maori. The Freeman draft preamble is marked with three corrections. One, in Freeman's handwriting, is likely to have been made before the draft was supplied to Busby.<sup>64</sup> Two others are in another hand, seemingly that of Hobson.<sup>65</sup>

The Freeman draft articles are closer to the ultimate translated text than the Freeman draft preamble is. The significant difference from the ultimate text is that there is no distinct guarantee of Maori property.<sup>66</sup> The articles are re-ordered and numbered in corrections marked on the draft in Freeman's handwriting, almost certainly before the draft was passed to Busby since they are adopted in the Busby drafts (and later in the Maori translation made by Henry and Edward Williams). The text of the preamble has been marked by a marginal line, apparently to mark it

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<sup>62</sup> See Judith Binney "The Maori and the Signing of the Treaty of Waitangi" in David Green (ed) *Towards 1990: Seven Leading Historians Examine Significant Aspects of New Zealand History* (GP Books, Wellington, 1989) 20-31 at 25-26.

<sup>63</sup> "[A]ll necessary Laws" corrects "the necessary Laws" in the text.

<sup>64</sup> Changing "evils" to "evil consequences" in the phrase "and being desirous to avert the evils which must result".

<sup>65</sup> Substituting "regarding" for "viewing" and amending "the necessary Laws" to "all necessary Laws". The two corrections are, however, in different pens, suggesting that they were made at different times. "[R]egarding" may be in the same pen or pencil as Hobson's changes to Busby's fair copy draft discussed below. It may therefore have been a correction made when Hobson was considering adding the Freeman preamble to the Busby draft of the articles as the basis of the treaty, a possibility discussed further below.

<sup>66</sup> Whether some protection of Maori property followed from the conferral of "all the Rights and Priviledges [sic] of British Subjects" is another matter.

off from the articles. However, as is discussed below, it appears that this marginal marking was not made at the time of the re-ordering and numbering of the draft but rather later by Hobson after he had received the Busby draft.

The first article involved the “United Chiefs of New Zealand” ceding to the Queen “the full Sovereignty of the whole Country”<sup>67</sup> between a place left blank in the draft and North Cape (with all the adjacent islands between latitudes and longitudes left blank). By the second article the same chiefs “yield[ed]”<sup>68</sup> to the Queen “the exclusive right of Preemption over such waste Lands as the Tribes may feel disposed to alienate”. The third article is expressed to be “[i]n consideration thereof”, in what is a correction to the original text in Freeman’s writing and probably made at the same time as the corrections re-ordering and numbering the articles. By it, the Queen “extend[ed] to the Natives of New Zealand Her Royal Protection and impart[ed] to them all the Rights and Priviledges [sic] of British Subjects”. The shape of these articles and some of the language used are maintained in the Busby drafts and are carried into the Maori text. In particular, article 3 of the Freeman draft was adopted by Busby with only minor textual corrections.

### **Busby’s drafts of the articles and subscription (Appendices 2 & 3)<sup>69</sup>**

The Busby first draft (**Appendix 2**) is covered with many corrections in Busby’s hand. Many were clearly made in composing the draft. One correction appears, however, to have been made at the time Busby prepared the second draft (**Appendix 3**), which is his fair copy of the first: the final part of the subscription was altered by the addition of the words “and enter into” and “& extent”. It seems to have been back-copied by Busby on to the first draft, which he meant to retain as

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<sup>67</sup> This is the corrected version, from the earlier ceding “in full Sovereignty the whole Country”. The correction does not seem to be in Freeman’s handwriting, but it is unclear whether it is Hobson’s.

<sup>68</sup> “Yield” corrects the earlier “concede”.

<sup>69</sup> AML MS 46, Box 2, Folder 6 (Appendix 2); ANZ ACGO 8341, IA9 9/10, 5f, 5b, 6f & 6b (Appendix 3).

his own record. Busby submitted the fair copy to Hobson on 3 February.<sup>70</sup> The only change of consequence<sup>71</sup> made by Busby to the fair copy is the annotation made after the third of the articles: “Signature of the British plenipotentiary?”<sup>72</sup> The Freeman draft had not made provision for Hobson’s signature. The question mark in the fair copy indicates that Busby was flagging for Hobson’s attention where the signature of the Consul would be placed.

There are marked differences as well as significant similarities between Busby’s drafts and the Freeman draft. Busby’s drafts have no preamble, but instead a long subscription. He expanded the articles of the treaty to apply to “the separate and Independent Chiefs” as well as to “[t]he Chiefs of the Confederation of the United Tribes of New Zealand”. The Freeman draft had identified as the Maori parties only “the Confederated Chiefs” (also described in that draft as “the United Chiefs of New Zealand”).

In Busby’s first article the chiefs cede to the Queen “absolutely and without reservation, all the rights and powers of Sovereignty which the said Confederation or individual chiefs respectively exercise or possess, or may be supposed to exercise or possess over their respective territories, as the sole Sovereigns thereof”.<sup>73</sup> This is to be compared with the Freeman draft in which the chiefs “cede to Her Majesty the full Sovereignty of the whole Country”. The only other

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<sup>70</sup> As indicated by the notation in the margin on the final page of the draft (Appendix 2).

<sup>71</sup> Six minor changes were made to the subscription: the words “Her Majesty” were omitted in the phrase “the gracious invitation of Her Majesty the Queen of England”; “against external enemies” became “from external enemies”; the words “Laws and” in the phrase “and feeling also the want of Laws and authority to restrain and punish the evil disposed and criminal” were omitted; so too were the words “and rights” in the phrase “accepting the privileges and rights of British subjects”; the word “hereunto” in the phrase “we have attached hereunto our signatures” was new; and “dates and places” became “places and dates”. Whether these changes were deliberate or accidental slips in copying is not clear.

<sup>72</sup> Parkinson also identifies the handwriting here as Busby’s. Parkinson “Preserved in the Archives”, above n 25, 24-25 & 82 n 14. Compare the “B” in “British plenipotentiary” with the “B” in “British subjects” in the line immediately above on the second page of the fair copy; also the “p” in plenipotentiary” with the “p” in “privileges” two lines above; and notice how “of the” is run together, as with “of the” in the fifth line of article 1 on the first page of fair copy. “Plenipotentiary” was certainly a word that Busby used in his despatches.

<sup>73</sup> The description of the territories of the Confederation is moved by Busby from the first article to the subscription and the southern boundary fixed at the Manukau and “the River Thames” (i.e. the Waihou River).

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difference of substance between the Busby and Freeman drafts is the more cautious expression, perhaps to meet any subsequent argument that the Confederation or (perhaps especially) the independent chiefs might not “exercise or possess” “all the rights and powers of Sovereignty”.<sup>74</sup> Under the Busby drafts, the chiefs were to cede such rights and powers as they “may be supposed to exercise or possess”.

By article 2 in the Busby draft, the Queen “confirm[ed] and guarantee[d] to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates, Forests Fisheries and other properties, which they may collectively or severally possess so long as it is their wish and desire to retain the same in their possession”. This was new. Nor had it been foreshadowed by the preamble in Freeman’s draft. Busby retained the Queen’s right of pre-emption from the Freeman draft. In Busby’s draft the chiefs “yield” (the word in Freeman’s draft) to the Queen “the exclusive right of preemption” (the phrase in Freeman’s draft) “over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf”. This last contrasts with Freeman’s “over such waste Lands as the Tribes may feel disposed to alienate”. Busby’s draft was more specific. The right of pre-emption in the Busby draft was a right of purchase and indicated that purchases of land would be made by “persons appointed by Her Majesty to treat with them in that behalf”. Busby also described Maori as “proprietors”. These were significant additions. But nothing was left out from the Freeman draft. The reference to “waste Lands” was incorporated by Busby into his subscription wherein the chiefs of the Confederation (but not the independent chiefs) confirmed that they “further yield[ed] to Her Majesty the exclusive right of preemption over all our Waste Lands”.

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<sup>74</sup> Loveridge “The Declaration of Independence”, above n 58, 30: “This proviso was probably aimed more at the ‘Separate and Independent Chiefs’ than at the Confederation, but was phrased with sufficient ambiguity to cover the possibility that none of the signatories actually held sovereign powers at the time of signing the treaty.”

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Article 3 of the Freeman draft was adopted almost without change. Busby simply altered the reference to the Queen to “Her Majesty the Queen of England” (from “Her Majesty the Queen”) and corrected Freeman’s misspelling of the word “privileges”.

Busby’s subscription was new. It has received little attention in the historiography, presumably because it was largely eviscerated in the text translated by Henry and Edward Williams.<sup>75</sup> Busby’s draft purported to express the understanding of the treaty held by the chiefs of the Confederation and their reasons for surrendering sovereignty.<sup>76</sup> “[A]ssembled in Congress at Victoria in Waitangi on the fifth day of February in the year of our Lord One thousand Eight hundred and forty”, the chiefs of the Confederation attested that they had “understood and seriously considered the gracious invitation of the Queen of England” to enter into the treaty.<sup>77</sup> They accepted it “sensible of our own weakness and inability to repress internal dissensions and to defend our Country from external enemies; and feeling also the want of authority to restrain and punish the evil disposed and criminal amongst us both natives and foreigners”.

The chiefs of the Confederation invoked their relationship with the British Crown and, “having had occasion from past Experience of the benignity and good faith of Her Majesty and of Her Majesty’s Royal Predecessors to repose entire Confidence in Her Majesty”, they “fully and entirely cede[d] and yield[ed] up to Her Majesty the Sovereignty of our territories ...”. They also “yield[ed] to Her Majesty the exclusive right of preemption over all our Waste Lands”, at the same time

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<sup>75</sup> Ross simply mentions that the English texts of the Treaty draw on Busby’s draft for the articles “shorn of the major part of his wordy conclusion [i.e. the subscription]”. Ross “Texts and Translations”, above n 23, 135. Orange goes a little further in writing that the deleted part of the subscription “made assertions (about Maori weakness and the need for British protection and authority) that Maori may have chosen to debate and which provided for cession by degrees of latitude and longitude, as Freeman’s draft had done”. Orange *The Treaty of Waitangi*, above n 31, 37. Parkinson provides a much fuller description of Busby’s “prolix explanatory clause”, and identifies additional connections between it and the Freeman draft. Parkinson “Preserved in the Archives”, above n 25, 23-24.

<sup>76</sup> See above n 71 as to the minor differences in the subscription between Busby’s first and fair copy drafts. The draft quoted in this section is the fair copy.

<sup>77</sup> Victoria was what Busby called his land on the foreshore at Waitangi, where in 1839 he had begun to sell sections.

“accepting the privileges of British subjects, and relying upon Her Majesty’s Royal Justice and benignity to our simple and unenlightened countrymen”. The only provision of the articles not explicitly referred to in this subscription is the property guarantee in article 2, unless it can be spelled out of the reference to “Royal Justice and benignity”.

The “Separate and Independent chiefs of New Zealand” were treated distinctly and their reasons for signing the Treaty were not similarly developed. Busby’s draft has them affirming their “authority over the Tribes and Territories which are specified after our respective names” and acknowledging that they have been “made fully to understand” the treaty provisions and “accept and enter into the same in the full meaning thereof”. Whereas the subscription for the chiefs of the Confederation referred to their being “assembled in Congress” at Waitangi on 5 February 1840, that for the independent chiefs assumed their agreement would be obtained “at the places and dates respectively specified”. In this way, unlike the Freeman draft in which the “Confederated Chiefs” were the only Maori party to the agreement, Busby’s draft envisaged the same treaty being offered to independent chiefs throughout New Zealand.<sup>78</sup> It seems probable that Hobson and Busby had already discussed such a significant change before Busby included it.

### **Hobson’s changes to Busby’s fair copy draft**

The changes not in Busby’s hand on the fair copy of his draft (**Appendix 3**) appear to be Hobson’s. They are more significant for what was deleted than for what was added or revised. Hobson made only one change to the text of the articles, substituting “individually” for “severally” in article 2 where Busby’s draft had guaranteed to Maori the possession of their properties “which they may collectively or severally possess”. But he eliminated much of Busby’s subscription. The statement by the confederated chiefs of their understanding of the treaty and

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<sup>78</sup> Parkinson has written that Busby’s subscription for the independent chiefs “was intended as a codicil to the document for signing subsequently to the Waitangi meeting, just as the codicil to the Declaration of Independence of 1835 was used ... for later accessions in 1836–39”: Parkinson “Preserved in the Archives”, above n 25, 83 n 20.

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their reasons for surrendering sovereignty was deleted. This deletion was indicated partly by a line through the text to be omitted, and partly by the absence of a marginal line indicating the text that was to be preserved (unlike the marginal line beside the articles and the beginning and end parts of the subscription). As a result of Hobson's change there was now a common subscription for both the chiefs of the Confederation and the independent chiefs that went along the lines:<sup>79</sup>

Now therefore we the chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi on the fifth day of February in the year of our Lord One thousand Eight hundred and forty, and we the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the provisions of the foregoing treaty, accept and enter into the same in the full spirit & meaning thereof. In witness of which we have attached our Signatures or marks at the places and dates respectively specified.

From his notations, Hobson seems to have toyed with the idea of adding that the chiefs of the Confederation were signing “[f]or and on behalf of ourselves and those we represent”. He apparently changed his mind. He did, however, alter the penultimate sentence of the draft, so that the chiefs entered into the Treaty not “in the full meaning and extent thereof” but “in the full spirit & meaning thereof”. It is possible, however, that this change was made later, when Hobson, Williams and Busby discussed the Maori translation on 5 February, as is discussed below.

### **Hobson preamble (Appendix 4)**<sup>80</sup>

The Freeman preamble had described the gain to Maori by the treaty in terms of avoiding the “evil consequences which must result” from British settlement in the “absence of all necessary Laws and Institutions” (**Appendix 1**). The Hobson preamble builds on this, with an increased emphasis upon urgency because of the pace of settlement expected. But it also includes, picking up on Busby's draft of article 2, a new purpose of protection of the property of the chiefs and their tribes.

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<sup>79</sup> Hobson's changes here were not unambiguous.

<sup>80</sup> ANZ ACGO 8341, IA9 9/10, 1f, 1b, 2f & 2b.

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And it explains the acquisition of sovereignty and that its purpose was the establishment of civil government. The Hobson preamble contains a number of corrections in Hobson's own hand. As amended in this way, it reads:

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favor the Native Chiefs and Tribes of New Zealand and anxious to Protect their just Rights and Property and to secure to them the enjoyment of Peace and good order, has deemed it necessary, in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress, to constitute and appoint a Functionary properly authorized to Treat with the aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those Islands which they may be willing to place under Her Majesty's Dominion.<sup>81</sup> Her Majesty therefore being desirous to establish a settled Form of Civil Government with a view to avert the evil consequences which must result from the absence of necessary Laws and Institutions alike to the Native Population and to Her Subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy, Consul, and L<sup>t</sup> Governor of such Parts of New Zealand as may be or may hereafter be ceded to Her Majesty to invite the Confederated & Independent Chiefs of New Zealand to concur in the following articles & Conditions.

In the draft before amendment Hobson had first referred to the concern to "avert the evil consequences that must result, both to the Native Population and to Her Subjects, residing in New Zealand from the absence of all Laws and Institutions necessary to restrain and to Protect Her Subjects". The edited version omits the reference to restraining and protecting British subjects.

The Hobson preamble is tailored to the concerns of the Maori audience (with peace, property and other rights to the fore). Hobson may have come to appreciate from discussions with local residents that such emphasis would be necessary if the treaty proposed were to be acceptable to Maori. The Hobson preamble introduces, as a principal purpose of the treaty, the protection of the chiefs and their tribes in their "just Rights and Property", in significant departure from the Freeman draft. In

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<sup>81</sup> Originally the draft was expressed that Hobson was authorised to "Treat with the Native Chiefs for the Cession of the Sovereignty".

this, it echoes the terms of article 2 as drafted by Busby and is likely to have reflected the insight obtained from Busby and perhaps the missionaries that an explicit protection of their property was critical if Maori were to agree to the treaty.<sup>82</sup> The Hobson preamble is more explicit than the Freeman preamble in explaining the need for and purpose of the cession of sovereignty. It also invokes an existing connection with the British Crown, reminding Maori of the favour with which they were regarded by the Queen. This invocation of an established regard may have been thought likely to influence the chiefs favourably and may have been an attempt to express the reluctance and motives with which the acquisition of sovereignty was being undertaken.

It is clear from the Maori translation that Henry and Edward Williams translated Hobson's preamble, whether they were given the extant version or a further copy of it. It is not clear when Hobson wrote his preamble. The most likely sequence is that he wrote it after receiving the Busby draft.<sup>83</sup> This is indicated by the fact that the preamble addresses the property protection contained in Busby's rewriting of Freeman's draft. It also includes, as the Freeman draft did not but the Busby draft did, an expansion of the treaty to include the independent chiefs as well as the chiefs of the Confederation. It may be, as has been suggested above, that these changes were discussed between Hobson and Busby before Busby's draft was received. If not, they must certainly have been discussed afterwards. It seems likely from the circumstance that Busby did not attempt to re-draft the Freeman preamble, that he was either told not to make such an attempt or that he himself thought it was a task best left to Hobson once he had considered the changed draft of the articles containing the operative provisions of a treaty. Either way, since the

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<sup>82</sup> As discussed in Chapter 14, Gipps's "unsigned treaty" had a reference to the chiefs' "just rights" but not to their property.

<sup>83</sup> In which case Ruth Ross's assessment that "it is clear that the preamble, in English, owed nothing to Busby" would need to be reconsidered. Ross "The Treaty on the Ground", above n 31, 18.

preamble recorded the reasons for the British offer of a treaty, Hobson was best placed to express British purpose accurately.<sup>84</sup>

Evidence that Busby anticipated that a preamble would be included is that in the subscription to his draft the chiefs of the Confederation respond to “the gracious invitation of the Queen of England”. Such invitation had been covered in the Freeman draft’s preamble and would be necessary if Busby’s draft were to be adopted. Busby’s draft was therefore incomplete on its face. Similarly, in the absence of a preamble introducing the British party to the treaty, the suggestion that Hobson’s signature would follow the articles drafted by Busby was detached from any context to give it meaning. Such signature would not belong after the subscription by the chiefs.

Parkinson has explained the absence of a preamble in Busby’s draft as being consistent with Busby’s omission of such device when earlier drafting the Declaration of Independence.<sup>85</sup> But that document was the declaration of one party only. Busby’s awareness that his draft was part only of a treaty seems indicated by his note on the first draft, retained in his personal papers, that it was the “draft of the Articles of a Treaty”.

Parkinson has argued that the Hobson preamble was not part of a revised draft provided by Hobson to Henry Williams for translation late on the afternoon of 4 February.<sup>86</sup> He contends instead that Hobson gave Williams a fair copy composite text containing the preamble from the Freeman draft and Busby’s draft of the

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<sup>84</sup> Although Busby would later write that his relationship with Hobson was “of the most unreserved and confidential character” until the Treaty was concluded, and that Hobson had made to him “an unreserved communication of his instructions and intentions”, it is impossible to know to what extent Hobson himself would have felt able to share with Busby his confidential Instructions (although he clearly had to give him information about the way in which the right of pre-emption would work for Busby to have been able to draft article 2). Busby *The Taranaki Question* (1860), above n 17, 3; Busby “Occupation of New Zealand” (c. 1865), above n 17, 84. Hobson himself was to complain that he had not been able to take legal advice on aspects of his Instructions because they “were given to me in confidence”. Hobson to Normanby, 20 February 1840, GBPP 1841 (311) XVII.493, 12-13 at 13.

<sup>85</sup> Parkinson “Preserved in the Archives”, above n 25, 24. As Parkinson acknowledges, contemporary British treaties did typically include a preamble.

<sup>86</sup> See also Ross “The Treaty on the Ground”, above n 31, 19.

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articles and subscription as amended by Hobson.<sup>87</sup> Parkinson suggests that Hobson did not write his preamble until he met with Williams on the 4th,<sup>88</sup> or even possibly as late as the morning of the 5th.<sup>89</sup> The marginal lines alongside the preamble in the Freeman draft (**Appendix 1**) and alongside the articles and (parts of) the subscription in the Busby draft (**Appendix 3**), which seem to be the same, provide possible support for Parkinson's thesis that Williams was first given a draft with Freeman's preamble.<sup>90</sup> Those lines may indicate the text that Hobson wanted included in the final draft to be given to Williams, as well as that which was to be omitted. Parkinson advances his argument also on the basis of three purported copies of the English text of the Treaty that were created in the months after the signing of the Treaty at Waitangi.<sup>91</sup> These three English texts differ from other contemporaneous officially-produced copies of the Treaty in English in having the preamble from the Freeman draft and Busby's amended articles and subscription with the 5 February date. The other English texts, of which there are five, have instead Hobson's preamble, Busby's articles, and Busby's amended subscription further amended to end with the date 6 February.<sup>92</sup> Parkinson argues that the three 5 February English texts of the Treaty are the results of copyists mistaking the

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<sup>87</sup> Parkinson "Preserved in the Archives", above n 25, 25-30.

<sup>88</sup> On Parkinson's thesis, Hobson could not have written his preamble much earlier than when he met Williams at 4 pm on the 4th, because, if he had, there would have been time to incorporate it into the revised fair copy draft that he gave to Williams.

<sup>89</sup> Parkinson is inconsistent about whether Hobson's preamble was written on the afternoon of 4 February or the morning of 5 February but seems to favour 4 February. See Parkinson "Preserved in the Archives", above n 25, 21, 30, 34-35 & 43.

<sup>90</sup> Parkinson "Preserved in the Archives", above n 25, 25.

<sup>91</sup> See copies enclosed in Hobson to Normanby, 16 February 1840, ANZ ACHK 16585, G30/1, 1-51 at 29-32 (**Appendix 8**); Hobson to Russell, 23 May 1840, ANZ ACHK 16585, G30/1, 56-103 at 75-78 (**Appendix 9**); Clendon to United States Secretary of State, 3 July 1840, United States National Archives, RG 59, Entry A1 85, Vol 168 (also ANZ Micro 2607 & UoA Microfilm 86-169) (**Appendix 10**).

<sup>92</sup> Included here is the Waikato Heads and Manukau Treaty sheet: ANZ ACGO 8341, IA9 8/9 (**Appendix 12**). See also copies enclosed in Gipps to Russell, 19 February 1840, CO 209/6, 32a-55b at 52a-54a (**Appendix 5**); Hobson to Normanby, 17 February 1840, CO 209/7, 7a-21a & 38a-39a at 13a-14b (**Appendix 6**); Hobson to Gipps, 5-6 February 1840, SLNSW DL N Ar/2, 5a-12b at 11a-12b (also ANZ Micro-Z 2717 & UoA Microfilm 09-006 Reel 2) (**Appendix 7**); Hobson to Russell, 15 October 1840, CO 209/7, 102a-b & 114a-178 at 178 (**Appendix 11**).

document given to Williams on 4 February (or a file copy made of it and retained by Hobson or Freeman) for the final English text.<sup>93</sup>

Parkinson's thesis may be correct. It is not the only, or possibly even the best, explanation, however, for the three 5 February English texts. Rather than those texts having been copied in error from a fair copy composite text given to Williams on the 4th, they may have been copied in error directly from the Freeman and Busby drafts (or from a fair copy made from them after 6 February) by someone who mistook them for the final English draft. This alternative hypothesis may be thought unlikely in the case of the earliest of the three texts (**Appendix 8**) if its scribe was, as Parkinson believes, Henry Williams.<sup>94</sup>

In addition to copying the wrong preamble, Williams made two errors in transcribing the English text of the Treaty, which are possibly best explained by his having copied directly from the Freeman and Busby drafts. First, he left out the words "and conditions" at the very end of the preamble, a mistake possibly more easily made if he copied from the Freeman draft (**Appendix 1**) with its line around the side of the text to be preserved rather than from a fair copy draft.<sup>95</sup> Secondly, the Williams copy of the English text of the Treaty (**Appendix 8**) leaves out the words "and Estates, Forests Fisheries" (or "Estates, Forests Fisheries and") in article 2, an omission that could have resulted from copying from the Busby draft (**Appendix 3**) since the two "and"s (the one before "Estates" and the other after "Fisheries") line up almost directly one above the other. Williams, in glancing back and forward between what he was copying and what he was writing, could quite conceivably have skipped from one "and" to another and thus accidentally missed copying a line of text.

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<sup>93</sup> Parkinson "Preserved in the Archives", above n 25, 25-30.

<sup>94</sup> As identified by Parkinson. Ibid 26. For my own part, I am not convinced from the handwriting that Williams was indeed the scribe of this copy of the Treaty.

<sup>95</sup> Although the marking in the margin curves around the words "and conditions", someone copying according to the marginal line might overlook the enclosure of the last two words because of the layout.

If the three 5 February texts are not copies of a lost fair copy revised draft with Freeman's preamble, then the Hobson preamble was probably part of what Williams was given to translate on the 4th. That seems the more likely possibility in any event. Hobson had received Busby's draft on 3 February and, knowing that the treaty had to be translated into Maori in time for the meeting on the 5th, it is doubtful that he would have left drafting the preamble as late as the meeting with Williams at 4 pm on the 4th.<sup>96</sup> Parkinson's explanation for this is that Hobson left writing the preamble until he met Williams "so that difficult expressions could be discussed privately" between the two.<sup>97</sup> It seems doubtful, however, that Williams could assist in describing British intentions by the treaty. Nor is it obvious what the "difficult expressions" were that would require to be "discussed privately". In addition, if Williams had had a hand in writing the preamble it is surprising that he did not say so in his "Early Recollections".<sup>98</sup>

It seems more likely that Busby's articles and advice as to what the chiefs wished to obtain from the treaty caused Hobson to re-express British intentions to better meet their aspirations sometime before he delivered the draft to Williams on the 4th. As the marginal line alongside the preamble in the Freeman draft perhaps indicates, Hobson may earlier have thought to use the preamble from the Freeman draft.<sup>99</sup> But the marginal lines there and on the Busby draft do not prove that the Freeman preamble was part of the material that Hobson gave to Williams on the 4th.

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<sup>96</sup> The possibility that Hobson wrote the preamble after seeing Williams on the 4th and did not give it to him for translation until the 5th is even more unlikely. It would have given Williams very little time to make the translation. And Hobson's lack of urgency on the 5th, when he did not leave the *Herald* until only about one and a half hours before the meeting was to begin, also counts against it. As to the timing, compare Journal of Felton Mathew, 6 February 1840, APL NZMS 88 (manuscript) & ATL MS-1620 (typescript) (p 35 of the typescript); Diary of Felton Mathew, 5 February 1840, MNZA X112 (manuscript & typescript) (p 6 of the typescript); and William Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi, New Zealand, February 5 and 6, 1840* (George Didsbury, Government Printer, Wellington, 1890) 12-14.

<sup>97</sup> Parkinson "Preserved in the Archives", above n 25, 30.

<sup>98</sup> See text accompanying n 22 above.

<sup>99</sup> If so this would mean that the Hobson's correction to Freeman's preamble substituting "regarding" for "viewing" could have been made at this time. See above n 65.

### The final English draft

In the five extant English texts of the Treaty which use Hobson's (rather than Freeman's) preamble and bear the date 6 February,<sup>100</sup> the preamble differs from Hobson's original in two respects. It omits the words "which they may be willing to place under Her Majesty's Dominion", which are not actually crossed out in the original. It also describes Hobson as "Lieutenant Governor of such parts of New Zealand as may be, *or hereafter shall be*, ceded to Her Majesty", whereas the original has "L<sup>t</sup> Governor of such Parts of New Zealand as may be *or may hereafter be* ceded to Her Majesty" (compare **Appendix 4** with **Appendices 5, 6, 7, 11 & 12**). Because all five texts are the same, these two differences cannot be explained as copying errors from the original Hobson preamble. They show that in the Government's files after 6 February there was either a fair copy of Hobson's preamble that incorporated these changes or a fair copy of the whole final English draft given to Williams to translate also with these corrections. Although any such fair copy could have been made by a copyist on or after 5 or 6 February, and the two changes to the Hobson preamble introduced at this point, the uniformity of the preamble in the five 6 February English texts of the Treaty makes it seem more likely that the changes were incorporated into the draft that Williams was asked to translate on the 4th.<sup>101</sup>

The five English texts that use the Hobson preamble and bear the 6 February date differ from the three that use the Freeman preamble and bear the 5 February date<sup>102</sup> in having a single subscription for the chiefs of the Confederation and the independent chiefs. This difference results from the moving of the date to the end of the subscription, changing it to 6 February and combining the two paragraphs which had earlier referred separately to the chiefs of the Confederation and the independent chiefs. It may be to this change that Busby was referring when he later

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<sup>100</sup> See above n 92 (Appendices 5, 6, 7, 11 & 12).

<sup>101</sup> The Maori text is not inconsistent with such a view.

<sup>102</sup> See above n 91 (Appendices 8, 9 & 10).

wrote that Hobson adopted his draft “without any other alteration than a transposition of certain sentences, which did not in any degree affect the sense”.<sup>103</sup>

The five 6 February English texts of the Treaty differ slightly between themselves in the subscription. Three refer to the chiefs of the Confederation “being assembled in Congress at Victoria in Waitangi” (**Appendices 7, 11 & 12**), one to their “being assembled in Congress at Waitangi” (**Appendix 5**), and one has the words “at Victoria” but crossed out (**Appendix 6**). One has “In witness whereof” (**Appendix 5**), whereas the other four have “In witness of which” (**Appendices 6, 7, 11 & 12**). Three have “Done at Waitangi” (**Appendices 5, 11 & 12**) and two have “Done in Waitangi” (**Appendix 6 & 7**). These discrepancies may reflect the perceived immateriality of the precise form of the subscription and also may indicate that these changes to the subscription were made at a late stage. Most likely this was when the translation was under discussion between Hobson, Williams and Busby on the 5th, at a time when it was clear that many independent chiefs would be attending.

The discrepancies with respect to the subscription may be contrasted with the exact equivalence of the articles in all eight of the 5 and 6 February English texts of the Treaty with the exception of the Williams copy (**Appendix 8**). Ross and Orange are almost certainly wrong to argue from the Maori text and the later Williams copy that the final English draft probably omitted by accident the words “forests” and “fisheries” in article 2.<sup>104</sup> And Parkinson is almost certainly correct that the explanation for the omission of those words from the Williams English copy is a simple transcription error on Williams’s part.<sup>105</sup> None of the seven other officially-produced copies of the Treaty in English omits reference to “forests” or “fisheries”.<sup>106</sup> Moreover, Ross’s argument has the further flaw that “estates” is also

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<sup>103</sup> See text accompanying n 17 above. This is Orange’s view also, except that she seems to consider that the change was made on 3 or 4 February by Hobson. Orange *The Treaty of Waitangi*, above n 31, 37.

<sup>104</sup> See above n 31 and accompanying text.

<sup>105</sup> Parkinson “Preserved in the Archives”, above n 25, 29-30. Note that when Parkinson writes “Freeman” in the final paragraph on p 29 (and onto p 30), he evidently means “Williams”.

<sup>106</sup> Appendices 5, 6, 7, 9, 10, 11 & 12.

omitted from the Williams copy of the English text and yet it is translated in the Maori text of the Treaty (as “kainga” or “villages”<sup>107</sup>), so that the Williams English copy is not of itself good evidence of what was, or what was not, in the final English draft of the Treaty.

One explanation for the omission of reference to “forests” and “fisheries” in the Maori text is that Henry and Edward Williams simplified the English draft in article 2, as they did in other parts of the Treaty.<sup>108</sup> If it was simplification it may have been in the belief that “forests” and “fisheries” were adequately covered by the guarantee of possession of all “other properties”, “o ratou taonga katoa” in the Maori text.<sup>109</sup> In 1847 Henry Williams himself translated “o ratou taonga katoa” as “all their other property of every kind and degree”.<sup>110</sup> “Forests” and “fisheries” aside, there does not appear to be any dispute that the text of the articles translated by Henry and Edward Williams was as given in the Busby fair copy draft with Hobson’s one change substituting “individually” for “severally” in article 2.

While it is impossible to know the form of the draft Williams was given to translate (whether composite or in separate parts), there is little scope for disagreement about what the final English text that Henry and Edward Williams translated contained, contrary to the view given by Ruth Ross. The most likely options are that Williams received either the original Busby draft and Hobson preamble (or possibly a fair copy of the latter) or a fair copy composite text made from them. If it was a fair copy combining the two drafts, then the original drafts may have become Hobson’s file copy of what he had given Williams to translate.

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<sup>107</sup> IH Kawharu “Translation of Maori Text” in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 319-321 [“Kawharu ‘Translation of Maori Text’”] at 320 & 321.

<sup>108</sup> See Biggs “Humpty-Dumpty”, above n 31.

<sup>109</sup> Alternatively, Henry and Edward Williams may have taken the view that in Maori thinking there was no distinction to be made between lands and forests and fisheries (whereas the reference to “forests” and “fisheries” in the English text was required because of the ways in which English law treated forests and fisheries relative to other types of property). Or they may have considered it dangerous to specify some types of property only, giving the appearance that others not specified were not included (for example, harbours, lakes and rivers).

<sup>110</sup> Williams to Bishop Selwyn, 12 July 1847, reproduced in Carleton *Henry Williams*, above n 22, 155-157 at 156. More recently, Hugh Kawharu has translated “o ratou taonga katoa” as “their treasures all”. Kawharu “Translation of Maori Text”, above n 107, 320.

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The differences between the 5 and 6 February texts, and between the various 6 February texts themselves, suggest two things. First, that the rearrangement of the subscription may have been undertaken after Hobson gave Williams a draft to translate, probably on the morning of the 5th when Hobson, Williams and Busby discussed the translation, but possibly even after the debate on the 5th ended.<sup>111</sup> The alteration of the penultimate sentence of the draft, so that the chiefs entered into the Treaty “in the full *spirit* & meaning thereof”, may also have been made at this time. Secondly, the differences in the subscription may suggest that one of the documents that Hobson was working from when he discussed the translation with Williams and Busby on the 5th was in fact Busby’s fair copy draft (whether or not this was also one of the documents that Williams had been given to translate). Hence the cross in the text at the bottom of the second page of the Busby draft (**Appendix 3**) may record a 5 February change to the Maori translation (and hence to the English text) in shifting the date to the end of the subscription. If the Busby draft was what Hobson retained as his file copy of the Treaty in English (together with Hobson’s preamble or a fair copy of it), then that might account for the small differences between the five 6 February English texts of the Treaty in the subscription.<sup>112</sup>

It seems then that the English text that Henry and Edward Williams translated, and which Hobson, Williams and Busby finalised on 5 February, is entirely known to us. It consisted of Hobson’s preamble, probably with the two corrections as appear in the various 6 February copies of the Treaty in English, and Busby’s draft of the articles and subscription as amended by Hobson before Henry and Edward Williams began on their translation and, so far as the already amended subscription was concerned, as probably further amended by Hobson, Williams and Busby when they met on the morning of the 5th. This text can be recreated as follows:

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<sup>111</sup> Mirroring changes to the Maori text made by Rev Richard Taylor. See above n 23.

<sup>112</sup> It may also explain why three of the texts make provision for Hobson’s signature and two do not. Compare Appendices 5, 11 & 12 with Appendices 6 & 7. It may be that Hobson was not concerned to record how precisely the English text was to be altered to reflect the change agreed upon on the 5th because his focus (and Williams’s and Busby’s) at that time was on settling the Maori translation. He may not have intended to read out the subscription when he read out the English text of the Treaty at the meeting.

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Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favor the Native Chiefs and Tribes of New Zealand and anxious to Protect their just Rights and Property and to secure to them the enjoyment of Peace and good order, has deemed it necessary, in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress, to constitute and appoint a Functionary properly authorized to Treat with the aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those Islands. Her Majesty therefore being desirous to establish a settled Form of Civil Government with a view to avert the evil consequences which must result from the absence of necessary Laws and Institutions alike to the Native Population and to Her Subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy, Consul, and L<sup>t</sup> Governor of such Parts of New Zealand as may be, or hereafter shall be, ceded to Her Majesty to invite the Confederated & Independent Chiefs of New Zealand to concur in the following articles & Conditions.

### First Article

The Chiefs of the Confederation of the United Tribes of New Zealand, and the separate and Independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England, absolutely and without reservation, all the rights and powers of Sovereignty which the said Confederation or individual chiefs respectively exercise or possess, or may be supposed to exercise or possess over their respective territories, as the sole Sovereigns thereof.

### Second Article

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates, Forests Fisheries and other properties, which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession. But the chiefs of the United Tribes and the individual chiefs yield to Her Majesty the exclusive right of preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

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### Third Article

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her Royal protection, and imparts to them all the rights and privileges of British subjects.

[Space for the signature of William Hobson]

Now therefore we the chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi, and we the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the provisions of the foregoing treaty, accept and enter into the same in the full spirit & meaning thereof. In witness of which we have attached our Signatures or marks at the places and dates respectively specified.

Done at Waitangi this fifth day of February in the year of our Lord One thousand Eight hundred and forty.

[Place for the signatures or moko of the chiefs]



## CHAPTER TWO

### WHATEVER WE WANT IT TO SAY?—TREATY HISTORIOGRAPHY<sup>1</sup>

In 1972 Ruth Ross described the Treaty of Waitangi as “ambiguous and contradictory in content”. She expressed the view that it “says whatever we want it to say”.<sup>2</sup> Scholars since either approve of this verdict or, through their own lack of agreement about the Treaty’s meaning, go some way to proving Ross’s point. This chapter examines the differences of view, which are seldom made explicit in scholarly writing on the topic, in order to identify questions about the meaning of the English text of the Treaty. The balance of the thesis seeks to answer these questions by exploring the wider context in which the Treaty was made and understood.

Few scholars are concerned with the meaning of the English text as understood by those who framed it. They have, nevertheless, expressed views about the meaning of the Treaty, arrived at from different points of departure. For some historians, the Treaty is part only of the narrative of British intervention in New Zealand. For them, the Treaty is less interesting as an object of study in itself than the reasons for the British assumption of sovereignty achieved through its instrumentality. Insofar as they express views about the meaning of the Treaty, they are indistinguishable from their views about Normanby’s Instructions to Hobson and their context. Some who emphasise British policy seem to view the Treaty as

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<sup>1</sup> This chapter can be compared to Michael Belgrave *Historical Frictions: Maori Claims and Reinvented Histories* (Auckland University Press, Auckland, 2005) ch 2 [“Belgrave *Historical Frictions*”]; and JMR Owens “Historians and the Treaty of Waitangi” (1990) 1 *Archifacts* 4–21 [“Owens ‘Historians and the Treaty’”].

<sup>2</sup> Ruth Ross “Te Tiriti o Waitangi: Texts and Translations” (1972) 6:2 *New Zealand Journal of History* 129–157 [“Ross ‘Texts and Translations’”] at 154. See also AH McLintock *Crown Colony Government in New Zealand* (RE Owen, Government Printer, Wellington, 1958) [“McLintock *Crown Colony Government*”] 63 (“[The Treaty’s] ethical abstractions are difficult to grasp and evaluate, and too often end in hair-splitting ambiguities”) & 71 (“even a scrupulous interpretation of its brief provisions—always provided such a feat were possible—meant the necessity of sowing the fresh seeds of discord”); Keith Sinclair *The Origins of the Maori Wars* (2nd ed, New Zealand University Press, Wellington, 1961) [“Sinclair *The Origins of the Maori Wars*”] 28 (“it had always to be ‘interpreted’”); and Owens “Historians and the Treaty”, above n 1, 4 & 18.

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something of a blank canvas at its inception with a meaning to be arrived at later through a political process carried on in New Zealand, Sydney, and London.<sup>3</sup>

More recently, and influenced in particular by the pioneering work of Ruth Ross, other historians have focused on the Maori text when considering the meaning of the Treaty. This scholarship has produced valuable insights and was a necessary corrective given the earlier neglect of the Treaty texts and their New Zealand context. But the emphasis has perhaps deflected attention from the English text. That may be an over-correction given the sequence, in which the Maori text was derived from the English text. In those circumstances, the English text would seem the natural place to start when considering the meaning of the Maori translation. Instead, there has been little attempt to engage with the meaning of the English text, apparently on the assumption that the concepts are clear because they are expressed in ordinary English words. In particular, there has been little consideration of what the pivotal concept of “sovereignty” meant to the framers.<sup>4</sup>

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<sup>3</sup> For example, Peter Adams *Fatal Necessity: British Intervention in New Zealand 1830–1847* (Auckland University Press, Auckland, 1977) [“Adams *Fatal Necessity*”]; Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) [“Hickford *Lords of the Land*”]; and Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008) [“Palmer *Treaty of Waitangi*”] 24-25.

<sup>4</sup> Paul McHugh makes similar points specifically in relation to the approach of the Waitangi Tribunal in its reports:

Although the Waitangi Tribunal ... has stressed that it must consult both texts and harmonise the two as much as possible, the weight of interpretative reliance tends heavily towards the Maori. The Tribunal has resorted to legal rules derived from international and municipal law ... to justify that approach ... . Contemporary conscience shamed by its behaviour towards Maori since 1840 sharpens the exercise, assisting the attribution to the English text of an amateurish subtlety: Leviathan’s brute club. Whereas the Tribunal has gone to great lengths to explore how Maori might have understood the text(s) in 1840, there has been no prolonged, accompanying attempt to get inside the meaning of the English text as it may have been understood by Pakeha in 1840. The English words are usually taken at face value, whilst also it is accepted that the concept of sovereignty embedded in the English text is that of the contemporary Leviathan. However, in marginalizing the English text a more pointed engagement with its terminology and historical context is avoided: the English text may be as helpful a means to understanding what Pakeha of the time thought the consequences of British sovereignty would be, as the Maori text in the case of the tribal chiefs.

Paul McHugh “The Historiography of New Zealand’s Constitutional History” in Philip Joseph (ed) *Essays on the Constitution* (Brooker’s, Wellington, 1995) 344-367 [“McHugh ‘New Zealand’s Constitutional History’”] at 365. The “Leviathan” is a reference to Thomas Hobbes’s absolute and unaccountable sovereign, as depicted in the eponymous treatise of 1651.

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Rather, it has been readily concluded that the cession of “sovereignty” in the English text was inimical to the guarantee of “rangatiratanga” or chiefly authority in the Maori text.<sup>5</sup> Claimed inaccuracy in the translation of “sovereignty” as “kawanatanga” has led to much speculation about whether it was deliberately mistranslated by Henry Williams and with what purpose.<sup>6</sup>

Other writers have been concerned to describe a Treaty that fuses the two texts or even transcends both, in emphasising the spirit in which it was made.<sup>7</sup> The Waitangi Tribunal has been criticised in this connection for constructing a “retrospective utopia” in undertaking its statutory responsibility to decide “the meaning and effect of the Treaty as embodied in the 2 texts” in the course of determining claims of Treaty breach.<sup>8</sup>

In recent years, additional perspective bearing on the meaning of the Treaty has been provided by legal scholarship. Some of it has been prompted by New Zealand domestic litigation and Waitangi Tribunal claims. Some of it has resulted from increasing comparative and international law interest in the rights of indigenous peoples. The legal and historical scholarship do not always acknowledge each other. Led by Paul McHugh, modern legal scholarship (perhaps reflecting a

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<sup>5</sup> Some historians, such as Judith Binney and Lyndsay Head, do not regard the two texts as irreconcilable, but reach this conclusion on a contextual analysis of the Maori text, without deconstructing the meaning of “sovereignty” in the English text, as described in the text accompanying ns 196-217.

<sup>6</sup> As Head has written, the hypothesis that Henry Williams deliberately mistranslated “sovereignty” “has achieved ... canonical status in modern Treaty analysis”. Lyndsay Head “The Pursuit of Modernity in Maori Society: The Conceptual Bases of Citizenship in the Early Colonial Period” in Andrew Sharp & Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past—A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 97-121 [“Head ‘Pursuit of Modernity’”] at 105.

<sup>7</sup> For advocacy of the construction of an “ideal text” in this way, see DF McKenzie *Oral Culture, Literacy & Print in Early New Zealand: the Treaty of Waitangi* (Victoria University Press, Wellington, 1985) [“McKenzie Oral Culture”] 45-47.

<sup>8</sup> Treaty of Waitangi Act 1975, s 5(2); WH Oliver “The Future Behind Us: The Waitangi Tribunal’s Retrospective Utopia” in Andrew Sharp & Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past—A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 9-29. Similarly, Anne Salmond has argued that the “persistent error” of blurring the two texts (“two very different documents, with divergent histories and implications”) “has led to a confused and confusing historiography of the Treaty of Waitangi”. Anne Salmond “Brief of Evidence for the Waitangi Tribunal” (Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 17 April 2010, A22) [“Salmond ‘Brief of Evidence, Wai 1040’”] 1.

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contemporary and practical concern with enforceable rights and against a background of legal orthodoxy that denies direct enforceability of the Treaty) has been largely concerned with common law interests, particularly with a doctrine of “aboriginal title”. On this view, the property guarantee in article 2 of the English text is said to have been declaratory of a rule of law that would have applied irrespective of the Treaty guarantee of property rights. This background may explain the lack of attention to the English text in legal scholarship, apart from the insight provided by some comparative and international lawyers that the terms of the English text of the Treaty conform to other British treaties of the time.<sup>9</sup> As a result of this legal scholarship, however, historians have been confronted with their earlier neglect of legal themes in the Treaty story and have made adjustments (or abandoned the field to the lawyers), perhaps not always to the benefit of good history.

Although there has been no thoroughgoing assessment of how those who framed the Treaty understood its English text, some light is shed on that topic by recent writing that touches on the origin of some of the concepts and language used in the Treaty.<sup>10</sup> Apart from continuing attention to Normanby’s Instructions to Hobson as providing explanation for British intentions in the Treaty,<sup>11</sup> some scholars have also pointed to the possible contributions to the Treaty language made by Governor Gipps. They identify similarities between the Treaty of Waitangi and Gipps’s so-

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<sup>9</sup> See text accompanying ns 125-133 below.

<sup>10</sup> In addition to the writing discussed in the following four paragraphs, see also Brian Easton “Was There a Treaty of Waitangi; and Was it a Social Contract?” (1997) *Archifacts* 21-49 [“Easton ‘Was There a Treaty of Waitangi?’”] at 30-33; Richard Dawson “Waitangi, Translation and Metaphor” (2005) 2:2 *Sites: A Journal of Social Anthropology & Cultural Studies* 33-63; and Paul McHugh “The Lawyer’s Concept of Sovereignty, the Treaty of Waitangi, and a Legal History for New Zealand” in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 170-189 [“McHugh ‘Lawyer’s Concept of Sovereignty’”] at 172 & 182-183.

<sup>11</sup> See, for example, Donald Loveridge “‘The Knot of a Thousand Difficulties’: Britain and New Zealand, 1769–1840” (Brief of Evidence for the Crown Law Office, Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 17 December 2009, A18) 153-163 & 195 (“there is in fact no need to go beyond Normanby’s instructions when seeking the origins of the English text”); Waitangi Tribunal *Orakei Claim Report*—Wai 9 (1987) 137-144; and Waitangi Tribunal *Muriwhenua Land Report*—Wai 45 (1997) 117 (“the Treaty and the instructions should be read together”).

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called “unsigned treaty”, also of February 1840.<sup>12</sup> They point to Gipps’s familiarity with American law (shown by his speech to the Legislative Council of New South Wales in July 1840 on the New Zealand Land Claims Bill<sup>13</sup>) to suggest that the use of the term “right of preemption” in article 2 of the Treaty may have resulted from his influence, since the phrase does not appear to have been used by the Colonial Office before 1840.<sup>14</sup> One historian has suggested that Busby, too, was familiar with the American law and adopted it in article 2 of the Treaty.<sup>15</sup> There has also been conjecture (discussed further below) from the similarities of text, that the English text of the Treaty of Waitangi was modelled on other British treaties of the time with native rulers, particularly a Sherbro/Ya Comba “convention” of 1825, which must have been provided to or known by Hobson or Busby.<sup>16</sup>

An exception to the general neglect of the framers and their understandings of the Treaty is an essay on James Busby by the British historian Ged Martin. Martin considers the Treaty to have been the end for which Busby had worked during the eight years of his Residency.<sup>17</sup> He sees the Treaty as effecting something “broadly similar” to Busby’s plan in 1836–37 for a British protectorate (on the model adopted towards the Ionian Islands),<sup>18</sup> and suggests that the Treaty was patterned on the Treaty of Union of 1706 between the kingdoms of Scotland and England.<sup>19</sup>

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<sup>12</sup> See, for example, Donald Loveridge “The ‘Littlewood Treaty’: An Appraisal of Texts and Interpretations” (2006) Stout Research Centre <[www.victoria.ac.nz/stout-centre/research-units/towru/publications/Littlewood-Treaty.pdf](http://www.victoria.ac.nz/stout-centre/research-units/towru/publications/Littlewood-Treaty.pdf)> at 18. For Gipps’s “unsigned treaty”, see Chapter 14, text accompanying ns 53-72. As is discussed there, other historians have emphasised the differences between Gipps’s treaty and the New Zealand treaty drafts.

<sup>13</sup> The Bill and the debate are discussed in Chapter 16.

<sup>14</sup> See, for example, Hickford *Lords of the Land*, above n 3, 102 & 108.

<sup>15</sup> MPK Sorrenson “Treaties in British Colonial Policy: Precedents for Waitangi” in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 15-29 [“Sorrenson ‘Precedents for Waitangi’”] at 20. Sorrenson suggests that Hobson, too, was familiar with American law—see text accompanying n 139 below. As is discussed below, Sorrenson’s writing is informed by the work of legal scholars such as Kenneth Keith and Paul McHugh.

<sup>16</sup> See text accompanying ns 125 & 133-134 below.

<sup>17</sup> Ged Martin “James Busby and the Treaty of Waitangi” (1992) 5 *British Review of New Zealand Studies* 5-22 [“Martin ‘Busby and the Treaty’”].

<sup>18</sup> Ibid 21. In relation to the Maori text of the Treaty, Martin argues that it “embodied something very close” to Busby’s 1837 protectorate scheme.

<sup>19</sup> Ibid 21.

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More recently, the Waitangi Tribunal's Te Paparahi o te Raki—Northland Inquiry has thrown a spotlight on understandings of the Treaty in 1840, including of those who had a hand in producing the English and Maori texts. Although the Tribunal has not yet reported, the evidence submitted to it is available and has been drawn on in what follows. Of particular interest for this thesis is the report prepared by Samuel Carpenter which argues that the Treaty must be seen in the context of the 1835 Declaration of Independence, the English draft of which was drawn up by Busby.<sup>20</sup>

Since discussion of the meaning of the English text of the Treaty generally arises tangentially in scholarly writing, that discussion is best reviewed first in terms of general themes in the historiography, before turning to what has been written directly about the individual articles.

### **The motives for British intervention in New Zealand**

Most historians are agreed that the British Government intervened reluctantly in New Zealand in 1839–40. They explain the reluctance as arising from aversion to the administrative burden and expense of greater Empire and, as Normanby had in the Instructions, out of contemporary humanitarian disquiet about the impact of European colonisation upon native peoples.<sup>21</sup>

There is also substantial agreement among historians as to why Britain intervened.<sup>22</sup> There was a perception that British subjects were responsible for a law and order problem on the New Zealand frontier which threatened Maori

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<sup>20</sup> For Carpenter's report, see text accompanying ns 315-325 below.

<sup>21</sup> Compare Trevor Williams "The Treaty of Waitangi" (1940) 25:99 History 237-251 ["Trevor Williams 'The Treaty of Waitangi'" at 238, 241 & 250; Alan Ward *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland University Press, Auckland, 1973) ["Ward *A Show of Justice*"] 30-31; Adams *Fatal Necessity*, above n 3, 11, 153 & 165; Keith Sinclair *A History of New Zealand* (4th ed, Penguin Books, Harmondsworth, Middlesex, 1991) ["Sinclair *A History of New Zealand* (4th ed, 1991)"] 54-55 & 68; and James Belich *Making Peoples: A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century* (Penguin Books, Harmondsworth, Middlesex, 1996) ["Belich *Making Peoples*"] 182.

<sup>22</sup> Very few give credence to the idea that French designs on New Zealand triggered the British action and, since I agree, I do not deal with this red herring.

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survival.<sup>23</sup> Many historians emphasise in this a particular concern about the scale and pace of Maori land alienations in the late 1830s, although for some the concern in the land alienations was not simply for Maori welfare but because they also threatened successful colonisation (which some put as an equal priority with Maori protection in British intervention).<sup>24</sup> Historians also divide over whether the perception of a need to protect Maori from the lawlessness and rapaciousness of British subjects was justified.<sup>25</sup>

There are, however, deep divisions among scholars about whether the Treaty was an idealistic new beginning in British imperial practice, as a result of evangelical and humanitarian influences in Whitehall. Nor is there agreement about the place

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<sup>23</sup> McIntock *Crown Colony Government*, above n 2, 5 & 29-30; Sinclair *A History of New Zealand* (4th ed, 1991), above n 21, ch 2; Adams *Fatal Necessity*, above n 3, 13 & 153-154; Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987) ["Orange *The Treaty of Waitangi*"] 2 & chs 1-2; Judith Bassett "The Pakeha Invasion, 1840-1860" in Judith Binney, Judith Bassett, Erik Olssen *The People and the Land—Te Tangata me Te Whenua: An Illustrated History of New Zealand, 1820-1920* (Allen & Unwin, Wellington, 1990) 39-56 ["Bassett 'The Pakeha Invasion'"] at 43; JMR Owens "New Zealand Before Annexation" in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2nd ed, Oxford University Press, Auckland, 1992) 28-53 ["Owens 'New Zealand Before Annexation' (2nd ed, 1992)"] at 28, 41-43, 48, 50 & 52; Belich *Making Peoples*, above n 21, 185-187; Raewyn Dalziel "Southern Islands: New Zealand and Polynesia" in Andrew Porter (ed) *The Oxford History of the British Empire: The Nineteenth Century* (Oxford University Press, Oxford, 1999, vol 3) 573-596 ["Dalziel 'Southern Islands'"] at 576-578; Alan Ward *An Unsettled History: Treaty Claims in New Zealand Today* (Bridget Williams Books, Wellington, 1999) ["Ward *An Unsettled History*"] 9-11.

<sup>24</sup> See, for example, Ward *An Unsettled History*, above n 23, 9-10, 12 & 17; Alan Ward "Land and Law in the Making of National Community" in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 115-129 ["Ward 'Land and Law'"] at 124; Ward *A Show of Justice*, above n 21, 30; Alan Ward *National Overview* (Waitangi Tribunal Rangahaua Whanui Series, GP Publications, Wellington, 1997) ["Ward *National Overview*"] vol 1, 5 & 45 & vol 2, 63; Sinclair *A History of New Zealand* (4th ed, 1991), above n 21, 53 & 68; Michael Belgrave "Pre-emption, the Treaty of Waitangi and the Politics of Crown Purchase" (1997) 31:1 *New Zealand Journal of History* 23-37 ["Belgrave 'Pre-emption'"] at 26; and Bassett "The Pakeha Invasion", above n 23, 43.

<sup>25</sup> Compare Owens "New Zealand Before Annexation" (2nd ed, 1992), above n 23, 28, 41, 43, 48-50 & 52-53 ("The humanitarian justification for annexation, the idea that New Zealand was sliding into uncontrollable warfare, anarchy, and depopulation, was grossly exaggerated"); Belich *Making Peoples*, above n 21, 185-187 ("There was no 'fatal necessity' [for British intervention], but the imperial government came to believe that there was"); Orange *The Treaty of Waitangi*, above n 23, 17-18 & 31; Ward *An Unsettled History*, above n 23, 12 ("Glenelg concluded that ... the only choice now lay between 'a Colonization, desultory, without Law, and fatal to the Natives, and a Colonization organized and salutary'. His judgment, though somewhat premature, was fundamentally correct. New Zealand would not have remained isolated for long from a sustained grab at its grasslands and forests by European investors and colonists"); and Ward *A Show of Justice*, above n 21, 33.

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Maori were to have in the new order, although the overwhelming consensus is that assimilation of Maori society into settler society was seen as the ultimate and desirable end.<sup>26</sup>

Although more recently the weight of scholarly opinion has discounted an earlier view that the Treaty of Waitangi was unique in British imperial history,<sup>27</sup> that earlier view had notable proponents including Trevor Williams,<sup>28</sup> Keith Sinclair and AH McIntock (although the latter thought the idealism which prompted it to be misguided).<sup>29</sup>

Trevor Williams<sup>30</sup> wrote that the “design” of the Treaty in its three articles was contained in Normanby’s Instructions to Hobson, written by the Permanent Under-

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<sup>26</sup> In addition to the views of Trevor Williams, Keith Sinclair, Alan Ward, Peter Adams, Claudia Orange and Richard Hill about assimilation discussed in this section, see, for example, MPK Sorrenson “How to Civilize Savages: Some ‘Answers’ from Nineteenth-Century New Zealand” (1975) 9:2 *New Zealand Journal of History* 97-110 [“Sorrenson ‘How to Civilize Savages’”]; Judith Binney “The Shadow of the Land” (1969) 3:2 *New Zealand Journal of History* 199-202 (book review) [“Binney ‘Shadow of the Land’”] at 201-202; James Belich “Hobson’s Choice” (1990) 24:2 *New Zealand Journal of History* 200-207 (book review) [“Belich ‘Hobson’s Choice’”] at 203; Belich “Making Peoples”, above n 21, 195; and Damen Ward “A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia” (2003) 1 *History Compass* 1-24 [“Ward ‘Means and Measure’”] at 9-10.

<sup>27</sup> In addition to the views of Ian Wards, Alan Ward, Peter Adams, Claudia Orange and Richard Hill discussed in this section, see the writings discussed at ns 130-143 and accompanying text.

<sup>28</sup> As to Sir Edgar Trevor Williams, widely known as Bill, see below n 30.

<sup>29</sup> See also WP Morrell *British Colonial Policy in the Age of Peel and Russell* (Clarendon Press, Oxford, 1930) 105; WP Morrell *Britain and New Zealand* (Longmans, Green & Co, London, 1944) 10 (“[The Treaty] has been, as still is, a charter of Maori rights. ... Britain had no secret reservations. The treaty, and the instructions which Hobson carried with him and which were duly laid before Parliament, are the best evidence of the purposes with which she acquired New Zealand—to keep the peace between the Maori tribes and the incoming British colonists, to promote an orderly and controlled colonization of the country, to reconcile colonization as far as possible with the best interests of the indigenous inhabitants, in fact to turn over a new leaf in the book called history”); WH Oliver *The Story of New Zealand* (Faber and Faber, London, 1960) [“Oliver *Story of New Zealand*”] 50-51; William Renwick “A Variation of a Theme” in William Renwick (ed) *Sovereignty & Indigenous Rights* (Victoria University Press, Wellington, 1991) 199-220 [“Renwick ‘A Variation of a Theme’”] at 207; and Binney “Shadow of the Land”, above n 26, 200.

<sup>30</sup> Sir Edgar Trevor (Bill) Williams, when a junior research fellow at Merton College, Oxford, undertook research on the Treaty of Waitangi. After distinguished service in the Second World War, including as an intelligence officer to General Montgomery, Williams returned to Oxford as a history fellow at Balliol College and became, in 1949, editor of the *Dictionary of National Biography*, a position he did not relinquish until 1980. From 1952–80 he was Warden of Rhodes House, Oxford, in which capacity he was known to many New Zealand Rhodes scholars. For details of Williams’s life, see CS Nicholls “Williams, Sir Edgar Trevor [Bill] (1912–1995)” *Oxford Dictionary of National Biography*. Seventy-five years on, Williams’s work remains remarkably fresh and thought-provoking. He was, for example, ahead of his

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Secretary for the Colonies, James Stephen.<sup>31</sup> British policy towards New Zealand in 1839–40 was, he said, “almost wholly Stephen’s handiwork”,<sup>32</sup> and the Instructions owed to Normanby “only their signature”.<sup>33</sup> Stephen had grasped the Instructions as “a humanitarian opportunity”,<sup>34</sup> though they were less the “[f]ruit of the humanitarian movement” than a bulwark against any repeat of the discreditable recent British encounter with the Xhosa people on the eastern frontier of the Cape Colony (a principal subject of inquiry by a House of Commons Select Committee in 1835–37).<sup>35</sup>

Williams considered that the Instructions laid down not only “a method of acquiring sovereignty” but also “a native policy to follow it”.<sup>36</sup> They were “a step forward in official policy”, “a signpost in the history of the second British empire,”<sup>37</sup> for they advanced the conception of the wardship of native races”.<sup>38</sup> Through them, the Treaty “marked a new method, or the coherent enlargement of an older and more tentative method, of attempting to protect a native race from the inrush of a new and essentially different culture”<sup>39</sup> and secure “equal justice” for it.<sup>40</sup>

Treaties had been made before with native tribes, with North American Indians or with the Bantu [Xhosa]. In the main they were attempts to secure the frontier or to extend it. In one sense, Waitangi was similar, for it advanced the frontier once and for all to the sea. But the differences were more radical. In the first place, the Treaty was neither a

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time in treating the Maori text as the true treaty (see “The Treaty of Waitangi”, above n 21, 240–241). He references an earlier “essay” of his entitled *Prelude to Waitangi*, which I have so far been unable to locate.

<sup>31</sup> Trevor Williams “James Stephen and British Intervention in New Zealand, 1838–40” (1941) 13:1 *The Journal of Modern History* 19–35 [“Trevor Williams ‘James Stephen and British Intervention’”] at 32.

<sup>32</sup> *Ibid* 34.

<sup>33</sup> *Ibid* 25.

<sup>34</sup> *Ibid* 31.

<sup>35</sup> On the Select Committee on Aborigines in British Settlements, see Chapter 3, text accompanying ns 198–227. On British dealings with the Xhosa before 1835, see also Chapter 4 text accompanying ns 195–197.

<sup>36</sup> Trevor Williams “James Stephen and British Intervention”, above n 31, 31.

<sup>37</sup> That is to say, the British Empire following the loss of the American colonies.

<sup>38</sup> Trevor Williams “James Stephen and British Intervention”, above n 31, 34. Compare Trevor Williams “The Treaty of Waitangi”, above n 21, 250.

<sup>39</sup> Trevor Williams “The Treaty of Waitangi”, above n 21, 238.

<sup>40</sup> *Ibid* 250.

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temporary expedient nor readily revocable. Secondly, it was designed to settle conditions *within* the frontier, not, as in the African and American instances, *beyond* it. They were quasi-diplomatic arrangements; Waitangi presaged a systematic native policy.

Williams was not sentimental about the Treaty, which he thought “was the product of several aims and carried the difficulties of a mixed cargo”.<sup>41</sup> He took the view that the British “had come to govern the country and to civilise the natives according to preconceived standards”.<sup>42</sup>

All—Governor, civil servant, missionary and Company man—shared at least this view: that the proper way to civilise the Maori was to make him a respectable sabbath-keeping workman, who, by serving the cause of colonisation and subjecting himself to European disciplines, would gain the precious blessings of Europe’s civilisation. They differed only in the stress they placed upon such discipline and in their estimate of the speed of its success. The aim of all, conscious or not, was the creation of a native working-class.

Despite the “many disadvantages” of the Treaty, Williams considered that “the main difficulties in the relationship between European and Maori in the years which followed 1840 were due to non-observance or evasion of its conditions and, most particularly, of the spirit in which they had been formulated”.<sup>43</sup>

Keith Sinclair,<sup>44</sup> too, thought that the “spirit informing” Normanby’s Instructions to Hobson was “a hope and some determination that the Maoris should not suffer from colonisation, as happened in other similar colonies”. For Sinclair, “humanitarian imperial ideology” (which was, in 1840 New Zealand, unopposed by any “established settler opinion on natives”) was the factor that distinguished New Zealand from other settlement colonies (and which had set up the conditions for good race relations into the twentieth century). “To emphasize the influence of ideology, to stress the power of hope, may be unfashionable. But in New Zealand it is hard to ignore.”<sup>45</sup> The aims of British policy were to protect Maori and to

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<sup>41</sup> Trevor Williams “James Stephen and British Intervention”, above n 31, 32.

<sup>42</sup> Trevor Williams “The Treaty of Waitangi”, above n 21, 247.

<sup>43</sup> Ibid 251.

<sup>44</sup> Sinclair’s *A History of New Zealand* was first published in 1959.

<sup>45</sup> Keith Sinclair “Why are Race Relations in New Zealand Better Than in South Africa, South Australia or South Dakota?” (1972) 5:2 *New Zealand Journal of History* 121-127 at 125-127.

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introduce law and order, and only to the extent that those aims could be achieved, to promote British settlement.<sup>46</sup> British policy was determined to achieve reconciliation of these aims even if past experience was that such reconciliation had not been achieved in other colonies.<sup>47</sup> Normanby's Instructions "marked a new and noble beginning in British colonial policy".<sup>48</sup>

The history of New Zealand was to be distinguished from that of earlier settlement colonies; the fate of the Maoris was to differ from that of the American Indian, the Bantu, the Australian or Tasmanian aborigine; for the new colony was being launched in an evangelical age. Imperialism and humanitarianism would henceforth march together. Even the Colonial Office, without much conviction [given the record of European colonisation], hoped that New Zealand would be the scene of a Utopian experiment.

Since colonisation could not be prevented, the Colonial Office's hope was that conflict between settlers and Maori could be averted if orderly colonisation took place under colonial rule. This was "a realistic beginning".<sup>49</sup> The Treaty was "a noble start"<sup>50</sup>—"an attempt to guarantee Maori welfare".<sup>51</sup>

From that time onwards it was the almost invariable insistence of successive British Governments that Maori interests were not to be subordinated to those of the settlers. At times it was even declared that the Maoris had a prior claim on the imperial power.

The future of New Zealand was seen by the Colonial Office, by Hobson and by Busby as "that of a 'plural society'"—"the home of white and brown men", where "[t]he problem of government was to reconcile their interests".<sup>52</sup> For Sinclair, however, the Treaty was no more than a beginning. The humanitarians, inside and outside government in London and in New Zealand, had identified the past pattern that led from colonisation to native wars, but their broad and vague aims to benefit Maori provided no solution to the problem.<sup>53</sup> Nor could one have been expected

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<sup>46</sup> Sinclair *A History of New Zealand* (4th ed, 1991), above n 21, 65.

<sup>47</sup> Sinclair *The Origins of the Maori Wars*, above n 2, 20-21.

<sup>48</sup> Sinclair *A History of New Zealand* (4th ed, 1991), above n 21, 68-69.

<sup>49</sup> Sinclair *The Origins of the Maori Wars*, above n 2, 21.

<sup>50</sup> Ibid 28.

<sup>51</sup> Ibid 20.

<sup>52</sup> Sinclair *A History of New Zealand* (4th ed, 1991), above n 21, 64.

<sup>53</sup> Sinclair *The Origins of the Maori Wars*, above n 2, ch 3.

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“except over a long period” of encounter.<sup>54</sup> Behind the humanitarian concern was, however, the implacable view that “the ultimate future of the Maoris was to be ‘amalgamation’ with the Europeans”.<sup>55</sup> In the long run all were agreed that Maori culture and society were not worth preserving.<sup>56</sup> In this attitude, Sinclair believed, lay the seeds of the land wars to come.<sup>57</sup>

AH McIntock considered the Treaty as, at once, part and parcel of “the attempt of the British Government to found in New Zealand a bi-national state of a pattern hitherto unknown”<sup>58</sup> and “a rather dull climax to an equally dull period wherein official policy moved hesitatingly to that end”.<sup>59</sup> “[L]ike Stephen”, Hobson “was on the side of the ‘Saints’<sup>60</sup> and conditioned to the belief that on all points of conflict it was the duty of the Crown to uphold those vague but powerful ‘rights and privileges’ of the Maori people as against the aspirations of the colonisers”. Consequently, McIntock thought the Treaty to be “an expression of unbalanced idealism, the epitome of principle divorced from practice”.<sup>61</sup> That the Crown should stand between colonists and Maori was the nub “of the confused thinking that harassed the colony for a full three decades”<sup>62,63</sup>

[R]igid adherence to the provisions of the treaty threw too great a burden upon the early governors who, perforce, became the arbiters, and not the allies, of settlement.

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<sup>54</sup> Ibid 26.

<sup>55</sup> Ibid 25.

<sup>56</sup> Ibid 23.

<sup>57</sup> Ibid 26.

<sup>58</sup> McIntock *Crown Colony Government*, above n 2, xi.

<sup>59</sup> Ibid 4.

<sup>60</sup> McIntock explains that “Saints” was then “a current term of derision as applied to the Evangelicals”. Ibid 53 n 4.

<sup>61</sup> Ibid 53.

<sup>62</sup> Ibid 70: “all three governors of the Crown Colony period [Hobson, Fitzroy and Grey] were incapable of playing an impartial role in the drama of government. Whatever their motives, they interpreted the treaty in a manner which suggested that it was in reality a charter of native ‘rights’, with respect to which the demands of colonization would necessarily be subordinate. As this was precisely what the Colonial Office expected of them, it was inevitable that this idealism was reflected in their policies. ... Most significantly ... it checked effectively any hope of a speedy grant of self-government, even to districts where the native question was of slight consequence.”

<sup>63</sup> Ibid 69.

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For McLintock, then, laudable as the Treaty had been in “its nobility of purpose and its genuine assertion of the principle of racial equality”,<sup>64</sup> “the tragedy of Waitangi was that it was born out of time, not as an instrument of pacification but as a harbinger of strife”.<sup>65</sup>

The thesis that the Treaty of Waitangi was the product of evangelical and humanitarian influence was first challenged on the basis that the historical record demonstrated no such idealism in the decision to intervene in New Zealand. Ian Wards argued that the humanitarian concern for the welfare of native peoples was in the end “no more than flirtation” for the Colonial Office.<sup>66</sup> The “determination that the British Empire should display at least one native race elevated rather than despoiled by the onrush of colonisation” may have featured in early drafts of the Instructions to Hobson.<sup>67</sup> By the time they were finalised and issued to Hobson in August 1839, however, Wards considered the aims of the Colonial Office had narrowed to acquiring sovereignty at the least possible expense, with all decisions about future policy to await its achievement.<sup>68</sup> “There was no matter of moral principle, no pledge for the future.”<sup>69</sup> The “guarantee of rights and possessions” in the Instructions was “idealistic residue” that survived from the earlier drafts, but only as a solution to the problem that the preferred alternative, of purchasing sovereignty by the payment of annual presents to the chiefs, was not a legitimate exercise of the royal prerogative.<sup>70</sup> Wards expressed regret that “this sensible course with ceding chiefs, which gave no undertakings for the future”, was not pursued.<sup>71</sup> The Treaty then “was never intended to be more than an internationally

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<sup>64</sup> Ibid 63.

<sup>65</sup> Ibid 71. Paul McHugh “Law, History and the Treaty of Waitangi” (1997) 31:1 New Zealand Journal of History 38-57 [“McHugh ‘Law, History and the Treaty’”] at 40-43 is not wrong to describe McLintock’s book as a “paradigmatic” Whig history in which Maori are seen as an obstacle to the progress of parliamentary democracy.

<sup>66</sup> Ian Wards *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852* (AR Shearer, Government Printer, Wellington, 1968) 23.

<sup>67</sup> Ibid 24.

<sup>68</sup> Ibid 25.

<sup>69</sup> Ibid 37.

<sup>70</sup> Ibid 27-28 & 387.

<sup>71</sup> Ibid 27-28.

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acceptable step of no lasting significance”.<sup>72</sup> And indeed Wards considered that it was treated as such by the Colonial Office in the years after 1840.<sup>73</sup>

On the view of Wards, this “idealistic residue” found its way into the Treaty by mistake.<sup>74</sup> Hobson and those involved in framing and explaining the Treaty “must perforce have believed that the words of [the Instructions] represented the intention of the Colonial Office” and could not have known that its intention was “limited to the act of obtaining sovereignty”.<sup>75</sup> There was “no doubt” that Hobson and those who assisted him “believed without reservation that its terms would be honoured in letter and in spirit”.<sup>76</sup> But, as a result of their mistake that the earlier humanitarian policy was still being adhered to in London, there were “inherent contradictions between the treaty and the policy of the Colonial Office”. Had the Colonial Office’s intention actually been to benefit Maori “more care would have been taken to ensure that the terms of the treaty ... were reconcilable with the colonisation and European settlement which were clearly going to take place”.<sup>77</sup> As it was:<sup>78</sup>

[A]mong the great array of draft instructions and associated memoranda, it is not possible to ascertain that any attention was given to the actual terms of the eventual treaty; no draft was prepared, no legal opinion sought—it was all left to amateurs and to chance.

Consequently, Wards dismissed the view that British intervention in New Zealand was prompted by humanitarian motives:<sup>79</sup>

Such a concept ... adds much to the great chapter of the nobility of mankind, but tells little of the realities and has, through over-emphasis and uncritical repetition, hindered

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<sup>72</sup> Ibid x.

<sup>73</sup> Ibid 48 & 57.

<sup>74</sup> Judith Binney has explained why Wards’s argument is misconceived in treating the Treaty guarantees as “idealistic residue” of earlier proposals for treaties with chiefs outside territories to be acquired in sovereignty by Britain, and it is therefore unnecessary for me to deal expressly with it any further. See Binney “Shadow of the Land”, above n 26, 200. As will be seen in Chapters 8 & 9, the historical record does not support Wards’s thesis. It is mentioned here only because it appears to have influenced some later scholarship.

<sup>75</sup> Ibid 42.

<sup>76</sup> Ibid 48. See also ibid 56.

<sup>77</sup> Ibid 42.

<sup>78</sup> Ibid 28.

<sup>79</sup> Ibid 23.

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our understanding of this area of New Zealand's history. More particularly, and perhaps more unfortunately, it has falsely represented the situation to five generations of Maori people.

Alan Ward, like Ian Wards, identifies a change of tone in Colonial Office policy beginning in mid-1839, just as the Instructions were being finalised. The approach of the Colonial Office “gained a much harder edge”<sup>80</sup> through 1840 when, after sovereignty of New Zealand had been obtained, Hobson was issued with new Instructions by Lord John Russell, who had by then succeeded Normanby as Secretary of State for the Colonies.<sup>81</sup> That “harder edge” was a move away from gradualism, in which Maori were to be protected in their customary usages in their own tribal areas until they adapted to European civilisation, “in favour of rapid ‘amalgamation’ ... in the settler-dominated polity”.<sup>82</sup>

This change was not to be explained, as Ian Wards had done, as the dissipation of humanitarian concern for Maori. “If anything”, rather than diminishing, that humanitarian concern increased through 1839–40 as the Colonial Office received reports of the rapid extension of European settlement in New Zealand and monitored progress of the New Zealand Company and other schemes for sending emigrants to New Zealand. This convinced the Colonial Office that “New Zealand was in process of becoming a settlement colony, no longer a predominantly Maori New Zealand in which the forms of a Protectorate could suffice”.<sup>83</sup>

[Stephen] was now fully convinced that New Zealand was becoming a thorough-going settler colony in which (as in Canada, where Lord Durham was contemporaneously compiling his famous report recommending the grant of responsible government<sup>84</sup>) state power would ultimately repose with the settlers, not the British officials. In these circumstances Stephen considered a policy of mere protection to be futile.

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<sup>80</sup> Ward *A Show of Justice*, above n 21, 34.

<sup>81</sup> Ibid 33–38 and Alan Ward “Law and Law-enforcement on the New Zealand Frontier, 1840–1893” (1971) 5:2 *New Zealand Journal of History* 128–149 [“Ward ‘Law and Law-enforcement’”] at 129–130.

<sup>82</sup> Ward *A Show of Justice*, above n 21, 37.

<sup>83</sup> Ibid 33–34 & 36.

<sup>84</sup> Durham's report is considered in Chapter 3.

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“British humanitarians and officials thought it futile to try to stem the tide of settlement or to shelter the Maori people and their culture in their own enclaves”:<sup>85</sup>

Instead, the ‘amalgamation’ of Maori as quickly as possible into the mainstream of the new society was considered the best course of action. This was the strategy underlying Article 3 of the Treaty, granting to Maori the rights and privileges of British subjects.

“The saving of the Maori race involved the extinction of Maori culture.”<sup>86</sup> The change to a policy of “rapid amalgamation” therefore reflected not the diminishment of humanitarian concern, which was in fact heightened by the information received, but “that the humanitarians’ confidence of success had ebbed proportionately”.<sup>87</sup>

Pessimism about Maori prospects “caused Stephen to be irresolute in defence of Maori interests when they conflicted with those of settlers”.<sup>88</sup> Ward considers that Stephen also doubted “government’s ability to engineer good race relations”, an attitude that tipped into “dangerous defeatism” since it not only “underestimated the Maoris’ own capacity for resistance to settler pressures” but also inhibited the British government from giving Maori a share in the government of the country for fear of settler backlash.<sup>89</sup> Behind this, too, Ward finds a view that Maori were not “competent to assume the co-equal responsibilities with settlers ..., not, at least, without a period of tutelage”.<sup>90</sup> This inability to embrace any formal sharing of political power was the “earliest, and gravest, weakness of official policy in New Zealand”.<sup>91</sup>

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<sup>85</sup> Ward *An Unsettled History*, above n 23, 17.

<sup>86</sup> Ward *A Show of Justice*, above n 21, 38.

<sup>87</sup> Ibid 33.

<sup>88</sup> Ward “Law and Law-enforcement”, above n 81, 129.

<sup>89</sup> Ward *A Show of Justice*, above n 21, 37; Ward “Law and Law-enforcement”, above n 81, 129.

<sup>90</sup> Ward “Law and Law-enforcement”, above n 81, 130.

<sup>91</sup> Ibid 131. It should be noted that Ward is of the view that the amalgamation policy was “the correct one, given the state of knowledge at the time, and compared to the alternative strategy of trying to preserve Maori communities in separate enclaves”. He considers that it was the execution of the policy which was faulty. Ward *An Unsettled History*, above n 23, 17. See also Ward “Land and Law”, above n 24, 125. It seems that in his later writing Ward may have shifted away from the “rapid assimilation” thesis, as is perhaps suggested by his description of the Treaty as “a solemn compact between Maori chiefs (rangatira) and the British Crown to

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Peter Adams, in his close study of British government policy-making from 1830 to 1847, argues in similar vein to Ian Wards that historians had taken the Instructions too much at face value. This had “led to a historical over-emphasis of humanitarianism as a motive in the annexation of New Zealand”.<sup>92</sup> Adams does not dispute that “a humanitarian desire to protect the Maoris from the impact of the expanding European frontier in the antipodes was one of the major reasons why the Colonial Office reluctantly accepted that Britain should intervene in New Zealand”,<sup>93</sup> but he identifies a second reason for intervention: the acceptance of a duty to act “arising out of the legal bond between subject and State, to control and protect British subjects who had chosen to go to New Zealand”.<sup>94</sup> If the Instructions (and antecedent drafts) give the impression that the main aim of British intervention was to protect Maori from the settlers, Adams also points to other statements of policy through which run the “thread” of the aim to protect British subjects settled in New Zealand.<sup>95</sup> This “dual duty”, to protect Maori and British subjects, was also an “equal” one: no priority was to be given either Maori or settler interests:<sup>96</sup>

Though the humanitarian desire to protect the Maoris stands out more clearly in the historical introduction and general tenor of Normanby’s final instructions to Hobson, the other part of the dual duty, the protection of the settlers and their interests, remained an equally important aim of British intervention in New Zealand.

Adams further argues, here implicitly disagreeing with Sinclair, that:<sup>97</sup>

Even the most ardent humanitarians, of whom Dandeson Coates<sup>98</sup> of the Church Missionary Society was the chief representative, did not intend British intervention to benefit the Maoris at the expense of the settlers. Insofar as he regarded the protection of the Maoris as a priority, it was because of their exploited position in the frontier situation

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build a nation by their joint endeavours”. See Ward *National Overview*, above n 24, vol 1, 115 & vol 2, 457-458; and Ward *An Unsettled History*, above n 23, 7.

<sup>92</sup> Adams *Fatal Necessity*, above n 3, 239.

<sup>93</sup> Ibid 165.

<sup>94</sup> Ibid 13.

<sup>95</sup> Ibid 165-166.

<sup>96</sup> Ibid 166.

<sup>97</sup> Ibid 170-171.

<sup>98</sup> For the role of Coates, see Chapter 8.

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of 1839. When the imbalance had been eliminated by the introduction of British laws to control criminals, Maoris and settlers would receive the same treatment and the same protection. The annexation, although explained to the Maoris as resulting mainly from the duty to protect them, was in reality intended to put both races on an equal footing and then govern impartially between them. The dual duty rationale contained both imperialistic and humanitarian motives for intervention within a promise of equality and impartiality in the future government of the two races.

Adams considers that the “historical over-emphasis of humanitarianism as a motive in the annexation of New Zealand” resulted from failure to understand that “[t]here was in fact a difference between what Hobson was instructed to tell the Maoris and what the Colonial Office actually meant”.<sup>99</sup> His Instructions were a “working document”, principally designed to tell him how to sell the cession of sovereignty to Maori. They “[n]aturally” put the most favourable gloss on British motivations.<sup>100</sup> Adams takes the view that this was not so much deliberate deception as varying the message according to the audience.<sup>101</sup>

Hobson was told to explain to the chiefs that Britain was intervening ‘especially’ on their behalf because there was no other way to protect them. The Colonial Office meant that Britain was intervening partly to protect the Maoris, but also to protect the British settlers in New Zealand and the interests they had created. Hobson was not directed to emphasize this, nor to explain the Government’s new willingness to promote the systematic colonization of New Zealand. The Maoris were to be told only half the story.

The “truth of the matter” was that the Treaty “was intended to protect the Maoris only insofar as their rights were compatible with British dominance”.<sup>102</sup> This purpose, Adams suggests, is evident in the pre-emption clause in the Treaty which aimed, “not to protect the Maoris from land speculators, but to finance systematic colonization by government profits on land bought from the Maoris”.<sup>103</sup> He considers that the Colonial Office later “regretted” that the land guarantee in article

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<sup>99</sup> Adams *Fatal Necessity*, above n 3, 166.

<sup>100</sup> Ibid 167.

<sup>101</sup> Ibid 166.

<sup>102</sup> Ibid 15.

<sup>103</sup> Ibid 14.

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2 of the Treaty had not been confined to land occupied and cultivated by Maori.<sup>104</sup> (Adams's views about pre-emption and Maori property are further discussed in this chapter in relation to article 2.)

While Adams acknowledges that the “promise of equality and impartiality in the future government of the races” was “a highpoint of early Victorian humanitarian idealism in one sense”, he takes the view that its fulfilment “ultimately depended upon their becoming brown Englishmen, and amalgamation meant simply the submergence of the Maori into the European”.<sup>105</sup> While many British officials believed that assimilation “should be quite gradual, and that the Maoris’ transition from their own customs and usages to those of British law and society should be eased as much as possible”,<sup>106</sup> the difference with those who favoured rapid assimilation was “more one of timing and manner than of substance. The ultimate goal was the same”.<sup>107</sup>

Being equal meant being British. Assimilation implied the protection of all under the same institutions and the same law.

Like Ian Wards, Adams sees the humanitarian motives for intervention being eclipsed as the Instructions went through various drafts and as the leadership of the Colonial Office changed in early 1839. A policy of “no colonization” while Baron Glenelg was Secretary of State for the Colonies gave way to a scheme for systematic colonisation where the profits on land sales would be used to promote further emigration under Normanby. This was a “momentous though unobtrusive change in Colonial Office attitudes to colonizing New Zealand”.<sup>108</sup>

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<sup>104</sup> Ibid.

<sup>105</sup> Ibid 245.

<sup>106</sup> Ibid 230.

<sup>107</sup> Ibid 226 & 213.

<sup>108</sup> Ibid 196.

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Claudia Orange expresses many of the same views as Wards, Ward and Adams. Like them, she identifies a marked change in Colonial Office thinking about New Zealand over the period 1838–39. Of the Instructions she writes:<sup>109</sup>

These instructions reveal a significant shift in Colonial Office thinking. The early plans for a British colony envisaged a Maori New Zealand in which settlers would somehow be accommodated. By the time Hobson got his final instructions in August 1839, however, the plan was for a settler New Zealand in which the Maori people would have a special ‘protected’ position.

Like Ward, Orange regards this shift as reflecting “a fatalistic or defeatist acceptance of the inevitable”:<sup>110</sup>

The tide of British colonisation could not be held back forever, the Maori world was changing and the initiative would pass by right to the British.

In one place Orange writes that the Colonial Office, in “contemplating ... a settler New Zealand in which a place had to be kept for the Maori”, was “not striking a balance between Maori and settler interests”;<sup>111</sup> in another that “[t]he protection of Maori alongside settler interests was an attempt to reconcile what had previously been seen as irreconcilable”.<sup>112</sup> Orange follows Adams in finding that British intervention occurred because the government accepted a dual duty to protect both settlers and Maori. But she differs from him in declaring that the duty recognised towards British subjects was not to the mixed bag of roughly 2,000 settlers already

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<sup>109</sup> Claudia Orange *An Illustrated History of the Treaty of Waitangi* (Bridget Williams Books, Wellington, 2004) [“Orange *Illustrated History of the Treaty*”] 19. Compare Orange *The Treaty of Waitangi*, above n 23, 31 (“No longer were they considering a Maori New Zealand in which a place had to be found for British intruders, but a settler New Zealand in which a place had to be found for the Maori”); and Claudia Orange “The Maori People and the British Crown (1769–1840)” in Keith Sinclair (ed) *The Oxford Illustrated History of New Zealand* (Oxford University Press, Oxford, 1990) [“Orange ‘Maori and the Crown’”] 43. See also Bassett “The Pakeha Invasion”, above n 23, 43: “The decisive factor in the despatch of Hobson was the unstoppable tide of emigration. His brief was to impose some order upon what was about to become a settler colony. Maori rights would be upheld if possible ... but they had been relegated to second place. The British government’s primary intention in 1840 was to secure New Zealand for orderly settlement”.

<sup>110</sup> Orange *The Treaty of Waitangi*, above n 23, 27.

<sup>111</sup> Orange “Maori and the Crown”, above n 109, 43.

<sup>112</sup> Orange *Illustrated History of the Treaty*, above n 109, 19.

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in New Zealand but to “the thousands of expected emigrants”.<sup>113</sup> Like Adams, Orange counsels that “the official insistence [in the Instructions] on the upholding of Maori rights is deceptive”; and her elaboration of this point is reminiscent of Ward:<sup>114</sup>

Hobson’s instructions did not provide for the incorporation of Maori within the colony’s administrative structure nor allow for the development of Maori government of any sort—options which had come before the government earlier. It was as if the perception of Maori capacity in this respect had diminished as the government moved towards accepting that New Zealand was destined to be a British settler colony.

Additionally, the British goal of “protecting” Maori from the worst effects of European contact

was not intended to preserve traditional Maori society but ultimately to destroy it and to amalgamate Maori with the settler community. The treaty laid the basis for this amalgamation.<sup>115</sup>

Orange gives three reasons why Britain proceeded to acquire sovereignty by treaty, and in so doing makes clear her view that humanitarian concerns were not the primary reason for British intervention in New Zealand. The first reason for the Treaty, to which the humanitarian concern was “subordinate”, was to achieve an unassailable basis for a declaration of British sovereignty over New Zealand.<sup>116</sup> Although the second reason was humanitarian concern for Maori, such motive was expedient also if the co-operation of Maori and the missionaries for the acquisition of sovereignty (the first reason) was to be obtained.<sup>117</sup> The third reason given by

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<sup>113</sup> Orange “Maori and the Crown”, above n 109, 43. See also Orange *The Treaty of Waitangi*, above n 23, 31 (“Decisions had been based as much upon the expectation of a rapid growth in British settlement and its effects on the Maori as upon the current situation”); and Ward *National Overview*, above n 24, vol 2, 63 (“The Crown ... saw itself as having a dual obligation—to protect Maori and to regulate colonisation in the interest of genuine settlers who would invest capital and labour and develop the country”).

<sup>114</sup> Orange *The Treaty of Waitangi*, above n 23, 31.

<sup>115</sup> Ibid 2.

<sup>116</sup> Ibid 32.

<sup>117</sup> Ibid.

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Orange reflects similar expediency: the Treaty responded to the need “to secure Maori co-operation as a basis for peaceful European settlement”.<sup>118</sup>

These views lead Orange to argue, like Adams, that the Treaty of Waitangi, and how it was explained to Maori, misrepresented how the British saw the future of New Zealand.<sup>119</sup>

The treaty was presented in a manner calculated to secure Maori agreement. The transfer of power to the Crown was thus played down. Maori suspicions were lulled by official recognition of Maori independence, by a confirmation of a degree of that independence under British sovereignty, and by the extension of Crown protection and other rights. Maori were told that the Crown needed their agreement in order to establish effective law and order—primarily for controlling Europeans, or Pakeha as they were called. Finally, the benefits to be gained from the treaty were stressed, rather than the restrictions that would inevitably flow.

Richard Hill’s contribution to the *New Oxford History of New Zealand* (2009) attacks the view of “wishful thinking” historians that British intervention in New Zealand in 1839–40 by way of the Treaty was an idealistic new beginning in British imperial practice—“an experiment in ‘humanitarian exceptionalism’”.<sup>120</sup> Britain secured New Zealand for the usual imperial reasons and as an “occupying power”.<sup>121</sup>

The purpose of colonising New Zealand was to procure Maori land and other resources, for the benefit of settler capital, with indigenous minds and bodies subjugated in the process. Maori wishes and desires were not unimportant, but were secondary and needed to fit within the settler colony paradigm.

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<sup>118</sup> Ibid 2.

<sup>119</sup> Ibid 33. See also ibid 91: “For British officials [who took copies of the Treaty around New Zealand for signature] ... the humanitarian element ... was merely part of the business of securing sovereignty. Certainly there was a desire to deal more fairly with the Maori, to improve on the record of British settlement, but tact, flattery, guile, bluff and a dash of subterfuge were all part of the diplomatic equipment.”

<sup>120</sup> Richard Hill “Maori and State Policy” in Giselle Byrnes (ed) *The New Oxford History of New Zealand* (Oxford University Press, South Melbourne, 2009) 513-536 [“Hill ‘Maori and State Policy’”] at 513.

<sup>121</sup> Ibid 514.

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A treaty “disguising the full realities of imperial intentions” was simply “the easiest and cheapest way of gaining a new colony”. The “apparently generous terms of the Treaty” were “not as uncommon in imperial settings as scholars and mythmakers have frequently believed” and were “essentially a matter of expediency” in a country destined for British settlement where Maori “had already proven their capacity to both resist and fight”. With this background, it was no surprise that “as soon as the colonising power was in a position to impose its will, it would do so”.<sup>122</sup>

Assimilation was never in doubt both because of “cultural and scientific assumptions about the ‘inferiority’ of native peoples” and because it was assumed that Maori would want to assimilate when they appreciated the benefits of European civilisation. In these circumstances, “anything indigenous could only be, in the scheme of things, impermanent”. Maori institutions were to be preserved only as “temporary measures, pending the emergence of ‘substantive sovereignty’ and the ‘amalgamation’ that would accompany it”.<sup>123</sup>

While never in any doubt that it held indivisible sovereignty, the Crown at first had limited coercive resources at its disposal. It generally, therefore, had no choice but to tolerate Maori governing their own affairs through their own institutions and customs.

However “the Crown did not envisage any ultimate outcome that included Maori customs and lifestyles”. “Amalgamation” would be “on Crown terms” and “meant, in the final analysis, full assimilation”.<sup>124</sup>

### **Was the Treaty unique?**

As has already been indicated, legal scholarship has undermined any earlier complacency that the Treaty was unprecedented in British imperial history. Tom

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<sup>122</sup> Ibid 515. See also Tony Ballantyne “The State, Politics and Power, 1769–1893” in Giselle Byrnes (ed) *The New Oxford History of New Zealand* (Oxford University Press, South Melbourne, 2009) 99-124 [“Ballantyne ‘The State, Politics and Power’”] at 104-105.

<sup>123</sup> Hill “Maori and State Policy”, above n 120, 516-517.

<sup>124</sup> Ibid 516.

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Bennion and Kenneth Keith have written that the Treaty has parallels in other treaties of the time with native rulers, particularly in Africa. They give as a “typical” example an 1825 agreement between Britain and Sherbro and Ya Comba (Sierra Leone). Like the Treaty of Waitangi, it involved the King of Sherbro and the Queen of Ya Comba ceding sovereignty in exchange for a promise of British protection, the grant of “the rights and privileges of British subjects”, and a guarantee of property rights for the King, Queen, and other native inhabitants. Bennion and Keith point out that not only the subject-matter but also the language of this agreement is very close to the Treaty of Waitangi: “the rights and privileges of British subjects” is a phrase common to both, and the guarantee in the Sierra Leone agreement of “the full, free, and undisturbed possession and enjoyment of the lands they now hold and occupy” is strikingly similar to that of “the full exclusive and undisturbed possession of their Lands ... which they may collectively or individually possess” in the Treaty of Waitangi.<sup>125</sup>

Keith makes the further related point that the Treaty “can be seen as having an almost inevitable general form and content”.<sup>126</sup>

[C]ession and extension of sovereignty (in article 1) has to be matched by the extension to the inhabitants of the new part of the Empire of British subject status (article 3); and, in accordance with colonial practice, *ius gentium* [the law of nations] and treaty practice, aboriginal title and rights would be recognised (article 2) ... .

The interests of native societies, as Keith explains, had been recognised in writings on the law of nations since the sixteenth century. Their protection, including through treaties, became accepted imperial practice.<sup>127</sup> Native interests were recognised by the common law too, the clearest statements being the United States

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<sup>125</sup> Tom Bennion “Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi” (2004) 35 Victoria University of Wellington Law Review 165-205 [“Bennion ‘Treaty-Making’”] at 201 (the paper was originally written in 1987 as part of an LLM course); Kenneth Keith “The Treaty of Waitangi in the Courts” (1990-1991) 14:1 New Zealand Universities Law Review 37-61 [“Keith ‘The Treaty of Waitangi’”] at 39.

<sup>126</sup> Keith “The Treaty of Waitangi”, above n 125, 40.

<sup>127</sup> This point is developed in the text accompanying n 234 below and in Chapter 3, text accompanying ns 3-10.

Indian rights cases of the early to mid-nineteenth century.<sup>128</sup> Here Keith's work connects with that of writers such as John Hookey, Frederika Hackshaw, Paul McHugh and others who have followed them.<sup>129</sup> They find the guarantee of property in article 2 of the Treaty to have been declaratory of common law rules that would have applied from the moment Britain assumed sovereignty in any event. This scholarship on aboriginal title at common law and as it may have been reflected in the Treaty is further discussed below.

Historians have picked up on this legal scholarship, revising earlier views of the Treaty's uniqueness in British imperial history but without revisiting the historical record of British policy development in the manner of Wards, Ward, Adams and Orange.<sup>130</sup> So, as has been seen, Richard Hill has referred to the Treaty's guarantees to Maori as "not as uncommon ... as scholars and mythmakers have frequently believed".<sup>131</sup> Another example is the work of Keith Sorrenson. He has argued from Keith's, Bennion's and McHugh's work that the Treaty was not "a

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<sup>128</sup> Ibid 39.

<sup>129</sup> John Hookey "*Milirrpum* and the Maoris: The Significance of the Maori Lands Cases Outside New Zealand" (1973-1976) 3 Otago Law Review 63-75; Frederika Hackshaw "Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi" in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 92-120 ["Hackshaw 'Aboriginal Title'"]; Paul McHugh "Aboriginal Title in the New Zealand Courts" (1984) 2 Canterbury Law Review 235-265 ["McHugh 'Aboriginal Title'"]; Paul McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) ["McHugh *The Maori Magna Carta*"].

<sup>130</sup> In addition to the views of Keith Sorrenson discussed below, see Dalziel "Southern Islands", above n 23, 579; Vincent O'Malley "Treaty-Making in Early Colonial New Zealand" (1999) 33:2 New Zealand Journal of History 137-154 at 137; David Williams "Te Tiriti o Waitangi—Unique Relationship Between Crown and Tangata Whenua?" in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 64-91 ["David Williams 'Unique Relationship?'"]; Belgrave "Pre-emption", above n 24, 23-24; Renwick "A Variation of a Theme", above n 29, 207; Miles Fairburn "Is there a Good Case for New Zealand Exceptionalism?" in Tony Ballantyne & Brian Moloughney (eds) *Disputed Histories: Imagining New Zealand's Pasts* (Otago University Press, Dunedin, 2006) 143-167 at 145; Ballantyne "The State, Politics and Power", above n 122, 104.

<sup>131</sup> See text accompanying n 122 above. See also Giselle Byrnes "Introduction: Reframing New Zealand History" in Giselle Byrnes (ed) *The New Oxford History of New Zealand* (Oxford University Press, South Melbourne, 2009) 1-18 at 1 ("this book questions the notion that New Zealand history is unique, distinct and even exceptional ..."); and Vincent O'Malley *The Meeting Place: Maori and Pakeha Encounters, 1642–1840* (Auckland University Press, Auckland, 2012) vii ("The supposed exceptionalism of much of New Zealand history can sometimes seem like a self-fulfilling prophecy. Everything looks unique if you fail to search for parallels elsewhere").

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unique development in British colonial policy, the result of a recent bout of humanitarian conscience” but rather “an expression of a much older colonial policy that had been applied in various parts of the British empire”.<sup>132</sup>

[T]here is very little in the Treaty, at least in its English text, that had not already been expressed in earlier treaties or statements of British colonial policy. The only thing about Waitangi that was unusual was its Maori text ...

Sorrenson refers to the British-Sherbro/Ya Comba agreement of 1825 as the “most interesting” of “several other West African agreements or treaties, using the same language [as the Treaty of Waitangi]”. He writes that:<sup>133</sup>

We have here, I think, what one might call a treaty language that was in fairly widespread use, ready to be applied wherever a crisis on one of the frontiers of empire needed to be resolved by the last resort of a treaty of cession. There is no need to attribute the expressive terms of the Treaty of Waitangi to Busby’s verbosity.

Sorrenson is “tempt[ed] ... to conclude” that Hobson and Busby had a copy of the Sierra Leone agreement with them at Waitangi, but contents himself with the possibility that they merely “knew of it, or similar agreements, since both had been briefed at the Colonial Office not long before the Treaty was drawn up”.<sup>134</sup> (The last statement is incorrect in relation to Busby, who was last in London in 1832).

Sorrenson also finds, building on McHugh, that article 2 of the Treaty conformed to long-established British North America policy (as seen, for example, in the Royal Proclamation of 1763<sup>135</sup>) and to common law principles as explained in the United States Supreme Court case of *Johnson v M’Intosh* (1823), in relation to the right of pre-emption and indigenous property in land.<sup>136</sup> (It appears that Sorrenson regards the Treaty’s conformity with these principles as a matter of policy

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<sup>132</sup> Sorrenson “Precedents for Waitangi”, above n 15, 15-16.

<sup>133</sup> Ibid 17. Sorrenson also writes: “The West African societies at this time were, like Maori society, essentially small-scale tribal societies with chiefly rulers ... . Accordingly, it is instructive to look at treaties concluded with some of these rulers in the years leading up to Waitangi.” Ibid 16.

<sup>134</sup> Ibid 17.

<sup>135</sup> See Chapter 5, text accompanying ns 24-26.

<sup>136</sup> Sorrenson “Precedents for Waitangi”, above n 15, 20-22.

preference adopted as a matter of choice rather than through automatic application of legal doctrine, although this position is not spelt out.) Sorrenson writes that *Johnson v M'Intosh* “was well known in British legal circles around the time of Waitangi” and refers to its application by the New Zealand Supreme Court in the 1847 case of *R v Symonds*.<sup>137</sup> He draws on Busby’s writings from the late 1850s and early 1860s to suggest that, in 1840, he was familiar not only in general with North American precedent about an exclusive Crown right of pre-emption of Indian land but also specifically with *Johnson v M'Intosh*.<sup>138</sup> And he says that “Hobson was also familiar with North American precedents since he had been elaborately briefed on them in London and in Sydney (by Gipps) before he came to New Zealand”.<sup>139</sup>

Sorrenson suggests that it would be misleading to judge the Treaty as novel because of comparisons with Australia where no treaty was signed and aboriginal property was not protected. The Australian situation was atypical.<sup>140</sup> Even there, however, Sorrenson points to indications of reconnection with the older British North American Indian policy in developments such as the letters patent establishing the province of South Australia in 1836 which permitted “waste and unoccupied” lands to be granted for settlement subject to “the rights of any Aboriginal Natives ... to the actual occupation or enjoyment ... of any Lands ... now actually occupied or enjoyed”.<sup>141</sup> Sorrenson considers that this new recognition of aboriginal interests was a change in British policy principally attributable to the influence of James Stephen, and that it was more successfully carried over into shaping policy towards New Zealand as reflected in the Treaty.<sup>142</sup> Sorrenson’s conclusion in relation to the English text of the Treaty is that

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<sup>137</sup> Ibid 22.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid 22-23, citing Paul McHugh “The Aboriginal Rights of the New Zealand Maori at Common Law” (DPhil thesis, Cambridge University, 1987) 228.

<sup>140</sup> Ibid 23.

<sup>141</sup> See Chapter 5, n 60.

<sup>142</sup> Ibid 23-28.

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the experience of belatedly attempting to protect Aboriginal rights in Australia was linked to the recent West African policy of negotiating sovereignty with local chiefs and a much older North American policy of imposing pre-emption to stop private dealings of the colonists with the natives. ... The recent Report of the Aborigines Committee may have lent some urgency to the attempt to protect Aboriginal and Maori rights, and some of its sentiments entered into policy, even the preamble of the Treaty of Waitangi, but the three articles of the Treaty are deeply embedded in an older colonial policy, drawn from various corners of the empire. They were cobbled together as a typically pragmatic response by the Colonial Office to yet another crisis on a far-flung imperial frontier.

It is of course true that Busby “wrote” the Treaty, on the basis of notes provided by Hobson and Freeman. But the gist of it is there in Normanby’s Instructions and in their briefings in the Colonial Office. So they wrote the English text in the treaty language of their day, adding very little that had not been spelled out in previous treaties, most notably the British-Sherbro agreement of 1825.<sup>143</sup>

### The problem of the two texts of the Treaty

One of the consequences of Ruth Ross’s seminal 1972 *New Zealand Journal of History* article on the two texts of the Treaty would seem to have been to switch historians’ attention from British motivation for intervening in New Zealand by way of treaty to Maori understanding of the Treaty. This represents a shift in concentration from policy development in London to events on the ground in New Zealand, and from Normanby’s Instructions to Hobson to the Maori text of the Treaty.<sup>144</sup> More recently, the work of the Waitangi Tribunal has also contributed to this development.<sup>145</sup> Maori understanding of the Maori text is set against the assumed plain language meaning of the English text. The English text is not contextualized by asking what it meant to its framers or what the contemporary British meanings of terms used in it were. Instead, the scholarship is dominated by

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<sup>143</sup> Ibid 28-29.

<sup>144</sup> See Belgrave “Pre-emption”, above n 27, 23-24; and Rachael Bell “‘Texts and Translations’: Ruth Ross and the Treaty of Waitangi” (2009) 43:1 *New Zealand Journal of History* 39-58 [“Bell ‘Ruth Ross and the Treaty’”] at 39 (“By insisting that the text in Maori was the Treaty of Waitangi, [Ross’s article] moved scholarly focus from the Colonial Office, which had dominated earlier studies, and asked instead what the Treaty had meant here, in New Zealand”).

<sup>145</sup> See McHugh “New Zealand’s Constitutional History” as quoted in n 4.

linguistic analysis of the Maori text, and the use of the English text as a reference against which the Maori text is to be compared.

Ross considered that the Maori text (Te Tiriti o Waitangi) must be treated as the authoritative text not only because it was the text signed by most Maori but also because she was of the view that the uncertainties about the shape of the final English draft were intractable.<sup>146</sup> Although she recognised that “[a]ny attempt to interpret the provisions of the Treaty of Waitangi, or to understand what the signatories, both Hobson and the New Zealanders, thought it meant, must review the circumstances in which the agreement was drawn up, taking into account all the relevant texts”,<sup>147</sup> Ross’s essay did not attempt to locate the meaning of the Treaty in the understandings of Hobson, Busby and its other framers. Except in the matter of the pre-emption clause, the essay had almost nothing to say about the English text, concentrating instead on the Maori.

Ross argued that the coined missionary word “kawanatanga” (derived from “kawana” or “governor”) was inadequate to translate the word “sovereignty” in article 1 of the Treaty. She referred to two later Maori translations of the English text in which “sovereignty” was translated using the word “mana” (“prestige” or

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<sup>146</sup> Ross “Texts and Translations”, above n 2. See Chapter 1, text accompanying ns 29-35. Ross explained her approach most clearly in an earlier version of the same essay:

The aim of this paper is to try to explain what the Treaty of Waitangi was, how it was drawn up, what at the time it was thought to mean, who signed it, who opposed it and why.

It has always seemed to me that one must accept the Maori text as the Treaty of Waitangi. This was the text of the agreement signed by Hobson and the chiefs at Waitangi on 6 February 1840 and subsequently assented to by 460 others, over a period of seven months. Therefore any discussion of the terms of the Treaty of Waitangi must surely hinge on the meaning of this Maori text.

To lawyers and academic historians this may seem a simplistic, maybe even a wayward approach. I am neither a lawyer, nor an academic historian. Nor do I speak or read Maori. But I have spent a fair amount of time looking at the Treaty of Waitangi, with Williams Maori Dictionary at one elbow and a Maori New Testament (the 1837 CMS text) at the other.

Ruth Ross “The Treaty on the Ground” in *The Treaty: Its Origins and Significance* (Wellington, 1972) 16-34 at 16. See also Bell “Ruth Ross and the Treaty”, above n 144, 44-45. As to Ross’s claim not to have been an “academic historian”, Rachael Bell refers to Keith Sinclair’s opinion that she was the “sternest perfectionist in New Zealand”. Bell’s own view is that Ross was “[m]ethodical, analytical, relentless in her pursuit of detail and accuracy”. Ibid 40.

<sup>147</sup> Ross “Texts and Translations”, above n 2, 130.

“authority”) in association, in one text, with the word “rangatira” (“chief”) and, in the other, with the word “rangatiratanga” (“chieftainship”). In neither was “kawanatanga” used to describe the sovereignty ceded by article 1.<sup>148</sup> Ross argued that only if “mana” had been associated with “kawanatanga” in the translation, as there was existing scriptural precedent for doing (or with “kingitanga”, or “kingship”, as had been done in the Declaration of Independence to express “all sovereign power and authorities within the territories of the United Tribes”), would the full implications of the transfer of sovereignty to the British Crown have been conveyed to Maori.<sup>149</sup> “Had Williams applied this scriptural precedent and associated *mana* with *kawanatanga* in the translation of sovereignty, no New Zealander would have been in any doubt about what the chiefs were ceding to the Queen.”<sup>150</sup> (Ross did not discuss what that “sovereignty” was beyond its being “territorial sovereignty”.<sup>151</sup>) In Ross’s view the use of “kawanatanga” in preference to “mana” could not have been other than a deliberate mistranslation by Henry Williams: “It is difficult not to conclude that the omission of *mana* from the text of the Treaty of Waitangi was no accidental oversight.”<sup>152</sup>

The mischief was compounded by the translation of article 2. “[T]e tino rangatiratanga” guaranteed “more than possession of their own lands”, which seemed to be Ross’s view of what the English text protected.<sup>153</sup> “Rangatiratanga” was in fact the word used in the Declaration of Independence to describe that independence. “Was it ‘independence’ which the Queen guaranteed to the chiefs, to the tribes, to all the people of New Zealand in 1840?” she asked.<sup>154</sup> Ross also considered that the translation of the pre-emption clause was inadequate to convey that the right of pre-emption acquired by the Crown was the exclusive right to

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<sup>148</sup> Ibid 140.

<sup>149</sup> Ibid 139-141.

<sup>150</sup> Ibid 141.

<sup>151</sup> Ibid 139.

<sup>152</sup> Ibid 141. Ross, *ibid* 139, did accept that the words “ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu te Kawanatanga katoa o o ratou w[h]enua” were adequate to convey “[t]he idea of giving up forever”. See also Orange *The Treaty of Waitangi*, above n 23, 40 and Salmond “Brief of Evidence, Wai 1040”, above n 8, 18.

<sup>153</sup> Ibid 143.

<sup>154</sup> Ibid 142-143.

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purchase land from Maori, rather than merely a right of first offer.<sup>155</sup> She did not, however, suggest that the translation of article 3 had been defective.<sup>156</sup>

Most subsequent scholarship on the Treaty reprises Ross's arguments about the English and Maori texts not reconciling other than in the translation of article 3.<sup>157</sup> Some typical conclusions about the translation of articles 1 and 2 are:

Ceding governorship [*kawanatanga*] is not the same as ceding sovereignty.<sup>158</sup>

[I]t is clear that the treaty text, in using *kawanatanga* and *rangatiratanga*, did not spell out the implications of British annexation.<sup>159</sup>

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<sup>155</sup> Ibid 145-148. Ross's view was, however, that the translation was accurate of the English draft, which itself did not make clear that the right of pre-emption was a monopoly right of purchase in the Crown rather than merely a right of first offer.

<sup>156</sup> Ibid 152-153. As Rachael Bell shows, Ross's essay picked up nineteenth century understandings of the English and Maori texts (including that they were not identical) and early twentieth century scholarship which tentatively pointed in the direction she later took and built on in her research. See Bell "Ruth Ross and the Treaty", above n 144, 41-45.

<sup>157</sup> See Ward *A Show of Justice*, above n 21, 44; Adams *Fatal Necessity*, above n 3, 164; JMR Owens "New Zealand Before Annexation" in WH Oliver (ed) *The Oxford History of New Zealand* (Oxford University Press, Wellington, 1981) 28-53 at 52; Owens "New Zealand Before Annexation" (2nd ed, 1992), above n 23, 51-52; McKenzie *Oral Culture*, above n 7, 41-43; James Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Penguin Books, Auckland, 1988) ["Belich *New Zealand Wars*"] 20-21; Orange *The Treaty of Waitangi*, above n 23, 40-43 (although Orange differs from Ross in considering that the word "mana" alone would not have been a helpful translation of "sovereignty"); Orange "Maori and the Crown", above n 109, 43; Orange *Illustrated History of the Treaty*, above n 109, 24-26, 39-41 & 44-45; FM Brookfield "The New Zealand Constitution: the Search for Legitimacy" in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 1-24 ["Brookfield 'Search for Legitimacy'"] at 4-5; David Williams "Unique Relationship?", above n 130, 78-80; Ranginui Walker "The Treaty of Waitangi as the Focus of Maori Protest" in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 263-279 ["Walker 'Focus of Maori Protest'"] at 263-265; Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin Books, Auckland, 1990) 90-94; Bruce Biggs "Humpty-Dumpty and the Treaty of Waitangi" in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 300-312 ["Biggs 'Humpty-Dumpty'"]; Salmond "Brief of Evidence, Wai 1040", above n 8, 10-28 & 84-89; McHugh *The Maori Magna Carta*, above n 129, 3-4; Martin "Busby and the Treaty", above n 17, 11; Easton "Was There a Treaty of Waitangi?", above n 10, 21-22 & 25; Paul Moon & Sabine Fenton "Bound into a Fateful Union: Henry Williams' Translation of the Treaty of Waitangi into Maori in February 1840" (2002) 111:1 *Journal of the Polynesian Society* 51-63 ["Moon and Fenton 'Fateful Union'"] at 51 & 57-59; Tony Ballantyne "Christianity, Colonialism and Cross-cultural Communication" in Tony Ballantyne *Webs of Empire: Locating New Zealand's Colonial Past* (Bridget Williams Books, Wellington, 2012) 137-158 at 151; Hill "Maori and State Policy", above n 120, 514.

<sup>158</sup> Walker "Focus of Maori Protest", above n 157, 264.

<sup>159</sup> Orange *The Treaty of Waitangi*, above n 23, 42.

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By choosing not to use either *mana* or *rangatiratanga* [in article 1] to indicate what the Maori would exchange for “all the Rights and Privileges of British subjects” [article 3], Williams muted the sense, plain in English, of the treaty as a document of political appropriation.<sup>160</sup>

The Maori text predicates a sharing of power and authority in the governance of the country between Crown and Maori. The English text is about a transfer of power, leaving the Crown as sovereign and Maori as subjects.<sup>161</sup>

The inclusion of *mana* would have conveyed the idea that very considerable powers of authority and control were being ceded, which is no doubt why it was left out. This omission, coupled with the confirmation to the chiefs of their *rangatiratanga*, or “chieftainship”, rendered the meaning of the Maori version of the article considerably less extensive than the English phrase “all the rights and powers of Sovereignty”.<sup>162</sup>

[I]t was the guarantee of te tino rangatiratanga (chieftainship) that was to lead to confusion, for Maori understood the word to mean far more than “possession”, as in the English text. In fact, it was a better approximation to sovereignty than kwanatanga. Although both words implied an exercise of power, authority and jurisdiction, rangatiratanga was of Maori derivation, with connotations of chiefly power that were familiar to Maori. Kwanatanga, on the other hand, derived from kawana (governor) and had associations with Pontius Pilate, Roman governor in the Bible, or with governors of New South Wales. It tended to imply authority in an abstract rather than a concrete sense.<sup>163</sup>

Ross’s view that the Maori text left unclear that the right of pre-emption in article 2 was to be a monopoly right of purchase and not merely a right of first offer has also been adopted.<sup>164</sup>

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<sup>160</sup> McKenzie *Oral Culture*, above n 7, 41.

<sup>161</sup> David Williams “Unique Relationship?”, above n 130, 79-80.

<sup>162</sup> Adams *Fatal Necessity*, above n 3, 164.

<sup>163</sup> Orange *The Treaty of Waitangi*, above n 23, 41.

<sup>164</sup> See, for example, Owens “New Zealand Before Annexation” (2nd ed, 1992), above n 23, 51-52; Adams *Fatal Necessity*, above n 3, 198-199; McKenzie *Oral Culture*, above n 7, 43; Orange *The Treaty of Waitangi*, above n 23, 42; David Williams “Unique Relationship?”, above n 130, 80; David Williams “*Te Kooti Tango Whenua*”: *The Native Land Court 1864–1909* (Huia Publishers, Wellington, 1999) [“David Williams *The Native Land Court*”] 105; Richard Boast *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008) [“Boast *Buying the Land, Selling the Land*”] 22-23; Salmond “Brief of Evidence, Wai 1040”, above n 8, 20.

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These differences between the English and Maori texts lead Sorrenson to say that, while the English draft is “deeply embedded in an older colonial policy, drawn from various corners of the empire” and contained “very little that had not been spelled out in previous treaties”, Henry Williams, in his “creative reworking” of it into a “saleable” Maori text, did create a “unique treaty”: “It is the Maori text that gives Waitangi its most distinctive quality. We in New Zealand have not yet come to terms with that.”<sup>165</sup>

In one of the closer studies of the Maori text and the pre-Treaty use of key terms found in it, Anne Salmond offers the opinion that the English and Maori texts of the Treaty are “two very different documents, with divergent histories and implications”.<sup>166</sup> In discussing the best translation equivalents in 1840 for the word “sovereignty” (the English meaning of which she takes from the 1825 edition of Blackstone’s *Commentaries* as “supreme, irresistible, absolute, uncontrolled authority”), Salmond identifies “mana”, “kingitanga” and the combination of the two (as used in the 1835 Declaration of Independence). As further possibilities she accepts “arikitanga” and “rangatiratanga”. She says that “[i]f Henry Williams had used any of these words, one might agree that his translation of ‘sovereignty’ into Maori was reasonable”. “Kawanatanga”, since it was used in “the official and missionary Maori of this period to refer to a lesser, delegated set of powers”, was “not an accurate or even a plausible translation equivalent for ‘sovereignty’”.<sup>167</sup>

The use of “rangatiratanga” in the second article of the Treaty suggested that “within their own domains, under the new relationship, the *rangatira*, *hapu* and people would retain autonomous control”.<sup>168</sup> Salmond expresses the opinion that “[o]verall, the relationship between the *rangatira* and the Crown described in Te

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<sup>165</sup> Sorrenson “Precedents for Waitangi”, above n 15, 29.

<sup>166</sup> Salmond “Brief of Evidence, Wai 1040”, above n 8, 1. This 2010 evidence to the Waitangi Tribunal’s Te Paparahi o Te Raki (Northland) Inquiry is a revised version of evidence originally given to the Tribunal in 1991 in its Muriwhenua Land Inquiry. Compare Anne Salmond “Treaty Transactions” (Brief of Evidence for the Waitangi Tribunal, Wai 45, 1991, F19).

<sup>167</sup> Salmond “Brief of Evidence, Wai 1040”, above n 8, 24-26.

<sup>168</sup> Ibid 19.

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Tiriti” (and reinforced by the explanations at Waitangi and other Treaty signings) “was one of a chiefly alliance, a balance of powers within largely autonomous spheres of action, with *ture* [European laws] and the Governor’s role as *kai-wakarite* [a mediator or judge in European-Maori disputes] probably applying to the interactions between them”.<sup>169</sup>

The Governor would not intervene within territories that were controlled and owned by Maori, nor interfere with “native laws and customs”, but rather, protect the *rangatira* and their people against unscrupulous, lawless whites.

Salmond expresses the view that the Maori text “indicate[d] that ‘kawanatanga’ would involve the introduction of *ture* (laws) and *tikanga* (customary rights) for Maori people exactly the same as those in England, with the Governor acting as *kai-wakarite* (mediator, adjudicator or negotiator)”.<sup>170</sup>

In Te Tiriti, however, it was not clear in which precise spheres *ture* and the *Kawana* as a *kai-wakarite* would be authorised to operate, and what would be the precise source of their authority. It seems likely from several references in Te Tiriti that *ture* and *kai-wakarite* would serve primarily to regulate individual Maori-European relationships and transactions (in trade or disputes, for instance); and that the source of their authority would be the alliance that had been forged between the *rangatira* and the Queen.<sup>171</sup>

Salmond is unusual, among scholars who have followed Ruth Ross in writing about the irreconcilability of the Maori and English texts of the Treaty, in providing a definition of “sovereignty” in the English text. Claudia Orange says only that “[t]he concept of sovereignty is sophisticated, involving the right to

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<sup>169</sup> Ibid 87.

<sup>170</sup> Ibid 28.

<sup>171</sup> See also Belich *Making Peoples*, above n 21, 200 (“the suggestion is that Maori saw the new governor’s authority as substantial and significant, but restricted to Pakeha”); Orange *The Treaty of Waitangi*, above n 23, 46 (“from the emphasis on protection, Maori might have expected that they were being offered an arrangement akin to a protectorate”) & 89; Orange “Maori and the Crown”, above n 109, 45 (“Maori authority might have to be shared, but it would be enhanced by British jurisdiction which would mainly apply to controlling troublesome Europeans. Hobson would merely be more effective than Busby”); McHugh *The Maori Magna Carta*, above n 129, 3-4 (quoting the opinion of Hugh Kawharu that the chiefs “would have believed they were retaining their rangatiratanga intact apart from a licence to kill or inflict material hurt on others, retaining all of their customary rights and duties as trustees for their tribal groups”).

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exercise a jurisdiction at international level as well as within national boundaries”.<sup>172</sup> She considered that “kawanatanga”, while implying “an exercise of power, authority and jurisdiction”,<sup>173</sup> had many shades of meaning and “was not likely to convey to Maori a precise definition of sovereignty”.<sup>174</sup> James Belich writes that “sovereignty” in article 1 of the English text meant “substantive sovereignty” (as opposed to “nominal sovereignty”). Such “substantive sovereignty” was “the actual dominion of a controlling power, whether a monarch or not, which exercises a decisive, though not necessarily absolute, influence over the whole of a country”. It included both “kawanatanga” (“Governor’s authority”) and “rangatiratanga” (“chiefly authority”).<sup>175</sup> Other scholars define “sovereignty” only by what it is not—namely the “mere” “kawanatanga” or “governorship” of the Maori text of the Treaty; or by what it was most like—“te tino rangatiratanga” (“the highest chieftainship”). What “kawanatanga” (or “governorship”) or “rangatiratanga” (or “chieftainship”) amounted to in 1840 is generally not explained either however.<sup>176</sup>

Andrew Sharp, like Salmond, provides an explanation of “sovereignty” in the English text (although he, too, uses “kawanatanga” and “rangatiratanga” as explanatory aids).<sup>177</sup> Like other writers, he considers that the English and Maori texts of the Treaty do not reconcile in the matter of sovereignty, kawanatanga and

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<sup>172</sup> Orange *The Treaty of Waitangi*, above n 23, 40.

<sup>173</sup> Ibid 41.

<sup>174</sup> Ibid 40. See also Orange *Illustrated History of the Treaty*, above n 109, 26: “[kawanatanga/governance or governorship] does not convey the many facets of sovereign power and authority”.

<sup>175</sup> Belich *New Zealand Wars*, above n 157, 21.

<sup>176</sup> See, for example: Brookfield “Search for Legitimacy”, above n 157, 14 (“In taking the *sovereignty* referred to in the English version of the Treaty, the British took more than *kawanatanga*—governance—of the Maori version”); Walker “Focus of Maori Protest”, above n 157, 264 (“Ceding governorship is not the same as ceding sovereignty. A governor is merely a satrap who rules on behalf of the sovereign”); and Moon & Fenton “Fateful Union”, above n 157, 58 (“*Rangatiratanga*—the power, rights and authority of the chief—was a sovereign power in its fullest sense. Thus, Williams’ translation ... promised to the Maori signatories the same sovereignty that they were supposedly ceding under the First Article of the English version to the Crown”).

<sup>177</sup> See also Samuel Carpenter “Te Wiremu, Te Puhipi, He Wakaputanga Me Te Tiriti: Henry Williams, James Busby, A Declaration and the Treaty” (report for the Waitangi Tribunal, Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, November 2009, A17) [“Carpenter ‘A Declaration and the Treaty’”] 32, 34-35 & 189.

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rangatiratanga. The meaning he assigns “sovereignty” in “1840 legal English” is quite possibly the sort of view held by other historians, such as Ross, without being made explicit by them.<sup>178</sup> Sharp writes that:<sup>179</sup>

[T]he English and Maori versions meant ... different things. To take an example: in 1840 legal English, “sovereignty” meant the absolute and indivisible power to legislate, judge, and interpret the law; the absolute power to administer it, and to back up its requirements by force; the sole power to engage in foreign relations and thus to appoint and control diplomats and force of arms. But in missionary Maori ... “kawanatanga” did *not* indicate the status of having full sovereign rights of government. It rather indicated the delegated and limited rights of, say, the Roman Pontius Pilate in Israel—or of Hobson were he to become Governor: rights in Hobson’s case delegated to him as much by the Maori as by his Queen. Such rights as he thus acquired would clearly not be those of a sovereign of a state or of a rangatira among his tribe. They would be limited—the Maori at Waitangi may well have thought—to keeping the peace by the use of force if necessary: to something like the derived *merum imperium* or *ius gladii* of the ancient Roman magistrate. Such peace-keeping activity they would have known about. Many Maori had travelled, for instance to New South Wales, and knew what governors were. Some had been the guests of governors and named their children after them. Many would have known what they were being offered because they had a concrete conception, derived from experience, of the kind of things governors did. But it is plainly impossible that they should have approached the abstract and magical conception of British legal sovereignty. To get near to it they would have had to have been told that sovereignty was like “mana”, “rangatiratanga”, and “kingitanga”—though impersonal, unlimited in its law-making scope and not obviously sacred. They would have had to have been told in the words of Thomas Hobbes, one of its greatest theorists, that the sovereign state was a “mortal God”: *Leviathan*, ruler of the proud, made by the proud to keep themselves in awe and to avoid *bellum omnes contra omnium*—the war of all against all.

### Why the differences between the two texts?

Those who conclude that articles 1 and 2 of the English draft and the Maori translation differ in the matter of ceded sovereignty and retained kawanatanga and

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<sup>178</sup> See McHugh “Lawyer’s Concept of Sovereignty”, above n 10, 170: “Historians, it seems to me, rely (understandably) upon the very vagueness of the concept of ‘sovereignty’, using it as shorthand for ‘supreme unaccountable power’”.

<sup>179</sup> Andrew Sharp *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s* (Oxford University Press, Oxford, 1990) 17-18.

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rangatiratanga are forced to consider whether Henry Williams deliberately mistranslated the Treaty to make it more acceptable to Maori by playing down the transfer of sovereignty.<sup>180</sup> Although some allowance is made for the difficulty of accurate translation,<sup>181</sup> most of the writers who believe that “sovereignty” would have been better translated as “rangatiratanga” (or “mana” or “kingitanga”) than “kawanatanga” conclude that Williams would have known that his translation did not convey the full implications of the transfer of sovereignty in article 1 of the English draft. Nevertheless many of the same writers seem anxious to acquit Williams of deliberate deceit.

Those writers who *do* find Williams guilty of intentionally playing down the implications of British sovereignty in his translation suggest a number of motivations, mostly benign. These include that Williams believed that British sovereignty was the only way to protect Maori from the interference of foreign powers in New Zealand, to bring law and order, to secure Maori in their land, and to promote Christianity and the work of the missions; and further that, to the extent that Maori would not agree to cede sovereignty if it were explained to them that they would be giving up their rangatiratanga, mana or kingitanga (which is what these writers consider should have been explained), then it was better for them that they were not told the full truth.<sup>182</sup> As Belich has written:<sup>183</sup>

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<sup>180</sup> Logically the same question should be asked of Busby, since he validated Williams’s translation and (unlike Hobson) could read and write Maori, but few historians do. Exceptions are: Martin “Busby and the Treaty”, above n 17, 11-12 (“it is hard to acquit Williams and Busby of deliberately sugaring the annexation pill by watering down the precise nature of the commitment”; “it is not impossible that James Busby connived at a laundered translation of the Treaty of Waitangi to smooth the process [of annexation and settlement]”); and Belich *Making Peoples*, above n 21, 194 (“It is possible that ‘rangatiratanga’ was an honest attempt to translate ‘ownership’. But it is more probable that it was a deliberate or semi-deliberate act of deceit by those who translated the treaty into Maori, notably Busby, Henry Williams and his son Edward”). The question has particular validity since, as will be seen in Chapter 16, Busby told the New South Wales Legislative Council in June 1840 that the nearest equivalent word for “independence” in Maori was “rangatiratanga”.

<sup>181</sup> See, for example: Biggs “Humpty-Dumpty”, above n 157; and Martin “Busby and the Treaty”, above n 17, 10.

<sup>182</sup> See, for example: Belich *Making Peoples*, above n 21, 194; Orange *The Treaty of Waitangi*, above n 23, 58-59; McKenzie *Oral Culture*, above n 7, 41-42 n 81; Walker “Focus of Maori Protest”, above n 157, 266 & 268; and Ward *An Unsettled History*, above n 23, 17.

<sup>183</sup> Belich “Hobson’s Choice”, above n 26, 203.

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Without Crown control, the missionaries believed, unorganized settlement would lead Maori away from the path of Christ and civilization—spiritual death—or towards physical extinction. Translators of the Treaty, especially Henry Williams, had to weigh this fate for their charges against the deception of softening their White Maori objective by conceding rangatiratanga, without which the Maori would not have signed. They chose the former course. To this extent the Treaty was a trick, and the intent of its parties was contradictory.

In addition, less creditably to Williams, it is suggested by some writers that his land purchases gave him an interest in ensuring that British sovereignty was established in New Zealand (and a reason to want to ingratiate himself with the new administration that would be investigating his land claims).<sup>184</sup>

Others seem to pull their punches. Owens, for example, writes:<sup>185</sup>

In comparing the English with the Maori text it becomes apparent that Henry Williams was not simply trying to translate, but rather to re-write the Treaty into a form that would be acceptable to Maori. The blunders of Hobson and his band of do-it-yourself diplomats can more properly be attributed to haste and inexperience than to deliberate deception.

Orange accepts that “[t]he choice of terms by Williams may not have been accidental”. But in offering a possible defence against his having deliberately obscured the implications of a transfer of sovereignty in his translation, she makes the rather surprising suggestion that in using rangatiratanga in his translation Williams was trying to ensure that rangatiratanga was protected under the new regime:<sup>186</sup>

It is possible that he chose an obscure and ambiguous wording in order to secure Maori agreement, believing (as did most missionaries at the time) that Maori welfare would be

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<sup>184</sup> Walker “Focus of Maori Protest”, above n 157, 266 & 268-269; Moon & Fenton “Fateful Union”, above n 157, 53-54.

<sup>185</sup> Owens “New Zealand Before Annexation” (2nd ed, 1992), above n 23, 52. Compare JMR Owens “Missionaries and the Treaty of Waitangi” (1986) 49 *Wesley Historical Society* (New Zealand) Journal 17-40.

<sup>186</sup> Orange *The Treaty of Waitangi*, above n , 41-42. The suggestion is surprising because Williams must have appreciated that the British Government would look to the English text to see what its promises were. Orange seems to undermine her point by immediately acknowledging that “[w]hatever Williams intended, it is clear that the treaty text, in using kawanatanga and rangatiratanga, did not spell out the implications of British annexation”.

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best served under British sovereignty. On the other hand, like many of his contemporaries, he may have believed that Maori could not claim an internationally recognisable sovereignty; even powers of chieftainship were seriously compromised by the rapid changes of the 1830s. In ensuring that rangatiratanga was guaranteed, therefore, Williams was not only safeguarding Maori land and possessions, but reinforcing the authority of the chiefs by building into the treaty a right to exercise some control. Williams could hardly know the extent to which chiefs might retain this under British sovereignty, although Hobson had probably confided to him the plans to establish a Protectorate of Aborigines designed to safeguard Maori rights. This could have been the “spirit and intent” of the treaty which he had expressly wanted to retain in the translation.

Alan Ward reaches a similar verdict:<sup>187</sup>

The chiefs were undoubtedly misled, but the Anglican missionaries would probably not have considered themselves as being deliberately deceitful. Although in general they sought to eradicate rather than preserve Maori institutions, they still had ill-formed intentions of using chieftainship, transformed by Christian education and with its more violent prerogatives curbed by British power, as the pivot of local administration in the land. They believed that this regenerated chieftainship ... was what most Maori aspired to, or should aspire to, and that this would be confirmed and strengthened, rather than threatened by the advent of British rule.

### Are the texts in fact so different?

Some recent scholarship on the Maori texts ponders whether “kawanatanga”, or to give the full phrase “te kawanatanga katoa” (“the complete governorship”), is reconcilable with “te tino rangatiratanga” (“the full chieftainship”). Belich considers the chiefs must have seen governorship either “as the loose and vague suzerainty of a nominal head, with Pontius Pilate and James Busby as precedents”<sup>188</sup> or (as he seems to consider more likely<sup>189</sup>) “as substantial and

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<sup>187</sup> Ward *A Show of Justice*, above n 21, 44. See also Belgrave *Historical Frictions*, above n 1, 59-61.

<sup>188</sup> Belich *Making Peoples*, above n 21, 194. See also Walker “Focus of Maori Protest”, above n 157, 264-265.

<sup>189</sup> See Belich *Making Peoples*, above n 21, 195. See also Belich “Hobson’s Choice”, above n 26, 202: “In *The New Zealand Wars*, I felt that Maori would have seen *kawanatanga* as no more than a ‘loose and vague suzerainty’. Most of the authors under review ... support this view,

significant, but restricted to Pakeha”.<sup>190</sup> Otherwise it would seem that Maori signed a treaty with “mutually contradictory” articles.<sup>191</sup>

Other scholars suggest that kawanatanga and rangatiratanga can be reconciled; and their work may indicate that the gap that others have postulated between the English and Maori texts can be bridged or at least narrowed.<sup>192</sup> This is done either by emphasising or expanding what was given up to the British Crown by kawanatanga, or by reinterpreting or diminishing what was retained by rangatiratanga.

In recent years, it has been the particular responsibility of the Waitangi Tribunal to examine the meaning of the two texts of the Treaty. Many of the Tribunal’s reports adopt the view of historians already encountered that the English and Maori texts differ in meaning.<sup>193</sup> The preference of the Tribunal has, however, been to see the texts as broadly “complementary”.<sup>194</sup> The prevailing view taken by the Tribunal is that “te tino rangatiratanga” in article 2 of the Maori text conveyed a sense of “tribal self-management on lines similar to what we understand by local government”. It sees a basis for this understanding in the English text also in its

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often noting that the kawana most familiar to Maori was Pontius Pilate, who washed his hands of the great issue of his day. But Judith Binney [in her essay “The Maori and the Signing of the Treaty of Waitangi”, discussed below] raises the very real possibility that we were wrong. Binney points out that Northland Maori were familiar with the governor of New South Wales, who clearly exercised real power in his province. One might add that, though Pilate washed his hands of one responsibility, he chose to do so, and he and other biblical kawana also exercised real power at other times. Positing a Maori understanding of kawana as a mere figurehead no longer seems tenable.”

<sup>190</sup> Belich *Making Peoples*, above n 21, 200.

<sup>191</sup> Belich “Hobson’s Choice”, above n 26, 202.

<sup>192</sup> Compare Ward *An Unsettled History*, above n 23, 16-17: “It is difficult to be any more explicit about what understandings the participants took away from the discussions in 1840. Many of the modern attempts to attribute more precise meanings to those discussions—either enlarging the meaning of rangatiratanga and reducing that of kawanatanga, or vice versa—are largely a projection onto the past of present-day goals or intentions.”

<sup>193</sup> See, for example, Waitangi Tribunal *Manukau Claim Report*—Wai 8 (1985) 90-91; Waitangi Tribunal *Orakei Claim Report*—Wai 9 (1987) 131 & 134; Waitangi Tribunal *Muriwhenua Land Report*—Wai 45 (1997) 115-116; and Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims*—Wai 215 (2004) 18-21.

<sup>194</sup> Waitangi Tribunal *Muriwhenua Fishing Claim Report*—Wai 22 (1988) 187.

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reference to “just Rights” and the article 2 guarantee to chiefs and tribes as well as individual Maori.<sup>195</sup>

Judith Binney and Lyndsay Head argue the need to consider the Treaty, even though it was a British production, as arising out of Maori experience of the 1820s and 1830s and as a response to Maori hopes and fears for the future.<sup>196</sup> This Maori experience included their exposure to the world outside New Zealand, to Europeans and their ideas, to trade, to technology, to settlement, and perhaps above all to Christian religion. On the whole Maori determined for themselves the terms on which they engaged with the European world. They had the power to decide. But over time the consequences of their choices began to escape their control as seen in, for example, the musket wars, the loss of land to settlement by sale or other arrangement, and the undermining of customary social systems by the new religion. These consequences were naturally greatest where European settlement was most concentrated, in particular in the far north of the country (around the Bay of Islands and the Hokianga).<sup>197</sup>

By the 1830s, northern Maori increasingly saw their world and the European world they had invited in “as being in competition”.<sup>198</sup> But this did not lead to a rejection of the European. In fact, as Binney writes, as the decade progressed there was increasing interest “in ideas of peace, derived from missionary teachings, and the law, *ngā ture*, a missionary term. It was the concept of negotiated mediation to prevent spiralling disputes that appealed.”<sup>199</sup> Some chiefs turned to Christian chiefs, missionaries, and even Busby, as mediators in disputes with Europeans or even within their own communities. In October 1835 they asserted their own independence but asked King William IV to be “a parent to their infant state”.<sup>200</sup>

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<sup>195</sup> Ibid 187-188 & 191. See also Waitangi Tribunal *The Ngai Tahu Report*—Wai 27 (1991) 233.

<sup>196</sup> Judith Binney “The Maori and the Signing of the Treaty of Waitangi” in David Green (ed) *Towards 1990: Seven Leading Historians Examine Significant Aspects of New Zealand History* (GP Books, Wellington, 1989) 20-31 [“Binney ‘Maori and the Signing of the Treaty’”]; Head “Pursuit of Modernity”, above n 6.

<sup>197</sup> Pre-1840 New Zealand history is dealt with further in Chapter 6.

<sup>198</sup> Binney “Maori and the Signing of the Treaty”, above n 196, 22.

<sup>199</sup> Ibid 24.

<sup>200</sup> Ibid 24-25. The Declaration of Independence is further discussed in Chapters 6 & 7.

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For Binney, “kawanatanga” was an “appropriate and careful choice”.<sup>201</sup> The base noun “kawana” was a transliteration of the English word “governor” but was “not simply a remote concept, a Humpty-Dumpty term made up by the missionaries for the difficult task of translating the biblical stories of provincial Roman governors (including Pontius Pilate, who washed his hands of responsibility)”. “Kawana” was also “the name for known individuals, known Governors, who had exercised power in New South Wales for half a century”.<sup>202</sup>

These were individuals whom some of the chiefs had personally met. It was a term for a position of authority, associated with the idea of rule by mediation and force. This was an intervening authority.

Binney rejects the suggestion that “mana” would have been a more appropriate translation of “sovereignty”: “the Treaty was not designed to remove the mana of the chiefs or the land”.<sup>203</sup> For her, kawanatanga/governorship (understood as “an intervening and mediating government”<sup>204</sup>) and rangatiratanga/chieftainship, “the mode of authority through which Maori tribal society operated at every level”,<sup>205</sup> could and did coexist in 1840 in the Treaty. “The bond between them was the concept of the laws, nga ture”, which, in 1840, “were the three clauses of Waitangi”.<sup>206</sup> That subsequent history was that kawanatanga and rangatiratanga “did not coexist easily, nor equally” was a quite different matter reflecting that Maori were “incorporated, not under an intervening and mediating government, but

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<sup>201</sup> Ibid 27. “Appropriate” was the Waitangi Tribunal’s conclusion in its Manukau Harbour report about the choice of “kawanatanga”, with which Binney said she concurred entirely.

<sup>202</sup> Ibid 26. See also John Laurie “Translating the Treaty of Waitangi” (2002) 111:3 *Journal of the Polynesian Society* 255-258 [“Laurie ‘Translating the Treaty’”] at 255: “When [Williams] chose the phrase *kawanatanga katoa* he used a term whose first association for Maori in 1840 would have been the Governor of New South Wales rather than the remote figure of Pontius Pilate.”

<sup>203</sup> Binney “Maori and the Signing of the Treaty”, above n 196, 27.

<sup>204</sup> Ibid 29. See also ibid 28: “Hobson and the missionaries had convinced [the chief Te Taonui] of the need for an intervening authority to protect Maori interests, and to mediate between them and traders and settlers.”

<sup>205</sup> Ibid 26.

<sup>206</sup> Ibid 28-29. Binney supports her conclusion that kawanatanga/governorship and rangatiratanga/chieftainship could coexist also by reference to Hobson’s explanation of the Treaty at Waitangi as described by Father Louis-Catherin Servant, a French Catholic priest. For Servant’s account, see Chapter 12, text accompanying n 52.

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under an ‘absolute Sovereignty’”. But that was explained by the fact that “[i]n 1840 none could have anticipated the extent of the colonization that would follow, nor that Maori would become a minority by 1860.”<sup>207</sup>

Lyndsay Head, like Binney, emphasises what was ceded by kawanatanga. Unlike Binney, however, she seems to restrict the scope of rangatiratanga to “authority over land” rather than, additionally, authority over people. Even “authority over land” seems to be confined by Head to the “continuing power of decision over [the land’s] alienation”.<sup>208</sup> Her argument is that much Maori action of the 1830s, including ultimately their acceptance of the Treaty, is to be explained by their fighting to “eradicate their fringe status [in the world] by pursuing modernisation, including political modernisation”.<sup>209</sup> The pursuit of modernity was a “choice of futures” made in “response to lived change”.<sup>210</sup> It arose from “political need” to bring settlers who were not incorporated into Maori society under some form of control and from “cultural change”, in particular change wrought by the musket wars which were a “catastrophe” for Maori and which “prompted the search for a value system that would delegitimise inter-group fighting—one that would create the conditions for the development of a civil society which repressed warfare”.<sup>211</sup> Christianity, too, was a choice of futures and also a “political primer for change”.<sup>212</sup>

Consciously replaying the conversion of the barbarians, the missionaries taught that peace was the condition of political and social modernity—that is, of a European-style society. This impacted heavily on culture, because tribal histories were almost exclusively histories of war. Fighting was central to the social identity of Maori. In setting up peace as the condition of modernity, therefore, Christianity proscribed one way of life, and prescribed another.

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<sup>207</sup> Ibid 29. Compare Judith Binney “Kawanatanga and Rangatiratanga, 1840–1860” in Judith Binney, Judith Basset and Eric Olssen *The People and the Land: Te Tangata me Te Whenua* (Allen & Unwin Ltd, Wellington, 1990) 77-97 at 78 and Salmond “Brief of Evidence, Wai 1040”, above n 8, 88-89.

<sup>208</sup> Head “Pursuit of Modernity”, above n 6, 107-108.

<sup>209</sup> Ibid 99.

<sup>210</sup> Ibid 103.

<sup>211</sup> Ibid 101-102.

<sup>212</sup> Ibid 102-103.

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Conversion required a new framework for political mores. Utu, the local principle of justice, was re-clothed as the retributive justice of God. In itself, this did not involve a major paradigm shift in Maori thinking. What was new was that God's law was efficacious in the area where traditional society had nothing to say: it dispensed utu without war. Christianity offered a model of governance where peace was protected by law, and where revenge was the responsibility of the state. These ideas were revolutionary. Their foreignness created an unfilled political space that would draw Maori into support for union with England.

By the Treaty, Maori chose to unite with Pakeha and to be governed. The decision to unite and to be governed was forced on them by political need and cultural change. It was nevertheless a decision requiring courage and trust.<sup>213</sup> For Head, trust was based on belief in English law as an alternative to custom:<sup>214</sup>

Equal treatment in a race-blind society governed by law was the original political “partnership” between Maori and the British. In 1840 Maori had a theoretical understanding that the Governor would form a political community ruled by British law.

Head argues that “rangatiratanga” in 1840 was a word frequently used by European translators in European contexts (for abstractions of “rule” or “sovereignty” or similar concepts in the Bible, or “independence” in the Declaration of Independence) but scarcely at all by Maori in traditional ones. Her point is that “rangatiratanga” is the language of “pre-Treaty modernity, not pre-Treaty tradition” and that the Treaty of Waitangi “would further add to [its] range [of meaning]”<sup>215, 216</sup>:

The aim of the Treaty was not to protect Maori culture; on the contrary, Williams believed that the processes of modernisation were active and sufficient agents of its transformation. It strains belief that, having transferred sovereignty to the Crown in the first article, Williams would posit a principle of omni-applicable Maori authority in the second, yet recent analysis is dependent on this being the case. The British did, of course, care about securing the colony's land base. This is logically why confirmation of te tino rangatiratanga is paired with advice on how to go about selling the land. The logic, and

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<sup>213</sup> Ibid 113-115.

<sup>214</sup> Ibid 115.

<sup>215</sup> Ibid 106-107.

<sup>216</sup> Ibid 107-108.

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the crudeness of the pairing, point to te tino rangatiratanga's referring not to culture in the sense of *Maoriness* itself, but specifically to land and resource ownership.

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It needs to be said that confining rangatiratanga to land ownership does not diminish the contemporary importance of Article 2. Land was the Maori stake in the colony. First, it was the commodity with which modernity was purchased. Second, by owning the land, Maori also controlled the most important boundary to state power. Nothing, therefore, was of greater importance than the confirmation of ownership. However, a crucial difference between current and historical meanings remains. In 1840 tino rangatiratanga did not distance Maori from the state, but fulfilled the logic of the Treaty's concern with land.

In Head's view, Williams's "word choices in ... the Treaty suggest only a striving for precision".<sup>217</sup>

John Laurie's views of kawanatanga and rangatiratanga are similar to Head's.<sup>218</sup> The chiefs signed the Treaty not because they thought that "their old powers remained intact" but because they believed that "British institutions, in particular state-supported law, were ... superior".<sup>219</sup> Rangatiratanga in article 2 could not have meant (as one modern translation has it<sup>220</sup>) the "unqualified exercise of ... chieftainship" because article 2 was a guarantee not only to chiefs but also to all the people of New Zealand ("nga tangata katoa o Nu Tirani"). "What sort of 'chieftainship' could 'all the people of New Zealand' exercise over their lands, their 'villages' and 'all their treasures' except some sort of property rights (or a very localized jurisdiction)?"<sup>221</sup> In amplification of this point, Laurie writes:<sup>222</sup>

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<sup>217</sup> Ibid 108.

<sup>218</sup> See also Phil Parkinson "'Preserved in the Archives of the Colony': The English Drafts of the Treaty of Waitangi" (2004) 11 *Révue Juridique Polynésienne/New Zealand Association for Comparative Law, Special Monograph*, at 32-33, 39-41 & 48-50; and Phil Parkinson "Brief of Evidence for the Crown" (Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 8 September 2010, D1).

<sup>219</sup> Laurie "Translating the Treaty", above n 202, 257.

<sup>220</sup> IH Kawharu "Translation of Maori Text" in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 319-321 at 321.

<sup>221</sup> Laurie "Translating the Treaty", above n 202, 256.

<sup>222</sup> Ibid.

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If there remains some ambiguity in the extent of the powers retained under the rubric of *rangatiratanga* it may be because Williams felt it was necessary to make it quite clear that the Treaty did not award the British Government the right to take land without the agreement of the owners. His choice of words reflected a belief that *rangatira* would continue to direct operations and manage affairs at a local, *hapu* level, much as the ruling squirearchy did in the English countryside.

Alan Ward's latest writing, in departure from his earlier work, fuses some of Binney's and Head's views. The Treaty was not drafted to deceive Maori.<sup>223</sup>

[O]fficials and missionaries seemed genuinely to have believed that their intervention would help protect the chiefs' local or tribal mana—their “tino rangatiratanga”—against the flow of settlement, and give them a place in the new scheme of things.

There was a shared view that “the problems of modernity required more concerted government than was possible at a tribal level, and that the Crown should be at the head of it”.<sup>224</sup> The exact relationship of kawanatanga to rangatiratanga was left for the future but the chiefs “would have been remarkably obtuse if they had not recognised that the Queen's authority was to extend over them in some way”.<sup>225</sup> “[R]ecognition of rangatiratanga certainly implied some ongoing authority resting with the chiefs and hapu”. But “[u]ltimate authority lay with the Crown.”<sup>226</sup> This experiment in joint participation in government was begun “in certain measure” in the 1840s and 1850s but was cut short in the 1860s.<sup>227</sup>

Ward accepts, however, that the British could have better explained how kawanatanga would impact on rangatiratanga, but that they chose not to do so and instead to “put the most positive and encouraging construction on the Treaty”. It may be that the British themselves were unsure “just how far, and for how long, Maori chieftainship and customs would be safeguarded and sustained” and

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<sup>223</sup> Ward *An Unsettled History*, above n 23, 14. In addition to the references given below, see Alan Ward “Brief of Evidence for the Crown” (Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 17 December 2009, A19).

<sup>224</sup> Ibid 16.

<sup>225</sup> Ibid 14 & 16.

<sup>226</sup> Ibid 15.

<sup>227</sup> Ward “Land and Law”, above n 24, 124-127; Ward *An Unsettled History*, above n 23, 14-15.

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believed that amalgamation into settler society was their best protection (a position consistent with Ward's earlier writing).<sup>228</sup> Whatever the case, the British focus was on securing Maori land rights:<sup>229</sup>

With it, all was possible; without it, everything else was theoretical. Land was what made chieftainship—and much else besides—concrete.

In different ways then, usually by expanding the meaning of *kawanatanga* or emphasising the nature of governorship, and by correspondingly diminishing the scope of *rangatiratanga* (in the manner of Head) or finding no necessary clash between it and *kawanatanga* (as Binney prefers), recent scholarship of the Maori text seems to suggest a reconciliation of the English and Maori texts of the Treaty. As is discussed below in this chapter, some scholarship on British imperial practice and law may also narrow the gap formerly identified between the two texts.

### **Understanding the Articles of the Treaty**

In addition to the insight into Treaty meaning to be gleaned from the general themes already discussed, historians and lawyers have attempted to explain aspects of the articles of the Treaty and their effect. Key questions arise from the articles as they appear in the English text, as addressed in the literature. How they have been answered to date has not focused on the meaning the concepts had for those who framed the Treaty but a review of what has been taken from the articles to date provides for such analysis.

An immediate issue concerns the treatment of “sovereignty” in article 1: were Maori considered by the Colonial Office to be capable of ceding sovereignty or was the Treaty adopted as a matter of form? What was the extent of the “sovereignty” obtained?

As difficult is the understanding of the guarantee of property and the meaning of the Crown's right of pre-emption in article 2: what was the nature and extent of

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<sup>228</sup> Ward *An Unsettled History*, above n 23, 17. See also Ward *National Overview*, above n 24, vol 1, 115.

<sup>229</sup> Ibid.

the rights of property guaranteed? Was it simply declaratory of a common law doctrine of aboriginal title? Did it extend to rights of “ownership”, including of lands not occupied and cultivated? Was the right of pre-emption a monopoly on purchase or was it a right of first offer? Was the purpose of pre-emption to protect Maori or to enable the Crown to control orderly settlement and to finance it? Was pre-emption a necessary underpinning for a Crown-granted system of titles which attached as a matter of law as an incident of sovereignty?

Further issues arise from article 3 and its relationship with article 1 of the Treaty: to what extent did the “rights and privileges of British subjects” impose English law on Maori? Does the absence of any guarantee of Maori custom in article 3 mean that it was to have no effect in the new order?

These are the principal questions that will be addressed in this thesis. They do not purport to exhaust the questions that might be asked. Additional issues which would repay further consideration include, for example, exploration of the meaning of “estates” and “other properties” in article 2 and why “lands, estates, forests, and fisheries” were the subject of specific mention but lakes, rivers, harbours, estuaries, and foreshore were not.<sup>230</sup>

### **Did the Colonial Office consider Maori were capable of ceding sovereignty?**

Much historical and legal writing regards the Treaty as ineffective to transfer sovereignty because Maori lacked sufficient political organisation to have sovereignty to cede. This once widespread opinion<sup>231</sup> is now largely discredited

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<sup>230</sup> Such matters were considered in the judgment of Chief Justice Fenton in the Native Land Court case of *Kauwaeranga* (1870). See Alex Frame “Kauwaeranga Judgment” (1984) 14 Victoria University of Wellington Law Review 227-245 [“Kauwaeranga”] at 239-245. See also Waitangi Tribunal *Muriwhenua Fishing Claim Report*—Wai 22 (1988) 174-179.

<sup>231</sup> *Wi Parata v Bishop of Wellington and Attorney-General* (1877) 3 NZ Jur (NS) SC 72 [“Wi Parata”] at 78; NA Foden *The Constitutional Development of New Zealand in the First Decade (1839–1849)* (LT Watkins Ltd, Wellington, 1938) [“Foden Constitutional Development”] 24-26; James Rutherford *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand, 1840* (Auckland University College Bulletin No 36, History Series No 3, 1949) [“Rutherford The Treaty of Waitangi”] 20-23 & 46-47; McLintock *Crown Colony Government*, above n 2, 62; Sinclair *A History of New Zealand* (4th ed, 1991), above n 21, 71-73; Oliver *Story of New Zealand*, above n 29, 49-50; Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens & Sons, London, 1966) [“Roberts-Wray

(although it is still clung to in pockets<sup>232</sup>). It represented a peculiarly New Zealand enthusiasm for a late nineteenth and early twentieth century view of international law (and specifically of States' personality at international law) that diverged from earlier juridical conceptions as well as from States' practice.<sup>233</sup>

Other scholarship, not all of it recent, has demonstrated that European states routinely entered into treaties with tribal societies in the eighteenth and nineteenth centuries and that these treaties (including the Treaty of Waitangi) were acknowledged in international law, being published in contemporary treaty series alongside agreements between "civilised" European states. This literature also shows that international law writers of the early to mid-nineteenth century had no doubt that "uncivilised" states had the capacity to enter into treaties with "civilised" powers.<sup>234</sup> In any event, as Paul McHugh has pointed out, it was a

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*Commonwealth and Colonial Law*"] 103; CC Aikman & JL Robson "Introduction" in JL Robson (ed) *New Zealand: The Development of its Laws and Constitution* (Stevens & Sons, London, 1967) 1-39 ["Aikman & Robson 'Introduction'"] at 3; Anthony Molloy "The Non-Treaty of Waitangi" [1971] *New Zealand Law Journal* 193-197 at 194-195; Adams *Fatal Necessity*, above n 3, 11 & 162 (although compare 56-57); Orange *The Treaty of Waitangi*, above n 23, 2 & 23 (although compare 87).

<sup>232</sup> See, for example, Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thompson Brookers, Wellington, 2007) ["Joseph *Constitutional and Administrative Law*"] 36 & 53-60; and Paul Moon "Three Historical Interpretations of the Treaty of Waitangi (1840)" (1999) *Electronic Journal of Australian and New Zealand History* ["Moon 'Three Historical Interpretations'"] at 16.

<sup>233</sup> See Paul McHugh "A History of Crown Sovereignty in New Zealand" in Andrew Sharp & Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past—A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 189-211 ["McHugh 'History of Crown Sovereignty'"] & Paul McHugh "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" (2002) 52 *University of Toronto Law Journal* 69-99. Mid-twentieth century New Zealand scholars could, for example, have picked up on MF Lindley's classic 1926 work on the acquisition of sovereignty of "backward" territories (refer n 234), which had been cited by Trevor Williams in his 1940 essay on the Treaty, but did not. Williams, who had also read a version of NA Foden's very different essay (refer n 231), seems however to have been torn on the question. See Trevor Williams "The Treaty of Waitangi", above n 21, 237 n 1 & 238-240.

<sup>234</sup> *Kauwaeranga*, above n 230, 231-238, especially 238; Kenneth Keith "International Law and New Zealand Municipal Law" in JF Northey (ed) *The AG Davis Essays in Law* (Butterworths, London, 1965) 130-148 ["Keith 'International Law'"] at 136-138; Keith "The Treaty of Waitangi", above n 125, 37-41; WA McKean "The Treaty of Waitangi Revisited" in GA Wood and PS O'Connor (eds) *WP Morrell: A Tribute* (University of Otago Press, Dunedin, 1973) 237-249; Benedict Kingsbury "The Treaty of Waitangi: some international law aspects" in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 121-157 ["Kingsbury 'The Treaty of Waitangi'"] at 121-122; Ian Brownlie *Treaties and Indigenous Peoples: The Robb Lectures 1991* (Clarendon Press, Oxford, 1992) 8-9; Bennion "Treaty-Making", above n 125, 167-172 &

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matter for the British Crown to determine, in exercise of the prerogative (as an act of state which could not be questioned in domestic law), what politics it would recognise and treat with as having sovereignty. Questions of international legal personality fell within the scope of the prerogative as a matter of domestic law.<sup>235</sup>

Nevertheless, despite the form of the Treaty of Waitangi as an international treaty concluded by an authorised agent of the Crown, and despite its subsequent publication in the Great Britain Parliamentary Papers and the British and Foreign State Papers, many historians consider that, in fact, the British government did not believe that Maori had sovereignty to cede.<sup>236</sup> In their view, the Treaty of Waitangi was entered into in order to give Britain a political basis to assume sovereignty and to advance settlement without opposition from Maori or from foreign powers. Some suggest that the treaty was for “show”,<sup>237</sup> or even that Britain would probably have pressed on to annex the country even if the chiefs had not signed the Treaty.<sup>238</sup> For others however, the Treaty was “the indispensable political preliminary to the peaceful occupation of New Zealand”,<sup>239</sup> or even “a pre-

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203-205; Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, Oxford, 2004) [“McHugh *Aboriginal Societies*”] including 47, 111-112, 150-152 & 200-203; MF Lindley *The Acquisition and Government of Backward Territory in International Law, Being a Treatise on the Law and Practice Relating to Colonial Expansion* (Longmans, Green & Co Ltd, London, 1926); C Wilfred Jenks *The Common Law of Mankind* (Stevens & Sons Ltd, London, 1958); CH Alexandrowicz “The Theory of Recognition *In Fieri*” (1958) 34 *British Yearbook of International Law* 176-198, especially 192-195; Ian Brownlie “The Expansion of International Society: The Consequences for the Law of Nations” in Hedley Bull & Adam Watson (eds) *The Expansion of International Society* (Clarendon Press, Oxford, 1984) 357-369 at 358-363; Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005); Palmer *Treaty of Waitangi*, above n 3, 155-163; Waitangi Tribunal *The Ngai Tahu Report—Wai 27* (1991) 221. See also Chapter 3, text accompanying ns 3-8.

<sup>235</sup> McHugh “History of Crown Sovereignty”, above n 233, 195. See also Michael Lobban “Custom, Common Law Reasoning and the Law of Nations in the Nineteenth Century” in Amanda Perreau-Saussine & James Murphy *The Nature of Customary Law* (Cambridge University Press, Cambridge, 2007) 256-278 at 268-270.

<sup>236</sup> In taking this view, some historians appear to be influenced by their own assessment that, as a matter of international law, Maori lacked sovereignty.

<sup>237</sup> For example, Walker “Focus of Maori Protest”, above n 157, 268.

<sup>238</sup> Ward *An Unsettled History*, above n 23, 13; Hill “Maori and State Policy”, above n 120, 514-515.

<sup>239</sup> Adams *Fatal Necessity*, above n 3, 11.

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condition perhaps of the Crown's assumption of sovereignty".<sup>240</sup> Bill Oliver considers "it is necessary to look to London, to the Colonial Office, to the humanitarians and the evangelicals" for an explanation as to why the British Government insisted that Maori chiefs had the capacity to enter into a treaty to cede sovereignty when they did not.<sup>241</sup>

Many alternative bases on which British sovereignty over New Zealand was accomplished are put forward. They include the Letters Patent of 15 June 1839 which extended Governor Gipps's Commission to include "any territory which is or may be acquired in sovereignty by Her Majesty" in New Zealand. On this view, Gipps's and Hobson's proclamations of 14 and 30 January 1840 respectively are evidence that Britain treated New Zealand as having been acquired before the Treaty was signed at Waitangi. Other opinion favours Hobson's 21 May 1840 proclamations of sovereignty over the North and South Islands and, as the completing legal act, their gazetting in London in October 1840. On both these views, New Zealand was not a "ceded" colony as a matter of international and imperial law, but a "settled" one (the only other category of colony, a "conquered" colony, clearly being inapplicable).<sup>242</sup>

NA Foden advanced the argument that New Zealand was annexed on the basis of settlement rather than the Treaty. He drew attention to minutes and draft instructions written by James Stephen in the Colonial Office in 1839 out of which grew the idea of annexing New Zealand to New South Wales. Stephen had raised the question of what sort of legislature to establish in New Zealand. A representative legislature seemed inappropriate for a young colony especially given the concern to protect Maori from the settlers but, as Stephen pointed out, "[i]t is

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<sup>240</sup> Richard Boast "Recognising Multi-Textualism: Rethinking New Zealand's Legal History" (2006) 37 *Victoria University of Wellington Law Review* 547-582 at 548: "the Treaty itself ... is quite clearly not the legal foundation for [British] sovereignty." Compare Richard Boast "Maori and the Law, 1840-2000" in Peter Spiller, Jeremy Finn & Richard Boast *A New Zealand Legal History* (2nd ed, Brookers Ltd, Wellington, 2001) 123-185 ["Boast 'Maori and the Law'"] at 133. See also Rutherford *The Treaty of Waitangi*, above n 231, 38, 44 & 47; Aikman & Robson "Introduction", above n 231, 4-5; McLintock *Crown Colony Government*, above n 2, 62; Brookfield "Search for Legitimacy", above n 157, 4.

<sup>241</sup> Oliver *Story of New Zealand*, above n 29, 49-51.

<sup>242</sup> As to British imperial law, see Chapter 3, "Constituting Empire".

not within the scope of the Royal prerogative to create a Legislature in the proposed Colony except by the Convention of a Representative Assembly”.<sup>243</sup> Foden, and others who have followed him,<sup>244</sup> interpreted this to mean that Stephen was prospectively treating New Zealand as a settled colony. In such a colony, English law went with the colonists. Under English law, the Crown could make laws only under the authority of legislation made by the Westminster Parliament. It could not itself set up a non-representative legislature, but a representative legislature could be established.<sup>245</sup> The situation was different in a conquered or ceded colony, where English law was not introduced. There, the Crown had full law-making powers under the prerogative power, including the power to set up a legislature body, whether or not representative. Foden therefore reasoned that, since in a ceded colony a non-representative legislature could be established, the only explanation for Stephen’s comment was that he viewed New Zealand as a settled colony. In the event, the Colonial Office did not seek authority from Parliament to set up a legislature in New Zealand. As Foden speculates (because there is no record of decision-making on this point), this could well have been because of the risk that Parliament would decline to legislate for a foreign country.<sup>246</sup> The risk was avoided by what Foden called the “ingenious device” of annexing the territories acquired in New Zealand to the colony of New South Wales, enabling its Governor and Legislative Council to make laws for New Zealand. The stratagem was only available because the Imperial statute which set up legislative authority in New South Wales gave New South Wales jurisdiction over “dependencies”.<sup>247</sup>

Paul McHugh adopts a different view. The Colonial Office regarded the conclusion of a treaty with Maori as a legal prerequisite for annexation, rather than being

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<sup>243</sup> See Chapter 9, n 395.

<sup>244</sup> For example, Adams *Fatal Necessity*, above n 3, 150-151 and Joseph *Constitutional and Administrative Law*, above n 232, 42.

<sup>245</sup> Roberts-Wray is sceptical whether this is correct law: “Apart from textbooks, there is little authority to support this, though there is no doubt that it was the accepted doctrine in the early nineteenth century.” Roberts-Wray *Commonwealth and Colonial Law*, above n 231, 152.

<sup>246</sup> This speculation seems inconsistent with the assumption that New Zealand would have been regarded as a settled colony.

<sup>247</sup> Foden *Constitutional Development*, above n 231, ch 2.

political expediency only.<sup>248</sup> Receiving the consent of those who were to be governed was no more than “a particular and local example of a principle of British constitutional theory dating at least from the beginning of the seventeenth century”<sup>249</sup> and was British imperial practice in all places (with the notable exception of Australia) where non-Christian societies were encountered from that time and where a jurisdiction over indigenous peoples was sought.<sup>250</sup> McHugh does, however, consider that in Hobson’s Instructions can be seen the “beginnings” of the distinction that came to be drawn during the second half of the nineteenth century between uncivilised societies without juridical capacity in international law and states that were part of the family of civilised nations with the ability to form international relations.<sup>251</sup>

McHugh considers that, in the decision to annex New Zealand to New South Wales, it can be seen that the Colonial Office was treating New Zealand in advance as falling into the category of a settled colony. But unlike Foden he does not regard this as undermining the argument that the basis of British sovereignty in New Zealand was the Treaty. In McHugh’s view, the error made by Foden and those who followed him was in not appreciating that the common law status of a colony—whether settled or ceded—had to do only with British settlers and the law that applied to them. If, in a colony acquired from its former indigenous rulers by treaty of cession, there was no local law to which the settlers could sensibly resort, the colony would have the common law status of a settled colony notwithstanding

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<sup>248</sup> Paul McHugh “Constitutional Theory and Maori Claims” in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 25-63 [“McHugh ‘Constitutional Theory’”] at 31-32; McHugh *The Maori Magna Carta*, above n 129, 29-30; McHugh *Aboriginal Societies*, above n 234, 166-167. See also Trevor Williams “The Treaty of Waitangi”, above n 21, 240 (“James Stephen ... always persisted in the view that the Treaty was a legal necessity as well as a political expedient. ... The implication of Stephen’s view was that to repudiate the Treaty was to disavow not only British honour, but British sovereignty as well”); Pat Moloney “Savagery and Civilization: Early Victorian Notions” (2001) 35:2 *New Zealand Journal of History* 153-176 at 169; and Palmer *Treaty of Waitangi*, above n 3, 74-75.

<sup>249</sup> McHugh “Constitutional Theory”, above n 248, 47.

<sup>250</sup> Ibid 26-30; McHugh *The Maori Magna Carta*, above n 129, 25-39; McHugh *Aboriginal Societies*, above n 234, ch 2. McHugh’s views are shared by other writers: see above n 234 and accompanying text.

<sup>251</sup> McHugh “Constitutional Theory”, above n 248, 32. Again, this is consistent with the views of other writers: see above n 234 and accompanying text.

its mode of acquisition. From that designation would flow the introduction into the colony of English law to apply to the British settlers (including the rule that the Crown could not subject them to the authority of a non-representative local legislature).

The classification of a colony as a settled colony in these circumstances had no bearing on the status or rights of the indigenous people in the colony, which were the same as they would be if the colony had been designated “ceded” (for example, in the relation to the continuity of indigenous law and property rights so far as the indigenous population was concerned). And the prior classification of a colony, like New Zealand, as “settled” did not imply that the local rulers were being treated as lacking the legal capacity to cede sovereignty, or that the Colonial Office regarded the decisive legal act in the acquisition of sovereignty as other than the treaty by which they agreed to cede sovereignty.<sup>252</sup> For McHugh, then, there is no contradiction in the statement that “New Zealand was acquired by the Crown by cession from the Maori chiefs through the Treaty of Waitangi, yet was regarded by the Colonial Office as a settled colony.”<sup>253</sup>

### **The domestic law status of the Treaty**

Some of McHugh’s earlier writing challenges the still orthodox legal view that, even if the Treaty of Waitangi is a valid international treaty, the promises made in it are not (and would not have been thought to have been in 1840) enforceable in the New Zealand courts.<sup>254</sup> Kenneth Keith had earlier pointed out that the legal rule—at least as the modern, twentieth century one—as to the status of treaties in domestic law was that they *are* enforceable in domestic courts unless they entail an alteration of domestic law, in which case they are enforceable only to the extent

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<sup>252</sup> Paul McHugh “The Common-Law Status of Colonies and Aboriginal ‘Rights’: How Lawyers and Historians Treat the Past” 61 *Saskatchewan Law Review* 393-429 [“McHugh ‘Common-Law Status’”] at 422-427.

<sup>253</sup> *Ibid* 422.

<sup>254</sup> *Wi Parata*, above n 231, 78-79; *Hoani Te Heuheukukino v Aotea District Maori Land Board* [1941] AC 308 at 324-325. As to the recognition that may be given to the Treaty in international law, see Kingsbury “The Treaty of Waitangi”, above n 234, 126 and McHugh *Magna Carta*, above n 129, ch 7.

that legislation is enacted to give effect to them.<sup>255</sup> He also identified ways in which a treaty, including the Treaty of Waitangi, could be relevant to the decision of a domestic court even without enabling legislation,<sup>256</sup> and suggested further (drawing some support from an 1870 decision of the Native Land Court and a 1903 opinion of the Privy Council<sup>257</sup>) that the Treaty of Waitangi might be enforced in the courts as a domestic contract (irrespective of the approach taken to it as a treaty).<sup>258</sup>

McHugh went further. He drew on Lord Mansfield's statement in *Campbell v Hall* (1774) that "the articles of peace by which [a country] is ceded, are sacred and inviolable according to their true intent and meaning" (a proposition Mansfield considered "too clear to be controverted").<sup>259</sup> From this, McHugh argued that the Treaty may have imposed limitations on what the Crown could do in its executive capacity and made pre-existing Maori property rights legally enforceable in the new order.<sup>260</sup> He referred to an 1826 Indian case where Mansfield's dicta had been applied.<sup>261</sup> McHugh also considered that the position might be stronger in the case of a treaty like that of Waitangi. He suggested that there may be a difference between "ordinary international treaties" and those (like the Treaty of Union

<sup>255</sup> Keith "International Law", above n 234, 139-142. Compare Keith "The Treaty of Waitangi", above n 125, 41-44 (arguing that some of the promises in the Treaty may not be "self-executing", that is capable of court enforcement without enabling legislation).

<sup>256</sup> Keith "The Treaty of Waitangi", above n 125, 47-60.

<sup>257</sup> *Kauwaeranga*, above n 230, 243-245; *Wallis v Solicitor-General for New Zealand* [1903] AC 173 at 179 & 187-188.

<sup>258</sup> Keith "International Law", above n 234, 146-148.

<sup>259</sup> *Campbell v Hall* (1774) 1 Cowp. 204 at 208.

<sup>260</sup> Paul McHugh "Maori Fishing Rights and the North American India" (1985) 6:1 Otago Law Review 62-94 ["McHugh 'Maori Fishing Rights'"] at 82-87; McHugh "Constitutional Theory", above n 248, 33 & 40; Paul McHugh "The Role of Law in Maori Claims" [1990] New Zealand Law Journal 16-20 & 36 ["McHugh 'Maori Claims'"] at 17; McHugh *The Maori Magna Carta*, above n 129, 91-92, 149 and generally 149-156. Kenneth Keith has cited *Re Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41 at 49 and *Nireaha Tamaki v Baker* (1901) NZPCC 371 at 382 as cases where the courts had suggested that the Crown was bound in law by its Treaty obligations. Keith "The Treaty of Waitangi", above n 125, 49. See also *R v Symonds* (1847) NZPCC 387 at 397 per Martin CJ; *Kauwaeranga*, above n 230, 243-245; *Mangakahia v New Zealand Timber Company Ltd* (1881-82) 2 NZLR (SC) 345 at 350; *Wallis v Solicitor-General for New Zealand* [1903] AC 173 at 179 & 187-188; and other cases referred to by Kent McNeil *Common Law Aboriginal Title* (Clarendon Press, Oxford, 1989) ["McNeil *Common Law Aboriginal Title*"] 189 n 113 & 191 n 124.

<sup>261</sup> McHugh "Constitutional Theory", above n 248, 40 n 121 and accompanying text; *Amerchund Burdeechund v The United East India Company Co* (1826) 4 Ind Dec (O.S.) 547 at 558-559.

between England and Scotland and the Treaty of Waitangi) that are the basis of the Crown's sovereignty.<sup>262</sup>

McHugh pointed out that, prior to the early nineteenth century, "most constitutionalists believed there were some limits upon Parliament locating these in the common law or, more usually, the law of nature".<sup>263</sup> If this "pre-positivist position" was still held at 1840, McHugh said that it was "conceivable the Treaty of Waitangi might be some limitation upon the Crown's sovereignty in Parliament".<sup>264</sup> Despite this, he suggested that Mansfield's dicta in *Campbell v Hall* should be taken as referring to the Crown in its Executive capacity and not as applying to Parliament.<sup>265</sup> He added that "[a]ny hope for a return to a lost legal tradition is, of course, impossibly starry-eyed."<sup>266</sup>

In his recent work, McHugh steps away from his earlier view that the terms of a treaty with an indigenous polity could place limits on the Crown's executive authority. He refers to other Indian cases (including in particular the judgment of the English Court of Chancery in 1793 in *Nabob of the Carnatic v East India Company*<sup>267</sup>) in arguing that, by the nineteenth century, English law held that treaties between Indian rulers and the East India Company could not be enforced in municipal courts. They were policy matters in respect of which the courts disclaimed jurisdiction.<sup>268</sup> This was part and parcel of a wider approach (for example, in the areas of land and customary law rights) in British colonies where

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<sup>262</sup> McHugh "Constitutional Theory", above n 248, 44-45.

<sup>263</sup> McHugh "Constitutional Theory", above n 248, 44. McHugh writes that "[t]wo such generally accepted limitations concerned the sovereign's duty to protect the subjects' personal liberty and property". He also says that "the contents of the Treaty of Waitangi, the land guarantee in particular, are remarkably similar to the rational limitations which many constitutionalists placed upon the sovereign". Ibid 44-45.

<sup>264</sup> Ibid 44.

<sup>265</sup> Ibid 33; McHugh "Maori Fishing Rights", above n 260, 86 n 27 & 87.

<sup>266</sup> McHugh "Constitutional Theory", above n 248, 45.

<sup>267</sup> (1793) 2 Ves Jun 56 (Ch).

<sup>268</sup> McHugh *Aboriginal Societies*, above n 234, 114-115.

“governmental relations with the tribes were wrapped in an obligation of guardianship that was inherently non-justiciable”.<sup>269</sup>

### **What was the extent of the sovereignty obtained through article 1?**

As has been discussed, scholars have generally not explained the concept of “sovereignty” in mid-nineteenth century English law and political philosophy, let alone considered what the phrase “all the rights and powers of Sovereignty” in article 1 of the Treaty meant to those who contributed to the English draft. Nor, in general, have they been concerned to look to the incidents of “sovereignty” in the different parts of Empire as a way of providing context to its use in the Treaty.

Paul McHugh is probably right that most historians take “sovereignty” as “shorthand for ‘supreme unaccountable power’” and have not probed more deeply into its meaning.<sup>270</sup> Sharp’s definition of “sovereignty” as (among other things) “the absolute and indivisible power” to make and enforce the law, including by force, probably represents the general assumption.<sup>271</sup> That definition echoes Blackstone (who is drawn on by Salmond to explain her understanding of “sovereignty”).<sup>272</sup> On this view, “sovereignty” is greater than “governorship” (kawanatanga) and conflicts with retained “chieftainship” (rangatiratanga). Trevor Williams, for example, endorses the 1859 view of William Swainson, the first Attorney-General for New Zealand, that, without understanding the position, Maori by the English Treaty “in ceding the Sovereignty ... gave us the power to abrogate their own usages and customs, to destroy the power of their own chiefs, and to impose our own laws upon them”.<sup>273</sup>

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<sup>269</sup> Ibid 213. For the argument that, whatever the formal legal position, the parties to the Treaty self-evidently proceeded on a different basis, see Joe Williams “Not Ceded But Redistributed” in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 190-197 [“Joe Williams ‘Not Ceded But Redistributed’”] at 192-193.

<sup>270</sup> See above n 178.

<sup>271</sup> See above n 179 and accompanying text.

<sup>272</sup> See above n 167 and accompanying text.

<sup>273</sup> William Swainson *New Zealand and its Colonization* (Smith, Elder & Co, London, 1859) 157-158, quoted in Trevor Williams “The Treaty of Waitangi”, above n 21, 247. Williams also endorsed Swainson’s view that the Maori text would not have conveyed the same meaning to

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If seen in this way, “sovereignty” cannot be reconciled with “rangatiratanga” unless rangatiratanga refers to land rights rather than to political authority. Because “sovereignty” is “absolute and indivisible power”, the possibility that kawanatanga and rangatiratanga together indicate a different notion of “sovereignty” in the English text is excluded.

Paul McHugh’s work both challenges and confirms historians’ views about “sovereignty” in the Treaty. It challenges historians’ apparent assumption that “sovereignty” was understood from the sixteenth century to the nineteenth century to mean “the absolute and indivisible power” in a territory, so that plurality in the legal order to accommodate the political systems of indigenous groups was not possible. McHugh’s work, however, confirms historians’ views about the Treaty, by arguing that, by the time New Zealand was founded in 1840, “sovereignty” had come to mean, at least for a white settlement colony such as New Zealand, the “absolute, singular and exclusive” legal authority in a territory<sup>274</sup> This firmer view may be contrasted with an earlier allowance that “it is quite arguable that Dicey’s<sup>275</sup> Whiggish version of sovereignty did not arrive with British rule”.<sup>276</sup>

McHugh describes how, until the nineteenth century, no one thought to dissect the nature of British sovereignty, nor perceived any inconsistency between the assertion of British sovereignty and the continuity of indigenous political and legal systems. He illustrates this by reference to British North America, where the exercise of sovereign power was essentially “jurisdictional”, concerned principally with authority over British nationals. To the extent that authority was exercised in relation to indigenous groups, it was almost invariably with the consent of those groups, generally obtained by treaty. It was not claimed as an incident of sovereignty. Whether indigenous groups were described in treaties as “allies” or

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Maori but rather left them with “the idea that their chieftainship, with whatever might be incident to it, was to remain unaltered”. Ibid.

<sup>274</sup> McHugh “The Lawyer’s Concept of Sovereignty”, above n 10, 180.

<sup>275</sup> For Albert Venn Dicey, see Chapter 3, text accompanying ns 135 & 249.

<sup>276</sup> McHugh “The Lawyer’s Concept of Sovereignty”, above n 10, 187. And see now also Paul McHugh “Brief of Evidence for the Crown” (Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 16 April 2010, A21) [“McHugh ‘Brief of Evidence, Wai 1040’”] 4-5, 22-26 & 56.

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“subjects” (and in some treaties they were referred to as both), imperial practice was pluralistic, allowing British sovereignty to coexist with indigenous polities, which remained essentially self-governing.<sup>277</sup> Although McHugh acknowledges that comparable practices continued past 1840 in British India and Africa,<sup>278</sup> he considers that imperial practice had changed by 1840 in relation to the white settlement colonies of Canada, Australia and New Zealand. There, he describes a shift in practice from the earlier jurisdictional and pluralistic model of sovereignty to one in which British sovereignty was “absolute”, “exclusive”, and “territorial”. There was “no constitutional authority apart from the Crown”.<sup>279</sup>

A comparable shift occurred later in India and Africa, although it was never as thoroughgoing.<sup>280</sup> McHugh describes the “treaty system” put in place on the eastern frontier of the Cape Colony with the Xhosa in the mid-1830s.<sup>281</sup> It demonstrated that “the juridical capacity of the tribes was to be recognized, even once they were under British protection or sovereignty”. The approach adopted there accepted the capacity of the Xhosa to make treaties “and contemplated preservation of their political integrity notwithstanding British sovereignty”.<sup>282</sup>

This suggested the older model of Crown sovereignty seen already to have been applied in the East Indies and British North America in the late eighteenth century. According to this model, the continuance of customary political forms and law was not regarded as incompatible with Crown sovereignty. Indeed, the South African experience confirmed (as in Australia and Upper Canada a generation before) that in the 1830s and where tribal peoples were concerned, Crown sovereignty was regarded as more about controlling settlers than interfering with the tribes’ internal affairs.

By contrast, the new absolute sovereignty applied in Canada, Australia and New Zealand was, in law, thoroughgoing in relation to all peoples within the territory

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<sup>277</sup> McHugh *Aboriginal Societies*, above n 234, ch 2.

<sup>278</sup> Ibid 76-85, 119, 164-166 & 205-206.

<sup>279</sup> Ibid 150. See also Paul McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, Oxford, 2011) [“McHugh *Aboriginal Title* (2011)”] 17-19.

<sup>280</sup> See above n 278.

<sup>281</sup> For which see Chapter 4, text accompanying ns 209-213.

<sup>282</sup> McHugh *Aboriginal Societies*, above n 234, 166.

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held in sovereignty.<sup>283</sup> All were in theory subject to English law (even with a degree of exceptionalism provided by that law or in administrative practice).<sup>284</sup>

British practice recognized that aboriginal polities had the capacity to make a cession of sovereignty or jurisdiction and land title to the Crown but that once this had been done those polities held no legal status. ... The Crown's dealings with aboriginal peoples were matters entirely of non-justiciable prerogative.

Aboriginal groups were denied legal status and their collective "rights" became non-justiciable, being claims which were "political" and which affected only "the conscience and discretion of the Crown as guardian".<sup>285</sup>

"[E]ven if ... *de facto* the tribal chiefs and other potentates retained significant authority" after assertion of British sovereignty, the jurisdictional and pluralistic model became conceptually impossible and indigenous groups became unequivocally "subjects" not "allies".<sup>286</sup>

Governors of Britain's settlement colonies may have tolerated tribalism but this was policy in the administration of the law and no more than temporary shielding. In these British possessions, the tribe was never regarded by colonial and imperial officials or (least of all) the settlers as having a juridical foundation.

There were a number of factors which fed this change. Unlike the position in India and Africa, in Canada, Australia and New Zealand "permanent white settlement had been the design and the outcome".<sup>287</sup> McHugh says that the "more aggressive model of sovereignty" was "cut to the imperial design of its time".<sup>288</sup> It was a necessary development for the Crown to support white settlement, particularly in securing land from indigenous groups.<sup>289</sup> The change also reflected the growth of confidence in British power and its ability to project its authority on far-flung

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<sup>283</sup> Ibid ch 3.

<sup>284</sup> Ibid 131-132.

<sup>285</sup> Ibid 150.

<sup>286</sup> Ibid 205 & 117.

<sup>287</sup> Ibid 119.

<sup>288</sup> Ibid 108.

<sup>289</sup> Ibid 117-120.

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empire and all its inhabitants.<sup>290</sup> Altruism led in the same direction. Absolute and exclusive sovereignty dovetailed with evangelical, humanitarian and liberal concerns about Britain's "duty" to "protect", Christianise and "civilise" indigenous peoples.<sup>291</sup> Increasingly the view was that indigenous groups' best protection lay with, and under, Crown sovereignty, not as "allies" but as "subjects".<sup>292</sup> Additionally, the new imperial design at once both contributed to, and was reinforced (and increasingly reified) by, creeping positivism in the law. Eventually this positivism would deny indigenous groups even original sovereignty.<sup>293</sup>

McHugh discusses the United States Supreme Court cases concerning the status of Indian tribes.<sup>294</sup> In his opinion, Chief Justice Marshall had transformed the "jurisdictional" sense of sovereignty into a doctrine of residual tribal authority, under which tribes were "domestic dependent nations". The British, however, had "rejected that approach and lurched from episode to episode in the second quarter of the nineteenth century towards a more absolutist and thoroughgoing concept of Crown sovereignty over tribal peoples".<sup>295</sup> McHugh's opinion is that "[s]omething resembling the Marshall doctrine in the United States was not doctrinally possible" under British imperial law until, in the early twentieth century, legal theory caught up to explain the divided sovereignty (between external foreign relations and internal government) of British protectorates which, apart from the earlier experience with the Ionian Islands, were undertaken only from the end of the nineteenth century.<sup>296</sup>

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<sup>290</sup> Ibid 48.

<sup>291</sup> Ibid 121-135.

<sup>292</sup> Ibid 48 & 177.

<sup>293</sup> Ibid 48, 108-116, 149-152, 178-181 & 200-213.

<sup>294</sup> Ibid 37-42 & 142-149.

<sup>295</sup> Ibid 117.

<sup>296</sup> Ibid 205-213. The idea that protectorates have divided sovereignty may not be helpful or accurate. Internal government in protectorates was sometimes undertaken through the instrumentality of local rulers or institutions but subject to ultimate British control (as is illustrated by the arrangements for administration of the Ionian Islands where Britain had a power of veto over the local, partly-elected legislative assembly). Often, however, as Kenneth Roberts-Wray describes, the British governed directly and there was no effective difference in internal government between a protectorate and a colony (although a protectorate was not part of the British realm and British administration was on trust until the ultimate resumption of local rule). Roberts-Wray *Commonwealth and Colonial Law*, above n 231, 47-50.

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In relation to New Zealand, McHugh notes the apparent discontinuity between ceded *kawanatanga* and retained *rangatiratanga* in the Maori text. He considers the dissonance between the two terms was “unnoticed and, anyway, too fine for colonial and imperial authorities”: “[t]hey looked simply to the less subtle cession of sovereignty in the English text.”<sup>297</sup> As a result, the Colonial Office “did not entertain the possibility of [Maori tribes] remaining outside the ordinary jurisdiction of English law after Crown sovereignty”, as had been the “older model” of Empire :<sup>298</sup>

Crown sovereignty in New Zealand meant that in point of law (for what happened on the ground was another matter) the Crown’s writ ran throughout the islands.

Maori autonomy “disappeared upon the Crown’s acquisition of sovereignty” notwithstanding a treaty of cession which (in its Maori text) “contemplated ... residual authority in the native chiefs”.<sup>299</sup>

Other historians have accepted that in North America sovereignty was not always treated as monolithic, but have taken the view that a degree of Maori self-government was never an option in New Zealand law. Claudia Orange, for example, concedes that “[i]n Canada, for example, Indians living on land which had not been secured by the Crown were left under the immediate authority of their own chiefs—a recognition by the Crown that they retained a degree of internal sovereignty”. But she takes the view that “in New Zealand, article 3 of the treaty had placed on the government an immediate responsibility for many thousands of Maori subjects”, precluding the Canadian approach.<sup>300</sup> Keith Sorrenson acknowledges the United States Supreme Court’s acceptance of a “divided sovereignty” (which he regards as consistent with the Maori text of the Treaty) but says that such an approach “has never been acceptable in New Zealand where the

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<sup>297</sup> McHugh *Aboriginal Societies*, above n 234, 166. See also Palmer *Treaty of Waitangi*, above n 3, 165: “the Maori text and understandings seem to me to be most consistent with the content of a treaty of protection”; however, “[t]he Treaty of Waitangi was not regarded by the British as a treaty of protection in 1840 because its English text was drafted as a treaty of cession. In 1840, Britain did not enter into treaties of protection.”

<sup>298</sup> McHugh *Aboriginal Societies*, above n 234, 168.

<sup>299</sup> Ibid 205.

<sup>300</sup> Orange *The Treaty of Waitangi*, above n 23, 106.

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Maori cession of sovereignty in Article 1 of the English text of Waitangi has always been used to promote a domestic sovereignty that is one and indivisible”.<sup>301</sup>

On the other hand, Joe Williams has questioned whether it can be right that the acquisition of sovereignty, of itself, could have the effect of abrogating either the customary law of Maori or the “tino rangatiratanga” guaranteed by the Treaty. Pointing to McHugh’s earlier acknowledgement (discussed in relation to article 2 below) that Maori property interests were a burden on the Crown’s ultimate title to land, he asks “why is it any more difficult to perceive the Maori right of rangatiratanga as a burden upon the ultimate (though now fettered) sovereignty of the Crown?”<sup>302</sup> Williams suggests that it is not self-evident that, whatever shape “sovereignty” had taken in England by 1840, “that cultural baggage arrived intact upon the shores of Aotearoa”.<sup>303</sup> In Williams’s view, “it could not possibly have been a coincidence that Chief Justice Marshall eight years before the signing of the Treaty of Waitangi” in the case of *Worcester v State of Georgia* “so accurately described the concept of rangatiratanga” when describing Indian nations as having “always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial”.<sup>304</sup> Williams points to the fact that Henry Sewell, later first Premier of New Zealand and then Attorney-General, had expressed the view in 1864 that the Maori position was the same as the North American Indian nations.<sup>305</sup>

A very different tack to most writers on the topic is taken by Paul Moon. He writes that the Colonial Office record to 1840 indicates that:<sup>306</sup>

[T]he British Crown never intended to rule, preside over, or govern Maori, let alone usurp the Maori sovereign right to self rule, and that the Treaty of Waitangi was the manifestation and confirmation of this firmly-held policy. Indeed, the evidence suggests

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<sup>301</sup> Sorrenson “Precedents for Waitangi”, above n 15, 20.

<sup>302</sup> Joe Williams “Not Ceded But Redistributed”, above n 269, 195.

<sup>303</sup> Ibid 191.

<sup>304</sup> Ibid 195-196, quoting *Worcester v The State of Georgia* (1832) 31 US 515 at 559, per Marshall CJ.

<sup>305</sup> Ibid 196-197. For Sewell’s views, see Chapter 19, text accompanying n 110.

<sup>306</sup> Paul Moon *Te Ara Ki Te Tiriti: The Path to the Treaty of Waitangi* (David Ling Publishing Ltd, Auckland, 2002) [“Moon Path to the Treaty”] 10.

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that the Treaty was intended by the Colonial Office to allow Crown rule to apply solely to British subjects in the fledgling colony. Maori sovereignty would accordingly have been left unaffected by British rule over British subjects in the country.

In Moon's view, cession of sovereignty was a surrender by Maori "only of the Maori right to rule Europeans in the colony".<sup>307</sup> He considers that there was nothing anomalous in confining the British authority acquired only to British subjects. This was "deliberately-employed policy—bordering on doctrine" applied in other parts of Empire.<sup>308</sup> He contends that Normanby's Instructions to Hobson made no reference to British authority applying to Maori and that the reference in the Instructions to preservation of Maori custom (to the extent compatible with universal standards of humanity) pointed to "the division of sovereignty that was planned for the colony".<sup>309</sup> The upshot was that "British law would apply immediately to British subjects in New Zealand, whereas Maori would be beyond its scope, providing, in essence, that they nominated to remain outside this realm".<sup>310</sup> Moon claims that his argument is supported by the terms of the Treaty (which does not suggest British rule over Maori), by Hobson's speech at Waitangi, and by Felton Mathew's contemporary account of the proceedings at Waitangi.<sup>311</sup> Perhaps inconsistently with his argument, Moon also expresses the opinions that Henry Williams intentionally mistranslated the Treaty,<sup>312</sup> that the guarantees in the Treaty were "cynical" because they were not intended to be honoured once the colonial state had consolidated its power,<sup>313</sup> and that Hobson himself wanted to bring Maori within British rule and acted to achieve that result.<sup>314</sup>

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<sup>307</sup> Ibid 102.

<sup>308</sup> Ibid 106.

<sup>309</sup> Ibid 108-114.

<sup>310</sup> Ibid 114.

<sup>311</sup> Ibid 130-132; Moon "Three Historical Interpretations", above n 232, 10-11. See also Grant Phillipson "Bay of Islands Maori and the Crown, 1793-1853" (Report for the Crown Forestry Rental Trust, Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, August 2005, A1) 302-303. Both Hobson's speech and Mathew's account are discussed in Chapter 12.

<sup>312</sup> Moon *Path to the Treaty*, above n 306, 139-147; Moon & Fenton "Fateful Union", above n 157.

<sup>313</sup> Moon "Three Historical Interpretations", above n 232, 6.

<sup>314</sup> Moon *Path to the Treaty*, above n 306, 133-139; Moon "Three Historical Interpretations", above n 232, 11-15.

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In his report for the Waitangi Tribunal's Northland Inquiry, Samuel Carpenter has made a concerted attempt to grapple with the meaning of the Treaty to James Busby and Henry Williams. Working from both texts of the Treaty, but with particular attention to the Maori text and therefore Williams, Carpenter suggests that sovereignty/kawanatanga reconciles with chieftainship/rangatiratanga. He argues that the division between kawanatanga and rangatiratanga can be seen as comparable to the relationship in England between central government and the local authority exercised by great landowners.<sup>315</sup> This domestic plurality of authority was also to be seen in Empire where Britain worked through local elites.<sup>316</sup> Applying this understanding, "kawanatanga was a national form of governance with enough civil muscle, and military muscle if necessary, to maintain internal 'peace and good order' and prevent foreign interference or invasion". Carpenter says it was "primarily a civil authority for the regulation of property rights and the suppression and punishment of offences against the peace". Rangatiratanga, on the other hand, was "traditional chiefly authority exercised in respect of hapu affairs, including land transactions. Rangatira would maintain order within the hapu and whanau according to Maori (and increasingly Christian) tikanga and laws."<sup>317</sup>

While sovereignty/kawanatanga ("civil government") applied to both Pakeha and Maori, so that "[t]here was one Sovereign and one Law" as "the controlling civil power of the land", "hapu-based authority" of chiefs was preserved under the Treaty in a manner similar to the hierarchy of English society.<sup>318</sup> Williams and other missionaries also "hoped that the chiefs' powers in relation to their hapu could be incorporated within Kawanatanga to make its rule over the entire country effective".<sup>319</sup> Carpenter points to Henry Williams's later statement that the Treaty had protected the chiefs' "Rank, Rights, and Privileges". He suggests that the effect of the Treaty was that, although existing ranks within Maori society were

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<sup>315</sup> Carpenter "A Declaration and the Treaty", above n 177, 5, 108 & 144-146.

<sup>316</sup> Ibid 6 & 27-31.

<sup>317</sup> Ibid 139.

<sup>318</sup> Ibid 142, 147, 155 & 159.

<sup>319</sup> Ibid 152.

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preserved, after the Treaty “this status was now held under the Crown”. The reference in the English text to “Estates” as well as “Lands”, and the provision of the article 2 guarantee to chiefs, tribes, families and individuals, could be seen as a confirmation of rank as well as property.<sup>320</sup>

Carpenter draws a connection, generally unremarked upon in the historiography, between the 1835 Declaration of Independence and the Treaty of Waitangi. He suggests that “[t]he rangatiratanga declared in He Wakaputanga [the Declaration] was the same chiefly and tribal authority protected by article two of te Tiriti”.<sup>321</sup> The kawanatanga ceded was “the right to exercise the national powers of governance that [the chiefs] had declared themselves possessed of in the Declaration”, and was to be understood in the same sense in which it had been used in the Declaration to translate “any function of government” from Busby’s English draft.<sup>322</sup> Carpenter argues that Busby himself distinguished between the “personal power and influence” of chiefs and “national institutional government” (something that Maori did not possess):<sup>323</sup>

[K]awanatanga was in substance what Maori were granting to Queen Victoria. They were granting her the authority to establish the kawanatanga that they did not in reality exercise. The need for “peace and good order” and the protection of Maori “just Rights and Property” (preamble, English text) in the face of European land purchase and lawlessness was the problem that lead to the Treaty in the first place, certainly from a missionary perspective. Although article one of the English version used the term “cede”, meaning to “give up one’s rights to [sovereignty]”, the reality was more accurately expressed by the preamble which referred to Hobson treat for “the recognition of Her Majesty’s Sovereign authority”. ... The sense of this was Maori agreeing to accept a new authority in the land rather than giving up an authority that they themselves already exercised.

Carpenter agrees with Alan Ward that the exact relationship between sovereignty/kawanatanga and chieftainship/rangatiratanga remained to be worked

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<sup>320</sup> Ibid 193-194.

<sup>321</sup> Ibid 152.

<sup>322</sup> Ibid 167-168. See also ibid 187-188.

<sup>323</sup> Ibid 160 & 162-163.

out in practice and was a topic “too remote and theoretical” for discussion at the Treaty signings.<sup>324</sup> He considers that Hobson and his officials may have envisaged a wider role for kawanatanga, including in matters of criminal justice, than did the chiefs and missionaries.<sup>325</sup>

**What was the guarantee of “full exclusive and undisturbed possession of their Lands and Estates, Forests Fisheries, and other properties” and was it simply declaratory of the common law position?**

The property guarantee in the first clause of article 2 of the English text has received little attention in the historiography compared to the issue of “sovereignty”, “kawanatanga” and “rangatiratanga”.<sup>326</sup> To the extent that there has been interest, it has focused on whether the article was intended to confirm and guarantee Maori in possession of all land in New Zealand they had not already sold to Europeans or only that land they were occupying or cultivating.<sup>327</sup> Historians here are following the historical record, since it became a question of no little controversy in England and New Zealand in the 1840s whether (as the New Zealand Company among others argued) lands not occupied or cultivated by Maori were “waste lands” that had become part of the Crown’s domain on its assumption of sovereignty in 1840. The historiography of this “waste lands” question is considered under the next heading of this chapter.

In comparison to it, very little attention has been given to the nature of the property guarantee in article 2. In particular, the meaning of the phrase “the full exclusive and undisturbed possession of their ... properties” has been neglected. Historians have simply assumed—perhaps not incorrectly—that whatever land Maori had rights to under the Treaty (whether that was all land in New Zealand or only the land they were occupying or cultivating) was “owned” by them.<sup>328</sup> While some

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<sup>324</sup> Ibid 139 (quoting Ward *An Unsettled History*, above n 23, 18).

<sup>325</sup> Ibid 195.

<sup>326</sup> A point made by Michael Belgrave. See Belgrave “Pre-emption”, above n 24, 23-24.

<sup>327</sup> See, for example, Adams *Fatal Necessity*, above n 3, ch 6; and Orange *The Treaty of Waitangi*, above n 23, 98-100.

<sup>328</sup> See, for example, Orange *The Treaty of Waitangi*, above n 23, 1 (“The treaty in English ... guaranteed [Maori] full rights of ownership of their lands, forests, fisheries and other prized

appear to recognise that the content of “ownership” depended on Maori custom, others appear to equate Maori “ownership” with the fullest interest known to English law, an estate in fee-simple. For legal scholars, these are critical questions, the answers to which are not self-evident.

Legal writers have tended to regard article 2 as merely declaratory of a common law doctrine of aboriginal title which would have applied irrespective of the Treaty. The doctrine recognised not ownership but occupation and use of their lands held under Crown ownership. Here again Paul McHugh’s work has been influential, although he himself has retreated from the opinion that aboriginal title, a burden on the Crown’s underlying ownership or title to land, is itself enforceable in the courts. McHugh now takes the view that aboriginal title is not a legal interest but a political trust dependent on recognition by the Crown as a matter of grace.<sup>329</sup>

Especially in his earlier work,<sup>330</sup> McHugh explains aboriginal title as a partial exception to the rule of British imperial law that the property rights of the existing inhabitants of a territory continue unaltered after a change in sovereignty unless at the time of acquisition there is an act of state extinguishing or modifying them. He argues that British imperial law distinguished between “civilised” and “uncivilised” territories. In the former, existing land rights and laws were confirmed and continued. In the latter, aboriginal land rights, long recognised as natural law rights, were recognised in a modified form. Under this doctrine of “modified continuity”, the paramount ownership of the land was vested in the Crown, subject to aboriginal rights to the continued occupation and use of their

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possessions”); Binney “Maori and the Signing of the Treaty”, above n 196, 25 (“[Hobson] was given instructions to make a treaty, and to recognize Maori land ownership, both long-standing British attitudes”); Sorrenson “How to Civilize Savages”, above n 26, 104 (“Maori owners”).

<sup>329</sup> Compare, for example, McHugh *The Maori Magna Carta*, above n 129, 94 & 104 to Paul McHugh “What a Difference a Treaty Makes—the Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law” (2004) 15 Public Law Review 87-102 [“McHugh ‘What a Difference a Treaty Makes’”] at 89 and Paul McHugh “Aboriginal Title in New Zealand: A Retrospect and Prospect” (2004) 2 New Zealand Journal of Public International Law 139-202 [“McHugh ‘A Retrospect and Prospect’”] at 145-146.

<sup>330</sup> McHugh still seems to acknowledge that nineteenth century British imperial law and practice allowed that there were aboriginal interests in land (although they were not justiciable in the courts). See McHugh “A Retrospect and Prospect”, above n 329, 143; and McHugh *Aboriginal Title* (2011), above n 279, 2-3.

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lands according to their own customs. This aboriginal title was a proprietary interest and, as McHugh in his earlier work considered it to be, a right in law that could be enforced in the courts (as through actions for trespass or ejectment). The doctrine of aboriginal title also placed one restriction on the land rights of aborigines that did not apply to inhabitants of “civilised” territories acquired by the British Crown: they were prevented from selling their land to anyone but the Crown. This was the so-called right or doctrine of “Crown pre-emption”.

McHugh gives two explanations for this difference of approach between “civilised” and “uncivilised” territories. First, creating aboriginal land rights as a burden on the Crown’s underlying ownership of the land and securing the right of pre-emption were ways to interpose the Crown between aboriginal landholders and land-hungry settlers and in that way to fulfil the Crown’s duty of guardianship toward native peoples. Secondly, the same rules allowed the Crown to control the process of settlement in the newly acquired territory where, in contrast to “civilised” territories, there was typically a large amount of uninhabited land, and to put in place an English system of property law (rather than have indigenous customary law define settler property rights including the rules of transfer).<sup>331</sup>

McHugh sees the “legal principles which British and American colonial practice reflected” as having been “analysed authoritatively” in the 1823 judgment of Chief Justice John Marshall of the United States Supreme Court in the case of *Johnson v M’Intosh*.<sup>332</sup> For McHugh this decision, which is discussed in Chapter 5, correctly applied two fundamental and related principles, one of English land law and the other of British imperial law and practice, that helped distinguish the approaches in “civilised” and “uncivilised” territories to the recognition of pre-existing property rights. The first was the feudal doctrine of tenures according to which the Crown is the sole source of title to land. Upon its introduction into an “uncivilised” territory this rule of English land law meant that the Crown not only had the underlying or

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<sup>331</sup> Paul McHugh *Maori Land Laws of New Zealand* (University of Saskatchewan Native Law Centre, Saskatoon, 1983) 8-13; McHugh “Aboriginal Title”, above n 129; McHugh *The Maori Magna Carta*, above n 129, 86-87 & ch 5.

<sup>332</sup> McHugh *The Maori Magna Carta*, above n 129, 106.

radical title to land that came with its sovereignty but also took legal title to or ownership of the land occupied by the indigenous population. McHugh describes the doctrine of tenures as a “constitutional tenet of the highest order”.<sup>333</sup> The second, related, principle (correctly applied in *Johnson v M’Intosh*) was that, because all land had to be “held of the Crown with rights thereto depending upon a grant from the Crown” (except the aboriginal title itself which was exceptional as a Crown-recognised rather than Crown-derived right), the Crown alone had the right to extinguish aboriginal title. No settler could purchase from the native occupiers a title to land that any court of the new sovereign could recognise. This was the doctrine of Crown pre-emption. Against the background of these undisputed legal principles, McHugh considered that the significance of *Johnson v M’Intosh* was “that it recognised aboriginal title in the strongest of terms”.<sup>334</sup>

McHugh considers that, because Britain in effect treated New Zealand as an “uncivilised” territory, feudal tenure (and with it Crown pre-emption) was consciously introduced into New Zealand by “act of state”<sup>335</sup> “from the moment sovereignty was declared” to prevent settlers from acquiring land directly from Maori.<sup>336</sup> In his earlier writings, this led McHugh to the conclusion that the guarantee of property and the right of pre-emption provided for in article 2 were “no more than declaratory of rules which would have applied in any event so far as Maori property rights are concerned”.<sup>337</sup>

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<sup>333</sup> McHugh “Aboriginal Title”, above n 129, 237.

<sup>334</sup> McHugh “Aboriginal Title”, above n 129, 241-242.

<sup>335</sup> McHugh *The Maori Magna Carta*, above n 129, 99-101. For “act of state”, see Chapter 3, text accompanying n 12.

<sup>336</sup> Ibid 98 & 102. As evidence of feudalism’s introduction in New Zealand, McHugh refers to Normanby’s Instructions to Hobson, Gipps’s 14 January 1840 land titles proclamation, the Land Claims Act 1840, the November 1840 Charter erecting New Zealand into a separate colony, and the Land Claims Ordinance 1841. He also considers that “feudal principle ... underlies the second article of the Treaty of Waitangi” in its provision for the Crown’s pre-emptive right. Ibid 101-103.

<sup>337</sup> McHugh “Maori Claims”, above n 260, 17. See also Paul McHugh “The Legal Basis for Maori Claims Against the Crown” (1988) 18 Victoria University of Wellington Law Review 1-20 [“McHugh ‘Legal Basis for Maori Claims’”] at 3; and McHugh *The Maori Magna Carta*, above n 129, 97.

McHugh has, however, changed his mind about whether aboriginal title was nineteenth century common law doctrine.<sup>338</sup> He now considers that “[t]hroughout the 19th century and for most of the 20th ... Crown ownership of tribally inhabited land was characterised as a political trust unenforceable in the courts.”<sup>339</sup> This was for two reasons. First, there was no title of which the courts could take cognisance because Maori land rights were not derived from a Crown grant. Secondly, tribes lacked legal status which would enable them to bring claims before the courts for land which was held under customary title.<sup>340</sup> This second point is part of McHugh’s larger argument (not confined to questions of property) that all aboriginal “rights” were non-justiciable until recognised in law by the sovereign

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<sup>338</sup> This is a considerable shift in view. Earlier, McHugh had described the *Wi Parata* (1877) approach (which denied legal recognition to Maori customary property) as one of “extreme infirmity”. Its error, he thought, followed from the court’s “mischaracterisation of the tribal title as subsisting at Crown sufferance”. McHugh “Legal Basis for Maori Claims”, above n 337, 5-6. This is to be contrasted with McHugh’s more recent opinion of the judgment in *Wi Parata* that it “reflected the received position in New Zealand and other British colonies of the same period” that there was no common law right of aboriginal title and that Maori were therefore “prevented ... [from having] recourse to the courts to vindicate the aboriginal property rights guaranteed under the Treaty of Waitangi, leaving that role to the Crown as their legal protector”. McHugh *Aboriginal Societies*, above n 234, 173. Compare also McHugh “Aboriginal Title”, above n 129, and McHugh *Aboriginal Title* (2011), above n 279.

<sup>339</sup> McHugh “What a Difference a Treaty Makes” (2004), above n 329, 89. See also Paul McHugh “Proving Aboriginal Title” [2001] *New Zealand Law Journal* 303-308 [“McHugh ‘Proving Aboriginal Title’”] at 303-304, McHugh “A Retrospect and Prospect”, above n 329, 145-151 and McHugh *Aboriginal Title* (2011), above n 279, ch 1. Signposts to this change of view include McHugh “New Zealand’s Constitutional History” (1995), above n 4, 354-359, McHugh “Law, History and the Treaty” (1997), above n 65, 43-44, McHugh “Common-Law Status” (1998), above n 252, 428-429 and Paul McHugh “A Tribal Encounter: The Presence and Properties of Common-Law Language in the Discourse of Colonization in the Early Modern Period” in Alex Calder, Jonathan Lamb & Bridget Orr (eds) *Voyages and Beaches: Pacific Encounters, 1769–1840* (University of Hawai‘i Press, Honolulu, 1999) 114-131 [“McHugh ‘Tribal Encounter’”] at 127-129. For his own description of this “turn”, see Paul McHugh “A History of the Modern Jurisprudence of Aboriginal Rights—Some Observations on the Journey So Far” in David Dyzenhaus, Murray Hunt & Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) 209-232 [“McHugh ‘Modern Jurisprudence of Aboriginal Rights’”] at 221-222. McHugh’s “turn” has been commented on by Mark Walters and Mark Hickford. See Mark Walters “Histories of Colonialism, Legality, and Aboriginality” (2007) 57:4 *University of Toronto Law Journal* 819-832 (book review); and Hickford *Lords of the Land*, above n 3, 19-20.

<sup>340</sup> McHugh “A Retrospect and Prospect”, above n 329, 145-146. In relation to the second reason for legal unenforceability, McHugh writes: “The tribes were not seen by the common law as distinct polities inside the Crown sovereignty—political beings organised by their own laws—but as a collection of Crown subjects unable to claim any right through this legally non-existent entity: the tribe. ... It rendered inconceivable articulation by the common law of any notion of aboriginal rights: that is to say, rights vested in tribal peoples as a result of their customary political and cultural form of organisation and lifestyle.”

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power.<sup>341</sup> The common law doctrine of aboriginal title is, for McHugh, a recent 20th century construct.<sup>342</sup>

Common-law Aboriginal title does not purport to be an historical explanation of what happened in the past, for one does not find eighteenth- and nineteenth-century individuals talking in the same terms as late twentieth-century lawyers. It is a doctrine constructed from principles that today are seen to have regularly underpinned Crown conduct in the past and that have been given contemporary legal significance in order to protect extant rights of use and occupation. Those principles are the Crown's recognition of the land rights of the Aboriginal inhabitants of its colonies and its practice of making itself the sole source of title for land held by settlers, thus requiring the cession of land by its Aboriginal owners to the Crown.

Although McHugh accepts that nineteenth century British officials undoubtedly did regard native peoples "as holding a lawful right to their lands that could not be extinguished without their consent", he seeks to emphasise that they "did not live in a world where late twentieth century Judges had already described those rights as justiciable and enforceable against the Crown". He emphasises a difference between the Crown as "the source of justice" and as "the subject of justice".<sup>343</sup>

McHugh's view that Maori land "rights" after British sovereignty had been obtained were of the kind described in *Johnson v M'Intosh* and that the Treaty in its English text simply applied the common law approach, has been followed by other scholars.<sup>344</sup> This understanding may appear to be supported by examples

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<sup>341</sup> See text accompanying ns 269 & 283-286 above.

<sup>342</sup> McHugh "Common-Law Status", above n 252, 428. See also McHugh *Aboriginal Title* (2011), above n 279, ch 1.

<sup>343</sup> McHugh "Proving Aboriginal Title", above n 339, 304. See also McHugh "A Retrospect and Prospect", above n 329, 151: "Yet it is important to reiterate that common law aboriginal title did not emerge as historical truth. Courts did not pretend that officials in the 19th century were operating other than to the widely held and rarely controverted principle of non-justiciability. Rather, aboriginal title emerged as legal doctrine concerned with the identification and articulation of extent rights, the protection of which courts were once but no longer content to leave to executive discretion. Aboriginal title did not invent the recognition of tribal property rights for the Crown, and governments had purported to do that throughout the history of Anglo-American colonialism. It simply removed the shield of non-justiciability." Compare McHugh "Aboriginal Title", above n 129, especially 240-258 on "judicial theories of aboriginal title" from 1810 to 1982.

<sup>344</sup> See, for example, Brookfield "Search for Legitimacy", above n 157, 10-11; Richard Boast "Treaty Rights or Aboriginal Rights" [1990] *New Zealand Law Journal* 32-36 ["Boast 'Treaty

from the early history of the colony in which the American approach to native title was influential. These include the Land Claims Act 1840 passed by the Legislative Council of New South Wales, the November 1840 Charter creating New Zealand a separate colony, the Land Claims Ordinance 1841 of the New Zealand Legislative Council, and the New Zealand Supreme Court case of *R v Symonds* in 1847.<sup>345</sup> It remains to be seen to what extent McHugh's altered view of the Crown's ownership of Maori occupied land being "a 'political trust' that was morally obliging but legally unenforceable" will come to be generally accepted.<sup>346</sup>

The view that the *Johnson v M'Intosh* approach to aboriginal property rights was the approach adopted in New Zealand in 1840 (including in the Treaty) has come in for recent criticism from Mark Hickford. He argues that British policy toward Maori property rights was not the straightforward application of pre-existing and well-established legal doctrine.<sup>347</sup> It was determined by political contest that was

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Rights"] at 32 (although see below text accompanying n 366, Boast follows the Waitangi Tribunal in arguing that Maori property rights under the common law doctrine of aboriginal title and as guaranteed by article 2 of the Treaty are "distinct"); Sorrenson "Precedents for Waitangi", above n 15, 20-23 (although see below n 347); Belgrave "Pre-emption", above n 24, 24-27 (although see below n 347); Ward *National Overview*, above n 24, vol 1, 5-6 & 15; Ann Parsonson "The Fate of Maori Land Rights in Early Colonial New Zealand: The Limits of the Treaty of Waitangi and the Doctrine of Aboriginal Title" in Diane Kirkby & Catharine Coleborne (eds) *Law, History, Colonialism: The Reach of Empire* (Manchester University Press, Manchester, 2001) 173-189; David Williams *The Native Land Court*, above n 164, 114-115; Jim Evans "Reflections on *Nireaha Tamaki v Baker*" (2005) 2 Te Tai Haruru: Journal of Maori Legal Writing 101-134 at 117-119; and FM Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (2nd ed, Auckland University Press, Auckland, 2006) 51-54. Some of McHugh's arguments had been anticipated by John Hookey and coincided with those advanced by Frederika Hackshaw. See Hookey "Milirrpum and the Maoris", above n 129; and Hackshaw "Aboriginal Title", above n 129.

<sup>345</sup> For which see Chapters 16-18.

<sup>346</sup> McHugh "A Retrospect and Prospect", above n 329, 146.

<sup>347</sup> See also Belgrave "Pre-emption", above n 24, 24-25, 27 & 28. Belgrave considers that the 1820s and 1830s Indian title cases of the United States Supreme Court cases were only one among "a wide range of authorities" that the Colonial Office, the New Zealand Association/Company, the Aborigines' Protection Society, and the Church and Wesleyan missionary societies could draw upon in the late 1830s and 1840s. Among the different views were those of Emmerich de Vattel, the eighteenth century Swiss jurist, who had taken the view that "civilised" peoples were entitled to displace aboriginal peoples who were not making best use of land. Belgrave argues that "[t]he principles used to recognize aboriginal title and their interpretation relied not on established legal precedent but on the working out of a series of political relationships between Maori and the state, and within the European world itself." At the time of the Treaty "there was ... a broad, if transitory, consensus that Maori had significant rights to land. ... [F]or a brief period in 1840 all adhered to the principle of aboriginal tenure". The debate continued, however, and it was not until the late 1840s that "Governor George

not settled in any decisive way until 1846 at the earliest. This political contest, principally between the Colonial Office and the New Zealand Company in London, made tactical use of the language of international law writings on the rights of indigenous peoples subject to colonisation (as received into the common law) as well as a mid-nineteenth century understanding of Scottish Enlightenment “stadial theory” by which indigenous rights were to be determined according to the stage of civilisation they had reached.<sup>348</sup> Hickford argues that the American law approach to aboriginal title was not appropriated into this policy debate until mid-1840, some months after Hobson had left for New Zealand, and then by the New Zealand Company, and that the Colonial Office resisted its use until 1846 when Earl Grey became Secretary of State for the Colonies.<sup>349</sup>

Hickford argues that throughout the period 1837–53 a “profound sense of movement and contestation underlay the formulation of British imperial policies on the proprietary rights of Maori”:<sup>350</sup>

In this making of policy, characterized by shifting points of emphasis, political argument and coalitions of interest, an imperial conception of the “territorial rights of the natives” of New Zealand arose haphazardly.

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Grey [was] able to turn the theoretical argument into effective policy by ensuring that title to land could be recognized, while promising its easy extinguishment. In the process, the nature of aboriginal title was established on the ground and, in being defined in practice, produced a compromise between the Marshall and Vattel positions.” See also below n 355. As has been seen, Keith Sorrenson seems to come to a similar conclusion that application in New Zealand of the American law on Indian title was a matter of policy choice rather than being inevitable legal doctrine. See text accompanying ns 136-143 above.

<sup>348</sup> For “stadial theory” (or “conjectural history”), see Chapter 3.

<sup>349</sup> Hickford *Lords of the Land*, above n 3, chs 1-4; Mark Hickford “Making ‘Territorial Rights of the Natives’: Britain and New Zealand, 1830–1847” (DPhil Thesis, University of Oxford, 1999) [“Hickford ‘Making territorial rights’”]; Mark Hickford “‘Settling Some Very Important Principles of Colonial Law’: Three ‘Forgotten’ Cases of the 1840s” (2004) 35 Victoria University of Wellington Law Review 1-30 at 4 & 13-17; Mark Hickford “‘Decidedly the Most Interesting Savages on the Globe’: An Approach to the Intellectual History of Maori Property Rights, 1837–53” (2006) 27:1 History of Political Thought 122-167 [“Hickford ‘Decidedly the Most Interesting Savages’”]; Mark Hickford “‘Vague Native Rights to Land’: British Imperial Policy on Native Title and Custom in New Zealand, 1837–53 (2010) 38:2 The Journal of Imperial and Commonwealth History 175-206; Mark Hickford “Law and Politics in the Constitutional Delineation of Indigenous Property Rights in 1840s New Zealand” in Shaunnagh Dorsett & Ian Hunter (eds) *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan, New York, 2010) 249-268.

<sup>350</sup> Hickford “Decidedly the Most Interesting Savages”, above n 349, 124.

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“Officials did not wish to be riveted to a doctrinaire position on the precise nature and extent of Maori property rights where a degree of policy flexibility was to be preferred.”<sup>351</sup> Hickford suggests that in 1839–40 all that was agreed upon in the Colonial Office about Maori property rights was that they could be purchased.<sup>352</sup> Out of the policy debate to that point had emerged no more than a “formulaic, non-analyzed recognition of aboriginal title ... such that it indicated the possibilities for further disputes as to the substance of such title. It was formulaic in that phraseologies of proprietary rights were recited in the absence of policy analysis.”<sup>353</sup> The same was true of the Treaty he argues:<sup>354</sup>

This Treaty was inherently contestable, as its second article was emblematic of a sympathetic yet formulaic, procedurally oriented vocabulary of indigenous proprietary rights vesting in Maori. Formulaic and non-analysed, it merely recited a view of Maori as possessing “lands and estates forests and other properties” in the absence of any clarity as to what such terms signified. As a Colonial Office sanctioned document, enjoying diverse responses and experiences throughout New Zealand, its terminology represented a point for commencing arguments as to proprietary interests, but not an answer or series of answers.

And:<sup>355</sup>

This phraseology [i.e. “full exclusive and undisturbed possession of their Lands and Estates, Forests Fisheries and other properties”] could not be comprehended with any exactitude as it was uncertain what Maori “possessed” or what such “possession” substantially entailed. What it denoted was potentially controversial and certainly malleable, not coherently appreciated.

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<sup>351</sup> Ibid 154.

<sup>352</sup> Hickford *Lords of the Land*, above n 3, 90; Hickford “Making Territorial Rights”, above n 349, 20 n 1.

<sup>353</sup> Hickford “Making Territorial Rights”, above n 349, 48.

<sup>354</sup> Hickford *Lords of the Land*, above n 3, 110.

<sup>355</sup> Hickford *Lords of the Land*, above n 3, 110–111. These views about the Treaty are similar to ones held by Peter Adams and Michael Belgrave. Adams says that article 2 was “fortuitous” and that “no particular thought was given to the matter until a head-on collision between Maori and settler claims to land occurred in the New Zealand Company’s settlements”. Adams *Fatal Necessity*, above n 3, 207. Belgrave writes that “[f]ar from being a simple declaration of legal principles, the Treaty’s property guarantees can be seen as malleable and highly contested, reflecting the changing relationships between Maori and the major European interests in New Zealand.” Belgrave “Pre-emption”, above n 24, 26. See also Belgrave *Historical Frictions*, above n 1, 29–30 & 66–69.

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A further alternative to the view that Maori interests in land in 1840 were in the nature of the Indian “right of occupancy” recognised in *Johnson v M’Intosh* is that of the Canadian legal scholar Kent McNeil, whose views have had comparatively little impact upon New Zealand scholarship. McNeil’s writing is considered in Chapter 5. For present purposes, it is sufficient to outline the way in which he differs from Paul McHugh and those New Zealand scholars who have followed him.

In his *Common Law Aboriginal Title*, McNeil distinguishes between territories acquired by Britain in sovereignty where there was a local system of land tenure capable of proof and those where there was not. If capable of proof, the native system of tenure would continue without any positive act of recognition on the part of the new sovereign required. The nature and extent of property rights were determined by custom.<sup>356</sup> Where no customary law system of property rights could be proved, McNeil considers that the common law could protect the fact of aboriginal occupation of land, in the manner in which occupation of land would be protected in England. Evidence of occupation could support an estate in fee simple.<sup>357</sup> (The distinction McNeil makes between customary title and common law recognition of aboriginal occupation is one acknowledged by McHugh, although his own work arguably does not maintain it.<sup>358</sup>)

Even if the doctrine of tenures was imported with sovereignty (a proposition he questions), McNeil takes the view that it was a fiction of law that gave the Crown no more than a “paramount lordship” over land (except where the territory was uninhabited or there was, within it, land that was without owners). As such, it

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<sup>356</sup> McNeil *Common Law Aboriginal Title*, above n 260, ch 6.

<sup>357</sup> Ibid ch 7.

<sup>358</sup> See Paul McHugh “Common Law Aboriginal Title” (1990) 49 Cambridge Law Journal 169-171 (book review) at 170; McHugh “Aboriginal Title”, above n 129, 235-236; McHugh “Maori Claims”, above n 260, 17; McHugh *The Maori Magna Carta*, above n 129, 94, 97 & 117; and McHugh “Law, History and the Treaty”, above n 65, 43.

could not affect native customary ownership or common law rights based on occupation.<sup>359</sup>

Of *Johnson v M'Intosh*, McNeil writes that “the right of occupancy” described by Chief Justice Marshall “envisaged an Indian interest unknown to the common law, the definition of which has understandably eluded judges ever since”.<sup>360</sup> Although McNeil does not do more than touch on the position of Maori, he expresses the opinion that Maori customary land rights “must be presumed to have continued” after British sovereignty. Although Maori customary title could have been extinguished by act of state, “the Treaty of Waitangi indicates that the Crown’s intention was just the opposite”.<sup>361</sup> When land legislation was later enacted, it “did not breathe new life into dead rights”.<sup>362</sup>

[R]ather, it took the existence of Maori land rights as given and provided a mechanism for integrating them into the English system which had been brought to New Zealand by the colonists. The legislative structure ... was thus erected on the foundation of the doctrine of continuity, the application of which did not depend on the Colony’s constitutional status [i.e., on whether New Zealand was a settled or ceded colony].

It can therefore be seen that there is a fundamental difference between McHugh and McNeil about whether a Maori customary law system of land tenure was preserved under British sovereignty or by the Treaty (as McNeil thinks) or whether Maori property rights were protected along *Johnson v M'Intosh* lines (as McHugh argues). Related questions are whether *Johnson v M'Intosh* “envisaged an Indian interest unknown to the common law” (as McNeil suggests), whether the doctrine of tenures applied in New Zealand and, if so, whether it gave the Crown simply a paramount lordship (as McNeil contends) or the paramount ownership of Maori land (as McHugh has it). These questions flow into the further question as to whether or not Maori interests in land were legally enforceable (as McNeil

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<sup>359</sup> McNeil *Common Law Aboriginal Title*, above n 260, 217-221. See text accompanying n 429 below, McNeil makes the related argument that Crown pre-emption was a matter of policy generally adopted in legislation rather than being common law doctrine.

<sup>360</sup> Ibid 236-237.

<sup>361</sup> Ibid 189.

<sup>362</sup> Ibid 191.

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considers) or were a political trust on the conscience of the Crown (as McHugh now argues).

While McNeil's views have had little impact on the New Zealand scholarship related to the nature of Maori property interests and the guarantee in article 2, an American scholar has recently come to the similar conclusion that the British government in 1840 recognised Maori as the "owners" of their land and had rejected the *Johnson v M'Intosh* approach.<sup>363</sup> Stuart Banner argues that:<sup>364</sup>

By the time the British exercised sovereignty in 1840, white settlers had been purchasing land from the Maori for years. Practice turned into law upon colonization, as Britain formally recognized Maori as owners of all the land in New Zealand, and the new colonial government began acquiring land through purchase.

The view expressed by McHugh that the Treaty guaranteed Maori rights of property in *Johnson v M'Intosh* terms, has been questioned by some who nevertheless take the view that the common law recognised Maori title according to the approach in *Johnson*. On this view, developed by the Waitangi Tribunal and Richard Boast, the Treaty added another dimension to the common law right of property. In its Muriwhenua Fishing Claim Report, the Tribunal took the view that the article 2 guarantee (with its reference to "exclusive" possession) did not simply confirm a common law right of occupation:<sup>365</sup>

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<sup>363</sup> Stuart Banner *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press, Cambridge, Massachusetts, 2007) [*Banner Possessing the Pacific*] ch 2, especially 60-61. Banner proceeds in error on the assumption that a minute by James Stephen (that *Johnson v M'Intosh* "though it may be good American law, is not the law we recognize"), was written in July 1839. In fact, as Mark Hickford has shown, it was almost certainly written in July 1840, because its addressee, Robert Vernon Smith, did not become Under-Secretary for the Colonies until September 1839. See Hickford "Decidedly the Most Interesting Savages", above n 349, 151 n 143. If dated in July 1840, the minute is explicable as a response to citation of *Johnson v M'Intosh* by Edward Gibbon Wakefield in his evidence to a House of Commons Select Committee on New Zealand (see Chapter 15). Banner's error has been made by other scholars and is understandable (given a pencil notation "1839" on the minute which is dated "28 July" only). The mistake does not, however, mean that Banner is wrong in his view that *Johnson v M'Intosh* was not the approach of the British Government towards Maori property in land.

<sup>364</sup> Ibid 47.

<sup>365</sup> Waitangi Tribunal *Muriwhenua Fishing Claim Report*—Wai 22 (1988) 208-209.

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While the doctrine of aboriginal title does form part of the necessary background to Colonial Office opinions as held at the time of the Treaty, and there is some concurrence between the doctrine and the Treaty principle of protecting Maori interests, the one is not determinative of the meaning of the other, and both have an aura of their own. ... It would be more correct to say, in our view, that the Treaty supplements the doctrine, while the doctrine upholds a right where the Treaty has no application.

Boast adopts the Tribunal's view that "the principles of the Treaty and the principles of aboriginal title rules are distinct", although they "subsist side by side". While acknowledging that treaties could extinguish or modify aboriginal title, and were often used to do so in the United States, Boast concludes that "[i]t would be too harsh to conclude that enforceable aboriginal title rights have been extinguished by the act of signing an unenforceable treaty of cession in New Zealand". (In the United States, by comparison, treaties with Indians were part of domestic law under the Constitution and enforceable.)<sup>366</sup>

Benedict Kingsbury has drawn attention to an 1877 report of the United States Senate Committee on Foreign Relations which expresses a similar view to that taken by the Waitangi Tribunal in suggesting that the language of the article 2 guarantee expands the aboriginal title recognised at common law. The view of the Senate Committee was that:<sup>367</sup>

It would be difficult to select language that would more clearly import a perfect ownership in all the soil of New Zealand, in the chiefs, the people as tribes, and as private owners, than that which is guaranteed in the treaty itself.

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<sup>366</sup> Boast "Treaty Rights", above 344, 34. See also David Williams "Unique Relationship?", above n 130, 88-89; and David Williams *The Native Land Court*, above n 164, 115-116.

<sup>367</sup> Kingsbury's source for the Senate Committee's statement is a further 1892 report of the Committee which was appended to the United States *Memorial* in the *Webster* case (an international arbitration relating to the pre-Treaty New Zealand land claims of the American, William Webster, which was not resolved until 1925). Kingsbury "The Treaty of Waitangi", above n 234, 124-125 & n 20.

### **Did article 2 exempt “waste lands” from the guarantee of properties?**

Was the guarantee of Maori property in article 2 intended to extend to all land in New Zealand that the chiefs and tribes had not already alienated (on fair terms) or only the land they occupied and cultivated? This question—the so-called “waste lands” question—became one of great controversy in the 1840s when the New Zealand Company, having difficulty proving its purchases of land according to custom, argued that lands not occupied and cultivated by Maori were “waste lands” of the Crown and available to be granted. The “waste lands” question was not put to rest until 1847 when the British Government decided to treat Maori as owners of land to the full extent of native custom and quite possibly to the whole country (although the effect was undermined by the programme of large scale land purchasing that then ensued). Historians have argued over whether this decision of the British government was a belated confirmation of rights guaranteed by article 2 of the Treaty or a pragmatic solution to years of political debate over a text that was ambiguous on its face.

Trevor Williams took the view that, whatever the English and Maori texts actually guaranteed, neither the Colonial Office nor Hobson in 1840 had intended to guarantee Maori rights to unoccupied land.<sup>368</sup> For JC Beaglehole, AH McLintock and Alex Frame by contrast, it was straightforward that the Treaty recognised Maori rights to the whole of the country.<sup>369</sup> This was Richard Boast’s view too until recently.<sup>370</sup> He now considers that British policy on the question was

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<sup>368</sup> Trevor Williams “The Treaty of Waitangi”, above n 21, 245 & 248-249.

<sup>369</sup> JC Beaglehole *New Zealand: A Short History* (George Allen & Unwin Ltd, London, 1936) [“Beaglehole *New Zealand*”] at 24-25; McLintock *Crown Colony Government*, above n 2, 66; Alex Frame “Property and the Treaty of Waitangi: A Tragedy of the Commodities?” in Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999) 224-238 at 228.

<sup>370</sup> Richard Boast “The Evolution of Maori Land Law 1862–1993” in Richard Boast, Andrew Erueti, Doug McPhail & Norman Smith *Maori Land Law* (Butterworths, Wellington, 1999) 47-101 at 48; Boast “Maori and the Law”, above n 240, 143-144.

“confused” until the mid-1840s. In this, he adopts Peter Adams’s study of the meaning of article 2 on the “waste lands” question.<sup>371</sup>

Adams’s study may have given the impression that the Treaty left undetermined whether Maori had rights to unoccupied and uncultivated lands,<sup>372</sup> but in fact he was clear that Hobson, Busby and the missionaries understood it to protect rights to all land, whether occupied or cultivated or not.<sup>373</sup> Moreover, Adams considered that recognition of Maori rights to unoccupied and uncultivated lands accorded with Normanby’s Instructions to Hobson (albeit that the land guarantee in article 2 was “fortuitous” because Hobson “was not specifically instructed to include [it] ... in the treaty”).<sup>374</sup>

The Instructions were the work of Stephen. Adams indicated that Stephen himself consistently believed, throughout the whole period of debate of the “waste lands” question in the 1840s, that Maori land rights were not limited to the lands they were occupying or using.<sup>375</sup> Adams considered, however, that the politicians at the Colonial Office in the period 1839–46 either had not intended to recognise Maori rights over the entire territory of New Zealand (and would not have approved Stephen’s draft had they appreciated it left open that possibility) or “regretted” earlier approval when they came to learn of the interpretation put on article 2 in New Zealand (which was not until later, since “the wording of the second article was sufficiently unspecific in the expression of its meaning”).<sup>376</sup>

Adams also argued that Gipps in 1840 held the view that Maori property in land did not extend to unoccupied and uncultivated lands (as Adams considered could

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<sup>371</sup> Boast *Buying the Land, Selling the Land*, above n 164, 24-25. Compare also Waitangi Tribunal *Orakei Claim Report*—Wai 9 (1987) 130-131; and Waitangi Tribunal *Muriwhenua Land Report*—Wai 45 (1997) 116.

<sup>372</sup> See Adams *Fatal Necessity*, above n 3, ch 6, including 182 (“the meaning of that article was still a matter of interpretation”) & 184 (“the battle over the meaning of the Treaty of Waitangi was by no means over”).

<sup>373</sup> Ibid 176-179.

<sup>374</sup> Ibid 178 & 207.

<sup>375</sup> Ibid 180-181.

<sup>376</sup> Ibid 179 & 207. The point is developed at ibid 179-188.

be seen from his “unsigned treaty” and Land Claims Bill).<sup>377</sup> In this way, Adams suggested that if Lord John Russell (who had become Secretary of State for the Colonies by the time the Treaty was received in London) or Gipps had understood the Treaty as Hobson did as confirming and guaranteeing Maori property in unoccupied lands, the Government would have disallowed it.<sup>378</sup> The guarantee of rights in all lands in article 2 had been agreed to by the Government “inadvertently” and “accidentally”:<sup>379</sup>

The belief that the Colonial Office intentionally guaranteed the Maoris possession and protection for all their lands in the second article of the Treaty of Waitangi is mistaken. The evidence shows that ... the protection of Maori rights to all their lands was not policy but accident, an accident to be regretted and to be neutralized ... .

In addition to Boast, Claudia Orange and Stuart Banner have both adopted Adams’s account of the “waste lands” question. Orange finds that Hobson and “those directly concerned in treaty-making” intended the Treaty to guarantee Maori rights to the whole of New Zealand but that this implication of article 2 “slipped past” Gipps and Russell. Like Adams, she believes that if Gipps or Russell had understood this about the Treaty the British government would have disallowed it.<sup>380</sup> Banner agrees that article 2 was “ambiguous” on the point of what property Maori possessed, whether only the land they were occupying and using or the entire country.<sup>381</sup> He also sees it as a question that had to be worked through politically and that was not resolved until 1847.<sup>382</sup>

Hickford appears to take a somewhat different view to Adams and other scholars. He does not discuss the Treaty text directly in relation to waste lands. But he seems to suggest that the Colonial Office in 1839–40 had decided that Maori had rights

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<sup>377</sup> Ibid 179.

<sup>378</sup> Ibid 179-180. Adams find support for this view in the 1844 opinion of George Hope, then Parliamentary Under-Secretary for the Colonies (1841–45), that if the Treaty had been understood in this sense “there can be little doubt that it would have been at once disallowed by Her Majesty’s Government”.

<sup>379</sup> Ibid 209 & 240-241.

<sup>380</sup> Orange *The Treaty of Waitangi*, above n 23, 98.

<sup>381</sup> Banner *Possessing the Pacific*, above n 363, 61.

<sup>382</sup> Ibid 60-63. See also Ward *National Overview*, above n 24, vol 1, 6 & 52 & vol 2, 1-2, 27-28, 77 & 125.

only to the land that they occupied and cultivated and that the rest was unowned “waste”, the title to which vested in the Crown upon the change of sovereignty. The “waste lands” debate between the Colonial Office and the New Zealand Company is therefore, for Hickford, not a debate about whether Maori had rights to land that they were not occupying or cultivating but one about whether land that did not appear to be occupied or cultivated could be immediately made available by the Crown for settlement (as the Company contended) or whether “a process in the field whereby colonial officials in New Zealand would collect information concerning assertions of customary entitlements to property from Maori themselves” was first required (as Hickford says the Colonial Office advocated).<sup>383</sup> It may be, however, that Hickford is making the more limited argument that, in London at least in 1839–40, no thought had been given to the question of what property Maori possessed, although it was assumed that there would be at least some unowned land in the country (that is, land to which no customary law claim would extend).<sup>384</sup>

### **Was pre-emption under article 2 a monopoly right of purchase or a right of first offer?**

Ruth Ross considered that, in 1840, the domestic legal meaning in the United Kingdom of “the exclusive right of preemption” was the right of first offer on land offered for sale.<sup>385</sup> In her view that was not how Hobson used the phrase.<sup>386</sup> He

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<sup>383</sup> Hickford “Decidedly the Most Interesting Savages”, above n 349, 135-136.

<sup>384</sup> Ibid 123, 135-136, 154 & 160.

<sup>385</sup> Ross “Texts and Translations”, above n 2, 144. Ross, ibid 148-149, referred to Justice Chapman’s opinion in *R v Symonds* (1847) that “the framers of the Treaty found the word [“pre-emption”] in use with a peculiar and technical meaning, and, as a short expression for what would otherwise have required a many-worded explanation, they were justified by very general practice in adopting it”. She considered that this was a “piece of gobbledygook, totally unsupported by the citation of any precedent or authority”. In fact, the American case-law cited by Chapman in his judgment in *Symonds* did support the existence of a Crown “pre-emptive right”, being “the exclusive right of the Queen to extinguish the native title” (albeit that Chapman described it as a right that “operates only as a restraint upon the purchasing capacity of the Queen’s European subjects, leaving the natives to deal among themselves as freely as before the commencement of our intercourse with them”). *R v Symonds* (1847) NZPCC 387 at 391.

<sup>386</sup> Ross also quoted Busby’s 1858 statement that, whatever its “etymological sense”, the word “pre-emption” in the English text of the Treaty was “used in the technical sense, in which it

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used it to mean a Crown monopoly right to purchase land (or “monopsony” in the term employed by Stuart Banner<sup>387</sup>), which prohibited Maori from selling to other purchasers even if the Crown refused to buy the land.<sup>388</sup> Ross considered that the Treaty language in article 2 did not secure a Crown monopoly in purchase and that Hobson was “mistaken about its actual meaning”.<sup>389</sup>

Ross argued that Hobson may indeed not have explained “the exclusive right of preemption” to Henry Williams as the monopoly right to buy the land. This explained why Williams’s translation also did not make the point clear, and why many, if not most, chiefs understood from the explanations given of the clause at Waitangi and elsewhere that they had surrendered merely the right of first offer.<sup>390</sup> Ross further argued that Williams was in all likelihood the “gentleman at the Bay of Islands, who had more to do with getting the treaty signed than any man in the colony”, who was the source referred to by one WF Porter in a letter to the *Southern Cross* newspaper in 1861 on the meaning of the pre-emption clause. Porter quoted the description given by his source of the explanation of the pre-emption clause given to Maori at Waitangi:<sup>391</sup>

[T]he pre-emption clause had to be explained to them over and over again, and the following is the explanation given: The Queen is to have the first offer of the land you may wish to sell, and in the event of its being refused by the Crown, the land is yours to sell it to whom you please.

As has been discussed above, most historians agree with Ross that the Maori text of the Treaty was unclear as to whether the right of pre-emption was a monopoly right of purchase or a right of first offer.<sup>392</sup> Only Paul Moon seems to suggest that

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has always been used in dealing with the American Indians ...—that is, as an exclusive right to deal with them for their lands”. See Chapter 18, text accompanying n 43.

<sup>387</sup> A “monopsony” is a market in which there is one buyer only.

<sup>388</sup> Ibid 143-144.

<sup>389</sup> Ibid 136.

<sup>390</sup> Ibid 145-146.

<sup>391</sup> WF Porter “The Treaty of Waitangi, As Explained to the Natives When that Document was Signed”, *The Southern Cross*, Auckland, 23 July 1861, at 4, quoted in Ross “Texts and Translations”, above n 2, 151-152.

<sup>392</sup> See above n 164.

pre-emption in article 2 was meant as and achieved only the right of first offer.<sup>393</sup> He takes it as established that Williams was WF Porter's correspondent.<sup>394</sup>

Peter Adams agrees with Ross that, on the British side, pre-emption was understood as the monopoly right of purchase<sup>395</sup> even though "[t]his is not now, and probably has never been the dictionary meaning of the term, where it is usually defined as 'the first offer' or the 'right of first refusal'."<sup>396</sup> He is, however, less sure than Ross that Henry Williams, the missionaries, and "other people entrusted with explaining the treaty", understood it merely as the right of first offer. He is also unsure of Ross's identification of Williams as WF Porter's source.<sup>397</sup> Ranginui Walker follows Ross both in thinking that "pre-emption" was a poor choice in the English text because it did not mean, as intended, the monopoly right of purchase, and in believing it "highly probable" that Henry Williams explained it to Maori as the right of first offer (although he does not express a view as to whether Williams knew he was misrepresenting the British intention behind the pre-emption clause).<sup>398</sup> JMR Owens glides over whether the translation was deficient or whether Williams genuinely understood "the exclusive right of preemption" as the right of first offer.<sup>399</sup> Claudia Orange considers it "unlikely" that Williams did not understand pre-emption as it was intended as the monopoly right of purchase, but

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<sup>393</sup> Moon *Path to the Treaty*, above n 306, 113 & 147-148.

<sup>394</sup> Ibid 147-148. Since I am of the view that it is extremely doubtful that Williams was indeed Porter's source (because, among other things, his presence at Waitangi is put in the third person in the letter quoted by Porter) and because the letter is, in any event, so long after the signing of the Treaty as to be of doubtful assistance, I do not deal further with it. The letter is also more relevant to understandings of the Maori text of the pre-emption clause than to the English draft (since, whatever the literal meaning of the words, the subjective intention that it should provide a monopoly purchase right is not in doubt).

<sup>395</sup> See Adams *Fatal Necessity*, above n 3, 175 & 193.

<sup>396</sup> Ibid 193 (note).

<sup>397</sup> Ibid 198-199.

<sup>398</sup> Walker "Focus of Maori Protest", above n 157, 265.

<sup>399</sup> Owens "New Zealand Before Annexation" (2nd ed, 1992), above n 23, 52: "The confusion of the Maori text indicates some difficulty in translation. Had the Maori agreed they could only sell land to the Crown; or had they merely agreed that the Crown should have first offer? A later, anonymous statement, which appears to have been made by Henry Williams, said that the Maori were told the Queen could have first offer, after which they could sell to whomever they pleased. Colenso's account, based on notes made at the time, casts doubt on this."

does not take a position on whether Williams's translation and explanation of it at Waitangi were intentionally misleading or not.<sup>400</sup>

Richard Boast differs from both Ross and Adams in finding that the word “pre-emption” in the Treaty did properly denote a monopoly right of purchase under British imperial law and practice of the time, although he agrees that Williams may have explained it as the right of first refusal at Waitangi.<sup>401</sup> Other legal scholars familiar with *Johnson v M'Intosh* and nineteenth century colonial case-law are likely to agree that “pre-emption” in article 2 had a particular provenance in imperial law in dealings with aboriginal peoples that differed from its use in domestic law to mean the right of first offer.<sup>402</sup>

### **What was the purpose of the right of pre-emption in article 2?**

Scholars are at odds on what the purpose was of “the exclusive right of preemption” bargained for in article 2. This difference of opinion largely mirrors views taken about whether British intervention in New Zealand was for the humanitarian purpose of protecting Maori interests. For Keith Sinclair, AH McLintock and Paul Moon, the purpose of Crown pre-emption was to protect Maori from land-sharks.<sup>403</sup> Other historians identify a mix of purposes, not only protective but also financial and administrative.<sup>404</sup> The financial motive was to

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<sup>400</sup> Orange *The Treaty of Waitangi*, above n 23, 42, 47 & 100-101. Orange also writes that: “Hobson and the Colonial Office unquestionably intended to obtain the sole right of purchasing Maori land and were confident that the treaty conferred this.” Ibid 100.

<sup>401</sup> Boast *Buying the Land, Selling the Land*, above n 164, 22-23. There is a difference between a right of first offer and a right of first refusal. Most writers assume that if pre-emption was explained to Maori other than as a monopoly right of purchase it was explained as a right of first offer.

<sup>402</sup> See, for example, David Williams *The Native Land Court*, above n 164, 104-105. See also Belgrave “Pre-emption”, above n 24, 26: “Historians have had only a weak understanding of the legal role of pre-emption in the Treaty, regarding it as a policy of convenience, understood by Maori as no more than a right of first refusal.”

<sup>403</sup> Sinclair *A History of New Zealand* (4th ed, 1991), above n 21, 68 & 76; Sinclair *The Origins of the Maori Wars*, above n 2, 28; McLintock *Crown Colony Government*, above n 2, 50, 63 & 66; Moon *Path to the Treaty*, above n 306, 112-113. See also Waitangi Tribunal *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*—Wai 785 (2008) vol 3, 1360-1361 (arguing that the Treaty was an attempt to balance Maori protection with successful British settlement).

<sup>404</sup> Trevor Williams “The Treaty of Waitangi”, above n 21, 249; Trevor Williams “James Stephen and British Intervention”, above n 31, 32; Orange *The Treaty of Waitangi*, above n 23, 100-

enable the Crown to buy Maori land cheaply, without competition, to sell at a large profit, and thereby pay for the costs of government and also establish a fund to assist emigration to New Zealand. The administrative reason for pre-emption was to give the Crown control of land sales so that it could direct where European settlement took place, thus making it easier to govern by concentrating settlement.

Stuart Banner sees the protective side of pre-emption but inclines to the view of one contemporary that “[t]he object of the preemptive right is less to protect Native interests, than to prevent the Natives from coming into competition with the Crown in the disposal of waste lands”.<sup>405</sup> Banner argues that the government could have allowed “competitive private purchasing ... while policing the market to prevent the re-emergence of the dubious transactions of 1839 and 1840” as an alternative to establishing a government monopsony. “But doing so would have required the colonial government to give up a major source of revenue in the spread between purchase and sale prices for Maori land, and that cost was too high.”<sup>406</sup>

Claudia Orange considers it possible that Hobson and the missionaries who assisted him in negotiating the Treaty may have had different ideas about the purpose of the pre-emption clause. Noting the missionaries’ anxieties about the pace and scale of European land acquisitions in the late 1830s, including about the New Zealand Company’s dubious purchases in 1839–40,<sup>407</sup> Orange writes that not only is it “reasonable to conclude that the general sense conveyed [to Maori] in explaining pre-emption was a protective one” but also that “[i]t is quite likely that negotiators did not realise the full significance of pre-emption; Hobson may not have widely publicised the financial provisions for the colony and the part that pre-emption would play.”<sup>408</sup> As for Hobson, however, Orange considers that he

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101 & 105; Belgrave “Pre-emption”, above n 24, 26 & 33; Banner *Possessing the Pacific*, above n 363, 77–78.

<sup>405</sup> Louis Chamerovzow *The New Zealand Question and the Rights of the Aborigines* (TC Newby, London, 1848) 382, quoted in Banner *Possessing the Pacific*, above n 363, 78. See also Ward *National Overview*, above n 24, vol 1, 43–44 & vol 2, 22 & 63 (but compare Ward *A Show of Justice*, above n 21, 55).

<sup>406</sup> Banner *Possessing the Pacific*, above n 363, 78.

<sup>407</sup> Orange *The Treaty of Waitangi*, above n 23, 58–59 & 101.

<sup>408</sup> *Ibid* 101.

“undoubtedly understood both the financial and humanitarian reasons for pre-emption, and realised also that regulated land sale was an orderly way of controlling settlement”.<sup>409</sup> She does not stress one factor above the others, and notes that pre-emption was not the hoped for financial boon in the early years of the colony, principally because the funds to purchase Maori land on a large scale were not forthcoming from London.<sup>410</sup>

Paul McHugh considers Crown pre-emption to be a rule of British imperial law, inseparable from the rule recognising native property rights (through “modified continuity”). If Maori were able to sell land directly to settlers, without any Crown right of pre-emption, that would mean that their customary laws would regulate the possession and transmission of those property rights.<sup>411</sup>

This was taking the presumption of continuity and the natives’ Crown-recognised title too far. The answer to this notional problem lay in the Crown’s pre-emptive right to extinguish native title: as against the Crown or any Crown grantee a person purchasing directly from the native enjoyed no rights recognisable in municipal law.

McHugh, however, recognises that in colonial legislation and practice (“[f]rom the earliest days of the North American colonies”) the assertion of the right of pre-emption had the added purpose of allowing the Crown to “control the pace of settlement in the New World and exert some control over the settlers lest they deal willy-nilly with the Indians and so create all kinds of chaos”. He accepts that in the

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<sup>409</sup> Ibid 105.

<sup>410</sup> Ibid.

<sup>411</sup> McHugh “Aboriginal Title”, above n 129, 242. See also Boast *Buying the Land, Selling the Land*, above n 164, 5 n 8 & 21-22 criticising Peter Adams (see text accompanying ns 413-424 below) for “overlook[ing] the constitutional and legal aspects of pre-emption” and “exaggerat[ing] its economic aspects”: “Pre-emption was an attribute of imperial constitutional law everywhere . . . . The necessity of insisting that only the Crown could legally cancel native title is obvious given the likely consequences that could ensue if such a power was placed in the hands of the settler community.” But see Adams *Fatal Necessity*, above n 3, 194.

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late eighteenth and early nineteenth centuries, pre-emption “also took a humanitarian flavour”.<sup>412</sup>

Peter Adams’s writing has been influential in putting forward additional British motives for the pre-emption clause in the Treaty, other than the humanitarian concern to protect Maori from land-sharking. Adams considers the pre-emption clause “had been inserted in the treaty not to protect the Maoris from land speculators, but to finance systematic colonization by government profits on land bought from the Maoris”.<sup>413</sup> “The need to provide an emigration fund was the real reason for the pre-emption provision”<sup>414</sup> and any protection it gave to Maori was “quite incidental” to that purpose.<sup>415</sup> The small scale of government land purchasing in the early 1840s was because “[t]he metropolitan government failed to realize the implications of its own policy” and provide the governors with the money they needed to buy land on a large scale.<sup>416</sup>

Adams identifies the control of European settlement in New Zealand as a “secondary reason” for pre-emption,<sup>417</sup> noting that the prevention of dispersion was one of the main advantages claimed by Edward Gibbon Wakefield for his scheme of so-called “systematic colonization” upon which, according to Adams, the Colonial Office based its land and emigration policy for New Zealand.<sup>418</sup> Adams concedes that pre-emption probably had a protective purpose in early formulations of Colonial Office New Zealand policy but that, if it did, it was jettisoned along with Glenelg’s “no colonization” plan in mid-1839.<sup>419</sup> He suggests, as with the

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<sup>412</sup> McHugh “Aboriginal Title”, above n 129, 242. See also McHugh “A Retrospect and Prospect”, above n 329, 143; McHugh *Aboriginal Societies*, above n 234, 172-173; Hackshaw “Aboriginal Title”, above n 129, 99.

<sup>413</sup> Adams *Fatal Necessity*, above n 3, 14.

<sup>414</sup> Ibid 195.

<sup>415</sup> Ibid 241. See also ibid 196: “[The protection of Maori from land-sharks was] the least important reason why the Colonial Office adopted a pre-emption policy in New Zealand.”

<sup>416</sup> Ibid 205.

<sup>417</sup> Ibid 197.

<sup>418</sup> Ibid 195-196.

<sup>419</sup> Ibid 196: “given that Glenelg’s partial intervention plan discouraged organized colonization, it may be assumed that pre-emption was not seen as a mechanism for financing emigration, but as a measure to prevent land disputes between the races, to stop speculation, and to protect the Maoris from exploitation. However, the momentous though unobtrusive change in Colonial Office attitudes to colonizing New Zealand between the end of May 1839, when

purposes of British intervention in New Zealand generally,<sup>420</sup> that Hobson was not instructed to explain to Maori that the purpose of pre-emption was to establish an emigration fund by buying Maori land cheaply and re-selling it at a large profit.<sup>421</sup> Humanitarian explanations for pre-emption given by one official to chiefs at the Coromandel and Tauranga (that pre-emption was “to check their imprudently selling their lands, without sufficiently benefitting themselves or obtaining a fair equivalent”<sup>422</sup> and was “intended equally for their benefit”) are described by Adams as “palpably misleading”. Adams considers that these explanations may be representative of those given generally at Treaty signings. If so, he thinks it hardly surprising since, in his view, officials were not likely to want to tell Maori that pre-emption was intended to allow the Government to purchase land cheaply to re-sell at a profit to fund emigration.<sup>423</sup> Busby, “so eager to promote British interference in New Zealand”, is said by Adams to have well understood this gap between “explanation and intention”.<sup>424</sup>

Hickford’s views about pre-emption both conform and conflict with certain aspects of the views of McHugh and Adams. He considers that, slow maturing as it was, Colonial Office policy on Maori property rights in general, and Crown pre-emption in particular, admitted certain Maori rights in land only because it allowed the Crown to insert itself between Maori and settlers for the purpose thereby of limiting or “disciplining” British settlement and controlling land sales as a source of future revenue.<sup>425</sup> “[R]ecognizing aboriginal title was functional in imperial policy”.<sup>426</sup> In this way he accepts McHugh’s general outline of aboriginal title as a burden on the Crown’s paramount ownership of land but denies that it or (as

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Glenelg’s ‘no colonization’ plan was still being used as a basis for policy-making, and mid-July when Hobson’s instructions were drafted, led to the adoption of that system of land and emigration administration which was the hall-mark of Wakefieldian colonization.”

<sup>420</sup> See text accompanying ns 99-101 above.

<sup>421</sup> Adams *Fatal Necessity*, above n 3, 239. The justification for the policy was that the land was deemed worthless in the hands of Maori and that value would be supplied to it by transferring it to settlers, whose settlement on the land would benefit everyone, Maori included. Ibid 240.

<sup>422</sup> Bunbury to Hobson, 6 & 15 May 1840, quoted in Adams *Fatal Necessity*, above n 3, 199. See also Chapter 12, n 91.

<sup>423</sup> Adams *Fatal Necessity*, above n 3, 199.

<sup>424</sup> Ibid 200.

<sup>425</sup> Hickford *Lords of the Land*, above n 3, ch 3.

<sup>426</sup> Hickford “Making Territorial Rights”, above n 349, 103.

McHugh continues to argue<sup>427</sup>) Crown pre-emption were imperial law doctrines rather than contestable political language that might, or might not, harden into imperial policy. In result, Hickford's views align with Adams's except that he gives more weight to controlling British settlement as a purpose of British insistence on pre-emption.

### **Was Crown pre-emption legal doctrine that would have applied in New Zealand even if article 2 had not provided for it?**

As has been mentioned, there is a difference of opinion, still subsisting, between McHugh and Hickford on this question. Most other legal writers are of McHugh's view that the Treaty in its pre-emption clause was merely declaratory of imperial law and that the doctrine of Crown pre-emption would have applied in New Zealand in any event, even if it had not been stipulated for in the Treaty.<sup>428</sup> Kent McNeil, however, argues across British colonies that private purchases from indigenous peoples were prohibited as a matter of policy generally adopted in legislation, rather than being common law doctrine of automatic application.<sup>429</sup>

Where a right of alienation was denied apart from legislation, the usual explanation was that the indigenous people in question did not have title, and therefore had nothing to sell.<sup>430</sup>

### **Did article 3 impose English law to the exclusion of Maori custom?**

There is more agreement among scholars about the meaning of article 3 than the other two articles of the Treaty. The Maori and English texts are also thought to reconcile well, as has been discussed.

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<sup>427</sup> See, for example, McHugh "A Retrospect and Prospect", above n 329, 143 & 151-152. For McHugh's earlier writings on the rule of Crown pre-emption, see the text accompanying ns 332-337 above.

<sup>428</sup> See, for example, Hackshaw "Aboriginal Title", above n 129, 113; Boast "Maori and the Law", above n 240, 133; Boast *Buying the Land, Selling the Land*, above n 164, 5 & 20-22; Belgrave "Pre-emption", above n 24, 26-27; Joseph *Constitutional and Administrative Law*, above n 232, 35 & 91-93; Ward *National Overview*, above n 24, vol 2, 32; Waitangi Tribunal *The Wairarapa Ki Tararua Report*—Wai 863 (2010) vol 1, 38.

<sup>429</sup> McNeil *Common Law Aboriginal Title*, above n 260, 227.

<sup>430</sup> As, for instance, in the case of the Australian Aborigines.

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The extension of the Queen's "Royal protection" to "the Natives of New Zealand" has received less attention in the literature than the conferral of "all the Rights and Privileges of British subjects". It is understood to mean that the British would protect Maori from invasion by foreign powers and also one tribe from another.<sup>431</sup> Why or whether this was a necessary guarantee given the award of "all the Rights and Privileges of British subjects" has not been discussed.

Historians and lawyers have considered the grant of "all the Rights and Privileges of British subjects" largely in terms of its implications for Maori customary law.<sup>432</sup> Other questions have been asked, but they have not cast much of a shadow across the historiography. For example, Ruth Ross questioned whether Henry Williams could have believed that Maori were being offered "all the same rights as those given to the people of England", particularly given the restriction placed on selling land by the pre-emption clause. She did not develop the point, however.<sup>433</sup> JMR Owens and Claudia Orange suggested that the language of article 3 deliberately played down the responsibilities (including amenability to English criminal law and loyalty to the Crown) which were part and parcel of the rights of British subjects.<sup>434</sup> And Paul Moon is a lone voice in arguing that the grant of "all the Rights and Privileges of British subjects" is in fact evidence that Maori were not regarded as British subjects under British sovereignty (which fits his thesis that British intervention in New Zealand did not aim to establish any government over

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<sup>431</sup> See, for example, Keith "The Treaty of Waitangi", above n 125, 42.

<sup>432</sup> There is also little scholarship on the content of "all the Rights and Privileges of British subjects". As Paul McHugh has suggested, this may in part be because the exercise of imagining what such "rights and privileges" comprised in 1840 is particularly difficult from the perspective of today's "obsessive rights-based way [of thinking]". McHugh suggests that the phrase was not intended to be rights specific but was rather a short-hand way to bring Maori "within the community of the common law". He says that this "is far from saying that it was intended that the common law was to supplant Maori customary law in their relations between themselves": "In their relations with government, however, Maori were seen as being provided with access to the same language—the language of the common law—as that which applied within the settler community." McHugh "Tribal Encounter", above n 339, 127.

<sup>433</sup> Ross "Texts and Translations", above n 2, 153.

<sup>434</sup> Owens "New Zealand Before Annexation" (2nd ed, 1992), above n 23, 52; Orange *The Treaty of Waitangi*, above n 23, 42-43. The assumption that with rights came responsibilities is a general one in the literature. See, for example, Adams *Fatal Necessity*, above n 3, 214: "In the third article of the treaty the Maoris were simply granted 'all the rights and privileges of British subjects', leaving for the future the question of whether the corresponding, but unmentioned, duties and obligations would be exacted in full."

Maori). On this view, the rights and privileges of British subjects rather than the status of subjects was what was conferred on them.<sup>435</sup> Otherwise the dominant question in the literature is whether (as a matter of law) the right to custom ended with British sovereignty and was replaced by full amenability to English law, or whether customary law continued for all or some purposes? Historians and lawyers have come at this question from slightly different angles, although their conclusions are not dissimilar.

Historians have noted that, while Hobson was instructed that “until they can be brought within the pale of civilized life, and trained to the adoption of its habits”, Maori were to “be carefully defended in the observance of their own customs, so far as these are compatible with the universal maxims of humanity and morals”,<sup>436</sup> there was no express protection for Maori custom in article 3 of the English text of the Treaty.<sup>437</sup> Historians have not concluded from this that the intention of the Treaty was for English law to supplant Maori custom entirely. They have argued, drawing on Normanby’s Instructions and other Colonial Office memoranda either side of 1840, that the question of how English law and Maori custom would intersect was very much an open one in 1840.<sup>438</sup> The general view is, however, that in not guaranteeing custom in article 3 and in emphasising the application of

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<sup>435</sup> Moon *Path to the Treaty*, above n 306, 130 & 154. Compare Orange *The Treaty of Waitangi*, above n 23, 32 (“the Waitangi treaty would promise Maori people the status of British subjects—a formal commitment which was unusual in British colonial practice at that time”) & 42 (“Elsewhere in the British Empire, native races were supposed to enjoy the status of British subjects, although they were not always treated accordingly. What was remarkable in New Zealand was that this was explicitly stated and the expression of humanitarian idealism thus publicised”).

<sup>436</sup> Practices of “human sacrifice” and cannibalism were specifically proscribed.

<sup>437</sup> See, for example, Trevor Williams “James Stephen and British Intervention”, above n 31, 33; and Adams *Fatal Necessity*, above n 3, 213-214 & 216 (“The omission was of no small significance, for it meant that the Colonial Office and the Colonial Government were not committed by treaty to uphold any aspect of Maori society, but only Maori rights to land”). As discussed in Chapter 12, and as recognised by historians, Hobson did promise to protect Maori custom both at Waitangi (although this may have been limited to an assurance to protect religious belief) and in a circular letter to chiefs dated 27 April 1840.

<sup>438</sup> See, for example, Trevor Williams “James Stephen and British Intervention”, above n 31, 32 (“Through [the Instructions] peep the three clauses of the subsequent treaty. ... The natives were to be left in the practice of their own customs”) & 33 (“[There was an] intention to treat the natives, though now to be British, as subject to different usages and therefore to different treatment from that accorded to the rest of the community. From the outset, then, the instructions introduced the notion of discrimination”); and McLintock *Crown Colony Government*, above n 2, 67.

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English law (as the most obvious right and privilege of British subjects), what the Treaty did was to affirm the ultimate purpose of British Maori policy: “the assimilation of the Maori into a European world” as one historian puts it.<sup>439</sup>

Historians agree that proposals in the late 1830s and early 1840s for the modification of English law as applied to Maori, including for the continuation of Maori customary law (to whatever degree), were seen as temporary protection only to cushion the transition to the European world.<sup>440</sup> As Damen Ward has written, they were not seen as “proposal[s] for full, institutional, pluralism, but for a particular, ostensibly temporary, structuring of the relationship between British law and indigenes in the interests of facilitating peaceful assimilation of indigenous peoples”.<sup>441</sup> There is some difference of opinion among historians as to when in the 1840s (and even later) the Colonial Office retreated from a policy of temporary toleration of Maori custom and began to insist on strict application of English law. But there is general agreement that the ultimate end of British Maori policy was assimilationist, including in the matter of Maori subjection to English law.

Paul McHugh’s recent writing makes clear his view that Maori custom was not recognised and enforceable in the new legal order upon British assumption of sovereignty.<sup>442</sup> He does not seem to reason from this, however, that British imperial law and practice did not allow Maori to continue to live under their own customs.

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<sup>439</sup> Binney “Shadow of the Land”, above n 26, 201. See, for example, Adams *Fatal Necessity*, above n 3, 216 (“Hobson’s inclusion in the Treaty of Waitangi of an article granting the Maoris the rights and privileges of British subjecthood accorded fully with the ultimate goal of Colonial Office policy: complete assimilation”), 230 & 237 (“The third article ... had not enshrined any such [temporary] toleration [of Maori customs and social institutions], but only the ultimate goal of British Maori policy: amalgamation”); and Ward *An Unsettled History*, above n 23, 17 (“the ‘amalgamation’ of Maori as quickly as possible into the mainstream of the new society was considered the best course of action. This was the strategy underlying Article 3 of the Treaty, granting to Maori the rights and privileges of British subjects”).

<sup>440</sup> See, for example, Adams *Fatal Necessity*, above n 3, ch 7, especially 212-213, 230 & 237; Alex Frame “Colonising Attitudes Towards Maori Custom” [1981] *New Zealand Law Journal* 105-110 at 106; Alan Ward *A Show of Justice*, above n 21, 33-40 & ch 5; Belgrave *Historical Frictions*, above n 1, 56-57; Ward “Means and Measure”, above n 26, especially 8-10; and McHugh “Brief of Evidence, Wai 1040”, above n 276, 96-97.

<sup>441</sup> Ward “Means and Measure”, above n 26, 9.

<sup>442</sup> See text accompanying ns 283-286 above.

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In his earlier writing, McHugh explains that it was imperial law and practice that a change to British sovereignty did not mean that existing local laws were abrogated. They continued unless the Crown declared by some act of state in the process of making the acquisition or by later legislation that they were extinguished. Where, however, the territory acquired contained a British population and the local laws and institutions were not suitable for application to them (as in the case of New Zealand), it was necessary to set up a legal order in which English law would apply to the settlers. The indigenous population would continue to be governed by their old laws, except those repugnant to English law, at least in disputes between themselves. In mixed cases involving both native peoples and Europeans, English law applied. It might also apply where an indigenous person was considered to have brought himself into association with European society or in cases of serious crime.<sup>443</sup>

McHugh argues that this was the situation with New Zealand. He considers that the Colonial Office minutes indicate that it had decided before 1840 that English law would apply in New Zealand to British subjects and to Maori principally in their dealings with Europeans. Maori customary law would continue to operate in most matters as far as Maori were concerned.<sup>444</sup>

McHugh does not attempt to reconcile the continuance of Maori custom with article 3 of the English text of the Treaty. Rather, he finds a declaration of the principle of qualified continuity of native laws in article 2 of the Maori text in the guarantee of “te tino rangatiratanga”:<sup>445</sup>

British sovereignty *of itself* did not supplant the Maori customary law with English law. If the guarantee in the Maori version of the Treaty of Waitangi of te tino rangatiratanga was no more than an assurance that the Chiefs’ cession of sovereignty would not displace their customary law, then this was a promise which to a great extent English imperial constitutional (colonial) law was able to keep. Captain Hobson was familiar with the East

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<sup>443</sup> McHugh *The Maori Magna Carta*, above n 129, 83-90; McHugh “Aboriginal Title”, above n 129, 235-237.

<sup>444</sup> See text accompanying n 252 above; McHugh *The Maori Magna Carta*, above n 129, 43-44.

<sup>445</sup> Ibid 86.

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Indian experience and with the constitutional arrangements for the region, having been stationed there during the 1830s. There is every reason to suppose that some form of legal pluralism was, in 1840, an expected outcome of British sovereignty over New Zealand.

Although continuity had been Colonial Office policy in 1839, McHugh takes the position that it was not carried through after 1840. He argues that, by the Royal Charter of 16 November 1840, English law was introduced on a thoroughgoing basis and the chiefs lost “whatever law-making or law-enforcing power they had held over their people by customary law”.<sup>446</sup>

Compared to other legal writers, Damen Ward focuses on the historical record when considering continuity of indigenous custom in Australasia in the 1830s and 1840s. He cautions against “overestim[at]ing the role of law and legalism as determinants of British policy”, a trap he suggests the Australian legal historian, Henry Reynolds, falls into in claiming that in the mid-1830s British imperial law recognised the right of indigenous populations to live under their own customs in matters affecting themselves.<sup>447</sup> In Ward’s opinion, British policy was that “not all customary law was considered ‘civilised’ enough to continue under British rule. Rather, social and cultural assessments of the nature of an indigenous society were used to help gauge the ‘acceptability’ of particular elements of the local law.”<sup>448</sup> In addition, he considers that any allowance continued for custom in New Zealand (as, for example, in the December 1840 Instructions to Hobson and by early Governors) resulted from the “practical limits of Crown authority” and the need to avoid “aggravating Maori opinion” given the meagre military and financial resources available to the Governors.<sup>449</sup>

More generally, Ward takes the view that “British policy on indigenous customary law was often vague and ambiguous”,<sup>450</sup> reflecting not only administrative and political pressures but also lack of “clarity and precision” in the “[s]ocial and

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<sup>446</sup> Ibid 90-92.

<sup>447</sup> Ward “Means and Measure”, above n 26, 3-4.

<sup>448</sup> Ibid 1. See also *ibid* 4.

<sup>449</sup> Ibid 6.

<sup>450</sup> Ibid 4.

intellectual attitudes [that] shaped British views of indigenous legal systems” (which included stadial theory).<sup>451</sup>

[T]he Colonial Office did not view the application of English law to indigenous people as an unambiguous exercise in applying a clear, unchanging, legal template. Indeed, British attitudes to colonial law often developed in a highly episodic, reactive, fashion.

Ward also considers that, in the mid-nineteenth century, “the dominant mode of British thought was assimilationist”. He deals with two strands of assimilationist opinion: a view that “the application of English law [should be modified] to temper its impacts on indigenous peoples” as a preliminary step towards assimilation (“exceptionalist” proposals) and an alternative approach favouring “strict application” of English law to indigenous groups.<sup>452</sup> The difference between these two strands of opinion was concerned with best method rather than ultimate end. “British policy presumed that English law would be a means of civilising indigenous people” and would “ultimately replace all indigenous customary law”.<sup>453</sup> Ward considers that, as late as 1845, the Colonial Office’s “preferred balance between exceptionalism and strict application [was still left] unclear”.<sup>454</sup>

Ward’s views have been picked up in recent writing on the relationship between English law and indigenous custom in Empire, including in the work of Paul McHugh. Much of it sees the 1830s and 1840s as marking a shift from tolerance of custom in the earlier, more pluralistic, Empire towards its replacement by English law and institutions, under a monolithic British sovereignty.<sup>455</sup>

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<sup>451</sup> Ibid 7 & 14. See also ibid 5-6.

<sup>452</sup> Ibid 1.

<sup>453</sup> Ibid 1 & 4.

<sup>454</sup> Ibid 15. See also Damen Ward “Constructing British Authority in Australasia: Charles Cooper and the Legal Status of Aborigines in the South Australian Supreme Court, c. 1840–60” (2006) 34:4 *The Journal of Imperial and Commonwealth History* 483-504.

<sup>455</sup> See and compare Shaunnagh Dorsett “Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of ‘Barbarous’ Customs in New Zealand in the 1840s” (2009) 30:2 *The Journal of Legal History* 175-197; Lisa Ford *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Harvard University Press, Cambridge, Massachusetts, 2010); and Russell Smandych “The Exclusionary Effect of Colonial Law: Indigenous Peoples and English Law in Western Canada, 1670–1870” in Louis Knafla & Jonathan Swainger (eds) *Laws and Societies in the Canadian Prairie West, 1670–1940* (University of British Columbia Press, Vancouver, 2005) 127-149.

### Questions

From this review of the literature, it is evident that there is little agreement about the meaning of the Treaty and that a number of questions are unsettled in relation to the understandings of the framers of the English draft.

One group of questions concerns British intervention in New Zealand in 1840: why did Britain intervene? what ends did it intend by intervention, both in the short term and in the long run?

Another group concerns the form of intervention through treaty: was treating with Maori for sovereignty seen as a necessary precondition for British assumption of sovereignty? were Maori seen as having sovereign rights to cede? did Britain already possess sovereignty (to part or all of the country) by right of Cook's discovery or through settlement by British subjects?

A further group of questions concern understandings of the effect of British sovereignty and the terms of articles 1 and 3 of the Treaty on Maori political organisation and custom: would Maori become British subjects? would Maori political systems and custom be replaced by British government and English law, in whole or part? would Maori self-government and custom be recognised in the new legal order and, if so, would this require "exceptional laws"? would Maori self-government and custom continue in fact as a pragmatic measure (even if without legal basis) and, if so, was this expected to be temporary or permanent?

Another group of questions arises in relation to the Crown right of pre-emption in article 2: was it a right of first offer or a monopoly right of purchase of Maori land? what was the British purpose in seeking the right of pre-emption from Maori? was it necessary to negotiate for the right of pre-emption or did it apply in New Zealand as an incident of British sovereignty?

A number of questions arise out of the guarantee of property in article 2: was article 2 understood to confirm the continuity of Maori property in accordance with custom? were Maori interests in land viewed as rights of occupancy or use or were

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they analogous to full ownership? was Maori property as guaranteed by article 2 seen as extending beyond land occupied and cultivated by Maori? was the guarantee of “full exclusive and undisturbed possession” more or less than the interests recognised by custom? would Maori customary property be recognised and enforceable in the colonial legal system in its own terms without legislation? if not, to what extent was the common law expected to protect Maori interests in land? was the doctrine of tenures introduced into New Zealand with sovereignty and did it affect Maori title to land?

A final and overarching question is whether the Treaty was seen as giving rise to legal rights (to self-government, custom and property) or simply to political claims against the Crown?



## CHAPTER THREE

### A VERY BRITISH EMPIRE

The Treaty of Waitangi is part of a wider imperial context. At 1840 Britain was an experienced imperial power, familiar with the acquisition and administration of territories comprising British and non-British populations. They included Europeans, former slaves, populations which had displaced or subjected native populations, as well as indigenous populations. The pre-existing systems of administration and law varied considerably. It would be wrong to think that this experience by 1840 had given rise to an “empire of uniformity” in which the consequences of acquisition of British sovereignty and the systems of British administration were standard. The British Empire at 1840 was one of great diversity. It was also in constant change, shaped not only by the different circumstances of the territories and the experience and practicalities of colonial encounter, but also by world and domestic British events and developing and receding ideas.

Despite the loss of the Thirteen Colonies following the American War of Independence, by 1840 Britain was a significant colonial power. In North America, it remained in possession of the Canada colonies acquired progressively from 1713, including the massive territory granted to the Hudson’s Bay Company, from the Bay to the Pacific coast.<sup>1</sup> It had extensive territories in India and had expanding influence over much more. Although the administration of British trading interests was first undertaken by the East India Company under Royal Charters from 1600, its increasing territorial administration from the 1760s brought with it greater scrutiny from the Imperial Parliament. Included in the territories run by the East India Company were possessions such as Aden, Singapore, Malacca and Penang. In Ceylon, littoral territories taken by conquest from the Dutch came under British

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<sup>1</sup> The original 1670 charter to the Company was for Rupert’s Land, the vast lands which drained into Hudson Bay. Following the merger of the Company in 1821 with its former rival in the fur trade, the North West Company, the Company’s charter was extended to cover all the territory west of Rupert’s Land to the Pacific coast.

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colonial rule in 1798 and territories in the interior were added by treaties and by conquest from the native Kandyan kingdom during the period 1815–18. New South Wales had been established as a convict colony in 1788. By 1840 further colonies had been created out of it in Van Diemen's Land and South Australia and the colony of Swan River in Western Australia had been established. British settlement was under way in the territories that would later become Victoria and Queensland. The French Revolutionary and Napoleonic Wars had added to the colonies in the Atlantic and Caribbean and brought the Cape Colony into British possession. The same wars had led to acquisition of Mauritius and the Seychelles as well as giving Britain responsibility for Malta and the Ionian Islands. Through taking over the territorial interests of chartered trading companies and by its own direct humanitarian interventions arising out of opposition to slavery, the British Crown between 1790 and 1821 had established small colonies in West Africa (Sierra Leone, the Gambia, and the Gold Coast).<sup>2</sup>

How British sovereignty and colonial government impacted on pre-existing indigenous systems of government, law and property are questions directly relevant to understanding what the British framers of the Treaty of Waitangi intended in New Zealand in relation to Maori society. The approaches taken to indigenous government and law in different parts of Empire are the subject of Chapter 4. A survey of how indigenous interests in land were treated in Empire is undertaken in Chapter 5. In that chapter also, there is consideration of how Indian property was treated post-Revolution in the United States of America. This consideration is required both because United States case-law relating to Indian land rights was subsequently invoked in debates about Maori land rights from 1840 onwards and because New Zealand scholars have treated it as declaratory of an English common law approach which was itself reflected in article 2 of the Treaty of Waitangi.

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<sup>2</sup> Andrew Porter (ed) *Atlas of British Overseas Expansion* (Simon & Schuster, London, 1991) ["Porter Atlas"]; CA Bayly (ed) *Atlas of the British Empire* (Facts on File, New York, 1989); Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens & Sons, London, 1966) [Roberts-Wray *Commonwealth and Colonial Law*] 655-913.

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In this chapter, the focus is on the wider imperial framework. It can conveniently be discussed in three parts. “Constituting Empire” looks at the way in which the Empire was set up under British law. “Administering Empire” discusses the machinery of colonial administration and the different forms it took. Because Empire was not static, it is also necessary to address as a third topic, “Influences on Empire”, those forces and ideas that had shaped Empire to 1840 and which would set a trend for the post-1840 future.

### **Constituting Empire**

In the two hundred years of British imperial expansion that preceded the Treaty of Waitangi, the usual method employed in acquiring new territories was treaty-making. Territorial gains were confirmed in treaties even where the territory had been first seized in war. The pattern of treaty-making and the forms of treaties themselves were much the same whether the treaty was between Britain and another European power or between Britain and a tribal group. Although treaties varied greatly in their terms and elaboration of obligations, those with tribal groups could be as extensive and complex as any. Treaties were made for all sorts of purposes: to establish relationships of peace and friendship or military alliance; to provide for commerce; to set up systems for prosecution or extradition of criminals; to suppress the slave trade; to provide access for missionaries; to acquire or lease land; to establish a protectorate or protected state; to cede sovereignty. This list is by no means exhaustive and in many cases treaties had multiple purposes. Although some transactions were described as “conventions”, “deeds” or simply “agreements”, they were not different or treated differently than those described as “treaties”. Britain entered into hundreds of agreements with non-European polities from the seventeenth century to 1840 in Africa, Arabia, Persia, the East Indies, South East Asia, and North America. Most were published in contemporary treaty collections and in the *British and Foreign State Papers* and

are now conveniently to be found in the *Consolidated Treaty Series*.<sup>3</sup> In these publications, agreements with small tribal groupings rub shoulders with treaties with European powers.<sup>4</sup>

In treating for sovereignty, Britain recognised non-Europeans possessing territory as having sovereign capacity to enter into treaties of cession (as well as other, lesser treaty arrangements). Australia (treated as what came to be known as *terra nullius*) was a rare exception.<sup>5</sup> Elsewhere, officials seem not to have questioned whether the political grouping with which they were dealing met some objective criterion for statehood, as long as it was independent of any higher authority.<sup>6</sup>

Although in 1837 the House of Commons Select Committee on Aborigines in British Settlements took the view that it was “inexpedient” for frequent treaties to be entered into between colonial governments and “tribes in their vicinity”, citing the inequality in position and the potential for dispute in such agreements and their manipulation by the Europeans, it nevertheless gave its “entire concurrence” to the treaty policy recently adopted by the Secretary of State for the Colonies, Baron Glenelg, towards the Xhosa on the eastern Cape Colony frontier (discussed in Chapter 4).<sup>7</sup> It is the case that from the middle of the nineteenth century, and influenced by writers such as John Austin who questioned whether tribal societies could possess sovereignty or law “simply or strictly so styled”, international lawyers started to propose a test of “civilisation” for full membership of the international community. Even so, only a few writers in the late nineteenth century took this to the extent of denying the sovereignty of “uncivilised” societies. More

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<sup>3</sup> Clive Parry (ed) *The Consolidated Treaty Series* (Oceana Publications, Dobbs Ferry, New York, 1969–1986) (hereafter “CTS”). Refer Clive Parry & Charity Hopkins *An Index of British Treaties 1101–1968* (Her Majesty’s Stationery Office, London, 1970); and Michael Meyer *Special Chronological List 1648–1920* (Oceana Publications Inc, New York, 1984) vol 1, part 1 (Colonial Treaties).

<sup>4</sup> See Chapter 2, n 234.

<sup>5</sup> See Chapters 4 & 5.

<sup>6</sup> See Chapter 2, n 234 and accompanying text.

<sup>7</sup> *Report from the Select Committee on Aborigines (British Settlements)*, GBPP 1837 (425) VII.1 at 80–81. For Glenelg’s treaty policy, see Chapter 4, text accompanying ns 209–210.

to the point, there was no noticeable change to the practice and extent of British treaty-making with tribal groups.<sup>8</sup>

At 1840, the more potent image was that of William Penn treating with the Lenape (“Delaware”) Indians under a great elm at Shackamaxon in 1682. While neither the treaty nor any contemporary account of its making has survived, the transaction was praised by international figures such as Voltaire and Thomas Clarkson and passed into popular legend.<sup>9</sup> It is said that Benjamin West’s 1771 painting of the imagined scene under the elm appeared in reproductions on Quaker-household walls on both sides of the Atlantic and was to be found on dinner plates, trays, curtains, quilts and jigsaws.<sup>10</sup> As will be seen in other chapters, Penn was often invoked in connection with proposals for British intervention in New Zealand in the late 1830s. There is no question but that, at 1840, the preference was to treat for cession of sovereignty of occupied territories rather than to assert sovereignty by discovery and occupation.

The power to acquire new territory outside Britain was a prerogative of the British Crown (the Executive).<sup>11</sup> Like the conduct of foreign affairs more generally, the acquisition of sovereignty was an “act of state” not subject to review in British courts and which did not require authorisation by Parliament. An assertion of sovereignty by the Crown was conclusive of that fact as a matter of British law.<sup>12</sup> At the time of taking sovereignty, the Crown generally succeeded to the public

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<sup>8</sup> See Chapter 2, n 234.

<sup>9</sup> Voltaire *Letters Concerning the English Nation* (London, 1733) 29; Thomas Clarkson *Memoirs of the Public and Private Life of William Penn* (London, 1849) 123-126 (1st ed, 1813).

<sup>10</sup> Ann Abrams “Benjamin West’s Documentation of Colonial History: *William Penn’s Treaty with the Indians*” (1982) 64:1 *The Art Bulletin* 59-75; Steven Conn *History’s Shadow: Native Americans and Historical Consciousness in the Nineteenth Century* (University of Chicago Press, Chicago, 2004) 40-48.

<sup>11</sup> The prerogative powers of the Crown are the residual powers possessed by it independently of statute.

<sup>12</sup> See Chapter 2, n 235; DL Keir & FH Lawson *Cases in Constitutional Law* (4th ed, Clarendon Press, Oxford, 1954) [“Keir & Lawson *Constitutional Law*”] 102; Kent McNeil *Common Law Aboriginal Title* (Oxford University Press, Oxford, 1989) [“McNeil *Common Law Aboriginal Title*”] 111-112.

property interests of the former sovereign. It could also expropriate or adjust, as an act of state, private property rights.<sup>13</sup>

Whether, in 1840, treaties, particularly those of cession, could be relied upon in the acquired territory as a source of rights is unclear. Reference has already been made to the views expressed on this topic by Kenneth Keith and Paul McHugh and to the conflicting case-law from *Campbell v Hall* (1774) until the early twentieth century.<sup>14</sup> For present purposes, it is not necessary to come to a concluded view on the legal position. The question is only of interest if the framers of the Treaty had views one way or the other. There is no record of any of them taking a position on the domestic legal status of the Treaty before or at its signing. As will be seen, the question did arise from time to time thereafter. For present purposes, it is enough to point to the fact that there was a strand of opinion, which often invoked *Campbell v Hall*, that the Treaty was fundamental domestic law and that its terms were directly enforceable. Busby himself, acting admittedly in self-interest in advancing his land claims, became a vocal proponent of this view.<sup>15</sup> Henry Williams took a similar position in 1847 in defending his role in the Treaty.<sup>16</sup> There were, however, others, perhaps more disinterested, who also considered that the Treaty conferred legal rights which were enforceable. They included Governor George Grey in 1847<sup>17</sup> and some judges were called upon to decide cases about Maori property rights guaranteed by article 2.<sup>18</sup>

That the framers of the Treaty may well have had the expectation that the agreement would be legally enforceable can be illustrated by a few contemporary examples of such thinking. In September 1840, James Stephen, the Under-Secretary for the Colonies, was obliged to seek the opinion of the Law Officers of

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<sup>13</sup> McNeil *Common Law Aboriginal Title*, above n 12, 162-163. The land titles proclamations of Governor Gipps (14 January 1840) and William Hobson (30 January 1840), directed at European purchases of Maori land, were arguably of this character.

<sup>14</sup> See Chapter 2, text accompanying ns 254-269.

<sup>15</sup> See Chapter 18, text accompanying n 25. See also William Wentworth's published reply to Governor Gipps's speech on the second reading of the Land Claims Bill, discussed in the text accompanying n 212 in Chapter 16.

<sup>16</sup> See Chapter 19, text accompanying n 37.

<sup>17</sup> See Chapter 18, text accompanying n 13.

<sup>18</sup> See cases referred to in Chapter 2, n 260.

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the Crown as to whether the terms of articles of capitulation of 1803 between Britain and the Netherlands for Guiana (which had been followed by a treaty of cession) fixed the distribution of powers between the Governor and local legislative bodies so that local ordinances inconsistent with them were invalid and unable to be confirmed. Stephen's letter to the Law Officer queried whether the articles of capitulation ("intended to regulate a tenure by a hostile power during war") had been overtaken by the treaty of cession, by which the colony was then held. He acknowledged that there were some statements by Lord Mansfield in *Campbell v Hall* which could suggest that, even following the treaty of cession, the prior articles of capitulation remained relevant and were to be observed, but queried whether they could "fix the laws of a country in perpetuity".<sup>19</sup> In response, the Law Officers were clear that, without abrogating legislation by the Imperial Parliament, the articles of capitulation were binding on the Crown.<sup>20</sup>

This capitulation is binding in good faith upon the Crown; and even in strict law we conceive that the sanction of the Crown since the cession of the colony, to the political institutions in existence, has given the same force to these institutions as if they had been established by an express grant from the Crown, like the legislatures in colonies settled by British subjects.

In this, the Law Officers clearly considered that the Crown actions in allowing the continuation of the local institutions in conformity with the articles of capitulation showed that those articles were not spent following the treaty of cession (even though the treaty itself had not itself made provision for the same institutional continuity). What is of significance in this exchange, which is contemporaneous with the signing of the Treaty of Waitangi, however, is that both Stephen's query and the response of the Law Officers proceeded on the assumption that *Campbell v Hall* was at least a correct statement of law in relation to treaties of cession. Stephen's questioning of its application was only in relation to articles of capitulation arguably superseded by the treaty of cession in respect of Guiana. The

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<sup>19</sup> Stephen to Law Officers, 9 September 1840 (quoting the former Secretary of State for the Colonies, Lord Aberdeen, in a despatch of 1 March 1835), GBPP 1849 (297) XI.1 at 209-220.

<sup>20</sup> Law Officers to Russell, 21 October 1840, GBPP 1849 (297) XI.1, 220-221 at 220.

effect, expressly alluded to in the correspondence, was that the terms were binding “in perpetuity” on the Crown, and could be altered only by an Act of the Imperial Parliament.

Recognition on other occasions that the principle in *Campbell v Hall* constrained Crown action inconsistent with the 1803 articles of capitulation in British Guiana is provided by Charles Clark, writing in 1834 (in *A Summary of Colonial Law*) about questions that arose in 1825, and Ivor Jennings, writing in 1957 about problems that arose in 1928.<sup>21</sup> Clark’s *A Summary of Colonial Law* (which, as will be seen, was consulted by Governor Gipps during the New Zealand Land Claims Bill debate in 1840) cited *Campbell v Hall* as authority for the proposition that the Crown’s right to make law in a ceded or conquered colony could be “restricted by compact with the ceding party”.<sup>22</sup> Similarly, Joseph Chitty, perhaps the pre-eminent legal treatise writer of the early nineteenth century, in his 1820 treatise on the prerogatives of the Crown, said, citing *Campbell v Hall*, that “the King [cannot] legally disregard or violate the articles on which the country is surrendered or ceded; but such articles are sacred and inviolable, according to their true intent and meaning”.<sup>23</sup> MF Lindley, writing in 1926 on the topic of the acquisition and government of “backward” territories, refers to s 67 of the Government of India Act 1858 which provided that treaties earlier entered into by the East India Company and succeeded to under the Act by the Crown “may be enforced by and against the Secretary of State in Council in like manner and in the same Courts as they might have been by and against the said Company if this Act had not been passed”.<sup>24</sup>

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<sup>21</sup> Charles Clark *A Summary of Colonial Law, The Practice of the Court of Appeals from the Plantations, and of the Laws and their Administration in all the Colonies; with Charters of Justice, Orders in Council, &c &c &c* (Sweet; Maxwell; and Stevens & Sons, London, 1834) [“Clark Colonial Law”] 26-27; Ivor Jennings *Constitutional Laws of the Commonwealth* (Clarendon Press, Oxford, 1957) vol 1 [“Jennings Constitutional Laws”] 47.

<sup>22</sup> Clark *Colonial Law*, above n 21, 6.

<sup>23</sup> Joseph Chitty *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (Joseph Butterworth & Son, London, 1820) 29.

<sup>24</sup> MF Lindley *The Acquisition and Government of Backward Territory in International Law, Being a Treatise on the Law and Practice Relating to Colonial Expansion* (Longmans, Green & Co Ltd, London, 1926) 196; Government of India Act 1858 (UK) 21 & 22 Vict c 106, s 67.

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The absolute view that treaties have no effect in municipal law unless incorporated in legislation is also criticised by some modern scholars. In addition to Kenneth Keith, whose views were considered in Chapter 2,<sup>25</sup> DL Keir and FH Lawson draw distinctions between treaty obligations between continuing sovereign nations (which are beyond the cognisance of municipal courts “because they do not administer treaty obligations between independent states”) and treaty provisions which “modify and create rights as between the Government and individuals, who are, or who are about to become, subjects of the Government”.<sup>26</sup> In the second case, while municipal courts could not question the act of state in making a treaty, they had the power and duty to enforce Government or individual rights arising out of it: “a treaty, like a contract, is made to be performed”. The exception to this was where the treaty promised to “make some alteration in the law”. In those circumstances, an Act of Parliament was required to change the law before the rights could be enforced. Keir and Lawson cite Alexander Hamilton in the *Federalist* papers for the point that the misconception (described by Hamilton as “doctrine ... never heard of”) that Parliamentary ratification was necessary for treaties to have effect in municipal law, had arisen because “Parliament ... is sometimes seen employing itself in altering existing laws in conformity with the stipulations of new Treaties”. If alteration of the law was not necessary, however, the “utmost plenitude” of the Crown’s prerogative to make treaties, meant that treaties were law, enforceable through the municipal courts.<sup>27</sup>

The distinction between treaty rights of sovereigns and treaty rights of individuals may provide a basis for distinguishing the case of *Nabob of the Carnatic v East India Company* (1793), which is relied upon by Paul McHugh as authority for treaty rights being non-justiciable.<sup>28</sup> The point is also made in it that the treaty’s character was “political” rather than “mercantile” in nature.<sup>29</sup> In any event, the decision, amounting to a few paragraphs only, is hardly compelling and seems to

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<sup>25</sup> See Chapter 2, text accompanying ns 255-258.

<sup>26</sup> Keir & Lawson *Constitutional Law*, above n 12, 104-106, quoting *Salaman v Secretary of State for India* [1906] 1 KB 613 at 639, per Fletcher Moulton LJ.

<sup>27</sup> Keir & Lawson *Constitutional Law*, above n 12, 106-109.

<sup>28</sup> See Chapter 2, text accompanying n 268.

<sup>29</sup> *Nabob of the Carnatic v East India Company* (1793) 2 Ves Jun 56 (Ch) at 60.

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have had a murky history.<sup>30</sup> This case is, however, of further interest because, as is discussed later, it was cited in an opinion in the United States Supreme Court case of *Cherokee Nation v State of Georgia* (1831) as authority for the proposition that the sovereign party to a treaty was the “sole arbiter of its own justice”, a phrase picked up in New Zealand in *Wi Parata v Bishop of Wellington* (1877).<sup>31</sup>

Many British treaties, particularly those involving ongoing payments in return for cession of rights (including territorial sovereignty) or providing for trade and commerce, are inexplicable in their own terms if not giving rise to municipally enforceable obligations.<sup>32</sup> At the other end of the spectrum, the argument has been made that the Treaty of Union (1706) between England and Scotland is fundamental law creating the state which cannot be abrogated.<sup>33</sup> As will be seen, James Busby in the late 1850s drew a direct parallel between the Treaty of Union and the Treaty of Waitangi in advancing the argument that the article 2 guarantees were enforceable in New Zealand courts.<sup>34</sup>

A territory acquired in sovereignty became part of the realm.<sup>35</sup> Within it, the Crown had all the prerogative rights it possessed in England.<sup>36</sup> The British Parliament could pass legislation for a colony.<sup>37</sup> Such direct legislation was, however, rare; Parliament’s role was treated as being subject to an “implied

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<sup>30</sup> See *Nabob of the Carnatic v East India Company* (1791) 1 Ves Jun 371 (Ch). In this case, the Lord Chancellor, Baron Thurlow, seems to have come to very different conclusions to Commissioner Eyre in the later case.

<sup>31</sup> See Chapter 5, text accompanying ns 203-205. An essay by Michael Lobban that discusses “the common law and the force of treaties” is not in my view inconsistent with the arguments made here. See Michael Lobban “Custom, Common Law Reasoning and the Law of Nations in the Nineteenth Century” in Amanda Perreau-Saussine & James Murphy *The Nature of Customary Law* (Cambridge University Press, Cambridge, 2007) 256-278 at 268 & 271-278.

<sup>32</sup> See, for example, Convention between Great Britain and the Timmanees of the Quia, signed at Freetown, 21 July 1820, 71 CTS 197-200; and Treaty between the East India Company and the Amirs of Hyderabad/Sindh, signed at Hyderabad, 11 March 1839, 88 CTS 355-358.

<sup>33</sup> See TB Smith “The Union of 1707 as Fundamental Law” [1957] Public Law 99-121; and Neil MacCormick *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press, Oxford, 1999) ch 4.

<sup>34</sup> See Chapter 18, text accompanying n 25.

<sup>35</sup> AF Madden “1066, 1776 and All That: the Relevance of English Medieval Experience of ‘Empire’ to Later Imperial Constitutional Issues” in John Flint & Glyndwr Williams (eds) *Perspectives of Empire: Essays Presented to Gerald S. Graham* (Longman, London, 1973) 9-26 [“Madden ‘1066, 1776 and All That’”] at 10; Clark *Colonial Law*, above n 21, 1.

<sup>36</sup> Roberts-Wray *Commonwealth and Colonial Law*, above n 2, 557-561.

<sup>37</sup> Jennings *Constitutional Laws*, above n 21, 47-48; Clark *Colonial Law*, above n 21, 10-14.

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obligation” that it would legislate only “in [a] case of necessity” and “as seldom as possible”.<sup>38</sup> This approach provided space for the local legislature to ensure that local needs were met by legislation that was timely and appropriate.

By customary international law, a number of valid methods of acquiring territory were recognised. Of most importance were conquest, cession, and settlement (discovery followed by occupation). The method of territorial acquisition was important in determining, under British imperial law (the law governing the relationship between Britain and its colonies, as distinct from the municipal laws of Britain and of each colony), what law applied in the colony and Crown powers to legislate for it. The principal distinction was between, on the one hand, conquered and ceded colonies and, on the other, settled colonies. Conquered and ceded colonies were grouped together in British imperial law because cession typically followed conquest.

Well before 1840, it was understood that there was differentiation between the two categories of colony in relation to the law to be applied following acquisition of sovereignty and the power to legislate. This differentiation was, however, to some extent an over-simplification which did not hold good in all cases (as is discussed later). It was nevertheless a classification that framed decisions about colonisation (in New Zealand and elsewhere), and which therefore requires brief description.<sup>39</sup>

The simple rule of thumb in British imperial law in conquered and ceded territories was that, subject to the terms of any treaty, local laws, customs and institutions, if

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<sup>38</sup> Clark *Colonial Law*, above n 21, 11 n 1. See also Peter Burroughs “Imperial Institutions and the Government of Empire” in Andrew Porter (ed) *The Oxford History of the British Empire: The Nineteenth Century* (Oxford University Press, Oxford, 1999, vol 3) 170-197 [“Burroughs ‘Imperial Institutions’”] at 178.

<sup>39</sup> The description given here draws on the following sources: Roberts-Wray *Commonwealth and Colonial Law*, above n 2; McNeil *Common Law Aboriginal Title*, above n 12, ch 4; Mark Walters “*Mohegan Indians v Connecticut* (1705–1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America” (1995) 33:4 *Osgoode Hall Law Journal* 785-829 at 789-792; Mark Walters “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44 *McGill Law Journal* 711-752 [Walters ‘Golden Thread’] at 714-729; Mark Walters “British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v British Columbia*” (1992) 17 *Queen’s Law Journal* 350-413 at 358-386; Clark *Colonial Law*, above n 21, 4-16.

not unconscionable or incompatible with the change in sovereignty,<sup>40</sup> remained in force until altered or replaced. What was “unconscionable” came to be seen in terms of what was considered “malum in se” (evil in itself or contrary to nature).<sup>41</sup> In conquered and ceded colonies, the Crown had power to make laws (at least, if not contrary to fundamental constitutional principle<sup>42</sup>) until such time as either English law was introduced or until a representative legislature was established in the colony.<sup>43</sup> If private property interests were not interfered with at the time of acquisition of sovereignty as an act of state, they could be later adjusted by prerogative legislation but such legislation would then be subject to British law.<sup>44</sup>

The effect of continuity of local law was to incorporate that system as one of the municipal legal systems of the imperial constitutional order. Such an approach was practical. Immediately supplanting local law would cause disruption and often unfairness for no significant gain, especially where there was no significant British community. It did not preclude a gradual process of assimilating local law to English law. Legal pluralism was familiar to the common law, as is shown by acceptance of local custom, mercantile custom, and canon law, and by toleration of parallel jurisdictions, such as borough and manorial courts. Such pluralism was the approach followed in England’s earlier medieval Empire. It was also an approach recognised by the law of nations and applied by other European powers in their

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<sup>40</sup> The extent to which indigenous sovereignty or (more narrowly) indigenous self-government was incompatible with a change in sovereignty is a principal question of this thesis, discussed in Chapter 4 in relation to other parts of Empire, and in relation to New Zealand particularly in Chapters 8, 12, 19 and 20.

<sup>41</sup> The view in *Calvin’s Case* (1608) that infidel laws were ipso facto abrogated by British sovereignty was rejected at an early stage.

<sup>42</sup> The extent of this constraint is unclear. In *Campbell v Hall* it was said that the Crown could not oust the Imperial Parliament’s power to legislate for a colony or make laws contrary to imperial laws of trade. *Campbell v Hall* (1774) 1 Cowp. 204 at 209.

<sup>43</sup> In *Campbell v Hall* it was decided that the Crown’s power to make laws continued until a representative legislature was *promised*. *Campbell v Hall* (1774) 1 Cowp. 204 at 212-213. Lawmaking by the Crown was carried out through Orders-in-Council, Letters Patent under the Great Seal of the Realm, or Royal Instructions issued under the Royal Sign Manual and Signet. Statutes might also give authority to the Crown to set up the institutions of government by these same instruments (as in the case of New Zealand in 1840 under 3 & 4 Vict c 62, s 2).

<sup>44</sup> There could be no act of state against British subjects in British territory. Confiscation of private property without compensation could be treated as contrary to fundamental constitutional principle and invalid. McNeil *Common Law Aboriginal Title*, above n 12, 162-164.

own empires. This tolerance of pluralism came under strain in England from the late eighteenth century, particularly with moves to centralise the administration of justice under the royal courts and to diminish the importance of custom. This trend may have affected the acceptability of pluralism in Empire, particularly in colonies where there was significant British settlement and the pre-existing local legal system was perceived as primitive.<sup>45</sup>

The simple rule in relation to settled colonies was that English law went with the colonists.<sup>46</sup> A consequence of the attachment of English law was that the Crown had no power to legislate except as authorised by legislation made by the King-in-Parliament (as was the constitutional position in Britain).<sup>47</sup> The prerogative powers, however, included the ability to set up courts of justice and a representative (elected) legislature. English law was “received” from the date of foundation of the colony, at least in respect of the common law.<sup>48</sup> After the setting up of a local legislature, Acts of the British Parliament applied in the colony only if such application was provided for or if the subject matter made application implicit (as, for example, in the case of legislation concerning nationality and shipping).<sup>49</sup> The received law included all municipal English law, both statute and common law, so far as applicable to the circumstances of the colony. In Blackstone’s much-invoked statement, English laws were “the birth-right of every subject” and were

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<sup>45</sup> Mark Walters “Aboriginal Rights, *Magna Carta* and Exclusive Rights to Fisheries in the Waters of Upper Canada” (1998) 23:2 *Queen’s Law Journal* 301-368 at 336-337; Paul McHugh “A Tribal Encounter: The Presence and Properties of Common-Law Language in the Discourse of Colonization in the Early Modern Period” in Alex Calder, Jonathan Lamb & Bridget Orr (eds) *Voyages and Beaches: Pacific Encounters, 1769–1840* (University of Hawai‘i Press, Honolulu, 1999) 114-131 at 117-118; Shaunnagh Dorsett “Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of ‘Barbarous’ Customs in New Zealand in the 1840s” (2009) 30:2 *The Journal of Legal History* 175-197 at 193; Madden “1066, 1776 and All That”, above n 35; Lauren Benton *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge University Press, Cambridge, 2002) [“Benton *Law and Colonial Cultures*”].

<sup>46</sup> The imported law was always English law rather than the Scots or Irish law. See Ian Holloway “A Fragment on Reception” (1998) 4 *Australian Journal of Legal History* 79-91.

<sup>47</sup> The British Settlements Acts, the first of which was in 1843, modified the position.

<sup>48</sup> In North America and New South Wales, the view was taken that British statutes were received only from the date of setting up of a local legislature. Bruce Kercher “Why the History of Australian Law is not English” (2004) 7 *Flinders Journal of Law Reform* 177-204 at 187.

<sup>49</sup> Jennings *Constitutional Laws*, above n 21, 52-53.

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“immediately there in force” in any settled colony. As Blackstone acknowledged, however, the general rule was subject to “very many and very great restrictions”:<sup>50</sup>

Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police<sup>51</sup> and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force.

The rule was often enacted in colonial legislation. Its application in practice caused a great deal of difficulty because whether English law was suited to local circumstances left considerable room for difference of opinion and personal preference.<sup>52</sup>

Examples of the simple rule relating to conquered and ceded colonies include the Cape Colony, British Guiana and Ceylon, where Roman-Dutch law and pre-existing institutions continued after the change in sovereignty. Further examples are those of Quebec and Mauritius, where French law continued.<sup>53</sup> All these are examples where continuity of existing law was provided for in articles of capitulation or treaties of cession. The American and Australian colonies are examples of colonies where the simple rule relating to settled colonies was applied to the settler communities.

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<sup>50</sup> William Blackstone *Commentaries on the Laws of England*, ed. by Joseph Chitty (London, 1826) vol 1, 102.

<sup>51</sup> As Cote explains, “laws of police” refers to “provisions for local government and administration, such as curfews, licensing and regulation of taverns, harbour regulations, laws for safety in travel and factories, the manner of conducting local government, and the like”. JE Cote “The Reception of English Law” (1977) 15 *Alberta Law Review* 29-92 at 78.

<sup>52</sup> See Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, Oxford, 2004) [“McHugh *Aboriginal Societies*”] 35-37; and Bruce Kercher “Judges and the Application of Imperial Law in Eastern Australia, 1788–1836: Resistance and Reception” in David Lemmings (ed) *The British and their Laws in the Eighteenth Century* (Boydell & Brewer, Woodbridge, Suffolk, 2005) 230-249 [“Kercher ‘Resistance and Reception’”] at 236-242.

<sup>53</sup> It should be noted, however, as is further discussed in Chapter 4, that this continuity attached to the European population (or in the case of Ceylon, to the Sinhalese population in the littoral areas conquered from the Dutch) rather than to the indigenous populations.

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The simple imperial law rules were described by eighteenth and nineteenth century legal text writers and were part of the intellectual baggage of educated British citizens of the day. Despite their general acceptance, their application in practice was more subtle than the texts suggested. That is because the legal theory was posited on two situations which did not exhaust all possibilities. The rule in relation to conquered and ceded colonies had as its paradigm the conquest or cession of a territory with a legal system of a type that British subjects could use. The paradigm in respect of settled colonies was previously uninhabited territory (although the rule was extended to sparsely inhabited territory where colonists and indigenous peoples lived far apart). What the simple rules did not cope with were situations outside the paradigms. In the case of conquered or ceded colonies, this was where the local law was not suitable for application to British settlers. In settled colonies, it arose where the settlers could not ignore the first occupants but did not mean to interfere with their own social systems.

In these two situations, it is not surprising that the position on the ground was much more untidy than the theories of the law books would suggest. Broadly, a degree of legal pluralism was the common response to such complexity, as I attempt to show in a review of how colonial administrations interacted with indigenous populations in a number of colonial settings in Chapter 4. Sometimes these accommodations are acknowledged in judicial decisions.<sup>54</sup> More often, they are to be seen in the historical records of official dealings, including treaty dealings. Just as the eighteenth and nineteenth century law texts are an inadequate guide to colonial legal arrangements, so too it is necessary to be cautious about the classification of colonies (as ceded or settled) adopted in court decisions. Such decisions, often decades after the acquisition of sovereignty, can reflect later perspectives on law and history (sometimes promoting a particular agenda) and need to be treated with scepticism by historians. For example, late nineteenth century case-law and international law writing (in part reflecting changes in thinking concerning “civilisation” and race) often rejected the ideas that indigenous

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<sup>54</sup> For example in *Freeman v Fairlie* (1828) 1 Moo Ind App 305 (Ch).

tribes had sovereignty to cede or recognisable law of their own, positions belied by the historical record of British dealings with them, including by treaties of cession.

Instead of starting with legal theory, even if acknowledged to be more subtle than the bald propositions in the texts would suggest, it may be more helpful to consider the range of options open to Britain when it acquired an inhabited territory. First, it might choose to abrogate local laws and subject the local population to the same municipal law (whether English law or an adaptation of it) as settlers. Secondly, it might choose to abrogate local law as a distinct system but recognise elements of the pre-existing law in the municipal law, as with recognition of custom by the common law in England (in what Mark Walters describes as “municipal continuity”<sup>55</sup>). Under either of these two options, some accommodation of pre-existing law by “exceptional laws” for the local population (whether permanently or temporarily) would be possible. Thirdly, it might reconstitute existing local courts under its own legal system or establish new courts to give separate effect to the pre-existing law (setting up what Lauren Benton has called “state-centred legal pluralism” or “structured legal pluralism”<sup>56</sup>). Finally, it might maintain local law and institutions as a distinct system independent from the municipal law system introduced for settlers (in what Walters calls “imperial continuity”<sup>57</sup>). As will be seen from the view undertaken in Chapter 4, the usual approach adopted in British colonial administration in relation to indigenous populations was the last-mentioned, “imperial continuity”, which could take weaker or stronger forms as provided for in treaties or other instruments (for example, instructions to Governors). The ultimate conclusion of this thesis is that “imperial continuity” was also the approach of the British Government in New Zealand in 1840, even if the drift of history was away from it towards “exceptionalism” and abrogation.

The institutions and powers of government in a colony—executive, legislative and judicial—were conferred by a variety of instruments. The executive functions of the Governor (including delegation to him of prerogative powers), the

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<sup>55</sup> Walters “Golden Thread”, above n 39, 718-720.

<sup>56</sup> Benton *Law and Colonial Cultures*, above n 45.

<sup>57</sup> See above n 55.

establishment and powers of a legislature, and the setting up and jurisdiction of courts, were constituted either by an Act of Parliament or by Charter conferred by Letters Patent (under powers conferred by statute or under the Royal Prerogative). The office of Governor was itself created by Letters Patent under the Great Seal. A separate Commission under the Royal Sign Manual and Signet appointed a named person to the office of Governor. Finally, Instructions under the Royal Sign Manual and Signet gave directions to the Governor about the manner in which his functions were to be exercised.<sup>58</sup> The Instructions issued formally in this manner are to be distinguished from the recurring directions given to Governors by the Colonial Office in regular despatches (which are also referred to as “Instructions” in this thesis, as, for example, in the case of Normanby’s 14 August 1839 Instructions to Hobson and Russell’s 9 December 1840 Instructions to Hobson). While Letters Patent and the Commission appointing the Governor were formally binding, the legal status of Instructions under the Royal Sign Manual and Signet was more doubtful in cases of conflict with local legislation. It was not until the Colonial Laws Validity Act 1865 that it was clearly provided that such Instructions did not prevail over inconsistent legislation. Although the Act put the matter beyond doubt, the approach taken in it probably represented the prevalent view. Certainly there was no doubt that instructions given in despatches from time to time did not have the force of law.<sup>59</sup>

The courts of justice were sometimes set up under separate Charters constituted by Letters Patent.<sup>60</sup> Judges were usually appointed to hold office “at the pleasure” of the Crown (not, as in England, during “good behaviour”).<sup>61</sup> It was possible to

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<sup>58</sup> Jennings *Constitutional Laws*, above n 21, 41.

<sup>59</sup> DB Swinfen *Imperial Control of Colonial Legislation 1813–1865: A Study of British Policy Towards Colonial Legislative Powers* (Clarendon Press, Oxford, 1970) [“Swinfen *Imperial Control of Colonial Legislation*”] ch 7.

<sup>60</sup> Clark *Colonial Law*, above n 21, 25 n 3.

<sup>61</sup> John McLaren *Dewigged, Bothered, and Bewildered: British Colonial Judges on Trial, 1800–1900* (Osgoode Society for Canadian Legal History, University of Toronto Press, Toronto, 2011) [“McLaren *British Colonial Judges*”] ch 3.

petition the Judicial Committee of the Privy Council in London (formally constituted in 1833) to challenge the decisions of local courts.<sup>62</sup>

Conferral of local legislative power was usually in terms of authority to make laws for “peace, order, and good government”.<sup>63</sup> Typically, the Act or Charter reserved some matters from the competence of the legislature (for example, foreign affairs). Other matters were identified where legislation could not come into force until assented to by the Crown. In addition, the Crown had powers to confirm or disallow local legislation. Legislation could be disallowed (by Order-in-Council) for reasons both of policy and for “repugnancy” to English law.<sup>64</sup> The main impact of the power to disallow legislation was probably in the discipline it imposed on local legislatures which knew that their enactments would be subject to scrutiny. In some colonies, and at different periods, however, the power to disallow was invoked frequently to bring legislatures into line, as happened with legislation in the West Indies in the 1820s and 1830s in relation to slaves and ex-slaves.<sup>65</sup> The process of review was cumbersome. The final decision was taken by the Privy Council after a number of reports of which the most important was that of the Colonial Office’s legal counsel. Reference to the Law Officers of the Crown (the Attorney-General and the Solicitor-General) might also be necessary in particular cases.<sup>66</sup>

In the period between the 1820s and 1840s when James Stephen provided the Colonial Office legal advice, the scrutiny of colonial legislation was close.<sup>67</sup> Even so, only about four per cent of enactments were disallowed. That number dropped to about one per cent between 1842 and 1865.<sup>68</sup> The decline was partly attributable

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<sup>62</sup> Jennings *Constitutional Laws*, above n 21, 55-56.

<sup>63</sup> Whether this imposed any real restriction on the scope of legislative authority was never authoritatively resolved in the nineteenth century.

<sup>64</sup> Swinfen *Imperial Control of Colonial Legislation*, above n 59, 15.

<sup>65</sup> See Russell Smandych “‘To Soften the Extreme Rigor of their Bondage’: James Stephen’s Attempt to Reform the Criminal Slave Laws of the West Indies, 1813–1833” (2005) 23:3 *Law and History Review* 537-588 [“Smandych ‘Criminal Slave Laws’”]; and Swinfen *Imperial Control of Colonial Legislation*, above n 59, chs 9-10.

<sup>66</sup> Swinfen *Imperial Control of Colonial Legislation*, above n 59, ch 1.

<sup>67</sup> *Ibid* 3.

<sup>68</sup> See *ibid* 187-188.

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to reluctance to interfere with the legislation of the growing number of responsible governments in settler colonies. It may also, however, have reflected a shift in attitude between Stephen and his successors, Herman Merivale and Frederick Rogers, who appear to have been prepared to give representative legislatures a freer rein than Stephen.<sup>69</sup> The Colonial Office was always clear that not every deviation from English law gave rise to “repugnancy”. Achieving uniformity of law throughout the Empire was never the aim.<sup>70</sup> What is less clear, however, is whether Stephen took the view that repugnancy could arise not only where colonial legislation conflicted with an Imperial statute but also where it impinged upon fundamental common law values. Merivale and Rogers thought such conflict did not give rise to repugnancy, a view ultimately reflected in the Colonial Laws Validity Act 1865.<sup>71</sup> If there was a difference between Stephen and his successors, that may also have contributed to the decline in disallowances from the 1840s.

Apart from disallowance, colonial statutes could be held invalid in the courts for repugnancy to English law. In some colonies, certification of validity by local judges was a precondition of promulgation of local legislation.<sup>72</sup> Judicial scrutiny for invalidity on repugnancy grounds seems also to have declined through the middle part of the nineteenth century and preceding the Colonial Laws Validity Act. This may have reflected shifts in legal thinking and identification of the judiciary with local government and communities.

#### Administering Empire

Before discussing the administration of colonies, it should be noted that colonies were not the only manifestation of Empire. The Acts of Union with Scotland

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<sup>69</sup> Ibid 41 & 117-122. For “responsible government”, see text accompanying n 104 below.

<sup>70</sup> Ibid 6.

<sup>71</sup> Ibid chs 5 & 11. The legislation was provoked by the extreme position taken in South Australia by Justice Boothby, as to which see also McLaren *British Colonial Judges*, above n 61, ch 8.

<sup>72</sup> See Kercher “Resistance and Reception”, above n 52, 242-244; and McLaren *British Colonial Judges*, above n 61, ch 7. James Busby’s attempts to have the land claims legislation of the New South Wales and New Zealand Legislative Councils declared invalid as repugnant to English law, including in the 1859 case of *Busby v White*, are referred to in Chapter 18.

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(1706–7) and Ireland (1800), preceded by treaties, can be seen as imperial expansion. By them, the constituent parts were united first as Great Britain (bringing together England and Wales with Scotland) and then as the United Kingdom of Great Britain and Ireland, under the Parliament at Westminster (in which there was distinct Scottish and Irish representation, although Catholics were excluded from the franchise until 1829). In both, continuity of offices, courts and laws was provided for. In Ireland, the continuity was subject to change by the Parliament at Westminster and the administration was controlled by a Lord Lieutenant and Chief Secretary who were answerable to London.<sup>73</sup> In Scotland, however, the separate legal system was guaranteed (art 19) and it was declared that “all Laws and Statutes in either Kingdom so far as they are contrary to, or inconsistent with the Terms of these Articles, or any of them, shall from and after the Union cease and become void, and shall be so declared to be by the respective Parliaments of the said Kingdoms” (art 25).<sup>74</sup> In addition to England, Wales, Scotland and Ireland, the British Isles also included as Crown dependencies the Isle of Man and the Channel Islands (the bailiwicks of Guernsey and Jersey and their dependencies). These territories, in which customary laws and institutions continued, were administered by the Home Secretary.<sup>75</sup>

Apart from overseas territories that were part of the dominions of the Crown, British authority was also exercised over *protectorates* and *protected states*. In both, the conduct of external relations and defence was undertaken by Britain. In a protected state, internal government was conducted by or in the name of the local ruler, with varying degrees of British influence (sometimes amounting to British rule in all but name). In a protectorate, internal government was undertaken by Britain, but could be with local participation. In many cases, there was little practical difference between the administration of a protectorate and a Crown colony.<sup>76</sup> A protectorate was not, however, part of the British realm and its role as

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<sup>73</sup> Union with Ireland Act 1800 (GB) 39 & 40 Geo III c 67.

<sup>74</sup> Union with Scotland Act 1706 (Eng) 6 Ann c 11.

<sup>75</sup> Roberts-Wray *Commonwealth and Colonial Law*, above n 2, 672-677.

<sup>76</sup> For “Crown colony”, see text accompanying ns 98-99 below.

the protecting power was a trust for the inhabitants of the territory which would, in theory, come to an end.<sup>77</sup>

The terms “protectorate” and “protected state”, in the senses here explained, were not current in 1840. The arrangements they describe were, however, seen some treaty relationships of the time. Among the large number of treaties negotiated by the East India Company with local rulers in India, were a number of treaties of protection with princely states which entailed recognition of local internal government and promises of British military aid, in exchange for British control of external relations.<sup>78</sup> On the terminology here used, such treaties established protected state arrangements.

A protectorate, in the sense here used, is illustrated by the Ionian Islands, which were placed “under the immediate and exclusive protection” of the British Crown by the Treaty of Paris 1815.<sup>79</sup> The Ionian Islands are of interest for New Zealand because they were a model for British intervention suggested by James Busby, the British Resident, in 1836–37.<sup>80</sup> The seven Ionian Islands<sup>81</sup> were constituted by the Treaty of Paris as a “single, free, and independent State, under the denomination of the United States of the Ionian Islands” but under British protection.<sup>82</sup> The Treaty provided that the “trading flag” of the United States would be recognised by the contracting parties.<sup>83</sup> (The flag subsequently adopted featured the Venetian Lion with the Union Jack in the top left hand corner.<sup>84</sup>) Although the United States were

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<sup>77</sup> Ibid 47-50.

<sup>78</sup> See, for example, treaty between the East India Company and Jhalawar, signed at Kota, 8 April 1838, 87 CTS 411-415; treaty between the East India Company and the Amirs of Hyderabad/Sindh, signed at Hyderabad, 11 March 1839, 88 CTS 355-358; and treaty between the East India Company and Herat, signed at Kandahar and Herat, 9 June & 13 August 1839, 89 CTS 241-244.

<sup>79</sup> Treaty between Great Britain, Austria, Russia and Prussia, signed at Paris, 5 November 1815, reproduced in Lewis Hertslet (ed) *A Complete Collection of the Treaties and Conventions, and Reciprocal Regulations, at Present Subsisting Between Great Britain & Foreign Powers* (Henry Butterworth, London, 1827) vol 1, 45-53 [“Treaty of Paris 1815”], art 2.

<sup>80</sup> See Chapter 7.

<sup>81</sup> Corfu, Paxos, Lefkas, Ithaca, Cephalonia, Zakynthos and Cythera.

<sup>82</sup> Treaty of Paris 1815, above n 79, art 1.

<sup>83</sup> Ibid art 7.

<sup>84</sup> Constitutional Chart of the United States of the Ionian Islands, passed by the Legislative Assembly on 2 May 1817 and ratified by the Prince Regent on behalf of King George III on 26 August 1817, reproduced in R Montgomery Martin *History of the Colonies of the British*

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to “regulate their internal organization” that was with the “approbation of the Protecting Power”. Under the terms of the Treaty:<sup>85</sup>

[I]n order to give to all the parts of this [internal] organization the necessary consistency and action, His Britannic Majesty will employ a particular solicitude with regard to the legislation and the general administration of those States. His Majesty will, therefore, appoint a Lord High Commissioner to reside there, invested with all the necessary power and authorities for this purpose.

A Constitutional Charter was subsequently adopted by a legislative assembly summoned by the Lord High Commissioner for that purpose under the terms of the Treaty of Paris. It was ratified by the Prince Regent on behalf of King George III in 1817. It provided for a partly-elected legislature. The Executive comprised a Senate appointed from members of the legislature (over whom the Commissioner had a power of veto). The President of the Senate was nominated by the Commissioner and was to receive the same military honours as him. The Commissioner had power to approve or reject legislation, and the Crown had a further year to disallow it. Although local government on each island was under the control of a “regent” appointed by the Senate, each island also had a “resident” appointed by the Commissioner.<sup>86</sup> The upshot was a “tight, not to say despotic, regime”.<sup>87</sup> The system set up was never likely to endure. Sir Howard Douglas, a Commissioner in the 1830s, described the arrangement as “a sort of middle state between a colony and a properly independent country without in some respects the advantages of either”.<sup>88</sup> The Ionian Islands were eventually ceded by Britain to Greece in 1864.

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*Empire in the West Indies, South America, North America, Asia, Austral-asia, Africa, and Europe* (WH Allen, London, 1843), Appendix 7, 258-270 [“Constitutional Chart of the Ionian Islands”], ch 7, s 6, art 1.

<sup>85</sup> Treaty of Paris 1815, above n 79, art 3.

<sup>86</sup> Constitutional Chart of the Ionian Islands, above n 84.

<sup>87</sup> Robert Holland “Patterns of Anglo-Hellenism: A ‘Colonial’ Connection?” (2008) 36:3 *The Journal of Imperial and Commonwealth History* 383-396 [“Holland ‘Anglo-Hellenism’”] at 385.

<sup>88</sup> Quoted in Holland “Anglo-Hellenism”, above n 87, 386. Douglas later spoke in the House of Commons debate on New Zealand in 1845. See Chapter 17, text accompanying n 187.

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Quite apart from the exercise of territorial authority, extraterritorial jurisdiction over British nationals had been asserted periodically since Tudor times. In addition to Admiralty jurisdiction over the high seas, some of these claims were in respect of conduct occurring in the territory of another sovereign state.<sup>89</sup> The Murders Abroad Act 1817 and the New South Wales Act 1823 by which, pre-1840, British subjects were prosecuted in Australian courts for crimes committed in New Zealand were in this tradition. Such prosecutions were, however, controversial and some were thrown out by the courts.<sup>90</sup> As is described in Chapter 6, the South Sea Islands Bill 1832, which sought to put this jurisdiction on a more secure basis, foundered in the United Kingdom Parliament. This, it seems, was a result of concerns about the legitimacy of legislating for a foreign country.<sup>91</sup> Similar concerns were, however, overcome in respect of the Cape of Good Hope Punishment Act 1836.<sup>92</sup> Eventually, but not until after New Zealand had become a colony, a generic solution was provided by the Foreign Jurisdiction Act 1843. The Act was not confined to British nationals and set up a new basis for extraterritorial jurisdiction by “treaty, capitulation, grant, usage, sufferance, and other lawful means”. It was prompted by the acknowledged unlawfulness of the jurisdiction asserted by George McLean at the Gold Coast described further in Chapter 4.<sup>93</sup>

The colonies in pre-Revolution North America were of two types, *chartered* and *royal*. Chartered colonies were territories granted by royal charter to individuals (or “proprietors”) or groups of colonists or companies. So, for example, William Penn was granted the Province of Pennsylvania by Charles II; Rhode Island and Connecticut were granted to groups of colonists; Massachusetts Bay was granted to a company of the same name; and Rupert’s Land was granted to the Hudson’s Bay Company. Royal colonies were administered directly by the Crown through Governors. During the seventeenth and eighteenth centuries, royal colonies became

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<sup>89</sup> McHugh *Aboriginal Societies*, above n 52, 69-70.

<sup>90</sup> See Chapter 6, text accompanying ns 54, 56 & 60.

<sup>91</sup> See Chapter 6, text accompanying ns 167-170.

<sup>92</sup> 6 & 7 W IV c 57.

<sup>93</sup> McHugh *Aboriginal Societies*, above n 52, 207.

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the preferred vehicle for Empire. Some former chartered colonies had their charters revoked and became royal colonies.

Outside North America and before the territorial acquisitions of the French Revolutionary and Napoleonic Wars, royal colonies were established in the islands of the West Indies and Atlantic Ocean. The principal British overseas possession was, however, India. The East India Company had received a monopoly on trade in the East Indies by royal charter in 1600. By 1840, it shared the administration of the British territories it had acquired in India with the Crown.<sup>94</sup> In this arrangement, the Company was represented by its Court of Directors, and the Crown by a Board of Control which was headed by a cabinet minister as President. By various charters and eighteenth and nineteenth century statutes, most importantly the Government of India Act 1833, the Crown, through the Board, increased its control. Because of this arrangement, British India was administered on a different basis than the rest of the Empire. When in 1801, the office of Secretary of State for the Colonies was created, India was not included in his responsibilities. India never came within the responsibilities of the department he headed, the Colonial Office.<sup>95</sup>

Chartered colonies were more suited to the commercial focus of earlier Empire. By the beginning of the nineteenth century, with expansion of Empire around the globe, the development of institutions for its administration, and a growing sense of imperial responsibilities, chartered colonies had fallen out of favour. In Africa, the charters of the Royal African Company (granted in 1750 for the Gold Coast) and the Sierra Leone Company (granted in 1799) were revoked (in 1821 and 1808 respectively) and they became Crown colonies (although a few years later in the

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<sup>94</sup> See Douglas Peers *India Under Colonial Rule: 1700–1885* (Pearson, Harlow, United Kingdom, 2006) [“Peers *India Under Colonial Rule*”].

<sup>95</sup> Ultimately, following the Indian Mutiny of 1857 and the cancellation of the Company’s charter in 1858, the administration of India fell to a separate government department, the India Office.

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Gold Coast, the Crown delegated administrative responsibilities for the trading forts to a committee of merchants).<sup>96</sup>

In the 1830s, new interest in emigration and “systematic colonisation” (promoted by Edward Gibbon Wakefield, as is discussed further below), led to revived interest in chartered colonies as a vehicle for such projects. South Australia was chartered to the South Australian Company under an 1834 Act of Parliament. The basis of the charter was a watered-down version of that proposed by the promoters of the Company due to opposition, especially from the Colonial Office which took the view that the proposals would appropriate Crown authority and responsibilities. As set up by 1836 when settlement began, it entailed shared responsibility between the Crown and Colonisation Commissioners for South Australia, represented in the colony by a Governor and Resident Commissioner respectively.<sup>97</sup> The promoters and supporters of the South Australian Company included a number of men who were also to be prominent in similar charter proposals for the settlement of New Zealand. They include Wakefield (who, however, fell out with the Company’s promoters), Robert Torrens (who was chairman of the Colonisation Commission and a member of the New Zealand Company of 1825 which put forward new schemes for the colonisation of New Zealand in 1838), William Hutt (also a Colonisation Commissioner and later a significant figure in the Wakefield-dominated New Zealand Association), and Lord Howick (who as Under-Secretary for the Colonies in 1832–34 had backed the South Australian scheme and who was to provide on and off support for the New Zealand Association and Company).

Whether chartered or royal, colonies varied according to whether they had a representative assembly (lower chamber of the legislature). Representative assemblies were associated with the early North American, West Indian and Atlantic Ocean settlement colonies. Apart from rare cases such as British Guiana where existing political institutions with representative elements were continued by

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<sup>96</sup> TO Elias *Ghana and Sierra Leone: The Development of their Laws and Constitutions* (Stevens & Sons Ltd, London, 1962) 13-14 & 229-230.

<sup>97</sup> Brian Dickey & Peter Howell (eds) *South Australia’s Foundation: Select Documents* (Wakefield Press, Netley, South Australia, 1986) 7-8.

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a treaty of cession, the colonies conquered or founded from the late eighteenth century were ones administered by the Crown through Governors.<sup>98</sup> The Governors were supported by Crown-appointed advisory councils and, from the mid-1820s, by Crown-nominated executive and legislative councils. These were what came to be called “Crown Colony” governments. In them, representative government was not initially regarded as appropriate either because they were penal settlements or because the local populations were not British.<sup>99</sup>

Representation in government in the early North American, West Indian, and Atlantic Ocean colonies had been inevitable. The distance and weakness of central control from London meant that settler participation in local government was vital to its legitimacy and survival. In addition, such participation was regarded by settlers as part of their birthright as British subjects. The guarantee of their liberties—including the rights not to be deprived of liberty or property without due process of law and not to be taxed or subjected to laws without their consent—were seen to rest on the institution of the jury and the right to representation in the legislature. They sought to replicate British institutions. Because a large proportion of settlers had become landowners, they considered themselves entitled, as with English property owners, to participate in government by sitting on juries and by electing representatives to law-making assemblies. The replication of the British Constitution in the colonies in this way became celebrated as illustrating British enlightenment.<sup>100</sup>

The North American representative assemblies operated with considerable freedom from Crown control, in part reflecting weaker patterns of deference in confident immigration societies. The assemblies raised revenue and decided how it would be spent. They took to themselves the privileges of the British House of Commons,

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<sup>98</sup> Some colonies were headed by a Lieutenant-Governor directly answerable to the Colonial Office (such as Van Diemen’s Land), while some dependencies of larger colonies were administered by a Lieutenant-Governor answerable to the Governor of the larger colony (such as New Zealand in 1840).

<sup>99</sup> Peter Burroughs “Imperial Institutions”, above n 38, 185 & 188.

<sup>100</sup> Jack Greene “Introduction: Empire and Liberty” in Jack Greene (ed) *Exclusionary Empire: English Liberty Overseas, 1600–1900* (Cambridge University Press, New York, 2010) 1-24 [“Greene ‘Empire and Liberty’”] at 1-11.

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and gained authority over much executive policy and the appointment of many executive officials. This independence set up the conditions for Revolution when the British Parliament, concerned that the colonists were too free and were not pulling their weight in contributing to the British war machine, imposed taxes directly and otherwise interfered with local administration. The colonists represented their resistance to these moves as a defence of the British Constitution against the new assertions to omnipotence of the British Parliament.<sup>101</sup>

The nature of the British Constitution then, as now, was intensely contested. The existence, location, and basis of any sovereign power within the domestic legal order was inextricably bound up with the conception of law, a branch of philosophy in constant motion. The American Revolutionary debates illustrate competing theories and shifts in thinking about the essentiality of an unlimited law-making authority. Whether the British view (that Parliament's sovereignty was unlimited) or the American view (that the common law limited Parliament's power) was the more authentic common law tradition is not a subject on which it is necessary to enter here.<sup>102</sup>

With the loss of the Thirteen Colonies, Britain found it prudent to concede more authority over internal affairs to the representative assemblies of the West Indian and remaining North American colonies. (In the case of the West Indian colonies, this freedom allowed local legislatures to resist abolition of slavery well into the nineteenth century and then to restrict the political and civil rights of the freed slaves.) When new settler colonies were established in Canada following the Loyalist migration, they too were granted representative government. When Lower and Upper Canada were created out of Quebec in 1791, they obtained representative assemblies and Catholic enfranchisement.<sup>103</sup>

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<sup>101</sup> Ibid 11-13.

<sup>102</sup> The literature on "sovereignty" is voluminous. A good place to start is with Michael Lobban and WPM Kennedy. See Michael Lobban *A History of the Philosophy of Law in the Common Law World, 1600–1900* (Springer, Dordrecht, 2007); and WPM Kennedy "Theories of Law and the Constitutional Law of the British Empire" in WPM Kennedy *Essays in Constitutional Law* (Oxford University Press, London, 1934) 3-23.

<sup>103</sup> Greene "Empire and Liberty", above n 100, 13-17.

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Despite representative assemblies and greater control over local matters, settlers in the Canadian colonies continued to resent restrictions on the freedoms that they saw as part of their “birthright”. They chafed under Governors who were more powerful and independent than the Governors of the pre-Revolution Thirteen Colonies and West Indian colonies. In addition, they resented the power of the Crown-appointed Legislative Councils (upper chambers of the legislatures) which vetoed the bills of the representative assemblies. A movement for responsible government, in which effective executive authority would be exercised by a cabinet drawn from the assembly (leaving the Governor as a figurehead), led to rebellion in both Lower and Upper Canada in 1837.<sup>104</sup> Lord Durham, later chairman (sometimes called “governor”) of the New Zealand Association, was sent to Canada to report. His report of January 1839 was written by Charles Buller (who as advocate for the New Zealand Company, was later strongly disparaging of Maori, and who later still became an advisor to the Colonial Office<sup>105</sup>). Buller was assisted in writing the report by Edward Gibbon Wakefield. Durham’s report recommended the unification of Lower and Upper Canada and the establishment of responsible government. Unification was achieved in 1840 but responsible government was not conferred for any of the Canadian colonies until 1848.<sup>106</sup>

In the agitation for responsible government, Canada was well ahead of other colonies, even those with substantial British populations. In New South Wales, the colony’s origin as a penal settlement greatly retarded the adoption of trial by jury and a representative legislature. Trial by jury was not finally established until 1833. Two-thirds elected representation on the Legislative Council was achieved eventually in 1842. Responsible government was not set up until 1856. Similarly, at the Cape Colony, representative government was not achieved until 1853, and responsible government not until 1872.<sup>107</sup> It is probably stating the obvious but should be noted that property and other qualifications prevented most indigenous

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<sup>104</sup> Ibid 17.

<sup>105</sup> See Chapter 17, text accompanying ns 190 & 197.

<sup>106</sup> Ged Martin *The Durham Report & British Policy: A Critical Essay* (Cambridge University Press, Cambridge, 1972) [“Martin *Durham Report*”].

<sup>107</sup> Greene “Empire and Liberty”, above n 100, 19-22.

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peoples from participating in representative or responsible government in these colonies (as they were to exclude most Maori in New Zealand after representative and responsible government were obtained through the 1852 Constitution Act).

In retrospect, it is possible to see at 1840 that the Empire was developing on two different trajectories according to whether the future of a colony was seen as one of “white settlement” or not.<sup>108</sup> In colonies of white settlement the invocation of British “birthright” was an unstoppable force. The Canadian colonies cleared the path for others. That the end point of responsible government did not follow inevitably from representative government when the colony did not fit the “white settlement” mould, is illustrated by the West Indian colonies. Despite having had powerful representative assemblies for the free population from an early stage, all but Barbados (where the proportion of white population was highest) relinquished their representative legislatures for Crown Colony government following the lead given by Jamaica after the black uprising at Morant Bay in 1865. This was done to forestall the white population having to share power with the freed slave population.<sup>109</sup> In other parts of the Empire where the British governed non-white populations, imperial administrators faced none of the same pressures to confer representative and responsible government and could convince themselves that these societies were not capable of assuming such responsibilities except perhaps after long tutelage under Crown Colony government.<sup>110</sup> As is further discussed in what follows, the different trajectory in dependent Crown Colonies (where representative and responsible government was deferred indefinitely) was shaped, and in turn reinforced, by changing mid-nineteenth century ideas of “civilisation”, attitudes to race, and theories of political philosophy.

In the 1830s, the Colonial Office was a new department of state. It had emerged in a very modest way at the end of the Napoleonic Wars to support the Secretary of

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<sup>108</sup> Ibid 22-24; Andrew Porter “Introduction: Britain and the Empire in the Nineteenth Century” in Andrew Porter (ed) *The Oxford History of the British Empire: The Nineteenth Century* (Oxford University Press, Oxford, 1999, vol 3) 1-28 at 4.

<sup>109</sup> Greene “Empire and Liberty”, above n 100, 16.

<sup>110</sup> Although, as seen below, James Stephen was supportive of black self-government in the West Indies and West Africa.

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State for the Colonies in dealing with his increased workload arising from the territories which were the British spoils of war. The Colonial Office, located at 13-14 Downing Street, was always small compared with the great departments it had to deal with to discharge many of its own responsibilities. Colonial administration and foreign relations, the responsibility of the Foreign Office, frequently overlapped. The conduct of British subjects in New Zealand before it became part of the British dominions might well have been the exclusive concern of the Foreign Office but for the fact that New South Wales Governors had taken an interest in it and had reported to the Colonial Office. When Hobson was dispatched to treat with Maori for sovereignty, however, the Colonial Office had to seek from the Foreign Office a commission appointing him Consul. Similarly, the co-operation of the Admiralty had to be obtained by the Colonial Office in the 1830s to send warships to show the flag and deal with British miscreants and to transport Hobson to New Zealand in 1839–40. Since it held the purse-strings, the Colonial Office was obliged to seek Treasury approval for any course of action that entailed cost. The 1830s were a period of austerity in government which constrained both Colonial Office action and the resources available to it for its own operation. It is said that it had only ten staff in 1830 and may not have had very many more by 1840.<sup>111</sup> When it is remembered how many colonies the department was responsible for and how much correspondence each generated, the achievements of the office are remarkable.

Its sense of purpose did not emerge until the appointments in the mid-1820s of Robert Hay, the first civil servant appointed as permanent under-secretary to head the office, and James Stephen, as legal counsel. These appointments coincided with the Age of Reform and adverse reaction to “old corruption”. In empire there was focus on the cost and autocratic behaviour of the aristocratic governors of colonies. These grandees were forced out by tightening up controls on their behaviour and the perks of office. There was no imperial civil service to draw on and so the old-

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<sup>111</sup> Zoë Laidlaw *Colonial Connections 1815–45: Patronage, the Information Revolution and Colonial Government* (Manchester University Press, Manchester, 2005) [“Laidlaw *Colonial Connections*”] 41.

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style Governors were replaced by military and naval officers who found the straitened terms acceptable since in the peace following the Napoleonic Wars they were often reduced to half-pay. Many of these Governors proved as autocratic as their predecessors and they were of variable quality.<sup>112</sup>

To keep the Governors and their subordinate officials under some better supervision and to steer them into better practices, Hay encouraged a culture of private correspondence between officials in London and in the colonies. This culture—which may have had some good features—added to the burdens of an already over-stretched office by drawing the Colonial Office into disputes between colonial officials which were often petty and by opening the way for Governors to be undermined by disaffected subordinates. In addition, this chaotic communication made it very difficult to capture the information in a central archive. In 1835, as Hay was being eased out in favour of Stephen as Under-Secretary, private correspondence was stopped and colonial officials (including Governors) were directed that all correspondence should be addressed to the Secretary of State as a matter of public record.<sup>113</sup>

As Under-Secretary, Stephen made it a point to overhaul the systems for dealing with and filing correspondence and minutes. Incoming despatches were date-stamped on arrival and directed by stamp up the chain of command in the office: from the desk officer for the particular colony, to Stephen, to the Parliamentary Under-Secretary, to the Secretary of State. Each added the date on which they saw the despatch (alongside their names on the stamp) and added any minutes of their own (either on the despatch itself or, if long, on an appended sheet). In respect of New Zealand, the desk officer played a minor role: Stephen himself was often the first to read despatches and they travelled up the chain of command from him. His minutes (mostly dictated to an amanuensis) often suggested a reply to the despatch which was usually approved by the politicians. As with other outgoing correspondence, the reply would then be written out as a full draft and stamped and

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<sup>112</sup> Ibid 40-43.

<sup>113</sup> Ibid 49-51, 63-66, ch 5 & 169-170.

passed back up the chain for corrections, improvements and final approval. This draft would be used to make fair copies for sending out and would itself be then retained on the Colonial Office file for the particular colony. Such files were bound in volumes (usually according to year but sometimes according to a particular correspondent or subject), indexed, and retained as a record. Because of this system, it is possible to see the contribution each officer made to the output of the office (at least if the reader can attribute the handwriting).

The huge diversity of colonies and the slowness of communication with them meant that the Colonial Office could not impose uniformity in administration and was obliged to trust Governors with wide discretion. Despatches from New Zealand in 1840 took three months to reach London and, depending on the vagaries of shipping, would not always arrive in sequence. As a result of this and the limited resources available to it, the Colonial Office operations were essentially reactive to developments on the spot as news of them was received in despatches.<sup>114</sup> Stephen himself said wryly of the realities of administering Empire that, much as “deliberative, far-sighted, and ... philosophical Government” was “sound and correct ... in theory”, “I do not know my alphabet better than I know that this is not the spirit of the English Government, and that the ambition of every Secretary of State and his operations will be bounded by the great ultimate object of getting off the mails”.<sup>115</sup> In reacting to the mails, the Colonial Office had to take account of the fact that, because of the time taken to communicate, events may well have moved on by the time its reaction was received in the colony (in New Zealand, more than six months could elapse).

Hay and Stephen did seek to promote more consistency across the Empire. Hay proposed an imperial civil service and Stephen was to advocate a standing colonial commission to advise the Secretary of State. Both, however, saw the limits to

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<sup>114</sup> See Burroughs “Imperial Institutions”, above n 38, 170-171; PJ Marshall “1783–1870: An Expanding Empire” in PJ Marshall (ed) *The Cambridge Illustrated History of the British Empire* (Cambridge University Press, Cambridge, 1996) 24-51 at 24.

<sup>115</sup> James Stephen to Henry Taylor, 16 November 1835, reproduced in Caroline Stephen (ed) *The Right Honourable Sir James Stephen K.C.B., LL.D.: Letters with Biographical Notes* (John Bellows, Gloucester, 1906) [“Stephen Letters”] 42-43 at 42.

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uniformity.<sup>116</sup> Stephen thought it would be folly and dangerous to lay down “abstract and speculative doctrines” (which should be left to “Professors and Men of Letters”).<sup>117</sup> Although he was under no illusion that the calibre of Governors left something to be desired, their “proximity to the scene of action ... more than compensate[d] for every other incompetency”.<sup>118</sup>

Had I the understanding of Jeremy Bentham himself, I should distrust my own judgement as to what is really practicable in such remote and anomalous societies.

On another occasion, Stephen said in the same vein that:<sup>119</sup>

The wisest Governor may judge erroneously but the wisest stranger to the Country must guess erroneously—at least the chance of guessing right is so slight as to be evanescent.

Despite this reluctance to second-guess officials on the spot, it is clear that the Colonial Office took very seriously the supervision of the conduct of Governors and other colonial officials and was not slow to offer criticism and advice and, where necessary, to intervene by providing directions and by exercising powers reserved to the Crown (as in disallowing laws). There were also some imperial initiatives in which the Colonial Office did require consistency of observation among colonies. The most thorough-going of these was the abolition of slavery under imperial legislation of 1833 drafted by Stephen. A concerted effort was also made in the Australian colonies to adopt a uniform system of land sales to promote emigration on a basis that was self-funding and which concentrated settlement in agricultural communities. This policy was provided for in regulations in 1831 (known as Lord Ripon’s Regulations, after the Secretary of State for the Colonies, Viscount Goderich, later the Earl of Ripon). The system of public land auctions (at an upset or reserve price of five shillings an acre) replaced the former system of

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<sup>116</sup> Laidlaw *Colonial Connections*, above n 111, 45-46; John Ward “The Retirement of a Titan: James Stephen, 1847–50” (1959) 31:3 *The Journal of Modern History* 189-205 at 194-195.

<sup>117</sup> Memorandum by James Stephen, 27 March 1845, CO 217/189, quoted in Porter “Britain and the Empire”, above n 108, 17.

<sup>118</sup> Stephen to Twiss, 25 August 1830, CO 111/98, quoted in Burroughs “Imperial Institutions”, above n 38, 177.

<sup>119</sup> Quoted in AGL Shaw “Stephen, Sir James (1789–1859)” *Oxford Dictionary of National Biography* [“Shaw ‘James Stephen’”].

free grants. The free grants system had failed to promote settlement and agriculture (in part because large tracts of land had been acquired by absent landowners and speculators), did not provide revenue for the colonies, and had led to charges against Governors of favouritism in the grants. The new auction system was taken from the United States and had been trialled in Canada. It sought to promote emigration of agricultural labourers at a time of high unemployment in Britain and to encourage the development of agriculture in the colonies by ensuring they would have to labour on properties owned by others before being in a position to acquire their own. The concentration of settlement that this policy would achieve would ensure a supply of labour and would also achieve a more integrated society. Although he was not the originator of these ideas, their adoption was influenced by the attractively-presented schemes of the “abductor and mystagogue”, Edward Gibbon Wakefield, for “systematic colonisation”.<sup>120</sup> The regulations were successful in generating revenue for the colonies and an inflow of immigrants. They were less successful in promoting agriculture and concentrated settlement, largely because the preference continued to be to use land for pastoral farming. Attempts to confine farming by limiting the areas granted were defeated by squatters. When, in 1838, the upset price of land was raised in an effort to tighten up the system, one of the results was to shift attention to land purchasing opportunities in New Zealand, then emerging as an object of British Government interest.<sup>121</sup>

The Colonial Office was responsible to the Secretary of State for the Colonies, who was a senior minister and member of the Cabinet. A second, junior minister was Parliamentary Under-Secretary for the Colonies. These ministers were supported

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<sup>120</sup> Ged Martin *Edward Gibbon Wakefield: Abductor and Mystagogue* (Ann Barry, Edinburgh, 1997). “Abductor” is accurate: Wakefield’s cynical abduction of a fifteen year old school-girl heiress shocked his contemporaries and earned him three years in Newgate prison. “Mystagogue” strikes exactly the right note in describing Wakefield’s fantasies, dogmatism, and spell-weaving. Because of his disgrace, Wakefield had to work behind the scenes. It was said by one contemporary that “he may be the screw under the stern but he won’t do for the figurehead”. Ibid 25. He was skillful in this. Lord Elgin said that his pen had “just enough truth to make a lie and a good one”. Ibid 26-27.

<sup>121</sup> Peter Burroughs *Britain and Australia 1831–1855: A Study in Imperial Relations and Crown Lands Administration* (Clarendon Press, Oxford, 1967).

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by the office which was headed by the Permanent Under-Secretary, a civil servant. During the period from 1837 to February 1839 when the British Government moved towards its decision to treat with Maori for the sovereignty of New Zealand, the three positions were occupied by Baron Glenelg, Sir George Grey,<sup>122</sup> and James Stephen. Glenelg was forced out of office in February 1839, before a final decision in relation to New Zealand was made by the Government, and Grey went with him. They were replaced by the Marquess of Normanby and Henry Labouchere, who in the end were responsible, with Stephen, for the Instructions to Hobson. Neither Normanby nor Labouchere remained in office long enough to receive news of the Treaty of Waitangi. In the subsequent years which are dealt with in this thesis, the succeeding Secretaries of State for the Colonies were Lord John Russell (September 1839–September 1841), Lord Stanley (September 1841–December 1845), William Gladstone (December 1845–July 1846) and Earl Grey<sup>123</sup> (July 1846–February 1852). The Parliamentary Under-Secretaries were, successively, Robert Vernon Smith (September 1839–September 1841), George Hope (September 1841–January 1846), Lord Lyttleton (January 1846–July 1846) and Benjamin Hawes (July 1846–February 1851). For most of this period, James Stephen was Permanent Under-Secretary, although his successor in 1848, Herman Merivale, was transitioning into that position as Assistant Under-Secretary from November 1846.<sup>124</sup>

Some of the people who held office after Hobson was dispatched to enter into a treaty with Maori can be sufficiently introduced as they appear in what follows. It is convenient, however, to give a short description at this stage of the backgrounds of Glenelg, Sir George Grey, Normanby and Labouchere because of the role they played in settling the terms for British intervention in New Zealand in 1840. Because of his extraordinary role in shaping British policy towards New Zealand,

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<sup>122</sup> Not to be confused with the 3rd Earl Grey (Lord Howick), who was earlier Parliamentary Under-Secretary (1830–33) and later Secretary of State (1846–52), or with Sir George Grey, Governor of New Zealand (1845–53 and 1861–68).

<sup>123</sup> See above n 122.

<sup>124</sup> Laidlaw *Colonial Connections*, above n 111, 206–207 (Appendix One: Senior Colonial Office Staff, 1815–50).

both before and after 1840, however, it is necessary to provide a more extensive biographical note on Stephen.

Charles Grant, later Baron Glenelg, grew up in an evangelical family. His father, also Charles Grant, had risen to prominence after working for the East India Company in India for twenty years. On his return to England, he became a director of the Company and a Member of Parliament. He was a member of the Clapham Sect,<sup>125</sup> prominent in the campaign to abolish slavery, a director of the Sierra Leone Company, and a founder of the Church Missionary Society and the British and Foreign Bible Society. His great project in life was the Christianisation of India. Although a staunch supporter of the East India Company, Grant was opposed to its territorial expansion not only because he feared it might overextend the resources of the Company but also because he thought such expansion was morally wrong.<sup>126</sup>

The son, Glenelg, had spent his early childhood in India and then been privately educated by the Reverend John Venn, the rector of Clapham and central figure in the Clapham Sect. His university education was at Magdalene College, Cambridge, then strongly evangelical. Grant was a barrister before turning to politics. He was elected to Parliament in 1811. He was Irish Chief Secretary from 1819 to 1823, in which position he supported Catholic emancipation. He was made Vice President of the Board of Trade in 1823 and entered the Cabinet in 1827 when appointed President of the Board of Trade and Treasurer of the Navy. From 1830–34 Grant was President of the Board of Control of India. He was made Secretary of State for the Colonies in 1835 by Viscount Melbourne (Prime Minister, 1834–41) and, shortly afterwards, was created Baron Glenelg. (The title was taken from the name of the house built by Henry Thornton in the grounds of his own house at Clapham and let to the first Charles Grant.) Glenelg had powerful enemies. He was not liked in royal circles and was aggressively criticised by Lord Howick (later Earl Grey), who considered himself to be an expert in colonial matters following his stint as

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<sup>125</sup> For which see John Wolffe “Clapham Sect (act. 1792–1815)” *Oxford Dictionary of National Biography*.

<sup>126</sup> Penelope Carson “Grant, Charles (1746–1823)” *Oxford Dictionary of National Biography*.

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Parliamentary Under-Secretary for the Colonies between 1830 and 1833. Glenelg's critics portrayed him as someone who was indecisive and out of his depth, but the British historian, Ged Martin, notes other contemporary opinions that he was principled and capable of firmness.<sup>127</sup> James Stephen's verdict was that he was highly conscientious and "enlightened".<sup>128</sup>

George Grey was the son of a Royal Navy captain, nephew of the 2nd Earl Grey (Prime Minister from 1830–34), and therefore cousin of Howick. He, too, came from an evangelical home (his mother was a friend of William Wilberforce) and remained deeply religious throughout his life. He was involved with the Church Missionary Society and the British and Foreign Bible Society. His appointment as Under-Secretary for the Colonies was his first ministerial appointment in what was a long political career, including as a long-serving Home Secretary. When Charles Grant was elevated to the peerage as Baron Glenelg, Grey defended Colonial Office policy in the House of Commons. It is said of his tenure at the Home Office that he was not an innovator but had a reputation for sound judgement. He is said to have been "careful in action and moderate in speech" and a kindly man "whose words could be implicitly trusted". From a reading of the New Zealand files in the Colonial Office during his period as Under-Secretary, the same impression of unspectacular soundness is obtained.<sup>129</sup>

Normanby was son of the Earl of Mulgrave, a title he succeeded to in 1831. He was created Marquess in 1838. He was a talented man who found it easy to coast through life and certainly coasted at the Colonial Office. He was a favourite with Melbourne, which accounts for some of the honours he achieved. On his death it was said of him that he was "one of the men who are clever boys and nothing more. There was, in his early life, a promise of excellence, both literary and political, but the promise has never been fulfilled." Before being made Secretary of

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<sup>127</sup> Ged Martin "Grant, Charles, Baron Glenelg (1778–1866)" *Oxford Dictionary of National Biography*.

<sup>128</sup> Stephen to Mrs Austin, 12 February 1839, reproduced in Stephen *Letters*, above n 115, 56–57 at 56.

<sup>129</sup> David Smith "Grey, Sir George, second baronet (1799–1882)" *Oxford Dictionary of National Biography*.

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State for the Colonies, he was Governor of Jamaica (1832–34) and Lord Lieutenant of Ireland (April 1835–March 1839). His manner was said to be “grand and condescending”. It seems to have been quickly realised that he was not suitable for the Colonial Office, and within seven months Melbourne had switched him with the much more capable Home Secretary, Lord John Russell.<sup>130</sup> The Colonial Office files for New Zealand do not suggest that Normanby provided any significant direction. Trevor Williams was hardly exaggerating when he wrote that Normanby contributed only his signature to Hobson’s Instructions.<sup>131</sup>

Henry Labouchere was from a Huguenot merchant family. His mother was from the Baring banking family and he himself was to marry a Baring cousin. He had been a Whig Member of Parliament since 1826. Before becoming Under-Secretary for the Colonies in February 1839, he had been a Lord of the Admiralty, Master of the Royal Mint, and Vice President of the Board of Trade. In his later career he was President of the Board of Trade, Chief Secretary of Ireland and, from 1855–58, Secretary of State for the Colonies. He is best remembered as chairman of “one of the most thorough of all Victorian inquiries”, the Taunton Commission (he was elevated to the peerage by that name in 1859) into private schools.<sup>132</sup> Labouchere was only at the Colonial Office for seven months in 1839. He contributed more to Hobson’s Instructions than Normanby. His modest additions, however, as is described in Chapter 8, may have added confusion, suggesting that Labouchere was possibly someone who had more confidence than was warranted.

As will be seen in subsequent chapters, no one contributed more to settling the terms on which Britain intervened in New Zealand in 1840 than James Stephen. That was the result of his dominance of the Colonial Office and the dependence of its political leaders on his judgement. New Zealand also provided Stephen with a rare opportunity to be creative in the design of a new colony. Rather than having to react to problems of administration in an established one where the range of

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<sup>130</sup> Richard Davenport-Hines “Phipps, Constantine Henry, first marquess of Normanby (1797–1863)” *Oxford Dictionary of National Biography*.

<sup>131</sup> See Chapter 2, n 33.

<sup>132</sup> GFR Barker “Labouchere, Henry, Baron Taunton (1798–1869)”, rev. HCG Matthew, *Oxford Dictionary of National Biography*.

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options was inevitably more constrained by its history and the need to defer to the judgement of officials on the spot, in the Instructions drafted by Stephen for Hobson, he was able to approach the matter on the basis of principle and drawing on what was by then his unparalleled experience of Empire. The existence in New Zealand of a substantial indigenous population under pressure from European encroachment presented in a new setting what was to Stephen a familiar problem and one which, by personal background and experience, he regarded with particular anxiety. As a result, the Instructions and Stephen's subsequent handling of British policy towards New Zealand exhibit very great care.

Stephen was the third son of the James Stephen, later to be a Chancery judge, who had been active in the Clapham Sect and in the anti-slavery movement.<sup>133</sup> The family remained connected with the law and with the abolitionist cause. His brother George was a lawyer and leading abolitionist. His brother Henry was a serjeant-at-law and provided much of the material compiled by Charles Clark in his *A Summary of Colonial Law* (1834).<sup>134</sup> His sister Anne married into the Dicey family and was the mother of Albert Venn Dicey (the "Venn" in his name acknowledging the Reverend John Venn, who was later to become James Stephen's father-in-law), author of the ground-breaking *Law of the Constitution* (1885).<sup>135</sup> The family also had connections with New South Wales. Stephen's uncle, John Stephen, became a judge of the New South Wales Supreme Court in 1825.<sup>136</sup> John's son, Alfred, was later to become Chief Justice of New South

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<sup>133</sup> Patrick Lipscomb "Stephen, James (1758–1832)" *Oxford Dictionary of National Biography*.

<sup>134</sup> Leslie Stephen "Stephen, Sir George (1794–1879)", rev. Peter Balmford, *Oxford Dictionary of National Biography*; Leslie Stephen "Stephen, Henry John (1787–1864)", rev. Patrick Polden, *Oxford Dictionary of National Biography*; Clark *Colonial Law*, above n 21, i. As will be seen in Chapter 16, Clark's *Colonial Law* was one of the books Governor Gipps had with him in the New South Wales Legislative Council chamber during the debate on the New Zealand Claims Bill in July 1840.

<sup>135</sup> Richard Cosgrove "Dicey, Albert Venn (1835–1922)" *Oxford Dictionary of National Biography*.

<sup>136</sup> CH Currey "Stephen, John (1771–1833)" *Australian Dictionary of Biography*.

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Wales,<sup>137</sup> and a further son, Sidney, was a judge of the Supreme Court of New Zealand between 1850 and 1858.<sup>138</sup>

The younger James Stephen was born in 1789.<sup>139</sup> He spent the first five years of his life living in St Kitts, where he contracted smallpox which left him with weak eyesight. His mother died when he was seven years old and his father then married William Wilberforce's sister. James Stephen himself acknowledged the influence on his life of Wilberforce and the Clapham Sect.<sup>140</sup> He recalled fondly his childhood memories of the lively discussions between members of the group in the oval library, designed by William Pitt, in the home of the banker and Sect member, Henry Thornton. He considered that such discussions had grown into "projects more majestic than any which ever engaged the deliberations of [Pitt's] Cabinet".<sup>141</sup>

For there, at the close of each succeeding day, drew together a group of playful children, and with them a knot of legislators, rehearsing, in sport or earnestly, some approaching debate; or travellers from distant lands; or circumnavigators of the worlds of literature and science; or the Pastor of the neighbouring Church, whose look announced him as the channel through which benedictions passed to earth from heaven; and, not seldom, a youth who listened, while he seemed to read the book spread out before him.

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<sup>137</sup> Martha Rutledge "Stephen, Sir Alfred (1802–1894)" *Australian Dictionary of Biography*.

<sup>138</sup> Where he settled the pleadings in the case of *Busby v White* discussed in Chapter 18.

<sup>139</sup> The biographical description of James Stephen given here draws on the following sources: Shaw "James Stephen", above n 119; Paul Knapland *James Stephen and the British Colonial System 1813–1847* (University of Wisconsin Press, Madison, 1953) ["Knapland *James Stephen*"]; Leslie Stephen "Stephen, Sir James (1789–1859)" in Leslie Stephen & Sidney Lee (eds) *The Dictionary of National Biography* (1908–9) ["Leslie Stephen 'James Stephen'"]; Leslie Stephen *The Life of Sir James Fitzjames Stephen* (Smith, Elder & Co, London, 1895) ch 1 ["Stephen *James Fitzjames Stephen*"]; and James Fitzjames Stephen "Biographical Notice of Sir James Stephen" in James Stephen *Essays in Ecclesiastical Biography* (Longmans, Green, Reader & Dyer, London, 1868) xi–xvi ["James Fitzjames Stephen 'James Stephen'"].

<sup>140</sup> Stephen asked his wife in a letter in July 1829 to ensure that his son Herbert observe William Wilberforce to "try to fix in the dear child's mind some recollection of him. He may live to be as old as Mr W. himself without ever meeting any man whose image would be so well worth retaining." In January 1845, he lamented to his wife: "Oh where are the people who are at once really religious, and really cultivated in heart and in understanding—the people with whom we could associate as our fathers used to associate with each other. No 'Clapham Sect' nowadays!" Stephen *Letters*, above n 115, 17 & 87.

<sup>141</sup> James Stephen *Essays in Ecclesiastical Biography* (Longmans, Green, Reader & Dyer, London, 1868) ["Stephen *Ecclesiastical Biography*"] 524. The *Essays* were first published in 1849.

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Stephen, the “youth who listened”, was educated at Trinity College, Cambridge, and admitted to the bar at Lincoln’s Inn. In 1813, while in private practice, he became legal counsel to the Colonial Office on a part-time basis. In this capacity, he reviewed all colonial legislation. It is said that he was motivated to join the Colonial Office because he wished to play a part in the ending of slavery. In 1814, he married a daughter of John Venn, rector of Clapham (Glenelg’s schoolmaster and the “Pastor of the neighbouring Church” described in recollection by Stephen). This made him the brother-in-law of Henry Venn, the long-serving secretary of the Church Missionary Society on whose committee Stephen served for nine years. After a breakdown brought on by overwork, Stephen ceased private practice in 1823 and became full-time legal counsel at the Colonial Office. In 1834, he was appointed Assistant Under-Secretary, and in 1836, succeeding Robert Hay, he became Permanent Under-Secretary (retaining also the role of legal counsel). He did not relinquish the position until retirement in 1847.

Stephen’s passion was his work. He worked ten or eleven hours every day and described his daily routine as “write, read, read, write or rather dictate all day, and weary eyes in the evening”: “[i]t is only by starvation and seclusion that I am able to get through it”.<sup>142</sup> With only two exceptions in his career, Stephen never worked on Sundays. His son described how, although he started off in life as a “strong evangelical” and “never avowedly changed”, he was not doctrinaire:<sup>143</sup>

[H]is experience of the world, his sympathy with other forms of belief, and his interest in the great churchmen of the middle ages led to his holding the inherited doctrine in a latitudinarian sense.

Stephen did not admire dogma in any setting. He himself wrote that while “[p]ositiveness, dogmatism, and an ignorant contempt of difficulties, may accompany the firmest convictions”, they did not accompany “the convictions of the firmest minds”.<sup>144</sup>

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<sup>142</sup> Quoted in Shaw “James Stephen”, above n 119.

<sup>143</sup> Leslie Stephen “James Stephen”, above n 139.

<sup>144</sup> Stephen *Ecclesiastical Biography*, above n 141, 537.

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The freedom with which the vessel swings at anchor, ascertains the soundness of her anchorage. To be conscious of the force of prejudice in ourselves and others, to feel the strength of the arguments we resist, to know how to change places internally with our antagonists, to understand why it is that we provoke their scorn, disgust, or ridicule—and still to be unshaken, still to adhere with fidelity to the standard we have chosen—this is a triumph, to be won by those alone on whom is bestowed not merely the faith which overcomes the world, but the pure and peaceable wisdom which is from above.

Stephen's idea of relaxation was to write essays on ecclesiastical history for the *Edinburgh Review*. When he took a rare holiday, his amanuensis went with him. Despite his devotion to his work, Stephen was an affectionate and caring father to his four children (a fifth having died in infancy).

A close colleague described Stephen as “shy beyond all the shyness you could imagine in anyone whose soul had not been pre-existent in a wild duck”.<sup>145</sup> It was perhaps this shyness that led Stephen to prefer written communication to face-to-face discussion. He found it almost impossible to delegate work and personally read all the incoming correspondence of the office. His exceptional memory and ability immediately to dictate lucid minutes and drafts in response meant that he was central to everything the department did. Secretaries of State did not have to follow his advice but, as it was always principled, grounded on experience, elegantly expressed, and carefully thought through, most did.<sup>146</sup> Because of Stephen's scrupulousness in looking at all sides of an issue and distrust of easy certainties, his advice could appear tentative. He was concerned to acknowledge and not minimise difficulties. He said of himself that he had “a morbidly vivid perception of possible evils and remote dangers”. His son, Leslie Stephen, said of this characteristic that “[a] sensitive nature dreads nothing so much as a shock, and instinctively prepares for it by always anticipating the worst. He always expected ... to be disappointed in his expectations.” But, as Leslie Stephen pointed out, it would be a mistake to take from this that Stephen was indecisive or unsure of his

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<sup>145</sup> Quoted in Shaw “James Stephen”, above n 119.

<sup>146</sup> See the views about Stephen of his colleague, Henry Taylor, reproduced in Stephen *Letters*, above n 115, 130-132 (which include the opinion that he produced “in the ordinary despatch of business, such State papers as the public archives of the kingdom for all the centuries over which they extend will probably afford few to equal”).

own opinions. He could hold strong views and did not give them up easily.<sup>147</sup> Although courteous in his dealings with others, he could be privately critical. So, for example, his view of Earl Grey was that he was “hard, cold, peremptory and self-willed”.<sup>148</sup>

Stephen’s influence was widely understood outside government and drew for him the enmity of those like Edward Gibbon Wakefield who were disgruntled by Colonial Office decisions. To them he was “King Stephen”, “Mr Over-Secretary Stephen” and “Mr Mother-Country”. Contrary to his reputation as being against colonisation and responsible government, Stephen supported both where it was appropriate. So, while in favour of Australian colonisation, he strongly opposed the charter suggestions for South Australia which he regarded as setting up a project which was “wild and impracticable”.<sup>149</sup> (As is discussed in Chapter 9, similar proposals by the New Zealand Association were later also opposed by Stephen, although he tried to find a middle ground between the Association and the Government.) When his opposition led to the South Australian promoters obtaining Parliamentary authority for their colony, he criticised that method as “risking consequences” which Parliament could not anticipate.<sup>150</sup> By 1839, it was becoming clear that many of the difficulties that Stephen had foreseen for the colony were coming about.<sup>151</sup>

Stephen felt keenly the public attacks on him. They contributed to a deterioration in his health in the 1840s. Other contributing factors were the years of overwork, the strain of commuting daily from Windsor (where he had moved in 1842 so that his sons could attend Eton), and the loss of his eldest son to illness in 1846 which

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<sup>147</sup> Stephen *James Fitzjames Stephen*, above n 139, 51-52.

<sup>148</sup> Quoted in Shaw “James Stephen”, above n 119.

<sup>149</sup> Memorandum by Stephen on the proposal of the South Australian Land Company, 14 July 1832, quoted in Knapland *James Stephen*, above n 139, 79.

<sup>150</sup> Report by Stephen on the South Australian Bill, 4 July 1834, quoted in Knapland *James Stephen*, above n 139, 81.

<sup>151</sup> It is very likely, as Keith Sorrenson has argued, that “the South Australian experience made Stephen and the Colonial authorities much more careful when another Wakefieldian organisation, the New Zealand Association, attempted to colonise New Zealand”. MPK Sorrenson “Treaties in British Colonial Policy: Precedents for Waitangi” in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 15-29 at 28.

triggered a breakdown and led to his resignation in 1847. Following that retirement, he became Professor of Modern History at Cambridge and, from 1855–58, Professor of History at the East India Company’s Haileybury College. He died in 1859. He was survived by his wife, a daughter, and two sons. Leslie Stephen became a significant literary figure, the first editor of the *Dictionary of National Biography*, and the father of Virginia Wolfe. James Fitzjames Stephen became a prominent jurist and codifier.

With his background, it is not surprising that, during his career at the Colonial Office, Stephen exhibited particular concern for slaves and aboriginal peoples. The only two occasions on which he put aside his scruples about working on a Sunday were in drafting the abolition of slavery legislation in 1833 and when there was a crisis in relation to the Xhosa on the eastern frontier of the Cape Colony (almost certainly connected with Glenelg’s Boxing Day 1835 repudiation of the annexation by war of Queen Adelaide Province).<sup>152</sup> Stephen never waived in his hatred of slavery. He regarded the slave trade as “brooding like a pestilence over Africa”, “converting one quarter of this fair earth into the nearest possible resemblance of what we conceive of hell, reversing every law of Christ and openly defying the vengeance of God”. He had faith in the “real character of the Negro race” and believed that the abolition of slavery in the West Indies had “yielded fruits better and earlier than even the authors of that measure dared to anticipate”.<sup>153</sup> He supported black representation in the West Indian legislatures and regarded the royal veto of colonial legislation as essential to protect the ex-slave population pending such reform.<sup>154</sup>

Stephen was deeply committed to the free colony of Sierra Leone. As TJ Barron has said, such commitment was “almost as a family legacy”. The first two Governors of the colony, Granville Sharp and Zachary Macaulay, were associated with the Clapham Sect. Stephen himself regarded Freetown as “the one city of

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<sup>152</sup> James Fitzjames Stephen “James Stephen”, above n 139, xiv (note).

<sup>153</sup> Quoted in TJ Barron “James Stephen, the ‘Black Race’ and British Colonial Administration, 1813–47” (1977) 5:2 *The Journal of Imperial and Commonwealth History* 131–150 [“Barron ‘James Stephen’”] at 133 & 140.

<sup>154</sup> Barron “James Stephen”, above n 153, 140–144.

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refuge for the Negro race”. Stephen accepted that the colony had not fulfilled the optimistic hopes with which it had been founded and that the slave trade had not been eliminated, but he attributed this to the Europeans and “the impotence of the law in a protracted contest with avarice”, rather than to over-optimistic assessments of African capacity.<sup>155</sup>

In general, the biographical literature about Stephen is disappointing in throwing light upon the extent to which he followed settled policies in relation to native peoples. Barron’s 1977 article, “James Stephen, the ‘Black Race’ and British Colonial Administration, 1813–47”, is an exception. The focus of the article is the West Indies and Sierra Leone. In both colonies, the principal black populations were slaves or former slaves. In Sierra Leone, however, the colony also had significant dealings with separate indigenous populations. As a result, Barron’s conclusions about Stephen’s views as to the proper connections between colonial administration and society and native populations are of particular comparative interest in relation to New Zealand, a colony not dealt with in Barron’s article.

Barron draws on the Colonial Office record in relation to the West Indian colonies and Sierra Leone. No doubt similar detailed examination of Colonial Office records in relation to other colonies possessing indigenous populations during Stephen’s tenure as Under-Secretary would offer further points of comparison. It is beyond the scope of this thesis to undertake such a review. Indeed, the comparative survey of Empire in this chapter and Chapters 4-5 has been largely limited to secondary material which is at a relatively high level of generality and which does not focus on Colonial Office decision-making. Although it will be argued that this survey of Empire shows general consistency in British policy towards indigenous peoples (thereby throwing light on British understandings of the Treaty of Waitangi), Barron’s analysis makes it possible to draw direction comparisons between Stephen’s approaches in Sierra Leone and New Zealand.

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<sup>155</sup> Ibid 133-134.

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The Colonial Office record in relation to New Zealand (reviewed in later chapters) supports the view that Stephen adopted policies in New Zealand that were consistent with the attitudes he took in relation to Sierra Leone. In both colonies, Stephen recognised native populations as possessing political and property rights which were to be respected and which could be modified only by agreement. Although Stephen believed in the benefits of Western civilisation for native peoples, he took the view that they were to be brought to “civilisation” by example, by their own consent. Stephen did not doubt the capacity of native races to develop in civilisation; although confident of the benefits of Western civilisation, he did not subscribe to notions of racial superiority. He had a profound fear of the damage that could result to less developed societies if brought into contact with more advanced populations. That applied not only to cases where white settlers were brought into contact with native societies but also in relation to Christianised ex-slave populations and native societies.

Barron writes that Stephen considered African tribes to be sovereign states for the purpose of all dealings between them and Britain:<sup>156</sup>

No rights could be exercised in the territories of African tribes, no property acquired or trade allowed, except under the laws established by those states.

Stephen stressed that British subjects in African territories had no rights or privileges except those that had been specifically negotiated for by Britain. To objections by British traders that this attitude recognised uncivilised polities, practising slavery and barbarous customs such as burning criminals alive, Barron notes that Stephen “tried to answer them by repudiating their argument point by point”:<sup>157</sup>

African laws were far from abominable; the punishment of death by burning had been sanctioned by the laws of at least one “civilised” European nation until the beginning of the nineteenth century. As for slavery, nations like the United States, France and Spain still recognised that peculiar institution, just as many African states did. Slavery as

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<sup>156</sup> Ibid 134-135.

<sup>157</sup> Ibid 135.

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known in West Africa was, moreover, a form of domestic servitude, still slavery indeed and illegal in British eyes, but much milder in its operation than West Indian slavery.

Stephen was also unmoved by the claims of settlers in Sierra Leone that, because there was not enough land within the colony for their needs, they should be entitled to occupy and be protected in their possession of African lands. He considered that the proper approach was to negotiate further cession of territory with the African tribes. Repeatedly, he maintained this view against settler pressure to seize territory by force.<sup>158</sup> Barron also writes that Stephen was critical of treaties that “did not strictly define both the limits of government intervention and the rights to be accorded to African tribal authorities”.<sup>159</sup>

Barron describes Stephen’s hope that the colony of Sierra Leone would serve as a launching-pad for the introduction of Western civilisation into Africa once African respect had been obtained by British conduct. Stephen himself wrote that Sierra Leone had been “established upon the express and avowed principle of advancing the cause of justice and humanity by studiously respecting the rights of the native inhabitants, till then perpetually violated by all the nations of Europe and emphatically by this country”. He said that the colony was to be “a place of resort for the neighbouring tribes where they might learn something of the arts and comforts of civilised life”. Barron concludes that Stephen “did not accept the argument that Europeans had a right or a duty to impose their culture on unwilling Africans”.<sup>160</sup>

Though he may have regarded the British government as the harbinger of civilisation, he never suggested that this justified, far less required, the destruction of African societies. Like a true Evangelical, he was all for individual conversion not mass baptism. Sierra Leone, in his opinion, was not maintained at the expense of the British government to serve as an instrument for chastising the “barbarous” blacks. It was merely a model of a free “civilised” modern state. Africans unfamiliar with this ideal, both those inside and outside the settlement, were to be brought to appreciate western civilisation by example alone.

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<sup>158</sup> Ibid.

<sup>159</sup> Ibid 136.

<sup>160</sup> Ibid 134.

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Stephen was sceptical about the role of government in “civilisation”. While it might play its part through such measures as anti-slavery treaties and by encouraging commerce, Stephen’s preference was to leave the project to missionaries. Barron says that this preference was apparent in the 1840s, under the influence of Stephen’s brother-in-law, Henry Venn, secretary of the Church Missionary Society. Stephen was particularly attracted to the Church Missionary Society’s policy of using native missionaries, trained at a Church Missionary Society college.<sup>161</sup> As Barron points out, the use of native missionaries was consistent with Stephen’s long-held view that, ideally, British administration would be undertaken by officials of African descent:<sup>162</sup>

That he did not regard the white man as an essential, nor perhaps even a desirable, part of the introduction of “civilisation” to Africa, is clear from his attitude to the employment of West Indians in Sierra Leone.

Stephen himself wrote that:<sup>163</sup>

It has long since appeared to me that the only proper mode of choosing public officers at Sierra Leone would be that of desiring the governors of the West India colonies to select, if possible, persons of adequate education etc. from amongst the inhabitants of those colonies of African descent.

Although this was a solution put forward in part because of the high mortality of British officials in West Africa, Barron argues that it was consistent with Stephen’s more general attitude that black administration was preferable:<sup>164</sup>

It was Stephen who championed the claims of the former West Indian, William Fergusson, who became, in Sierra Leone in 1844, the first coloured governor in the British Empire. Nor was this an isolated case. In 1842 Stephen suggested that the best alternative to the parliamentary proposal to abandon the Gambia and the Gold Coast was to place them “exclusively in the hands of Mullattoes or Negroes from the West Indies and [leave them] to maintain themselves like the American settlement of Liberia”.

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<sup>161</sup> Ibid 136-138.

<sup>162</sup> Ibid 136.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid 137.

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Stephen obviously favoured the creation of self-governing black colonies which would retain some kind of association with the British Empire.

Although Stephen believed that the best interests of African societies lay in their adoption of Western culture (so that his references to “African civilisation” were, as Barron explains, to “European civilisation as adopted by Africans”), he did not consider that the relative backwardness of African cultures arose from any innate inferiority. Barron writes that Stephen’s view was that the cultural inferiority of African societies was “no more than an historical accident, not a biological fact”. He ridiculed the notion of “a Negro in the abstract” and pointed to the advancement of educated former slaves of the West Indies. His religious background meant that he believed in the “family of man”, in which all had equal intellectual capacity and moral instincts.<sup>165</sup> As Barron writes:<sup>166</sup>

Stephen was convinced that Africans could be brought by peaceful means to learn the advantages of western ways, and he hoped that the New World blacks who had already advanced along that road would themselves be the instruments for the transmission of western civilisation to their ancestral homes.

Stephen’s view that “civilisation” had to be at the pace that suited native populations and with their consent was at risk where distinct communities, at different stages of development, were brought into contact. This explains his opposition to the creation of colonies of mixed settlement. His sensitivity extended to proposals to send West Africans to settle in the West Indies. He took the view that putting together different communities would set the stage for conflict and would allow the more advanced group to dominate the other. Barron writes that Stephen believed that “[t]he worst mistake which a colonial power could make in instituting a new settlement ... was to create a mixed population of white and non-white settlers”.<sup>167</sup>

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<sup>165</sup> Ibid 138-139 & 145-146.

<sup>166</sup> Ibid 139.

<sup>167</sup> Ibid 144-145.

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Stephen's successor as Permanent Under-Secretary for the Colonies for the period 1848–59, Herman Merivale, was also concerned for the aboriginal peoples of Empire but does not seem to have regarded their interests with quite the same priority. Merivale was supportive of colonisation and held assimilationist views.<sup>168</sup> While Stephen had recognised the need to trust the judgement of officials on the spot, Merivale took this further and seems to have preferred a policy of deference to colonial administrators and representative governments. On one occasion, he went so far as to say that there was “no alternative except to shut our eyes to proceedings which seen at this distance wear a most extravagant aspect”.<sup>169</sup>

#### Influences on Empire

Before the American Revolution, there is little sense of a British philosophy of Empire. Although early charters for colonies and instructions to British officials often contained requirements that native populations were not to be harmed, the working out of policies was generally left to those on the spot. In India and North America, there are examples of British officials who respected and even embraced native cultures. They include the “Orientalists” and “White Mughals” of India and Sir William Johnson, first northern Superintendent of Indian Affairs (1756–74) in North America.<sup>170</sup>

The effect of the loss of the Thirteen Colonies, together with troubles in Ireland and territorial expansion in India and Canada, brought to the fore in Britain questions of the justification and purpose of Empire. These questions were considered against the background of Enlightenment and Christian attachment to

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<sup>168</sup> See Herman Merivale *Introduction to a Course of Lectures on Colonization and Colonies* (Longman, Orme, Brown, Green & Longmans, London, 1839), especially 25–30; and Herman Merivale *Lectures on Colonization and Colonies: Delivered Before the University of Oxford in 1839, 1840, and 1841* (Longman, Brown, Green & Longmans, London, 1841–42, 2 vols), especially vol 2, 150–217.

<sup>169</sup> Minute by Merivale on Fitzroy to Grey, 7 February 1853, CO 201/463, quoted in Burroughs “Imperial Institutions”, above n 38, 177.

<sup>170</sup> See Peers *India Under Colonial Rule*, above n 94, 37–38; Brian Young “‘The Lust of Empire and Religious Hate’: Christianity, History, and India, 1790–1820” in Stefan Collini, Richard Whatmore & Brian Young (eds) *History, Religion, and Culture: British Intellectual History 1750–1950* (Cambridge University Press, Cambridge, 2000) 91–111; William Dalrymple *White Mughals: Love and Betrayal in Eighteenth-Century India* (Harper-Collins, London, 2002). For Sir William Johnson, see Chapter 4.

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the brotherhood of man. The ethical agenda was set by Edmund Burke in his attack on corruption in the East India Company, which he described as “one of the most corrupt and destructive tyrannies that probably ever existed”. Speaking in support of the East India Bill of 1783, introduced by Charles Fox but drafted by Burke himself, Burke expressed British obligation to its colonial peoples as a “trust”:<sup>171</sup>

[A]ll political power which is set over men, and ... all privilege claimed ... in exclusion of them, being wholly artificial, and ... a derogation from the natural equity of mankind at large, ought to be some way or other exercised for their benefit.

If this is true with regard to every species of political dominion, and every description of commercial privilege, ... then such rights or privileges, or whatever else you choose to call them, are all in the strictest sense a *trust*; and it is of the very essence of every trust to be rendered *accountable*; and even totally to *cease*, when it substantially varies from the purpose for which alone it could have a lawful existence.

The Bill, which Burke saw as “the *Magna Charta* of Hindostan”, was intended to establish British Government control over the Company in order to restore to and protect Indians in their rights and freedoms. Although Fox’s Bill was not passed, William Pitt’s India Act of 1784 set up shared Government and Company administration in a way that provided opportunity to realise the “trusteeship” advocated by Burke.<sup>172</sup> Burke developed his ideas not only in his speeches in Parliament on these and other Indian Bills but also during the course of his seven-year Parliamentary impeachment for mismanagement and corruption of Warren Hastings, the first Governor-General of India.<sup>173</sup> Burke took the view that if Britain did not govern India ethically it would corrupt its own body politic:<sup>174</sup>

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<sup>171</sup> Andrew Porter “Trusteeship, Anti-Slavery, and Humanitarianism” in Andrew Porter (ed) *The Oxford History of the British Empire: The Nineteenth Century* (Oxford University Press, Oxford, 1999, vol 3) 198-221 [“Porter ‘Trusteeship’”] at 199.

<sup>172</sup> Ibid.

<sup>173</sup> Scholars generally regard Hastings as a less deserving target of prosecution than many officials who followed him.

<sup>174</sup> Quoted in Uday Mehta *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (University of Chicago Press, Chicago, 1999) [“Mehta *Liberalism and Empire*”] 156.

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Today the Commons of Great Britain prosecutes the delinquents of India [i.e., Hastings and his associates]: tomorrow the delinquents of India may be the Commons of Great Britain.

It was essential to devise “some method of governing India *well*, which will not of necessity become the means of governing Great Britain *ill*”. Without such solution, there was no justification for imperial rule over Indians: “a ground is laid for their eternal separation; but none for sacrificing the people of that country to our constitution”.<sup>175</sup> Burke advocated respect for traditional Indian laws and institutions (the “ancient constitution” of India) and considered that government of Indians could only be legitimate with their implicit consent:<sup>176</sup>

Men must be governed by those laws which they love. Where thirty millions are to be governed by a few thousand men, the government must be established by consent, and must be congenial to the feelings and habits of the people.

In his speech at the opening of the impeachment of Hastings, Burke argued that:<sup>177</sup>

[I]f we must govern such a Country, [we] must govern them upon their own principles and maxims and not upon ours, that we must not think to force them to our narrow ideas, but extend ours to take in theirs; because to say that that people shall change their maxims, lives, and opinions, is what cannot be.

In these views can be seen Burke’s distaste for revolution (most vehemently expressed in his reaction to the French Revolution) and preference for gradual change respectful of tradition and tolerant of difference. Burke had no difficulty in seeing Indian society as a political community which should be protected. These were also the views that led Burke to regard the Protestant Ascendancy in Ireland as unjust and to side with the American colonists in their invocation of the British Constitution in their resistance to the demands of George III and the Imperial

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<sup>175</sup> Quoted in Jennifer Pitts *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton University Press, Princeton, 2005) [“Pitts *Turn to Empire*”] 69.

<sup>176</sup> Quoted in Karuna Mantena “The Crisis of Liberal Imperialism” in Duncan Bell (ed) *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (Cambridge University Press, Cambridge, 2007) 113-135 [“Mantena ‘Liberal Imperialism’”] at 115-116.

<sup>177</sup> Ibid.

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Parliament.<sup>178</sup> Of the latter he said, “in order to prove that the Americans have no right to their liberties, we are every day endeavouring to subvert the maxims which preserve the whole spirit of our own”.<sup>179</sup>

Burke’s articulation of the relationship between Britain and its empire as one of trusteeship and protection was highly influential beyond India. Burke’s ethical arguments were adopted by those concerned for the aboriginal populations of the Empire in a humanitarian movement first galvanised by the effort to abolish the slave trade and, eventually, slavery itself. Andrew Porter has written of this that “[n]otwithstanding India’s importance, no issues did more to make principles of Imperial trusteeship explicit, implant them in the public mind, and compel Imperial and colonial governments to act upon them, than those of the slave trade and slavery itself”.<sup>180</sup> The anti-slavery movement was led by Christian evangelicals, including William Wilberforce and the Clapham Sect, and Quakers and their sympathisers, including Thomas Clarkson and Thomas Fowell Buxton.<sup>181</sup> These religious groups emphasised in their advocacy the brotherhood of man. They commemorated their victories with coins and medallions depicting white men and black men shaking hands and with words such as “We Are All Brethren” and “Am I Not a Man and a Brother?”.<sup>182</sup>

Although the House of Commons resolved in 1792 that the slave trade should be gradually abolished, it was not until legislation of 1805–7 that Britain ended its involvement in the trade. That still left the question of emancipation of slaves in the Empire. It was not until 1833 that legislation was passed emancipating slaves in British colonies from 1 August 1834. It took a further six years (and £20 million compensation) before “apprenticeship” of former slaves to their former masters

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<sup>178</sup> See Mehta *Liberalism and Empire*, above n 174, ch 5.

<sup>179</sup> Ibid 156.

<sup>180</sup> Porter “Trusteeship”, above n 171, 201.

<sup>181</sup> Buxton, Wilberforce’s successor as leader of the Parliamentary opposition to slavery, was not himself a Quaker but was the son and husband of Quakers. His sister-in-law, Elizabeth Fry, a Quaker, was a leading social and prison reformer.

<sup>182</sup> Adam Hochschild *Bury the Chains: Prophets and Rebels in the Fight to Free an Empire’s Slaves* (Houghton Mifflin Company, Boston, 2005).

ended.<sup>183</sup> By that time, the attention of the humanitarians and evangelicals had moved to the position of aboriginal peoples, seen clearly in the 1835–37 inquiry and report of the House of Commons Select Committee on Aborigines in British Settlements.<sup>184</sup> Buxton chaired the committee and wrote the report with the assistance of the women of his family.<sup>185</sup> By then, the sense of “trusteeship” had developed from that of protection propounded by Burke. Burke’s view was that British trusteeship was to be used to protect Indian society.

The newer view, which also emerged in respect of India but which came to be applied more generally, was that trusteeship imposed a duty to improve native societies. The motivation to improve Indian society was appealing to East India Company administrators and to evangelicals. The administrators found Indian society baffling and, influenced by ideas of the Scottish Enlightenment and later Benthamite utilitarianism, looked to rational government as a means of lifting it. The evangelicals unabashedly regarded Christianising India as improving it.<sup>186</sup>

A number of the significant figures in the East India Company administration in the very late eighteenth and early nineteenth centuries were Scots. They were influenced by writers such as David Hume and Adam Smith and adopted a theory of “conjectural history” by which human progress moved through stages. Under this “stadial theory”, human societies evolved from hunting, to pastoralism, to agricultural, and finally to commerce. The view of Orientalists and early conjectural historians (such as William Robertson<sup>187</sup>) that India was a highly civilised society was challenged by administrators, most significantly James Mill, who, from a London desk at the East India Company (where he was chief examiner of despatches) and without ever visiting India, wrote a three-volume *History of*

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<sup>183</sup> Porter “Trusteeship”, above n 171, 202–204.

<sup>184</sup> Ibid 206–209.

<sup>185</sup> See Zoë Laidlaw “‘Aunt Anna’s Report’: The Buxton Women and the Aborigines Select Committee, 1835–37” (2004) 32:2 *The Journal of Imperial and Commonwealth History* 1–28.

<sup>186</sup> Porter “Trusteeship”, above n 171, 199–201. See also Jon Wilson *The Domination of Strangers: Modern Governance in Eastern India, 1780–1835* (Palgrave Macmillan, Houndsmills, Basingstoke, Hampshire, 2008) [“Wilson *Domination of Strangers*”].

<sup>187</sup> Whose *History of America* (1777) was to be cited by Governor George Gipps in the New Zealand Land Claims Bill debate of mid-1840: see Chapter 16, text accompanying n 146.

*British India* (1817). This was, as Mill himself described it, “a *judging* history” to determine India’s place in “a scale of civilisation”. Karuna Mantena says of Mill’s *History* that it was “a full-scale assault upon every claim made on behalf of the achievements of Indian arts, science, philosophy, and government”. It was intended to justify a change from governing India by its own norms and systems to government through British laws and administrative systems. Mill was devoted to the political philosophy of Jeremy Bentham which advocated rational government on the principle of maximising “utility” (the greatest happiness of the greatest number). Bentham had recognised that an impediment to scientific legislation was that local conditions, customs and prejudices had to be accommodated. Mill, however, adapted conjectural history (not a feature of Bentham’s writing) to clear the decks: local customs and prejudices reflected the level of civilisation of the society and were baggage which British administration could legitimately discard in the interests of raising Indian society to a higher level. In his *History*, Mill argued that British government in India missed the mark because it had “conceived the Hindus to be a people of high civilization, while they have, in reality, made but a few of the earliest steps in the progress to civilization”.<sup>188</sup>

It is not easy to gauge how influential Mill and conjectural history were upon the development of a British philosophy of Empire before 1840. Some of the language of “stadial theory” crops up in the record of British decision-making leading up to the dispatch of Hobson to New Zealand to treat with Maori for sovereignty. It may, however, be the case that “stadial theory” became more prominent in relation to New Zealand from the 1850s under the influence of liberal thinkers, especially John Stuart Mill, the brilliant son of James Mill, pupil of Bentham, supporter of Wakefield,<sup>189</sup> and successor to his father’s desk in the East India Company. John Stuart Mill’s writings about Empire and indigenous peoples, which were part of the

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<sup>188</sup> Mantena “Liberal Imperialism”, above n 176, 116-117; Pitts *Turn to Empire*, above n 175, chs 4-5; Mehta *Liberalism and Empire*, above n 174, 87-97; JW Burrow *Evolution and Society: A Study in Victorian Social Theory* (Cambridge University Press, Cambridge, 1966) ch 2; Wilson *Domination of Strangers*, above n 186, 136-142.

<sup>189</sup> See Philip Temple *A Sort of Conscience: The Wakefields* (Auckland University Press, Auckland, 2003) 131-132 & 424-425.

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development of utilitarianism into liberal political theory (a development which had started before 1840), are considered below.

The shift to a transformative responsibility in administering Empire resonated with Christian evangelicals who aspired to convert native populations to Christianity. With respect to India, Charles Grant<sup>190</sup> in the late 1780s and 1790s had advocated the view that good government required the promotion of Christianity and Western skills. As James Mill was later to do, Grant had rejected the Orientalist and early conjectural history view of the high civilisation of Indian society. As Andrew Porter comments, Grant's approach provided a "bridge" between Burke's "trusteeship" (focused on protection of Indian society) and the ambitions of East India Company administrators and utilitarians (who wished to use government power to intervene directly to change Indian society). The bridge was "official support for missions and education assisting the process of transformation while mitigating the extent to which government directly imposed change". Although the utilitarians and evangelicals had different motives, they shared Burke's belief in "good government" (accountable and in the interests of the governed) and his disavowal of conquest and force as legitimate means for acquiring and holding territories.<sup>191</sup>

Although Grant's view was not immediately implemented in India, it was the agenda picked up by missionary societies from the 1790s in their overseas missions elsewhere. In the early to mid-nineteenth century this effort, which had not peaked by 1840, came to concentrate on indigenous populations.<sup>192</sup> Because of the political connections of the missionaries (often through the networks established by Wilberforce, Buxton and others to fight slavery) both the position of aborigines in the Empire and the achievements of the missions to them became known to colonial Governors, the Colonial Office and the wider British political

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<sup>190</sup> See above text accompanying n 126.

<sup>191</sup> Porter "Trusteeship", above n 171, 200-201; Mantena "Liberal Imperialism", above n 176, 117-118.

<sup>192</sup> Andrew Porter "Religion, Missionary Enthusiasm, and Empire" in Andrew Porter (ed) *The Oxford History of the British Empire: The Nineteenth Century* (Oxford University Press, Oxford, 1999, vol 3) 222-246.

establishment from the 1820s. A number of colonial administrators, as well as highly-placed officials in London, notably James Stephen, shared the evangelical background and sympathies of the missionaries. These sympathies combined with Burkean notions of responsibility and accountability in administration to produce a number of legal measures and initiatives protective of aborigines and ex-slaves. In the West Indies, Stephen was concerned to ensure that the criminal law applied equally to blacks and whites.<sup>193</sup> In the Cape Colony, Ordinance 50 of 1828 removed laws which discriminated against “Hottentots” (as the Khoikhoi and Sans or Bushman peoples of the Khoisan group were together called) and established their legal equality with whites. The ordinance was passed by the Legislative Council of the Acting-Governor Richard Bourke, later Governor of New South Wales from 1831 to 1837.<sup>194</sup> In Australia, as is seen in Chapter 4, Lieutenant-Governor Arthur of Van Diemen’s Land attempted to rescue the dwindling Aboriginal population of the colony and the Colonial Office issued directives to Governors from time to time that it was not acceptable for military action to be undertaken against Aborigines.<sup>195</sup> At this time too, the system of appointment of Protectors of Aborigines spread from the Caribbean to other colonies with indigenous populations.<sup>196</sup>

In parallel with these developments, there was imperial endorsement of the policy pursued in Canada from the 1820s of settling Indians on defined lands as Christian farming communities. This policy aimed to “civilise” and protect Indians but had the further advantages of freeing up land for settlement and breaking perceived

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<sup>193</sup> Smandych “Criminal Slave Laws”, above n 65; Swinfen *Imperial Control of Colonial Legislation*, above n 59, ch 9.

<sup>194</sup> Alan Lester “Thomas Fowell Buxton and the Networks of British Humanitarianism” in Helen Gilbert & Chris Tiffin (eds) *Burden or Benefit? Imperial Benevolence and Its Legacies* (Indiana University Press, Bloomington, 2008) 31-48 [“Lester ‘Networks of British Humanitarianism’”] at 35; Timothy Keegan *Colonial South Africa and the Origins of the Racial Order* (University Press of Virginia, Charlottesville, 1996) [“Keegan *Colonial South Africa*”] 102-107; Elizabeth Elbourne *Blood Ground: Colonialism, Missions, and the Contest for Christianity in the Cape Colony and Britain, 1799–1853* (McGill-Queen’s University Press, Montreal, 2002) [“Elbourne *Blood Ground*”] ch 6.

<sup>195</sup> See Chapter 4, text accompanying ns 107-112.

<sup>196</sup> Alan Lester & Fae Dussart “Trajectories of Protection: Protectorates of Aborigines in Early 19th Century Australia and Aotearoa New Zealand” (2008) 64:3 *New Zealand Geographer* 205-220 at 208-210.

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dependency on present-giving, the cost of which to the British Treasury was causing concern. By the mid-1830s, communities such as that on the Credit River Mississauga Reserve, were being extolled as a model for Empire, in particular by the important House of Commons Select Committee on Aborigines (1835–37).<sup>197</sup>

The Aborigines Committee was set up on the motion of Thomas Fowell Buxton. He had been interested in the plight of aborigines and the work of missionaries with them for some time. One of his many correspondents was John Philip of the London Missionary Society at the Cape Colony, with whom he had dealings in respect of the “Hottentots” in the 1820s. In the early 1830s, Buxton’s attention was drawn by Philip to the commando raids being carried out by the colony against the Xhosa tribes on the eastern frontier. Buxton worked on the idea of a Select Committee to inquire into the matter for some time before obtaining government support for one in July 1835. Because, through his network of contacts, Buxton had become aware that the treatment of aborigines was properly a concern in other parts of Empire (including New Zealand), the inquiry was set up to look at the matter more generally. Although the Committee did range more widely, the escalation of hostilities at the Cape into war in 1835 meant that much of its proceedings were dominated by British policy towards the Xhosa. Buxton did not confine his efforts to the Select Committee, he also made representations to the Colonial Office, where Glenelg was now Secretary of State and Stephen was Assistant Under-Secretary. He brought to the Colonial Office Philip’s communications about the war, including the killing and mutilation of the Xhosa chief, Hintsa, following his attempt to escape from British custody. This was news to the Colonial Office which had not yet heard from Governor D’Urban.<sup>198</sup> Buxton described to his cousin, Anna Gurney, who later ghost-wrote the report of the

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<sup>197</sup> See *Papers relating to the Aboriginal Tribes of North America, New South Wales, Van Diemen’s Land, and British Guiana*, GBPP 1834 (617) XLIV.339.

<sup>198</sup> Lester “Networks of British Humanitarianism”, above n 194, 34-40; Keegan *Colonial South Africa*, above n 194, 148-150; Elbourne *Blood Ground*, above n 194, 279-287; Laidlaw *Colonial Connections*, above n 111, 146-152.

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Select Committee, how shocked those at the Colonial Office were by the information received:<sup>199</sup>

You remember how cold used to be my reception at the Colonial Office when I talked about South Africa—Kaffirs—aborigines. ... I went there yesterday—saw Glenelg, Grey—and Stephen—I found the atmosphere changed to blood—almost to fever heat. They talked of Hintza—Southey—Philip—Somerset—D’Urban with absolute familiarity—knew more about—and spoke more indignantly against Commandoes than you or I ever did—intimated that they would revoke D’Urban—restore the country to its owners—acknowledge error and the national disgrace—place Stockenström as Deputy Governor at the frontier, in an independent office—prohibit the entry of an armed man into Kaffirland—in short take the most extravagant of our whimsies—and they talked of them as sober sense—bare [justice?]-and the least which could be done for a race whom we have so grievously oppressed—Stephen said “here have I spent my life in this office—I never knew that we had received a line from Stockenström—I only knew that you were crack-brained about aborigines—I have now dived into all this neglected correspondence—I have read every word of the evidence before the Committee—and I am lost in astonishment, indignation, shame, and repentance—It gave me a fever said he. ... It is already agreed, that you shall have protection of aborigines in every Colony where we get into contact with them” and fifty other things equally surprising and delightful.

The result was Glenelg’s Boxing Day 1835 despatch repudiating the annexation of what had been called Queen Adelaide Province, as is further discussed in Chapter 4.

In its Report of June 1837, the Committee accepted Britain’s responsibility to protect and “civilise” aborigines of the Empire. It acknowledged that British imperial power could either be to aborigines “the greatest blessing, or the heaviest scourge”. The disparity of power meant that aborigines lacked the capacity “to

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<sup>199</sup> Quoted in Elbourne *Blood Ground*, above n 194, 285-286. George Southey was Hintsa’s killer. Lord Charles Somerset had been Governor of the Cape Colony from 1814 to 1826. Andries Stockenström had been Commissioner-General for the Eastern Province (1829–33). After giving evidence to the Aborigines Committee in 1835, he was appointed by the Colonial Office as Lieutenant-Governor of the Eastern Province in 1836 (see Chapter 4).

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enforce the observance of their rights”. This power imbalance was said to constitute “a new and irresistible appeal to our compassionate protection”.<sup>200</sup>

The Committee reviewed the results of British contact with aborigines in all parts of the globe. It found there to be a discrepancy between repeated government statements that aborigines were to be dealt with justly and the reality of their treatment:<sup>201</sup>

[T]he intercourse of Europeans in general, without any exception in favour of the subjects of Great Britain, has been, unless when attended by missionary exertions, a source of many calamities to uncivilized nations.

Too often, their territory has been usurped; their property seized; their numbers diminished; their character debased; the spread of civilization impeded. European vices and diseases have been introduced amongst them, and they have been familiarized with the use of our most potent instruments for the subtle or the violent destruction of human life, viz. brandy and gunpowder.

Some of the fears expressed by the Committee seem a little overblown both as to European depredations and as to aboriginal resilience. The references to usurpation of aboriginal lands are principally referenced to Australia which, as the review in Chapter 6 shows, must be regarded as exceptional. Elsewhere indigenous peoples were usually recognised as owners of their lands whose interests had to be purchased. Nevertheless, the Committee was able to point with justification to the calamitous effects of British colonisation on the aboriginal tribes of Empire. So, for example, the Committee spoke of the “exterminat[ion]” of the Beothuk of Newfoundland and the loss of all but the “tradition that [the Caribs of the West Indies] once existed”. In the Australian colonies, “[m]any deeds of murder and violence have undoubtedly been committed”.<sup>202</sup> In the Pacific (including New Zealand), runaway convicts from the penal colonies had “been the inlet of

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<sup>200</sup> *Report from the Select Committee on Aborigines (British Settlements)*, GBPP 1837 (425) VII.1 at 3.

<sup>201</sup> *Ibid* 5.

<sup>202</sup> *Ibid* 6 & 10.

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incalculable mischief to this whole quarter of the world”.<sup>203</sup> In respect of the Cape Colony, the Committee went into great detail to record the damage inflicted on the Khoikhoi and Sans and, on the eastern frontier, it was highly critical of the commando raids and recent war against the Xhosa.<sup>204</sup>

The Committee was not at all supportive of traditional aboriginal societies. It regarded them as uncivilised. Aborigines lived a “wandering life”; subsisted by hunting and fishing rather than cultivation of the soil; were idle, poorly clothed (or not clothed at all); were debased by such practices as cannibalism, human sacrifice, infanticide, and endemic warring. Aborigines were said to have capricious and harsh laws. Their treatment of women was indifferent. Their customs were “superstitions” and obstacles to “improvement” (Maori tapu was given as an example). They were difficult to wean away from their “wandering state”. And, when in contact with Europeans, they were vulnerable to drunkenness and “debauchery”.<sup>205</sup>

The Committee considered that past failures to “civilise” aboriginal peoples had been because the project had preceded Christianisation. Recent successes were enthusiastically pointed to (including in New Zealand) where conversion had been allowed to begin the process.<sup>206</sup> The Committee quoted extensively from the evidence it had received from Peter Jones, the chief (and Methodist missionary) of the Mississauga of the Credit River Reserve. It painted a picture to gladden evangelical hearts:<sup>207</sup>

The improvement the Christian Indians [of Upper Canada] have made, has been the astonishment of all who knew them in their pagan state. The change for the better has not only extended in their hearts, views and feelings, but also in their personal appearance, and in their domestic and social condition.

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<sup>203</sup> Ibid 14.

<sup>204</sup> Ibid 25-44. The Committee’s findings were, however, softened at the instigation of the Colonial Office. See Laidlaw *Colonial Connections*, above n 111, 152-153.

<sup>205</sup> *Report from the Select Committee on Aborigines (British Settlements)*, GBPP 1837 (425) VII.1 at 44-58.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid 47.

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In the case of the Credit River Mississauga, the Indians had exchanged their “wandering state, living in wigwams, and depending on the chase for subsistence” for a settled pastoral idyll:<sup>208</sup>

About ten years ago this people had no houses, no fields nor horses, no cattle, no pigs, and no poultry. Each person could carry all he possessed on his back, without being much burthened. They are now occupying about 40 comfortable houses, most of which are built of hewn logs, and a few of frame. They are generally one-and-a-half story high, and about 24 feet long and 18 feet wide, with stone or brick chimneys; two or three rooms in each house; their furniture consists of tables, chairs, bedsteads, straw mattresses, a few feather beds, window-curtains, boxes and trunks for their wearing apparel, small shelves fastened against the wall, for their books, closets for their cooking utensils, cup-boards for their plates, cups, saucers, knives and forks. Some have clocks and watches. They have no carpets; but a few have mats laid on their floors. This tribe owns a saw-mill, a work-shop, a blacksmith’s shop, and a warehouse, the property of the whole community. They have about 200 acres of land under cultivation, on which they grow wheat, Indian corn or maize, oats, peas, potatoes, pumpkins and squashes. In their gardens they raise beans, melons, cabbages, onions, &c. A few have planted fruit-trees in their gardens, such as apple-trees, cherry-trees, pear-trees, currant and gooseberry-bushes. All these thrive well here, when properly cultivated. They have a number of oxen, cows, horses, pigs, poultry, dogs and cats; a few barns and stables; a few waggons and sleighs; also all sorts of farming implements.

The Committee remarked on Jones’s evidence on the improvement in dress (“they now use English cloth”) and treatment of women (“who have been raised from the drudgery of beasts of burthen, and are now treated with consideration by their husbands”).<sup>209</sup>

The Committee drew from the evidence of Jones and other witnesses from Upper Canada, mainly missionaries, that Christianisation was the key to “civilisation”:<sup>210</sup>

[N]o sooner did they become converts to [Christianity’s] doctrines, than they exhibited that desire for the advantages of civilized life, and that delight in its conveniences, which

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<sup>208</sup> Ibid 47-48.

<sup>209</sup> Ibid 48.

<sup>210</sup> Ibid 49-50.

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have hitherto been supposed to belong exclusively to cultivated nations, and to be utterly strange and abhorrent to the nature of the savage.

The Committee reported similar cause for optimism with respect to Christian missions to the South Sea Islands. There, for 17 years after the first attempts at conversion in 1797 “the work appeared to make no progress”. It was thought that these were people who were “idolaters and cannibals, and their country a rude and barbarous wilderness, without arts, without commerce, without civilization, and without the rudiments of Christianity”. But within the “brief space” of the last 20 years, they “have conveyed a cargo of idols to the depôt of the Missionary Society in London”.<sup>211</sup>

[T]hey have become factors to furnish our vessels with provisions, and merchants to deal with us in the agricultural growth of their own country. Their language has been reduced to writing, and they have gained the knowledge of letters. They have, many of them, emerged from the tyranny of the will of their chiefs into the protection of a written law, abounding with liberal and enlightened principles, and 200,000 of them are reported to have embraced Christianity.

The Committee took the view that by such missionary activity, combined with the “fair dealing” with aborigines pioneered by William Penn,<sup>212</sup> “every tribe of mankind” could be brought to civilisation and saved from the “desolating effects of ... association [with] unprincipled Europeans”.<sup>213</sup> The evils of contact (including the diminution of aboriginal populations) and the benefits of “civilisation” could be secured only by “the propagation of Christianity, together with the preservation, for the time to come, of the civil rights of the natives”. Such an outcome was also to the advantage of Britain:<sup>214</sup>

Savages are dangerous neighbours and unprofitable customers, and if they remain as degraded denizens of our colonies, they become a burthen upon the State.

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<sup>211</sup> Ibid 58.

<sup>212</sup> Ibid 46.

<sup>213</sup> Ibid 44.

<sup>214</sup> Ibid 45.

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The Committee made a number of recommendations, both in relation to specific colonies and generally.<sup>215</sup> It acknowledged that there were a wide variety of relationships between “the British colonies and the Aborigines in their vicinity”.<sup>216</sup>

It is obviously difficult to combine in one code rules to govern our intercourse with nations standing in different relationships towards us. Some are independent communities; others are, by the nature of treaties, or the force of circumstances, under the protection of Great Britain, and yet retain their own laws and usages; some are our subjects, and have no laws but such as we impose.<sup>217</sup>

Equally, there was great variety “in their moral and physical condition. They are found in all the grades of advancement, from utter barbarism to semi-civilization”.<sup>218</sup> So, for example, in relation to Australia, the report included a section on the “Duties of Protector of Natives”. It identified, among other duties, a responsibility for Protectors “to suggest to the local Government ... such short and simple rules as may form a temporary and provisional code for the regulation of Aborigines, until advancing knowledge and civilization shall have superseded the necessity for any such special laws”.<sup>219</sup> Of general application were the recommendations, that the protection of natives was to be a responsibility of the Crown (since it was “not a trust which could conveniently be confided to the local Legislature”),<sup>220</sup> that new territories were not to be acquired (“either in sovereignty or in property”) without the approval of the British Government,<sup>221</sup> that treaties

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<sup>215</sup> For the Select Committee’s recommendations in respect of New Zealand, see Chapter 9, text accompanying ns 16 & 17.

<sup>216</sup> *Report from the Select Committee on Aborigines (British Settlements)*, GBPP 1837 (425) VII.1 at 76.

<sup>217</sup> This statement is ambiguous. It is not clear whether the Committee regarded all aborigines living within colonial borders as British subjects without “laws but such as we impose”. In the recommendations of the report that followed, it seems that the Committee regarded the Australian Aborigines in this way. As the review undertaken in Chapter 4 shows, however, such characterisation would not have been accurate in respect of many of the other indigenous populations of the Empire.

<sup>218</sup> *Report from the Select Committee on Aborigines (British Settlements)*, GBPP 1837 (425) VII.1 at 76.

<sup>219</sup> *Ibid* 84.

<sup>220</sup> *Ibid* 77-78. This applied whether the legislature was elected or appointed.

<sup>221</sup> *Ibid* 78-79. This “rule”, however, did not apply to the settlement of “vacant lands” within British colonies. The Committee considered that the extent of such “vacant lands” in North and South America, Australia, and Southern Africa was “certainly sufficient to absorb whatever labour or capital could be profitably devoted to colonization”.

should not be entered into with native tribes,<sup>222</sup> that effort should be made to teach aborigines within colonies about English law (making allowance in that law for their “ignorance and prejudices”),<sup>223</sup> that private purchases of aboriginal lands should be prohibited,<sup>224</sup> that religious instruction and education was to be provided (and paid for out of land sales),<sup>225</sup> that missionaries were to be encouraged,<sup>226</sup> and that the sale of “ardent spirits” should be prevented.<sup>227</sup>

The approach of the Aborigines Committee was similar to that taken by Charles Grant in late eighteenth century India. It looked to improvement of the position of aborigines principally through the agency of missionaries and the process of Christianisation. The role of government was largely to support missionary endeavour and to ensure that aboriginal rights were respected and protected by law. This was not the “rational” interventionist approach to government advocated by the East India Company administrators (including James Mill). It is possible, nevertheless, to see in the Committee’s Report (for example, in its recommendations about instructing aborigines in English law) a tipping of the balance of interest from protection of aboriginal societies towards their transformation and eventual assimilation. Certainly, improvement in the condition of aborigines is linked to progress up the stadial ladder. A question of interest for this thesis is how the Colonial Office, under James Stephen, saw the priority as between protection and assimilation. The record of Colonial Office decisions about New Zealand in the period 1837–40 (including the instructions concerning Maori given to Hobson by Normanby in August 1839 and by Russell in December 1840) may suggest that its preference was for protection, with transformation a more

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<sup>222</sup> Ibid 80. See, however, text accompanying n 7 above.

<sup>223</sup> Ibid 79-80. The Committee recommended that aborigines outside colonial borders should be encouraged to enter into treaties to devise “some simple and effectual method of bringing to justice such of their own people as might be guilty of offences against the Queen’s subjects”. The Committee considered that British subjects were already amenable to colonial courts for crimes against aborigines beyond the frontier.

<sup>224</sup> Ibid 78. See Chapter 5, text accompanying ns 87-89.

<sup>225</sup> Ibid 79.

<sup>226</sup> Ibid 80-81. The missionaries not only were to be concerned with “moral and religious improvement” but also were to advance “the social and political improvement of the tribes”. They were to prevent “any sudden changes which might be injurious to the health and physical constitution of the new converts”.

<sup>227</sup> Ibid 78.

gradual process to be left largely to missionary endeavour and Maori consent, and with more tolerance of Maori custom and society in the meantime.

Whether or not it is possible to see a shift in thinking towards assimilation in the Aborigines Committee and whether or not the Colonial Office took a different view, it is the case that there were developing ideas gaining currency in this period which came to bear on future directions. That may be seen in the positions taken over succeeding years by the Aborigines' Protection Society, which was established in 1837 following the Committee's report. Founding members of the Society included Thomas Fowell Buxton, Thomas Hodgkin, Joseph Sturge, and others who had been prominent in the anti-slavery movement. As Keith Sinclair described in his Master's thesis in 1946, the Society took the view that protection of aborigines could be reconciled with "systematic colonisation" as proposed by Edward Gibbon Wakefield. It gave qualified support to the New Zealand Association's plans and continued to be supportive of the Association's successor, the New Zealand Company, until well into the 1840s.<sup>228</sup>

So, the Reverend Montague Hawtrey, a member of the Society and of the Association, provided an appendix to the Association's book *The British Colonization of New Zealand* (published in 1837) in which he made suggestions for how Maori society could be assimilated with settler society. (The book and appendix are discussed in Chapter 9.) Hawtrey and other members of the Aborigines' Protection Society who supported the Association were no doubt sincere in the view that Maori welfare could be advanced in tandem with British settlement. Their support for the Association was premised on the understanding that Maori interests would be enhanced and not prejudiced by colonisation. Sinclair's view, which is shared here, was that Wakefield and other leading

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<sup>228</sup> Keith Sinclair "The Aborigines Protection Society and New Zealand: A Study in Nineteenth Century Opinion" (MA thesis, University of New Zealand, 1946).

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promoters of the Association adopted the humanitarian case for intervention in New Zealand for their own ends.<sup>229</sup>

The “Colonizers”, by including and stressing plans for native welfare in their programme were rather conciliating humanitarian opinion than adopting its attitude. ...

There is a strong suggestion running throughout the dealings of the Aborigines’ Protection Society with the “Colonizers” that Dr Hodgkin was deceived by the fair professions of the latter.

Until settlement began, however, and the Company began to advance positions that were clearly inimical to Maori interests, the different ends were not apparent.<sup>230</sup> The preparedness of the Society to accept that assimilation of Maori into settler society was desirable and not inconsistent with their protection may be an indication of a developing general view. If so, the failure of the Colonial Office to act on concrete proposals in 1840 for advancing assimilation of aboriginal peoples in Empire indicates its coolness towards anything other than a long term project for assimilation (in which missionary success would determine the pace) and a preference to keep settlers and aborigines apart as much as possible in the meantime. So, for example, when Standish Motte, a chairman of the New Zealand Company, produced for the Aborigines’ Protection Society elaborate proposals for integrating aborigines into the legal order of British colonies (“Extending to Them Political and Social Rights, Ameliorating Their Condition, and Promoting Their Civilization”), the suggestions were not adopted by the Colonial Office and the ideas did not feature in the near-contemporary Instructions issued to Hobson. Motte had proposed that general integration be tempered by “special laws” such as to give magisterial authority to chiefs (assisted by a “native constabulary force”)

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<sup>229</sup> Ibid 43-44. See also MPK Sorrenson “How to Civilize Savages: Some ‘Answers from Nineteenth-Century New Zealand’” (1975) 9:2 *New Zealand Journal of History* 97-110 at 103; and Michael Belgrave “Pre-emption, the Treaty of Waitangi and the Politics of Crown Purchase” (1997) 31:1 *New Zealand Journal of History* 23-37 at 28. Beaglehole’s different view was that the Association “began its career with the very best intentions”. JC Beaglehole *Captain Hobson and the New Zealand Company: A Study in Colonial Administration* (Smith College Studies in History, Northampton, Massachusetts, 1927) 13.

<sup>230</sup> After the split, the secretary of the Society, Louis Alexis Chamerovzow wrote in 1848 a powerful defence of Maori rights. See Louis Chamerovzow *The New Zealand Question and the Rights of the Aborigines* (TC Newby, London, 1848).

over “all minor offences committed among themselves” in areas of significant Aboriginal settlement.<sup>231</sup> Similarly, the Colonial Office did not treat proposals made in June 1840 by Captain George Grey, soon to be appointed Governor of South Australia and later Governor of New Zealand, for the “best Means of Promoting the Civilization of the Aboriginal Inhabitants of Australia” as providing a blueprint for the treatment of all indigenous peoples of Empire.

Grey had taken the view that it had been the “common error” to allow Australian Aboriginals to be governed by their own customs rather than English law in their dealings among themselves. He acknowledged that this approach had “originated in philanthropic motives”<sup>232</sup> and believed it was also in application of the imperial law rule relating to conquered colonies. The approach was, however, misconceived because “savage and traditional customs should not be confounded with a regular code of laws” and because, in conquered territories to which the imperial law rule had attached, “all persons resident in this territory become amenable to the same laws, and proper persons are selected by the Government to watch over their due and equitable administration”—something that was not possible with regard to Aboriginal custom. Abrogating Aboriginal custom and superseding it with British law was necessary to prevent Aborigines remaining “hopelessly immersed in their present state of barbarism”. It was a “contradiction to suppose that individuals subject to savage and barbarous laws can rise into a state of civilization, which those laws have a manifest tendency to destroy and overturn”. Grey considered that Aborigines “suffering under their own customs” should “from the moment [they] are declared British subjects” have the protection of English law and “be taught that the British laws are to supersede their own”.<sup>233</sup> If application of English law was confined to cases of inter-racial crime only, Grey thought that it would seem to

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<sup>231</sup> Standish Motte *Outline of a System of Legislation, For Securing Protection to the Aboriginal Inhabitants of All Countries Colonized by Great Britain; Extending to them Political and Social Rights, Ameliorating their Condition, and Promoting their Civilization* (John Murray, London, 1840) 13 & 16-17 (also at CO 209/8, 426a-441b).

<sup>232</sup> Grey to Russell, 4 June 1840 (enclosing “Report upon the best Means of Promoting the Civilization of the Aboriginal Inhabitants of Australia”), GBPP 1841 (311) XVII.493, 43-47 at 43.

<sup>233</sup> Grey may not have intended his proposals to apply to Aborigines in communities far from British settlement and not in “communication” with white settlers.

Aborigines that they were being punished not for acts “odious” in themselves but only because whites were involved. Grey suggested that punishments for first offences could be tempered<sup>234</sup> and that unsworn evidence of Aborigines should be received in colonial courts.<sup>235</sup> His report also included proposals for schools and labour schemes for Aborigines.<sup>236</sup>

While the Colonial Office sent Grey’s report to the Australian Governors (Gipps being instructed to forward a copy to Hobson) as potentially “fit for adoption ... subject to such modifications as the varying circumstances of the colony may suggest”,<sup>237</sup> it was not picked up as general policy. Stephen thought it inapplicable to the Cape Colony (“because our relations with the Aborigines there are of a very different & peculiar character”).<sup>238</sup> While it was enclosed with Russell’s 9 December 1840 Instructions to Hobson, it was for the purpose of drawing to Hobson’s attention Grey’s Aboriginal labour proposals.<sup>239</sup> As is shown in Chapter 19, Russell’s Instructions to Hobson and Stephen’s many memoranda were consistent with the view not only that Maori should be left to govern themselves but also that Maori institutions and customs had validity in themselves without the need for “special laws”. To the extent that recent scholarship may be taken to suggest that the only options seen to be available in 1840 were strict application of English law to indigenous peoples or some exceptional laws to smooth transition, the picture is therefore incomplete.<sup>240</sup> The survey of the implications of British sovereignty for indigenous systems of government and law in other parts of Empire undertaken in Chapter 4 supports the view that more plurality was tolerated. That is not to say that, by 1840, there were not gathering ideas and forces which were to cause a shift towards a more monolithic view of British sovereignty and law.

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<sup>234</sup> Grey to Russell, 4 June 1840, GBPP 1841 (311) XVII.493, 43-47 at 44.

<sup>235</sup> Ibid 45.

<sup>236</sup> Ibid 45-47.

<sup>237</sup> Russell to Gipps, 8 October 1840, GBPP 1844 (627) XXXIV.315, 99-100 at 100. Grey’s report received a mixed response from the Australian Governors: see Chapter 4, text accompanying ns 136-139.

<sup>238</sup> Minute by Stephen (5 October 1840) on draft of Russell to Gipps, [8] October 1840, CO 201/304, 267a-268a at 267b.

<sup>239</sup> See Chapter 19, n 17.

<sup>240</sup> See Chapter 2, ns 440 & 452-455.

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Burkean respect for indigenous societies had already lost ground against evangelical and utilitarian positions that these societies were morally and technologically backward and needed to be transformed. The divide between “the civilised” and “the savage” was developed by John Stuart Mill (for whom it has been said that Empire was a rare blind-spot) to justify despotic rule over indigenous groups “provided the end be their improvement, and the means justified by actually effecting that end”.<sup>241</sup> Although Mill’s mature writing (from which this justification of ends over means is taken) was not published until the late 1850s, he had prefigured it in an early essay in 1836 in which he denied the capacity of “barbarians” to co-operate to form civilised societies which would allow them to be recognised as nations under international law. While Mill allowed that indigenous societies could be led to civilisation, he treated the “training” required as a slow, incremental and precarious process.<sup>242</sup> Although Duncan Bell has cautioned that there were other liberal thinkers of the mid-nineteenth century who had concerns about the morality of Empire, Mill was part of and helped shape the growing support for British imperialism from the 1840s until the “crisis of liberal imperialism” that began with the Indian Mutiny of 1857–58.<sup>243</sup>

At 1840 forces more compelling than those of ideas were about to transform Britain and the world. Recent scholarship underscores that the 1840s were a pivotal decade in the “birth of the modern”. The conditions that precipitated change had been building since late in the eighteenth century. Between 1783 and 1841, the population of the British Isles doubled to 26.7 million. By 1851, half of the population of England lived in towns, compared to one-third in 1801.<sup>244</sup> Exports and imports had increased seven or eight-fold between 1780 and 1850. Roads,

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<sup>241</sup> Mill *On Liberty* (1859), quoted in Mantena “Liberal Imperialism”, above n 176, 119. See also Mehta *Liberalism and Empire*, above n 174, 70-73 & 97-106; and Pitts *Turn to Empire*, above n 175, 133-162.

<sup>242</sup> Mantena “Liberal Imperialism”, above n 176, 120-121.

<sup>243</sup> Duncan Bell “Empire and International Relations in Victorian Political Thought” (2006) 49:1 *The Historical Journal* 281-298.

<sup>244</sup> Boyd Hilton *A Mad, Bad, and Dangerous People? England 1783–1846* (Clarendon Press, Oxford, 2006) [“Hilton *Mad, Bad, and Dangerous*”] 5 & 7.

canals, railways, factories had transformed the landscape and society.<sup>245</sup> It was not, however, until the end of the 1840s that social strain caused by these changes and political instability subsided and the pessimism of the 1830s (which had ended in economic recession) gave way to the era of Victorian confidence. This confidence coincided with an increase in governmental capacity as the machinery of modern government began to take shape. The repeal of the Corn Laws (1846) and Navigation Acts (1849) ushered in the era of free trade in which central tenets were “a minimal State and the free play of competition”. Associated with faith in markets and confidence in God’s providence, sentimental humanism retreated in the face of sterner attitudes to the disadvantaged.<sup>246</sup> The Whigs settled into office for the next thirty years. The coming men of Empire were “colonial reformers” in the New Zealand Company mould.

By 1840, the British Parliament reigned supreme. Although British legal thinking before 1840<sup>247</sup> may have coalesced around the view, most forcefully expressed by John Austin in 1832<sup>248</sup> and later by Albert Venn Dicey,<sup>249</sup> that the sovereignty of the British Parliament was indivisible and unlimited, the extent to which contrary views were still held by lawyers is not clear. Even less clear is the extent to which, in 1840, an earlier common law constitutional tradition had been eclipsed in popular thinking.<sup>250</sup> It may be possible to see in positions taken in relation to New Zealand discussed in this thesis some echo of a less absolute view of sovereignty. What “sovereignty” meant in the British Constitution is not a matter taken further

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<sup>245</sup> John Brewer “England: The Big Change” (26 June 2008) 55:11 *The New York Review of Books* 54-55 & 58 (book review) [“Brewer ‘England’”] at 54.

<sup>246</sup> Hilton *Mad, Bad, and Dangerous*, above n 244, 23-24, 30-32, 38, 311-315 & 628-630; Brewer “England”, above n 245; CA Bayly *The Birth of the Modern World 1780–1914: Global Connections and Comparisons* (Blackwell Publishing, Malden, Massachusetts, 2004); David Eastwood “The Age of Uncertainty: Britain in the Early-Nineteenth Century” (1998) 6:8 *Transactions of the Royal Historical Society* 91-115; Philip Harling “Equipoise Regained? Recent Trends in British Political History, 1790–1867” (2003) 75:4 *The Journal of Modern History* 890-918.

<sup>247</sup> See the American Revolutionary debates discussed above at n 102 and accompanying text.

<sup>248</sup> John Austin *The Province of Jurisprudence Determined* (John Murray, London, 1832).

<sup>249</sup> Although as to Dicey, see Mark Walters “Dicey on Writing the *Law of the Constitution*” (2012) 32:1 *Oxford Journal of Legal Studies* 21-49.

<sup>250</sup> See Michael Lobban “Custom, Nature, and Authority: The Roots of English Legal Positivism” in David Lemmings (ed) *The British and their Laws in the Eighteenth Century* (The Boydell Press, Woodbridge, Suffolk, 2005) 27-58, especially 52-58.

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here. In part, that is because this large topic may not be susceptible of any useful answer. More importantly, for present purposes what is of greater interest is what the implications of British “sovereignty” were for local or indigenous systems of government and law. That is the focus of Chapter 4, where the view is taken that, at 1840, British sovereignty was not seen as incompatible with continuing indigenous self-government. In 1840, however, the trend of legal thought was moving away from such plurality. Austin had developed an austere positivist vision of law which, later in the century following publication by his widow of a second edition of *The Province of Legislation Determined* and his other lectures and papers, would be influential in diminishing the role of custom in the legal system and pave the way for a more monolithic and exclusive view of sovereignty, both within the British Constitution and within Empire.<sup>251</sup>

Other forces at work which, after 1840, impacted directly on the indigenous peoples of Empire included the tsunami of emigration to the colonies, the conferral of representative and responsible government to “white settlement” colonies, erosion of belief in the universal brotherhood of man through humanitarian disillusionment, settler propaganda, and new attitudes towards race (later to be capped by “social Darwinism”). However, it is important to recognise that, at 1840, these developments were not anticipated.

Emigration from Britain in the 25 years to 1840 totalled some one million persons. In the decade to 1850, the number rose to nearly 1.7 million. In the decade 1850–60, it was 2.3 million. Nearly ninety per cent of emigration from 1830–40 was to the United States and the Canadian colonies (in about equal proportions). The percentage of British emigration to Australasia went from 9.5% in the decade to 1840 to 22.1% in the decade from 1850–60.<sup>252</sup> At 1841, the settler population of

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<sup>251</sup> Wilfrid Rumble “Austin, John (1790–1859)” *Oxford Dictionary of National Biography*.

<sup>252</sup> Porter *Atlas*, above n 2, 85. Compare Elizabeth Errington “British Migration and British America, 1783–1867” in Phillip Buckner (ed) *Canada and the British Empire* (Oxford University Press, Oxford, 2008) 140–159 at 141; and James Belich *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783–1939* (Oxford University Press, Oxford, 2009) [“Belich *Replenishing the Earth*”] 82–83, 225, 261–263 & 279.

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the Australasian colonies was about 210,000. By 1860, it was 1.25 million.<sup>253</sup> In New Zealand, only 27,500 immigrants arrived in the period 1840–52.<sup>254</sup> The great population increases took place between 1850 and 1866 and between 1872 and 1886.<sup>255</sup> Settler numbers exceeded the Maori population from 1858.<sup>256</sup> Between 1853 and 1870, the settler population increased from around 30,000 to over 250,000.<sup>257</sup> Between 1870 and 1886, it doubled again to 500,000.<sup>258</sup>

Durham's report recommending responsible government for a united Upper and Lower Canada, although provided in January 1839, had little immediate impact, as Ged Martin has shown.<sup>259</sup> It was not until the Whigs returned to power in 1846, with Earl Grey (Durham's brother-in-law) as Secretary of State for the Colonies, that responsible government for the Canadian colonies was achieved from 1848. Even in Canada, with its substantial white population, the development was, as Peter Burroughs has written, "by no means inexorable or straightforward". Rather, "[i]t emerged haphazardly out of conflict, dialogue, and institutional adaptation".<sup>260</sup> In part, the change resulted from settler insistence on their "birthright"; in part, it reflected Whig ideology; and, in some measure, it appealed to London as a way of reducing the burden and cost of imperial rule. Once achieved in Canada, the direction for other "white settlement" colonies was set. While in 1840, New Zealand's future as a white settler colony was not clear, the pace of immigration (and the sympathy for settlers of British politicians connected with the New Zealand Company) soon made a measure of responsible government inevitable. A measure of responsible government would have been achieved under the 1846 Constitution Act but it was not brought into effect because of Governor George

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<sup>253</sup> Belich *Replenishing the Earth*, above n 252, 83 & 261.

<sup>254</sup> Jock Phillips & Terry Hearn *Settlers: New Zealand Immigrants from England, Ireland & Scotland 1800–1945* (Auckland University Press, Auckland, 2008) ["Phillips & Hearn *Settlers*"] 30.

<sup>255</sup> James Belich "How Much Did Institutions Matter? Cloning Britain in New Zealand" in Jack Greene (ed) *Exclusionary Empire: English Liberty Overseas, 1600–1900* (Cambridge University Press, New York, 2010) 248–268 ["Belich 'Cloning Britain'"] at 248.

<sup>256</sup> MPK Sorrenson "How to Civilize Savages: Some 'Answers' from Nineteenth-Century New Zealand" (1975) 9:2 *New Zealand Journal of History* 97–110 at 105.

<sup>257</sup> Phillips & Hearn *Settlers*, above n 254, 34.

<sup>258</sup> Belich "Cloning Britain", above n 255, 248.

<sup>259</sup> Martin *Durham Report*, above n 106.

<sup>260</sup> Peter Burroughs "Imperial Institutions", above n 38, 187.

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Grey's representation that it was premature.<sup>261</sup> The New Zealand Constitution Act 1852 provided responsible government but on a basis that reserved important powers to the Crown (notably for native affairs) and left scope for a redistribution of power between the Governor and Parliament. At 1840, these developments could not have been foreseen. That is shown by the speech of William Molesworth, a committee member of the New Zealand Association, in the House of Commons in March 1838 on a no-confidence motion against Baron Glenelg.<sup>262</sup> While Molesworth was wholly in favour of self-government for Canada, he thought that self-government was not appropriate for other colonies.<sup>263</sup>

I can hardly conceive a greater absurdity than the proposal to set up democratic institutions in all our colonies, amongst the ignorant and superstitious millions of India, amongst our negro fellow-subjects in the West Indies, or the convict and once convict inhabitants of New South Wales, or amongst the motley and not half or even quarter civilized population of our territories in South Africa, or even among the labouring rustics for whom Parliament has provided the means of settling in South Australia, most of whom could not tell you the meaning of the word "democratic" or the word "institution". Sir, I am convinced that the form of government, which a colony should possess, must depend upon the special circumstances of the case, and that the sort of constitution which was very good for one colony might be very bad for another: that some colonies absolutely require a despotic authority; that for others an aristocratic power may be the most suitable; and I doubt much whether amongst all our colonies there be more than two or three, in which I should not be very much afraid to try the experiment of pure democracy.

In Molesworth's approving reference to "despotic authority" and sardonic comment about "our negro fellow-subjects", there is a glimpse of an uglier side to Empire that was to grow in the mid-nineteenth century. As will be seen in Chapter 4, the mid-1830s Xhosa wars at the eastern Cape Colony frontier fanned popular racism. More significantly, as the 1840s progressed, missionary disillusionment about their progress with the Khoikhoi and Xhosa and humanitarian retreat in the face of settler hostility meant that by the time of the War of the Axe (1846–47)

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<sup>261</sup> See Chapter 19, n 95.

<sup>262</sup> See Chapter 9, text accompanying ns 196-197.

<sup>263</sup> William Molesworth (6 March 1838) 41 GBPD HC cc 476-512 at 484.

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there were no effective white champions for the Xhosa cause.<sup>264</sup> The settlers had been very effective in a propaganda war, largely carried on through the pages of their newspapers, reports which were picked up by the press in Britain and other colonies. They had succeeded in shedding their image as a “motley” population and in depicting the indigenous populations as incapable of civilisation and obstacles to progress.<sup>265</sup>

The political influence of the humanitarians and missionary societies in Britain was beginning to wane. The fiasco of the African Civilization Society’s Niger expedition of 1841 effectively finished Thomas Buxton as a political force by making him a “figure of fun”. The movement for protection of ex-slaves and aborigines (known as “Exeter Hall” after the building in which the abolitionists had met) was openly attacked for having wrong priorities when there were Britons who required help. Thomas Carlyle’s 1849 essay on the “Negro Question” expressed his criticisms of the emancipation of the West Indian slaves in racially offensive language and argued that it was high time to declare that “Negro and White are *unrelated*”. In the West Indies and in Britain there was much support for the view that no one had benefitted from emancipation.<sup>266</sup> At the same time at the Cape Colony, the disillusionment of missionaries was complete:<sup>267</sup>

After 1850 ... the idea that the Xhosa possessed a humanity that would allow them to receive the Gospel simply through the agency of the missionary message was displaced as the central tenet of belief in missionary culture. It was replaced with the conviction that the character of Xhosa culture and society was the central obstacle to the spread of missionary civilization. Missionary culture before the 1850s was built upon the notion

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<sup>264</sup> See Chapter 4, n 215.

<sup>265</sup> Alan Lester “British Settler Discourse and the Circuits of Empire” (2002) 54:1 *History Workshop Journal* 24-48; Alan Lester “Colonial Settlers and the Metropole: Racial Discourse in the Early 19th-Century Cape Colony, Australia and New Zealand” (2002) 27:1 *Landscape Research* 39-49.

<sup>266</sup> Lester “Networks of British Humanitarianism”, above n 194, 42-45; Porter “Trusteeship”, above n 171, 210-216; Catherine Hall “William Knibb and the Constitution of the New Black Subject” in Mark Daunton & Rick Halpern (eds) *Empire and Others: British Encounters with Indigenous Peoples, 1600–1850* (UCL Press, London, 1999) 303-324 at 313-322; Thomas Carlyle “Occasional Discourse on the Negro Question” (December 1849) 40:240 *Fraser’s Magazine for Town and Country* 670-679.

<sup>267</sup> Richard Price *Making Empire: Colonial Encounters and the Creation of Imperial Rule in Nineteenth-Century Africa* (Cambridge University Press, Cambridge, 2008) 141.

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that what needed to be changed in Xhosa society were Xhosa hearts. But by 1850 the idea had entered missionary culture that the Xhosa had no hearts. Before 1850 a dominant theme of missionary culture was that the chiefs would provide access to Xhosa culture. But that idea too had been eroded, as the chiefs came to be seen as being at the centre of the cultural resistance to the missionary project.

The humanitarian rout was completed by the Indian Mutiny (1857–58), the New Zealand Wars (1860s) and the Morant Bay rebellion in Jamaica (1865). John Stuart Mill attempted to push back against the rising tide of racism and retreat from liberal universalism. He had hit out at Carlyle’s “Negro Question”, attacking the notion that there was any “original difference of nature” between blacks and whites.<sup>268</sup> Now in 1865 he took the lead in seeking to have Governor Eyre held to account for his brutal suppression of the Morant Bay rebellion. Despite the support of major public figures like Charles Darwin and Herbert Spencer, the campaign was unsuccessful. It was opposed by equally prominent Victorians including Carlyle and Charles Dickens. It was clear that the public supported Eyre and was unsympathetic to the ex-slaves. Mantena considers that the campaign against Eyre was counter-productive in relation to the good government of ex-slave and indigenous populations of Empire.<sup>269</sup>

The retreat from liberalism in the politics of Empire was not only a shift in popular culture, it also reflected a change in thinking from “ethical justifications” to “alibis” of Empire.<sup>270</sup> James Fitzjames Stephen, son of James Stephen of the Colonial Office, articulated the conservative view that humans (even in “civilised” societies) needed to be compelled to live morally and were not by nature progressive.<sup>271</sup> British government of India was “founded on conquest, implying at every point the superiority of the conquering race”. It should not, therefore, “shrink from the open, uncompromising, straightforward assertion” of its superiority or

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<sup>268</sup> See Bart Schultz “Mill and Sidgwick, Imperialism and Racism” (2007) 19:1 *Utilitas* 104-130 at 110-111.

<sup>269</sup> Mantena “Liberal Imperialism”, above n 176, 121-122.

<sup>270</sup> *Ibid* 131.

<sup>271</sup> *Ibid* 125.

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apologise for it.<sup>272</sup> John Seeley gave no ethical justification for British rule in India but, as Mantena points out, instead treated it “as *the lesser evil* compared to leaving India to disintegrate on her own”.<sup>273</sup> Henry Maine attempted no philosophy of Empire in India. Rather he argued that the lesson of the Mutiny was that the liberal reform agenda for the transformation of Indian society had been misguided and that British rule could only be secured by working through Indian institutions and customs. This strategy of “indirect rule” came to be applied in India and in many other parts of the Empire in the late nineteenth century. “Indirect rule” was not a return to “trusteeship” recognising inherent value in the institutions and customs of indigenous societies. Rather it was a pragmatic means to rule in the interests of Britain.<sup>274</sup>

Lacking any pretence of ethical justification, it is perhaps not surprising that, in many parts of Empire, British administrators withdrew from the society of the governed to their clubs, bungalows and cantonments maintaining “a consciousness of beleaguered difference, moral ascendancy, and the mystique of rule”.<sup>275</sup> This separation also accorded with late nineteenth century ideas of “social Darwinism”<sup>276</sup> and racial superiority. The same attitudes were to be seen in self-administering “white settler” colonies, such as New Zealand, in relation to indigenous populations.<sup>277</sup>

John Stuart Mill was despondent at the eclipse of the liberal dream that colonisation and aboriginal advancement to civilisation were compatible. He wrote in 1866 to Henry Chapman, the former puisne judge of the Supreme Court of New

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<sup>272</sup> JF Stephen, *The Times*, 1 March 1883, at 8, quoted in Mantena “Liberal Imperialism”, above n 176, 124.

<sup>273</sup> Mantena “Liberal Imperialism”, above n 176, 128.

<sup>274</sup> Ibid 128-131; Burroughs “Imperial Institutions”, above n 38, 181-182. See also McHugh *Aboriginal Societies*, above n 52, 205-206: “[‘Indirect rule’] was not grounded in any notion of residual or remnant native sovereignty, however. That is, it had no legal basis, but was seen as permissive, tolerant, and subject to the paramount authority of the Crown.”

<sup>275</sup> Burroughs “Imperial Institutions”, above n 38, 183.

<sup>276</sup> A perversion of Darwin’s own theories for which he was not responsible: see Adam Gopnik *Angels and Ages: A Short Book about Darwin, Lincoln, and Modern Life* (Quercus, London, 2009) 155-159.

<sup>277</sup> See Keith Sinclair *The Origins of the Maori Wars* (2nd ed, New Zealand University Press, Wellington, 1961) ch 1; and John Stenhouse “Imperialism, Atheism, and Race: Charles Southwell, Old Corruption, and the Maori” (2005) 44:4 *Journal of British Studies* 754-774.

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Zealand, about the “universal colonial question—what to do with the aborigines”. He expressed his fear that New Zealand now looked unlikely to fulfil earlier hopes that Maori, “on account of [their] higher qualities and more civilisable character”, would cope with colonisation:<sup>278</sup>

But the eternal source of quarrel, the demand of the colonists for land, has defeated these hopes; and it seems as if, unless or until the progressive decline of the Maori population ends in their extinction, the country would be divided between two races always hostile in mind, if not always in actual warfare. Here, then, is the burthen on the conscience of legislators at home. Can they give up the Maoris to the mercy of the more powerful, & constantly increasing, section of the population? Knowing what the English are, when they are left alone with what they think an inferior race, I cannot reconcile myself to this. But again—is it possible for England to maintain an authority there for the purpose of preventing unjust treatment of the Maoris, and at the same time allow self government to the British colonists in every other respect? How is that one subject to be kept separate, and how is the Governor to be in other things a mere ornamental frontispiece to a government of the colony by a colonial Cabinet and Legislature, and to assume a will and responsibility of his own, overruling his cabinet and legislature whenever the Maoris are concerned? If the condition of colonial government is, to keep well with the colonial population and its representatives, there is no hindering the colonists from making their cooperation depend on compliance with their wishes as to the Maoris. I do not see my way through these difficulties. Nor do I feel able to judge what would be the consequence of leaving the colonists, without the aid of the Queen’s troops, to settle the Maori difficulty in their own way. Perhaps the proofs which the Maoris have given that they can be formidable enemies may have produced towards them in the colonists a different state of mind from the overbearing and insolent disregard of the rights and feelings of inferiors which is the common characteristic of John Bull when he thinks he cannot be resisted.

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<sup>278</sup> Mill to Chapman, 7 January 1866, reproduced in Francis Mineka & Dwight Lindley (eds) *The Later Letters of John Stuart Mill 1849–1873* (University of Toronto Press, Toronto, 1972) vol 16, 1135-1137 at 1136.

## CHAPTER FOUR

### BRITISH SOVEREIGNTY & NATIVE GOVERNMENT

As has been seen in Chapter 2, modern scholarship, led by Paul McHugh and Damen Ward, generally suggests that by 1840, when Britain treated for the sovereignty of New Zealand, the concept of sovereignty (at least in the type of colony established in New Zealand) had come to admit of no plurality in government or law. In New Zealand, the British Crown obtained complete authority in both. Although, as a matter of political choice, the Crown could (and did in fact) largely leave Maori society alone to regulate itself, this was understood to be a pragmatic expedient which would not endure and which did not acknowledge any legitimate right against the Crown. Maori custom might be recognised either by “exceptional” legislation or by the municipal law of the colony (where the custom met common law tests for acceptability). This was, however, simply acknowledgment of local conditions, which did not touch the thoroughgoing power in government and law of British sovereignty which extended to Maori and non-Maori without distinction.<sup>1</sup> In assessing whether McHugh and Ward are correct that, by 1840 and in the circumstances of New Zealand, indigenous systems of authority and law were regarded in British thinking as incompatible with British sovereignty, some survey of Empire is inescapable.

McHugh acknowledges that the older “jurisdictional” model of sovereignty (which did not regard plurality in government and law as inconsistent with British colonial rule) continued to apply in some parts of the Empire (for example, in India and at the Cape Colony) even after 1840, but argues that the older model (which had operated throughout the Empire before the early nineteenth century) had been supplanted by 1840 in the Canadian and Australian colonies. They are said to have established the pattern of a “more aggressive” sovereignty, followed in New

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<sup>1</sup> See Chapter 2, text accompanying ns 276-299, 442 & 447-454.

Zealand by a more confident imperial power which saw the country as a place for British settlement.<sup>2</sup>

In this chapter, I question whether British policy and thinking had evolved in relation to Canada (specifically the colony of Upper Canada) in the way suggested by McHugh. Mark Walters convincingly demonstrates that the “pluralistic” approach had not been eclipsed in Upper Canada by 1840.<sup>3</sup> To develop this point it is necessary to set the early to mid-nineteenth century evidence for Canada in its historical context, which requires some review of the eighteenth century history despite the fact that McHugh accepts it. The survey undertaken in this chapter also indicates that the Australian colonies are properly to be regarded as exceptional in terms of British imperial policy and practice; they are quite unlike Upper Canada (making it difficult to accept their association in McHugh’s argument). As is seen in other chapters, it is also striking that British dealings with Australian Aborigines were never treated as a model for dealings with Maori in respect of sovereignty, self-government and property. In addition, a focus on Upper Canada and the Australian colonies, to the exclusion of other parts of Empire, obscures the parallels to be drawn from other colonial experience.

It would be wrong to assume, before the New Zealand record is considered, that settlement was the design for the New Zealand colony in 1840 and that the “pluralistic” model was not feasible. As developed in subsequent chapters, British acquisition of sovereignty was for the protection of Maori. In 1840, only limited British settlement was anticipated, confined to coastal enclaves focused on whaling, timber extraction and perhaps some arable farming (pastoral farming was not in contemplation). The expectation was that Maori and non-Maori would largely be kept apart, leaving a “pluralistic” approach open. In addition, because of the invocation of the experiences of other parts of the Empire in the development of proposals for British intervention in New Zealand, it is necessary to query McHugh’s association of New Zealand with Canada and Australia. So, for

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<sup>2</sup> See Chapter 2, text accompanying ns 277-288.

<sup>3</sup> See text accompanying ns 94-103 below.

example, Hobson promoted intervention on the model of the East India Company's trading factories and Busby promoted intervention on the model of the Ionian Islands protectorate (an arrangement which McHugh regards as anomalous in the early nineteenth century and not "doctrinally possible" until the early twentieth century<sup>4</sup>). Nor is exclusion of consideration of the wider Empire appropriate given the striking similarity between the Treaty of Waitangi and the West African treaties pointed out by Keith, Bennion and Sorrenson.<sup>5</sup> Indeed, further comparable arrangements are referred to later in this chapter. With the background of the wider imperial experience, McHugh's conclusion that the dissonance in the Maori translation of the Treaty between *kawanatanga* and *rangatiratanga* was "unnoticed and, anyway, too fine for colonial and imperial authorities" who "looked simply to the less subtle cession of sovereignty in the English text" is unconvincing.<sup>6</sup>

The extent to which aboriginal tribal government continued after assumption of British sovereignty varied from colony to colony and over time. There was no one imperial policy as can be seen from a brief survey of British dealings with native peoples in its possessions in North America, Australia, Guiana, West Africa, the Cape Colony, India and Ceylon.

### **British North America Before 1776**

It is clear from the terms of the early royal charters, commissions and instructions and from colonial statutes that native peoples in North America were not treated as subject to British sovereignty simply by virtue of British discovery and settlement.<sup>7</sup> Sovereignty over them was acquired only through conquest or, as was more usual,

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<sup>4</sup> See Chapter 2, text accompanying n 296. Hobson's and Busby's "South Asian models" are discussed in Tony Ballantyne "Race and the Webs of Empire" in Tony Ballantyne *Webs of Empire: Locating New Zealand's Colonial Past* (Bridget Williams Books, Wellington, 2012) 24-47 at 37.

<sup>5</sup> See Chapter 2, text accompanying ns 125-135.

<sup>6</sup> Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, Oxford, 2004) ["McHugh *Aboriginal Societies*"] 166.

<sup>7</sup> Ibid 43-45 & 92-105; Mark Walters "Mohegan Indians v Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33:4 Osgoode Hall Law Journal 785-829 ["Walters 'Mohegan Indians'"] at 793-795.

by treaties of cession. In fact, few Indian tribes were brought under British sovereignty by these means. Although some statutes and treaties of the 17th and 18th centuries described Indians as “subjects”, the same instruments often also described them as “allies”, a description that more accurately reflected the manner in which relations between Indian tribes and British colonial officials were conducted under the “Covenant Chain”.<sup>8</sup>

The Covenant Chain was derived from the “iron” chain treaty between Dutch colonists and the Haudenosaunee confederacy, called the Iroquois by the French, and the Five (later Six) Nations by the British.<sup>9</sup> After the Dutch were ousted from New York in 1664, the English reconfirmed the “iron” chain as a “silver covenant chain” at a council at Albany at which the compact was sealed by the British gift of a two-row wampum belt. Such councils and gifts (which had been a feature of European and Indian dealings from earliest times) were an extension to Europeans of customary practices between Indian nations. Walters explains that the Covenant Chain was essentially to achieve “peace, alliance, trade and protection” and established a connection of “kinship” rather than a relationship of sovereign and subject.<sup>10</sup> According to Indian custom, such a covenant did not “maintain itself”. It required “constant effort and renewal to keep it bright and shiny” and to ensure that it did not “rust”.<sup>11,12</sup>

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<sup>8</sup> Walters refers to a 17th century Virginian treaty by which “Indian Kings & Queens” acknowledged their “Dependency on” and “Subjection to” to the English Crown but were also secured “Power to Govern their own People”. Walters “*Mohegan Indians*”, above n 7, 798-799.

<sup>9</sup> The Haudenosaunee confederacy comprised the Mohawk, Seneca, Onondaga, Cayuga, Oneida and (from the 1720s) Tuscorara nations.

<sup>10</sup> Mark Walters “Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after *Marshall*” (2001) 24:2 *Dalhousie Law Journal* 75-138 [“Walters ‘Brightening the Covenant Chain’”] at 80-82.

<sup>11</sup> “Statement of the Haudenosaunee Concerning the Constitutional Framework and International Position of the Haudenosaunee Confederacy” (1983), quoted in Walters “Brightening the Covenant Chain”, above n 10, 82.

<sup>12</sup> Walters “Brightening the Covenant Chain”, above n 10, 82-83. See also Mark Walters “Promise and Paradox: The Emergence of Indigenous Rights Law in Canada” in Benjamin Richardson, Shin Imai & Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oxford, 2009) 21-50 [“Walters ‘Promise and Paradox’”] at 26-28.

## Chapter Four: British Sovereignty & Native Government

The brightening of the chain was achieved through nation-to-nation councils conducted according to elaborate customary procedures. The customs included the preliminary “at wood’s edge” ceremony (to remove symbolic obstacles encountered in travel) and the “ceremony of condolence” (to cover the dead and wipe away tears), the kindling of the council fire, lengthy formal speeches filled with metaphor and use of mnemonic devices, periods of private deliberation and consultation, the giving of wampum strings or belts and the exchange of presents.

By the mid-eighteenth century it appears that the Covenant Chain was beginning to rust and was under strain because of sharp practices in European land purchasing from Indians.<sup>13</sup> Re-establishing good relations with the Indian tribes became a priority for the Imperial Government because it needed to enlist Indian allies in its war with France. As a result, Indian affairs were removed from the control of the colonies and placed under an Indian Department within the British military establishment in North America in 1756. Responsibility for Indian affairs was divided between northern and southern Superintendents. The first northern Superintendent was Sir William Johnson (1715–74) who held office for nearly twenty years (from 1756 until his death in 1774). Johnson, of Irish background, had come to New York state in 1738. He had lived in close proximity to the Mohawk, learning their language and customs and having Mohawk “common law wives”. The Mohawk adopted Johnson as an honorary sachem and he led them in war against the French at the Battle of Lake George in 1755.<sup>14</sup>

Johnson understood the Covenant Chain relationship and moved quickly to renew it. Walters describes how in 1756 Johnson was to be found “on his way to affirm the covenant chain treaty at Onondaga, ‘march[ing] on at the Head of the Sachems singing the condoling song which contains the names, laws & Customs of their renowned ancestors’”.<sup>15</sup> Under Johnson, the Covenant Chain was extended to the tribes of the Great Lakes region and beyond: the Ojibway, the Mississauga, the Algonquin, the Huron, and the Ottawa among others. The chain was extended

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<sup>13</sup> These strains over land, leading to the Royal Proclamation of 1763, are discussed in Chapter 5.

<sup>14</sup> Walters “Brightening the Covenant Chain”, above n 10, 97; McHugh *Aboriginal Societies*, above n 6, 103-104; Milton Hamilton *Sir William Johnson: Colonial American 1715–1763* (Kennikat Press, Port Washington, New York, 1976).

<sup>15</sup> Walters “Promise and Paradox”, above n 12, 28, quoting Johnson’s journal.

further and confirmed between 1764 and 1766 following Pontiac's War, an uprising against the British by Great Lakes Indians which followed actions by the British military in taking possession of forts within Indian territory and discontinuing the custom of giving presents.<sup>16</sup> The extended Covenant Chain thereby became, as Walters has described it, "a generalized crown-aboriginal treaty relationship".<sup>17</sup> The flavour of covenant brightening is demonstrated by a speech of Johnson at a council at Detroit in September 1761:<sup>18</sup>

Brethren—The great King George my Master being graciously pleased some years ago to appoint me to the Sole management & Care of all his Indian Allies in the Northern parts of North America directed me to light up a large Council fire at my House in the Mohocks Country for all Nations of Indians in amity with his Subjects, or who were inclined to put themselves under his Royal protection to come thereto, and receive the benefit thereof.

...

Brethren—With this belt In the name of his Britannick Majesty I strengthen and renew the antient Covenant Chain formerly subsisting between us, that it may remain bright & lasting to the latest Ages, earnestly recommending it to you, to do the same, and to hold fast thereby as the only means by which you may expect to become a happy & flourishing people.

...

Brethren—... I [am] sent by the General & Commander in Chief to renew in his Majesty's Name the friendship formerly subsisting between you and us, to give assurances of his clemency and favour to all such Nations of Indians as are desirous to come under his Royal protection, as well as to acquaint you that his Majesty will promote to the utmost an extensive plentiful commerce on the most Equitable terms between his Subjects & all Indians who are willing to entitle themselves thereto, & partake of his Royal Clemency by entering into an offensive and Defensive Alliance with the British Crown.

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<sup>16</sup> Walters "Brightening the Covenant Chain", above n 10, 82; Walters "Promise and Paradox", above n 12, 28.

<sup>17</sup> Walters "Brightening the Covenant Chain", above n 10, 81.

<sup>18</sup> Johnson's speech at the conference with Indian tribes at Detroit, 9 September 1761, reproduced in James Sullivan (ed) *The Papers of Sir William Johnson* (The University of the State of New York, Albany, 1921) vol 3, 474-480 at 476-478.

Johnson understood that the Covenant Chain did not establish British sovereignty over Indians. Not all British officials may have been as observant. Pontiac's War is said to have arisen because "Indian nations feared that the Crown had repudiated its role as father and assumed the mantle of sovereign".<sup>19</sup> Johnson himself was careful to ensure that British actions could not be interpreted as a claim of sovereignty or assertion of a right to interfere in Indian affairs beyond the influence of kinship affirmed by the Covenant Chain. So, for example, when he heard in 1763 that the treaty he had made with the Six Nations and Caughnawaga Mohawks "to renew the Covenant Chain" was being represented in British circles as having entailed Indian submission to the Crown as "subjects", he wrote to the Lords of Trade to complain that "the very word would have startled them, had it been ever pronounced by any Interpreter".<sup>20</sup> Similarly, while the Royal Proclamation of 1763 (which referred to "the several Nations or Tribes of Indians with whom We are connected, and who live under Our Protection"<sup>21</sup>) was welcomed by Johnson as necessary to reassure those who had participated in Pontiac's War that the Covenant Chain remained bright, his concern that some of terms of the Proclamation (references to British "Sovereignty" and "Dominion") might reignite Indian fears led him to convene a treaty council at Niagara in 1764 to explain the Proclamation.<sup>22</sup> The council at Niagara was the largest ever held, attended by nations from the Great Lakes and beyond. John Borrows argues that it was at the council that the Proclamation was effectively incorporated into the Crown-Indian Covenant Chain.<sup>23</sup> Johnson gave the chiefs a 23-row wampum belt bearing the date 1764. Walters explains that this demonstrated that "the relationship that it affirmed

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<sup>19</sup> Walters "Promise and Paradox", above n 12, 28.

<sup>20</sup> Johnson to the Lords of Trade, 25 September 1763, quoted in Walters "Brightening the Covenant Chain", above n 10, 98-99.

<sup>21</sup> Royal Proclamation 1763 (UK), reprinted in Clarence Brigham *British Royal Proclamations Relating to America, 1603-1783* (Johnson Reprint, New York, 1971) 212-218 at 215.

<sup>22</sup> Walters "Promise and Paradox", above n 12, 28-29; Walters "Brightening the Covenant Chain", above n 10, 99-100.

<sup>23</sup> John Borrows "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch (ed) *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (UBC Press, Vancouver, 1997) 155-172 at 161.

was far more complicated and nuanced than the text of the Proclamation might suggest”: “The royal sovereign had become, once again, an indigenous father.”<sup>24</sup>

Johnson was also quick to complain to the Lords of Trade and the Commander-in-Chief of British forces in North America when he saw the text of a treaty made at Detroit in September 1764 between Colonel Bradstreet on behalf of the British Crown and some of the “Western Nations”, including the Mississauga of the Toronto area.<sup>25</sup> By the first article, the chiefs for themselves and their “Nations” acknowledged that they were “the Subjects and Children” of King George III and that the King had “Sovereignty Over all and every part of this Coun[try] ... [in as] full and as ample a manner as in any part of his ... Dominions whatever”.<sup>26</sup> In his letters to the Lords of Trade, Johnson expressed his conviction that the text of the treaty did not reflect what had “*really* passed” at the council.<sup>27</sup> “[E]xpressions of subjection ... must either have arisen from the ignorance of the Interpreter, or from some other Mistake; for I am well convinced, they never meant or intend, any thing like it, and that they can not be brought under our Laws, for some Centuries”.<sup>28</sup>

I am impatient to hear the exact particulars of the whole transaction, and I dread its consequences, as I recollect that some attempts towards Sovereignty not long ago, was one of the principal causes of all our troubles, and as I can see no motive for proposing to them terms, which if they attended to them, they most assuredly never meant to observe  
...

In his letter to the Commander-in-Chief of British forces in North America, General Thomas Gage, he wrote that the treaty concluded by Colonel Bradstreet was “extraordinary”. He was convinced that there had been a misunderstanding by the person recording the agreement. He had reviewed “the Indian Records” and

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<sup>24</sup> Walters “Promise and Paradox”, above n 12, 29.

<sup>25</sup> Walters “Brightening the Covenant Chain”, above n 10, 100-102.

<sup>26</sup> “Congress with the Western Nations”, Detroit, 7-10 September 1764, reproduced in James Sullivan (ed) *The Papers of Sir William Johnson* (The University of the State of New York, Albany, 1921) vol 4, 528.

<sup>27</sup> Johnson to the Lords of Trade, 26 December 1764, quoted in Walters “Brightening the Covenant Chain”, above n 10, 101.

<sup>28</sup> Johnson to the Lords of Trade, 30 October 1764, quoted in Walters “Brightening the Covenant Chain”, above n 10, 101.

found that such a mistake was not uncommon, as he was able to substantiate through personal knowledge of one council.<sup>29</sup>

I find in the Minutes of 1751 that those who made ye Entry say, that Nine different Nations acknowledged themselves to be his Majesty's Subjects, altho I sat at that Conference, made entrys of all the Transactions, in which there was not a Word mentioned, which could imply a Subjection ... .

Johnson found it “necessary to observe” that:<sup>30</sup>

[N]o Nation of Indians have any word which can express, or convey the Idea of Subjection ... . [T]hey often say, we acknowledge the great King to be our Father ... for which our People too readily adopt & insert a Word [i.e. sovereign] very different in signification, and never intended by the Indians ... .

Although in this correspondence Johnson was content to attribute the error to innocent mistake, he later expressed the view that the claim advanced in treaties that Indians were subjects of the British Crown was sometimes intentionally made although known to be inaccurate. These were claims made “for our Interest ... when we were squabbling with the French about Territory” and it was a “very gross Mistake” to treat them as accurate.<sup>31</sup> That this was not a fanciful view is indicated by a 1730 Board of Trade letter pointed to by Walters which commented upon the advantage to be obtained from such language in subsequent disputes with European nations: “words may easily be inserted acknowledging their dependence upon the Crown of Great Britain, which agreement remaining upon record in our Office, would upon future disputes with any European Nation, greatly strengthen our title in those parts”.<sup>32</sup>

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<sup>29</sup> Johnson to Gage, 31 October 1764, quoted in Walters “Brightening the Covenant Chain”, above n 10, 102.

<sup>30</sup> Johnson to Gage, 31 October 1764, quoted in Walters “Promise and Paradox”, above n 12, 28 n 31.

<sup>31</sup> Johnson to Gage, 7 October 1772, quoted in Walters “Brightening the Covenant Chain”, above n 10, 104.

<sup>32</sup> Board of Trade to Duke of Newcastle, 20 August 1730, quoted in Walters “Brightening the Covenant Chain”, above n 10, 104.

That Johnson was not alone in these views is illustrated by other material assembled by Walters. Even the Bradstreet-Detroit Treaty to which Johnson objected referred to the Indian tribes as “Nations” and drew a distinction between Indians and “His Majesty’s Subjects”. The Treaty provided for the surrender of any Indian who plundered or killed a British subject “to be tried and punished agreeable to the Laws & Customs of this Colony at that time in force” but implicitly confirmed that similar crimes committed by Indians upon Indians were outside British jurisdiction.<sup>33</sup> Similarly, an Imperial Bill of 1764 (which was not enacted because of the Stamp Crisis of 1765) would have provided summary jurisdiction for Indian Department officers over minor criminal and civil matters between European traders or between traders and Indians but not over disputes between Indians only. Article 19 of the Bill recognised the existing “Government” and “Civil Constitution” of the Indian nations in the northern district.<sup>34</sup> Similarly, various 17th and 18th century colonial statutes reviewed by Walters<sup>35</sup> indicate that native laws were regarded as having “some legal force as part of distinct legal systems with at least some degree of independence from the local colonial legal systems introduced for settlers”:<sup>36</sup>

Significantly, statute law relied upon but did not create the institution of native chieftainship; it imposed certain statutory duties on chiefs which related to settler-native concerns, but did not delegate to them power over native peoples. The statutes therefore imply that native chiefs, and the customary laws defining their relationship to native communities, derived British legal authority from some other source than statutory law.

This evidence suggests that, at the very least, Indian tribes were looked upon as internally sovereign nations allied to the British Crown.<sup>37</sup> This status was not seen

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<sup>33</sup> Mark Walters “The Extension of Colonial Criminal Jurisdiction Over the Aboriginal Peoples of Upper Canada: Reconsidering the *Shawanakiskie* Case (1822–26)” (1996) 46:2 Toronto Law Journal 273-310 [“Walters ‘Reconsidering the *Shawanakiskie* Case’”] at 278-279.

<sup>34</sup> “Plan for the future Management of Indian Affairs” (1764), quoted and discussed in Walters “Reconsidering the *Shawanakiskie* Case”, above n 33, 280. See also McHugh *Aboriginal Societies*, above n 6, 105.

<sup>35</sup> Walters “*Mohegan Indians*”, above n 7, 793-795 & 798-801.

<sup>36</sup> Ibid 801.

<sup>37</sup> The other possibility is that they remained fully sovereign in matters of external as well as internal relations and were therefore properly regarded as “foreign nations” from the British perspective. See Walters “*Mohegan Indians*”, above n 7, 801-803.

as being inconsistent with British assertion of Crown sovereignty over the territories in which Indian nations lived for the purposes of international relations and jurisdiction over British subjects.

The only time in the pre-Revolutionary War period when the status of an Indian tribe became an issue in legal proceedings was in respect of a long-running land dispute between the Mohegan Indians and Connecticut. The case concerned lands reserved out of a 1640 Indian grant and held on trust for the Mohegans, rather than unceded lands or lands beyond colonial boundaries. The case is described by Walters.<sup>38</sup> For present purposes, what is important is his conclusion that the case confirmed that, as a matter of British imperial law, Indian tribes on reserved lands were “governed internally by systems of Aboriginal customary law and government which were independent from the local legal systems of the colonies in which they were located”.<sup>39</sup> The case established three points:<sup>40</sup>

First, native nations on reserved lands within colonial boundaries were not necessarily subject to colonial municipal law but might retain an independent status; second, courts, in determining whether natives were subject to municipal law, considered local Crown practice, in particular treaties entered into between local officials and native nations; and third, in those cases where treaties indicated that natives were not subject to local colonial law, their own customary laws, including those relating to government, continued in force and were justiciable in British imperial courts.

Walters leaves open whether the Indian tribes in these circumstances “enjoyed some sort of non-international, sovereign status” or whether the imperial order simply recognised Aboriginal customary law and government “as forming systems which constituted components of the British imperial order—systems which, therefore, were subject to and derived legal legitimacy from British imperial sovereignty”.<sup>41</sup> Although Walters expresses the view that “it is difficult to see” that, from the perspective of British imperial law, Indian tribes on reserved lands

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<sup>38</sup> Ibid 803-828.

<sup>39</sup> Ibid 788.

<sup>40</sup> Ibid 828.

<sup>41</sup> Ibid 788.

within colonial boundaries were “internationally sovereign states”,<sup>42</sup> it is noteworthy that the opposite view was expressed in an interim ruling on jurisdiction by a majority of commissioners on a 1743 Royal Commission of review into the matter, and that the opinion that the Mohegans remained sovereign according to “the Law of Nature and Nations” was maintained by one commissioner in the eventual decision on the merits.<sup>43</sup> The majority opinion on the interim ruling was that:<sup>44</sup>

The Indians though Living amongst the Kings Subjects in these Countries, are a Separate and Distinct People from them, they are treated with as Such, they have a Polity of their own, they make Peace and War with any Nation of Indians when they think fit, without controul from the English.

...

... [A] Matter of Property in Lands in Dispute between Indians a Distinct People (for no Act has been Shewn whereby them became Subjects) and the English Subjects, cannot be Determined by the Laws of our Land, but by a Law Equal to both Parties, which is the Law of Nature and Nations.

Whatever the precise sovereign status of Indian tribes at common law, the *Mohegan* case recognised Indian customary law as an independent system rather than one absorbed into and modified by the municipal law of the colony which governed settlers.

The *Mohegan* case, while interesting in indicating that some sort of Indian independence was not unthinkable in British legal understanding, is not on its own authoritative of the status of Indian tribes. The Covenant Chain itself may tell a slightly different story and with perhaps greater claims to authority. At the least, and as Sir William Johnson insisted, it seems to show that Indians tribes were regarded as retaining internal sovereignty. That was the basis on which the

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<sup>42</sup> Ibid 829.

<sup>43</sup> See ibid 820-826.

<sup>44</sup> Book of proceedings before the Commissioners of Review (1743), quoted in Walters “*Mohegan Indians*”, above n 7, 820.

Covenant Chain continued to be brightened by annual present-giving by the British down to the Revolutionary War and, as will be seen, beyond it.

### **The Canadian Colonies**

Until the Treaty of Paris (1763) with France, British interests in what is now Canada were limited. Small colonies in Newfoundland and Nova Scotia (which then included the settlements of New Brunswick, later a separate colony) undertook fishing and trading, with only limited farming. Dealings with the small native populations (which were measured in hundreds only) did not require the same formal treaty relations as developed in the Thirteen Colonies, although in Nova Scotia there were treaties of peace and friendship which respected aboriginal power. These colonies were in addition to Rupert's Land, which was under charter to the Hudson's Bay Company. Following the Seven Years' War, Britain obtained the territories later to be called Lower Canada (Quebec), Upper Canada (Ontario), Prince Edward Island, and Cape Breton (which was later added to the colony of Nova Scotia). The British territories were to receive a large influx of loyalist British settlers following the American Revolutionary War (1775–83). This significantly changed the balance in the power relationship with aboriginal groups.

British imperial policy towards the Indian tribes of Canada was concentrated on Upper Canada. Although the 1763 Proclamation purported to apply to all the Canadian possessions, the small and strategically unimportant Indian populations outside Upper Canada were not a focus of sustained imperial interest, and dealings with them were largely left to local officials and, in some colonies, settler assemblies, with predictably dire results for Indians. While Indian tribes may have been left to manage themselves (in a similar manner to the Aboriginal tribes of the Australian colonies), this was without any legal status such as arguably was recognised in respect of those Indian tribes who entered into the Covenant Chain. Although there were a few cases where Indians were prosecuted for serious crimes

under colonial law, colonial authorities seem to have ignored transgressions which involved Indians only, other than the exceptional case of murder.<sup>45</sup>

In Upper Canada, the Indian population was more numerous and it was necessary to deal with them for re-settlement both of the British who had been displaced from the American colonies and of the Six Nations Indians of New York State who had fought for the British. Upper Canada, too, was of strategic importance because of its border with the United States.<sup>46</sup> In Upper Canada, the Covenant Chain approach as developed by Sir William Johnson continued under family stewardship. Colonel Guy Johnson, Sir William's nephew, and Sir John Johnson, Sir William's son, were successively Superintendent General of Indian Affairs from 1774 to 1828. Sir William's grandson, William Claus, was Deputy Superintendent from 1800–26.<sup>47</sup>

By the Quebec Act 1774 much of the territory set aside for Indian nations by the Royal Proclamation of 1763<sup>48</sup> was added to the province of Quebec (later, in 1791, to be separated into the colonies of Upper and Lower Canada).<sup>49</sup> The Indian territory included the lands inhabited by the Ojibway (or Chippewa) peoples, to

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<sup>45</sup> See John Reid & Elizabeth Mancke "From Global Processes to Continental Strategies: The Emergence of British North America to 1783" in Phillip Buckner (ed) *Canada and the British Empire* (Oxford University Press, Oxford, 2008) 43-65; JM Bumstead "The Consolidation of British North America, 1783–1860" in Phillip Buckner (ed) *Canada and the British Empire* (Oxford University Press, Oxford, 2008) 43-65 at 43-46; Elizabeth Errington "British Migration and British America, 1783–1867" in Phillip Buckner (ed) *Canada and the British Empire* (Oxford University Press, Oxford, 2008) 140-159 at 142-143 & 154; Sarah Carter "Aboriginal People of Canada and the British Empire" in Phillip Buckner (ed) *Canada and the British Empire* (Oxford University Press, Oxford, 2008) 200-219 ["Carter 'Aboriginal People of Canada and the British Empire'"] at 200-204; John Reid "*Pax Britannica* or *Pax Indigena*? Planter Nova Scotia (1760–1782) and Competing Strategies of Pacification" (2004) 85:4 *The Canadian Historical Review* 669-692; LFS Upton "Indian Affairs in Colonial New Brunswick" (1974) 3:2 *Acadiensis* 3-26 ["Upton 'Indian Affairs in Colonial New Brunswick'"]; LFS Upton "Indian Policy in Colonial Nova Scotia 1783–1871" (1975) 5:1 *Acadiensis* 3-31 ["Upton 'Indian Policy in Colonial Nova Scotia'"]; LFS Upton "Indians and Islanders: The Micmacs in Colonial Prince Edward Island" (1976) 6:1 *Acadiensis* 21-42 ["Upton 'The Micmacs in Colonial Prince Edward Island'"]; LFS Upton "The Extermination of the Beothuks of Newfoundland" (1977) *The Canadian Historical Review* 133-153 ["Upton 'The Extermination of the Beothuks'"]; and Sidney Harring *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (University of Toronto Press for The Osgoode Society for Canadian Legal History, Toronto, 1998) ch 8.

<sup>46</sup> Carter "Aboriginal People of Canada and the British Empire", above n 45, 204.

<sup>47</sup> Walters "Brightening the Covenant Chain", above n 10, 97 & 115.

<sup>48</sup> For the Royal Proclamation of 1763, see Chapter 5, text accompanying ns 24-26.

<sup>49</sup> Much Indian territory, however, passed into the control of the United States of America when Britain ceded that part of Quebec south of the Great Lakes in 1783.

which the Mississauga belonged. The Mississauga possessed the north shores of Lake Ontario and Lake Erie. They had joined the Covenant Chain in 1761. With the Loyalist Migration creating demand for land, the British Crown treated with the Mississauga for acquisition of large tracts for settlement, some of which were also used for the relocation of the Six Nations Indians.<sup>50</sup> As was the case with similar dealings with other Indian bands, the agreements with the Mississauga typically reserved portions of the land to be retained by them under their customs.<sup>51</sup>

Indian legal status and the application of colonial law to them was not mentioned in the legislation of the British Parliament, including the Quebec Act 1774 and the Constitutional Act 1791 (by which Quebec was divided into Lower and Upper Canada). Nor was it dealt with expressly in colonial ordinances made under authority of those Imperial Acts.<sup>52</sup> The work of Mark Walters, however, demonstrates that, “[w]ithin this little England”,

aboriginal law and government continued to regulate the internal affairs of Indian nations in unsundered lands, and little attempt was made to assert English law in native communities.<sup>53</sup>

The status of Indian bands under the Covenant Chain remained “one of quasi-independence”.<sup>54</sup> Walters concludes that “the opinions and policies of the imperial crown were not inconsistent with the continuity of aboriginal jurisdiction over internal native matters even after the introduction of colonial law and courts into the territory”.<sup>55</sup> This view is substantiated by a number of considerations, developed by Walters in several different articles. They include the position taken by Lieutenant-Governor Simcoe of Upper Canada, and approved by the British Government, in relation to the rights of Indian tribes in that part of Quebec ceded

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<sup>50</sup> Mark Walters “‘According to the Old Customs of Our Nation’: Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826–1847” (1999) 30:1 *Ottawa Law Review* 1-45 [“Walters ‘The Credit River Mississauga Reserve’”] at 7-8 & 14-15.

<sup>51</sup> See Chapter 5, text accompanying n 75.

<sup>52</sup> Walters “Reconsidering the *Shawanakiskie* Case”, above n 33, 283-285; Walters “Brightening the Covenant Chain”, above n 10, 107-108.

<sup>53</sup> Walters “The Credit River Mississauga Reserve”, above n 50, 15.

<sup>54</sup> *Ibid* 16.

<sup>55</sup> Walters “Reconsidering the *Shawanakiskie* Case”, above n 33, 284.

to the United States by the Treaty of Paris 1783. In despatches and speeches (including to affected Indian bands at a council at Niagara in 1793) Simcoe described the Indian tribes of the Great Lakes as “Free Nations” and “Independent Nations”. Their agreement to British settlement had not entailed loss of Indian sovereignty, which had been secured by treaties<sup>56</sup> and “reciprocally and constantly acknowledged”.<sup>57</sup> The British position was that American claims to a “sort of Paramount Sovereignty” (as Thomas Jefferson was said to have described it) were unfounded because contrary to “the nature of the Indian sovereignty”. Such assertion of authority over Indian nations by reason of their occupancy of lands within the territorial boundaries of the United States was a “novel” principle, “never assumed by the British Nation” and incompatible with the “natural rights” and “acknowledged Independency” of Indians.<sup>58</sup>

As Walters shows, these views were also held by Simcoe and the British Government in relation to the status of the Indian tribes of Upper Canada.<sup>59</sup> They were also the views of other officials in Upper Canada. So, for example, the Attorney-General in 1796 advised that freehold estate could not be granted by the Crown to the Six Nations since they “do not acknowledge the Sovereignty of the King” and were, rather, “Allies” and “Aliens” who, under English law, could not hold estates from the Crown.<sup>60</sup> Similarly, Justice William Dummer Powell (later Chief Justice), in an extrajudicial report on the Six Nations in 1797, stated the position as being that:<sup>61</sup>

The manners of the Indians required that the Tract assigned them should be in common[,]  
inalienable[, and kept out of the view of our Municipal Laws, at least so long as they  
affected to consider themselves Allies, for this purpose a Council, a Treaty, a [wampum]

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<sup>56</sup> At the council at Niagara in 1793, Simcoe provided copies of earlier treaties to the Indian nations to help them in their negotiations with the United States. Walters “Brightening the Covenant Chain”, above n 10, 111.

<sup>57</sup> Simcoe’s own efforts to brighten the Covenant Chain and his understanding of it are described by Walters. See *ibid* 113.

<sup>58</sup> *Ibid* 109-112.

<sup>59</sup> *Ibid* 112-113.

<sup>60</sup> White to Russell, 26 September 1796, quoted in Walters “Brightening the Covenant Chain”, above n 10, 114.

<sup>61</sup> Powell to Russell, 3 January 1797, quoted in Walters “Brightening the Covenant Chain”, above n 10, 114.

## Chapter Four: British Sovereignty & Native Government

Belt, was adequate; it was a Compact of one nation with another, to be governed by general rules and not by the provisions of the common Law of England.... [The] Government cannot wish to constrain them or to introduce our Laws among them as long as they continue a people apart ... .

Powell's "personal opinion", expressed in a communication deprecating the indictment of the son of the Six Nations' chief, Joseph Brant, for the murder of a non-Indian on reserve land, was "ever in favour of the entire Independence of the Indians in their Villages".<sup>62</sup> Walters considers Powell's opinions to be "consistent with imperial crown policy". He maintains that they suggest that Indian lands were "enclaves exempt from the regular course of colonial municipal law and the jurisdiction of colonial courts". Relations with the British were not a matter of municipal law but of treaty. Matters occurring on Indian lands "fell within the jurisdiction of the native nations themselves".<sup>63</sup>

Additional substantiation for his views is found in further statements of officials, cited by Walters. So, one administrator in 1797 described unceded Indian lands as "extra-judicial Territory".<sup>64</sup> And William Claus, when Deputy Superintendent General of Indian Affairs, reported that, at a council at the Muncey Delaware reserve in 1820, Indians were advised that:<sup>65</sup>

they must consider themselves subject to our Laws if they committed any outrage or offences on our Land ... . Any outrage among themselves committed on their own Lands they might punish or compromise as they thought proper.

Despite the significant change in population balance between settlers and Indians in Upper Canada in the late eighteenth and early nineteenth centuries, British relations with Indian tribes continued in the pattern set by Sir William Johnson before the Revolutionary War. They continued to be an imperial, not a local

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<sup>62</sup> Powell "Statement Respecting Mr Brant", enclosed in Powell to Russell, 3 January 1797, quoted in Walters "Reconsidering the *Shawanakiskie* Case", above n 33, 292.

<sup>63</sup> Walters "Reconsidering the *Shawanakiskie* Case", above n 33, 292.

<sup>64</sup> Russell to the Duke of Portland, 28 January 1797, quoted in Walters "Reconsidering the *Shawanakiskie* Case", above n 33, 285.

<sup>65</sup> Claus to Johnson, 25 November 1820, quoted in Walters "Reconsidering the *Shawanakiskie* Case", above n 33, 288.

colonial, concern. They continued within the framework of the Covenant Chain, under the supervision of members of the Johnson family.<sup>66</sup> That this was not simply a dynastic preference is, however, indicated by imperial instructions to Sir John Johnson (Superintendent General until 1828) to follow the approach taken by Sir William Johnson in conducting Indian affairs.<sup>67</sup> Walters points also to treaties for acquisition of land in this period as acknowledging the status and authority of Indian chiefs in relation to their nations. He argues that it is implicit in this recognition that “at least aspects of native customary law and government had survived in unceded lands notwithstanding the introduction of colonial law and courts into the province”.<sup>68</sup>

Few prosecutions of Indians for crimes even against Europeans are recorded in the late eighteenth and early to mid-nineteenth centuries. This reflected doubt about the jurisdiction of colonial courts to deal with Indians, which does not seem to have been resolved until the second half of the nineteenth century. It is only from that time that Indians appeared regularly in criminal cases. Although a handful of Indians were indicted for crimes before the 1820s, they were rarely arrested and tried.<sup>69</sup> Instead, most inter-racial crime was resolved at nation-to-nation council meetings.<sup>70</sup>

The first conviction in Upper Canada for a crime in which perpetrator and victim were both Indian did not occur until 1822, in the prosecution of Shawanakiskie. Although there had been earlier cases where charges had been presented to grand juries, no indictments had resulted before 1821. Chief Justice Powell explained that the enquiries had been taken away from the grand juries upon “representation of a Treaty”, in apparent reference to treaty recognition of Indian jurisdiction in such

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<sup>66</sup> As to the way in which the Johnson family kept the Covenant Chain bright in this period, see Mark Walters “The Morality of Aboriginal Law” (2006) 31:2 Queen’s Law Journal 470-520 [“Walters ‘The Morality of Aboriginal Law’”] at 489-490 and Walters “Brightening the Covenant Chain”, above n 10, 116-117.

<sup>67</sup> See Walters “Brightening the Covenant Chain”, above n 10, 115-116, discussing the 1783 Instructions to Sir John Johnson (reissued twice, in 1787 and 1812).

<sup>68</sup> Walters “Reconsidering the *Shawanakiskie* Case”, above n 33, 287.

<sup>69</sup> In one such exceptional case in 1820, the prerogative of mercy was exercised in sentence. See Walters “Reconsidering the *Shawanakiskie* Case”, above n 33, 294 n 90.

<sup>70</sup> Ibid 286 & 294; Harring *White Man’s Law*, above n 45, 123.

matters.<sup>71</sup> In the 1821 trial presided over by Powell, the question of jurisdiction remained judicially undetermined when the accused was acquitted for “want of any evidence”.<sup>72</sup>

The case of *R v Shawanakiskie* (1822) is important not only because it was the first conviction of an Indian for a crime against another Indian but because it is relied on by some scholars as establishing the jurisdiction of the courts of Upper Canada over Indians in all criminal matters, negating tribal authority in respect of such matters.<sup>73</sup> As Walters has demonstrated, the case is much more equivocal. It is far from a denial of native jurisdiction in internal matters and does not support a claim that Indians were subject to colonial criminal law in all cases.<sup>74</sup>

The case concerned the killing of an Indian woman in the British town of Amherstburg by Shawanakiskie, a member of the Ottawa nation. The question of jurisdiction was covered in Justice William Campbell’s charge to the grand jury, which indicted Shawanakiskie. When, following Shawanakiskie’s conviction at trial, a question arose as to whether jurisdiction was ousted by treaty, the jurisdictional question was referred by the Lieutenant-Governor to the other members of the King’s Bench, Chief Justice Powell and Justice D’Arcy Boulton.<sup>75</sup>

Campbell’s grand jury charge was framed before any question of treaty exemption arose. In substance, he took the view that there were three possibilities where criminal responsibility of Indians was concerned. First, in unceded territories,

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<sup>71</sup> Powell’s charge to the Grand Jury of the Western District, Autumn 1821, quoted in Walters “Reconsidering the *Shawanakiskie* Case”, above n 33, 300.

<sup>72</sup> Powell to Hillier, 8 October 1822, quoted in Walters “Reconsidering the *Shawanakiskie* Case”, above n 33, 300.

<sup>73</sup> See, for example, Lisa Ford *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Harvard University Press, Cambridge, Massachusetts, 2010) [“Ford *Settler Sovereignty*”] 186; John Pratt “Aboriginal Justice and the ‘Good Citizen’: an Essay on Population Management” in Kayleen Hazlehurst *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Avebury Press, Aldershot, United Kingdom, 1995) 39–71 at 46–47; and Russell Smandych “The Exclusionary Effect of Colonial Law: Indigenous Peoples and English Law in Western Canada, 1670–1870” in Louis Knafl & Jonathan Swainger (eds) *Laws and Societies in the Canadian Prairie West, 1670–1940* (University of British Columbia Press, Vancouver, 2005) 127–149 [“Smandych ‘Exclusionary Effect’”] at 132.

<sup>74</sup> Walters “Reconsidering the *Shawanakiskie* Case”, above n 33, 274.

<sup>75</sup> Ibid 293.

Indians were “not amenable to our Laws or Courts of Justice”.<sup>76</sup> Secondly, on reserved lands “situated in the immediate vicinity of, and indeed surrounded by extensive settlements of Europeans or civilized Inhabitants”, Indians might, for reasons of policy, be subject to colonial laws, at least for “crimes against the law of nature”, such as murder. Campbell explained the policy in these terms:

To Indians so situate, with whom we have daily intercourse, and sometimes intermarry, it might be extremely dangerous to extend such exemption from the laws of the land, particularly in cases of murder and other atrocious crimes against the law of nature, or against the universally acknowledged rights of *meum* and *tuum* [i.e. rights of property], for I make a very natural distinction between such crimes and those that are made so merely by many of our municipal Laws, and of which the Indians can have no knowledge.

Thirdly, Campbell considered that jurisdiction for crimes committed in European settlement was “full and unquestionable”.<sup>77</sup>

When, after Shawanakiskie’s conviction, the issue of whether he was exempted by treaty from application of British criminal law arose, Campbell referred the matter to Lieutenant-Governor Maitland with the comment that “other Judges had on former occasions expressed an Opinion that the Indians of this Country are in no case amenable to our Laws, being exempted therefrom by Treaty”. When Maitland referred the question to Powell and Boulton, they expressed very different views. Boulton took the view that a treaty exemption was “preposterous” in relation to Indians “resident amongst us”, who were “under the protection of our Law”. If any exemption existed under treaty it could only be in relation to “cases within Indian Territory” (which Walters considers to be a reference not to unceded Indian lands within Upper Canada but to Indian lands beyond its borders).<sup>78</sup> Powell replied by sending Maitland his 1821 grand jury charge (in the case where the Indian accused had ultimately been acquitted for insufficiency of evidence). Walters extrapolates

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<sup>76</sup> While the matter is not free from controversy, to my mind, Walters convincingly demonstrates that Campbell reached this position as a matter of law and not as a pragmatic response to the difficulties of enforcement. See *ibid* 296-298.

<sup>77</sup> Campbell’s charge to the Grand Jury, Autumn 1822, quoted in Walters “Reconsidering the *Shawanakiskie* Case”, above n 33, 294-296.

<sup>78</sup> Walters “Reconsidering the *Shawanakiskie* Case”, above n 33, 293 & 299-300.

from it, in detail which it is not necessary to repeat, that, quite apart from treaty exemptions, Powell's view was that jurisdiction could not be asserted over natives who adhered to their own "habits" or customs (of which colonial courts were "ignorant"), and who were themselves "ignorant" of British law. In his charge, Powell therefore continued to adhere to his 1797 opinions that British law did not apply to Indians who remained outside settler society. Powell's 1821 grand jury charge had left open whether a treaty exemption existed but did not suggest that any such exemption would be ineffective, as Boulton had suggested.<sup>79</sup> (It may be noted that the colonial administration never located the treaty in issue. It seems clear that it was the 1764 Detroit treaty made by Colonel Bradstreet, discussed earlier, which did indeed contain an exemption from colonial criminal jurisdiction.<sup>80</sup>) For present purposes, it is enough to note Walters' verdict that the case established no more than that "natives offending against natives in settled parts of the colony were subject to colonial jurisdiction".<sup>81</sup> Although Boulton thought that treaty exemption was impossible as a matter of law, the other two judges considered that, irrespective of proof of an express treaty exemption, as a matter of law, British jurisdiction over Indians depended on the circumstances.

It is not surprising given the doubts about colonial criminal jurisdiction over Indians within Upper Canada that there was no attempt to use the Canada Jurisdiction Act 1803 to apply British criminal law to Indians beyond the boundaries of the Canadian colonies. This was true also of Rupert's Land, at least until 1839.<sup>82</sup> Prosecutions under the Act were only for murder and never against a "full-blooded" Indian. All the Métis (those of mixed blood) prosecuted for murder

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<sup>79</sup> Powell's charge to the Grand Jury of the Western District, Autumn 1821, quoted and discussed in Walters "Reconsidering the *Shawanakiskie* Case", above n 33, 300-303.

<sup>80</sup> Walters "Reconsidering the *Shawanakiskie* Case", above n 33, 278-279 & 305; and see text accompanying ns 25-30 above.

<sup>81</sup> Ibid 306.

<sup>82</sup> In 1839 Adam Thom was appointed as Recorder of the Quarterly Court of Assiniboia at the Red River. His more expansive view of British jurisdiction in relation to Indians may, as Foster has argued, have been a case of "perceived necessities, and [his] somewhat aggressive approach ..., carry[ing] the day, not law". See Hamar Foster "Law and Necessity in Western Rupert's Land and Beyond, 1670-1870" in Louis Knafla & Jonathan Swainger (eds) *Laws and Societies in the Canadian Prairie West, 1670-1940* (UBC Press, Vancouver, 2005) 57-91 ["Foster 'Law and Necessity'"] at 76. Compare Smandych "Exclusionary Effect", above n 73, 131-132.

were either directly employed by fur companies or were closely associated with them in some way. Even so, and as late as 1838, the conviction of a Métis, who worked for the Hudson's Bay Company, for the murder of a K'ashot'ine Indian was highly controversial.<sup>83</sup>

From all this it can be seen that, by the mid-1820s in Upper Canada and the Indian Territories, Indians were still treated as allies rather than British subjects despite Britain's assertion of complete territorial sovereignty. Indian internal affairs were not the concern of colonial government and law. Whether Indian tribes possessed internal "sovereignty", and whether their internal government was recognised by the imperial legal order, remained as open as it had been at the time of the *Mohegan* case. Colonial judges and officials did not develop any overt doctrine to explain the legal status of Indian tribes. But their acknowledgment of the significance of the Covenant Chain relationships is not reconcilable with a denial of some special status.

For the purposes of this thesis, it is the position in 1840 that is critical. The description of Upper Canada history summarized here suggests that Paul McHugh is over-bold to say that as the 1820s progressed Indians were no longer "'Allies' with a measure of recognised autonomy" but had become "'Subjects' amenable to English law" and that "[t]he notion of British sovereignty as being exhaustive and leaving no formal room for tribal law and custom had taken hold".<sup>84</sup> McHugh describes this shift as attributable to the new imperatives of Empire: military and

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<sup>83</sup> Hamar Foster "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act Cases*" (1991-1992) 21 *Manitoba Law Journal* 343-389 ["Foster 'Forgotten Arguments'"] at 363-383; Foster "Law and Necessity", above n 82, 73-78.

<sup>84</sup> McHugh *Aboriginal Societies*, above n 6, 107. McHugh writes that, by the end of the 1820s, Indian "forms of political organization and representation were denied juridical standing before the courts of Upper Canada. Their relations with the Crown were rendered 'political' in the sense of being non-justiciable or unrecognizable in the colonial courts except through the protective agency of the Governor." Indians could not bring proceedings in colonial courts to protect their collective customary rights, which became political claims only. *Ibid* 156; and see the evidence relied upon at *ibid* 154-155. Whether these conclusions are sound on a full review of the historical record is beyond the scope of this thesis.

strategic reasons for alliances with Indian tribes had faded and the principal concern became obtaining land for settlement.<sup>85</sup>

It is undeniable that there were significant changes in the relationship between colonial administration and Indian nations in the period 1820–40. Colonial policy became increasingly influenced by humanitarian and missionary concerns to protect and to “civilise” Indians. Such attitudes inevitably entailed greater intrusion on Indian society.<sup>86</sup> At the same time, as Indian affairs passed out of the hands of the Johnson family, there was a decline of British interest in brightening the Covenant Chain and a loss of understanding of its importance, illustrated by a growing scepticism about present giving which came to be seen as encouraging Indian dependency (and was finally discontinued in 1858). Even while the traditional forms were still outwardly followed, Walters describes an increasing unwillingness of British officials to engage with Indian culture in its own terms.<sup>87</sup> This period of “rusting” of the Covenant Chain coincided with change and decline in traditional Indian society as it was encroached upon by European settlement. In this period, expressions of impatience with Indian ideas of independence became more common. Such statements are relied upon by McHugh in support of his argument that British sovereignty now excluded plurality in government and law.

So, Lieutenant-Governor Maitland, writing in connection with the Shawanakiskie case to the Secretary of State for the Colonies, accepted the advice of Justice Boulton that there could be no Indian exemption from municipal criminal law. He acknowledged that the colonial administration may itself have contributed to the contrary view “by declining to punish offenders among the Indians themselves, except in atrocious cases”.<sup>88</sup> In the mid-1820s, the Attorney-General (later to be Chief Justice), John Beverley Robinson, ridiculed the idea of treaties with the Mohawk Indians “residing in the heart of one of the most populous districts of

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<sup>85</sup> Ibid 107 & 152-153.

<sup>86</sup> See Chapter 3, text accompanying n 197. See also Walters “The Credit River Mississauga Reserve”, above n 50, 19.

<sup>87</sup> See Walters “Brightening the Covenant Chain”, above n 10, 118-125.

<sup>88</sup> Maitland to Bathurst, 1 November 1823, quoted in Walters “Reconsidering the *Shawanakiskie* Case”, above n 33, 304-305. See also McHugh *Aboriginal Societies*, above n 6, 107.

Upper Canada, upon lands purchased for them and given to them by the British Government”. In his opinion this was much the same as talking of “making a treaty of alliance with the Jews in Duke street or with the French emigrants who have settled in England”.<sup>89</sup> Separately, he asserted that the Governor “has no power to exempt the Mohawk Indians inhabiting the Province from the operations of the laws Civil and Criminal”.<sup>90</sup> In 1839, Justice Macaulay expressed the view that the Indian “cherished belief of independence as a separate people” was untenable because they were “domiciled within the organized portions of the Province”.<sup>91</sup>

[T]he Six Nations have, I believe, asserted the highest pretensions to separate nationality, but in the Courts of Justice they have been always held amenable to, and entitled to the protection of the Laws of the land. Instances could be cited in which Indians in different parts of the Province have been arraigned, criminally, for homicides committed on white people and on each other, and also for other indictable offences.<sup>92</sup>

In the 1851 case of *Sheldon v Ramsey*, Justice Burns described the Six Nations as having “no corporate powers or existence” nor “any recognised patriarchal or other form of government or management, so far as we see in any way”. They had never been recognised as “a separate and independent nation, governed by laws of their own, distinct from the general law of the land”. They were “British subjects, and under the control of and subject to the general law of England”.<sup>93</sup>

Walters himself has identified the statements relied upon by McHugh. He acknowledges that they indicate a strand of thinking which is a shift from the former Indian policy. Even so, he points to substantial continuity which can be seen in the official record after 1830 and which points to the continuing recognition of Indian government and law in Upper Canada. Given this continuity, he

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<sup>89</sup> Robinson to Horton, 14 March 1824, quoted in McHugh *Aboriginal Societies*, above n 6, 155.

<sup>90</sup> Robinson to Givens, 9 July 1827, quoted in Walters “Reconsidering the *Shawanakiskie* Case”, above n 33, 305 n 114. See also McHugh *Aboriginal Societies* above n 6, 107.

<sup>91</sup> Macaulay “Report on Indian Affairs”, submitted to Lieutenant-Governor Arthur, 22 April 1839, quoted in Walters “Brightening the Covenant Chain”, above n 10, 125.

<sup>92</sup> Macaulay “Report on Indian Affairs”, submitted to Lieutenant-Governor Arthur, 22 April 1839, quoted in Smandych “Exclusionary Effect”, above n 73, 132-133.

<sup>93</sup> *Sheldon v Ramsay* (1852) 9 UCQB 105 at 133-134 per Burns J, quoted in McHugh *Aboriginal Societies*, above n 6, 154-155. McHugh incorrectly attributes these opinions to Chief Justice Robinson, who delivered a separate judgment in the case.

questions whether it is safe to think that the views expressed by Robinson and Macaulay “reflected the ‘true’ common law position for the period during which it was developed (from the 1840s to 1860s)”.<sup>94</sup>

It seems unlikely that the views expressed by Justice Campbell and Chief Justice Powell in 1821–22 could be abruptly discarded by the 1830s. And indeed there are pointers the other way. An 1836 Lower Canada Executive Council committee report referring to the Treaty of Niagara (1764) continued the view that the Indian tribes were “Allies” of the Crown and that their relationship had been confirmed by annual present-giving ever since.<sup>95</sup> There is no reason to think that the position in Upper Canada would have been different. Indeed also in 1836, the Attorney-General for Upper Canada, Robert Jameson, confirmed for the Lieutenant-Governor that relations with the Indian tribes were not for the local assembly but “most constitutionally within the jurisdiction and prerogative of the Crown”. While the Crown might be prevailed upon to sanction new arrangements for the internal government of the Indian tribes, that was not a course that could be imposed by the local assembly. Jameson described the relationship between the Crown and the tribes in terms that did not differ from those existing in 1776:<sup>96</sup>

The Territories which they inhabit within the Province are tracts of Crown land devoted to their sole use as his “Allies”, and over which His Majesty has never exercised his paramount right except at their request, and for their manifest advantage. They have within their own communities governed themselves by their own laws and customs—their Lands and property have never been subject to tax or assessment, or themselves liable to personal service. As they are not subject to such liabilities, whither to they yet possess the political privileges of His Majesty’s subjects generally.

Although McHugh says that this opinion expresses both “an older, dying legal characterisation of the tribes and the newer one of thoroughgoing amenability to

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<sup>94</sup> See, for example, Mark Walters “White Man’s Law” (2000) 25:2 Queen’s Law Journal 719-724 (book review) at 723.

<sup>95</sup> Report of a Committee of the Executive Council of Lower Canada to the Earl of Gosford, Governor of Lower Canada, 13 June 1837, quoted in Walters “Brightening the Covenant Chain”, above n 10, 119-120.

<sup>96</sup> Opinion of Attorney-General Jameson, 18 February 1836, quoted in McHugh *Aboriginal Societies*, above n 6, 153.

English law”,<sup>97</sup> it is difficult to read the opinion as other than an affirmation as at 1836 of the independence of Indian tribes in matters of internal government (whatever rights of British subjects they might also have).

A striking example of Indian self-government, located only 18 miles from the city of Toronto, was that of the Credit River Mississauga reserve, established in 1826. Under the leadership of Kahkewaquonaby, or Peter Jones (a Methodist minister born to a Welsh father and Mississauga mother), the Credit River Mississauga established themselves as a Christian farming community on the reserve. The community flourished and was treated as a model for aboriginal advancement in the report of 1837 by the House of Commons Select Committee on Aborigines, to whom Jones gave evidence.<sup>98</sup> The government and custom observed in the reserve was that adopted by the community itself. Its authority within the reserve was recognised by the colonial legislature when, in response to a petition by the band’s council, it made it an offence to hunt or fish on the reserve “without the consent of three or more of their principal men or chiefs”. As Walters has pointed out, this legislation proceeded on the assumption that the Mississauga had a lawfully established government. The statute left identification and empowerment of chiefs to the band’s internal customs. It did not impact upon Indians or their property. It empowered the Mississauga to deal with non-Indian trespassers.<sup>99</sup>

In 1830, the Credit River Mississauga Indians adopted a Constitution which was recognised by the Indian Department. The Constitution derived from “our ancient customs”. It asserted the nationhood of the band and maintained aspects of Indian customary law while adopting measures adapted to meet their modern circumstances. Enactments made under the Constitution by the band’s council regulated such matters as family rights, adoption, criminal responsibility, use of the

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<sup>97</sup> McHugh *Aboriginal Societies*, above n 6, 153-154.

<sup>98</sup> Walters “The Credit River Mississauga Reserve”, above n 50, 5 & 18-19. See Chapter 3, text accompanying ns 207-210.

<sup>99</sup> *Ibid* 20.

shared resources of the band, immigration, public welfare and ratification of treaties.<sup>100</sup>

Some other Indian nations also enacted constitutions in the 1830s and 1840s, which were also recognised by the Indian Department.<sup>101</sup> These may have been a late elaborate flourish on the earlier systems of Indian self-government. They may not have endured far into the 19th century in this form (the Credit River Mississauga Reserve Constitution endured only until the nation moved to the Grand River in 1847). But they show that British thinking had not rejected the principle and practice of tribal autonomy by 1840. Nor do they suggest that at that date there was no longer room for tribal law or custom to be recognised by the legal system of Upper Canada. As Walters points out, the Credit River Mississauga nation was “an aboriginal nation exercising legislative, executive and judicial power of its own over a full range of civil and criminal matters”. This was “with the full knowledge and active encouragement of colonial and imperial officials whose own legal and government institutions were based in a capital located only a short distance away”.<sup>102</sup>

It would strain credulity to suggest that this legal system did not have some legal status in colonial and imperial law, either at common law or as an incident to treaty rights to reserve land.

Some of the statements already discussed which seem adverse to Indian self-government arose in the context of resettlement of Six Nations Indians from the United States under the authority of the Crown. Others seem to be typically concerned with Indians living in or close to British settlements. The position may have been seen to be different in the case of unceded Indian lands or bands on reserved lands which were more remote from British settlements. Certainly Chief Justice Robinson, who had taken the view as Attorney-General in the mid-1820s that the Mohawk Indians were subject to colonial criminal and civil laws, took the

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<sup>100</sup> Ibid 24-45.

<sup>101</sup> See the examples given by Walters “The Credit River Mississauga Reserve”, above n 50, 25 n 129.

<sup>102</sup> Ibid 43.

view as late as 1859, in the case of *R v McCormick*, that unceded Indian lands within Upper Canada “had never by any particular act been reduced into actual possession of the Crown” and could “never be supposed to have been under the actual supervision and charge of its officers”.<sup>103</sup>

## Australia

In the Australian colonies, there was nothing equivalent to the engagement of British North American administrators with the Indian bands. In New South Wales, the extent of effective government even at 1840 was confined to a radius of about 100 miles from Sydney. This limitation and the absence of any incentive to enter into relations with Aboriginal groups (as for the purposes of land purchases or alliances for security) meant that no relationships comparable to the Covenant Chain in Upper Canada eventuated. The Instructions to Governors said little about policy towards Aborigines beyond statements about their protection from violence.<sup>104</sup> Charters of Justice given to the colony did not suggest that Aborigines were subject to colonial law, although an 1816 Proclamation by Governor Macquarie purported to prohibit fighting between Aborigines and customary punishments “at or near Sydney, and other principal Towns and Settlements in the Colony”.<sup>105</sup>

Contact between Aborigines and settlers occurred principally at the margins of settlement, as squatters moved to occupy lands further afield. While some settlers employed Aborigines, many resorted to violence to drive them from their lands. Where Aborigines retaliated with violence, the colonial administration intervened in support of the settlers, either by sending troops or by giving encouragement to private settler expeditions. While some Governors were interested in “civilising”

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<sup>103</sup> *R v McCormick* (1859) 18 UCQB 131, 135-136 per Robinson CJ, quoted in Walters “Reconsidering the *Shawanakiskie* Case”, above n 33, 286.

<sup>104</sup> Alan Atkinson “Conquest” in Deryck Schreuder & Stuart Ward (eds) *Australia’s Empire* (Oxford University Press, Oxford, 2008) 33-53 [“Atkinson ‘Conquest’”] at 42; AGL Shaw “British Policy Towards the Australian Aborigines, 1830–1850” (1992) 25:99 *Australian Historical Studies* 265-285 [“Shaw ‘British Policy’”] at 268; McHugh *Aboriginal Societies*, above n 6, 159.

<sup>105</sup> McHugh *Aboriginal Societies*, above n 6, 159-160.

Aborigines, this did not prevent them from supporting punitive expeditions against those Aboriginal groups implicated in violence.<sup>106</sup> In Van Diemen's Land, the clashes between settlers and Aborigines were particularly violent. It is estimated that between 1824 and 1831 more than 187 settlers, and perhaps two to three times that number of Aborigines, were killed. The effects of settlement on the Aboriginal population of Van Diemen's Land were catastrophic: their numbers were reduced from an estimated 2,000–6,000 to 300–400 by the early 1830s when Lieutenant-Governor Arthur, attempting to preserve them from further destruction, first tried to confine them to the Tasman Peninsula and then, when that plan failed, moved them to Flinders Island in Bass Strait where they “lived and died in the hands of government”.<sup>107</sup>

By the 1830s, the humanitarian movement in Britain had extended its concern from slavery to the treatment of aborigines in British colonies. The Colonial Office began to reprimand governors of the Australian colonies for not controlling violence against Aborigines and for the involvement of their administrations in punitive military expeditions.<sup>108</sup> By 1837, following the report of the Aborigines Committee, Glenelg instructed Governor Bourke of New South Wales that all Aborigines within the territory of the colony were to be regarded as subjects:<sup>109</sup>

Your Commission as Governor of N.S. Wales asserts H.M.'s Sovereignty over every part of the Continent of New Holland which is not embraced in the Colonies of Western or Southern Australia. Hence I conceive it follows that all the natives inhabiting those Territories must be considered as Subjects of the Queen, and as within H.M.'s Allegiance. To regard them as Aliens with whom a War can exist, and against whom H.M.'s Troops may exercise belligerent right, is to deny that protection to which they deserve the highest possible claim from the Sovereignty which has been assumed over the whole of their Ancient Possessions. ... If the rights of the Aborigines as British

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<sup>106</sup> Richard Waterhouse “Settling the Land” in Deryck Schreuder & Stuart Ward (eds) *Australia's Empire* (Oxford University Press, Oxford, 2008) 54-77 [“Waterhouse ‘Settling the Land’”] at 59; Atkinson “Conquest”, above n 104, 43; Ann Curthoys “Indigenous Subjects” in Deryck Schreuder & Stuart Ward (eds) *Australia's Empire* (Oxford University Press, Oxford, 2008) 78-102 [“Curthoys ‘Indigenous Subjects’”] at 86; Shaw “British Policy”, above n 104, 268.

<sup>107</sup> Atkinson “Conquest”, above n 104, 46-47.

<sup>108</sup> Shaw “British Policy”, above n 104, 268; Curthoys “Indigenous Subjects”, above n 106, 89.

<sup>109</sup> Glenelg to Bourke, 26 July 1837, reproduced in *Historical Records of Australia*, series 1, vol 19, 47-50 at 48-49.

## Chapter Four: British Sovereignty & Native Government

Subjects be fully acknowledged, it will follow that, when any of them comes to his death by the hands of the Queen's Officers, or of persons acting under their Command, an Inquest should be held to ascertain the cause which lead to the Death of the deceased. Such a proceeding is important not only as a direct protection to Society at large against lawless Outrage, but as it impresses on the Public a just estimate of the value of Human Life.

By the same despatch, Glenelg approved the steps Bourke had taken to inquire into the deaths of Aborigines at the hands of explorers under the command of Major Mitchell. While Glenelg saw "no reason to dissent" from the conclusion reached by Bourke's Executive Council on the inquiry that the killings had been in self-defence, he nevertheless directed Bourke to refer the case to the New South Wales law officers for decision on "the lawfulness of Major Mitchell's proceedings, or [whether] ... a further enquiry [was] necessary for vindicating the Authority of the Law".<sup>110</sup> These instructions were no doubt a factor in prosecutions in relation to Aboriginal killings such as those taken by Governor Gipps in 1838 in relation to the Myall Creek massacre.<sup>111</sup> However, attitudes in New South Wales remained hostile to Aborigines: violence continued and military action against Aborigines did not end; juries seldom convicted settlers for crimes of violence against Aborigines.<sup>112</sup>

As may be seen in other parts of the Empire at the same time, evangelical and humanitarian concerns led in the Australian colonies in the 1830s to support for the work of the missionaries, the establishment of Protectors of Aborigines (to investigate injuries done to them and to defend them charged with offences), and even the creation of some land reserves (typically beside mission stations). In

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<sup>110</sup> Ibid 49.

<sup>111</sup> Waterhouse "Settling the Land", above n 106, 58; Curthoys "Indigenous Subjects", above n 106, 90.

<sup>112</sup> Waterhouse "Settling the Land", above n 106, 58; Heather Goodall "Authority Under Challenge: Pikampul Land Queen Victoria's Law During the British Invasion of Australia" in Mark Dauntun & Rick Halpern (eds) *Empire and Others: British Encounters with Indigenous Peoples, 1600–1850* (UCL Press, London, 1999) 260-279; Damen Ward "Constructing British Authority in Australasia: Charles Cooper and the Legal Status of Aborigines in the South Australian Supreme Court, c. 1840–60" (2006) 34:4 *The Journal of Imperial and Commonwealth History* 483-504 ["Ward 'Constructing British Authority'"] at 492-493; Brent Salter "Early Interactions Between Indigenous People and Settlers in Australia's First Criminal Court" (2009) *Australian Law Journal* 56-62.

practice, however, little came of these efforts, which were poorly resourced. Low expectations were soon realised.<sup>113</sup> By 1850, while Earl Grey expressed regret at the failure of the measures for the lot of the Aborigines, he accepted that “nothing more can be done”.<sup>114</sup> The dealings of the colonial administration in New South Wales with Aborigines amounted at this time to little more than the maintenance of a police force in frontier areas, annual distribution of blankets, and some medical assistance.<sup>115</sup> Expenditure on Aborigines remained low and information about them was sketchy at best (they were omitted from censuses).<sup>116</sup>

It is against this historical context that the April 1836 decision of the New South Wales Supreme Court in *R v Murrell*, holding (in reversal of earlier authority) that Aborigines were liable to penalty under colonial law in respect of conduct among themselves, must be considered.<sup>117</sup> Murrell had been charged with murder of another Aborigine on the highway between Richmond and Windsor (in what the Attorney-General was to describe as “a populous part of the King’s territory”). It seems that Murrell’s tribe had wanted the colonial courts to deal with him, to avoid conflict with his victim’s relatives.<sup>118</sup> The question of jurisdiction was raised as a preliminary point in the Supreme Court. The decision, asserting jurisdiction, is relied upon by some as reflecting a new Empire-wide orthodoxy that native peoples within a colonial territory were, by virtue of British territorial sovereignty, subject to British law.<sup>119</sup>

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<sup>113</sup> Shaw “British Policy”, above n 104, 272-285.

<sup>114</sup> Minute of Earl Grey, quoted in Shaw “British Policy”, above n 104, 284.

<sup>115</sup> Curthoys “Indigenous Subjects”, above n 106, 91. See also Ford *Settler Sovereignty*, above n 73, 203: “Despite *Murrell*, Aboriginal communities on New South Wales peripheries continued to regulate themselves for generations to come”.

<sup>116</sup> See, for example, R Montgomery Martin *The British Colonial Library* (John Mortimer, London, 1836, 12 vols) [“Martin *The British Colonial Library*”] vol 2 (*History of Australasia*); and R Montgomery Martin *History of the Colonies of the British Empire in the West Indies, South America, North America, Asia, Austral-asia, Africa, and Europe* (WH Allen, London, 1843) [“Martin *Colonies of the British Empire*”] 413-472.

<sup>117</sup> *R v Murrell and Bummaree* [1836] NSWSupC 35; *R v Ballard or Barrett* [1829] NSWSupC 26.

<sup>118</sup> Ford *Settler Sovereignty*, above n 73, 198.

<sup>119</sup> See, for example McHugh *Aboriginal Societies*, above n 6, 161-162; and Ford *Settler Sovereignty*, above n 73, 2-5 & 203.

There was no doubt at the time in New South Wales that *Murrell* expressed a new view as to the application of British law to Aborigines. In his summing-up to the jury at Murrell's trial (which followed the ruling of the full bench of the Supreme Court as to jurisdiction), Dowling, then Acting Chief Justice, said that "until recently it had been the general opinion of the Public and of one or two of the Judges, that Aboriginal Blacks were not amenable to British law, excepting when the aggression was made on a white man". In fact, as Lisa Ford has shown, even where a crime was committed by an Aborigine against a European, the exercise of jurisdiction by the Supreme Court was controversial until as late as 1835. Although in *Ballard* in 1829 the Court had asserted that jurisdiction in mixed cases was clear, the subsequent conduct of law officers in avoiding bringing such cases to court and the reluctance of judges to subject Aborigines to normal processes and sentences indicates official discomfort with the formally-adopted position in mixed cases.<sup>120</sup>

In *Murrell*, the judgment of the full Supreme Court was given by Justice Burton for himself and Chief Justice Forbes and Justice Dowling. The Court ruled that Aborigines were subject to the laws of New South Wales for offences in breach of the King's peace in the colony, including in respect of offending committed against other Aborigines. This proposition was unqualified in the judgment. It was explained in terms of English law being the "law of the land". New South Wales was a settled colony, the territory of which had been "unappropriated" when acquired by the British Crown. Although Aborigines were a "free and independent people", they were not a sovereign state governed by laws of their own. Imperial legislation setting up the legal system of the colony provided only for English law. Because the crime of which Murrell was accused took place within the colony, English law applied.

Additional makeweight points were made by Burton justifying jurisdiction. First, he said that it would be "the greatest possible inconvenience and scandal to this community" if murder and other serious crimes could be committed with impunity "in our Streets" simply because the accused and victim were both Aborigines.

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<sup>120</sup> Ford *Settler Sovereignty*, above n 73, ch 7.

Secondly, he expressed the view that it was to the advantage of Aborigines to have the “sanctuary” of English law, in apparent reference to the benefits both of deterring Aboriginal crime and of supplanting revenge killings demanded by custom. Thirdly, he expressed the view that access to British justice generally was likely “to produce the best results as to the Natives themselves”. Any difficulties in administering British justice to Aborigines arising from cultural difference could be addressed, Burton thought, by the local legislature and by readiness to exercise of the Royal Prerogative of Mercy to “people so circumstanced as they”.

The decision about jurisdiction in *Murrell* appears to have been received with some surprise in the wider community. A correspondent to the *Sydney Herald* queried the assertion in the case that Aborigines had no laws of their own and questioned the fairness of imposing upon them British laws of which they were ignorant, saying that if Murrell were found guilty and sentenced to death it would be “legal murder”.<sup>121</sup> In fact, Murrell was acquitted at trial after the jury had deliberated for a few minutes only. Ford comments of this speedy acquittal that it may have reflected the jury’s acceptance that “indigenous peoples were, to some degree, independent of British law”.<sup>122</sup>

*Murrell* left a number of questions unanswered. It did not decide that Aborigines were themselves British subjects and statements in the case seem to suggest that they were not so regarded. As seen above, this status was something the Colonial Office found it necessary to address directly in Glenelg’s despatch of 1837 and, in respect of South Australia, explicitly in Governor Hindmarsh’s proclamation of 28 December 1836.<sup>123</sup> Nor did *Murrell* answer the arguments that had led to

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<sup>121</sup> *The Sydney Herald*, 5 May 1836, reproduced in *R v Murrell and Bummaree* [1836] NSWSupC 35.

<sup>122</sup> Ford *Settler Sovereignty*, above n 73, 199. The acquittal may have reflected a popular preference not to include Aborigines in the colony as much as a view that it was unfair to apply British justice to them.

<sup>123</sup> Proclamation by Governor Hindmarsh, 26 December 1836, reproduced in Brian Dickey & Peter Howell (eds) *South Australia’s Foundation: Select Documents* (Wakefield Press, Netley, South Australia, 1986) 77: “It is also, at this time especially, my duty to apprise the Colonists of my resolution to take every lawful means for extending the same protection to the NATIVE POPULATION as to the rest of His Majesty’s Subjects, and of my firm determination to punish with exemplary severity, all acts of violence or injustice which may in any manner be

jurisdiction over Aborigines in respect of crimes against other Aborigines being rejected by the Supreme Court in *Ballard* in 1829.

In *Ballard*,<sup>124</sup> Chief Justice Forbes and Justice Dowling had not treated imperial legislation introducing English law into the colony as determinative. Rather, they had taken the view that the question of jurisdiction was determined by no “fixed known rule”. The policy adopted by judges and colonial governments in New South Wales and in other colonies (in particular the North American colonies) was “not to enter into or interfere with any cause of dispute or quarrel between the aboriginal natives”. Forbes said that he was “not aware that British laws have been applied to the aboriginal natives in transactions solely between themselves, whether of contract, tort, or crime”. He thought it “wise principle”, resting “upon principles of natural justice”, not to interfere with “the institutions of the natives”. Similarly, Dowling denied that there was any reason to interfere with Aboriginal “institutions”, saying that Aborigines “owe no fealty to us, and over whom we have no natural claim of acknowledgement or supremacy”. The Court recognised that Aboriginal custom was suited to their circumstances, whereas English law was not. Application of English law could not be confined to serious crime and imposing the whole of English law would be absurd. It should be noted that the decision in *Ballard* was warmly supported by the newspapers of the colony.<sup>125</sup>

On its face, *Murrell* would have made Aborigines subject to all New South Wales law. In fact, there seems to have been no expectation that jurisdiction in civil disputes or minor criminal matters would be exercised in respect of Aborigines. There was also expectation that the criminal law would be tempered by judicial discretion in sentencing, exercise of the Royal Prerogative of Mercy, and perhaps by procedural modifications to meet the circumstances of Aborigines. Although the reasoning in *Murrell* suggests thoroughgoing application of British law within

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practised or attempted against the NATIVES, who are to be considered as much under the Safeguard of the law as the Colonists themselves, and equally entitled to the privileges of British Subjects.”

<sup>124</sup> *R v Ballard or Barrett* [1829] NSWSupC 26.

<sup>125</sup> See *The Australian*, Sydney, 16 June 1829 and the *Sydney Gazette and New South Wales Advertiser*, 11 May 1830, reproduced in *R v Ballard or Barrett* [1829] NSWSupC 26.

British territory, it is not without significance that the position was reached in a case involving a crime that was *malum in se*, committed in an area of settlement, and where the accused's own people seemed content for him to be tried by British law. As is illustrated by cases in Upper Canada and British Guiana, these factors exerted a powerful pull towards jurisdiction in other colonies too.

There are some curious features to *Murrell's* case. Neither Forbes nor Dowling, the judges in *Ballard*, wrote judgments in *Murrell* such as might have explained their shift in position. When Murrell's plea against jurisdiction was first raised before Forbes (leading to his referral of the matter to the Full Court), he described it as "perfectly just". Burton's judgment for the Court was handed down the day before Forbes left the colony permanently. The simple solution adopted in *Murrell* (that jurisdiction over Aborigines followed *ipso facto* from territorial sovereignty) was not only novel in legal thinking, it immediately created a dissonance between theory and practice.

Not surprisingly, *Murrell* did not resolve all questions of jurisdiction, which continued to be controversial in New South Wales and in other Australian colonies.<sup>126</sup> It was not the approach followed by the admittedly erratic Justice John Walpole Willis in Port Phillip (then still part of New South Wales) in the 1841 case of *Bonjon*<sup>127</sup> or by Justice Cooper in South Australia throughout the 1840s.<sup>128</sup> In Western Australia, for most of the 1840s, jurisdiction in cases involving only Aborigines seems to have been confined to crimes both *mala in se* and committed against Aborigines employed by or living with settlers.<sup>129</sup> Criticisms of imposition of criminal jurisdiction over Aborigines continued to surface in newspapers

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<sup>126</sup> This is also the argument of Finnane. See Mark Finnane "The Limits of Jurisdiction: Law, Governance, and Indigenous Peoples in Colonized Australia" in Shaunnagh Dorsett & Ian Hunter (eds) *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave Macmillan, New York, 2010) 149-168.

<sup>127</sup> *R v Bonjon* (1841) GBPP 1844 (627) XXXIV.315 at 148-155.

<sup>128</sup> See Ward "Constructing British Authority", above n 112.

<sup>129</sup> See Ann Hunter "The Boundaries of Colonial Criminal Law in Relation to Inter-Aboriginal Conflict ('*Inter Se* Offences') in Western Australia in the 1830s-1840s" (2004) 8:2 *Australian Journal of Legal History* 215-236.

throughout the 1840s.<sup>130</sup> In 1851, a grand jury in Adelaide complained about having to hear a murder case involving only Aborigines.<sup>131</sup> Notwithstanding that Justice Dowling joined Burton's judgment in *Murrell* and later criticised the decision given by Justice Willis in *Bonjon*, Justice Cooper records that in 1840 Dowling had told him "the Supreme Court [of New South Wales] never interfered in a case between Natives".<sup>132</sup> This seems largely borne out by the very small number of cases in which Aborigines were prosecuted.

The approach taken in *Murrell* appealed more to Governor Gipps however. Following *Bonjon*, he thought it important that the law should be "rendered definite" and considered it desirable to enact legislation declaring that Aborigines "are amenable to our courts of law, like any other of Her Majesty's subjects". He developed his views in correspondence in which he sought the opinion of Chief Justice Dowling on this course of action. Gipps's views included that Britain had assumed "unqualified dominion" over New South Wales for more than half a century and had established British law within the colony "without reference to any other law, or laws, save such as may be made by the local legislature". He noted that, in many official documents, the Aborigines had been said to be Her Majesty's subjects. He asserted that "upon British territory, no law save British law can prevail, except by virtue of some treaty or enactment", neither of which applied in the case of the Aborigines of New South Wales. Even if the Aborigines were treated as a conquered people entitled to preserve their own laws until others were proclaimed, that would not support a separate system of law for them "first, because the aborigines never have been in possession of any code of laws intelligible to a civilised people; and secondly, because their conquerors (if the

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<sup>130</sup> See, for example, *The Inquirer*, Perth, 19 January 1842, quoted in Henry Reynolds *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Allen & Unwin Ltd, St Leonards, New South Wales, 1996) ["Reynolds *Aboriginal Sovereignty*"] 65-67.

<sup>131</sup> See Ward "Constructing British Authority", above n 112, 496.

<sup>132</sup> Quoted in Reynolds *Aboriginal Sovereignty*, above n 130, 63.

sovereigns of Great Britain are so to be considered) have declared that British law shall prevail throughout the whole territory of New South Wales”.<sup>133</sup>

Despite being of the view that “British law alone exists in the colony”, Gipps stressed that “the utmost degree of mercy and forbearance should be exercised” in respect of Aborigines.<sup>134</sup> This last point Gipps had already developed in a despatch of April 1841 to the Colonial Office, commenting on George Grey’s 4 June 1840 report which advocated strict application of colonial law to Aborigines.<sup>135</sup> In the despatch, Gipps acknowledged that a strict application of British law would be unjust. He suggested that it was only “the more obvious offences against society than can, with any degree of justice, be visited against the savage with extreme severity”. He referred to “murder, rape, violence against the person” as among offences which, without doubt, would be regarded “alike by the savage and the civilized man, as deserving of punishment”.<sup>136</sup>

Gipps considered that Grey’s proposals were consistent with the approach already being taken by the government of New South Wales:<sup>137</sup>

[T]he language now held by this government is, that the aborigines are Her Majesty’s subjects, and that whilst they are entitled in every respect to the benefit and protection of English law, they are amenable also to the penalties which are imposed on infractions of the law, whether the offence be committed against one of themselves or against white men. The practice of the government also is, as far as possible, in conformity with this language; and no law, save English law, or, to speak more correctly, the law of the colony founded on English law, is recognised as being of any force in it.

(This firm opinion from Gipps may be contrasted with the tentative response he made in December 1840 to proposals by Hobson for modification of colonial criminal law in its application to Maori.<sup>138</sup>)

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<sup>133</sup> Thomson (for Gipps) to Dowling, 4 January 1842, enclosed in Gipps to Stanley, 24 January 1842, GBPP 1844 (627) XXXIV.315, 143-155 at 144.

<sup>134</sup> Ibid.

<sup>135</sup> For Grey’s report, see Chapter 3, text accompanying ns 232-236.

<sup>136</sup> Gipps to Russell, 7 April 1841, GBPP 1844 (627) XXXIV.315, 104-106 at 105.

<sup>137</sup> Ibid 104-105.

<sup>138</sup> See Chapter 12, n 76.

It should be noted, however, that other officials were not as supportive of Grey's proposals. Governor Hutt of Western Australia disagreed that British law should apply to dealings between Aborigines.<sup>139</sup> James Stephen in the Colonial Office read down Grey's suggestions as meaning only that Aborigines should be subject to the responsibilities of British law "so far as they can be taught to understand before hand what those responsibilities in general are":<sup>140</sup>

But in their relations to each other there w<sup>d</sup> seem no reason why they should not be governed by their own customs, except in so far as those customs may be manifestly inhuman or pernicious of themselves as to require and to admit the interposition of authority to prevent the observance of them.<sup>141</sup>

The suggestion of declaratory legislation to put the jurisdictional question beyond doubt was not adopted. Dowling had given the opinion that the matter had been settled by the decision of the Full Court in *Murrell*.<sup>142</sup> The Colonial Office agreed that "until that decision is over-ruled, ... it must be held to be the law of the colony".<sup>143</sup> In the end, whether or not the decision in *Murrell* was correct as a matter of New South Wales law, does not establish it as an authority of universal application in colonies with more complex histories of dealings between the British Crown and native peoples, often entailing recognition of political authority and even sovereign rights.

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<sup>139</sup> Hutt to Russell, 10 July 1841, GBPP 1844 (627) XXXIV.315 at 392-394.

<sup>140</sup> Stephen minute, 26 November 1841, quoted in Damen Ward "A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia" (2003) 1 History Compass 1-24 at 13.

<sup>141</sup> Although Paul McHugh suggests that by the early 1840s the "imperial authorities" supported "thoroughgoing application of English law, at least in criminal matters, ... [leaving] no room *de jure* for Aboriginal custom even in matters *inter se*", Stephen's memorandum suggests partial application of English law only and leaves room for regulation of Aboriginal society according to custom. McHugh *Aboriginal Societies*, above n 6, 164. Lisa Ford also refers to an 1838 Proclamation, prepared by the Colonial Office, which provided Aborigines were free to govern themselves so long as their custom did not affect settlers. Ford *Settler Sovereignty*, above n 73, 204.

<sup>142</sup> Dowling to Gipps, 8 January 1842, enclosed in Gipps to Stanley, 24 January 1842, GBPP 1844 (627) XXXIV.315, 143-155 at 145-146.

<sup>143</sup> Stanley to Gipps, 2 July 1842, GBPP 1844 (627) XXXIV.315 at 156.

## British Guiana

When Britain acquired the territory of Demerara-Essequibo by conquest from the Dutch in 1803, it included, in addition to European sugar planters and 65,000 African slaves, a population of several thousand Amerindians.<sup>144</sup> The Amerindian tribes lived mostly in the hinterland and relations with them were managed under a system inherited from the Dutch. For each of the six major rivers of the colony there was a Protector of Indians and, under him, “Postholders” stationed at up-river trading posts. These posts also served as rallying points for Indians from which bush expeditions were led by Postholders to capture runaway slaves or suppress slave rebellions. The relationship with the Indians was maintained by distribution of presents annually at the posts to reward them for their assistance (although observance lagged from time to time). The Protectors and Postholders were not invested with any authority over Indians. They were authorised to interfere in Indian society only if asked to assist by the Indians themselves.<sup>145</sup>

The Instructions to the Protectors required them to supervise the work of the Postholders and to forward on to the colonial administration their quarterly reports. The Protectors themselves were to send an accompanying reporting commenting on the conduct of the Postholders “and whether they are liked and well thought of by the Indians of the respective posts”. The Protectors were also to provide information “as nearly as can be ascertained” of:

the numbers of Indians in their respective districts, their tribes, captains, increase or decrease since last Report, and the probable cause of either; their general health and condition, disposition; viz. whether apparently satisfied or dissatisfied with us; and, if the latter, what is the probable cause.

On an annual basis the Protectors were to required to “mention such Indians, captains or others, as, from any particular instance of good conduct or ability, they

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<sup>144</sup> See Mary Menezes *British Policy Towards the Amerindians in British Guiana 1803–1873* (Clarendon Press, Oxford, 1977) [“Menezes *Amerindians in British Guiana*”] 6 & 19–28.

<sup>145</sup> Ibid ch 2.

may think deserving of an especial mark of distinction or favour in the ensuing distribution of presents”.<sup>146</sup>

For their part, the Instructions to the Postholders (which do not appear to have materially changed between 1803 and the 1830s) required reports, both quarterly and where there was special reason, but principally required them to use their “utmost exertions to attach to the post the Indians who call upon him, or who live in his vicinity”. He was to “endeavour on all occasions to prevent misunderstanding or quarrels between the several Indian tribes” and where there were quarrels, was required to “exert himself to restore peace”. He was to prevent any non-Indians (“whether whites, free coloured, or negroes”) from passing beyond the post without a pass from the Governor or the Protector. The Postholder had power to detain anyone who attempted to travel beyond the post without a pass.

The Instructions prohibited the Postholder from trading with the Indians, appropriating “the property of the Indians, much less their wives or children”, or otherwise taking advantage of his office. His employment of Indians required the prior approval of the Protector, who was required to be satisfied that the arrangement was voluntary and would be paid. He was not to interfere or permit interference with their trade and was to ensure that they were paid for their goods. Although the arrangements restricted access by non-Indians up-river of the trading post, the Postholder did not have power to hinder Indians who wished to travel down-river. He was, however, to endeavour to persuade them to “wait on the protector”. If an Indian made a complaint of “ill treatment”, the Postholder was to take him to the Protector for the complaint to be investigated and for redress in appropriate cases. This was “[a]ll exclusive of the action which the fiscal [the prosecuting officer of the colony] might think proper to bring against the offender or offenders”. Where “any white or free coloured person about the post” wanted to “have an Indian woman to live with him”, such person was required to advise the

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<sup>146</sup> “Instructions for the Protectors of Indians” dated 10 August 1824, enclosed in Lieutenant-Governor D’Urban to Under-Secretary Horton, 16 May 1827, GBPP 1834 (617) XLIV.339, 168-171 at 169-170.

Postholder, who was then himself to take the woman and her parents “or nearest relations” to the Protector for him to “ascertain whether such cohabitation takes place with the free consent of the parties, and whether the woman be not engaged to some Indian”. Cohabitation could occur only with the consent of the Protector.<sup>147</sup>

These Instructions to Protectors and Postholders are consistent with the Amerindians being left to regulate their own society, outside the direct responsibility of the colonial administration. The relationship was a loose alliance in which the assistance provided by Indian tribes in trade or by contribution to the security of the colony (where whites were heavily outnumbered by African slaves) was recognised through annual gifts. Tribal authority, whether exercised through “captains” or otherwise, was accepted in dealings between the Postholders and the Indians. The colonial administration accepted a responsibility to provide some protection from contact with non-Indians (whether prompted by humanitarian concern or self-interest is not clear). But there was a general policy of non-interference except to attempt, through influence, to maintain peace between tribes. There was also appreciation of cultural flashpoints (as in the care in relation to non-Indian cohabitation with Indian women to ensure that there was not engagement to an Indian man). While, as in other parts of the Empire, from the late 1820s there was interest in promoting Christianity and “civilisation” among the Indians (in part, as in Canada, perhaps prompted by the expense of present giving), the project seems not to have advanced significantly by 1840.<sup>148</sup> There seems to have been little agreement about the pace at which assimilation of Indians to colonial society could be undertaken. A proposal in 1826 to reorganise Indian populations around parishes and schoolhouses, supervised by magistrates, received the response from one Protector that it indicated “a very incorrect estimate of the character of the Indians of Guiana”:

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<sup>147</sup> “Post-Holders’ Instructions, as enacted by the Honourable Court of Policy, on the 14th of May 1803” (and as re-issued on 2 May 1815), enclosed in Lieutenant-Governor D’Urban to Under-Secretary Horton, 16 May 1827, GBPP 1834 (617) XLIV.339, 168-171 at 170-171.

<sup>148</sup> See Menezes *Amerindians in British Guiana*, above n 144, chs 2-4 & 9; and *Papers relating to the Aboriginal Tribes of North America, New South Wales, Van Diemen’s Land, and British Guiana*, GBPP 1834 (617) XLIV.339 at 166-229.

## Chapter Four: British Sovereignty & Native Government

A feeling of the most perfect independence, both as to their conduct and place of residence, a sensitive jealousy of foreign control, ... a deeply rooted attachment to their peculiar customs and habits, ... form the strong and leading features in the character of these people, and must be first broken in upon, and in a great measure eradicated, before they can be brought to submit ... to be confined to the limitation of parishes or districts  
... .

The same Protector expressed the view that, even in the case of the Arawak (generally accounted to be the most “advanced” of the Amerindian tribes, because of their greater contact with Europeans), the project was one that would take many years to accomplish because “their attachment to the customs of their forefathers permit of but little assimilation to our habits and manners”. The experience of half a century of a German Moravian mission suggested that “considerable time, and much patience and perseverance” would be required.<sup>149</sup> This view was one that the Governor of the time agreed with.<sup>150</sup>

This was the background to the neglected case of *Billy William* in 1831,<sup>151</sup> in which questions of the application of colonial law to an Arawak Indian were ventilated.<sup>152</sup> The case concerned the death of Hannah who, like her husband Billy William, was an Arawak. It was established by witnesses that Billy had stabbed Hannah when at “Solitude”, a remote property on a tributary of the Pomeroon river, granted by the Crown for timber extraction purposes to John Alstein, described as a “coloured man”. Hannah and Billy were visiting Alstein with whom they were already acquainted (they appear to have lived nearby). The evidence given at the trial suggests that Billy stabbed Hannah in a jealous rage and when affected by alcohol (with which he had been plied by Alstein). There was evidence that Hannah had a reputation for adultery and that she had earlier been carrying on a liaison with Alstein. (This was disputed by some witnesses but the Colonial Office seems

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<sup>149</sup> “Observations on the Proposals of Mr Hilhouse, by Mr George Bagot, Protector of Indians in Essequibo”, 18 January 1827, GBPP 1834 (617) XLIV.339 at 167-168.

<sup>150</sup> D’Urban to Horton, 16 May 1827, GBPP 1834 (617) XLIV.339 at 166-167.

<sup>151</sup> This case does not feature in the comparative literature on Empire. It is, however, written up by Mary Menezes. See Menezes *Amerindians in British Guiana*, above n 144, 130-132.

<sup>152</sup> A copy of the indictment, sentence and judge’s notes of evidence upon the trial (including his ruling on the defence’s jurisdictional challenge) were enclosed in D’Urban to Goderich, 15 April 1831, GBPP 1834 (617) XLIV.339 at 173-180.

ultimately to have been of the view that there was some foundation for it.) Billy had run away after stabbing Hannah but had been forced to seek help from the Protector of Indians for the Pomeroon when Hannah's family came after him. As the Protector, Gerard Timmerman, was later to explain at the trial, in which he was called for the defence, he had sent Billy to the Governor for protection, not expecting that he would be put on trial. Indeed, it is clear from his subsequent evidence that Timmerman considered that he had no authority to act against an Indian for such a crime.

Notwithstanding Timmerman's expectation, and notwithstanding that the fact that no Indian before then appears to have been subjected to colonial legal process for a crime even against a non-Indian, Billy was put on trial for murder in the Court of Civil and Criminal Justice in Georgetown. The court comprised the President, Charles Wray, and eight lay members. The defence challenged the jurisdiction of the Court and ran defences of intoxication and justification according to custom, based on a claim of Hannah's adultery. The defence called as witnesses Timmerman and another Protector of Indians, and some settlers of longstanding on the Pomeroon. They gave evidence that the Arawak Indians were allies of the Crown not its subjects, and that according to Arawak custom husbands could punish adultery by death. Thus, one of the settlers gave evidence that the only tie between Indians and the colony was the "retaining fee" paid to them as allies of the Crown in the form of the annual presents. The payment was "subjecting to serve when called on; solely as allies": "there is no clause I have heard of calling on them to submit to the laws in other respects."<sup>153</sup> The second Protector explained his function as acting "as a mediator, not as a magistrate" if an Indian made a complaint to him. If the offender "did not choose to appear", he did not feel authorised to compel his attendance. In quarrels between Indians, the Protector considered he could only act if called upon to do so "as mediator".<sup>154</sup> Gerard Timmerman gave evidence to similar effect and explained that he had sent Billy

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<sup>153</sup> Ibid 178 (Evidence of William Hilhouse).

<sup>154</sup> Ibid 179 (Evidence of A Van Ryck de Groot).

Williams to the Governor for his protection from Hannah's father: "I did not send him to be tried, for I did not think he would be tried".<sup>155</sup>

As recorded by Wray, counsel for Billy William submitted that, although the Indians had been conquered, "their laws and customs have been observed". Those customs "would punish adultery with death", as the Romans had indeed done. Just as "[a]mbassadors have peculiar privileges; here also may be imperium in imperio [i.e. state within a state]": "The court has never taken cognizance of any offences of Indians." Wray also records the submission that Billy was "domiciled in the woods before the grant was given", apparently making the point that the offence occurred in an area occupied by Arawak.<sup>156</sup>

The submission that the law of the colony did not apply to Billy William was not accepted by Wray. He considered it decisive that "the spot where the act was committed ... [was] within the territory of Great Britain". Britain's territorial rights were demonstrated by Alstein's occupation under a grant from the Crown, existence of another grant further inland, and earlier maintenance of a Dutch fort beyond that.<sup>157</sup> Wray asserted that the Indians had never disputed the British territorial right:<sup>158</sup>

[O]fficers, whose very name is that of their protectors, and dispensed among them, and to these we learn by the evidence, they are in the constant habit of submitting their disputes; they receive from us presents for services; there is therefore a customary communication between us and them as a body, yet as a body we never hear of their complaining of our encroachments, or claiming any rights inconsistent with them.

Wray denied that there was any "general government" among the Indians and said that the evidence was that they had "no code of laws". Indian custom was "not material". As a conquered nation, they could not claim "a jurisdiction which would supersede our rights":

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<sup>155</sup> Ibid 178 (Evidence of Gerard Timmerman).

<sup>156</sup> Ibid 177.

<sup>157</sup> Ibid 179.

<sup>158</sup> Ibid 179-180.

## Chapter Four: British Sovereignty & Native Government

[T]hese foreigners, then so conquered [by the Dutch as predecessors of the British], have chosen to continue within the territory, have never disputed our rights, and have adopted our institutions formed for their express comfort and protection. Are they then not in the situation of any other foreigner who came into another nation's bounds, or remain in and domicile themselves under the new Government when a conquest is made, and do they not bind themselves thereby to obey and conform to those laws that the new community has thought proper to establish? In my judgment they do.

Although disavowing reliance on pragmatic considerations, Wray also pointed to the inconvenience of the existence of “two absolute and independent criminal jurisdictions in the same territory, the one for Indians, the other for Europeans and blacks”. If there was no jurisdiction in the case of offences between Indians, there would be doubt as to whether there could be “jurisdiction over an Indian killing a white or black man” or the reverse. The better course, he suggested, was that Indians were protected by the general law and therefore subject to it. Any hardship caused by application of colonial laws because of Indian unfamiliarity with them and different cultural preferences could be dealt with by recommendations for the exercise of the Royal Prerogative of Mercy.<sup>159</sup>

Following this ruling, Billy Williams was found guilty and sentenced to death, but with a recommendation for mercy “on the grounds of this being the first trial of an Indian for such an offence, and his probable ignorance of our laws and customs”.<sup>160</sup> The Lieutenant-Governor in forwarding the recommendation to the Colonial Office added his own recommendation that a sentence of banishment be substituted, since without removal from the colony Hannah's family would feel bound to avenge her.<sup>161</sup>

Viscount Goderich accepted the recommendation that a sentence of banishment was appropriate.<sup>162</sup> Even though he expressed doubt whether it was just to impose any punishment at all (since he accepted that Billy had killed Hannah in conformity

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<sup>159</sup> Ibid 180.

<sup>160</sup> Ibid 173.

<sup>161</sup> D'Urban to Goderich, 15 April 1831, GBPP 1834 (617) XLIV.339 at 173.

<sup>162</sup> Billy was transported for life to Trinidad. Menezes *Amerindians in British Guiana*, above n 144, 134.

with Indian custom because of her adulteries), Goderich considered that his removal would be “a mercy not to him only, but to other members of his tribe” since it would avert a blood feud.<sup>163</sup> On the question of British criminal jurisdiction over Indians, Goderich agreed with the conclusion Wray had reached, but his reasons suggest that he viewed the matter less absolutely than Wray. The nature of Billy’s offending and associated policy considerations were treated by Goderich as significant, leaving open the possibility that a territorial justification would not be adequate in respect of all Indian offences against the colonial criminal code:<sup>164</sup>

The general question as to the exercise by the British courts of a criminal jurisdiction over the Indian tribes, though it involves some difficulties, admits, I think, upon the whole, of little hesitation. Penal laws devised for a civilized community cannot of course be applied indiscriminately and in the entire extent, to regulate the conduct of a people in a state of barbarism; but there are some crimes of a violent and atrocious description which are common to every state of society, and may be everywhere properly visited with punishment of a similar degree of severity. For offences of this character, when brought under the cognizance of the protectors of Indians, post-holders or other colonial authorities, the Indians must be considered amenable to the jurisdiction of the criminal courts. In any other case also to which the laws of the colony may be found applicable, and where violence is likely to ensue for want of judicial arbitration, ... the policy of encouraging these savages to refer their quarrels to the decision of our laws, and of taking upon ourselves the punishment of the offences which they may commit [is the correct one].

Tempering the severity of penalty was also suggested by Goderich not only to be fair but also best calculated to encourage Indians to submit to British law:<sup>165</sup>

It will often happen probably that the sentence of the court, and the degree of effect to be given to it, cannot with propriety be exactly the same in the case of an Indian as in that of a British offender; but in such cases, and indeed in every case more or less, regard should be had, without of course perverting or exceeding in any degree the letter and spirit of the British laws, to the sentiments which prevail amongst the Indians. The administration of

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<sup>163</sup> Goderich to D’Urban, 21 July 1831, GBPP 1834 (617) XLIV.339, 181-182 at 181.

<sup>164</sup> Goderich to D’Urban, 17 February 1832, GBPP 1834 (617) XLIV.339, 196-198 at 196. This letter was almost certainly drafted by James Stephen, as could be verified by examination of the records at Kew.

<sup>165</sup> Ibid 196-197.

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criminal law amongst every people and class, commonly has some reference to prevalent feelings and opinions. It is not certainly desirable that this should proceed to the extent of falling in with them when erroneous or unjust ... ; but when we regard an offence in the light in which it is chiefly to be considered by the administrators of penal law, as an index, namely, of the degree of danger which society has to apprehend from the perpetrator, it would be impossible to leave out of the account the extent to which he may or may not have offended against the habitual feelings and opinions of the community of which he is a member. If any man shall have shewn that he is not to be governed by the sense of right and wrong, partial or mistaken though it be, which exists amongst those with whom he lives, and that the punishments of the law only, and not the sympathies and antipathies of his fellow-creatures can control him, it were no more than consistent with the principle upon which all jurisprudence proceeds, to adopt in his case a more severe execution of the law than would be proper in the case of an offender who had shewn less indication of having discharged himself from the restraints of public opinions and feelings. If the opinions and feelings of the particular community be wrong in their direction, or exaggerated in degree, the object of him who administers the law should be neither to shock them by a rigid adherence to the abstract justice of the case, nor to warrant them by conforming to their error, but gradually to correct them by maintaining a higher standard, and, as far as possible, enforcing it, whilst at the same time he bears in mind the impracticability of at once imposing by law a sense of obligation which custom has not sanctioned, or suddenly setting aside one which it has sanctioned unduly. Under the direction of these general principles, and with the limitations which I have indicated, I conceive that the criminal jurisdiction of the colonial courts might be extended to the Indians both beneficially and in a manner which would be satisfactory to them, and lead them to seek the interposition of the tribunals.<sup>166</sup>

The significance of *Billy William*'s case is hard to gauge. As perhaps is true also of *Murrell*'s case in New South Wales, it can be argued that jurisdiction could be found where the crime was *malum in se*, where it was committed in an area of European settlement, or when British intervention was either acquiesced in by the tribe or was considered necessary to remove customary obligations of retribution. In *Billy William* all these conditions were made out. That Wray's judgment may have been controversial and did not settle jurisdictional questions more generally is

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<sup>166</sup> It is interesting to note that passages from Goderich's despatches were quoted with approval in the report of the House of Commons Select Committee on Aborigines in British Settlements in 1837. See GBPP 1837 (425) VII.1 at 10.

indicated by subsequent doubts expressed into the twentieth century. William Arrindell, who had earlier represented Billy William, when Chief Justice in the 1850s expressed the view that the Amerindians owed the British “no obedience, and were not subject to our laws”. He thought the Court “ought not ... to meddle with the Indians”.<sup>167</sup> A Governor of the same period considered that the question of jurisdiction had not yet been determined satisfactorily by the courts.<sup>168</sup> A later Governor described the prosecutions of Indians as an embarrassment “for we never feel warranted in applying to them our laws, of which they are wholly ignorant”.<sup>169</sup> A Commission of Inquiry of 1870 conceded that the question of jurisdiction over the Amerindians was “a somewhat hopeless subject”.<sup>170</sup> Menezes suggests that there was no successful prosecution of an Amerindian for murder between 1831 and 1939 when she says there was a “heated public discussion” about a seven year sentence handed down in a murder case with Amerindian accused and victim.<sup>171</sup>

## West Africa

Britain’s territorial acquisitions in West Africa before 1840 were limited. Few indigenous peoples were brought within British control. On the Gold Coast, British authority was confined to the Cape Coast Castle and other forts.<sup>172</sup> Even within them, authority over native peoples was sometimes limited by treaty arrangements, as in the case of an 1817 treaty with the Asante which permitted the Governor to deal with Asante “guilty of secondary offences” but which provided for the perpetrator of “any crime of magnitude” to be returned to the Asante King “to be

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<sup>167</sup> Quoted in Menezes *Amerindians in British Guiana*, above n 144, 141.

<sup>168</sup> Ibid 142-143.

<sup>169</sup> Ibid 145-146.

<sup>170</sup> Ibid 147.

<sup>171</sup> Ibid 152-153.

<sup>172</sup> See TC McCaskie “Cultural Encounters: Britain and Africa in the Nineteenth Century” in Andrew Porter (ed) *The Oxford History of the British Empire: The Nineteenth Century* (Oxford University Press, Oxford, 1999, vol 3) 665-689 [“McCaskie ‘Britain and Africa in the Nineteenth Century’”] at 671; TO Elias *Ghana and Sierra Leone: The Development of their Laws and Constitutions* (Stevens & Sons Ltd, London, 1962) [“Elias *Ghana and Sierra Leone*”] 13-14; and Martin *Colonies of the British Empire*, above n 116, 552-558.

dealt with according to the laws of his country”.<sup>173</sup> Although, after 1830, Captain George McLean took the initiative of encouraging the coastal tribes outside the forts (principally the Fante) to submit to British justice, there was a Parliamentary inquiry into the practice which led to the position being regularised by the enactment of the Foreign Jurisdiction Act 1843 and by treaties (collectively known as “the Bond”).<sup>174</sup> The treaties outlawed “[h]uman sacrifices, and other barbarous customs, such as panyaring [kidnapping for slavery]” and provided, with the objects of “the protection of individuals and of property”, that “[m]urders, robberies, and other crimes and offences, will be tried and inquired of before the Queen’s judicial officers and the Chiefs of the district, moulding the customs of the country to the general principles of British law.”<sup>175</sup> These treaties, providing for shared responsibility and consensual adaptation of custom, were the extent of British interference with native government on the Gold Coast. It is likely that more impact on Fante society resulted from the activity of the Methodist missionaries in the 1830s than from British administration.<sup>176</sup>

In establishing a home for ex-slaves in Sierra Leone, Britain entered into treaties for the acquisition of land from local rulers (as is further described in Chapter 5<sup>177</sup>).<sup>178</sup> Many of these provided for cession of sovereignty by the chiefs to Britain, usually with guarantees of peaceful possession of land occupied by the native population. They also contain terms indicating that the cession of sovereignty (or in one case the promise to “bear true allegiance” to George III) did not affect tribal authority. Thus in a 1788 treaty, the chief Naimbana and other rulers bound themselves and their successors to guarantee the “peaceable possession” of ceded

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<sup>173</sup> Treaty between Great Britain and Ashantee, signed at Coomassie, 7 September 1817, 68 CTS 5-7 (art 8).

<sup>174</sup> Elias *Ghana and Sierra Leone*, above n 172, 14-18; *Report from the Select Committee on the West Coast of Africa*, GBPP 1842 (551) XI.1 at iv-vii.

<sup>175</sup> Declaration between Great Britain and the Fantee Chiefs, signed at Cape Coast Castle, 6 March 1844, 96 CTS 235-236.

<sup>176</sup> See McCaskie “Britain and Africa in the Nineteenth Century”, above n 172, 671-672.

<sup>177</sup> See Chapter 5, text accompanying ns 35-47.

<sup>178</sup> As to British relations with the African tribes of Sierra Leone, see also TJ Barron “James Stephen, the ‘Black Race’ and British Colonial Administration, 1813-47” (1977) 5:2 *The Journal of Imperial and Commonwealth History* 131-150 (discussed in Chapter 3, text accompanying ns 156-167).

lands and to protect the settlers (who were referred to as George III's subjects) "against the insurrections and attacks of all nations or people whatever". The treaty also provided for Naimbana and his successors to continue to receive "customs paid for watering" by ships in harbour (while other harbour dues were to be payable to the "free settlers and subjects of His Britannic Majesty"). Naimbana's "allegiance" to King George was not treated as constituting him a subject.<sup>179</sup> The treaty is, in this respect, reminiscent of those treaties of alliance entered into in British North America under the Covenant Chain, which likewise contained pledges of allegiance.

In 1825, a "Convention" was entered into between the British Crown (through the agency of the Governor of Sierra Leone) and the King of Sherbro and the Queen of Ya Comba "on behalf of themselves, their tributary Chiefs, Headmen, and people" to provide protection against the Kusso nation which had been pursuing a war of extermination against the Sherbro and Ya Comba people. By the treaty,<sup>180</sup> "the full, entire, free, and unlimited right, title, possession, and sovereignty of all the territories and dominions to them respectively belonging, ... together with all and every right and title to the navigation, anchorage, waterage, fishing, and other revenue and maritime claims in and over the said territories, and the rivers, harbours, bays, creeks, inlets, and waters of the same" was ceded to the British Crown. For its part, the Crown agreed to accept the cession of the territories "giving and granting to the said Banka, King of Sherbro, and Ya Comba, their tributary Kings, Chiefs, and Headmen, and the other native inhabitants of the said territories and dominions, the protection of the British Government, the rights and privileges of British subjects, and guaranteeing to [them] ... and to their heirs and successors forever, the full, free, and undisturbed possession and enjoyment of the

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<sup>179</sup> Treaty between Great Britain and the Chiefs of Sierra Leone, 22 August 1788, 50 CTS 359-362.

<sup>180</sup> The convention seems not to have been subsequently ratified. See Bathurst to Turner, 18 December 1825, reproduced in *British and Foreign State Papers, 1825-1826* (London, 1848) vol 13, 308-309.

lands they now hold and occupy”.<sup>181</sup> The similarity in language between this Treaty and the Treaty of Waitangi has been remarked on by Keith, Bennion, and Sorrenson.<sup>182</sup> The guarantees extended to the chiefs in their capacities as kings, chiefs, and headmen seem to be an acknowledgement of their continuing authority over their own people.

A further treaty entered into in 1825 in respect of the “Bacca Loco” territories appears from its preamble to have been prompted by impasse in securing the appointment of a successor on the death of the principal chief. Those with the authority to make the appointment seem to have doubted that their nominee would be accepted without civil disorder, imperilling trade and “the maintenance of the just rights and privileges of the inhabitants”. As a result, they ceded “the full, entire, free, and unlimited right, title, and sovereignty into and over the territories and dominions of Bacca Loco” to the British Crown.

As appears from a further deed the following year, the cession of sovereignty seems to have been with the object of allowing the British to make the appointment and provide the support necessary to prevent civil war. In this context, the guarantee in the 1825 treaty to the chiefly families and the inhabitants of the territories of “the continued and unmolested enjoyment of such lands and other property as they now possess” was more than a guarantee of property rights. As the 1826 deed makes clear, the treaty was concerned with preservation of a customary order. In the deed, the Governor of Sierra Leone confirmed the appointment, made at the time the 1825 treaty was entered into, of “Fatimah Bramah as Chief of the 8 towns of Bacca Loco”. In the deed, the Governor promised to support Fatimah Bramah “by force of arms, as it is the wish of the great majority of the inhabitants so to do, in order to prevent civil war among themselves”. He also appointed the 22nd December “for the usual ceremonies by the Headmen to install Fatimah Bramah as Chief”. For his part under the deed, Fatimah Bramah agreed to carry out

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<sup>181</sup> Convention between Great Britain and Sherbro, signed at Plantain Island, 24 September 1825, 75 CTS 379-384 (incomplete) & also reproduced in E Hertslet *The Map of Africa By Treaty* (3rd ed reprint, Frank Cass & Co Ltd, London, 1967) vol 1, 31-32.

<sup>182</sup> See Chapter 2, text accompanying ns 125 & 133.

the Governor's instruction "for the improvement of commerce and civilization", to allot land for a school and for the Governor's residence, and (in what appears to be a case of imperio in imperium) to permit "all persons from the interior and from Sierra Leone" to pass "with the most perfect freedom" through and reside within "Bacca Loco" "so long as they conform to the laws of the country, and conduct themselves with becoming obedience and respect to the Chief and to the Headmen whose duty it will be at all times to keep up good order and justice".<sup>183</sup>

An 1827 "Convention" ceding sovereignty to King George, in terms similar to the 1825 Bacca Loco treaty, was entered into in respect of the territories of the "Kafu Bulloms" by "Bey Sherbro" (also known as John Macaulay Wilson) who had succeeded his father as "sovereign". In return for the cession of sovereignty, the British guaranteed "to the Kafu family and to the inhabitants":

the continued and unmolested enjoyment of such lands and other property as they now possess, together with all their rights, usages, and customs, with respect to domestic servitude, at the same time it being clearly understood that no ruler, Headman, Chief, or head of a family, or any other being a subject of the said Bey Sherbro, shall attempt to remove any of his, her, or their domestics, or their children, male or female, from the territories of the Kafu Bulloms, for the purpose of being carried into bondage or made use of for any purposes of traffic.

Again, the terms of the agreement preserved the Kafu Bulloms social organisation (while preventing removal of "domestics" out of their territory) and also described the Kafu Bulloms as "subjects" of Bey Sherbro, notwithstanding the cession of "the full entire free and unlimited right, title, and sovereignty, into and over the territories and dominions of the Kafu Bulloms, for ever" to the British Crown.<sup>184</sup>

A 1827 "Treaty" ceding sovereignty to the island of Bulama, and reconfirming an earlier cession of the territory of Ghinala and "the adjacent islands of the island of

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<sup>183</sup> Convention between Great Britain and the Chiefs of Bacca Loco, signed at Port Logo, 12 December 1825, 75 CTS 477-480; Deed between Governor Campbell ("in the name of the King of Great Britain") and Fatimah Bramah, signed at Port Logo, 14 December 1826, 76 CTS 284-285.

<sup>184</sup> Convention between Great Britain and the Kafu Bulloms, signed at Yongoroo/Hastings, 8/10 March 1827, 77 CTS 117-120.

Bulama”, provided that “[t]he relations which now exist between different classes of the community are to continue, but no slave or domestic servant is to be sold for exportation beyond the frontier of Ghinala”. The African parties to the treaty were “Benagre, King of the Biafras, for himself and the other King named Faring, for himself, his heirs and successors, in concert with his Chiefs and Headmen, for themselves, their heirs and successors”. The treaty further provided that “[i]f any native within the territory of Bulama, Ghinala, or the islands adjacent commits a breach of the laws of Great Britain, either by being engaged in the export Slave Trade, directly or indirectly, he shall be subject to trial by the British laws”.<sup>185</sup> The impression given by this provision is that “British laws” would not otherwise apply to natives of the ceded territories.

Most of these treaties with smaller groupings on the fringes of Sierra Leone were prompted by the slave trade and had limited purposes beyond stopping the trade and protecting those entering into the treaties from slave raiders. The colony of Sierra Leone was, however, a more ambitious undertaking.

The small colony of Sierra Leone was largely a settlement of ex-slaves who had been cut off from their traditional systems of government.<sup>186</sup> The population of Freetown did, however, include some local peoples. How British administration was carried on in relation to them is unclear. RM Martin in 1843 listed this native population under the heading of “Resident Strangers”.<sup>187</sup> TO Elias writes that the largest of the native groups in Freetown, the Kru people, “elected one of their number as chief to preside over their local government council and to settle disputes in their own courts according to their laws and traditions”.<sup>188</sup> The 1821 Charter of Justice appears to assert British jurisdiction over “all offenders” for offences committed within the colony, but how this was applied has not been examined. Also unclear is whether the Charter maintained a proviso in the earlier 1799 Charter which exempted from the civil jurisdiction of the Mayor’s Court of

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<sup>185</sup> Treaty between Great Britain and Biafra, 24 June 1827, 77 CTS 285-286.

<sup>186</sup> See McCaskie “Britain and Africa in the Nineteenth Century”, above n 172, 666-670; and Elias *Ghana and Sierra Leone*, above n 172, 220-238.

<sup>187</sup> Martin *Colonies of the British Empire*, above n 116, 530-537.

<sup>188</sup> Elias *Ghana and Sierra Leone*, above n 172, 224.

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Freetown (later the Court of the Recorder of Freetown) “such suits or actions as should be between natives of Africa only not become settlers within the said colony or factories, in which case his said late Majesty willed that the same should be determined among themselves, unless both parties should by consent submit the same to the determination of the said Mayor’s Court”.<sup>189</sup>

In 1840, the Gambia was a small territory attached to the colony of Sierra Leone. It is an example of the compatibility of British sovereignty with native government, as is indicated by an 1827 treaty with Brekama. By this treaty, the British Crown took “the people of Brekama under [its] protection and sovereignty ... on the following conditions”:<sup>190</sup>

Art. I. In case the people of Brekama are attacked by any other native power, the King of Great Britain will assist them with supplies of arms and ammunition, or such other support as may be judged best by the British Commandant at the Gambia.

II. They engage not to allow any slaves to be purchased or sold within their territory, nor to employ themselves or their people in this trade.

III. They engage to give every facility to British commerce, that no interruption will be given to British subjects or their agents in any part of Brekama, and that no duties will be levied upon them, their agents, or their property.

IV. They engage not to enter into any war without previous consultation with and consent of the British Commandant.

V. The King of Great Britain engages not to disturb any inhabitant of Brekama, either now or hereafter, in the actual possession of his lands, houses, or other property, in his religion, nor in the domestic servitude now usual in Brekama.

VI. The people of Brekama engage that when the Chief dies, and a new election takes place, the Headmen will notify the death and the election to the Commandant of the

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<sup>189</sup> Sierra Leone Charter of Justice, 17 October 1821, reproduced in Charles Clark *A Summary of Colonial Law, The Practice of the Court of Appeals from the Plantations, and of the Laws and their Administration in all the Colonies; with Charters of Justice, Orders in Council, &c &c* (Sweet; Maxwell; and Stevens & Sons, London, 1834) [“Clark Colonial Law”] 499-535 at 505, 512 & 523.

<sup>190</sup> Treaty between Great Britain and Brekama, signed at Brekama, 29 May 1827, 77 CTS 235-237.

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Gambia, and the object of their choice (elected by the majority according to the usual forms) will be confirmed by the representatives of His Majesty the King of Britain before he can be finally invested in the cap or turban.

...

VIII. The King of Great Britain will in future pay the people of Brekama one piece of blue baft [coarse cotton cloth] for the Chief, one piece of blue baft for the Headmen, and two pieces of blue baft for the people annually on the 29th May.

In July 1840 a “Convention” was entered into between the Lieutenant-Governor of the Gambia on behalf of Queen Victoria and the King of Combo. The king ceded to Queen Victoria “for ever, all claim, title, and right to the sovereignty of the territory”. The limited nature of the authority expected to be exercised thereafter by the British Crown appears by the agreement of the parties “to afford no shelter or protection to criminals of any description who may take refuge in the settlement of Bathurst and its dependencies, or in the kingdom of Combo, and that each party shall deliver all offenders claimed as criminals to the other party on application to that effect being made by the proper authorities”.<sup>191</sup>

### Cape Colony

In southern Africa, the Cape Colony contained a sizeable indigenous population of some 30,000 “Hottentots” (as the Khoikhoi and Sans peoples of the Khoisan group were known). In addition, at the Eastern Cape there were a few thousand Bantu-speaking Xhosa (usually referred to as “Kaffirs” by the British). These indigenous populations were, however, outnumbered by the European population (Dutch-Afrikaans and British) and the recently emancipated “coloured” (African and Asian) populations.<sup>192</sup>

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<sup>191</sup> Convention of Cession between Great Britain and Combo, signed at Bathurst, 13 July 1840, 90 CTS 283-284.

<sup>192</sup> Andrew Porter (ed) *Atlas of British Overseas Expansion* (Simon & Schuster, London, 1991) 81; Christopher Saunders & Iain Smith “Southern Africa, 1795–1910” in Andrew Porter (ed) *The Oxford History of the British Empire: The Nineteenth Century* (Oxford University Press,

The experience of the “Hottentots” under British administration has little bearing on questions of interpretation of the Treaty of Waitangi for the reason that neither the Khoikhoi nor the Sans were living traditionally when Britain conquered the Cape from the Dutch in 1795. The Khoikhoi, who had farmed livestock at the Cape until dispossessed of their land by the Dutch, and the Sans, who were traditionally hunter-gatherers, had been forced to become bondsmen and farm workers for the Dutch. Their customary systems of social organisation had been broken down and they were subject to a variety of formal discriminations, including that they could not own land.<sup>193</sup> Those who took up the “Hottentots” cause in the 1820s were therefore concerned with achieving civil equality with the white population—which was largely achieved with Ordinance 50 of 1828.<sup>194</sup>

Treaties made with the Xhosa in the Eastern Cape in 1835 and 1836 have more relevance to New Zealand circumstances. Some background is required. Keeping peace on the ever-expanding eastern frontier between settlers and Xhosa (who fought continuously over land and cattle) was a constant issue for the British administration, as it had been for the Dutch before them. In 1811–12 British forces cleared the Xhosa from west of the Fish River. Following a further campaign in 1818–19, the land between the Fish and the Keiskamma Rivers was declared neutral territory, although later it was described as the “ceded territory” and opened up to settlement. To stabilize the frontier, in 1820 5,000 British immigrants were settled on land conquered from the Xhosa in the first large-scale British settlement of the Cape. But despite these campaigns and settlement the problems on the eastern frontier persisted. The British response was a policy of commando raids

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Oxford, 1999, vol 3) 597-623 [“Saunders & Smith ‘Southern Africa, 1795–1910’”] at 597; Martin *Colonies of the British Empire*, above n 116, 477-478.

<sup>193</sup> Timothy Keegan *Colonial South Africa and the Origins of the Racial Order* (University Press of Virginia, Charlottesville, 1996) [“Keegan *Colonial South Africa*”] 15 & 25-26; Elizabeth Elbourne *Blood Ground: Colonialism, Missions, and the Contest for Christianity in the Cape Colony and Britain, 1799–1853* (McGill-Queen’s University Press, Montreal, 2002) [“Elbourne *Blood Ground*”] 10; Joan Church “The Place of Indigenous Law in a Mixed Legal System and a Society in Transformation: A South African Experience” [2005] *Australia & New Zealand Law & History E-Journal* 94-106 [“Church ‘The Place of Indigenous Law in a Mixed Legal System’”] at 96; *Report from the Select Committee on Aborigines (British Settlements)*, GBPP 1837 (425) VII.1 at 25-26.

<sup>194</sup> See Chapter 3, text accompanying n 194.

and reprisals to recover allegedly stolen cattle and, from time to time, to drive the Xhosa back over the Keiskamma River. As a result of lobbying by humanitarians such as Andries Stockenström (commissioner-general in the eastern districts), John Fairburn (editor of the *South African Commercial Advertiser*) and John Philip (of the London Missionary Society), a new Governor, Benjamin D'Urban, arrived in the colony in 1834 with instructions to enter into treaties of alliance with the independent Xhosa chiefs by which they would assume responsibility for the peaceful conduct of their followers in return for annual presents. Before this policy could be attempted, however, the Xhosa in December 1834 invaded the ceded territory, triggering war.<sup>195</sup>

D'Urban—now spurning the counsel of Philip, who had earlier had his ear, and falling under the influence of settlers and Methodist missionaries who were not sympathetic to the Xhosa—decided that the solution was not treaties but significant expansion of British territories to make the border not the Keiskamma River but the Kei River. To this end he struck at the Xhosa heartland (“Kaffraria”) by invading over the Kei. The paramount Xhosa chief, Hintsa, was captured and forced to agree to humiliating terms.<sup>196</sup> He was then killed trying to escape and his body mutilated (later a cause célèbre for humanitarians). In May 1835, D'Urban proclaimed the annexation of the 7,000 square miles of territory between the Keiskamma and Kei Rivers, to be called “Queen Adelaide Province”, announcing also an intention to expel all Xhosa to beyond the Kei. With this announcement there began a considerable speculation in land in Queen Adelaide Province.<sup>197</sup>

Soon after, however, D'Urban came to appreciate that he did not have the military resources to expel all Xhosa to beyond the Kei and to keep them there.<sup>198</sup> Thus by

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<sup>195</sup> Saunders & Smith “Southern Africa, 1795–1910”, above n 192, 577-578; Keegan *Colonial South Africa*, above n 193, 129-140.

<sup>196</sup> See the agreement between D'Urban and Hintsa, signed at Isolo, 29–30 April 1835, 85 CTS 115-122.

<sup>197</sup> Keegan *Colonial South Africa*, above n 193, 141-145.

<sup>198</sup> Ibid 147.

September 1835, as described by Timothy Keegan, “D’Urban fell back on a policy of providing defined locations for the chiefdoms”:<sup>199</sup>

The Xhosa in the Queen Adelaide Province were to become British subjects, and British magistrates were to ensure that British justice should prevail. For the first time, intact indigenous societies were to be incorporated with their own institutions under British rule—a proposed increase of some 70,000 souls in the country’s population.<sup>200</sup> The settlers were aghast at this reversal of policy, and D’Urban’s reassurance that large tracts would still be left vacant between the locations for the “occupation and speculations of Europeans” did not placate them.

The change of policy found expression in treaties entered into with Xhosa chiefs in September 1835. A 17 September treaty between Governor D’Urban, on behalf of the King of England, and the Gaika chiefs is typical of others.<sup>201</sup> In it, the chiefs on behalf of themselves, their families and their tribe, agreed “to bear true allegiance to, and to be faithful subjects of, His Majesty the King of England”:

to be friends to His Majesty’s friends, and enemies to his enemies; to obey the commands of His Majesty’s Governor, and the duly constituted colonial authorities, and to live in submission to the general laws of the colony. The Governor and the laws, at the same time, extending to them the same protection and security as to the other subjects of His Majesty.

The “general laws of the colony” did not, however, apply in full to the Gaika. Article 2 of the treaty provided:

II. To the penalties of these laws, the above chiefs and representatives as aforesaid, their tribe and families, hereby alike become amenable if they break them; and they must be aware that these laws inflict severe punishment, and even death itself, upon those who commit the crimes of treason, viz., rebellion, or taking up arms against the King, or the Government of the colony; murder, rape, setting houses or property on fire, theft, whether of horses, cattle, sheep, goats, or other property. And such penalties will be

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<sup>199</sup> Ibid 148.

<sup>200</sup> The policy was less than benign however. See below n 204 and accompanying text.

<sup>201</sup> Treaty between Great Britain and the Gaika, signed at Fort Willshire, 17 September 1835, 85 CTS 296-299. See also treaties between Great Britain and the tribes of Congo and T’Slambie, 6/17 & 17 September 1835 respectively, 85 CTS 291-295 & 300-303.

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equally incurred, if they be committed by any members of the above tribes, or families, against each other, as if committed against other inhabitants of the colony.

...

And the aforesaid chiefs and representatives are also made aware that any proceedings on their part, or on the part of any of their tribe or families, as aforesaid, against any one, whether within or without their tribe, for the pretended offence of witchcraft, are peremptorily forbidden by the above cited laws, and will be severely punished accordingly.

At the same time, the aforesaid chiefs and representatives understand, and it is a part of this Treaty, that the said English laws do not apply, and will not be applied to, or interfere with, the domestic and internal regulations of their tribe and families, nor with their customs, in so far as these do not involve a breach of the above-cited laws.<sup>202</sup>

Article 2 of the treaty therefore appears to limit the application of British law to the Gaika to serious criminal offences (ones that involved a breach of allegiance, were mala in se, or which were known sources of discord on the eastern frontier). Apart from these offences, the treaty did not interfere with the internal regulation of the tribe.

By articles 3 and 4, the chiefs promised to put a stop to all present and future “predatory incursions” in the colony and to surrender their guns, in return for which, by article 5, the Governor promised in the King’s name “to afford, in favour of the aforesaid chiefs and representatives, their tribe and families, all due protection and support for the maintenance of their rights, their property, their security and welfare, equally with the other subjects of His Majesty”.

Other terms of the agreement included that the Governor agreed to assign “a fair and adequate proportion” of land to each chief and his family “according to the amount of population of each family” from a defined tract of country (out of which

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<sup>202</sup> One of the treaties has “the exercise of these remaining free to them as at present so long as they may desire to retain them”. Treaty between Great Britain and the tribe of Congo, signed at Graham’s Town and Beka, 6 & 17 September 1835, 85 CTS 291-295 at 293. Compare article 2 of the Treaty of Waitangi: “so long as it is their wish and desire to retain the same in their possession”.

also reservations would be made for “places of public worship, schools, magistracies, military stations, and other public services”<sup>203</sup>), with the chiefs to make an annual payment of “one fat ox” “in token of fealty to the King of England, and of acknowledgment of holding his lands under His Majesty’s sovereignty”. A final provision worth noting is the chiefs’ agreement by article VIII that

they and the heads of families shall act as magistrates of the colony, each in his location, if required to do so by the Governor, and under such titles, and to obey such instructions, as shall by him be determined; and that they shall not harbour, nor suffer to be harboured, within their respective locations, any person or persons, whether of their own tribe or of others, whether English, Hottentots, Boers, or of any other nation, suspected or known to have been guilty of any crime or offence against the colony, but shall immediately secure and deliver up any such person or persons to the nearest colonial authorities.

D’Urban’s ultimate object seems to have been to “erode the power of the chiefs” by setting them up to administer laws prescribed by the colonial administration.<sup>204</sup> Certainly, the administrator of Queen Adelaide Province, Lieutenant-Colonel Harry Smith, regarded it as his mission to impose “civilisation” upon the Xhosa (described by him as “slippery vagabonds”), through exercise of sovereign authority over the chiefs. He told the Xhosa that they were to become “real Englishmen”.<sup>205</sup>

These ambitions were never realistic. As is suggested by the more limited terms of the treaties, the Xhosa had not accepted assimilation. Nor was British power in Queen Adelaide Province adequate to compel it against their wishes. Smith’s forceful approach to assimilation was not one shared by most missionary and

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<sup>203</sup> “Ministers of the gospel, schoolmasters, and, where necessary, English magistrates or residents, will be duly appointed within the above locations” (art 8).

<sup>204</sup> Timothy Keegan writes that “[w]ithin the new province D’Urban’s policy was to erode the power of the chiefs, and reduce them ‘to the most wholesome position of subordinate magistrates (or field cornets) acting under prescribed rules and limits’. Colonel Harry Smith, the new ruler of Queen Adelaide Province, developed grand ideas of himself as supreme chief over the African chiefdoms, dispensing the magical benefits of civilization to his grateful subjects.” Keegan *Colonial South Africa*, above n 193, 148. Compare McHugh *Aboriginal Societies*, above n 6, 164-165.

<sup>205</sup> Alan Lester “Settlers, the State and Colonial Power: The Colonization of Queen Adelaide Province, 1834–37” (1998) 39:2 *Journal of African History* 221-246 [“Lester ‘The Colonization of Queen Adelaide Province, 1834–37’”] at 227-228.

officials with direct contact with the chiefs.<sup>206</sup> Smith himself soon backed down, later writing.<sup>207</sup>

When I administered the government of kaffirland in 1836, I opened the gates of a flood which I could not stem, by undermining the power of the chiefs. My error was soon apparent; and I was compelled to re-establish that which it had before been my purpose to weaken.

In any event, both D'Urban and Smith's more extreme plans and the even softer system of administration envisaged by the terms of the treaties were soon overtaken by decisions taken in London. As has been discussed in connection with the proceedings of the Aborigines Committee, D'Urban was outflanked by Thomas Fowell Buxton and John Philip of the London Missionary Society. The consternation of the Colonial Office led immediately to Glenelg's Boxing Day 1835 despatch rebuking D'Urban for his conduct towards the Xhosa and requiring the abandonment of Queen Adelaide Province.<sup>208</sup> The despatch reiterated the policy that D'Urban had been sent to the Cape to carry out in 1834 of entering into treaties of alliance with the independent Xhosa chiefs.<sup>209</sup>

[W]e must look to the Chiefs, and to them alone, and must no longer take upon ourselves to make reprisals upon the people.

Andries Stockenström, who had given evidence to the Aborigines Committee critical of D'Urban's administration, was appointed Lieutenant-Governor of the Eastern Cape with instructions to restore friendly relations with the Xhosa based on new treaties.<sup>210</sup>

The new treaties were entered into by Stockenström for the King and the Xhosa chiefs in December 1836. The 5 December treaty with the tribe of Gaika is

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<sup>206</sup> Ibid 237-245.

<sup>207</sup> Quoted in Lester "The Colonization of Queen Adelaide Province, 1834-37", above n 205, 243.

<sup>208</sup> See Chapter 3, text accompanying ns 198-199.

<sup>209</sup> Glenelg to D'Urban, 26 December 1835, quoted in Keegan *Colonial South Africa*, above n 193, 150.

<sup>210</sup> Keegan *Colonial South Africa*, above n 193, 150.

representative of the others.<sup>211</sup> It recorded that “[t]here shall be peace and amity for ever between his said Britannic Majesty, his subjects (particularly those of the said Colony) and the Kafir Nation” (art 1). And it confirmed the effect of a proclamation made the same day which “restored” Queen Adelaide Province to the Xhosa by agreeing upon the Keiskamma River as the boundary line between Cape Colony and the Xhosa territories (thereby reverting to what had been agreed in 1819) (art 2). By article 3, the chiefs (“for themselves, their tribe, and their heirs and successors”) acknowledged the British Crown’s “right of full sovereignty” to the territory to the west of the Keiskamma River (“renouncing for ever all claim, which they ... may ever have had, or supposed to have had, to the same or any part thereof”).

For present purposes, the more significant provisions of the Treaty are those contained in articles 4-6. By article 4, the chiefs accepted “as a special mark of his said Majesty’s grace and favour any part of the Territory between the Keiskama and the Kat River, as a loan, to be ... held upon such terms, and to such extent as shall be laid down by or on the part of his said Majesty, which terms shall be incorporated in this Treaty”. They promised “at no period ever to lay claim to the possession or occupation of any other part of the Territory known by the name of the Ceded Territory, except such part as shall be allotted to them in the manner herein-above stated”. By article 5, Stockenström, in the name of the King, granted to the chiefs of the Gaika “that part of the said Territory called the Ceded Territory, to be specified at the foot of this Treaty”. This territory was to be “held by the said Chiefs and Tribe, their heirs and successors in perpetuity, never to be reclaimed by or on behalf of His said Majesty, except in case of hostility committed, or a war provoked by the said Chiefs of Tribe, or in case of a breach of this Treaty, or any part thereof, and for which breach satisfaction or redress shall not be otherwise given or obtained”.

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<sup>211</sup> Treaty between Great Britain and the Gaika, signed at King William’s Town, 5 December 1836, 86 CTS 291-302. See also the treaties between Great Britain and the tribes of T’Slambie and Congo (5 December 1836) and the Fingoes (10 December 1836), 86 CTS 303-329.

By article 6, in an example of *imperium in imperio*, the tribe was to govern itself under its own laws:

The said contracting Chiefs and their Tribe shall, in the said Territory so granted to them, enjoy the full and entire right to adopt or adhere to the Kafir Laws, or any other Law which they may see fit to substitute, as also to expel or exclude from the same any person whom they do not think proper to admit or retain; and, with the exception of the contingencies of hostility, war, or breach of these Treaties, specified in the foregoing Article V, the right of His said Majesty to the dominion over the said Territory shall in no way be exercised therein, any more than in any part of Kaffraria itself, subject, however, to the restrictions and conditions specified in the following Article [which provided for the King's right to station troops and build forts in the territory but not to have those troops patrol the territory or "in any way to molest, disturb, or interfere with the inhabitants"].

Cross-border movement was strictly regulated (art 9). British agents were to reside near the principal chiefs, and under their protection, and were to resolve by diplomatic means any disputes between the British and the tribe, whether involving individuals or the chiefs and the colonial government (arts ?? 11-12). British subjects entering the tribal territory were, however, subject to its laws (art 16). Similarly, any Xhosa within the colony was subject to colonial law (art 23). The Treaty also provided that the tribe known as the "Fingoes" was under British protection in the Ceded Territory and was not to be molested or interfered with by the tribe of Gaika, the chiefs of which promised to "leave [the Fingoes] in full enjoyment of their property, laws, or customs, and in no way to avenge any grievance or dispute which may heretofore have existed between the Kafirs and the said Fingoes" (art 28).<sup>212</sup> The colonial government subsequently found it necessary to broker a supplementary treaty of peace and alliance, to which it and various tribes within the Ceded Territory were parties and in which the Crown was to act as

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<sup>212</sup> The chiefs also promised that, in Xhosa lands beyond the boundary of the Ceded Territory, they would allow the Fingoes "to continue in their present situations with their property, in the full enjoyment of their own Laws and customs" until they had completed harvesting their crops (after which time they were to be permitted to leave with all their property) (art 29).

arbiter in disputes between tribes if necessary.<sup>213</sup> This continued the strategy of diplomatic engagement in which the Xhosa tribes were treated by the colonial authorities as sovereign powers within the “loaned” lands despite apparent continuation of hostilities which might have been used to “reclaim” the lands and assert direct British authority.

The triumph of the humanitarians reflected in Stockenström’s treaties was, however, short-lived. The annexation of Queen Adelaide Province had been popular not only with settlers in the Eastern Cape but also with commercial interests in Cape Town. Stockenström’s appointment was not well received in the colony where the humanitarian influence was weak. D’Urban did not accept that his policies had been in error and schemed against Stockenström. The hostility towards Stockenström in the colony was so marked that the Colonial Office felt it had little choice but to replace him in 1839. With Stockenström’s replacement, his treaties came under increasing strain, although they were not formally modified until 1845. The chiefs, however, from 1839 lost trust in the administration and frontier problems re-emerged. The administration did little to defuse settler hysteria about Xhosa aggression.<sup>214</sup> By this time, there was no effective humanitarian voice in the colony to provide some balance. The missionaries were becoming disillusioned by their slow progress, especially in respect of the Khoi settlement on the Kat River. Other humanitarians, such as John Fairburn, the editor of the *South African Commercial Advertiser*, were in full retreat. Fairburn switched, over the next few years, to become an advocate of military action against the Xhosa.<sup>215</sup>

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<sup>213</sup> Treaty between Great Britain and the Ammakwane Tribe, signed at Fort Peddie, 19 June 1838, 88 CTS 3-7 (supplementing the 5 December 1836 treaty between Great Britain and the tribe of Congo, in similar terms to the treaty of the same date between Great Britain and the Gaika discussed above).

<sup>214</sup> Keegan *Colonial South Africa*, above n 193, 151-158.

<sup>215</sup> Ibid 117-128, 167-168 & 216-217; Elbourne *Blood Ground*, above n 193, chs 8-10; Andrew Bank “Losing Faith in the Civilizing Mission: The Premature Decline of Humanitarian Liberalism at the Cape, 1840–60” in Mark Daunton & Rick Halpern (eds) *Empire and Others: British Encounters with Indigenous Peoples, 1600–1850* (UCL Press, London, 1999) 364-383 [“Bank ‘Losing Faith’”].

By 1845, when new treaties were entered into, the 1836 treaties were not being observed by the British.<sup>216</sup> Encroachment on the authority of the chiefs was formalised in the new treaties. They abandoned British recognition of Xhosa laws and provided that criminal offences committed by British subjects within Xhosa territory were to be tried under British law in the colony. The chiefs were obliged by the terms of the treaties to make reparations for Xhosa raids on settler property, particularly cattle and horses.<sup>217</sup> Matters moved inexorably to war. In April 1846, war broke out with British invasion of Xhosa territory beyond the Ceded Territory. The “War of the Axe” of 1846–47 led to the recovery of Queen Adelaide Province, renamed “British Kaffraria”. Not only was there no opposition to the war within the colony, it was effectively sanctioned by the new Whig Secretary of State for the Colonies, Earl Grey. Grey considered that the Xhosa chiefs had “abused” their independence and needed to be brought under British authority. He endorsed a return to D’Urban’s 1835–36 assimilationist policies. In a clear indication of the extent of the shift, Grey brought back Harry Smith (then riding high as a hero of the Sikh War) as Governor. Smith’s earlier admission that he might have overreached in his treatment of the Xhosa chiefs in 1835–36 had, by this time, evaporated. He was implacable in the view that the Xhosa were, “like every other barbarian, ... a desponding creature”; “once subdued, [they are] easily kept subordinate”. On a visit to the defeated Xhosa chiefs in December 1847, he tore up a sheet of paper in front of them saying, “I make no treaty. I say this land is mine.” Smith may not have eradicated Xhosa government altogether (that was to be achieved by Sir George Grey in the 1850s,<sup>218</sup> between his two terms as Governor of New Zealand), but formal recognition of Xhosa independence was lost.<sup>219</sup>

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<sup>216</sup> Keegan *Colonial South Africa*, above n 193, 215.

<sup>217</sup> See treaties between Great Britain and the Xhosa tribes, January 1845, 98 CTS 1-35.

<sup>218</sup> Keegan *Colonial South Africa*, above n 193, 284-285 & 288; Bank “Losing Faith”, above n 215, 378-380.

<sup>219</sup> Keegan *Colonial South Africa*, above n 193, 215-221. That this approach was not inevitable in the 1840s in southern Africa is illustrated by the case of Natal where the authority of the chiefs was recognised and indigenous law continued to operate subject only to a requirement that it be not “repugnant”. See Church “The Place of Indigenous Law in a Mixed Legal System”, above n 193, 97-98; and Menezes *Amerindians in British Guiana*, above n 144, 16.

## India

Before the conquest of Bengal (1756–65), the East India Company's interests were in a string of trading factories along the east and west coasts of India, including Calcutta, Madras and Bombay, the so-called "Presidency Towns".<sup>220</sup> Bombay had been transferred to the British Crown by the Portuguese as part of the marriage dowry of Catherine of Braganza in 1660. Eight years later it was handed over by the Crown to the Company. The other trading factories were operated by the Company as concessions from the Mughal rulers. Within the three Presidency towns, the Company exercised authority over all residents by letters patent. Outside them, by a combination of letters patent and Mughal permission, the Company exercised authority over British subjects and its own employees.<sup>221</sup>

From 1765, the Company gained responsibility for the civil administration of the whole of the Mughal provinces of Bengal, Bihar and Orissa. This brought with it the right to collect the revenues that had formerly gone to the Mughal rulers, giving it a stake in maintaining both the revenue base and the systems for its collection.<sup>222</sup> PJ Marshall explains that the Company's interest in raising revenue gave it "a concern for maintaining an orderly society and for stable property relations with clearly defined rights to land, on which they believed rural prosperity to depend".<sup>223</sup> Continuation of existing laws and institutions was necessary to achieve these interests.

By the early nineteenth century, a dual system of law and courts, first adopted in Bengal, was in place in all three Presidencies.<sup>224</sup> In each Presidency Town, a Supreme Court and subordinate courts had civil and criminal jurisdiction over all within the town and over British subjects and Company servants in the Presidency.

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<sup>220</sup> Douglas Peers *India Under Colonial Rule: 1700–1885* (Pearson, Harlow, United Kingdom, 2006) ["Peers *India Under Colonial Rule*"] 24 & 27.

<sup>221</sup> McHugh *Aboriginal Societies*, above n 6, 76-78.

<sup>222</sup> Peers *India Under Colonial Rule*, above n 220, 43-45.

<sup>223</sup> PJ Marshall "1783–1870: An Expanding Empire" in PJ Marshall (ed) *The Cambridge Illustrated History of the British Empire* (Cambridge University Press, Cambridge, 1996) 24-51 ["Marshall '1783–1870: An Expanding Empire'"] at 48.

<sup>224</sup> Alan Gledhill *The Republic of India: The Development of its Laws and Constitution* (Stevens & Sons, London, 1951) ["Gledhill *The Republic of India*"] 148-153.

In civil matters involving parties who were Muslim or Hindu, Muslim or Hindu law was applied. If there was no applicable law, English law was applied with any necessary adaptation to meet local conditions. The continued application of Muslim and Hindu law to those populations was comparatively straightforward. More difficult was the question addressed in 1828 by the Chancery judge, James Stephen (father of the future Permanent Under-Secretary for the Colonies), by what means English law had been introduced into the Presidency Towns for application to British subjects and Company servants.<sup>225</sup>

Outside the Presidency Town, in the *mofussil*, the Company operated criminal courts applying Muslim criminal law, with British judges and Muslim legal advisers.<sup>226</sup> With steady adoption of British procedure and notions of criminal justice, however, the Muslim character of these courts was inevitably eroded. Gledhill's view is that "by 1832 the Muslim system had been so considerably amended as to show little evidence of its origin".<sup>227</sup> Civil justice in the *mofussil* was administered by district courts and lower courts of more limited jurisdiction. In the district courts, British judges applied Muslim and Hindu law as expounded by mulavis and pandits. The lower courts were presided over by Indians. In addition, local and petty disputes continued to be decided by landlords.<sup>228</sup> Courts of civil and criminal appeal were established.

In addition to the advantage the Company saw in stability of law and institutions, the dual system was also thought from the beginning to be the only fair approach. Sir Warren Hastings took the view in 1774 that:<sup>229</sup>

It would be a grievance to deprive the people of the protection of their own laws, but it would be a wanton tyranny to require their obedience to others of which they are wholly ignorant, and of which they have no possible means of acquiring knowledge.

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<sup>225</sup> *Freeman v Fairlie* (1828) 1 Moo Ind App 305 (Ch).

<sup>226</sup> Before 1790 in Bengal, the court had Muslim judges.

<sup>227</sup> Gledhill *The Republic of India*, above n 224, 153.

<sup>228</sup> Lauren Benton *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge University Press, Cambridge, 2002) ["Benton *Law and Colonial Cultures*"] 134.

<sup>229</sup> Quoted in Reynolds *Aboriginal Sovereignty*, above n 130, 79.

Sixty years later, the same attitude led the Company to criticise proposals in the Government of India Act 1833 for introduction of English criminal practices:<sup>230</sup>

Whatever may be the prejudices of Englishmen, we strongly deprecate the transfer to India of all the peculiarities of our criminal judicature. We are not satisfied that these peculiarities are virtues. There is no inherent perfection in the number twelve, nor any mysterious charm in an enforced unanimity of opinion; and legislating for the Indian people, we should be apt to seek for precedents in the ancient usages of India, rather than in the modern practice of England.

Despite these impulses, it was never going to be possible to maintain Muslim and Hindu law without modification. The introduction of British procedures and the hierarchy of the system of courts inevitably impacted on the substance of the pre-existing law.<sup>231</sup> From the late eighteenth century efforts had been made to capture the mass of Muslim and Hindu law in digests or codes. This effort arose out of the perceived need for greater certainty about custom than was provided by treating it as a matter of fact to be established in each case by expert opinion. In time, however, the texts came to be treated as identifying rules rather than simply as evidence of practices. Such reduction could distort and fix custom, preventing its development. Proponents of codification in the mid-nineteenth century, such as James Mill and Thomas Babbington Macaulay, thought that it had particular advantages for India. In the case of Mill, this enthusiasm stemmed from his exasperation with the complexity of Indian society and law. Macaulay's support was for a scientific and rationale code of universal application. In the end, however, both Mill and Macaulay failed to progress their ideas, in part because they came to acknowledge the necessity of reflecting difference, which made any codification an enormous task. When codification projects did have some success

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<sup>230</sup> Quoted in MF Lindley *The Acquisition and Government of Backward Territory in International Law, Being a Treatise on the Law and Practice Relating to Colonial Expansion* (Longmans, Green & Co Ltd, London, 1926) 375.

<sup>231</sup> See also Benton *Law and Colonial Cultures*, above n 228, 127-152.

in the 1860s and 1870s, it was because they tackled discrete topics in which general solutions had by then emerged.<sup>232</sup>

In administering its territories, the East India Company had little choice but to use existing Indian systems, as the Mughal Empire before it had done. Although this approach was in part dictated by practical limitations on its power to undertake direct administration and in part by self-interest in maintaining its revenue base through social and economic stability, it also reflected a general imperial preference to preserve local systems.<sup>233</sup> CA Bayly's assessment is that "[w]ithin the British empire ... 'tribes' were still generally thought to be socially beneficial".<sup>234</sup>

Tribal leaders were believed to provide political stability. The contemporary understanding of human history also taught that tribes were indivisible entities which could be measured, demarcated and stimulated to become healthier redoubts of commerce and virtue.

So, for example, in Bengal the population continued to have, under Company administration, a more significant relationship with a "patchwork of petty principalities", whether ruled by landholders (zamindars) or kings or queens (rāja or rānī).<sup>235</sup>

This preference to preserve and work through existing networks of authority did however not prevent, over time, important change in Indian society. Efforts to

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<sup>232</sup> See Jon Wilson *The Domination of Strangers: Modern Governance in Eastern India, 1780–1835* (Palgrave Macmillan, Houndsmills, Basingstoke, Hampshire, 2008) ["Wilson *The Domination of Strangers*"] chs 4 & 6; and Sandra den Otter "'A Legislating Empire': Victorian Political Theorists, Codes of Law, and Empire" in Duncan Bell (ed) *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (Cambridge University Press, Cambridge, 2007) 89–112.

<sup>233</sup> Peers *India Under Colonial Rule*, above n 220, 6–7 & 16–17; Peter Burroughs "Imperial Institutions and the Government of Empire" in Andrew Porter (ed) *The Oxford History of the British Empire: The Nineteenth Century* (Oxford University Press, Oxford, 1999, vol 3) 179 & 181.

<sup>234</sup> CA Bayly "The British and Indigenous Peoples, 1760–1860: Power, Perception and Identity" in Mark Daunt & Rick Halpern (eds) *Empire and Others: British Encounters with Indigenous Peoples, 1600–1850* (UCL Press, London, 1999) 19–41 ["Bayly 'The British and Indigenous Peoples'"] at 36.

<sup>235</sup> Wilson *The Domination of Strangers*, above n 232, 23.

define the rights and responsibilities of different groups within society by reference to custom and tradition had the effect of distorting and entrenching that custom and tradition. In particular, caste was transformed from a cultural tradition to a legal taxonomy in which identities, rights and responsibilities were created and fixed.<sup>236</sup> Accordingly, the verdict of historians is generally that the Company “tended to promote a kind of traditionalization rather than really to preserve the status quo”:<sup>237</sup>

[T]he impact of colonial rule was most revolutionary and transformative when it tried to preserve what it deemed to be “tradition”, for it often invented “traditions” or converted practices into tradition when in fact they were far from widespread or widely accepted.

From the 1820s, however, it is possible to see in British India the development of an increasingly aloof administration receptive to the idea that Indian tradition was a barrier to progress and that it had a duty to promote social reform. This in part reflected a growing social separation between English administrators and Indians. India can be seen to be in the vanguard of the creation of the modern administrative state. In this, it was ahead of other colonies and even of Britain.<sup>238</sup> PJ Marshall says that “[b]y contemporary standards the government of British India was an ambitious one, at least in its intentions”:<sup>239</sup>

Its ambitions were those of an authoritarian regime invested with a great deal of power and disposing of a large public revenue. Many of the most innovative minds in early nineteenth-century Britain applied themselves to questions as to how Britain should use its power to govern India.

As seen in Chapter 3, domestic British interest in India had been aroused in the late eighteenth century by the exposure of misbehaviour and corruption of East India Company officials. It had led to the assumption of Government oversight of the Company (although, importantly for this thesis, the oversight was never entrusted to the Colonial Office but to a stand-alone Board of Control). The trial of Warren

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<sup>236</sup> Peers *India Under Colonial Rule*, above n 220, 44

<sup>237</sup> Bayly “The British and Indigenous Peoples”, above n 234, 36; Peers *India Under Colonial Rule*, above n 220, 7.

<sup>238</sup> Peers *India Under Colonial Rule*, above n 220, 55; Wilson *The Domination of Strangers*, above n 232.

<sup>239</sup> Marshall “1783–1870: An Expanding Empire”, above n 223, 49.

Hastings (1788–95), prosecuted by Edmund Burke, then embedded the notion of responsibility or “trusteeship”. At the same time there was a flowering of intellectual interest in India (“orientalism”). The “innovative minds” of early to mid-nineteenth century Britain were drawn to the challenges of administration and society in India. Social reform for India was advocated by the utilitarians (most notably Jeremy Bentham and James Mill), evangelicals (such as Charles Grant, father of Glenelg), liberals (especially John Stuart Mill), “anglicists” (such as Thomas Babbington Macaulay), as well as the recently-admitted missionaries in India (some of the sternest critics of Indian society and practices, especially sati).<sup>240</sup>

These influences did not greatly effect how India was governed before 1840. Company officials remained “broadly of one mind that India must be governed according to its own, and not British, precedents”.<sup>241</sup> It is overstating matters to describe the period between 1820 and 1857 (when the Indian Mutiny occurred) as an “age of reform”. Reforming measures were undertaken in this period. They included proscription of sati, efforts to Christianise Indians, codification of customary law, and the promotion of western education and English language (most famously by Macaulay who, in his 1835 Indian Education Minute, expressed the view that “I have never found one among them [the Orientalists] who could deny that a single shelf of a good European library was worth the whole native literature of India and Arabia”).<sup>242</sup> There remained, however, a gap between projects for reform and their implementation. Although English was made the official language of government and was embraced, along with western education, by the elite (although more so by Hindus than by Muslims), its penetration was limited. Macaulay’s proposals were funded by the Company only to the extent of

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<sup>240</sup> See also Peers *India Under Colonial Rule*, above n 220, 34-38 & 51-59. Missionaries had been kept out of British India until 1813. Ibid 53.

<sup>241</sup> DA Washbrook “India, 1818–1860: The Two Faces of Colonialism” in Andrew Porter (ed) *The Oxford History of the British Empire: The Nineteenth Century* (Oxford University Press, Oxford, 1999, vol 3) 395-421 [“Washbrook ‘Two Faces of Colonialism’”] at 404.

<sup>242</sup> Peers *India Under Colonial Rule*, above n 220, 51-59; Thomas Babbington Macaulay’s minute on Indian education of 2 February 1835, reproduced in GM Young (ed) *Speeches by Lord Macaulay with his Minute on Indian Education* (Oxford University Press, Oxford, 1935) 345-361 at 349.

£10,000 a year.<sup>243</sup> In North India, Urdu rather than English replaced Persian as the official language. In matters of religion, the Company itself did not promote Christianity.<sup>244</sup> The proscription of sati was promoted by invoking Hindu religious texts to challenge customary justification for the practice.<sup>245</sup> Marshall's verdict is that "[f]or most of the nineteenth century, Britain did not make significant changes in India".<sup>246</sup>

Reform programmes generally remained on paper. ... [The] regime had very little direct contact with its subjects. Except in a few instances, like the banning of widow burning (suttee), the British were reluctant to use the law to enforce social change on Indians and it is doubtful whether they had much capacity to do so. New educational initiatives as yet affected only limited groups in towns. Public work programmes did not develop on any large scale until late in the nineteenth century.

Reform efforts did pick up pace under Lord Dalhousie, Governor General of all of India from 1846 until 1856, and under the influence of a new generation of administrators educated at the Company's school at Haileybury in Hertfordshire. The perception of increased hostility to Indian tradition during the Dalhousie years was widely accounted to have been the cause of the Indian Mutiny.<sup>247</sup> The Mutiny itself was a defining moment in British imperial history—not only in India. One in seven Europeans in India died, along with 800,000 Indians. East India Company rule was replaced by direct British Government administration. British sovereignty was proclaimed and the Mughal Emperor was banished. As a consequence of the Mutiny, the reform agenda was largely given up. The view was taken that the British had miscalculated in allowing traditional rulers to be alienated from them. As a result, their place in the system of administration was strengthened. These changes mostly reflected a pragmatic response to the Mutiny based on the long-standing imperatives of security and profit. It did not reflect greater tolerance

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<sup>243</sup> Equivalent to £834,000 today.

<sup>244</sup> Washbrook "Two Faces of Colonialism", above n 241, 415-416; Peers *India Under Colonial Rule*, above n 220, 58-59; Wilson *The Domination of Strangers*, above n 232, 157; Bayly "The British and Indigenous Peoples", above n 234, 36.

<sup>245</sup> Peers *India Under Colonial Rule*, above n 220, 56.

<sup>246</sup> Marshall "1783-1870: An Expanding Empire", above n 223, 49.

<sup>247</sup> Washbrook "Two Faces of Colonialism", above n 241, 416-418.

towards the Indian population. Indeed, the Mutiny left a legacy of racism (especially directed at Muslims), which influenced attitudes in other parts of Empire.<sup>248</sup>

### Ceylon

At 1840, the British colony of Ceylon (Sri Lanka) consisted of more than 1 million non-European peoples and a mere 3,000 or so Europeans.<sup>249</sup> The “native” inhabitants comprised a Sinhalese (Buddhist) majority, Tamils (Hindu), Moors (Muslim), Burghers (mixed-blood descendants of Portuguese and Dutch, both Roman Catholic and Protestant Christians), and other smaller ethnic groups. The Maritime Provinces obtained by the British in 1798 had established Dutch systems of government and law in which there was self-management at local level and separate systems of law attached to different ethnic or religious groups. When British rule was proclaimed in 1799, and by the 1801 Charter of Justice, pre-existing laws and institutions under the Dutch were confirmed. By that time, Roman-Dutch law (which had absorbed some local custom) had supplanted Sinhalese law for the majority Sinhalese population. A Dutch code of Hindu law (*Tesavalamai*) applied among the Tamil inhabitants of the north-east of the country. The Moors observed Muslim law, which was collected and promulgated by the British in 1806. Other distinctive groups had their own customary law which was recognised by colonial courts on expert evidence or authoritative texts. For example, the customary law of the Colombo Chitties, a sub-category of the Burgher population, was applied without legislative enactment.<sup>250</sup> The colonial

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<sup>248</sup> Peers *India Under Colonial Rule*, above n 220, 64-74. For the extent to which the reform impulse survived, see *ibid* 75-79.

<sup>249</sup> Martin *Colonies of the British Empire*, above n 116, 375.

<sup>250</sup> T Nadaraja “The Administration of Justice—1796 to 1948: Part II: The Law” in KM de Silva (ed) *History of Ceylon* (University of Ceylon, Peradeniya, 1973) 327-342 [“Nadaraja ‘The Administration of Justice’”] at 327-331; I Jennings & HW Tambiah *The Dominion of Ceylon: The Development of its Laws and Constitution* (Stevens & Sons Ltd, London, 1952) [“Jennings & Tambiah *The Dominion of Ceylon*”] 52-53, 57, 179-182 & 252-253.

civil service included only small numbers of Europeans who were required to know the local languages. Legislation was translated into Sinhalese and Tamil.<sup>251</sup>

In the interior, the last of the Sinhalese kingdoms, the Kandyan kingdom, was brought under British rule by 1818. There, under an 1815 treaty, administration by the Governor of Ceylon was substantially through the principal chiefs, to whom were preserved “the rights, privileges, and powers of their respective Offices”. Under the same Treaty, the people of the province were confirmed in “the safety of their persons and property, with their Civil Rights and Immunities, according to the Laws, Institutions, and Customs established and in force amongst them”.<sup>252</sup>

Despite initial continuity, there was considerable modification of both systems of law during the early period of British administration. In the Maritime Provinces, over time, the Dutch courts were replaced by institutions set up along English lines. In 1801, a Charter provided for a Supreme Court with civil and criminal jurisdiction. And in 1810, a further Charter introduced trial by jury in criminal matters. These changes inevitably modified pre-existing Roman-Dutch practice and procedure. Similarly in the Kandyan province the *mahā naduva* (the Great Court of Justice) was replaced by a Board of Commissioners. It was inevitable that English legal principles and process came to supplant much of the pre-existing system especially in relation to criminal law and practice and civil procedure and evidence. Kandyan custom survived principally in respect of family law, land tenure, and inheritance.<sup>253</sup>

There was a substantial restructuring of British administration in Ceylon in 1833. A unified civil and judicial administration was set up for the Maritime and Kandyan provinces. It included the creation of a Legislative Council, to which were

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<sup>251</sup> Martin *Colonies of the British Empire*, above n 116, 387.

<sup>252</sup> Nadaraja “The Administration of Justice”, above n 250, 327; Jennings & Tambiah *The Dominion of Ceylon*, above n 250, 12-14; Convention between Great Britain and Kandy, signed at Kandy, 2 March 1815, 63 CTS 483-486.

<sup>253</sup> KM de Silva “The Administration of Justice—1796 to 1948: Part I: The Courts” in KM de Silva (ed) *History of Ceylon* (University of Ceylon, Peradeniya, 1973) 317-326 at 318-321; Nadaraja “The Administration of Justice”, above n 250, 329 & 332-335; Jennings & Tambiah *The Dominion of Ceylon*, above n 250, chs 5 & 7.

appointed Sinhalese and Tamil representatives. District Courts were set up. In part this standardisation was an attempt to curb Kandyan nationalism.<sup>254</sup>

Despite the trend to British justice, there remained a considerable “native” element. Until 1843, juries were selected from the same ethnic and caste background as the accused; after then, language not ethnicity and caste became the basis of jury selection.<sup>255</sup> District Court judges, and Supreme Court judges in civil cases, were supported by assessors, permitting local and ethnic input.<sup>256</sup> At the local level, village councils continued to decide minor cases, as authorised by s 4 of the 1833 Charter.<sup>257</sup> Chiefs continued to exercise authority in village life.<sup>258</sup>

## Singapore

In 1838, a House of Lords Select Committee on New Zealand (the proceedings of which are discussed in Chapter 9) was referred by witnesses to a treaty with the Sultan of Johor by which sovereignty of Singapore was obtained for Britain. Because of this reference, the survey undertaken here of the implications of British sovereignty for native systems of government and law in the different parts of the Empire may usefully conclude by mentioning this treaty. It was cited to the Committee as an example of an “exceptional” law adopted “out of Deference to the

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<sup>254</sup> KM de Silva *A History of Sri Lanka* (C Hurst & Company, London, 1981) [“de Silva *A History of Sri Lanka*”] 262-264; Vijaya Samaraweera “The Colebrooke-Cameron Reforms” in KM de Silva (ed) *History of Ceylon* (University of Ceylon, Peradeniya, 1973) 77-88 at 81; KM de Silva “The Legislative Council in the Nineteenth Century” in KM de Silva (ed) *History of Ceylon* (University of Ceylon, Peradeniya, 1973) 226-248 at 226-229 & 248; Nadaraja “The Administration of Justice”, above n 250, 322.

<sup>255</sup> LA Wickremeratne “Education and Social Change, 1832 to c1900” in KM de Silva (ed) *History of Ceylon* (University of Ceylon, Peradeniya, 1973) 165-186 [“Wickremeratne ‘Education and Social Change’”] at 173.

<sup>256</sup> Jennings & Tambiah *The Dominion of Ceylon*, above n 250, 120; Martin *Colonies of the British Empire*, above n 116, 388.

<sup>257</sup> Jennings & Tambiah *The Dominion of Ceylon*, above n 250, 91-92; Ceylon Charter of Justice, 1833, reproduced in Clark *Colonial Law*, above n 189, 544-567 at 546.

<sup>258</sup> Wickremeratne “Education and Social Change”, above n 255, 166-167; Martin *Colonies of the British Empire*, above n 116, 387-388.

## Chapter Four: British Sovereignty & Native Government

native Customs and Prejudices”.<sup>259</sup> That seems to have been a reference to article 6 of the Treaty which provided that:<sup>260</sup>

In all cases regarding the ceremonies of religion, and marriages, and the rules of inheritance, the laws and customs of the Malays will be respected, where they shall not be contrary to reason, justice, or humanity. In all other cases the laws of the British authority will be enforced with due consideration to the usages and habits of the people.

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<sup>259</sup> See Chapter 9, n 223 and accompanying text.

<sup>260</sup> Memorandum of agreement between Great Britain and Johor, signed June 1823, 73 CTS 227-229 at 229.

## CHAPTER FIVE

### BRITISH SOVEREIGNTY & NATIVE LAND

Whenever sovereignty was acquired by Britain in an overseas territory inhabited by non-British peoples, it became necessary to decide how pre-existing rights to land were to be treated in the new order. It can be argued that there was no consistent imperial approach and that the recognition of property rights depended on the circumstances of the local people and of the acquisition of sovereignty. The case can also be made out that there was, at least pre-1840, a consistent approach respectful of existing rights to land, which was departed from only in exceptional circumstances.<sup>1</sup> A brief survey of Empire, such as is attempted in this section, may suggest that both views have validity because the circumstances encountered in different territories led to similar outcomes respectful of existing rights. What the comparisons do not suggest, however, is that imperial policy with respect to rights to land was determined simply according to classification of the local people as “civilised” or “uncivilised”.

In colonies with pre-existing European populations, the invariable approach was to maintain local law relating to property in land and not to interfere with private ownership. This position was very often explicitly taken in articles of capitulation and treaties of cession. But, even without such guarantees, these were default positions under British imperial law. Examples can be found in post-acquisition treatment of property in territories acquired from European powers in Quebec, the Caribbean, Malta, Cape Colony, Mauritius and the Seychelles.<sup>2</sup>

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<sup>1</sup> See and compare Stuart Banner *How the Indians Lost their Land: Law and Power on the Frontier* (Harvard University Press, Cambridge, Massachusetts, 2005) [“Banner *How the Indians Lost their Land*”] & *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press, Cambridge, Massachusetts, 2007) [“Banner *Possessing the Pacific*”].

<sup>2</sup> See Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens & Sons, London, 1966); Charles Clark *A Summary of Colonial Law, The Practice of the Court of Appeals from the Plantations, and of the Laws and their Administration in all the Colonies; with Charters of Justice, Orders in Council, &c &c &c* (Sweet; Maxwell; and Stevens & Sons, London, 1834); and R Montgomery Martin *History of the Colonies of the British Empire in the West Indies*,

Although the development of British administration in India and Ceylon varied in time and nature, the administration was similar in that it did not seek to disturb existing rights of property. In neither was British settlement a significant factor. In India, the priority was the collection of tax revenue through existing structures, which gave the East India Company no reason to upset existing rights of property.<sup>3</sup> Intervention was rather directed to better definition of the respective interests of landlords and tenants to facilitate more effective administration of revenues.<sup>4</sup> Similarly in Ceylon, the British carried on Dutch efforts to simplify Sinhalese systems of tenure to make them better approximate English freehold tenure (as was already the case with tenure in Tamil areas). When simplification led to customary interests in unoccupied lands being overlooked in relation to the Kandyan Provinces, the interpretation of the legislation (which had favoured the British Crown) was modified by administrative order.<sup>5</sup>

The circumstances that confronted the British Crown in North America were very different from the colonies with settled European populations acquired from other European powers or the populous and long-organised societies of India and Ceylon. The North American colonies were established for the purpose of British settlement in vast territories with relatively small native populations. They therefore prefigured the colonies later established in Australia and New Zealand. The history of British and later United States laws and practices in respect of Indian rights to land are of particular interest to New Zealand not only because of the historical parallels but also because of their invocation in New Zealand debates about the nature of Maori property in land in the 1840s (including their possible impact on the terms of the Treaty of Waitangi itself) and because of their

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*South America, North America, Asia, Austral-asia, Africa, and Europe* (WH Allen, London, 1843).

<sup>3</sup> PJ Marshall “1783–1870: An Expanding Empire” in PJ Marshall (ed) *The Cambridge Illustrated History of the British Empire* (Cambridge University Press, Cambridge, 1996) 24-51 at 48; Douglas Peers *India Under Colonial Rule: 1700–1885* (Pearson, Harlow, United Kingdom, 2006) 45-48.

<sup>4</sup> Jon Wilson *The Domination of Strangers: Modern Governance in Eastern India, 1780–1835* (Palgrave Macmillan, Houndsmills, Basingstoke, Hampshire, 2008) 104-132.

<sup>5</sup> Michael Roberts “Land Problems and Policies, c. 1832 to c. 1900” in KM de Silva (ed) *History of Ceylon* (University of Ceylon, Peradeniya, 1973) 119-145 at 119-122; KM de Silva *A History of Sri Lanka* (C Hurst & Company, London, 1981) 191-192, 194-195 & 275-276.

subsequent influence on New Zealand law and historiography up to the present day. Thus, as has already been described, there is a strong strand of scholarship that article 2 of the Treaty was declaratory of a common law position that Maori did not own land but had merely a “right of occupancy” which burdened the Crown’s underlying title to the land as “analysed authoritatively” by Chief Justice Marshall in the United States Supreme Court decision of *Johnson v M’Intosh* in 1823.<sup>6</sup> As will be seen, in the 1840s, this same view was put forward, particularly by the New Zealand Company in London and by Governor Gipps in Sydney. It was, however, repudiated by the Colonial Office and others involved in the Treaty, such as James Busby, who took the view that *Johnson v M’Intosh* neither represented British law and practice in North America nor was the approach taken in the Treaty.<sup>7</sup> Consideration of North American practice also sheds light on other questions about article 2 including the existence of a right of Crown pre-emption consequential upon sovereignty, application of the doctrine of tenures, and the right to treat unoccupied lands as “waste lands” of the Crown.

Because of its importance, it necessary to deal with North American practice and law at some length. It is convenient (and roughly chronological) to address in sequence the pre-American Revolutionary War position, the positions in western and southern Africa, Australia and Canada, before returning to developments in the United States down to 1840 (which require consideration in more detail, particularly in relation to the decisions of the Supreme Court).

### **British North America before 1776**

The history of how Indian interests in land were treated in British North America has been convincingly described by Stuart Banner.<sup>8</sup> For this thesis, it is enough to summarize the arguments and evidence which support his conclusion that British

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<sup>6</sup> See Chapter 2, text accompanying ns 329-334 & 344.

<sup>7</sup> See Chapters 15-18.

<sup>8</sup> Banner *How the Indians Lost their Land*, above n 1.

policy was that Indians owned their lands and that Europeans could acquire it only by purchase from them.

British acceptance that Indians were owners of land was achieved by the end of the seventeenth century, after initial controversy.<sup>9</sup> Arguments had been advanced that because Indians were heathen and savages without law, leading nomadic existences, they did not have rights of property and it was legitimate for land to be taken from them, by force if necessary. The terms of earlier charters of the English Crown may have reflected these attitudes.<sup>10</sup> Such attitudes were, however, by no means universally held. Contrary arguments put forward by Spanish theologians de Vitoria and de Las Casas were much admired in Elizabethan England and the Papal Bulls and French Charters for the Americas did not deny property to Indians.<sup>11</sup> By late in the seventeenth century, it seems to have become generally accepted that dispossessing Indians of their land on the basis of their heathen beliefs was not legitimate. Nor could land be claimed by conquest unless the war was “just” (which it would not be if undertaken for the purpose of obtaining land). It had also become clear that Indians were agriculturalists, not nomads, and that they did recognise and allocate property in land.

More importantly, quite apart from the theoretical arguments, from the outset of settlement land was commonly acquired by purchase and the practice seems to have become the norm well before the end of the seventeenth century.<sup>12</sup> From then and until the Revolution, Indians were treated as owners of land as is demonstrated by the large number of surviving deeds of purchase (in the absence of which New

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<sup>9</sup> Ibid 12-20.

<sup>10</sup> Compare ibid 15 to Brian Slattery “Paper Empires: The Legal Dimensions of French and English Ventures in North America” in John McLaren, AR Buck & Nancy Wright (eds) *Despotic Dominion: Property Rights in British Settler Societies* (University of British Columbia Press, Vancouver, 2005) 50-78 [“Slattery ‘Paper Empires’”] at 65-71. See also Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, Oxford, 2004) [“McHugh *Aboriginal Societies*”] 91-95.

<sup>11</sup> McHugh *Aboriginal Societies*, above n 10, 89-91; Slattery “Paper Empires”, above n 10, 54-65.

<sup>12</sup> Banner *How the Indians Lost their Lands*, above n 1, 20-29.

Jersey colonists in 1747 “would *hiss* at the person pretending Property”),<sup>13</sup> the prevalence of statutes requiring settlers to obtain the permission of colonial governments before buying land (the first being enacted by Massachusetts in 1634),<sup>14</sup> and extensive court and government interventions to protect Indian property interests from trespass and from fraud. Banner writes that “colonial officials often enforced Indian property rights against the competing claims of colonists”.<sup>15</sup>

New England court records are full of property disputes, many involving Indian property owners, and the Indians were treated the same as English litigants. When colonists or their livestock trespassed on Indian land, for example, Indian plaintiffs prevailed in court. In 1710, when a group of Mohawks refused to permit New York officials to survey land the Mohawks claimed not to have sold, Governor Robert Hunter returned to Albany, checked the property records, discovered the Mohawks were right, and called off the survey. In 1733, when the Mohawks persuaded Governor William Cosby that a purported sale of their land had been fraudulently procured, Cosby invalidated the transaction.

Colonists referred to Indians as “owners” or “proprietors” of their lands. They described their acquisitions of land as purchases and they concluded them by deeds with the Indians which were in form indistinguishable from those by which they transferred land between themselves. Banner stresses that “Indian property rights in land in the colonial period were full property rights, not the limited ‘right of occupancy’ discussed by John Marshall in *Johnson v M’Intosh*”.<sup>16</sup>

Banner identifies five reasons why the English settlers recognised Indians as the owners of their lands: Indians were cultivators; they were seen to operate a system of property among themselves (not dissimilar to the overlapping individual and group rights to be found in England before the enclosures of the seventeenth and eighteenth centuries); the English lacked the military strength to seize land and needed to maintain allies among the Indians against the ambitions of France; land was cheap to buy and purchase with the agreement of the Indian owners entailed

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<sup>13</sup> Ibid 26-27.

<sup>14</sup> Ibid 27.

<sup>15</sup> Ibid 27-28.

<sup>16</sup> Ibid 28.

less risk than taking it without such consent; and once purchases had been made there was common interest in recognising Indian ownership of land as the root of valid titles.<sup>17</sup> When, in the late 1680s, the Governor of New England attempted to invalidate all titles that could not be traced to a government grant (arguing that the “pretended Purchases from Indians” did not give good title as “from the Indians noe title cann be Derived”) it caused an outcry.<sup>18</sup>

There was, however, considerable scepticism about whether Indian ownership extended beyond occupied and cultivated lands (even William Penn doubted that Indian property extended to unoccupied lands). To many it seemed preposterous that so few might claim ownership of vast territories, even those over which they hunted or travelled. Banner writes that “[o]n the level of theory” the arguments were “fought to a standstill” (although they were revived again after the Revolution in the early nineteenth century, again with no result<sup>19</sup>). Whatever the theory, in practice, the English generally recognised Indian ownership to the territories they claimed, and purchased their hunting grounds and other uncultivated lands. That is not to say that the rights of the Indian owners were fully respected. With increasing English settlement, the incidents of illegal occupation of unoccupied Indian lands increased, sometimes supported by dubious government grants.<sup>20</sup>

However, even in respect of lands to which the Indian claim to ownership was free of doubt, Banner accepts that the acknowledgment of Indian ownership was purely self-interested on the part of English purchasers and that the results were far from favourable to the Indian sellers. By the end of the colonial period the eastern-most tribes had little land left to them and most had been forced to migrate west beyond the frontier of English settlement. Banner describes a process in which the circumstances of settlement left Indians with very few options but to sell land at an

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<sup>17</sup> Ibid 35-42.

<sup>18</sup> Ibid 41-42. Because of the Revolution of 1688, the Governor’s intended reform was not implemented.

<sup>19</sup> See text accompanying ns 104-107 below.

<sup>20</sup> Banner *How the Indians Lost their Lands*, above n 1, 29-35.

increasing pace. He indicates that often Indians did not sufficiently understand the transactions and in some cases there was systematic fraud.<sup>21</sup>

Banner considers that it would be a mistake to think that the English were “merely pretending to treat the Indians as landowners” for their own purposes. He argues that Indians were undoubtedly regarded as owners of land in the colonial period. In any event, he makes the point that:

There is no actual difference between respecting others’ property rights and treating them as if one is respecting their property rights. That’s what a property right *is*—the knowledge that one will be treated as a property owner.<sup>22</sup>

The fact that recognition of Indian property suited English purposes meant, however, as Banner notes, that English colonial land policy was unstable, and set up the conditions in which changes of circumstances would lead to change in the policy of recognition after the Revolution (a point returned to below in discussing the case-law of the United States Supreme Court):<sup>23</sup>

Each of the factors that gave rise to Indian property rights was subject to change. Some were already changing in the colonial period. The balance of power between settlers and Indians was constantly in flux, and over the long run it was tipping inexorably in favour of the settlers. Land was growing more expensive with each new wave of European immigration. In later years, other factors would change as well. Settlers would begin encountering Indians farther west who lacked agriculture. Memories of the English common fields would grow dim with the passage of time. Eventually the percentage of American landowners who traced their title back to a purchase from the Indians would begin to decline. The respect paid to Indian property rights during the colonial period was far from perfect; but after the Revolution, Indian property rights would never again be as strong, because the white residents of the United States would face a very different set of circumstances.

Of particular significance in the change of circumstances was the 1763 Royal Proclamation prohibiting private land purchases which, over time, meant that

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<sup>21</sup> Ibid 49-84.

<sup>22</sup> Ibid 42.

<sup>23</sup> Ibid 43.

British landowners increasingly looked to Crown grants instead of purchases from Indians as the foundation of their titles, and so had less common cause in recognising Indian ownership of land.

The 1763 Proclamation arose out of the concern of the Imperial Government to remove the dissatisfaction of Indian tribes with settlement and sharp private land purchasing practices. These had led to conflict and had caused some tribes to side with the French in the on-going struggle for dominance in North America. The strains between Indians and colonists had been greatly exacerbated by the huge increase in the settler population, which from 250,000 in 1700 had reached 1.2 million by 1750. With this background, the Proclamation prohibited new land grants and settlement in lands “reserved” to Indians west of a north-south line drawn along the ridge of the mountains running through New York, Pennsylvania, Virginia, North and South Carolina, and Georgia.<sup>24</sup> Private land purchasing east of the line was also prohibited. Instead all land purchases from Indians were to be undertaken by colonies themselves (governors in the royal colonies and proprietors in the proprietary colonies). Purchases of Indian lands were to be made at public meetings of the tribes (a reform that Indians themselves had proposed to prevent tribal lands being sold by individuals without authority).<sup>25</sup> By the Proclamation “Indian land sales were transformed from *contracts* into *treaties*—from transactions between private parties into transactions between sovereigns”.<sup>26</sup>

Before the Proclamation was adopted, the Imperial Government had set up the Indian Department, attached to the British military forces in North America.<sup>27</sup> To the Department fell the responsibility of ensuring that the Proclamation was observed. Sir William Johnson ensured that the Department followed an approach that was respectful of Indian property. He accepted that British rights to land

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<sup>24</sup> The boundary line in the Proclamation was provisional and was re-drawn after negotiations with colonies and Indian tribes in the 1760s and early 1770s. See *ibid* 92-93 & 95-98.

<sup>25</sup> *Ibid* 85-94.

<sup>26</sup> *Ibid* 85.

<sup>27</sup> See Chapter 4, text accompanying n 14.

“Extend no farther than they are actually purchased by Consent of the natives”<sup>28</sup> and disclaimed any intention by the Crown to “deprive any Nation of Indians of their Just property by taking possess<sup>n</sup> of any Lands to which they have a lawfull Claim”.<sup>29</sup>

Despite their purposes, the Proclamation and the Indian Department proved unequal to the task of preventing both westward expansion of settlement and private purchases of (and unauthorised settlement on) Indian land east of the Proclamation’s line. This was for a number of inter-related reasons: the huge demand for land; settler confidence that the colonial administrations could not prevent such expansion and, in the end, would be obliged to protect it;<sup>30</sup> the refusal of existing settlers west of the line to relocate to the east; the pressures on Indians to sell land, often to repay debt; and the gambles of land speculators (who were encouraged by a misapplied and doctored legal opinion by the English law officers, Charles Pratt and Charles Yorke, that in British India a Crown grant was not a precondition for validity of title and that land could be acquired privately) that the Proclamation was invalid and would be revoked.<sup>31</sup> Banner concludes that the Proclamation was a “dismal failure”. Its “most obvious effect ... was to replace legal land acquisition with illegal land acquisition”.<sup>32</sup> For all that, the change in policy had a lasting legacy in that it repositioned land acquisition as the concern of the Crown (and later the Federal Government of the United States) to be actioned through treaties. Banner argues that the change from private contract to State treaty had “[a]s a strict legal matter ... no bearing on whether the Indians owned their land before they sold it” but that “the fact that all new land titles derived from the

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<sup>28</sup> Johnson to Kempe (Attorney-General of New York), 7 October 1765, quoted in Hamar Foster “Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act Cases*” (1991-1992) 21 *Manitoba Law Journal* 343-389 [“Foster ‘Forgotten Arguments’”] at 353-354.

<sup>29</sup> Speech of Sir William Johnson at the conference with Indian tribes at Detroit, 9 September 1761, reproduced in James Sullivan (ed) *The Papers of Sir William Johnson* (The University of the State of New York, Albany, 1921, vol 3) 474-480 at 478.

<sup>30</sup> As Banner explains, purchases of land were not illegal, simply unenforceable (although in some colonies settlement on Indian lands was made an offence). Speculators seem to have calculated that this was a risk worth running. See Banner *How the Indians Lost their Land*, above n 1, 101.

<sup>31</sup> Ibid 98-104.

<sup>32</sup> Ibid 104.

Crown rather than from the Indians had some subtle long-run effects on the way Anglo-Americans thought about the Indian ownership of land”.<sup>33</sup> This point will be returned to later, in considering the shift in thinking from Indians as owners to mere occupants of their lands in the post-Revolution period. Before returning to developments in North America, it is convenient to consider near contemporary British dealings with the land of indigenous populations in other parts of the Empire.

### West Africa

British interests in west Africa were to be found in the Gold Coast, Sierra Leone and the Gambia. In all three, land was purchased by the British from local chiefs. Purchases were made both by private British interests and by the Crown, the latter by treaties reproduced in the *British and Foreign State Papers* and other nineteenth century treaty series. The earliest purchases or concessions from the local rulers in west Africa appear to have been those concluded by the Royal African Company of England on the Gold Coast in the late seventeenth century in establishing its trading forts (although it may have taken over even earlier sixteenth century concessions obtained by its predecessor, the Royal Adventurers of England trading to Africa). Subsequent Acts of the Imperial Parliament vesting property of the Company in a successor Company and later in the Crown itself, referred to the interests earlier obtained by agreement with local rulers.<sup>34</sup>

In order to set up the “Province of Freedom” as a home for former slaves and black refugees from the American War of Independence in Sierra Leone, land was acquired by treaty from the paramount chief Naimbana and “other Kings, Princes, Chiefs, and potentates subscribing thereto” in 1788 (after a first treaty had been repudiated by them<sup>35</sup>).<sup>36</sup> The treaty (the sovereignty aspect of which has already

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<sup>33</sup> Ibid 108.

<sup>34</sup> Kent McNeil *Common Law Aboriginal Title* (Oxford University Press, Oxford, 1989) [“McNeil *Common Law Aboriginal Title*”] 127-128.

<sup>35</sup> The second treaty recorded that the first “was not (to our certain knowledge) valid, [the land] having been purchased from people who had no authority to sell the same”.

been referred to<sup>37</sup>) was to set the pattern for dealing in land for the purposes of settlement in Sierra Leone and the Gambia. By it, Naimbana and the other subscribing chiefs “granted ... and for ever quit claim to a certain district of land [thereafter described] for the settling of the said free community to be theirs, their heirs and successors for ever”. Naimbana, for himself and his heirs and successors, promised “to grant the said free settlers a continuance of a quiet and peaceable possession of the land granted, their heirs and successors, for ever”. The purchase price in goods was set out in the treaty.

The 1788 treaty was followed by a number of treaties for the purchase of land in Sierra Leone and the Gambia down to 1840, often accompanied by cession of sovereignty as has been discussed.<sup>38</sup> Typically they included guarantees by the British Crown of continuing native possession and enjoyment of lands not sold. These native rights are described in terms which mirror the description of the rights of sovereignty and property acquired by the British Crown under the same treaties. Thus in the 1818 “Treaty of Peace and Amity” between the British Governor of Sierra Leone and the King and chiefs of the Bago Country, the King and chiefs ceded “the full, entire, free, and unlimited possession and sovereignty of the islands constituting the Isle de Loss”, and the Governor in return guaranteed to the “native inhabitants” of two of the islands “the full, entire, and free possession of the lands they now hold, provided they behave themselves peaceably and according to the laws in force in the said islands”.<sup>39</sup> Similarly, in the 1825 “Convention” between the British Crown and the King of Sherbro and others, the British Crown obtained the “full, entire, free, and unlimited right, title, possession, and sovereignty of all

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<sup>36</sup> Treaty between Great Britain and the Chiefs of Sierra Leone, 22 August 1788, 50 CTS 359-362. See also McNeil *Common Law Aboriginal Title*, above n 34, 124-125; and TO Elias *Ghana and Sierra Leone: The Development of their Laws and Constitutions* (Stevens & Sons Ltd, London, 1962) 220.

<sup>37</sup> See Chapter 4, text accompanying n 179.

<sup>38</sup> See Chapter 4, text accompanying ns 180-191. In addition to the examples discussed in what follows, see the West African treaties reproduced in the *Consolidated Treaty Series* as listed in chronological order in Michael Meyer *Special Chronological List 1648-1920* (Oceana Publications Inc, New York, 1984) vol 1, part 1 (Colonial Treaties), 83ff (Great Britain and African Tribes and Politics). Meyer’s list is part of the *Index-Guide to Treaties* to the *Consolidated Treaty Series* edited and annotated by Clive Parry.

<sup>39</sup> Treaty between Great Britain and the King and Chiefs of the Bago Country, signed at Crawford’s Island, 6 July 1818, 69 CTS 43-46.

the territories and dominions to them respectively belonging” and guaranteed in return to the King, chiefs and “the other native inhabitants” “the full, free, and undisturbed possession and enjoyment of the lands they now hold and occupy”.<sup>40</sup>

The language of the guarantees sometimes varied, although not in ways which affected the substance of what was promised. For example, the word “entire” in the phrase “the full, entire, and free possession” was sometimes replaced with “certain”. Sometimes the word “property” was included in the guarantee. So, for example, in a convention with the Timmanees of the Quia in July 1820 the guarantee was of “the full, certain, and free possession of the lands, houses, or any other sort of property they may now or hereafter enjoy”.<sup>41</sup> This same treaty also contains an example common to others of a requirement for an annual rental payment by the British Crown to the local King in default of which payment the agreement is said to “be considered as null and void”. In one treaty, two African “families” were recognised as the “lawful proprietors and possessors” of their territories.<sup>42</sup> In yet another, the native inhabitants were guaranteed the possession of their lands “in the same manner as other inhabitants in the said colony”.<sup>43</sup> In a July 1840 convention ceding sovereignty in the Gambia, “the individuals at present in possession of property of any description” were guaranteed that they should “in nowise be disturbed in the enjoyment of the same by any of the provisions of this Convention”.<sup>44</sup> Only exceptionally do the treaties seem to draw a distinction between occupied and cultivated lands (the possession of which was guaranteed) and unoccupied lands (the possession of which was not guaranteed).<sup>45</sup>

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<sup>40</sup> Convention between Great Britain and Sherbro, signed at Plantain Island, 24 September 1825, 75 CTS 379-384.

<sup>41</sup> Convention between Great Britain and the Timmanees of the Quia, signed at Freetown, 21 July 1820, 71 CTS 197-200.

<sup>42</sup> Convention between Great Britain and the Chiefs of Bacca Loco, signed at Port Logo, 12 December 1825, 75 CTS 477-480.

<sup>43</sup> Treaty between Great Britain and North Bulloms, 2 August 1824, 74 CTS 389-392.

<sup>44</sup> Convention of Cession between Great Britain and Combo, signed at Bathurst, 13 July 1840, 90 CTS 283-284.

<sup>45</sup> Treaty between Great Britain and the King of Bulola, signed at Lawrence Town, 23 June 1827, 77 CTS 283-284; Treaty between Great Britain and Biafra, signed 24 June 1827, 77 CTS 285-286. In these two treaties, the availability of unoccupied and uncultivated lands for

A final feature worth commenting on in relation to the west African treaties is that some explicitly recognise and acquiesce in prior private land purchases by British subjects. This seems to indicate that there was no understanding in west Africa that the Crown had an inherent right of pre-emption which excluded its own subjects from purchasing native lands. (In none of the many west African treaties was a Crown right of pre-emption similar to that in article 2 of the Treaty of Waitangi obtained.) A striking example of the apparent acceptance of private land purchases is to be found in an 1821 “treaty” between the King of the North Bulloms, “his Chieftains and Headmen” and John McCormack, a settler.<sup>46</sup> This agreement was witnessed by Kenneth Macaulay, a cousin of a later acting Governor of Sierra Leone, and was later published in the *British and Foreign State Papers* and in Hertslet’s *Commercial Treaties*. The agreement purported to be one of purchase of land apparently previously occupied by McCormack under an earlier agreement. It provided for a “yearly rent, custom, or subsidiary gift” in default of which it was to become null and void. Of particular interest is a recital in the agreement by the King, his chieftains and headmen that:

Forasmuch as in times past it hath been usual and customary to grant unto Europeans, and more especially them of the English nation, certain lands or districts in our territory for the purposes of commerce and trade, and we, without intending to divest ourselves of the lordship thereof, but in order to advance by all proper means the good and welfare of our country, and the benefit of our subjects, have, from time to time, by treaties, written stipulations, and agreements, encouraged the occupancy of such lands, districts, or isles as were selected for the purpose by our friends, the subjects of His Brittanic Majesty ...

In a subsequent treaty between the British Crown and the North Bullom King and people, transferring the sovereignty and property of certain lands, the transfer is

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settlement may have been the outcome obtained by the agreements rather than indicating British rejection of any claim of proprietorial interest in such lands.

<sup>46</sup> Engagement between Great Britain and the King of the North Bulloms, signed at Iombo, 5 June 1821, 71 CTS 483-486. See also Agreement between Great Britain and the Chief of the Mandingo, signed at Fouricaria, 30 December 1825, 76 CTS 51-57.

subject to a number of pre-existing leases to British subjects (identified in a schedule), one of which is McCormack's 1821 "purchase".<sup>47</sup>

### **A treaty with the Sultan of Aden**

Although dealing with a more developed social structure (and thus in some respect more comparable to the dealings in India and Ceylon), the terms of a treaty of cession entered into in September 1838 between the Sultan of Aden and the British Crown compares with the West African treaties.<sup>48</sup> By the treaty, the Sultan ceded "in perpetuity, in free sovereignty to the British Government, the land of Aden". In return, the Sultan was to receive an annual payment for so long as Britain retained possession and he and his family were to be "at liberty to reside at Aden, and will be treated with the courtesy and honour due to their rank and station". The British Government, for its part, engaged not to interfere with "the Mahomedan religion" and extended "British protection" to "[a]ll persons who may choose to reside within [Aden]". The treaty contained a guarantee of property in its 8th article:

The British Government guarantees to the present inhabitants of the territory ceded in the first article, the full and undisturbed enjoyment of all houses and other private property now in their possession. In the event of any part of the same being required for public purposes, the same will be purchased at a fair valuation.

### **Cape Colony**

When British administration was secured over the Cape in 1815, native title had already been overtaken by Dutch rule. The Khoikhoi had been dispossessed of their farmlands by the Dutch and forced to become bondsmen and farm workers. The privileges of Burgher<sup>49</sup> status, including the right to own lands, were denied to them.<sup>50</sup> In 1828, by Ordinance 50, the British conferred the right to own lands to "Hottentots and other free persons of colour".<sup>51</sup> Because of this history, the

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<sup>47</sup> Treaty between Great Britain and North Bulloms, 2 August 1824, 74 CTS 389-392.

<sup>48</sup> Treaty between Great Britain and the Sultan of Aden, September 1838, 88 CTS 105-107.

<sup>49</sup> A "Burgher" was a Dutch-speaking citizen of the colony.

<sup>50</sup> See Chapter 4 n 193.

<sup>51</sup> Timothy Keegan *Colonial South Africa and the Origins of the Racial Order* (University Press of Virginia, Charlottesville, 1996) 103-104.

dealings of the British towards the Khoikhoi shed little light on British policy in New Zealand in 1840. What does appear from the adoption of the Ordinance is that there was no notion that indigenous people were incapable of holding land on the same terms as Europeans.

### **Australian colonies**

The reports from Cook's 1770 visit produced an impression that the indigenous inhabitants of Australia were scattered hunter-gatherers whose social development was so primitive that they could not enter into dealings with Europeans, nor resist European settlement.<sup>52</sup> The military leaders of the penal settlement that was established in New South Wales following Cook's expedition were instructed to, first, secure themselves from "any attacks or interruptions of the natives", and then to "proceed to the cultivation of the land".<sup>53</sup> There was no pre-existing European settlement (such as by missionaries or traders) which might have undertaken land dealings and from which a better understanding of Aboriginal society might have been obtained.<sup>54</sup> The objective of setting up the penal settlement and defending it from Aborigines was therefore undertaken in the view that the land was available for the taking because it was not the subject of any proprietary interests. This was the thinking that led to Australia being treated as *terra nullius*, a concept (if not a term) which had recently been given intellectual respectability by the writings of the Swiss philosopher Emerich de Vattel and which, although not applied in North America, seemed to fit the Australian position.<sup>55</sup>

Australia, from Cook's and Banks's reports, seemed to present sparseness of an entirely different magnitude. North America had some empty places, but Australia sounded like an empty continent.

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<sup>52</sup> Banner *Possessing the Pacific*, above n 1, 16-19. See also MPK Sorrenson "Treaties in British Colonial Policy: Precedents for Waitangi" in William Renwick (ed) *Sovereignty & Indigenous Rights: The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 15-29 ["Sorrenson 'Precedents for Waitangi'"] at 23-24.

<sup>53</sup> Banner *Possessing the Pacific*, above n 1, 19-20. See also Sorrenson "Precedents for Waitangi", above n 52, 25-26.

<sup>54</sup> Banner *Possessing the Pacific*, above n 1, 26.

<sup>55</sup> Ibid 17.

By the time it came to be appreciated that the Aboriginal population was not insubstantial and did have notions of property in land,<sup>56</sup> reversing the initial assumption would have been highly inconvenient even if it had been possible to establish relations with the native peoples despite the persistence of the view that they were irredeemably primitive. These beginnings were to have tragic consequences for Aboriginal peoples as the European population increased and settlement expanded through the nineteenth century. By the 1830s, terra nullius was law. The New South Wales Supreme Court held that Australia was properly regarded as “uninhabited”, meaning that it was properly classified as a “settled colony” in which all land vested in the Crown and was available for disposition by it.<sup>57</sup>

Doubts were expressed about the justice of this approach in both Australia and England from the 1820s and it was criticised by the Aborigines Committee in 1837 as expropriation “without the assertion of any other title than that of superior force”.<sup>58</sup> The Colonial Office gave instructions to the South Australia Colonisation Commission that it was not to sanction “any act of injustice towards the Aboriginal Natives” “whose Proprietary Title to the Soil, we have not the slightest ground for disputing”.<sup>59</sup> The letters patent establishing the province of South Australia and permitting “waste and unoccupied” lands to be granted for settlement was subject to the proviso that:<sup>60</sup>

nothing in those our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own Persons or in the Persons of their Descendants of any Lands therein now actually occupied or enjoyed by such Natives.

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<sup>56</sup> Ibid 28-32.

<sup>57</sup> *R v Steele* [1834] NSWSupC 111. See also Bain Attwood *Possession: Batman's Treaty and the Matter of History* (The Miegunyah Press, Melbourne, 2009) [“Attwood *Batman's Treaty*”] 76-82.

<sup>58</sup> Banner *Possessing the Pacific*, above n 1, 32-35; *Report from the Select Committee on Aborigines (British Settlements)*, GBPP 1837 (425) VII.1 at 82.

<sup>59</sup> Grey to Torrens, 15 December 1835, quoted in Banner *Possessing the Pacific*, above n 1, 35.

<sup>60</sup> Letters patent establishing the Province of South Australia, 19 February 1836, reproduced in Brian Dickey & Peter Howell (eds) *South Australia's Foundation: Select Documents* (Wakefield Press, Netley, South Australia, 1986) 74.

## Chapter Five: British Sovereignty & Native Land

It is hard to escape the view that these expressions of concern for Aboriginal rights to land were known by the Colonial Office to be gestures which would not change the reality of Aboriginal disempowerment. The most that was achieved in South Australia was the setting aside of small parcels of land as “reserves” for Aborigines, as was also being done in New South Wales. Aborigines were not given the right to choose whether or not land should be sold for settlement. Nor did they receive any payment for it.<sup>61</sup>

Stuart Banner explains that a reversal of the terra nullius approach was never a realistic prospect.<sup>62</sup> Even those who acknowledged injustice to Aborigines did not argue that they should be dealt with as owners of the land:<sup>63</sup>

Reversing terra nullius would have posed a terrible administrative problem for settlers and their government. The land titles of every single landowner in Australia were based on a purchase from the Crown. Every landowner had either obtained his land from the government or occupied the final link in a chain of conveyances that had originated with a grant from the government. And the Crown’s title to the land rested on the legal fiction that the Crown had instantly become the owner of all the continent in 1788. In short, every landowner in Australia had a vested interest in terra nullius. To overturn the doctrine would have been to upset every white person’s title to his or her land. The result would have been chaos—no one would be sure of who owned what.

Everyone from the Colonial Office to the bush knew this was true.

The Colonial Office was required to accept the inevitable when asked to consider the appropriateness of Governor Bourke’s proclamation of August 1835 declaring that John Batman’s June 1835 purchases from the Kulin people at Port Phillip were

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<sup>61</sup> Banner *Possessing the Pacific*, above n 1, 35-36. See also Sorrenson “Precedents for Waitangi”, above n 52, 26-27.

<sup>62</sup> Banner *Possessing the Pacific*, above n 1, 38-46.

<sup>63</sup> Ibid 43-44.

invalid.<sup>64</sup> Glenelg approved the course adopted by Bourke to maintain “the right of the Crown to the Soil on which these new Settlements have been effected”.<sup>65</sup>

Although many circumstances have contributed to render me anxious that the Aborigines should be placed under a zealous and effective protection, and that their Rights should be studiously defended, I yet believe that we should consult very ill for the real welfare of that helpless and unfortunate Race by recognising in them any right to alienate to private adventurers the Land of the Colony. It is indeed enough to observe that such a concession would subvert the foundation on which all Proprietary rights in New South Wales at present rest, and defeat a large part of the most important Regulations of the Local Government.

The Batman purchases and their aftermath are also interesting because the syndicate that Batman was acting for obtained unfavourable legal opinions (which were later cited by Governor George Gipps in support of his position in the New Zealand Claims Bill debate in mid-1840) which referred to the United States Supreme Court cases of *Johnson v M’Intosh* and *Worcester v The State of Georgia*, apparently from James Kent’s *Commentaries on American Law*, for the proposition that the Crown had a “right of pre-emption” by discovery which precluded European purchases of land.<sup>66</sup>

### Canadian colonies

By 1791, the treatment of Indian land rights in Upper Canada (later Ontario) differed from that in the other Canadian colonies—Lower Canada (later Quebec) and the maritime colonies (Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland).<sup>67</sup> Only in Upper Canada was Indian property in land acknowledged. The reasons for the difference in treatment are complicated. They

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<sup>64</sup> On Batman’s purchases, see Attwood *Batman’s Treaty*, above n 57. Bourke’s proclamation is quoted at *ibid* 83-84.

<sup>65</sup> Glenelg to Bourke, 13 April 1836, reproduced in *Historical Records of Australia*, series 1, vol 18, 379-381 at 379.

<sup>66</sup> See speech of Sir George Gipps on the second reading of the New Zealand Land Claims Bill, 9 July 1840, GBPP 1841 (311) XVII.493, 63-78 at 69-72.

<sup>67</sup> See the overview given by Sarah Carter “Aboriginal People of Canada and the British Empire” in Phillip Buckner (ed) *Canada and the British Empire* (Oxford University Press, Oxford, 2008) 200-219 at 202-204.

arise out of the history of French and British administration and conflict. For example, in Nova Scotia, the British took the view that Mi'kmaq claims had been extinguished by French occupation and the Treaty of Utrecht of 1713 or that the Mi'kmaq, as allies of France, had lost their lands as a consequence of the defeat of the French in 1760.<sup>68</sup> The difference in treatment between Upper Canada and the other colonies also reflects the size of the Indian populations which were numerous only in Upper Canada (estimated at 13,000 in 1827) and extremely small in the Maritimes (being measured in the hundreds only in New Brunswick, Prince Edward Island and Newfoundland).<sup>69</sup> By the early nineteenth century, some bands, such as the Beothuk of Newfoundland,<sup>70</sup> were in terminal decline not only from disease and poverty but also from settler violence. The Loyalist migration after the American War of Independence had a disproportionate impact on the population balances in the maritime colonies and to some extent Lower Canada. These migrants expected to obtain land and their occupations (often undertaken during seasons when Indian bands were hunting and fishing elsewhere) were supported by provincial governments.<sup>71</sup> The whole of Prince Edward Island was allocated by lottery to a handful of Europeans in 1767 without recognition of Mi'kmaq claims.<sup>72</sup>

The pattern of Indian dispossession in the Maritimes was ameliorated from time to time by governments reserving some lands for them, often to secure allegiance at times when renewal of hostility with France or the United States was anticipated,

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<sup>68</sup> Ibid 202; George Stanley "Introduction" in Ian Getty & Antoine Lussier (eds) *As Long as the Sun Shines and Water Flows* (University of British Columbia Press, Vancouver, 1983) 1-26 at 5-6.

<sup>69</sup> *Papers relating to the Aboriginal Tribes of North America, New South Wales, Van Diemen's Land, and British Guiana*, GBPP 1834 (617) XLIV.339 at 34-35; LFS Upton "Indian Affairs in Colonial New Brunswick" (1974) 3:2 *Acadiensis* 3-26 ["Upton 'Indian Affairs in Colonial New Brunswick'"] at 5-6; LFS Upton "Indians and Islanders: The Micmacs in Colonial Prince Edward Island" (1976) 6:1 *Acadiensis* 21-42 ["Upton 'The Micmacs in Colonial Prince Edward Island'"] at 23; LFS Upton "The Extermination of the Beothuks of Newfoundland" (1977) *The Canadian Historical Review* 133-153 ["Upton 'The Extermination of the Beothuks'"] at 152-153.

<sup>70</sup> Shanawdithit, reputedly the last of the Beothuk, died in 1829. See Upton "The Extermination of the Beothuks", above n 69; and Ingeborg Marshall *A History and Ethnography of the Beothuk* (McGill-Queen's University Press, Montreal, 1996).

<sup>71</sup> See, for example, LFS Upton "Indian Policy in Colonial Nova Scotia 1783-1871" (1975) 5:1 *Acadiensis* 3-31 ["Upton 'Indian Policy in Colonial Nova Scotia'"] at 14.

<sup>72</sup> Upton "The Micmacs in Colonial Prince Edward Island", above n 69, 21-22.

or in a rare flowering of humanitarian concern. However, even such reserves were sometimes described as being available “during pleasure” of the government or “for the time present”.<sup>73</sup> Moreover, the existence of reserves also did not stop settlers from illegally squatting on them.<sup>74</sup>

In Upper Canada the approach was very different. The interests of Indian tribes in land were the subject of continuing imperial attention. Pre-Revolution land policy pursued by the British in North America (as reflected in the 1763 Proclamation) was continued under the stewardship of Sir William Johnson’s family. Land was acquired from Indians by purchase, concluded through treaties arrived at in public gatherings conducted in accordance with Indian custom. Such treaties typically reserved parts of the land of the tribes to be retained by them under their customs.<sup>75</sup> The size of these reserves dwindled as the growth of the settler population (from 80,000 in 1812 to 220,000 in 1830) increased the pressure on land. From the late 1820s, the policy of “civilisation” and goal of turning Indians into farmers may also have reduced the amount of land it was thought necessary to reserve.<sup>76</sup> With further European population growth, sharp practices emerged to persuade Indians to relinquish further land, including reserved land.<sup>77</sup> As a result there was large-scale loss of Indian land and resulting cultural stress.<sup>78</sup>

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<sup>73</sup> See Upton “Indian Policy in Colonial Nova Scotia”, above n 71; Upton “Indian Affairs in Colonial New Brunswick”, above n 69; and Upton “The Micmacs in Colonial Prince Edward Island”, above n 69.

<sup>74</sup> See, for example, Upton “Indian Affairs in Colonial New Brunswick”, above n 69, 7-8.

<sup>75</sup> Mark Walters “‘According to the Old Customs of Our Nation’: Aboriginal Self-Government on the Credit River Mississauga Reserve, 1826–1847” (1999) 30:1 *Ottawa Law Review* 1-45 at 4.

<sup>76</sup> Mark Walters “Promise and Paradox: The Emergence of Indigenous Rights Law in Canada” in Benjamin Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oxford, 2009) 21-50 at 31; John Pratt “Aboriginal Justice and the ‘Good Citizen’: an Essay on Population Management” in Kayleen Hazlehurst *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Avebury Press, Aldershot, United Kingdom, 1995) 39-71 at 48.

<sup>77</sup> There were threats to treat uncultivated lands as waste lands and to take over management of tribal affairs. It was also suggested that the government was not able to protect Indian lands other than reserved lands. See examples in *Indian Treaties and Surrenders from 1680 to 1890* (Government Printer, Ottawa, 1891) [“*Indian Treaties*”] vol 1, 112-113 & 119-122.

<sup>78</sup> Seven million acres were purchased in just seven major land cession agreements from 1812–1822. Robert Surtees “Indian Land Cessions in Upper Canada, 1815–1830” in Ian Getty and

Irrespective of the effects, the formal position in Upper Canada was, however, that all land had to be purchased from Indian owners by the Crown before it could be made available for settlement. This seems to be the basis on which James Stephen, commenting on the United States Supreme Court case of *Johnson v M'Intosh*, said that, whether or not it was good law in the United States, "it is not the Law we recognize and act upon on the American Continent": "British Law in Canada is far more humane, for there, the Crown purchases of the Indians, before it grants to its own subjects".<sup>79</sup>

The many treaties and surrenders entered into, which were reproduced in a Government publication in 1891, provide ample evidence that Indians were clearly recognised as owners of land.<sup>80</sup> Their title was not one of mere occupancy. Thus in a 1787 agreement, the Indian sellers of land covenanted that they were "the true, lawful and rightful owners" of the land and that they were "lawfully and rightfully seized in their own right of a good, sure, perfect, absolute and indefeasible estate of inheritance in fee simple".<sup>81</sup> Similarly, in a 1789 agreement with the "Chippeway tribe or Nation", the land and harbour transferred was conveyed "in fee", with "all title to the soil, woods and waters" renounced by the sellers.<sup>82</sup> For the most part, reservations of land were simply excluded rather than being re-granted under a Crown title.<sup>83</sup>

It is perhaps possible to get an understanding of British views about the nature of Indian titles from an interesting grant by which the Crown settled upon the Six Nations from New York State land it had earlier acquired from the Mississauga on the Grand River. The Six Nations (Iroquois, including Mohawks) had been forced

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Antoine Lussier (eds) *As Long as the Sun Shines and Water Flows* (University of British Columbia Press, Vancouver, 1983) 65-84 at 66.

<sup>79</sup> Stephen to Smith, 28 July 1840, CO 209/4, 343a-344a. The memorandum is further discussed in Chapter 15, text accompanying ns 66-68.

<sup>80</sup> *Indian Treaties*, above n 77.

<sup>81</sup> Indenture between Great Britain and the Mississauga Nation, signed at the Bay of Quinté, 23 September 1787, reproduced in *Indian Treaties*, above n 77, 32-34 at 33.

<sup>82</sup> Treaty between Great Britain and the Chippewa (Ojibwe) Nation, signed at York, 22 May 1789, reproduced in *Indian Treaties*, above n 77, 15-16.

<sup>83</sup> A statute of 1839 conferred upon the Crown the ability to protect such reserved lands from trespass and injury. It treated the Indian tribes as having title to such lands. See Protection of Crown Lands Act 1839 (Upper Canada) 2 Vict No 15.

to relocate to Upper Canada following the American War of Independence, having been allied with the British. The land was not conveyed as European title. Rather, the land was given “to be held and enjoyed by them in the most free and ample manner, and according to the several customs and usages of them”. This was “the full and entire possession, use, benefit and advantage”. The same was later described in the grant as “the free and undisturbed possession and enjoyment” of the land.<sup>84</sup> It is clear that the intention was to replicate in a new country the traditional customary ownership of the Six Nations. In another twist, the Six Nations a few years later petitioned to let them exchange their title for fee simple title. Their indication of what they would “relinquish and surrender” in exchange for the fee simple may also shed some light on the nature of their customary interest. It purported to be a relinquishment by “the Sachems and Chief Warriors” of the Six Nations of “all and singular their and each of their right, title, interest, property, possession, claim and demand whatsoever, which they or either of them had, might or would have had either in law or equity”.<sup>85</sup>

### **Aborigines Committee Report of 1837**

Three years before the Treaty of Waitangi was signed, the House of Commons Select Committee on Aborigines took the opportunity to survey British treatment of aboriginal land rights throughout the Empire. As has been discussed, the setting up of the Committee followed humanitarian outrage at the war waged against the Xhosa on the eastern frontier of the Cape Colony. The Committee took a stance which was strongly sympathetic to the interests of indigenous peoples and viewed British colonisation to that point as highly destructive to them. With this attitude, the Committee’s treatment of aboriginal land issues was condemnatory, perhaps excessively so given the attempts to recognise native ownership of land in some of colonies, as has been described. The Committee reported, severely:<sup>86</sup>

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<sup>84</sup> Grant of land by Lieutenant-Governor Simcoe to the Six Nations Indians, 14 January 1793, reproduced in *Indian Treaties*, above n 77, 9-10.

<sup>85</sup> Petition of Joseph Brant on behalf of the Six Nations Indians, 15 January 1798, reproduced in *Indian Treaties*, above n 77, 23-25 at 24.

<sup>86</sup> GBPP 1837 (425) VII.1 at 5.

## Chapter Five: British Sovereignty & Native Land

It might be presumed that the native inhabitants of any land have an incontrovertible right to their own soil: a plain and sacred right, however, which seems not to have been understood. Europeans have entered their borders uninvited, and, when there, have not only acted as if they were undoubted lords of the soil, but have punished the natives as aggressors if they have evinced a disposition to live in their own country.

It recommended:<sup>87</sup>

So far as the lands of the Aborigines are within any territories over which the dominion of the Crown extends, the acquisition of them by Her Majesty's subjects, upon any title of purchase, grant or otherwise, from their present proprietors, should be declared illegal and void. This prohibition might also be extended to lands situate within territories which, though not forming a part of the Queen's dominions, are yet in immediate contiguity to them. But it must be admitted, that we have not the power to prevent transactions of this nature in the countries which are neither within the Queen's allegiance, nor affected by any of those intimate relations which grow out of immediate neighbourhood. In such cases it may be impracticable to prevent the acquisition of lands by British subjects; but it should be distinctly understood, that all persons who embark in such undertakings must do so at their own peril, and have no claim on Her Majesty for support in vindicating the titles which they may so acquire, or for protecting them against any injury to which they may be exposed in the prosecution of any such undertakings.

These views seem to prefigure the instruction to Hobson to negotiate with Maori for an exclusive right for the Crown to purchase Maori land, resulting in the pre-emption clause in article 2 of the Treaty of Waitangi.<sup>88</sup> The Report is also significant because it is inconsistent with the notion of a right of pre-emption in the British Crown by virtue of the acquisition of sovereignty. If such right had been understood to be inherent in the Crown as sovereign, the Report would surely have said so. A third reason why the Committee's recommendation intersects with New Zealand history was because Governor Gipps drew on the second quoted passage when defending his New Zealand Land Claims Bill (on the basis that that the

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<sup>87</sup> Ibid 78.

<sup>88</sup> See Chapter 8, text accompanying n 19.

“immediate contiguity” between New South Wales and New Zealand justified the invalidation of pre-1840 British land purchases).<sup>89</sup>

### **The United States**

Initially, the Declaration of Independence did not change the policies and practices relating to Indian land. Although the 1763 Proclamation was no longer effective, the States continued to prohibit private land purchasing,<sup>90</sup> while undertaking their own land acquisitions. They struggled, however, to control illegal private purchases, as had the imperial government before them. The States’ own practices in acquiring land were also sometimes suspect and land was sometimes taken without proper purchase. The Continental Congress tried ineffectually to pressure the States into controlling private purchases and dealing fairly with Indians.<sup>91</sup>

There was a change in attitude at the end of the Revolutionary War. The Confederation government treated the Indians, who had sided with the British, as a defeated enemy. The former acceptance that Indians were property owners whose land had to be properly purchased was replaced by a retributive policy, also fuelled by the burgeoning demand for land, by which, in a series of “forced treaties” in the mid-1780s, the government confiscated land without compensation, confining Indians to reservations conceded to them as a matter of grace.<sup>92</sup>

This aggressive policy could not be sustained when it became clear that Indian resistance was likely to lead to war. There was also a swing back to recognition of the moral and legal claim of Indians as “the natural owners of the soil” with “just rights”, including the “right to refuse to sell”.<sup>93</sup> By the late 1780s, there was a return to the pre-1783 practice of acknowledging Indian land rights and treating

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<sup>89</sup> See Chapter 16, text accompanying n 139-141.

<sup>90</sup> The Virginia Constitution of June 1776 provided that “no purchases of Land shall be made of the *Indian* Natives but on behalf of the Publick, by authority of the General Assembly”. Comparable provisions were adopted by other States. Banner *How the Indians Lost their Land*, above n 1, 117-118.

<sup>91</sup> Ibid 114-121.

<sup>92</sup> Ibid 112-113 & 121-129.

<sup>93</sup> Ibid 134-135, quoting Congressman Elias Boudinot of New Jersey and a 1792 treaty between the United States and the Wabash and Illinois tribes.

with them for purchase.<sup>94</sup> Although the repudiation of Indian ownership of land was short-lived, it was, however, to prove an important step in the development of the view that Indians were not owners but mere occupiers of land, as is explained below. In the late 1780s and 1790s, that was in the future. For the moment, the mood of the times was expressed in the Northwest Ordinance of 1787 of the Continental Congress:<sup>95</sup>

The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

By the Constitution of 1787, the federal government gained exclusive control of Indian matters. In the Intercourse Act of 1790, it obtained the monopoly right to purchase Indian land (a right it has never relinquished). This right was generally referred to as the right of “pre-emption”. Although that label might have been apt to mislead if taken to mean a right of first refusal rather than a monopoly right, it seems clear that it was always understood in its intended sense. As Stuart Banner points out, this monopoly power was “the same power the Crown had claimed for itself in the Proclamation of 1763”.<sup>96</sup> By the Act, the States lost the ability to purchase Indian land.

Although the legal framework appeared to provide protection for Indian land, the reality in application was very different even when the legal proprieties were observed. The pressure for land for settlement grew. It did not prevent illegal purchases, both by private individuals and by state governments (which the federal government proved inadequate to restrain). The federal government itself succumbed to the pressures to open up land for settlement and to raise revenue for itself through on-sales. Treaties with Indians for land exhibited many of the worst

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<sup>94</sup> Ibid 129-135.

<sup>95</sup> Northwest Ordinance 1787, art 3, quoted in Felix Cohen “Original Indian Title” (1947-48) 32 Minnesota Law Review 28-59 [“Cohen ‘Original Indian Title’”] at 41.

<sup>96</sup> Banner *How the Indians Lost their Land*, above n 1, 135.

features of pre-1763 private land purchasing. They included direct coercion through threats of violence and refusal to vindicate Indian rights against settler trespass (except by offering to buy the land). There were on occasion examples of fraud (such as through the insertion without disclosure of adverse terms into treaty texts) or dealings with those lacking authority over the land. Indians were sometimes manipulated into debt (often through the setting up of trading posts in the vicinity) in order to induce them to part with land as payment. Promises made in treaties were often not honoured; sometimes the purchase price itself remained unpaid.<sup>97</sup>

While the federal government continued the earlier British approach of dealing with Indians as owners of land, Banner describes a fundamental shift in attitude about the nature of Indian land rights in the late eighteenth and early nineteenth centuries: from ownership to occupancy.<sup>98</sup> On his account, the belief that Indians had merely a right of occupancy and that the ownership of the land was with the successors to the British Crown was “conventional wisdom” by 1823 when the United States Supreme Court put the “final nail in the coffin” with its decision in *Johnson v M’Intosh*.<sup>99</sup> While that conclusion may be overstated (and is questioned below), the new view of Indian occupancy had undoubtedly emerged by 1823 and Banner’s explanation for how it came about is convincing.

Three main reasons are given by Banner for the shift. First, the government monopoly on purchase (generally followed after 1763), meant that, over time, land titles were traced not, as formerly, to Indian ownership but to government grant (leading to a “gradual erosion of the political base for recognizing Indian property rights”<sup>100</sup>). It also gave the impression that Indian title was somehow inferior because it did not include an unfettered power of disposition. Government

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<sup>97</sup> Ibid 136-149.

<sup>98</sup> Ibid ch 5.

<sup>99</sup> Ibid 150, 178 & 179.

<sup>100</sup> Ibid 108.

purchase of Indian lands came to be regarded as a pragmatic approach to avoiding trouble rather than an acknowledgment of pre-existing ownership.<sup>101</sup>

Secondly, with the decline of the settled Indian populations of the east coast and the increasing identification, with the westward push of settlement, of Indians with the nomadic hunters of the Great Plains, it came to be thought—or at least it was convenient to think<sup>102</sup>—that Indians did not cultivate the land and, therefore, on Lockean notions, had no property in it.<sup>103</sup> (The nature of Indian interests in respect of their hunting grounds became controversial again in revival of seventeenth century debates,<sup>104</sup> although the practice remained to purchase such territories.<sup>105</sup> Although the question was noted and reserved by Chief Justice Marshall of the United States Supreme Court in the case of *Johnson v M’Intosh* in 1823,<sup>106</sup> in the later Supreme Court case of *Mitchel v The United States* it was held that Indian hunting grounds were “as much in their actual possession as the cleared fields of the whites, and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected”.<sup>107</sup>)

Thirdly, and as Banner suggests most importantly, in response to anticipatory State grants of Indian lands not yet purchased by the federal government, contingent rights known as “pre-emption rights” arose. Some of these arose in respect of lands thought to have been conquered during the Revolution but which under the policies re-established in the late 1780s remained to be purchased. Others were simply in anticipation of federal purchases (which would have allowed the title to be perfected) and in response to the political pressure on state governments for land. A market in pre-emption rights developed. The view of them changed over time so that, instead of being contingent future interests in land still owned by Indians, they

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<sup>101</sup> Ibid 107-111 & 189.

<sup>102</sup> See ibid 153: “The shift must be partly attributable to its practical consequences. . . .”

<sup>103</sup> Ibid 151-157 & 189-190.

<sup>104</sup> See text accompanying n 20 above.

<sup>105</sup> Banner *How the Indians Lost their Lands*, above n 1, 157-159.

<sup>106</sup> *Johnson v M’Intosh* (1823) 21 US 543 at 588: “We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits.”

<sup>107</sup> *Mitchel v The United States* (1835) 34 US 711 at 746. See also *Worcester v The State of Georgia* (1832) 31 US 515 at 579 per McLean AJ.

came to be seen as the fee simple title itself, which was simply burdened by the Indian possessory interest until it was extinguished<sup>108,109</sup>:

In practical terms, in the short run, the two ways of thinking about preemption rights had identical consequences. Either way, the Indians could stay on the land as long as they wished, and could sell only to the federal government, at which point the holder of the preemption right would become the land's owner. But to think of the preemption right as a fee simple title was to change the legal understanding of a land grant from the government.

The holder of a preemption right acquired it from a state government. For a preemption right to be a kind of fee simple title in land currently possessed by the Indians, therefore, the land occupied by the Indians had to be owned in fee simple by the state, not by the Indians—otherwise the state would lack the power to grant preemption rights. The shift to an understanding of preemption rights as fee simple titles was thus necessarily accompanied by a shift in the understanding of who owned the land *before* the preemption rights were granted. As preemption rights became more common, lawyers increasingly began to believe that the Indians had *never* held their land in fee simple. The land had *always* been owned by the government, subject to the Indians' right of possession.

The extent to which this view took grip is beyond my topic.<sup>110</sup> Certainly, in debates in Congress in 1795 and 1796, considerable opposition was expressed to the notion that Indians had mere rights of occupancy in respect of their lands in debates (debates which are strikingly similar to those relating to the nature of Maori property in Sydney in 1840 and London in 1845, which are discussed in Chapters 16 and 17).<sup>111</sup> The United States Supreme Court had a first look at the question in 1810 in the case of *Fletcher v Peck*. Chief Justice Marshall, for all members of the Court except Justice Johnson, said shortly that “the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not

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<sup>108</sup> Banner *How the Indians Lost their Lands*, above n 1, 160-163 & 190.

<sup>109</sup> Ibid 163-164.

<sup>110</sup> See ibid 168-178.

<sup>111</sup> See ibid 164-168.

## Chapter Five: British Sovereignty & Native Land

such as to be absolutely repugnant to seisin in fee on the part of the state”.<sup>112</sup> From this, however, Johnson dissented strongly:<sup>113</sup>

To me it appears that the interest of Georgia in that land amounted to nothing more than a mere possibility, and that her conveyance thereof could operate legally only as a covenant to convey or to stand seised to a use.

The correctness of this opinion will depend on a just view of the state of the Indian nations. This will be found to be very various. Some have totally extinguished their national fire, and submitted themselves to the laws of the states: others have, by treaty, acknowledged that they hold their national existence at the will of the state within which they reside: others retain a limited sovereignty, and the absolute proprietorship of their soil. The latter is the case of the tribes to the west of Georgia. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right of soil. Can, then, one nation be said to be seised of a fee-simple in lands, the right of soil of which is in another nation? It is awkward to apply the technical idea of a fee-simple to the interests of a nation, but I must consider an absolute right of soil as an estate to them and their heirs. A fee-simple estate may be held in reversion, but our law will not admit the idea of its being limited after a fee-simple. In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it. What, then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. If the interest in Georgia was nothing more than a pre-emptive right, how could that be called a fee-simple, which was nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell? And if this ever was any thing more than a mere possibility, it certainly was reduced to that state when the state of Georgia ceded, to the United States, by the

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<sup>112</sup> *Fletcher v Peck* (1810) 10 US 87 at 142-143.

<sup>113</sup> *Ibid* 146-147.

constitution, both the power of pre-emption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States.

This was the intellectual background against which the United States Supreme Court embarked on its significant Indian rights cases of the 1820s and 1830s. In the United States, even more so than in New Zealand in the 1840s, the arguments relating to Indian land could not be separated from issues of Indian sovereignty (as Johnson's judgment in *Fletcher v Peck* shows). For that reason, in what follows, the issues of land and sovereignty in the cases are dealt with together.

### **Indian rights in the United States Supreme Court**

Much contemporary New Zealand scholarship, referred to in Chapter 2, takes the position that article 2 of the Treaty of Waitangi is simply declaratory of the English common law position "analysed authoritatively" by the United States Supreme Court in *Johnson v M'Intosh* (1823). The judgment of the Court, delivered by Chief Justice John Marshall, stands for the proposition that aboriginal property in land is a "right of occupancy" which burdens the ultimate ownership of the soil acquired by the British Crown and its successors with sovereignty. The aboriginal interest can be acquired or extinguished only by the sovereign power, in application of what scholars have come to call the doctrine of Crown pre-emption. The judgment is also said to be consistent with a necessary introduction of the English system of land tenure by which the Crown is the sole source of title to land.<sup>114</sup>

Quite apart from any influence the case may have had on the framing of article 2,<sup>115</sup> *Johnson v M'Intosh* was invoked in the debates about the legal validity of pre-

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<sup>114</sup> See Chapter 2, text accompanying ns 329-337 & 344.

<sup>115</sup> Sorrenson and McHugh suggest that *Johnson v M'Intosh* was known to British colonial officials, including to Hobson, Gipps and Busby, men who all had a hand in framing the Treaty of Waitangi (see Chapter 2, text accompanying ns 137-139). As will be seen in later chapters, this requires some speculation on the historical evidence. Hobson may have known of the *Cherokee Nation* case through the writing of Rev John Dunmore Lang (as described in Chapter 10) but seems to have had only the most superficial knowledge of United States law. Gipps knew of the United States cases by the time of the New Zealand Land Claims Bill debate of June-July 1840, but it seems his attention was not drawn to them until after the Treaty. There is no evidence that Busby was aware of the cases before the Treaty was entered

Treaty European land purchases in New Zealand that immediately followed British acquisition of sovereignty, as is discussed in Chapters 15 and 16. *Johnson v M'Intosh* and other United States Supreme Court decisions of the period were also invoked in the New Zealand case-law of the nineteenth century, beginning with *R v Symonds* (1847) and including *Wi Parata v Bishop of Wellington* (1877), seminal cases in terms of Maori rights and the Treaty of Waitangi in New Zealand law. Although it is a principal argument of this thesis that the American cases were misapplied to New Zealand circumstances, their misuse was compounded by selective drawing from the materials and misunderstanding of their overall effect. It is therefore necessary to explain the cases and their context in some detail, although it is possible to confine the discussion to the pre-1840 cases (in any event, the key decisions for United States law): *Johnson v M'Intosh* (1823), *Cherokee Nation v The State of Georgia* (1831), *Worcester v The State of Georgia* (1832) and *Mitchel v The United States* (1835).

These cases seem to have been read, at least in New Zealand and New South Wales in the 1840s, only in legal commentaries rather than in the full law reports, making it necessary to look to their description in those sources, as well as to the judgments themselves. The American texts available were James Kent's *Commentaries on American Law* and Joseph Story's *Commentaries on the Constitution of the United States*. Kent was Chancellor (senior judge) of New York State (1814–23) and was the first professor of law at Columbia University (1793–98, 1823–37). Story was Dane Professor of law at Harvard University (1829–45) and a justice of the Supreme Court (1811–45), where he sat on *Johnson v M'Intosh* and the subsequent Indian rights cases.

The cases themselves are discussed first, before considering Kent's and Story's *Commentaries*.

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into and, when Gipps relied upon *Johnson v M'Intosh* in the Land Claims Bill debate, Busby denied its applicability to New Zealand.

***Johnson v M'Intosh* (1823)**

Although Banner convincingly makes the case that *Johnson v M'Intosh* did not come entirely out of the blue in the United States,<sup>116</sup> it is nevertheless important as an authoritative statement of legal doctrine concerning the land rights of Indian tribes following acquisition of territorial sovereignty by the British Crown. It asserted the Crown's ultimate title to all land and limited pre-existing native property to rights of occupation. Such doctrine is not encountered in other British colonies before 1840. Nor is it consistent with the history of land dealings in America discussed above. Whether or not it reflected popular understanding, its legal vulnerability is illustrated by the shifts in position of the judges of the Supreme Court in subsequent decisions, when the stakes were higher and more closely implicated the rights of the Indians. Rather than being, as Banner describes it, "the final nail in the coffin of the older view of Indian property rights",<sup>117</sup> it may more accurately be seen as novel and contestable legal doctrine.<sup>118</sup>

*Johnson v McIntosh* was not directly concerned with the property interests of Indians. As Lindsay Robertson shows, it was a rushed decision on a jacked-up application by land speculators to obtain a ruling that direct purchase of 27.5 million acres of Illinois Indian and Piankashaw lands in 1773 and 1775 was valid notwithstanding a later government grant of some of the same land, where the attempt of the parties to confine the issues for determination was ignored by Marshall who used the case to fix an entirely collateral dispute about the legitimacy of the grant of what was then Chickasaw land<sup>119</sup> in Kentucky (before Kentucky was a State) by the State of Virginia to militia who had served in the Revolutionary War (and thereby also resolve a stand-off between Virginia and the Supreme Court arising from earlier judgments of the Court). Marshall could have decided against the speculators simply on the basis either that the purchases were prohibited by the

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<sup>116</sup> Banner *How the Indians Lost their Lands*, above n 1, 163-178.

<sup>117</sup> Ibid 179.

<sup>118</sup> Banner himself acknowledges that Marshall's judgment in *Worcester* "included none of the ambiguity and vacillation of his earlier pronouncements" and that "[t]he crux of *Worcester* contradicted some of what Marshall had said in his earlier opinions". See *ibid* 220-221.

<sup>119</sup> The Chickasaws had relinquished the land by treaty in 1818.

Royal Proclamation of 1763 or, retrospectively, by the Virginia Declaratory Act of 1779 which had declared all unlicensed Indian land purchases ever made in Virginia to be invalid. Indeed he *did* decide against the speculators on both these grounds.<sup>120</sup> But his judgment did not rest there because, Robertson argues, that would not have helped Virginia. To help Virginia, he needed to be able to find that the grants to the military veterans had vested in them a property right that could be enforced in the courts against Kentucky's rival grantees to the same land, notwithstanding that when they had been made the lands were still in the possession of the Chickasaws. Marshall achieved this by ruling that the British Crown, to whose rights in this instance the State of Virginia had succeeded, had acquired ownership in fee simple of Indian lands by its acquisition of territorial sovereignty by discovery.<sup>121</sup>

Marshall made it clear that questions about title to land for the courts did not depend simply on principles of "abstract justice". The courts were bound by the rules "indispensible to that system under which the country has been settled". They prevailed even if "opposed to natural right, and to the usages of civilized nations".<sup>122</sup> The first "indispensible" rule was that discovery "gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession".<sup>123</sup> The consequence of exclusion of other Europeans was that the discoverer obtained "the sole right of acquiring the soil from the natives" (also described as "the exclusive right ... to appropriate the lands occupied by the Indians" and "the exclusive power" to extinguish the Indian right of occupancy).<sup>124</sup> The second "indispensible" rule was that it was for the discoverer to decide what relations it

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<sup>120</sup> *Johnson v M'Intosh* (1823) 21 US 543 ["*Johnson*"] at 585 & 594-597.

<sup>121</sup> Lindsay Robertson *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of their Lands* (Oxford University Press, New York, 2005). See also Banner *How the Indians Lost their Land*, above n 1, 178-183.

<sup>122</sup> *Johnson*, above n 120, 572 & 591.

<sup>123</sup> *Ibid* 573. In this respect, the effect of discovery was the same as the effect of conquest: the courts could not question such acts of state. *Ibid* 588-592. Compare Banner *How the Indians Lost their Land*, above n 1, 185-187.

<sup>124</sup> *Johnson*, above n 120, 573, 584 & 585.

established with the native inhabitants.<sup>125</sup> In North America, Indian rights were not “entirely disregarded” but were “necessarily, to a considerable extent, impaired”. In respect of land, their occupation was protected. Their right of occupation was recognised to be “a legal as well as just claim”.<sup>126</sup> It was “entitled to the respect of all Courts” and could “effectually bar an ejectment”.<sup>127</sup> Their use of the land was “according to their own discretion”

but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.<sup>128</sup>

While the occupation rights of Indians were respected, the “ultimate dominion” (also expressed as “a seisin in fee” and “a clear title to all the lands ... subject only to the Indian right of occupancy”) was in the discoverer and included a “power to grant the soil, while yet in possession of the natives”: “These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy”.<sup>129</sup>

Marshall explained that the “universal recognition of these principles” was proved by “[t]he history of America, from its discovery to the present day”.<sup>130</sup> This history he then set out in detail, from the earliest English charters, through the treaties concluded between European powers and between European powers and the United States, to recent American land grants. For present purposes, it is enough to say that much of Marshall’s history is highly contestable.<sup>131</sup> In particular, Marshall’s insistence that the only Indian right in land recognised in the history of the colonies was a right of occupancy is, as Banner has said, “flat wrong”.<sup>132</sup> Marshall himself was to give a different account of American history in *Worcester*

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<sup>125</sup> Ibid 573.

<sup>126</sup> Ibid 574.

<sup>127</sup> Ibid 592.

<sup>128</sup> Ibid 574.

<sup>129</sup> Ibid 574, 585 & 592 (affirming *Fletcher v Peck*).

<sup>130</sup> Ibid 574.

<sup>131</sup> See Banner *How the Indians Lost their Land*, above n 1, 183-188.

<sup>132</sup> Ibid 134.

*v The State of Georgia*, as is discussed below. It should also be noted that a different view of Indian land rights was put forward by Chancellor Kent of New York later in 1823 in the case of *Goodell v Jackson*. Alienation of the Oneida Indians lands to Europeans was not prevented by any doctrine of discovery giving rise to an exclusive right of Crown pre-emption. Rather it was impossible because, by statute, Europeans were prohibited from purchasing it.<sup>133</sup>

Marshall was at pains throughout his judgment in *Johnson* to emphasize that the question for the Court was whether it was competent for the courts of the United States to recognise title obtained directly from the chiefs of the Illinois and Piankashaw nations.<sup>134</sup> His opinion was that the United States courts could not recognise any such title because, by discovery, the British Crown and its successor, the United States, had “clear title” to all land within the territories discovered and the exclusive right to purchase the Indian right of occupancy. Although the Indian occupants would be protected in their occupation (including by the courts), they could not alienate their entitlement to occupation against the United States except by surrendering it to the government. That did not preclude the Indian nations dealing with the land according to their own laws, but any rights under Indian custom—whether held by individual Indians or by Europeans “incorporate[d]” into the nations by purchase—were protected only by “their laws” and the United States courts had no jurisdiction in relation to such claims.<sup>135</sup>

Because of the importance attached in later New Zealand debates to the title to land acquired by the Crown by acquisition of sovereignty, in which the United States approach was invoked, it is worth noting here that nowhere in *Johnson v M'Intosh*

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<sup>133</sup> *Goodell v Jackson* (1823) 20 Johns 693 [*“Goodell”*] at 718-734. In the earlier case of *Jackson v Wood* (1810), Kent, then the chief justice of the New York Supreme Court, had described the Oneida Indians as the “original proprietors of the soil”. Banner *How the Indians Lost their Land*, above n 1, 177.

<sup>134</sup> *Johnson*, above n 120, 572 (“and the question is, whether this title can be recognised in the Courts of the United States”; “a title which can be sustained in the Courts of this country”), 587 (“in our Courts”), 589 (“Courts of this country”) & 604-605 (“the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States”). See Eric Kades “History and Interpretation of the Great Case of *Johnson v M'Intosh*” (2001) 19:1 Law and History Review 67-116 at 104-105.

<sup>135</sup> *Ibid* 593-594.

is there any suggestion that the basis of the Crown's title to land was a common law doctrine of tenures (by which all title emanated from the ultimate title of the Crown) rather than the doctrine of discovery.

Although *Johnson v M'Intosh* was not directly concerned with the legal basis of the relationship between the United States and Indian tribes, Marshall expressed the view that the Indian tribes were "independent nations" over whom the United States had a "limited sovereignty", not extending to interference with internal tribal governance.<sup>136</sup> For their part, Indian nations were limited in their own sovereignty in that they could not alienate land outside the nation. The only other possible limitation was in respect of external relations.<sup>137</sup> On the question of sovereignty, it is interesting to note that Chancellor Kent of New York in the same year expressed the more definite view that the Oneida Indians were aliens not citizens of the United States because they, and the other tribes of the Six Nations Indians, were "free and independent nations" which, though "considered by our laws as dependent tribes" ("placed under our protection, and subject to our coercion, so far as the public safety required it, and no further"), were "governed by their own usages and chiefs".<sup>138</sup> The idea that individual Oneida Indians were United States citizens seemed to Kent to be "utterly fallacious, and ... entirely destitute of any real foundation in historical truth".<sup>139</sup>

It is repugnant to all the treaties, and to all the public documents, to the declared sense and practice of colonial governments, and of the government of the *United States*, and of this state [New York].

*Johnson v M'Intosh* can be made, in the way that lawyers do, to reconcile with the latter cases. This can be done by reading *Johnson* and later cases to say, either that

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<sup>136</sup> Ibid 574, 588 & 590.

<sup>137</sup> In this respect, Marshall said simply that "any attempt" by European nations "to intrude ... would be considered as an aggression which would justify war". Ibid 587.

<sup>138</sup> *Goodell*, above n 133, 709-710. See also ibid 714: "The *United States* have never dealt with those people, within our national limits, as if they were extinguished sovereignties. They have constantly treated with them as dependent nations, governed by their own usages, and possessing governments competent to make and to maintain treaties. They have considered them as public enemies in war, and allied friends in peace."

<sup>139</sup> Ibid 716.

the “exclusive title” that vested in the British Crown by right of discovery was not the underlying title to or ownership of the lands but merely the exclusive right to purchase those lands from Indians, or that the Indian “right of occupancy” in reality, since it was a perpetual legal right, could hardly be distinguished from absolute title (even if as a technical matter it was a right that burdened the Crown’s underlying title or ownership of lands).<sup>140</sup> Historians, however, should be wary of attempting any such reconciliation. In *Cherokee Nation v The State of Georgia* and in *Worcester v The State of Georgia* the Supreme Court was divided in its decisions. But it is a struggle to reconcile even the majority opinions with *Johnson v M’Intosh*. In addition, the judges themselves seem to have understood that they were engaged in a contest over whether *Johnson* should stand, with Marshall’s judgment for the majority of the court in *Worcester* best regarded as a repudiation of the position he had taken, without appreciation of its implications for Indian rights, in *Johnson* (even though it was not expressly over-ruled). *Mitchel v The United States* represented a move back towards *Johnson* from *Worcester* as the balance of power in the Court shifted and it tried to find a middle ground all could live with. From the perspective of New Zealand law and history, however, the case may be more significant for deciding that Indian land rights could be enlarged by treaty between the colonising power and the Indians.

### **Background to *Cherokee Nation v The State of Georgia* (1831)**

*Cherokee Nation* was a case about the legal status of the Cherokee nation, and only indirectly about Indian land rights. It touched upon Indian land rights only because *Johnson v M’Intosh* had decided that European discovery had “impaired” Indian property rights—reducing them to a “right of occupancy”—and *Cherokee Nation* involved reconsideration—and arguably retreat—from discovery doctrine.

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<sup>140</sup> See, for example, Foster “Forgotten Arguments”, above n 28, 355-357; Mark Walters “The Morality of Aboriginal Law” (2006) 31:2 Queen’s Law Journal 470-520 at 503-506; Howard Berman “The Concept of Aboriginal Rights in the Early Legal History of the United States” (1977-78) 27 Buffalo Law Review 637-667 at 649-650, 655, 660 (“[*Worcester*] may be viewed as the culmination of an evolving doctrine of aboriginal rights first addressed by the Court in *Fletcher v Peck*”) & 666 (“It is important to read these cases as manifesting an evolving doctrine”); and Cohen “Original Indian Title”, above n 95, 48-50.

The background to *Cherokee Nation* was a dispute of long-standing between the Georgia and the federal government over the pace at which the federal government was extinguishing Indian title in Georgia.<sup>141</sup> Only the federal government could buy Indian lands under the Constitution, and Georgia complained that it was doing so too slowly, in default of an 1802 promise to purchase lands “as early as the same can be peaceably obtained on reasonable terms”.<sup>142</sup> Tension between the federal government and Georgia increased through the 1820s, especially in relation to Cherokee land which the federal government had had no success in purchasing despite its threat to leave the Cherokees “exposed to the discontent of Georgia and the pressure of her citizens” if they did not relocate to land in the west offered in exchange for the tribe’s land in Georgia.<sup>143</sup> The Cherokees were not the largest of the Indian tribes still remaining east of the Mississippi, either in numbers or in size of territory. But their lands, mostly in northwestern Georgia, were very fertile and surrounded by white settlement. Moreover, by the 1820s, many of the Cherokees were farming their lands as the whites did, growing cotton and other crops and raising cattle (according to Banner, they owned nearly 80,000 head of livestock). Their land thus being more productive than other tribes’, “it was worth more, and the Cherokees were accordingly less willing than other tribes to exchange it for undeveloped land in the west”.<sup>144</sup> The Cherokees were “Americanizing” in other ways too. In July 1827, they adopted an elaborate “Constitution for the Government of the Cherokee Nation”, which asserted the Government’s “sovereignty and jurisdiction” over “the common property of the nation” (the boundaries of which were given) “embracing the lands solemnly guaranteed and reserved forever to the Cherokee Nation by treaties concluded with the United

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<sup>141</sup> See Banner *How the Indians Lost their Land*, above n 1, 191-201.

<sup>142</sup> Ibid 195.

<sup>143</sup> Ibid 199, quoting John Calhoun, United States Secretary of War, 1824. To this threat a Cherokee delegation replied: “Sir, to these remarks we beg leave to observe, and to remind you, that the Cherokees are not foreigners, but original inhabitants of America; that they now inhabit and stand on the soil of their own territory; and that the limits of their territory are defined by the treaties which they have made with the Government of the United States; and that the States by which they are now surrounded have been created out of lands which were once theirs; and that they cannot recognise the sovereignty of any State within the limits of their territory.” Ibid 199-200.

<sup>144</sup> Ibid 198-199.

States”. The message to Georgia from the Cherokees was clear: they were not leaving their lands.<sup>145</sup>

For its part, the Georgia’s legislature had declared in late 1826 that it “own[ed] exclusively the soil and jurisdiction of all the territory within her present chartered and conventional limits” and that it claimed (except in the matter of regulation of commerce<sup>146</sup>) “the right to exercise, over any people white or red within those limits, the authority of her laws”.<sup>147</sup> This was, writes Banner, “an unprecedentedly narrow reading of the Constitution, which had always been understood to give the federal government virtually total authority over Indian affairs”.<sup>148</sup> Georgia then passed a series of statutes in 1827 and 1828 barring Cherokees from testifying in court and entering the non-Indian parts of Georgia without a permit, subjecting them to state law, declaring their own laws void, and asserting that all the lands in Georgia “belong to her absolutely; that the title is in her; that the Indians are tenants at her will, and that she may at any time she pleases determine that tenancy, by taking possession of the premises”.<sup>149</sup> In 1830, after gold had been discovered on Cherokee lands, the Georgia legislature made good this last threat, first, by passing a statute authorising the Governor to take possession of all gold, silver and other mines on Cherokee lands, and then by authorising the seizure of all Cherokee land and its distribution to white settlers. It also made it unlawful for the Cherokees to assemble for any purpose.<sup>150</sup>

As Banner describes, “[t]hese statutes sparked a national debate that would not be resolved for several years”.<sup>151</sup>

Did Georgia have the authority to take these actions? Did the federal government have the responsibility to protect the Cherokees from Georgia? Did it even have the authority to do so? Indian removal was no longer just a matter of Indians and land; now it was a

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<sup>145</sup> 1827 Constitution of the Cherokee Nation, art 1.

<sup>146</sup> Which was undeniably a power given to Congress under the Constitution.

<sup>147</sup> Banner *How the Indians Lost their Land*, above n 1, 200.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid 201.

<sup>151</sup> Ibid.

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constitutional crisis too.<sup>152</sup> A process that had been proceeding slowly and quietly offstage for some time suddenly moved into the spotlight. By the late 1820s, there was a vigorous national debate—not just about the relative power of Georgia and the federal government, but also over whether, and how, the Indians should be relocated west of the Mississippi.

Banner describes how “[t]here were really two debates about Indian removal in the late 1820s and early 1830s”.<sup>153</sup> The first was about whether the federal government had the legal right to force Indians to exchange their lands for lands west of the Mississippi River. The second was about whether removal was in the best interests of the Indians as well as the whites.<sup>154</sup> It was in connection with the first issue that *Johnson v M’Intosh* came to be used more and more by Georgia as an argument for the legal right of the federal government to remove the Cherokees. The argument based on *Johnson* was that the Indians were mere occupants of the land—“tenants at will”—who could be removed at any time by their “landlord”, the federal government.<sup>155</sup> As we shall see, a sense of the possible uses, including this, that *Johnson* could be put to permeates the decisions in *Cherokee Nation* and *Worcester* even though Indian land interests were not directly in issue in those cases. But even before the Supreme Court came to hear these cases, the argument that Indians did not have either a legal right to their lands or a full property interest in them had become the subject of considerable white opposition.

Opposition had arisen in response to Georgia’s legislation and the open siding of the new President and old Indian fighter, Andrew Jackson, with Georgia against Cherokee interests. Jackson had long opposed the recognition of Indian rights of sovereignty and land.<sup>156</sup> And on becoming President in March 1829 he lost no time in telling the Cherokees that they had no right to form an independent nation within the territorial limits of Georgia, and that he would not interfere with any internal

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<sup>152</sup> See also *ibid* 214-216.

<sup>153</sup> *Ibid*.

<sup>154</sup> The pro-removal position ultimately prevailed. See *ibid* 206-214.

<sup>155</sup> *Ibid* 205.

<sup>156</sup> *Ibid* 202-203.

laws passed by Georgia.<sup>157</sup> Jeremiah Evarts, a New England lawyer who was also the secretary of the American Board of Commissioners for Foreign Missions, led the opposition to Georgia and Andrew Jackson. Beginning in August 1829 he published under the pseudonym “William Penn” a series of articles in the Washington *National Intelligencer* on the Indian removal question.<sup>158</sup> The articles were published in book form in late 1829 as *Essays on the Present Crisis in the Condition of the American Indians ... Under the Signature of William Penn*. As Joseph Burke writes, it

soon became the holy writ, the reference work, and the legal brief of the many preachers, congressmen, and lawyers interested in defending the Cherokees, attacking Georgia, and condemning Jackson. In over 100 pages of fine print, these essays ransacked treaties, statutes, and federal and state court decisions for every shred of evidence supporting the Cherokee claims.<sup>159</sup>

Evarts wrote that the right of the Cherokees to the lands they occupied was “a plain question, and easily answered”. They had “the same natural rights as other men”—“a title absolutely unencumbered in every respect”.<sup>160</sup> Of the argument that they could have no property over their hunting grounds, Evarts merely observed that “[w]ithout admitting this doctrine, it is sufficient to reply here, that it has no application to the case of the Cherokees”: they were not hunters or “mere wanderers, without a stationary residence” but agriculturalists and farmers. Moreover, they had a long history of selling lands to white settlers.<sup>161</sup>

Indian rights had not been modified by European discovery or by the early English royal charters:

But is it not manifest, on the bare statement of this subject, that not even a king can grant what he does not possess? And how is it possible, that he should possess vast tracts of

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<sup>157</sup> Joseph Burke “The Cherokee Cases: A Study in Law, Politics, and Morality” (1968-69) 21 *Stanford Law Review* 500-531 [“Burke ‘The Cherokee Cases’”] at 504.

<sup>158</sup> Banner *How the Indians Lost their Land*, above n 1, 205.

<sup>159</sup> Burke “The Cherokee Cases”, above n 157, 505.

<sup>160</sup> [Jeremiah Evarts] *Essays on the Present Crisis in the Condition of the American Indians; First Published in the National Intelligencer, Under the Signature of William Penn* (Perkins & Marvin, Boston, 1829) 7.

<sup>161</sup> *Ibid* 8.

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country, which neither he, nor any European, had ever seen; but which were in fact inhabited by numerous independent nations, of whose character, rights, or even existence, he knew nothing.

It was “very easy to understand” why the European powers found it convenient to agree rules of colonisation as between themselves.<sup>162</sup> But the charters (“however expressed, or whatever might seem to be implied in them”) could not go further than affecting the rights of Europeans: “the idea that they could divest strangers of their rights is utterly preposterous”. “None of the Protestant colonists professed to act upon such principles”. They “as a general thing, if not universally, obtained of the natives, by treaty, the privilege of commencing their settlements”.<sup>163</sup>

The British Crown (as evidenced, for example, by the 1763 Proclamation) had taken the Indian tribes under its protection but it was “too large a leap” from this to infer that the Indians held their lands by permission of the Crown<sup>164, 165</sup>.

There is a distinction between affording protection and usurping unlimited control over rights and property. ... How many small states are there in Europe, at this moment, possessing a limited sovereignty, and remaining under the protection of larger states, yet exercising the right of administering their own government, in regard to many essential things, as truly as the State of Massachusetts, or South Carolina, administers its own government?

Indeed it was “safer to infer” that the Indian tribes had been taken under British protection “because they had important rights” that required protection.<sup>166</sup>

Nothing had changed since the Revolution.<sup>167</sup>

[T]he whole history of our negotiations with them, from the peace of 1783 to the last treaty to which they are a party, and of all our legislation concerning them, shows, that they are regarded as a separate community from ours, having a national existence, and

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<sup>162</sup> Ibid 57.

<sup>163</sup> Ibid 58.

<sup>164</sup> Ibid 59-60.

<sup>165</sup> Ibid 60.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid 10-11.

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possessing a territory, which they are to hold in full possession, till they voluntarily surrender it.

Evarts reviewed all the treaties with the Cherokees, beginning with the Treaty of Hopewell of 1785 and including treaties entered into by Georgia.<sup>168</sup> These treaties clearly recognised Cherokee nationhood<sup>169</sup> (to the point that some went so far as to recognise the continuing right of the Cherokees to declare war against the United States<sup>170</sup>) and were indistinguishable from treaties between European nations. They were treaties of “peace and friendship”. It was irrelevant if the view taken of the Cherokee was that they were “a power of the ... tenth rate” (“very feeble, and totally incompetent to defend its own rights”) or “an uncivilized people, ... not to be ranked among nations” (something that had been “said gratuitously, and without the least shadow of proof”). It was irrelevant “above all” because “the objection comes too late”: “The United States, are, as a lawyer would say, *estopped*” by its treaties and by its laws.<sup>171</sup> As in the colonial period, it was also irrelevant that the Cherokee had been taken under the protection of the United States by its treaties. As was “decisively stated by Vattel”, a weaker state could acknowledge a superior without any loss of rights beyond those implicit in the acknowledgment.<sup>172</sup>

Some of the treaties also guaranteed to the Cherokees their land “as their own absolute property”, and to which the federal and state governments had not “even the shadow of a claim”.<sup>173</sup> Of the Indian treaties generally, Evarts concluded:<sup>174</sup>

In none of these treaties is the original title of the Indians declared to be defective. In none of them is it said, that Indians have not the power of self-government; or that they must come under the government of the several States. In no case, have the Indians signed away their inheritance, or compromitted their independence. They have never

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<sup>168</sup> See *ibid* 11-51, 63-73.

<sup>169</sup> “Every instance of this kind implies that the Indian communities had governments of their own; that the Indians, thus living in communities, were not subject to the laws of the United States; and that they had rights and interests distinct from the rights and interests of the people of the United States, and, in the fullest sense, public and national. All this is in accordance with facts; and the whole is implied in the single word *treaty*.” *Ibid* 20.

<sup>170</sup> See, for example, *ibid* 17-18.

<sup>171</sup> *Ibid* 21. Evarts considered the legislation of the United States only briefly; see *ibid* 53.

<sup>172</sup> *Ibid* 22.

<sup>173</sup> *Ibid* 30.

<sup>174</sup> *Ibid* 53.

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admitted themselves to be tenants at will, or tenants for years. Upon the parchment all stands fair; and, so far as their present engagements extend, they are under no more obligation to leave their country, than are the inhabitants of Switzerland to leave their native mountains.

These conclusions about the United States' treaties with Indian tribes were said to be supported by Chancellor Kent's opinion in *Goodell v Jackson* (extracts of which were given in an appendix).<sup>175</sup> The upshot of the treaties was that "the United States are bound to secure to the Cherokees the integrity and inviolability of their territory, until they voluntarily surrender it".<sup>176</sup>

Evarts also responded to the claim that a different view of the matter had been taken by the United States Supreme Court in *Fletcher v Peck* and *Johnson v M'Intosh*. Those cases had not "touch[ed] the question of jurisdiction, or present title; except the Court throws out some expressions, which were manifestly intended for the protection of the Indians in their right of occupancy; that is, their right of possessing their own country, to the exclusion of the whites, without limitation of time". In *Fletcher*, "the contingent interest of Georgia in the Indian territory" had been "designated by the technical phrase of *seisin in fee*". In *Johnson*, the impairment of Indian rights identified by the Court was that Indians "could not sell to foreign nations, except to the discoverers" ("this being a matter of agreement among the European nations"), and could not sell lands to private purchasers ("this being a matter of municipal law among the whites, and often of treaty stipulations between whites and Indians"). This limitation involved no "usurpation or encroachment".<sup>177</sup> It was "a matter of necessity" and was "especially of benefit to the Indians".<sup>178</sup> Evarts read the judgment as "decisively in favor of the *right* of the Cherokees to remain on their land, as long as they please", pointing out that though Georgia might be seised in fee of the Cherokees land, it would have to wait until the Cherokees "voluntarily dispose of their country, through the medium of the treaty-making power" (be that "for a hundred or a

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<sup>175</sup> Ibid 92 & 108-111.

<sup>176</sup> Ibid [2].

<sup>177</sup> Ibid 82.

<sup>178</sup> Ibid 82-83.

thousand years”) before it could take possession.<sup>179</sup> (These points were more fully developed in a *New York Observer* article on *Fletcher* and *Johnson* which Evarts reproduced in an appendix.<sup>180</sup>) He also emphasised that the Supreme Court in *Fletcher* and *Johnson* had “said nothing ... as to the effect or application of treaties”.<sup>181</sup>

What was said on the subject of the *rightful occupancy* of the Indians, had respect to the naked claims of peaceable Indians, who remained upon the lands of their fathers. How much stronger the case of the Cherokees now is, defended as they are by so many solemn stipulations, must be apparent to every candid mind.

Of Georgia’s claim to a title to all Cherokee lands by discovery, Evarts responded that “[t]he exclusive right of *extinguishing the Indian title*, or what has usually been called the right of preemption, is a totally different thing from this all-absorbing and overwhelming right of discovery, on which Georgia now insists.”<sup>182</sup>

Evarts also rejected arguments that Cherokee removal was a “moral necessity” either for Georgia or for the Cherokee.<sup>183</sup> In relation to the former, he dealt with an argument that “great inconveniences will be experienced, by having an *imperium in imperio*;—a separate, independent [Cherokee] community surrounded by our own citizens”. In addition to the facts that the Cherokee were a “little pacific community” from whom no harm was to be feared, and who had entered into treaties by which they had agreed to all that the United States could “reasonably desire” (for example, the delivery up of fugitives and the right of free navigation of

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<sup>179</sup> Ibid 83. See also *ibid* 10: “Some shallow writers on this subject have said that ‘the Cherokee have *only* the title of occupancy’; just as though the title of occupancy were not the best title in the world, and the only original foundation of every other title. Every reader of Blackstone knows this to be the fact. As to the past, the Cherokees have *immemorial occupancy*; as to the future, they have a perfect right to *occupy their country indefinitely*. What can they desire more?”

<sup>180</sup> Ibid 105-108. Of *Fletcher v Peck*, it was said that “Indian title is not in the least affected by this decision.” The “clear title” referred to in *Johnson v M’Intosh* was “abundantly explained to be the *exclusive right of acquiring the Indian lands*”. If “technically called a *seisin in fee*” it did not establish that Georgia could drive the Cherokee from their lands. It was further pointed out that “[t]he Court was not called in either of the cases cited, to say any thing about treaties with the Indians”.

<sup>181</sup> Ibid 84.

<sup>182</sup> Ibid 86.

<sup>183</sup> Ibid 90.

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waterways), Evarts considered that the inconveniences of an “imperium in imperio” were “altogether chimerical”<sup>184,185</sup>:

Among our own citizens, we have governments within governments, of all sizes from a school district upwards; and all sorts of corporations with limited powers. In Great Britain, there is a vast diversity of customs, rights, franchises, and exemptions, peculiar to different towns, boroughs, cities, and counties, and to the larger divisions of the realm. ... [T]here have been separate communities of Indians, in most of the older members of our confederacy, from the first settlement of the country; and no disastrous consequences have followed.

Evarts also denied that the Cherokee would benefit from removal. If removed west of the Mississippi, the Cherokee would be “crowded together under one government” with “different tribes, speaking different languages, in different states of civilization”:<sup>186</sup>

The wisest men, who have thought and written on this subject, agree in the opinion, that no tribe of Indians can rise to real civilization, and to the full enjoyment of Christian society, unless they can have a community of their own; and can be so much separated from the whites, as to form and cherish something of a national character.<sup>187</sup>

Evarts pointed out that “[n]othing of this kind has ever yet been done, certainly not on a large scale, by Anglo-Americans”:

To us, as a nation, it will be a new thing under the sun. We have never yet acted upon the principle of seizing the lands of peaceable Indians, and compelling them to remove. We have never yet declared treaties with them to be mere waste paper.

Let it be taken for granted, then, that *law will prevail*.<sup>188</sup>

Evarts began his *Essays* in August 1829 with the declaration that the Indian question “will be among the most important, and probably the most contested,

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<sup>184</sup> Ibid 91-92.

<sup>185</sup> Ibid 92.

<sup>186</sup> Ibid 97.

<sup>187</sup> Ibid 9.

<sup>188</sup> Ibid 101.

business of the 21st Congress”.<sup>189</sup> In December 1829 both the Cherokees and Andrew Jackson ensured that this was so. The Cherokees petitioned Congress to intervene to protect their rights from Georgia’s recent laws. Jackson announced that a Bill would go before Congress setting aside territory west of the Mississippi for the Indians, and voting money for removal. Although the choice of staying or removing would be a voluntary one for the Indians, Jackson stated that Indians who stayed would be required to submit to state law and would retain only such property as they had “improved by their industry”.<sup>190</sup> In early 1830, memorials poured into Congress, most from opponents of the Bill.<sup>191</sup>

It is enough to notice of the Congressional debate on the Removal Bill that it lasted from late February to late May 1830, with the Bill passing the House of Representatives by a margin of only 5 votes split along regional lines (the Senate voted on party lines).<sup>192</sup> The speeches “explored the moral and legal implications of the Indian question”, and the best of those made in opposition to the Bill were published by Jeremiah Evarts, who also arranged a reprinting of his *Essays*.<sup>193</sup>

The Cherokees now only had one option: to take their case to the Supreme Court. Their first attempt to find or frame a case to take to the Court failed: their challenge to a Georgia statute under which one Cherokee was indicted for murdering another on Cherokee land could not proceed when Georgia tried and executed the accused notwithstanding that the Supreme Court had agreed to hear the case.<sup>194</sup> Their next attempt was *Cherokee Nation v The State of Georgia*.

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<sup>189</sup> Ibid [2].

<sup>190</sup> Burke “The Cherokee Cases”, above n 157, 504-505; Banner *How the Indians Lost their Land*, above n 1, 217.

<sup>191</sup> Banner *How the Indians Lost their Land*, above n 1, 217.

<sup>192</sup> Ibid 218.

<sup>193</sup> Burke “The Cherokee Cases”, above n 157, 506-508. For a description of the debates, see Francis Prucha *American Indian Treaties: The History of a Political Anomaly* (University of California Press, Berkeley, 1994) 161-165.

<sup>194</sup> Banner *How the Indians Lost their Land*, above n 1, 218-219.

***Cherokee Nation v The State of Georgia (1831)***

The case of *Cherokee Nation v The State of Georgia*, in which the Cherokee Nation sought an injunction to restrain Georgia from executing its laws against the Cherokees, found the Supreme Court in the middle of a political storm. Marshall may have been uncomfortable about the political use being made of *Johnson*. He seems, however, to have been anxious to avoid confrontation with Jackson and Georgia at a time when the authority of the Court was not secure. (Georgia had refused to appear to argue its case.) He thought the case could be safely decided on a narrow jurisdictional point: that the Cherokees lacked standing to seek its injunction against a state because it was not a “foreign nation” in terms of the provision of the Constitution relied upon. Of the merits of the case, Marshall commented that “[i]f courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be believed”.<sup>195</sup> But his finding that Indian tribes were not “foreign nations” but rather “domestic dependent nations” allowed him to avoid further engagement with the merits.<sup>196</sup> His preference to decide the case on a point of jurisdiction, also allowed him to avoid deciding whether the question in the case “savours too much of the exercise of political power to be within the proper province of the judicial department” (his tentative view was that some of the complaints could not be looked into, although he suggested that protection of the possessory rights of Indians might be properly decided by the Court).<sup>197</sup> Marshall may have been worried by reliance on *Johnson* to justify Georgia’s attempts to remove the Cherokee. He inserted in the judgment statements which were capable of interpretation as an adjustment of the balance struck in *Johnson* between the federal government’s property in land and the Indians’ right of occupancy. The Indians’ “unquestionable, and heretofore, unquestioned right to the lands they occupy” continued “until that right shall be extinguished by a voluntary cession to our government”. Over Indian lands, the government’s assertion of “a title independent of their will” was one which “must

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<sup>195</sup> *Cherokee Nation v The State of Georgia* (1831) 30 US 1 [*“Cherokee Nation”*] at 15.

<sup>196</sup> *Ibid* 17.

<sup>197</sup> *Ibid* 20.

take effect in point of possession when their right of possession ceases”.<sup>198</sup> Marshall may not have seen this as any watering down of the government’s rights in respect of land, or, if intended as a modification of *Johnson*, he may have hoped that it would pass unnoticed.

In fact, Marshall’s judgment (which was joined by McLean) provoked a strong response within the Court.<sup>199</sup> Johnson and Baldwin wrote separate opinions, concurring in the jurisdictional point, in order to distance themselves from Marshall’s comments. Johnson, whose sympathies towards Indians seem to have shifted since his dissent in *Fletcher v Peck* in 1810,<sup>200</sup> considered that the Cherokees—“a race of hunters”, “low in the grade of organized society”—did not constitute a state (although he allowed that they might achieve that status in time under their new Constitution).<sup>201</sup> Indians had “never ... been recognised as holding sovereignty over the territory they occupy”.<sup>202</sup> In addition, Johnson considered the claim raised political questions that were not justiciable: the complaint was in effect that Georgia had declared war on the Cherokee. Citing the English case of *Nabob of the Carnatic*,<sup>203</sup> he expressed the view that “[i]n the exercise of sovereign right, the sovereign is the sole arbiter of his own justice” (a phrase that resonates in New Zealand through its use, without attribution, in *Wi Parata*).<sup>204</sup> The same case was also relied upon by Johnson as authority for the view that courts could not enforce treaty obligations.<sup>205</sup>

Baldwin’s judgment is even more explicitly an attack on Marshall’s. He even described it as a “dissent” although it concurred in the dispositive point.<sup>206</sup> Baldwin’s main concern was Indian rights in land and hence Marshall’s apparent

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<sup>198</sup> Ibid 17.

<sup>199</sup> The case was heard by six not seven judges due to the absence of Duvall.

<sup>200</sup> See text accompanying n 109 above.

<sup>201</sup> *Cherokee Nation*, above n 195, 21 & 23.

<sup>202</sup> Ibid 22.

<sup>203</sup> (1791) 1 Ves Jun 371 & (1793) 2 Ves Jun 56 (Ch). See Chapter 3, text accompanying ns 28–31.

<sup>204</sup> *Cherokee Nation*, above n 195, 29; *Wi Parata v Bishop of Wellington and Attorney-General* (1877) 3 NZ Jur (NS) SC 72 at 78.

<sup>205</sup> Ibid 30.

<sup>206</sup> Ibid 32 & 48. See also ibid 41: “... I should, as a dissenting judge ...”.

retreat from *Johnson v M'Intosh* and *Fletcher v Peck*. In apparent reference to the efforts to read down *Johnson* in public debates (which he seems to have seen reflected in Marshall's judgment), Baldwin referred to attempts to confine the principles in *Johnson* to relations between European nations themselves, so that "they did not assume thereby any rights of soil or jurisdiction over the territory in the actual occupation of the Indians". Baldwin asserted that "the language of the court" in *Johnson* was "too explicit to be misunderstood" in this way:<sup>207</sup>

In the case of *Johnson vs. M'Intosh*, ... the nature of the Indian title to land on this continent, throughout its whole extent, was most ably and elaborately considered; leading to conclusions satisfactory to every jurist, clearly establishing that from the time of discovery under the royal government, the colonies, the states, the confederacy and this union, their tenure was the same occupancy, their rights occupancy and nothing more; that the ultimate absolute fee, jurisdiction and sovereignty was in the government, subject only to such rights; that grants vested soil and dominion, and the powers of government, whether the land granted was vacant or occupied by Indians.

In addition to these concerns, Baldwin disclaimed any power of the court to divest the states of "rights of dominion and sovereignty over the territory occupied by the Indians" which had always been "asserted and maintained" by the colonies and, after them, by the states.<sup>208</sup> While the courts could enforce Indian rights under treaties, their rights could only be claimed "in that capacity in which they received the grant or guarantee": that was not in the capacity of foreign states.<sup>209</sup>

The case then took an extraordinary turn. The judgments of Marshall, Johnson and Baldwin were released—only four days after the hearing had concluded, and on the last day of the Court's session—and were apparently reported in the press as vindication of Jackson's Indian policy. About ten days later—after the Court had risen—a dissenting opinion of Thompson and Story (written by Thompson) appeared. It seems that Thompson and Story had dissented from the result throughout but had not thought to write up their dissent. The decision to write,

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<sup>207</sup> Ibid 49 & 48.

<sup>208</sup> Ibid 49.

<sup>209</sup> Ibid 45.

according to Story, was at the urging of Marshall himself.<sup>210</sup> Marshall may have been upset by the reaction to the decision, or he may have thought that the separate opinions of Johnson and Baldwin, going beyond the narrow point on which he had decided the case, required a response. He may have come to the conclusion that his attempt to avoid confrontation with Jackson and Georgia, while providing some better protection for Indian rights by finessing *Johnson* without fanfare, had failed.

The opinion was a dissent on the jurisdiction question on which the majority had decided the case. Thompson concluded that the Cherokee were a state or nation:<sup>211</sup>

They have been admitted and treated as a people governed solely and exclusively by their own laws, usages, and customs within their own territory, claiming and exercising exclusive dominion over the same, yielding up by treaty, from time to time, portions of their land, but still claiming absolute sovereignty and self government over what remained unsold.

In terms of the Constitution, the Cherokee nation was a “foreign” state. Thompson pointed out that, since the Cherokee were a foreign nation before European discovery of America, it was necessary to enquire “when or how have they lost that character, and ceased to be a distinct people, and become incorporated with any other community?”<sup>212</sup> In this way, in the manner of Evarts’s *Essays* and Kent’s judgment in *Goodell v Jackson*,<sup>213</sup> Thompson turned the question of Cherokee nation status on its head. Thompson addressed these questions against the history of all dealings with the Cherokee. The history he rehearsed was different in material respects from that given by Marshall in *Johnson*, particularly in its attention to treaties concluded with the Cherokee. Although the majority opinions

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<sup>210</sup> Burke “The Cherokee Cases”, above n 157, 514 & 516. Story wrote that “neither Judge T. nor myself contemplated delivering a dissenting opinion, until the Chief Justice suggested to us the propriety of it, and his own desire that we should do it.”

<sup>211</sup> *Cherokee Nation*, above n 195, 53.

<sup>212</sup> *Ibid* 54.

<sup>213</sup> *Goodell*, above n 133, 709-710 (cited by Thompson in *Cherokee Nation*, above n 195, 67): “The Oneidas, and the other tribes composing the Six Nations of Indians, were originally free and independent nations. It is for counsel, who contend that they have now ceased to be a distinct people, and become completely incorporated with us, and clothed with all the rights, and bound to all the duties of citizens, to point out the precise time when that event took place. I have not been able to designate the period, or to discover the requisite evidence of such an entire and total revolution.”

in *Cherokee Nation* had traversed much of this material also, Thompson's judgment contained an effective refutation of their reasons and conclusions. In his own opinion, he drew support from the dissent of Justice Johnson in *Fletcher v Peck* and from Kent's judgment in *Goodell v Jackson*.<sup>214</sup> His conclusion about the Cherokee Nation was that it was:<sup>215</sup>

a numerous and distinct nation, living under the government of their own laws, usages, and customs, and in no sense under the ordinary jurisdiction of the state of Georgia; but under the protection of the United States, with a solemn guarantee by treaty of the exclusive right to the possession of their lands. This guarantee is to the Cherokees in their national capacity.

Thompson, like Marshall but more openly, repositioned *Johnson v M'Intosh* in relation to land rights. While content to describe the Cherokee as having rights of "occupancy" and allowing the limitation that "we do not recognize the right of the Indians to transfer the absolute title of their lands to any other than ourselves",<sup>216</sup> Thompson made it clear that there was little difference between ownership and occupancy in real terms. The Cherokees' occupancy was a "matter of right, ... not ... mere indulgence". They could not be disturbed in or deprived of such occupancy "without their free consent; or unless a just and necessary war should sanction their dispossession". Until then, "there is as full and complete recognition of their sovereignty, as if they were the absolute owners of the soil".<sup>217</sup> The nature and extent of Cherokee property rights were described by treaties which "all recognize, in the most unqualified manner, a right of property in this nation, to the occupancy at least, of the lands in question". It was "immaterial whether this interest is a mere right of occupancy, or an absolute right to the soil".<sup>218</sup> The 1830 Georgian statute asserting title to mines was without legal basis—the Cherokee right of occupancy secured by treaty meant that the state "has not even a

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<sup>214</sup> *Cherokee Nation*, above n 195, 57-58 & 67-68.

<sup>215</sup> *Ibid* 74.

<sup>216</sup> *Ibid* 55.

<sup>217</sup> *Ibid*.

<sup>218</sup> *Ibid* 70.

reversionary interest in the soil”.<sup>219</sup> Thompson also took the view that the questions in issue in the case (including under treaty) were not political and non-justiciable because they involved “rights of persons or property”.<sup>220</sup> Treaty obligations were not “gratuitous” obligations:<sup>221</sup>

They are obligations founded upon a consideration paid by the Indians by cession of part of their territory. And if they, as a nation, are competent to make a treaty or contract, it would seem to me to be a strange inconsistency to deny to them the right and the power to enforce such a contract.

While the United States could not be sued (a view that is not explained in the judgment), Thompson considered that violation of a treaty by a state would sustain an action “when the question relates to a mere right of property, and a proper case can be made between competent parties”.<sup>222</sup>

The public interest in the *Cherokee Nation* decision was such that the court reporter, Richard Peters, published a stand-alone volume of the case in which he included not only the arguments and judgments but also such related materials as the treaties with the Cherokees and an opinion by James Kent on the Cherokee claims.<sup>223</sup> Marshall welcomed the publication, writing to Peters:<sup>224</sup>

I should be glad to see the whole case. It is one in which a very narrow view has been taken in the opinion which is pronounced by the Court. The judge who pronounced that opinion had not time to consider the case in its various bearings; and had his time been so abundant, did not think it truly proper to pass the narrow limits that circumscribed the matter on which the decision of the court turned. The dissenting opinion, it is true, go [sic] more at large into the subject, but those which were delivered in Court look to one side of the question only, and the public must wish to see both sides.

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<sup>219</sup> Ibid 76.

<sup>220</sup> Ibid 51 & 75.

<sup>221</sup> Ibid 58-59.

<sup>222</sup> Ibid 59.

<sup>223</sup> Burke “The Cherokee Cases”, above n 157, 518.

<sup>224</sup> Marshall to Peters, 19 May 1831, quoted in Burke “The Cherokee Cases”, above n 157, 518.

*Worcester v The State of Georgia (1832)*

An opportunity for Marshall to revisit “both sides” of the question raised in *Cherokee Nation* arose the following year. Samuel Worcester was a missionary among the Cherokee. He had been convicted under an 1830 Georgia law that made it an offence punishable by not less than four years’ hard labour for a white person to reside in Cherokee country without a licence from the Governor. Worcester was one of 11 missionaries prosecuted under this law in 1831 and sentenced to the minimum four years’ hard labour. While nine of the missionaries accepted pardons, Worcester and one other, Elizur Butler, rejected the offer so that the constitutionality of the Georgia law could be tested in the Supreme Court. This was done by writ of error in which Worcester was the named plaintiff. The argument put forward for Worcester in the case was that the Georgia law was unconstitutional and void as contrary to treaty guarantees which recognised the Cherokee as a sovereign nation over whom the state of Georgia had no jurisdiction. There was intense public interest in the case, in part because the Indian question and the plight of the missionaries had become campaign issues in the presidential contest of 1832. Georgia announced that it would ignore an unfavourable ruling from the Court and again refused to appear.<sup>225</sup>

This time Marshall took two weeks to write his opinion, which was joined by Thompson, Story and Duvall, giving a majority of the Court.<sup>226</sup> For Marshall, the case was “in every point of view in which it can be placed, ... of the deepest interest”.<sup>227</sup> It raised questions beyond the particular law under which Worcester had been prosecuted. It put in issue all of the laws of Georgia that (“it has been said at the bar” by counsel for Worcester) “seize on the whole Cherokee country, parcel it out among the neighbouring counties of the state, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence”. At issue was whether Georgia was entitled to claim jurisdiction over the Cherokee. Marshall’s answer was that it was not and that its statutes were repugnant to the

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<sup>225</sup> Burke “The Cherokee Cases”, above n 157, 519-521.

<sup>226</sup> Ibid 522.

<sup>227</sup> *Worcester v The State of Georgia* (1832) 31 US 515 [“Worcester”] at 536.

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Constitution, laws and treaties of the United States. As he had done in *Johnson v M'Intosh*, Marshall supported his decision by an appeal to history. But the account of American history he gave in *Worcester* was very different. It was an account heavily influenced by Thompson and Story's dissent in *Cherokee Nation*, itself informed by Kent's judgment in *Goodell v Jackson* and Evarts' *Essays*.

Brian Slattery, in a useful analysis of *Worcester*, divides Marshall's new account of the history of British and American relations with Indian tribes into four stages.<sup>228</sup>

In the first stage, Marshall wrote that:<sup>229</sup>

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and the rest of the world, having institutions of their own, and governing themselves by their own laws.

The "full right" of the Indians to their lands and their "title to self government" were the same "original right[s]" that "the undisputed occupants of every country" possessed.<sup>230</sup> The notion that "the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied" was "difficult to comprehend".<sup>231</sup>

In the second stage, Europeans discovered the Americas. But it was equally difficult to comprehend how discovery could "give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors":

Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied?

(From the fact that no answer is supplied, it seems that Marshall treated this question as rhetorical.) All that had occurred with discovery was that the European

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<sup>228</sup> Slattery "Paper Empires", above n 10, 51-54.

<sup>229</sup> *Worcester*, above n 227, 542-543.

<sup>230</sup> *Ibid* 560.

<sup>231</sup> *Ibid* 543.

powers who had “discovered and visited different parts of this continent at nearly the same time”, had found it convenient in order to avoid “bloody conflicts, which might terminate disastrously to all”, “to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves”.<sup>232</sup> This principle—for which Marshall could quote *Johnson v M’Intosh* as authority—was “that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession”.<sup>233</sup> It gave to the discoverer, “as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it”. This was “an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it”.<sup>234</sup>

[I]t could not affect the rights of those already in possession . . . . It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

This was a clear repudiation of *Johnson v M’Intosh* discovery doctrine as it affected the rights of Indians.<sup>235</sup>

The third stage was a long period of history, from the planting of the first chartered colonies, through the establishment of treaty relations between the British Crown and Indian nations, to the post-Revolutionary War period when the United States entered into its own treaties with the Cherokee. In the first part of this period, Britain could have adopted any policy it wanted towards the Indians. It might have conquered them and extinguished their rights of sovereignty, self-government and property. If it had done so, no court could controvert its actions.<sup>236</sup> But it had not done so. Its charters “were considered as blank paper so far as the rights of the

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<sup>232</sup> Ibid.

<sup>233</sup> Ibid 543-544, quoting *Johnson*, above n 120, 573.

<sup>234</sup> Ibid 544.

<sup>235</sup> Compare *Johnson*; see text accompanying ns 125-129 above.

<sup>236</sup> *Worcester*, above n 227, 543.

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natives were concerned”<sup>237</sup> (and some even recognised the nationality of the Indian tribes):<sup>238</sup>

The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood.

Later, Britain, in order to secure its position in North America against the pretensions of France and Spain, sought to cultivate the Indians as “effective friends”, by entering into alliances by treaty.<sup>239</sup> The true import of these treaties, and of the relationships they brought into being, was not to be gauged from their texts. It was important to understand the circumstances in which they had been made and to see them from the Indian point of view:<sup>240</sup>

Not well acquainted with the exact meaning of words, nor supposing it to be material whether they were called the subjects, or the children of their father in Europe; lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country: and this was probably the sense in which the term was understood by them.

So understood, it was

[c]ertain ... that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or

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<sup>237</sup> Ibid 546.

<sup>238</sup> Ibid 544-545.

<sup>239</sup> Ibid 546.

<sup>240</sup> Ibid 546-547.

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otherwise, might seduce them into foreign alliances.<sup>241</sup> The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only.<sup>242</sup>

British policy towards the Indian nations “inhabiting the territory from which she excluded all other Europeans” (including in the 1763 Proclamation, which Marshall set out) had therefore been to consider them “as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection”.<sup>243</sup> “This was the settled state of things when the war of our revolution commenced.”<sup>244</sup> Significantly in this analysis, none of the impairments on Indian land rights ascribed as following from discovery in *Johnson v M’Intosh* (the incompetence of Indians to dispose of land “to whomsoever they pleased” and discoverer’s “clear title” and “power to grant the soil, while yet in [their] possession”) were identified.

“Far from” adopting a new policy towards the Indian tribes, the United States had continued the British approach, as was to be seen from its own, very similar, Indian treaties.<sup>245</sup> Its treaty with the Delaware Indians in 1778 was, “in its language, and its provisions ... formed, as near as may be, on the model of treaties between the crowned heads of Europe”.<sup>246</sup> Where, in treaties, Indians had acknowledged themselves to be under the protection of the United States, such stipulations were “undoubtedly to be construed in the same manner” as comparable provisions in the British treaties, which was that:<sup>247</sup>

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<sup>241</sup> See also *ibid* 551-552 & 559: “The Indian nations had always been considered as distinct, independent political communities ... with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians.”

<sup>242</sup> *Ibid* 547.

<sup>243</sup> *Ibid* 548.

<sup>244</sup> *Ibid* 549.

<sup>245</sup> *Ibid* 549.

<sup>246</sup> *Ibid* 550.

<sup>247</sup> *Ibid* 552. See also *ibid* 560-561, citing Vattel in support of the proposition that “the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its

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The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character.

In the fourth, and as yet incomplete, stage of Indian history (which overlapped with the third), white settlement was increasing and

the strong hand of the government was interposed to restrain the disorderly and licentious from intrusions into their country, and from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder.<sup>248</sup>

But although United States “protection” was becoming more active, the basis of the relationship between the tribes and the government had not changed. The Treaty of Holston (1791), which had “explicitly recogniz[ed] the national character of the Cherokees, and their right of self government; thus guarantying their lands”, “has been frequently renewed, and is now in full force”.<sup>249</sup> Acts of Congress “manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States”.<sup>250</sup> An 1819 Act “avowedly contemplates the preservation of the Indian nations as an object sought by the United States, and proposes to effect this object by civilizing and converting them from hunters into agriculturalists”.<sup>251</sup> Even Georgia’s own laws—until an “abandonment” of former opinions in 1828—were said to show conformity with the view of the federal government and the other states that the Indian nations were

distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of

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right to self government, by associating with a stronger, and taking its protection”. See also *ibid* 581-582 per McLean AJ.

<sup>248</sup> *Ibid* 552.

<sup>249</sup> *Ibid* 556.

<sup>250</sup> *Ibid* 557.

<sup>251</sup> *Ibid* 557.

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that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed

<sup>252</sup>  
... .

As for the Cherokee:<sup>253</sup>

The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

(Marshall may have continued to regard Indian tribes as the “domestic dependent nations” described in *Cherokee Nation*. But in *Worcester*, as Hamar Foster has written, “he emphasized nationhood over dependence”.)

Consequently, Marshall held, not only that the statute under which Worcester had been prosecuted, but also that all of the Georgia legislation he had reviewed, was void as repugnant to the Constitution, laws and treaties of the United States.<sup>254</sup> No jurisdictional issue arose:<sup>255</sup>

Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment, if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the constitution, laws, and treaties of his country.

Worcester’s conviction was overturned.

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<sup>252</sup> Ibid 559-560.

<sup>253</sup> Ibid 561.

<sup>254</sup> Ibid 561-563.

<sup>255</sup> Ibid 562.

Two judges did not join Marshall's opinion.<sup>256</sup> McLean, who had joined Marshall's judgment in *Cherokee Nation*, wrote a separate concurring opinion. While also holding that Georgia's laws were a violation of treaties and laws of the United States, he took a narrower view of Indian rights than Marshall. While accepting that "[a]ll the rights which belong to self government have been recognized as vested in them" (such as "gives to them a distinct character as a people, and constitutes them, in some respects, a state"),<sup>257</sup> he asserted that "[a]t no time has the sovereignty of the country been recognized as existing in the Indians".<sup>258</sup> He also emphasised that some "remnants" of Indian tribes had, and others might still, lose their rights of self-government (an extra stage to Marshall's history).<sup>259</sup> He expressed the political opinion that it would be best if the Cherokee vacated Georgia,<sup>260</sup> observing that "a sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or, eventually, consent to become amalgamated in our political communities".<sup>261</sup> McLean seems also to have been concerned to restate the *Johnson v M'Intosh* view of Indian land rights:<sup>262</sup>

Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called the right to the ultimate domain, but the Indians have a present right of possession.

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<sup>256</sup> The Court was again composed of six not seven judges as Johnson was absent due to ill health. Burke considers that he would probably have dissented had he sat. Burke "The Cherokee Cases", above n 157, 524.

<sup>257</sup> *Worcester*, above n 227, 580 & 581. See also *ibid* 581: "In the management of their internal concerns, they are dependent on no power. They punish offences under their own laws, and, in doing so, they are responsible to no earthly tribunal. They make war, and form treaties of peace."

<sup>258</sup> *Ibid* 580. See also *ibid* 591: "The residence of Indians, governed by their own laws, within the limits of a state, has never been deemed incompatible with state sovereignty, until recently."

<sup>259</sup> *Ibid* 580, 590, 593 ("If a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them") & 594 ("But, if a contingency shall occur, which shall render the Indians who reside in a state, incapable of self-government, either by moral degradation or a reduction of their numbers, it would undoubtedly be in the power of a state government to extend to them the aegis of its laws. Under such circumstances, the agency of the general government, of necessity, must cease"). See also *Cherokee Nation*, above n 195, 60 per Thompson AJ.

<sup>260</sup> *Worcester*, above n 227, 588 & 595.

<sup>261</sup> *Ibid* 593.

<sup>262</sup> *Ibid* 580. See also *ibid* 581 ("[the Indians] may not be admitted to possess the right of soil") & 584 ("Under its charter, ... Georgia derived a right to the soil, subject to the Indian title, by occupancy.")

Baldwin was the only judge to dissent in the case. The basis of his dissent (the text of which was not provided to Peters for reporting) was that the record had not been properly returned on the writ of error. But he also said of the merits of the case that his opinion “remained the same as was expressed by him in the case of the Cherokee Nation v. The State of Georgia, at the last term” (which might be seen to also indicate that he considered the rest of the Court to have resiled from *Cherokee Nation*).<sup>263</sup>

Although Worcester and Butler were pardoned and released as a result of the Supreme Court’s ruling (although not without Georgia dragging its heels for a time), as Banner writes, so far as the Cherokee were concerned, *Worcester* “changed nothing”.<sup>264</sup>

Georgia continued to make life difficult for the Cherokees, and the federal government continued to offer to purchase the Cherokees’ land. John Ross, the Cherokee’s principal chief, continued in vain to enlist the federal government’s help.

Eventually, in 1835, the federal government “resorted to the oldest trick in the book” and signed a treaty with a group of dissident Cherokees by which the United States purported to buy all of the Cherokees’ land in exchange for land west of the Mississippi. Ross spent the next three years contesting this agreement, only for the Army in 1838 to round up the Cherokees and intern them in forts to await transportation while he was in Washington negotiating with the government. At this point, Ross gave up. During the autumn and winter of 1838–39 it is estimated that 4,000 of 16,000 Cherokees died on the “Trail of Tears” from Georgia to present-day Oklahoma.<sup>265</sup> Other eastern tribes were coerced into moving too. By

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<sup>263</sup> Ibid 596.

<sup>264</sup> Banner *How the Indians Lost their Land*, above n 1, 223. See also ibid 221-222, discussing President Andrew Jackson’s almost certainly apocryphal response to news of *Worcester v The State of Georgia*: “John Marshall has made his decision, now let him enforce it.”

<sup>265</sup> Ibid 223-225. See also Theda Perdue & Michael Green *The Cherokee Nation and the Trail of Tears* (Viking, New York, 2007) ch 6.

the middle of the nineteenth century, almost no land east of the Mississippi remained in Indian possession.<sup>266</sup>

***Mitchel v The United States (1835)***

The last Indian land case that Chief Justice Marshall sat on was *Mitchel v The United States*.<sup>267</sup> It was heard in the January term in 1835. Marshall was then making plans to retire (plans overtaken by his death in July).<sup>268</sup> And when the opinion of the Court was handed down in March, it was delivered by Baldwin. The fact that Baldwin delivered the opinion of the Court, given his dissenting opinion in *Worcester* and his disagreement with Marshall in his concurring judgment in *Cherokee Nation*, may suggest that the opinion of the Court was a compromise which attempted to find a middle ground. The Court sat as six because Duvall had resigned and had not been replaced. By then, Johnson's place on the Court had been taken by Wayne, a Jacksonian appointment from the Georgia Supreme Court. Story and Thompson were likely to have supported Marshall on the Indian questions; but Wayne and McLean almost certainly were sympathetic to the views of Baldwin. If the Court was evenly balanced, it may have been necessary to find some middle ground. It may be that Marshall, on the cusp of retirement, was keen for the Court to present a more united front. Whatever the reason, the opinion delivered by Baldwin for the Court, papered over the likely differences in arriving at position all could live with, somewhere on the spectrum between Marshall's opinions in *Johnson* and *Worcester*. It may have helped in achieving a compromise that *Mitchel* was concerned not with the Cherokee, nor indeed directly with any Indian nation (because it was concerned with title derived by purchase from the Seminole Indians). What is more, since the case arose out of relations between the colonial powers (Spain and Britain) and their successor, the United States, on the one hand, and the Indian tribes of Florida, on the other, the Court was able to say that the history of dealings differed from those that had occurred in the Thirteen

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<sup>266</sup> Banner *How the Indians Lost their Land*, above n 1, 226.

<sup>267</sup> *Mitchel v The United States* (1835) 34 US 711 [*"Mitchel"*].

<sup>268</sup> Jean Smith *John Marshall: Definer of a Nation* (Henry Holt & Company, New York, 1996) 522-523.

Colonies. That distinction may not stand up to scrutiny but provided an apparently plausible basis for unanimity.

Mitchel claimed as successor to purchases of over one million acres of land from the Seminole Indians, which purchases had been confirmed by the Spanish authorities between 1804 and 1811, a title disputed by the United States which asserted that rights to the land had been transferred to it under a treaty with Spain. In the Supreme Court, Mitchel was successful on the basis that the original purchase had been made “bona fide, for a valuable consideration, of the adequacy of which the Indians were competent judges”,<sup>269</sup> that the Seminole Indians had property in land that they were able to convey, and that the Spanish Governor, who had authority to confirm the transaction, had done so.

Florida was unusual in that it had originally been a possession of Spain until 1763, before becoming a British colony for 20 years, and then reverting to a possession of Spain until 1783 to 1821, at which point it was ceded by Spain to the United States. Baldwin started with the British period, in which, at the outset, the nature and extent of Indian land rights conformed to the “[o]ne uniform rule” of other British North American colonies, namely that:<sup>270</sup>

friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.

Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent.

This, he said, was also the view taken by the Supreme Court in *Johnson v M’Intosh* “which has received universal assent”.<sup>271</sup>

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<sup>269</sup> *Mitchel*, above n 267, 731.

<sup>270</sup> *Ibid* 745-746.

<sup>271</sup> *Ibid* 746.

Despite this start, Britain had chosen to depart from the “uniform rule” in Florida, and had, by treaties, recognised Indian property in land.<sup>272</sup> The British had come to this position “more from a sense of justice than motives of mere policy”.<sup>273</sup> But when Spain had taken possession of Florida in 1783, it found it politic (because an independent United States at its borders made friendship with the Indians desirable) not only to respect the rights enjoyed by the Indians under British rule, but to provide more elaborate guarantees of property<sup>274,275</sup>:

Spain did not consider the Indian right to be that of mere occupancy and perpetual possession, but a right of property in the lands they held under the guarantee of treaties  
....

The United States had succeeded to these obligations.<sup>276</sup> As a result, the United States had, in respect of Indian lands in Florida, only “the ultimate reversion in fee”, a “very remote contingent interest” in the lands.<sup>277</sup> Since they had property, the Indians had the right of alienation, subject only to ratification (which in circumstances of long possession could be presumed if direct evidence was lacking).<sup>278</sup>

For the purposes of this thesis, there are three significant points to be derived from *Mitchel*. First, *Mitchel*, together with *Cherokee Nation* and *Worcester*, shows that *Johnson v M’Intosh* was not a definitive statement of the American law relating to Indian land rights in 1840. Secondly, it demonstrates that the confinement of Indian land rights to rights of occupancy was not a doctrine of the common law based upon discovery (as indeed ought to have been clear from *Johnson* itself). Thirdly, *Mitchel* makes clear that the controlling consideration in identifying the nature and extent of Indian land rights was the agreements entered into between the colonising power and the Indians. When this is appreciated, it may be thought

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<sup>272</sup> See *ibid* 749-750.

<sup>273</sup> *Ibid* 750.

<sup>274</sup> See *ibid* 751 & 753.

<sup>275</sup> *Ibid* 752.

<sup>276</sup> *Ibid* 754-755.

<sup>277</sup> *Ibid* 756 & 758.

<sup>278</sup> *Ibid* 758-761.

surprising that *Johnson v M'Intosh* was successfully invoked after 1840 as helpful in determining the scope of Maori land rights following British acquisition of sovereignty through the Treaty of Waitangi, with its guarantee of “full exclusive and undisturbed possession of Land ... and other properties”.

### **Kent's and Story's *Commentaries***

The extent to which the American cases were known in Britain, Australia and New Zealand in 1840 is not clear. Certainly the conflict between Georgia and the Cherokee nation was followed, particularly in missionary circles. There were strong connections between the American Board of Commissioners for Foreign Missions (of which Jeremiah Evarts was secretary and whose founder was the uncle of Samuel Worcester) and both the London Missionary Society and the Church Missionary Society.<sup>279</sup> Worcester's appeal to the Supreme Court was reported in the English missionary press, where it was claimed to establish that “the Indian tribes are recognised as independent, where they have not yet ceded their possessions”.<sup>280</sup> Indian rights and the question of Cherokee removal were also covered in a book published in London in 1833 by Calvin Colton, where he reproduced the judgments of Marshall and McLean in *Worcester*, as well as discussing *Cherokee Nation*. Colton regarded it as an “unatoneable outrage” for the discovery doctrine which applied between European nations to be used to limit Indian rights.<sup>281</sup>

Are not the barbarian's right of jurisdiction and his territorial title, as good and as sacred as the civilized man's? And if not, what makes the difference? Civilization? What is civilization? Who will define the boundary between the two conditions?

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<sup>279</sup> Andrew Porter *Religion Versus Empire? British Protestant Missionaries and Overseas Expansion, 1700–1914* (Mancsher University Press, Manchester, 2004) 123; Andrew Porter “North American Experience and British Missionary Encounters in Africa and the Pacific, c. 1800–1850” in Mark Daunton & Rick Halpern (eds) *Empire and Others: British Encounters with Indigenous Peoples, 1600–1850* (UCL Press, London, 1999) 345–363 at 357.

<sup>280</sup> (August 1832) 11 Wesleyan-Methodist Magazine 593.

<sup>281</sup> Calvin Colton *Tour of the American Lakes, and Among the Indians of the North-West Territory, in 1830* (Frederick Westley & AH Davis, London, 1833, vol 2) 35 & 42.

He regarded this pretension as never having been followed in British colonial practice,<sup>282</sup> and considered it had also been rejected by the United States Supreme Court in *Worcester*.<sup>283</sup> As is discussed in Chapter 16, Colton's book was drawn on in the controversy that continued in Sydney after enactment of the New Zealand Land Claims Bill in August 1840, where it was used to counter the argument (based on *Johnson v M'Intosh*) that Maori, like the American Indians, did not have property in land.<sup>284</sup>

In the debates in the New South Wales Legislative Council that preceded the enactment of the Bill, the principal sources for American law were, however, Kent's *Commentaries on American Law* (Lecture 51 "Of the Foundation of Title to Land") and Story's *Commentaries on the Constitution of the United States* (Book 1, Chapter 1 "Origin of the Title to Territory of the Colonies"). Kent's editions came out in 1828, 1832, 1836 and 1840. It seems the edition available in New South Wales in July 1840 was the 1836 edition. Story's *Commentaries* were first published in 1833 and were available in 1840 in the first edition only since a second edition was not produced until 1851.

Story grounded the title of the United States to its territory in discovery.<sup>285</sup> He acknowledged that it "may not be easy upon general reasoning to establish the doctrine, that priority of discovery confers any exclusive right of territory". It was "probably adopted by the European nations as a convenient and flexible rule, by which to regulate their respective claims".<sup>286</sup> While in respect of "desert and uninhabited land", the doctrine caused no difficulty, it was otherwise where territory was already inhabited:

[I]t is not easy to perceive, how, in point of justice, or humanity, or general conformity to the law of nature, it can be successfully vindicated. As a conventional rule it might properly govern all the nations, which recognised its obligation; but it could have no

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<sup>282</sup> Ibid 43-44 & 85.

<sup>283</sup> Ibid ch 5.

<sup>284</sup> See Chapter 16, text accompanying ns 181-189.

<sup>285</sup> Joseph Story *Commentaries on the Constitution of the United States* (Hilliard, Gray & Company, Boston, 1833) vol 1, [3].

<sup>286</sup> Ibid 4.

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authority over the aborigines of America, whether gathered into civilized communities, or scattered in hunting tribes over the wilderness. Their right, whatever it was, of occupation or use, stood upon the original principles deducible from the law of nature, and could not be justly narrowed or extinguished without their own free consent.

Story considered that there was no doubt that at the time of discovery, the Indian tribes inhabiting the continent claimed “the exclusive possession and occupation of the territory within their respective limits, as sovereigns and absolute proprietors of the soil”.<sup>287</sup> He declined however “to enter upon ... the actual merits of the titles claimed by the respective parties upon principles of natural law”, because such questions, as a matter of domestic law, had been overtaken by the way in which the colonising powers had acted in their own self-interest.<sup>288</sup> With that introduction, Story simply summarized the position reached in *Johnson v M’Intosh*,<sup>289</sup> before quoting at great length from this “celebrated case” for its “summary of the historical confirmations adduced in support of these principles, which is more clear and exact than has ever been before in print”.<sup>290</sup> No other case was discussed in the text. *Cherokee Nation* was not referred to at all and *Worcester* was cited in a footnote suggesting that it supported the account of American history given by Marshall in *Johnson*.<sup>291</sup> *Mitchel* was not referred to for the reason that it had not yet been decided when the *Commentaries* were first published (although it is interesting that the second edition, which is unrevised on this topic, does not mention it).

Kent’s *Commentaries*, in the 1836 third edition, referred to *Cherokee Nation*, *Worcester* and *Mitchel*, as well a *Johnson v M’Intosh*. *Mitchel* was discussed briefly in two footnotes, neither of which dealt with the treaty dimension which makes the case of particular interest in the New Zealand context.<sup>292</sup> The other

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<sup>287</sup> Ibid 5.

<sup>288</sup> Ibid 6.

<sup>289</sup> See ibid 7-8.

<sup>290</sup> Ibid 8.

<sup>291</sup> See ibid 8.

<sup>292</sup> James Kent *Commentaries on American Law* (3rd ed, EB Clayton & James Van Norden, New York, 1836) vol 3, 377 & 386.

cases, however, were discussed at some length in the text.<sup>293</sup> Kent's summaries of the cases are accurate. In relation to *Johnson, Cherokee Nation* and *Worcester*, Kent was content to describe the cases without editorial comment. Nevertheless, Kent expressed personal views at a number of points in the chapter. So, for example, in a footnote, he described the majority opinion in *Fletcher v Peck* as "a mere naked declaration, without any discussion or reasoning by the court in support of it". That was to be contrasted, he said, with the separate opinion of Justice Johnson which held that "the Indian nations were absolute proprietors of the soil", with "the restrictions upon the right of soil in the Indians amount[ing] only to an exclusion of all competitors from the market, and a pre-emptive right to acquire a fee simple by purchase when the proprietors should be pleased to sell".<sup>294</sup> With respect to *Worcester*, Kent set out the background to the case, in which the "purport and effect" of Georgia's legislation was to destroy the Cherokee as a political nation.<sup>295</sup>

Those laws dealt with them as if they were alike destitute of civil and political privileges, and were mere tenants at sufferance, without any interest in the soil on which they dwelt, and which had been uninterruptedly claimed and enjoyed by them and their ancestors as a nation from time immemorial. Their lands had been guaranteed to them as a nation, and the protection of the United States pledged to them in their national capacity, and their existence, competence, and rights, as a distinct political society, recognised, by treaties made with them in the years 1785, 1791, 1798, 1805, 1806, 1816, 1817, and 1819, by the government of the United States, under all the forms and solemnities of treaty compacts.

In a long footnote, Kent was also highly critical of the Indian policies of Andrew Jackson.<sup>296</sup>

Kent's review indicated that questions of Indian sovereignty and property had repeatedly been before the Supreme Court. Even after *Johnson v M'Intosh*,

[t]he same court has since been repeatedly called upon to discuss and decide great questions concerning Indian rights and title; and the subject has of late become

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<sup>293</sup> See *ibid* 378-384.

<sup>294</sup> *Ibid* 378.

<sup>295</sup> *Ibid* 382-383.

<sup>296</sup> See *ibid* 398-400.

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exceedingly grave and momentous, affecting the faith and character, if not the tranquillity and safety, of the government of the United States.<sup>297</sup>

Following *Cherokee Nation*, “[t]he subject was again brought forward, and the great points which it involved reasoned upon and judicially determined, in the case of *Worcester v. State of Georgia*”.<sup>298</sup> Of *Worcester* he wrote:<sup>299</sup>

The Supreme Court of the United States, in the case of *Worcester*, reviewed the whole ground of controversy, relative to the character and validity of Indian rights within the territorial dominions of the United States, and especially in reference to the Cherokee nation within the territorial limits of Georgia. They declared that the right given by European discovery was the exclusive right to purchase, but this right was not founded on a denial of the right of the Indian possessor to sell. Though the right to the soil was claimed to be in the European governments, as a necessary consequence of the right of discovery and assumption of territorial jurisdiction, yet that right was only deemed such in reference to the whites; and in respect to the Indians, it was always understood to amount only to the exclusive right of purchasing such lands as the natives were willing to sell. The royal grants and charters asserted a title to the country against Europeans only, and they were considered as blank paper, so far as the rights of the natives were concerned.

A critical reader might have taken from Kent the view that the United States Supreme Court cases did not reconcile easily and that *Johnson v M’Intosh* was by no means the definitive position. But because Kent did not say so explicitly, this may not have been apparent to all readers. Not even a critical reader would have realised from the footnote references to *Mitchel* that United States law was different where treaties modified the application of discovery doctrine.

### The law and aboriginal property

The survey already made suggests that British colonial practice was in general respectful of the existing rights to land of the native inhabitants in and after the acquisition of sovereignty. This general approach seems to have been departed

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<sup>297</sup> Ibid 381.

<sup>298</sup> Ibid 382.

<sup>299</sup> Ibid 383.

from only exceptionally. A final point to be made is that the approach may have been influenced, consciously or unconsciously, by an understanding of what was required as a matter of British law, both domestic land law and imperial law. Certainly recognising native property was not inconsistent with British law.

It is not possible to attempt here an assessment of the influence of law upon the land policies adopted in the colonies, either as a matter of imperial expectations or in explaining local action. While there may have been litigation in colonies in which the nature of native title to land was considered, apart from India (which might be thought to be in a category of its own), such matters do not appear to have arisen directly for consideration in courts in England until the late nineteenth century. Despite that there were bodies of law, both British imperial law and English land law, described in contemporary legal texts, which were potentially applicable. New Zealand may have been exceptional in the extensive recourse to legal sources in debates about Maori interests in land in the 1840s.<sup>300</sup> (To give but one example, in the debate over the New Zealand Land Claims Bill 1840 in the New South Wales Legislative Council, Governor Gipps made extensive use of the United States Supreme Court case-law on Indian title as explained by Kent and Story in their *Commentaries* in defending his view of Maori property and also had with him in the Council chamber a copy of Charles Clark's *A Summary of Colonial Law* (1834).) However, it seems unlikely that law and legal arguments played no role in other colonies, as the reliance on legal sources in the New Zealand debates may itself suggest.

It is therefore relevant to consider how questions of aboriginal property might have been resolved by English law in 1840. Such inquiry is also of importance because of the use made of *Johnson v M'Intosh* in the New Zealand Supreme Court decision of *R v Symonds* in 1847<sup>301</sup> and the approach taken in recent scholarship

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<sup>300</sup> The debates are discussed in Chapters 15-18.

<sup>301</sup> *R v Symonds* (1847) NZPCC 387.

that article 2 of the Treaty was declaratory of the common law position “analysed authoritatively” in *Johnson*.<sup>302</sup>

The principles of British imperial law and English land law applicable to determination of aboriginal land rights are best set out in Kent McNeil’s *Common Law Aboriginal Title* (1989).<sup>303</sup> He draws upon historical legal sources to argue for the rights that should be recognised in law today. Although his concern is with the present legal position of aboriginal rights, and his argument is therefore a legal one rather than simply an historical account, it is still a work of legal history and as such is a proper source for those who are interested in contemporary legal understandings.

As is relevant to the themes of this thesis, McNeil draws a distinction between colonies where native interests in land are recognised as a matter of customary law and those where occupation of land by natives is protected by English common law.<sup>304</sup> In general the distinction might mirror whether the colony was regarded as having been acquired through cession or conquest, on the one hand, or settlement on the other, but not necessarily.<sup>305</sup> Where land was held as property according to native customs which were themselves capable of proof, the customary regime would continue<sup>306</sup> (whether or not the customary property was equivalent to English property notions<sup>307</sup>) unless it was taken at the time of sovereignty by an act of state or by later expropriation either under the prerogative (in a conquered or ceded colony) or by legislation (after English law was introduced into the colony).<sup>308</sup> Where the customary regime was too undeveloped to be given effect in colonial municipal law, native interests in land would have been recognised by application of general principles of English law: evidence of native occupancy<sup>309</sup>

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<sup>302</sup> See Chapter 2, text accompanying ns 332 & 344.

<sup>303</sup> McNeil *Common Law Aboriginal Title*, above n 34.

<sup>304</sup> Ibid chs 6 & 7.

<sup>305</sup> See ibid ch 4.

<sup>306</sup> How such rights were to be enforced is not made been explicit, but McNeil seems to envisage the British legal system established in the colony would protect them if capable of proof.

<sup>307</sup> McNeil *Common Law Aboriginal Title*, above n 34, 194.

<sup>308</sup> Ibid 162-164.

<sup>309</sup> For what constitutes “occupancy”, see ibid 197-204.

of land being treated as evidence of lawful possession which could support an estate in fee simple. McNeil refers to the latter method of recognition as “common law aboriginal title”.

Although McNeil acknowledges that “the weight of opinion” in 1989 was that New Zealand had been acquired by settlement, he expresses the tentative view (indicating that “[t]o do justice to the complex topic of Maori land rights in New Zealand would require a book in itself”) that, irrespective of whether New Zealand was settled or ceded, “the customary rights of the Maoris must be presumed to have continued”. This, he considers, is also indicated by the terms of the Treaty.<sup>310</sup> The consequence, in terms of McNeil’s analysis, is that it was not necessary to have recourse to “common law aboriginal title” in New Zealand. “Maori title continued.”<sup>311</sup>

In the course of developing his arguments, McNeil rejects the view that the English law doctrine of tenures (the notion that all land is held in fee of a lord, and ultimately of the King) attached to colonies with the acquisition of sovereignty to make the Crown the ultimate proprietor of all land.<sup>312</sup> In consequence, he disputes the view that post-acquisition of sovereignty all legal titles had to derive from Crown grant. McNeil considers that there was no legal necessity for importation of the doctrine of tenures into colonies because it arose out of very different English historical circumstances. Even in the United Kingdom, it did not apply in the Orkney and Shetland Islands.<sup>313</sup> More fundamentally, such notions arose “from a misconception of the effect of the doctrine of tenures”,<sup>314</sup> which was a legal fiction of original Crown ownership and grants “invented” to explain feudal relationships and their incidents of service: “[t]hat is the fiction’s purpose, and that is the extent of its application.”<sup>315</sup> There was no reason why land could not be held allodially (not in fee of a lord) in the colonies. But even the doctrine as applied in England

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<sup>310</sup> Ibid 189.

<sup>311</sup> Ibid 190.

<sup>312</sup> Ibid ch 3 & 216-221.

<sup>313</sup> Ibid 79 n 1, 153-154 n 102 & 156.

<sup>314</sup> Ibid 79.

<sup>315</sup> Ibid 107.

conferred only a “paramount lordship” over lands owned by subjects.<sup>316</sup> With the exception of foreshore and seabed land,<sup>317</sup> the Crown could not claim title to any land on the basis of its fictitious original ownership. For the Crown to claim land, it had to “prove its present title just like anyone else”.<sup>318</sup> Its title either had to be a matter of record or made a matter of record by being proven by the procedure of inquest of office or information of intrusion.<sup>319</sup> Furthermore, in England “perfectly good titles to land” could arise other than by Crown grant, for example by adverse possession.<sup>320</sup>

McNeil finds it necessary also to address the argument that as a matter of law any aboriginal title was inalienable except to the Crown.<sup>321</sup> This raises whether there is a right of pre-emption inherent in the Crown. McNeil considers that restrictions on alienability of titles held according to native custom could only arise out of that custom. In respect of common law aboriginal title, McNeil considers that no rule of Crown pre-emption attached as a matter of English law. Rather, “prohibition of private purchases from indigenous landholders appears to have been a matter of policy generally backed by legislation when adopted, rather than a consequence of the application of English law”.<sup>322</sup> The implementation of policy by legislation made “[j]udicial attempts to formulate a common law basis for the rule ... unnecessary”; but where attempted (as in *Johnson v M’Intosh*), “they are probably unsustainable”.<sup>323</sup> McNeil points out that the policy was not followed in all places.<sup>324</sup>

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<sup>316</sup> Ibid 220: “This lordship would itself be real property, an incorporeal thing of which the Crown would be seised in demesne. But although a lordship ‘hovers’ over the land to which it relates, it is essential to realize that it is quite distinct from the land itself, and in no way detracts from a freeholder’s seisin and title. Thus, with respect to the land itself the indigenous occupiers would be seised in demesne as freehold tenants, while the Crown would be seised in service as lord.”

<sup>317</sup> Ibid 103-105.

<sup>318</sup> Ibid 85.

<sup>319</sup> See *ibid* 93-103.

<sup>320</sup> Ibid 78 & ch 2.

<sup>321</sup> Ibid 221-235.

<sup>322</sup> Ibid 227.

<sup>323</sup> Ibid 235.

<sup>324</sup> Ibid 227.

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Where a conquest or cession from a European sovereign was involved, British subjects were able to purchase lands held by Europeans. Moreover, lands in British India apparently could be purchased from the native inhabitants by aliens as well as subjects, to the extent that such purchases were not prohibited by legislation. In the settled Gold Coast Colony as well, the validity of private purchases of native lands seems to have been generally accepted.

McNeil's views lead him to the conclusion that *Johnson v M'Intosh* was wrong in law. He criticises the "right of occupancy" as "an Indian interest unknown to the common law, the definition of which has understandably eluded judges ever since".<sup>325</sup> He points out that the later Supreme Court decisions entailed a retreat from *Johnson*: in *Worcester* "Marshall appears to have changed his mind" and "to have adopted a position virtually indistinguishable from that taken by Johnson in his dissenting opinion in *Fletcher v Peck*".<sup>326</sup> Further refinement was undertaken in *Mitchel*, which on McNeil's analysis does not return to the position taken in *Johnson*.<sup>327</sup>

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<sup>325</sup> Ibid 236-237.

<sup>326</sup> Ibid 252-253.

<sup>327</sup> See ibid 253-259.



## CHAPTER SIX

### WORTHY OF GILBERT & SULLIVAN?— BUSBY’S RESIDENCY

With the context of Empire provided by Chapters 3-5, the backgrounds of the framers of the Treaty of Waitangi can now be considered. The following six chapters concentrate on James Busby, James Stephen and the Ministers responsible for colonial affairs, and William Hobson (with George Gipps—who plays a prominent role in subsequent chapters—also making an appearance).

James Busby is the subject of this chapter and the next. In this chapter, Busby’s background, character, and performance as British Resident from 1833 to 1840 are reviewed. The following chapter concentrates on the ideas he developed and promoted during the course of his Residency about the appropriate political association between Great Britain and New Zealand. Busby’s ideas cannot be properly understood without understanding the man, which is why it is necessary to first paint a picture of this exasperating individual, whose part in the history of New Zealand spanned the critical years of the 1830s, the drafting of the Treaty, and continued, at least in the story told here, until his death in 1871. Before turning to Busby himself, it is, however, first necessary to explain how it was that Britain came to appoint a Resident at New Zealand.

#### **Britain and New Zealand, 1769–1833**

It was not until some twenty years after Captain James Cook’s first voyage to New Zealand (in the course of which he took possession of the islands in the name of King George III<sup>1</sup>) that contact between Europeans and Maori became established. The catalyst was the establishment of the penal settlements of New South Wales and Norfolk Island. At that stage, the exploitation of the resources of New Zealand became feasible. Deep-sea whalers hunting sperm whales called at New Zealand

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<sup>1</sup> See AH McLintock *Crown Colony Government in New Zealand* (RE Owen, Government Printer, Wellington, 1958) [“McLintock *Crown Colony Government*”] 6.

harbours, mainly in the Far North, for reprovisioning and watering. Sealing gangs operated with ruthless efficiency in the Deep South. There was the beginning of a timber trade in New Zealand conifers.<sup>2</sup> This early and sporadic contact offered opportunities for chiefs and tribes to gain material advantages (particularly useful items made of iron and steel) and ascendancy over their rivals.<sup>3</sup> The Governors of New South Wales, for their part, were keen to foster trading opportunities with New Zealand. Philip King (Lieutenant-Governor of Norfolk Island from 1791, and later Governor of New South Wales between 1800 and 1806) had hopes that New Zealand flax could be the basis of an industry using convict labour. To further this scheme, he asked the captain of HMS *Daedalus* to invite a Maori to travel to Norfolk Island to instruct the convicts how to dress flax. The captain took it upon himself to abduct two Maori from the Cavalli Islands, Tuki Tahua and Ngahuruhuru. These chiefs could not tell King anything about such menial work but they were courteously treated by King and returned to New Zealand with agricultural tools, seeds, and pigs.<sup>4</sup>

Tales such as those brought back by Tuki and Ngahuruhuru of their experiences in Norfolk Island and Sydney (which they had visited on route to Norfolk Island), and the material advantages they had obtained, encouraged other adventurous Maori to follow them, principally by crewing on whaling vessels. (Not all those who worked on such vessels joined voluntarily; many were pressed into service, and women were kidnapped, matters of concern to authorities in New South Wales.) Matara, the son of the northern Bay of Islands Te Hikutu chief, Te Pahi, worked his passage to Sydney with instructions from his father to make contact with Governor King. He, too, returned to New Zealand with presents of more tools and pigs for Te

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<sup>2</sup> JMR Owens "New Zealand Before Annexation" in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2nd ed, Oxford University Press, Auckland, 1992) 28-53 ["Owens 'New Zealand Before Annexation'"] at 31-32.

<sup>3</sup> Judith Binney "Two Communities, 1820-1839" in Judith Binney, Judith Bassett, Erik Olssen *The People and the Land—Te Tangata me Te Whenua: An Illustrated History of New Zealand, 1820-1920* (Allen & Unwin, Wellington, 1990) 11-33 ["Binney 'Two Communities'"] at 11; Vincent O'Malley *The Meeting Place: Maori and Pakeha Encounters, 1642-1840* (Auckland University Press, Auckland, 2012) ["O'Malley *The Meeting Place*"] 10 & 146.

<sup>4</sup> Judith Binney "Tuki's Universe" in Judith Binney *Stories Without End: Essays 1975-2010* (Bridget Williams Books, Wellington, 2010) 45-61 ["Binney 'Tuki's Universe'"] at 45-46.

Pahi from King. Following this, in 1805, Te Pahi himself and four of his sons set out to visit King. After one son had been taken hostage by the whalers on arrival at Norfolk Island to secure payment of their passages, Te Pahi and his sons were rescued by the British authorities and sent to Sydney on HMS *Buffalo*. There, King put them up at Government House for nearly three months.

Te Pahi was an interested observer of all he saw, including of the social structure of colonial society and the customs of Aborigines. He attended a criminal trial and was shocked at the sentence of death imposed on three men for stealing food from the government stores. He visited the men in prison and presented a petition on their behalf to King. Binney describes how he remonstrated with King at dinner about the sentence, saying (as recorded by King) “a man might very justly be put to death for stealing a piece of iron, as that was of a permanent use; but stealing a piece of pork which, to use his own expression, was eat and passed off” was disproportionate. After his return to New Zealand, Te Pahi set up a gallows and proudly informed King that he had executed six New South Wales convicts for piracy. King noted of this that Te Pahi had evidently regarded that crime “in a very different point of View to the Crime of stealing a piece of Pork”.<sup>5</sup> Te Pahi's experience is an example of how earlier Maori travels were bringing back what Binney has described as “new images of power and of justice”, as well as new technology.<sup>6</sup>

Te Pahi returned to New Zealand loaded with useful gifts which greatly enhanced his prestige and domination of the business of provisioning European ships—a circumstance that excited jealousy which was ultimately to be his downfall. While in the first twenty years of commercial exchanges between Europeans and Maori in New Zealand both were learning from each other and adapting to set up common ground for fair dealings (assisted as much by foreign travel by Maori as relationship-building on the New Zealand coast), the potential for serious

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<sup>5</sup> Ibid 46, 48 & 50.

<sup>6</sup> Ibid 61.

misunderstanding and wilful misconduct remained.<sup>7</sup> The events surrounding the burning of the *Boyd* in 1809 in Whangaroa harbour provide the most significant illustration of this. In retaliation for the flogging of a young chief who crewed on the *Boyd*, Ngati Uru attacked and destroyed the ship, killing most of its crew. Stories of the attack circulated through the Pacific. In 1810, the crews of five whaling ships mounted a reprisal raid on Te Pahi's pa, destroying it and seriously wounding Te Pahi. Te Pahi had probably not been complicit in the attack on the *Boyd* and is likely to have been set up by his rivals for control of the European trade, who may well have included the chief, Tara, of Kororareka, on the southern side of the Bay of Islands. The whalers' raid triggered inter-tribal fighting in which Te Pahi was killed. The fall-out from the *Boyd* and its aftermath was to make European ships nervous about visiting New Zealand in the next few years for fear of reprisals.<sup>8</sup> The check to commercial activity ensured that, when trade did resume, Maori were motivated to ensure that inter-racial conflicts did not escalate to such a degree of violence again.<sup>9</sup>

In the interim, another chief, Ruatara of Te Hikutu, was undertaking travel that was to have a profound effect on the future of New Zealand. After a number of adventures on whalers from 1805, Ruatara found his way to England in 1809 where he was disappointed not to achieve his ambition of seeing George III. He was discovered in very poor health by the Reverend Samuel Marsden. Marsden had settled in New South Wales as a chaplain and had by 1809 become a magistrate and a significant landowner at Parramatta, where he was visited by Te Pahi and other Maori. He was the agent in the colony of the London Missionary Society and had travelled to England to persuade the Church Missionary Society to support a missionary project for Tahiti and New Zealand, to be initiated by lay settlers, followed by ordained missionaries. Marsden took Ruatara back to Parramatta, with William Hall (a carpenter) and John King (a shoemaker and ropemaker), two of the three lay missionaries Marsden had recruited when in England (the third, Thomas

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<sup>7</sup> O'Malley *The Meeting Place*, above n 3, passim.

<sup>8</sup> Binney "Two Communities", above n 3, 13; Binney "Tuki's Universe", above n 4, 48.

<sup>9</sup> O'Malley *The Meeting Place*, above n 3, 63, 103 & 228.

Kendall, a schoolmaster, did not arrive in New South Wales until 1813). Ruatara lived for eight months at Parramatta, teaching Marsden the Maori language and learning about agriculture. After a further ill-fated voyage (on which he was abandoned at Norfolk Island and returned to Marsden at Parramatta), Ruatara eventually arrived home in 1812. With the death of Te Pahi and others, Ruatara became the principal chief of Te Hikutu, and established the tribe at Rangihoua. He became a champion of European agriculture (Marsden had supplied him with wheat seed and tools) but was unable to convince his people that the effort of growing wheat would produce food until Marsden sent him a hand-powered flour mill and more wheat seed in 1814 with the lay missionaries, Thomas Kendall and William Hall.<sup>10</sup>

By 1814, Marsden had finally been able to launch his plans for a mission to New Zealand. Kendall and Hall were dispatched bearing a letter to Ruatara which explained that Kendall had been sent to “teach the Boys and Girls to read and write”, as Marsden and Ruatara had discussed at Parramatta. Ruatara was asked to be “very good to Mr. Hall and Mr. Kendall”:<sup>11</sup>

They will come to live in New Zealand if you will not hurt them; and teach you how to grow corn Wheat and make Houses, and every thing.

Ruatara travelled again to Parramatta, this time in the company of the Ngapuhi chiefs, Korokoro and Hongi Hika, where he spent another five months studying agriculture. He returned with gifts from Governor Macquarie including livestock. The missionaries, now including John King, were established under Ruatara's protection at Rangihoua and Marsden preached the first Christian service there on Christmas Day 1814.<sup>12</sup>

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<sup>10</sup> Binney “Tuki's Universe”, above n 4, 49; O'Malley *The Meeting Place*, above n 3, 71-74; Angela Ballara “Ruatara (?–1815)” *Dictionary of New Zealand Biography*; GS Parsonson “Marsden, Samuel (1765–1838)” *Dictionary of New Zealand Biography*.

<sup>11</sup> Binney “Tuki's Universe”, above n 4, 49.

<sup>12</sup> Angela Ballara “Ruatara (?–1815)”, *Dictionary of New Zealand Biography*; GS Parsonson “Marsden, Samuel (1765–1838)” *Dictionary of New Zealand Biography*.

Ruatara died shortly after Marsden's return to Parramatta in February 1815. The mission then came under the protection of Hongi Hika. Although the missionaries had hoped to become influential, Hongi ensured that he kept the upper hand. European technology and agriculture was valued but the Christian mission was not, and the missionaries themselves were treated with contempt (some of which they brought on themselves by their own behaviour and quarrels with each other). Instead of effecting transformation of Maori, the early Church Missionary Society undertakings at Rangihoua and Kerikeri (from 1819) barely survived.<sup>13</sup> In the case of Kendall, the Maori world had more impact on him than he on it.<sup>14</sup> This lack of impact was also the experience of the mission established by the Wesleyan Missionary Society at Whangaroa in 1823, which was sacked by Ngati Uru in 1827 and forced to relocate to Mangungu on the Hokianga.<sup>15</sup> Church and Wesleyan missions had little success in their Christian mission until the end of the decade.

The presence of the missionaries and their contribution to the Maori uptake in agriculture did, however, assist in re-establishing the conditions in which trade could develop again after the setback of the *Boyd*.<sup>16</sup> Their settlements also established the pattern for European purchase of land by deed from Maori.<sup>17</sup> From the beginning, no Europeans established themselves on land without the authority of those Maori who were understood to have property interests in the land. The complexity of Maori customary property, with its overlapping and layered individual, family and tribal interests, came to be appreciated. A family (or families) might have rights to occupy, cultivate or use the resources of the land. Members of the wider tribe could have use rights also but, in addition, the tribe itself had property and political interests in land equivalent to collective ownership

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<sup>13</sup> Owens "New Zealand Before Annexation", above n 2, 36; Binney "Two Communities", above n 3, 14; O'Malley *The Meeting Place*, above n 3, 78-79 & 169-171.

<sup>14</sup> See Judith Binney "Kendall, Thomas (1778?–1832)" *Dictionary of New Zealand Biography*.

<sup>15</sup> Owens "New Zealand Before Annexation", above n 2, 37.

<sup>16</sup> Binney "Two Communities", above n 3, 13 & 14.

<sup>17</sup> See H Hanson Turton *Maori Deeds of Old Private Land Purchases in New Zealand, from the year 1815 to 1840* (George Didsbury, Government Printer, Wellington, 1882).

and sovereignty.<sup>18</sup> When Europeans sought to settle on land, it was understood that the different Maori interests, individual, family and tribal, would have to be addressed and satisfied. The process required familiarity with the circumstances of the tribe.<sup>19</sup> The early purchasers knew that sales conducted with one or two individuals, however high their status, were likely to come unstuck. So, when in the late 1830s, Australian land-sharks treated with one or two chiefs on the basis of deeds already prepared and which required only the filling in of boundary details left blank and the affixing of signatures or marks, the missionaries and old settlers said that such procedure could not conform with Maori custom. Their view was borne out by the results of the Land Claims Commission after 1840, which of the 9.3 million acres claimed, found that only 468,000 acres were obtained validly.<sup>20</sup>

To what extent Maori “sellers” and European “purchasers” had shared understandings of the nature of the arrangements over land is much less clear. The notion of trading in land as a commodity was unknown to pre-contact Maori.<sup>21</sup> Early agreements were almost certainly understood by Maori, and possibly by most Europeans, as conveying rights to occupy and use land according to custom rather than as outright alienations. Through the late 1820s and 1830s, it may be that Maori, at least in the Far North, came to have some understanding of European ideas of “sale” and that Europeans became more confident that the rights they were acquiring were more complete and secure.<sup>22</sup> Even so, as Vincent O'Malley points out, such “buyers” allowed Maori “to continue to live on lands supposedly ‘sold’ by them, made ongoing gifts above and beyond any agreed purchase price, and generally complied with other widely understood expectations”. As he says, this

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<sup>18</sup> O'Malley *The Meeting Place*, above n 3, 142-144; Stuart Banner *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press, Cambridge, Massachusetts, 2007) [“Banner *Possessing the Pacific*”] 50-52.

<sup>19</sup> Banner *Possessing the Pacific*, above n 18, 63-64.

<sup>20</sup> Ibid 67. See also Alan Ward *National Overview* (Waitangi Tribunal Rangahaua Whanui Series, GP Publications, Wellington, 1997), vol 2, 64-65.

<sup>21</sup> Banner *Possessing the Pacific*, above n 18, 53-55.

<sup>22</sup> Ibid 70-73; O'Malley *The Meeting Place*, above n 3, 146-147.

may have been because Europeans before 1840 “were not in a position to argue otherwise, even while hoping that they one day might be”.<sup>23</sup>

By the 1810s, one of the most desirable items of trade for Maori was the musket. Even the missionaries were forced into the exchange. Ngapuhi, under the leadership of Hongi Hika, used muskets in inter-tribal warfare from 1818. The “musket wars” continued through the 1820s, causing huge loss of life and major population displacement. They diminished in the 1830s, as tribes throughout the country achieved some parity in arms and as a result of the spread of Christianity.<sup>24</sup> Maori themselves may also have come to a realisation that warfare was a barrier to progress and prosperity.<sup>25</sup>

The musket wars did not mean that New Zealand was again cut off from the wider world. Trade continued, and so did Maori travel. The most famous visit was that undertaken by Hongi Hika and the Te Hikutu chief, Waikato, to England in 1820 with Thomas Kendall (who was ordained on the trip). A principal purpose of the visit was to compile a Maori grammar with Samuel Lee, a Professor of Hebrew at Cambridge University, who was associated with the Church Missionary Society. During the visit, the chiefs had an audience with King George IV and were given gifts by him of weapons and armour. The meeting with George IV convinced Hongi Hika that the missionaries in New Zealand were not rangatira, because the King did not know them personally. Hongi was also affronted with the gifts given to him by the Church Missionary Society (but was able to exchange these and other unwanted gifts for muskets in Sydney on the voyage home<sup>26</sup>). Hongi was,

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<sup>23</sup> O'Malley *The Meeting Place*, above n 3, 147. See also Grant Phillipson “Bay of Islands Maori and the Crown, 1793–1853” (Report for the Crown Forestry Rental Trust, Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, August 2005, A1) [“Phillipson ‘Bay of Islands Maori and the Crown’”] ch 4; and Michael Belgrave *Historical Frictions: Maori Claims and Reinvented Histories* (Auckland University Press, Auckland, 2005) ch 3. Compare Waitangi Tribunal *Muriwhenua Land Report*—Wai 45 (1997) 5 & 392 & ch 3 and Waitangi Tribunal *The Hauraki Report*—Wai 686 (2006) vol 1, 86–92.

<sup>24</sup> Owens “New Zealand Before Annexation”, above n 2, 44–46.

<sup>25</sup> Lyndsay Head “The Pursuit of Modernity in Maori Society: The Conceptual Bases of Citizenship in the Early Colonial Period” in Andrew Sharp & Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past—A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 97–121 [“Head ‘Pursuit of Modernity’”] at 101–102.

<sup>26</sup> O'Malley *The Meeting Place*, above n 3, 64.

however, convinced that the meeting with the King had established a relationship between the British Crown and Ngapuhi.<sup>27</sup> It was this relationship that was repeatedly drawn on by Ngapuhi chiefs in 1831, 1835, and 1840.<sup>28</sup> The first occasion was when chiefs, assembled at Kerikeri on 5 October 1831, wrote with the assistance of the Reverend William Yate asking William IV “to become our friend and the Guardian of these Islands”.<sup>29</sup> The second was the Declaration of Independence signed by 34 northern chiefs on 28 October 1835 by which William IV was asked to “continue to be the parent of their infant State, and ... [to] become its Protector from all attempts upon its independence”.<sup>30</sup> The third occasion was through the Treaty of Waitangi.

In the 1831 letter asking William IV to be a “friend and ... Guardian”, there is an indication that Northland chiefs were concerned about their ability to control the pace of change.<sup>31</sup> There had been significant change to Maori society in just a few years. One of the matters it is not easy to assess is the impact upon chiefly authority. Some recent scholarship suggests that contact with Europeans over trade may have altered the dynamics of Maori society because dealing with rangatira (chiefs) was easier for Europeans than dealing with the wider hapu (tribes).<sup>32</sup> On the other hand, the spread of Christian ideas and literacy and the personal influence of the missionaries may have undermined traditional authority.<sup>33</sup> In any event, it is important not to overlook the fact that chiefly authority in Maori society was shared and circumscribed. A number of men and some women were recognised by

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<sup>27</sup> Judith Binney “Stories Without End” in Judith Binney *Stories Without End: Essays 1975–2010* (Bridget Williams Books, Wellington, 2010) 353–368 [“Binney ‘Stories Without End’”] at 354–355; O’Malley *The Meeting Place*, above n 3, 63–65 & 80.

<sup>28</sup> Binney “Stories Without End”, above n 27, 355. See also Phillipson “Bay of Islands Maori and the Crown”, above n 23, ch 5; and Manuka Henare “The Changing Images of Nineteenth Century Maori Society—From Tribes to Nation” (PhD thesis, Victoria University of Wellington, 2003).

<sup>29</sup> Letter of the chiefs assembled at Kerikeri to King William IV, enclosed in Bourke to Goderich, 23 December 1831, CO 209/1, 87a–98b at 97a–98a. Yate had sent the chiefs’ letter to the Colonial Secretary for New South Wales on 16 November 1831 and requested that the Governor forward it on to the Secretary of State for the Colonies to lay before the King. See CO 209/1, 96a.

<sup>30</sup> See Chapter 7, text accompanying ns 63–65.

<sup>31</sup> See also Head “Pursuit of Modernity”, above n 25, 99–101.

<sup>32</sup> See, for example, O’Malley *The Meeting Place*, above n 3, 198–199.

<sup>33</sup> See, for example, O’Malley *The Meeting Place*, above n 3, 199–203.

their hapu as rangatira. The impression gained by Samuel Marsden that “there is no middle class of people in New Zealand: they are all either chiefs or (in a certain degree), slaves” was not too dissimilar from views expressed by other Europeans.<sup>34</sup> The independence of chiefs of the same tribal groupings was often remarked upon. This applied even in relation to the senior high chiefs or ariki (although it is thought that there were no acknowledged ariki in Northland in 1840).<sup>35</sup> The authority of chiefs was only partly derived from their lineage. It was “sustained only by personal ability” in enhancing the mana (prestige) of hapu with which the chief's standing was inextricably linked.<sup>36</sup> As O'Malley has explained:<sup>37</sup>

Rangatira had great influence over their hapu by dint of their mana and personal standing. But influence did not equate to actual authority beyond that conferred on them by the wider community in order to implement communally agreed courses of action. Decision-making was “a matter of discussion, compromise, and consensus ... [which] almost always—save in the case of slaves or client hapu—called for voluntary assent of the persuaded rather than obedience to any authority”. If there was an incentive to take the word of the chief seriously it lay in the fact that the rangatira was considered the personal embodiment of the mana of the hapu. His misfortunes and reversals would be shared by the wider community and this often created a good reason for both chiefs and their communities to find common ground where possible.

In 1831, much of the recent change experienced by Maori society had been driven by an explosion in trade from the mid to late-1820s. In addition to the increasing numbers of deep-sea whalers, most of them American, putting into New Zealand for supplies, shore-whaling stations were set up to target the right whale. These

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<sup>34</sup> Samuel Marsden *Observations on the Introduction of the Gospel into the South Sea Islands: Being My First Visit to New Zealand in December 1814*, quoted (from Robert McNab ed. *Historical Records of New Zealand*, vol 1, 387) in O'Malley *The Meeting Place*, above n 3, 197. See generally O'Malley, *ibid* 196-198.

<sup>35</sup> Binney “Two Communities”, above n 3, 26-27; Anne Salmond “Brief of Evidence for the Waitangi Tribunal” (Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 17 April 2010, A22) 14.

<sup>36</sup> Binney “Two Communities”, above n 3, 27-28. See also Angela Ballara Iwi: *The Dynamics of Maori Tribal Organisation from c.1769 to c.1945* (Victoria University Press, Wellington, 1998) [“Ballara Iwi”] 179 & 204-207; Angela Ballara *Taua: ‘Musket Wars’, ‘Land Wars’ or Tikanga? Warfare in Maori Society in the Early Nineteenth Century* (Penguin Books, Auckland, 2003) [“Ballara Taua”] 79-81; and Waitangi Tribunal *Muriwhenua Land Report*—Wai 45 (1997) 29-30.

<sup>37</sup> O'Malley *The Meeting Place*, above n 3, 198, quoting Ballara *Iwi*, above n 36, 145.

were financed by merchants in Sydney and Hobart. Shore-whaling was seasonal during the winter months. During the "off-season" (also described as the "drinking season"), the estimated 30 whaling stations became involved in cutting and dressing flax and growing produce for the Australian market. Many of the shore whalers took Maori wives. The transient deep-sea whalers provided a lucrative market for liquor and prostitution. The beach at Kororareka was on its way to becoming notorious for drunkenness, fighting and debauchery.<sup>38</sup>

More significantly still, from 1827, New Zealand's trade in timber and flax with New South Wales and Van Diemen's Land took off. By 1830, the value of New Zealand's exports to Australia exceeded £20,000. In addition to flax and timber, and whale oil and whalebone from on-shore stations, the trade included increasing volumes of dried fish, salted pork, maize and vegetables. Australian merchants put agents in place in New Zealand (often at the invitation of tribes) to coordinate supply from Maori and transport to the Australian market. Many of the more successful agents took Maori wives and were integrated into the tribal community. The agents, through the merchant houses they represented, were able to supply Maori with the goods they valued. In addition to muskets and agricultural implements, they included pipes, heavy blankets and Parramatta cloth (a combination of wool and cotton made by convicts). Maori tribes quickly appreciated that having a resident European to facilitate trade with Australia was of great value. Apart from the missionaries and a few escaped convicts and deserters from ships, these resident traders were the among first European settlers in New Zealand.<sup>39</sup>

A plan for more organised settlement from Britain had been promoted in 1825 by the New Zealand Company but had not progressed beyond a preliminary expedition in 1826–27 when two ships carrying 60 tradesmen attempted to establish settlements at the Bay of Islands and the Hokianga. This project failed due to Maori hostility but a few of the immigrants returned to the Hokianga from

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<sup>38</sup> Owens "New Zealand Before Annexation", above n 2, 32-33.

<sup>39</sup> Ibid 34; Binney "Tuki's Universe", above n 4, 51-54; Binney "Two Communities", above n 3, 20-21.

Sydney (to which the expedition had withdrawn) and established sawmilling and shipbuilding operations. The New Zealand Company of 1825 had been promoted by men such as the future Lord Durham and Robert Torrens, later a Colonisation Commissioner for South Australia. Some of the promoters, including Durham, later became active in the New Zealand Association which developed plans for colonisation in 1837. The 1825 Company was itself briefly revived in 1838–39, with Torrens playing an active role, but its land purchases at the Hokianga were soon taken over by Wakefield's Association. The Association soon became the New Zealand Land Company, of which Durham was chairman. Later still, it became the New Zealand Company.<sup>40</sup>

From the early 1830s, the missionary effort began to bear fruit. Why the missionaries became suddenly so much more successful in making conversions is a matter of some controversy. Hongi's death in 1828 may have removed some constraints. It also helped that the second wave of missionaries were of better character and were more suited to the task. Henry Williams, who arrived in 1823, was a former naval officer who was respected by Maori. His brother, William, who arrived in 1826 to join him at Paihia, was a talented linguist who quickly gained high proficiency in the Maori language. Other Church Missionary Society arrivals included Robert Maunsell, who was also skilled in the Maori language, George Clarke, later Protector of Aborigines, and William Colenso, the printer at Paihia. The work of the missionary wives also gained respect. Maori were excited by the translations of the Bible, Prayer Book, and hymnals and to see their language in print. Reading and writing spread, and led to wider dissemination of missionary teaching. The missionary message may also have made more impression in the war-weary aftermath of the musket wars (when Ngapuhi were no longer dominant in warfare) and under the influence of greater European presence and with the increase in trade. Maori evangelists (often freed slaves of the Ngapuhi raids who carried the Christian message back to their own tribes) were also influential in

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<sup>40</sup> Richard Wolfe *A Society of Gentlemen: The Untold Story of the First New Zealand Company* (Penguin Books, Auckland, 2007).

spreading Christianity.<sup>41</sup> At the Hokianga, too, the Wesleyans, who had in 1828 re-established their mission at Mangungu, were succeeding in making converts. Under the superintendence of William White, the Mangungu station became a commercial hub where Maori milled timber and sold it through White's agency.<sup>42</sup> Once reading took hold, the stories of the Bible exerted a powerful pull over Maori:<sup>43</sup>

The introduction of the Bible, with its stories, its parables, its genealogies, and its songs was to strike a rich vein of cultural identification. ... The Bible reinforced the genealogical structure of oral history; it told of prophetic leaders who communicated directly with an intervening God; it confirmed that the holders of power were the holders of knowledge. It also introduced the notion of a necessary salvation.

The conversions achieved by the missionaries were complicated by Maori adaptation of the missionary messages to fit their own cultural values. This process was to be an enduring feature of Maori Christianity. An extreme early adaptation is to be seen in the movement associated with Papahurihia from 1833, which blended missionary teaching with Maori religious traditions. Combining the serpent of Genesis with a Maori lizard spirit, the adherents thought of themselves as Jews, rather than Christians, and looked to a heaven in which missionaries would be excluded.<sup>44</sup>

A considered assessment of the missionary effort in New Zealand is beyond the scope of this thesis. The current of contemporary historical opinion that the missionaries saw little worth preserving in Maori society and looked to "the ultimate assimilation of the Maoris to a European way of life" may be too black

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<sup>41</sup> Owens "New Zealand Before Annexation", above n 2, 36-38; O'Malley *The Meeting Place*, above n 3, ch 7;

<sup>42</sup> MB Gittos "White, William (1794–1875)" *Dictionary of New Zealand Biography*.

<sup>43</sup> Binney "Two Communities", above n 3, 15-17.

<sup>44</sup> Owens "New Zealand Before Annexation", above n 2, 38-39; O'Malley *The Meeting Place*, above n 3, ch 7; Judith Binney "Papahurihia, Penetana (?–1875)" *Dictionary of New Zealand Biography*. For the argument that print and the Bible were used by Maori to "fashion new cultural spaces and political idioms within the colonial order", see Tony Ballantyne "Christianity, Colonialism and Cross-cultural Communication" in Tony Ballantyne *Webs of Empire: Locating New Zealand's Colonial Past* (Bridget Williams Books, Wellington, 2012) 137-158.

and white.<sup>45</sup> It is the case that the missionaries were strong opponents of the colonisation plans of the New Zealand Association in the late 1830s because they considered European settlement to be too great a risk to Maori. After 1840, they were among the most forceful advocates for Maori whenever their interests clashed with those of settler society.<sup>46</sup>

The decisions taken in Sydney and London in the years 1831–32, which brought Busby to the Bay of Islands as British Resident in 1833, therefore coincided with important changes in the Maori world. The forces that were bringing about these changes continued to build through the decade. So, the Church Missionary Society and the Wesleyan Missionary Society expanded to 11 and six stations respectively by 1839, from Kaitaia to Kawhia, Tauranga and Rotorua. Further missions as far afield as Turanga (Gisborne) and the Kapiti Coast were imminent. A Catholic mission was also underway with the arrival of Bishop Pompallier in January 1838.<sup>47</sup> Trade continued to boom, with a few busts along the way (such as with the flax trade), and by the end of the decade the value of exports had risen to £83,000. The contribution of agriculture, including wheat and maize, continued to climb, leading to *The Sydney Gazette* expressing the view in May 1836 that “New Zealand is becoming a perfect granary for New South Wales”. The settled European population, too, rose sharply, from an estimated 300 at the beginning of the decade to perhaps 2,000 at 1840 (although much of this came in a rush at the end, accompanied by rampant speculation in land).<sup>48</sup> These newcomers were less dependent on integration into Maori society. A separate European society was developing which saw itself as more “respectable” than the old New Zealand hands. With this sense of respectability, resigned tolerance of frontier disorder gave way to increasing complaints about lawless behaviour. Maori, too, were concerned

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<sup>45</sup> Judith Binney “Narrative of a Residence in New Zealand” (1968) 2:2 *New Zealand Journal of History* 204-208 (book review) at 205.

<sup>46</sup> See John Stenhouse “God’s Own Silence: Secular Nationalism, Christianity and the Writing of New Zealand History” (2004) 38:1 *New Zealand Journal of History* 52-71.

<sup>47</sup> Binney “Two Communities”, above n 3, 22-23.

<sup>48</sup> Owens “New Zealand Before Annexation”, above n 2, 34-35 & 50; Binney “Tuki’s Universe”, above n 4, 54. It should be noted that Vincent O’Malley’s recent assessment is that the European population, even in 1840, may not have greatly exceeded 1,000. See O’Malley *The Meeting Place*, above n 3, 100-102.

by the drift. New Zealand was still a Maori world but there was a sense, shown by the pleas for protection in the 1831 Kerikeri letter and 1835 Declaration of Independence, that control was slipping out of their hands. Maori population decline in the north, inability to control land sales, and a reaction against traditional warfare as a means of resolving disputes (prompted by the experience of the musket wars and missionary teaching about peace and law) undermined confidence.<sup>49</sup>

New Zealand had been an object of interest to the Governors of New South Wales since that colony was established. Beginning with King, they had encouraged trade and good relations with Maori. The bad behaviour of Europeans in New Zealand was seen as a threat to both and as a matter for which Governors had some responsibility. The inclusion in the Commissions of the early Governors of responsibility for "all the Islands adjacent in the Pacific Ocean" between the latitudes 10° 37'S and 43° 39'S, within which most of New Zealand was situated, was used as justification for a number of measures.<sup>50</sup> Governor King made an order in 1805 that Maori brought to Sydney were to be well treated and could be removed from the colony only when the Governor was satisfied they would be returned to their homeland.<sup>51</sup> Governor Macquarie issued an order in December 1813 that vessels leaving Sydney to trade in New Zealand or the Pacific Islands were required to post bonds of £1,000 for good behaviour. Native peoples were asserted to be "under the protection of His Majesty", with transgressions against them punishable with "the utmost rigour of the law".<sup>52</sup> This measure was backed up by the appointment of Thomas Kendall as a justice of the peace before his departure for the Bay of Islands in 1814. The chiefs Hongi, Ruatara and Korokoro

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<sup>49</sup> Binney "Two Communities", above n 3, 32-33.

<sup>50</sup> Governor Phillip's Commissions (1786 & 1787) and Governor Brisbane's Commission (1821), reproduced in *Historical Records of Australia*, series 1, vol 1, 1-8 at 1 & 2 and vol 10, 589-596 at 590.

<sup>51</sup> Richard Hill *Policing the Frontier: The Theory and Practice of Coercive Social and Racial Control in New Zealand, 1767-1867* (VR Ward, Government Printer, Wellington, 1986) Part 1 ["Hill *Policing the Frontier*"] 32.

<sup>52</sup> Ibid 35; Anne Salmond *Between Worlds: Early Exchanges Between Maori and Europeans 1773-1815* (Penguin Books, Auckland, 1997) 428-431.

were authorised to assist him.<sup>53</sup> Legal sanctions were provided for by the Murders Abroad Act of 1817, enacted by the Parliament of the United Kingdom, which authorised the trial and punishment of British citizens for murders and manslaughter committed in New Zealand (which was acknowledged to be outside the King's dominions).<sup>54</sup> A second justice of the peace, the Reverend John Butler, was appointed in 1819 and reappointed in 1822 (while Kendall's appointment lapsed).<sup>55</sup> Further British statutes of 1823 and 1828 gave jurisdiction to the Supreme Courts of New South Wales and Van Diemen's Land to try offences committed in New Zealand.<sup>56</sup> In 1826, following a petition by London merchants, the Admiralty gave orders that any naval ship of the East Indies fleet stationed at Sydney should visit New Zealand periodically.<sup>57</sup>

These measures were largely futile. The 1805 and 1813 orders were ignored by ships captains and Kendall and the chiefs soon came to the view that their authority was illusory in the absence of effective back-up from New South Wales.<sup>58</sup> Butler was no more effective, and when he left New Zealand in 1823 he was never replaced as justice of the peace.<sup>59</sup> The rare cases that resulted in prosecution in Australian courts generally collapsed because of difficulties with witnesses and legal doubt about jurisdiction.<sup>60</sup> When Van Diemen's Land was created a separate colony from New South Wales in 1823, the southern latitude of New South Wales was lifted to 39° 12' S, which excluded all but the upper North Island of New Zealand. The Governor of Van Diemen's Land was given no authority over "adjacent islands".<sup>61</sup>

By 1830, it was clear that all measures taken to date had failed. Pressure to take more effective steps was maintained by missionaries and traders. In August 1830,

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<sup>53</sup> Hill *Policing the Frontier*, above n 51, 37-38.

<sup>54</sup> Ibid 42.

<sup>55</sup> Ibid 42 & 44.

<sup>56</sup> Ibid 46-47.

<sup>57</sup> Ibid 49.

<sup>58</sup> Ibid 38-41.

<sup>59</sup> Ibid 44 & 50.

<sup>60</sup> See, for example, *R v M'Dowall* [1827] NSWSupC 18 and *R v Palmer* [1838] NSWSupC 52.

<sup>61</sup> Hill *Policing the Frontier*, above n 51, 47; Governor Darling's Commission (1825), reproduced in *Historical Records of Australia*, series 1, vol 12, 99-107 at 100.

Samuel Marsden reported to Governor Darling the loss of life in the so-called "Girl's War" between northern and southern tribes of the Bay of Islands, which he blamed on the behaviour of the captain of a visiting whaler. Marsden considered it high time that a check be put on the lawless behaviour of ships' crews in New Zealand harbours (not least because there was reason to fear that Maori "will at some period redress their own wrongs by force of arms [against Europeans] if no remedy is provided to do them justice") and recommended the stationing there of a "small armed King's Vessel with proper authority".<sup>62</sup> Darling endorsed the recommendation in a despatch forwarding Marsden's letter to the Colonial Office, explaining that he considered it preferable to his own initial idea of stationing an officer at the Bay of Islands "in the character of a Resident, with a few Troops to enforce regularity on the part of the Whalers".<sup>63</sup> A "Resident" was an agent of the British Crown responsible for protecting British interests in a foreign territory to which no ambassador or envoy was accredited. In the early to mid-nineteenth century British residents were most commonly encountered in India, where they were posted to a number of states, including princely states under British protection.

The recommendation to station a ship at New Zealand was not accepted in London. The Colonial Office referred it to the Admiralty, which declined to do other than repeat its instructions to the Commander of the East Indies station that a ship should visit New Zealand from time to time. The Admiralty clearly felt that British Government responsibility was diluted by the fact that other nationals were also implicated in the disorders. It observed to the Colonial Office that "the greater part of the Trade, in the quarter in question, is carried on by Americans".<sup>64</sup>

In 1831, Darling was forced into action himself by the involvement of a British ship, *The Elizabeth*, in the Ngati Toa attack on the settlement of the Ngai Tahu chief, Tamaiharanui, at Akaroa. The raid, which was in retaliation for the killing of

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<sup>62</sup> Marsden to Darling, 2 August 1830, CO 209/1, 15a-18a at 17b.

<sup>63</sup> Darling to Murray, 12 August 1830, CO 209/1, 11a-14a at 12a.

<sup>64</sup> Howick to Barrow, 5 January 1831, CO 209/1, 19a-20a; Elliot to Howick, 7 January 1831, CO 209/1, 21a-b at 21b.

the Ngati Toa chief Te Pehi Kupe at Kaiapoi in 1828, had been carefully planned by Te Rauparaha, the Ngati Toa chief. Te Rauparaha had, through successful trading activities at Kapiti Island and on a visit to Sydney, amassed a substantial arsenal of muskets.<sup>65</sup> With Captain Stewart of the *Elizabeth*, he arranged passage for his war party of 100 men to Akaroa in exchange for a cargo of flax. Stewart actively assisted in the deception by which Tamaiharanui and his family were lured onto the *Elizabeth* and captured, before the assault was launched on his pa, Takapuneke. Following the massacre which then ensued, Stewart returned the Ngati Toa raiding party to Kapiti, together with their prisoners, baskets of human flesh, and flax taken from Akaroa. Stewart did not hand Tamaiharanui over to Te Rauparaha for some days while he attempted to obtain the balance of the cargo of flax he had been promised. Eventually, however, he gave the Ngai Tahu chief up to torture and death and sailed for Sydney with his payment, which is said also to have included some Ngai Tahu slaves.<sup>66</sup>

News of the involvement of the *Elizabeth* in these events began to circulate in Sydney after its arrival. Soon afterwards, two chiefs arrived in Sydney to protest the role of the *Elizabeth* in the Ngati Toa raid. One was the younger brother of Tamaiharanui. He was supported by the Rangihoua chief Wharepoaka, indicating that the approach to Darling had the support of the Bay of Islands chiefs. Darling directed that criminal charges be brought against Stewart and four members of his crew but the proceedings were mishandled. It is not clear whether this was because of genuine doubts about jurisdiction and criminality, because of the incompetence of the Crown Solicitor, William Moore (of whom Darling already had a low opinion), or because of pressure brought to bear by merchant interests in Sydney (the *Elizabeth* was owned by a group of local merchants including William Wentworth, who features in later chapters of this thesis). The accused, apart from Stewart, and key witnesses were spirited away before the trial began. Stewart's

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<sup>65</sup> Te Rauparaha boasted of having 2,000 muskets.

<sup>66</sup> Binney "Tuki's Universe", above n 4, 56; Hill *Policing the Frontier*, above n 51, 54-55; Steven Oliver "Tama-i-hara-nui (?-1830/1831?)" *Dictionary of New Zealand Biography*; Darling to Goderich, 13 April 1831, CO 209/1, 28a-65a.

trial was then adjourned because witnesses were not available. When his bail was discharged and he was released on his own bond only, he too left the colony.<sup>67</sup>

At this stage, Darling wrote to the Colonial Office about the *Elizabeth* affair and the collapse of the prosecutions. In writing the despatch, he may have appreciated that his own handling of the matter could be seen by the Colonial Office as insufficiently firm. Certainly, in the despatch, he expressed outrage about the role of the *Elizabeth* as “a case in which the character of the Nation was implicated”.<sup>68</sup> He wrote that Maori “look to this Government for redress, for the injuries they have sustained; without which, it is to be apprehended that they will avenge themselves on the European Settlers, the Law of retaliation appearing to be in perfect accordance with their notions of justice”.<sup>69</sup> Darling's letter also contained information about a trade in shrunken Maori heads which he intended to move to stop.<sup>70</sup>

Darling advised the Colonial Office that he had resolved to “immediately” appoint a Resident, “which appears in accordance with the wishes of the Natives”. Such an appointment would both “assure [Maori] of the desire of His Majesty's Government to afford them protection” and “tranquillize the minds of the Settlers, who are apprehensive, that their lives will be made answerable for the proceedings of their Countrymen”. The appointment of a Resident would lay a “foundation” which could later be “extended and improved to our advantage” if that was thought desirable.<sup>71</sup> Darling further advised the Colonial Office that he would provide the Resident with a vessel and that he proposed to appoint Captain Collet Barker of the 39th Regiment to the position.<sup>72</sup> Barker, a veteran of the Peninsula War, had shown himself to be an energetic and sound administrator as commander of garrisons at

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<sup>67</sup> Binney “Tuki's Universe”, above n 4, 56; Hill *Policing the Frontier*, above n 51, 55; *R v Stewart* [1831] NSWSupC 31.

<sup>68</sup> Darling to Goderich, 13 April 1831, CO 209/1, 28a-65a at 30a.

<sup>69</sup> Ibid 31a-b.

<sup>70</sup> Ibid 33a-34a, 60a-61b (Browne to Colonial Secretary, 30 March 1831) & 64a-65a (Henry Williams to Marsden). Darling was to issue a proclamation in which he prohibited the traffic and threatened to impose penalties on those who imported heads. Hill *Policing the Frontier*, above n 51, 56.

<sup>71</sup> Darling to Goderich, 13 April 1831, CO 209/1, 28a-65a at 31b.

<sup>72</sup> Ibid 32a.

Raffles Bay (near present-day Darwin) and at King George Sound (Western Australia). He had a reputation for establishing good relations with local Aboriginal peoples. At the time Darling sent his despatch to London, Barker was leading an expedition to ascertain the mouth of the Murray River. Barker succeeded in the mission but was killed by Aborigines within three weeks of Darling's letter.<sup>73</sup>

When Darling's despatch arrived in London, James Busby, who would eventually be appointed Resident in New Zealand in place of Barker, was already in the capital and actively seeking some such appointment.

### **James Busby: the early years**

James Busby was born in Edinburgh in 1800, the second son of John Busby, a mining engineer, and his wife, Sarah Kennedy.<sup>74</sup> John Busby came from Northumberland but Sarah Kennedy was from Scotland and, according to family tradition, was connected with the Earls of Cassilis (the name later given by the Busby family to their property in the Hunter Valley after emigration to New South Wales). It is probably through the Kennedy family connection that the Busbys obtained the support of the Earls of Haddington, which was later to be of value to James in obtaining appointment as British Resident at New Zealand. The family circumstances were not prosperous. John Busby took work for a time in Ireland before returning to Edinburgh. The first son, George, studied medicine at Edinburgh (he was later to become a surgeon at Bathurst, New South Wales) but there seems to have been insufficient means to support James through university. There were also three younger sons, John, Alexander and William, and a daughter,

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<sup>73</sup> J Bach "Barker, Collet (1784–1831)", *Australian Dictionary of Biography*.

<sup>74</sup> Various dates for Busby's birth are given, some as late as 1802. Busby's own correspondence supports the year 1800, which is given by Ged Martin "James Busby and the Treaty of Waitangi" (1992) 5 *British Review of New Zealand Studies* 5-22 ["Martin 'James Busby and the Treaty of Waitangi'"'] at 13. See James Busby to George Busby, 21 December 1829 ("I have not lived 30 years a bachelor ...") & 29 March 1830 ("... for we are both on the wrong side of thirty ..."), AML MS 46, Box 1, Folder 2 (holographs) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (pp 101 & 120 of the typescript).

Catherine, to provide for. James is said by Ged Martin to have been enrolled in the faculty of medicine at Edinburgh for a single year in 1816–17.<sup>75</sup>

In 1821, John Busby applied to the Colonial Office for employment in New South Wales. On the recommendation of John Thomas Bigge, who had from 1819–22 undertaken a royal commission into the condition of the New South Wales colony, he was appointed in March 1823 to supervise coal-mining in the colony and to devise a water supply scheme for Sydney. It seems to have been decided that the whole family would emigrate, a decision which required negotiation about the payment of their passage. James Busby, then 23, was sent to London to press the family's case.<sup>76</sup>

George remained behind to complete his studies but the rest of the family sailed from the Leith on the *Triton* in September 1823.<sup>77</sup> Establishing a pattern that he was to maintain, James Busby's letters about the voyage are dull and self-preoccupied. In one he admits "I have kept no journal and the greater number of any incidents which might have relieved the monotony of our voyage have escaped my recollection".<sup>78</sup> Even an encounter with a pirate ship does not greatly enliven his account of the voyage. The greatest excitement seems to have been caused by the family's excessive alarm over the tomfoolery associated with crossing the

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<sup>75</sup> Ibid 17. In addition to Martin's essay, this chapter draws on the biographical information about John and James Busby provided by: GP Walsh "Busby, John (1765–1857)" *Australian Dictionary of Biography*; JW Davidson "Busby, James (1801–1871)" *Australian Dictionary of Biography* ["Davidson 'Busby'"]; James Rutherford "Busby, James (1800–1871)" in GH Scholefield (ed) *A Dictionary of New Zealand Biography* (Department of Internal Affairs, Wellington, 1940) vol 1, 123–126 ["Rutherford 'Busby'"]; James Rutherford "Busby, James (1801–1871)" in AH McLintock (ed) *An Encyclopaedia of New Zealand* (Government Printer, Wellington, 1966); Claudia Orange "Busby, James (1802–1871)" *Dictionary of New Zealand Biography*; and Eric Ramsden *Busby of Waitangi: H.M.'s Resident at New Zealand, 1833–40* (AH & AW Reed, Wellington, 1942) ["Ramsden *Busby of Waitangi*"].

<sup>76</sup> See Ramsden *Busby of Waitangi*, above n 75, 23–26.

<sup>77</sup> It seems that James may have left debts in Scotland. In later correspondence he expressed some anxiety that they not come to the notice of people in Sydney. See James Busby to George Busby, 22 March 1829, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 62 of the typescript). See also Gibson to Busby, 14 July 1830, AML MS 46, Box 2, Folder 5 (holograph) & Box 7, Volume 5 (typescript) and ATL qMS-0347 (p 23 of the typescript), sending him the "scheme of division made amongst your creditors".

<sup>78</sup> James Busby to George Busby, 6 December 1823, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 13 of the typescript).

Equator, from which Sarah Busby was reported not to have recovered for a fortnight.<sup>79</sup> The letters refer to James Busby's attempts to school his younger brothers in mathematics and to his own work on a treatise on viticulture.<sup>80</sup> The treatise, later published in Sydney in 1825, was to further James Busby's ideas (developed in part through a visit to Bordeaux in 1822) that an export industry in wine could be established in New South Wales.<sup>81</sup> On the voyage to New South Wales, however, even a visit to "the famous Vineyard of Constantia" outside Cape Town did not raise any real enthusiasm for James, who wrote that he had not learnt anything from it "however it may be of importance to me to be able to say I was there" (and indeed his treatise when published did refer to the vineyard<sup>82</sup>).<sup>83</sup>

The Busby family arrived in Sydney on 24 February 1824. They obtained grants of land in the Hunter Valley, although the family maintained its home in Sydney for some years. At an early stage, John Busby Snr. was sent to New Zealand to supervise the refloating of the Government brig *Elizabeth Henrietta* in Foveaux Strait. On his return, he made recommendations for the scheme for Sydney's water supply and subsequently had responsibility for its construction. There were delays in completion of the project which led to some public controversy. In 1834, Governor Bourke attributed the delays in construction to John Busby's poor supervision of the convict labour and appointed William Busby (who had been working with his father on the project) as overseer. John Busby refused to give up his position and continued to supervise the work without salary, protesting his treatment. The criticisms of John Busby were resented by the family. Even from New Zealand, James Busby was involved in drafting memorials and developing the

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<sup>79</sup> Ibid (p 14 of the typescript).

<sup>80</sup> See, for example, ibid (pp 13-14 of the typescript).

<sup>81</sup> James Busby *A Treatise on the Culture of the Vine, and the Art of Making Wine* (R Howse, Government Printer, Sydney, 1825).

<sup>82</sup> Ibid xxviii. On "Constantia" wine, see HE Laffer "Empire Wines" (1936) 85 *The Journal of the Royal Society of Arts* 77-96 at 79-80.

<sup>83</sup> James Busby to George Busby, 6 December 1823, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 15 of the typescript).

family strategy to vindicate John Busby.<sup>84</sup> Although the Colonial Office approved Bourke's action, John Busby was eventually paid £1,000 compensation in addition to the salary of which he had been deprived. The project was completed in 1837 and the success of the scheme in time eclipsed the difficulties of its construction and ensured a lasting reputation for John Busby in Sydney.

In the short term, however, the effect was to associate the Busby name with controversy which reflected more general divisions in colonial society in Sydney. In particular, the Busbys came to be associated with what might be crudely characterised as the Tory free settler preference of the former governor, Ralph Darling (1825–1831), rather than a similarly crudely characterised Whig emancipist preference of the new governor, Richard Bourke (1831–1837). The Sydney newspapers were also divided along such lines. In the emancipist press, John Busby was dubbed “Mr. Borer Busby”. In due course, James Busby (who was thought to take himself too seriously) came to be described as “Mr. Borer Junior Busby”.<sup>85</sup> Although it has been suggested that Governor Bourke was prejudiced against James Busby when he was British Resident at New Zealand because of his experiences with the father,<sup>86</sup> there is little basis for such speculation. James, however, who was quick to perceive slights and slow to forgive, certainly thought that Bourke treated him unfairly throughout his Residency, although even he did not express the view that Bourke's animus was transferred to him from his father.

In the early years of his residence in New South Wales, James Busby obtained employment as superintendent of a school farm for male orphans at Cabramatta, 20 miles from Sydney, where he instructed the youths in viticulture under an arrangement in which Busby was to share in the profits of the farm. Although his treatise on the culture of the vine published in 1825 “fell dead from the Press” (as

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<sup>84</sup> See, for example, James Busby to Alexander Busby, 23 March 1835, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 28–31 of the typescript).

<sup>85</sup> See instance at text accompanying n 175.

<sup>86</sup> Ramsden *Busby of Waitangi*, above n 75, 40; Peter Adams *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland University Press, Auckland, 1977) [“Adams *Fatal Necessity*”] 65.

one critic put it),<sup>87</sup> Busby remained convinced that wine-making in Australia had a great future. In 1830, acknowledging the criticism of his earlier work as “abstruse”, he published *A Manual of Plain Directions for Planting and Cultivating Vineyards, and for Making Wine, in New South Wales*. The work was dedicated to Governor Darling and was explained as designed “to increase the comforts, and promote the morality of the lower classes of the Colony; and more especially of the native-born youth”.<sup>88</sup>

Those who have witnessed the temperance and contentment of the lowest classes of the people in the Southern Countries of Europe, where wine is the common drink of the inhabitants, and have contrasted them with the unhappy effects produced by the consumption of spirits, or of malt liquors, among the same ranks, in less favoured climates, will easily perceive, how much it would add to the happiness of the Colonists of New South Wales, if their habits were assimilated, in this respect, to those of the inhabitants of wine countries; and will appreciate the importance of introducing the one beverage, and diminishing the use of the others, in a Community constituted like this,—in which the high price of labour is calculated to allow the almost unlimited use of ardent spirits, and where the excitement they produce, is more likely than in most other countries, to terminate in mischievous results.

Of his own wine-making at Cabramatta, he said the results had been “tasted by some of the best judges in the Colony”, with the verdict “[i]t was perfectly sound, and was said to resemble a Burgundy wine”.<sup>89</sup> Busby's second publication is said to have been received more favourably by the press than his earlier treatise.<sup>90</sup>

Before publication of the *Manual*, however, Busby had lost his position at the school, which had come under the control of the trustees of the Church and School Corporation in August 1826. He was not minded to go quietly. His escalating dispute, in a pattern which was repeated on many occasions in his life (particularly in relation to his much later land claims in New Zealand, discussed in Chapters 16

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<sup>87</sup> Quoted in Eric Ramsden *James Busby: The Prophet of Australian Viticulture* (Sydney, 1941) [“Ramsden *The Prophet of Australian Viticulture*”] 3.

<sup>88</sup> James Busby *A Manual of Plain Directions for Planting and Cultivating Vineyards, and for Making Wine, in New South Wales* (R Mansfield, Sydney, 1830) v-vi.

<sup>89</sup> Ibid 23.

<sup>90</sup> Ramsden *The Prophet of Australian Viticulture*, above n 87, 11.

and 18), drew in a widening circle of officials and other participants (including here the Governor, the Attorney-General and the Colonial Secretary) and was characterised by extravagant language. When his brother George tried to talk his indignation down, the effort was bitterly resented by James<sup>91</sup> who was determined to “proceed before the Lord Chancellor of England before they can dispossess me or deprive me of my right”.<sup>92</sup> Even though Darling found Busby temporary employment, as Collector of Internal Revenue and a member of the Land Board (until the permanent appointees arrived in the colony), Busby was not satisfied. Eventually his dispute with the trustees was settled in 1827 on their paying him £1,250.<sup>93</sup>

While the temporary appointments did not mollify Busby's anger with the trustees of the Church and School Corporation, he was very pleased that the Land Board position in particular gave him considerable standing in society:<sup>94</sup>

[I]t defines me an Esq<sup>r</sup> and gives me an authorized station in Society which I had no pretensions to before and shall not likely lose.

It was important to him that the other members of the Land Board were the Lieutenant-Governor and the Governor's brother-in-law and that news of his appointment had impressed others and caused some surprise. Busby wondered in a letter to his brother George what “the Grassmarket people” in Edinburgh would make of his success.<sup>95</sup>

Busby's enhanced social standing did not, however, result in improvement in his own personal circumstances. In early 1829, he complained to George in Bathurst

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<sup>91</sup> See James Busby to George Busby, 1 September 1826, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (pp 18-19 of the typescript).

<sup>92</sup> James Busby to George Busby, 8 December 1826, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 24 of the typescript).

<sup>93</sup> James Busby to George Busby, 27 November 1827, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 39 of the typescript).

<sup>94</sup> James Busby to George Busby, 29 June 1827, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 33 of the typescript).

<sup>95</sup> Ibid (p 32 of the typescript). The Grassmarket was the historic market square in Edinburgh and, at that time, a poor part of the city.

## Chapter Six: Busby's Residency

that living at home was “uncomfortable”.<sup>96</sup> He was not getting on with his father or with his brother John.<sup>97</sup>

I am sure breakfast and dinner pass without an average of ten words more than what is absolutely necessary. And after that every one gets out of the way as fast as he can. Such is our situation. Providence has answered all our most sanguine expectations & exceeded them, in coming to this country. And this is the gratitude we shew. I never was so unhappy when in circumstances of the greatest embarrassment.

Matters had not improved by December 1830, when he wrote to George:<sup>98</sup>

I do assure you that had I the means of living elsewhere—I do not believe I would stay a week in the house. I consider matters to be in that way that it would be more to my credit to leave than to remain. Independently of the uncontrollable disgust which every thing I witness produces—It can only make you uncomfortable to write this to you. But it is perhaps right you should know the real state of matters. I think 12 months more of such a life would have such an affect upon my temper as to make me unfit for any Society—If I am not so already.

At this period of his life, one of a number of times when he seems to have been at a low ebb, Busby reveals odd behaviour, perhaps consistent with this self-assessment that he was becoming “unfit for any Society”.

On one occasion he describes to his brother George a quarrel with a mutual acquaintance, George Brooks, that was wholly irrational on his own account of it. George wrote to point out how unreasonable James was being, but without effect. James had expected Brooks to call on him and felt so seriously slighted when the call did not come (even though he knew Brooks was staying at home with an ill child) that he wrote cutting off the acquaintance. Brooks was not the only person Busby suspected of being cool towards him. To George he complained that in a group of acquaintances, including Brooks, he detected “a dryness of manner

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<sup>96</sup> James Busby to George Busby, 25 January 1829, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 52 of the typescript).

<sup>97</sup> James Busby to George Busby, 1 March 1829, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 58 of the typescript).

<sup>98</sup> James Busby to George Busby, 5 December 1830, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 153 of the typescript).

towards me, or rather an indication that I was considered as a knowing or mercenary individual with whom a particular acquaintance was not to be desired".<sup>99</sup> Brooks's mild reply, explaining his domestic worries and saying that he did not wish to forgo the acquaintance, elicited a furious response (which James relayed to his brother):<sup>100</sup>

I am sorry that my note was not sufficiently explicit as I unwillingly revert to a painful subject. I should be sorry to distrust the process of reasoning by which you appear to have arrived at the satisfactory conclusion that your conduct has been exactly what the dictates of "native duty and affection" demanded and nothing more or less. The truth is that it is with me a matter of feeling rather than of judgement and I am foolish enough to think that the first spontaneous burst of feeling in such circumstances is a safer guide than any conclusion arrived at by the most ingenious process of reasoning. It is very probable that I am incapable of justly appreciating those feelings which could only be participated by the members of your family, not having had any experience of such circumstances as those out of which they have arisen—but this much I may say—that I made enquiry on Thursday and ascertained that your child was better. I have however endeavoured to reverse our respective situations, and I cannot but persuade myself that mutatis mutandis James Busby would not have treated Geo Brooks so. ... Notwithstanding that you conclude me unreasonable, I must be excused for stating that I still think a feeling of resentment was both natural and proper. ... And while you are unwilling to forego the "acquaintance" to which you have reduced the relationship formerly subsisting, that I should think it due to myself to decline that acquaintance, and to close further discussion on the subject by wishing you most sincerely an uninterrupted continuance of the domestic happiness in which you appear to be absorbed.

An extraordinary feature of this last letter to George Busby is that it goes on to report that Brooks had taken the bull by the horns and insisted on seeing James, at which meeting the two men were reconciled. Indeed, James reports with pleasure Brooks had been singing the praises of George's skill as a surgeon to people of consequence in Sydney.<sup>101</sup> James seems to be quite oblivious to the poor impression left by his correspondence with Brooks, which he thought it worthwhile

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<sup>99</sup> James Busby to George Busby, 11 January 1830, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 104 of the typescript).

<sup>100</sup> James Busby to George Busby, 17 January 1830, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (pp 106-107 of the typescript).

<sup>101</sup> Ibid (p 107 of the typescript).

to reproduce at length despite the outcome of this trivial affair, the generosity displayed by Brooks towards George, and George's earlier suggestion that James had seemed to be too hasty in his reaction.

James was clearly capable of inspiring friendship. In one letter to George he refers to the "really magnificent" silver gilt punch bowl and ladle sent to him in New South Wales by friends in Scotland.<sup>102</sup> The punch bowl, embossed with the rose and thistle, bore two inscriptions: "Presented to James Busby Esquire by a few of his old friends on both sides of the Tweed as a testimony of their high esteem for his distinguished worth and honorable character" and "An honest man's the noblest work of God". Even then, however, Busby was unable to restrain himself from criticising his friends for being too "gross" to see that "common decency would prevent me from placing such an affair to be gazed upon by a party of friends".<sup>103</sup>

In mid-1829, the permanent appointment to the office of Collector arrived in Sydney. Busby was reconciled to his replacement (although he commented to George about his successor that he had "been for some time in the West Indies and has brought with him rather an awkward certificate of it in the form of a Mulatto youth of 18 or 20 years of age—whom he introduced to me as his son").<sup>104</sup> Obtaining alternative appointment was now, however, a matter of urgency for Busby. He spent some time thinking up possible positions to suggest to Darling. One scheme was to set up a Protector of Convicts.<sup>105</sup> From time to time, he expressed fears to George that he was falling out of favour with Darling and those around him.<sup>106</sup> He was concerned that any position offered to him should not entail

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<sup>102</sup> The punch bowl is still in the possession of Busby's descendants.

<sup>103</sup> James Busby to George Busby, 22 March 1829, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 62 of the typescript).

<sup>104</sup> James Busby to George Busby, 19 October 1829, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 89 of the typescript).

<sup>105</sup> James Busby to George Busby, 26 July 1829, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 80 of the typescript).

<sup>106</sup> See, for example, James Busby to George Busby, 7 December 1829 & 17 October 1830, AML MS 46, Box 1, Folder 2 (holographs) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (pp 96 & 142 of the typescript).

loss of status.<sup>107</sup> This concern eventually led to his declining a position as secretary of the Land Board when his successor at the Land Board arrived at the end of 1830.<sup>108</sup> For more than a year, Busby had been toying with the idea that the best way to secure advancement would be to visit London and lobby there for appointment. He floated a number of strategies for how he might obtain the attention of the Colonial Office. One such idea was to put to the Office a proposal for land regulations reform—a topic on which he wrote some papers.<sup>109</sup> It seems that a reason why Busby may not have acted on this plan to go to London until February 1831, after he had been displaced from his positions and it was clear that there were no prospects to be had in Sydney that met his ambitions, was because he had formed an attachment to Agnes Dow.<sup>110</sup> There are indications that Busby was increasingly self-conscious about his unmarried status.<sup>111</sup> From the circumstance that he and Agnes were married almost immediately on his return from London in October 1832, it seems that they may have had an understanding before he left for England.<sup>112</sup> Whatever the ties in Sydney, however, Busby clearly felt he had no

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<sup>107</sup> James Busby to George Busby, 26 July 1829, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 80 of the typescript).

<sup>108</sup> James Busby to George Busby, 7 November 1830, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 144 of the typescript): "... I certainly never shall after being the most efficient member of the Board for three-fourths of the period of its existence, consent to become its servant. In fact it would be such a degradation as the Governor would I think never propose ... ". When Darling did not appoint him to the vacant post of police magistrate at Parramatta, he wrote to George that "the Governor has fairly passed the Rubicon with me". James Busby to George Busby, 5 December 1830, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 152 of the typescript).

<sup>109</sup> See, *passim*, Busby's letters to his brother George from 26 July 1829 to 26 December 1830, AML MS 46, Box 1, Folder 2 (holographs) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (pp 80-157 of the typescript).

<sup>110</sup> See James Busby to George Busby, 15 & 22 August 1830, AML MS 46, Box 1, Folder 2 (holographs) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (pp 136-138 of the typescript).

<sup>111</sup> See, for example, James Busby to George Busby, 21 December 1829, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 101 of the typescript).

<sup>112</sup> See also Ramsden *Busby of Waitangi*, above n 75, 33 ("It is probable that they were engaged to be married before Busby left for Europe in 1831"); and James Frew to Busby, 13 June 1832, AML MS 46, Box 2, Folder 5 (holograph) & Box 7, Volume 5 (typescript) and ATL qMS-0347 (p 22 of the typescript) ("... but with a good companion which I am sure you will find in your intended ...").

choice but to press his claims in London. He had no employment and was in debt.<sup>113</sup> He sailed on 17 February 1831.<sup>114</sup>

### Busby's appointment as Resident

On the voyage, Busby wrote a number of papers to present to the Colonial Office on Australian topics. They included the treatment of convicts, emigration policy, and the use of juries.<sup>115</sup> They also included a paper entitled "A Brief Memoir relative to the Islands of New Zealand", which was subsequently published in London as part of a work entitled *Authentic Information Relative to New South Wales and New Zealand*. The pamphlet is described later in more detail.<sup>116</sup> Importantly, after describing conditions in New Zealand (including the recent *Elizabeth* affair<sup>117</sup>) and the benefits both to British interests and to Maori to be

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<sup>113</sup> See James Busby to George Busby, 12 February 1830, AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 112 of the typescript) and James Busby to Alexander Busby, 4 December 1830, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 2 of the typescript). See also n 77.

<sup>114</sup> *Sydney Gazette and New South Wales Advertiser*, 17 February 1831, at 3.

<sup>115</sup> See James Busby to Alexander Busby, 10 August 1831, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 6 of the typescript) and "Précis of Mr. Busby's case for the Earl of Haddington", 3 February 1832, AML MS 46, Box 2, Folder 4 (holograph) & Box 7, Volume 4 (typescript) and ATL qMS-0352 (typescript) (p 52 of the typescript).

<sup>116</sup> See Chapter 7, text accompanying ns 2-3.

<sup>117</sup> The reference to the *Elizabeth*, indicates that Busby had heard of the events before leaving Sydney if the date on his manuscript of "June 1831" is correct. Although Darling's despatch to Goderich on the subject was not written until 13 April 1831, it mentions that information about the incident had reached Darling in early February, which could fit in with Busby's departure. Darling's despatch could not have reached London by June, and Busby himself was later to say that he was the first to bring the state of New Zealand to the notice of the Colonial Office. Darling's 13 April despatch contains the information that he intended to appoint Captain Barker as Resident at New Zealand in response to the situation in New Zealand. It seems unlikely that the conversation Busby reports with Under-Secretary Hay in which the possibility of his being appointed Resident was floated could have taken place if Darling's despatch had been already received by the Colonial Office. It may be possible to clarify the date of receipt of Darling's despatch by checking the Colonial Office correspondence registers or through turning up a date-stamped copy on a New South Wales file, but the copy on the New Zealand file (the only one consulted here) is not date-stamped. On the material available to me, it seems more likely that Darling's despatch was not received until after Busby's interviews with Colonial Office officials. Certainly no reaction to the *Elizabeth* was sent to New South Wales by the Colonial Office until Goderich's letter to the new Governor, Bourke, of 31 January 1832 (referred to below). If Darling's 13 April 1831 despatch was not received at the time of Busby's interviews with the Colonial Office, then by the time of Busby's return from the Continent, matters had moved on. By then the Colonial Office would have been aware of Darling's intention to appoint a Resident. Darling's 4 June 1831 despatch had

obtained from a closer relationship, he concluded with a recommendation that “an authorized agent or resident” be appointed with the “authority of a magistrate” over British subjects and authority to enter into a treaty or treaties with Maori for the protection of commercial trade and for “the delivering up” by Maori of “all runaway convicts and persons not having authority from the British Government, to trade in the Islands”. Such a Resident might be expected, in concert with the missionaries “and the humanizing influence of commerce, and the domestic industry it would produce”, to persuade Maori into “the habits of a more civilized people”.<sup>118</sup>

Busby arrived in London on the eve of the Age of Reform. The Whigs had formed a Government in November 1830 (a fact of which Busby was probably ignorant when he left Sydney) but had been unable to secure a majority to pass its Reform Bill. The Whigs had accordingly called an election which was nearly completed when Busby arrived. The election resulted in a landslide victory for the Whigs, who pressed on with a second Reform Bill despite the hostility of the House of Lords, whose rejection of the Bill in October sparked riots and disturbances around the country. After Parliament had been prorogued to enable the Bill to be presented in a new session for a third time, the third Reform Bill was passed by an even larger majority of the Commons in March 1832. When the King refused to create new peers to ensure the passage of the Bill in the Lords and sent for the Duke of Wellington to form a Tory government, the “Days of May” brought the country to the brink of revolution. The Duke of Wellington was unable to form a government and the King was forced to invite Earl Grey to again do so. By then the King was prepared to create additional Whig peers but that course was avoided when the opposition peers were prevailed upon by him to abstain from voting on the Bill, allowing it to pass and receive the Royal Assent on 7 June 1832.<sup>119</sup>

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advised that, because of the death of Captain Barker, the appointment would go to Captain Sturt.

<sup>118</sup> James Busby *Authentic Information Relative to New South Wales, and New Zealand* (Joseph Cross, London, 1832) [“Busby *Authentic Information*”] 68-69.

<sup>119</sup> Edward Pearce *Reform! The Fight for the 1832 Reform Act* (Jonathan Cape, London, 2003).

Despite the momentous events being played out during his stay in England, there is no reference to them in the admittedly meagre surviving correspondence of this period from Busby. Busby, as a Tory, may well have felt gloomy at his prospects of success with the new Government. But in fact, matters could not have played out much better for him.<sup>120</sup> The ninth Earl of Haddington, continuing his favour for the Busby family, obtained an interview for Busby with the Permanent Under-Secretary for the Colonies, Robert Hay. Haddington, although a Tory, was a significant politician and, as a “waverer” on the Reform Bill (he voted against it in 1831 but for it in 1832), may have had influence with the Whigs at the time.<sup>121</sup> Hay had already received a copy of Busby's paper on New Zealand from John Barrow, the permanent secretary at the Admiralty. Hay evidently liked the paper and was later to draw on it in his own paper on New Zealand to the Royal Geographical Society in April 1832.<sup>122</sup> Busby reported to his brother Alexander that Hay had asked him whether he would like to be the Resident at New Zealand if the Government decided to make such an appointment and that he had replied, “I would prefer it to any other employment the Government could offer me”.<sup>123</sup> Busby submitted his other papers relating to Australia. He reported “long conversations” with Lord Howick, the parliamentary under-secretary (and eldest son of the Prime Minister, Earl Grey), who had “evidently not only read—but studied my papers—he was perfectly familiar with them”. Land regulations reform in Australia was also said to have been discussed.<sup>124</sup> Busby suggested to Alexander

<sup>120</sup> Busby himself acknowledged this in a letter to his brother Alexander of 10 August 1831: “I have been singularly fortunate in the period of my arrival. If I had had an intuitive knowledge of everything that was going on, I could not have timed my visit better.” AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 6 of the typescript).

<sup>121</sup> HCG Matthew “Hamilton, Thomas, ninth earl of Haddington (1780–1858)” *Oxford Dictionary of National Biography*. Haddington had entered politics in 1802 and served as a commissioner for the Indian Board of Control in 1809 and from 1814–22. Under Peel's Tory administrations of 1834–35 and 1841–46, he was lord lieutenant of Ireland and first lord of the Admiralty (after turning down the governor-generalship of India).

<sup>122</sup> James Busby to Alexander Busby, 10 August 1831, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 6 of the typescript); RW Hay “Notices of New Zealand” (1832) 2 *Journal of the Royal Geographical Society of London* 133–136 (compare p 136 to Busby *Authentic Information*, above n 118, 58–59).

<sup>123</sup> James Busby to Alexander Busby, 10 August 1831, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 6 of the typescript).

<sup>124</sup> *Ibid.*

## Chapter Six: Busby's Residency

that some of the credit for the 1831 Ripon Regulations<sup>125</sup> should be attributed to him since Governor Darling appeared to have included his papers on land regulation reform in despatches to the Colonial Office:<sup>126</sup>

The truth is that I believe they were the ground work of all that has been done only they have pushed the principle too far in not admitting Emigrants to have a claim for a Grant—in fact in not considering their emigration as an equivalent to so much money. ... I asked Lord Howick whether it would be agreeable to him that I should offer some observations in the question relating to Land. He said he would be very glad to receive them. I intend to point out in what respects I consider them wrong.

These explanations are consistent with Busby's invariable practice of seeing his own hand in the actions taken by others and his stubbornness of view to the point of rudeness.

In addition to his interviews with the Colonial Office, Busby was invited to give evidence to a House of Commons select committee on “secondary punishments” (additional penalties able to be imposed on those transported to penal settlements). The Committee printed Busby's paper on the treatment of convicts.<sup>127</sup> In his evidence to the Committee, Busby maintained that transportation to New South Wales improved the lot of “the labouring classes in this country”: “many of them are satisfied that they have made a desirable change, instead of incurring a severe punishment”; “[a]ll of them have an abundance of food, and very few of them work hard”; “I have known individuals who have committed crimes to get to New South Wales, and I think I have known of people who have endeavoured to induce their relatives or connexions to commit crime in order to get them sent out”.<sup>128</sup> When the evidence collected by the Committee was received in New South Wales in about September 1832 (shortly before Busby's return to the colony), Busby's remarks

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<sup>125</sup> See Chapter 3, text accompanying n 121.

<sup>126</sup> James Busby to Alexander Busby, 10 August 1831, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 6-7 of the typescript). This surmise was based on an indication by the New South Wales desk officer that he had read the papers.

<sup>127</sup> Ibid (p 6 of the typescript).

<sup>128</sup> Reported in *The Sydney Monitor*, 12 September 1832, at 2.

were treated with derision in the local press and fuelled the adverse criticism which greeted his appointment as Resident.<sup>129</sup>

During his time in London, Busby dined with Thomas Fowell Buxton<sup>130</sup> and his family, to whom he had been given a letter of introduction by the Reverend Samuel Marsden. He wrote to Alexander that he had no doubt that Buxton, to whom he had sent a copy of his paper on New Zealand, would put in a good word for him with Viscount Goderich, the Secretary of State for the Colonies, should that be necessary. Buxton appears to have asked Busby to copy to him any of his despatches of interest about New Zealand.<sup>131</sup> Busby also breakfasted with Buxton's sister-in-law, Elizabeth Fry, the Quaker penal reformer. Nor did Busby miss the opportunity to promote his Australian wines. He had taken ten gallons of the 1829–30 vintage to England<sup>132</sup> and sent bottles to those he met, including to Goderich, Howick and Barrow. He also sent them copies of his two publications on viticulture, “bound in such style as makes me quite proud of my Authorship”.<sup>133</sup>

Well satisfied with his contacts and believing that he had an assurance of appointment to some fitting position (although nothing specific had been settled), Busby pursued his other dream, travelling to Spain and France to visit vineyards, observe raisin curing, and collect vine cuttings for consignment to New South Wales.<sup>134</sup> The vine cuttings were obtained principally from the botanic gardens in Montpellier and the nursery in the Luxembourg Gardens in Paris. Altogether nearly 700 vine cuttings were shipped to New South Wales and formed the principal stock from which the Australian wine industry began, earning Busby his lasting

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<sup>129</sup> See text accompanying ns 173-175 below.

<sup>130</sup> See Chapter 3, text accompanying n 181.

<sup>131</sup> See below n 194.

<sup>132</sup> James Busby *Journal of a Tour Through Some of the Vineyards of Spain and France* (Stephens & Stokes, Sydney, 1833) [“Busby *Journal of a Tour*”] 2.

<sup>133</sup> James Busby to Alexander Busby, 10 August 1831, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 7 of the typescript).

<sup>134</sup> See *ibid*; and “Précis of Mr. Busby's case for the Earl of Haddington”, 3 February 1832, AML MS 46, Box 2, Folder 4 (holograph) & Box 7, Volume 4 (typescript) and ATL qMS-0352 (typescript) (pp 52-53 of the typescript).

reputation as the father of the industry. Busby also gathered seeds for a range of vegetables and fruits. The visit occupied three months in late 1831.<sup>135</sup>

Busby returned to London in early 1832 to find that, instead of his having secured an assured position, Goderich proposed simply to write to Governor Bourke to recommend Busby's employment.<sup>136</sup> As far as the New Zealand prospect was concerned, in Busby's absence, events had moved on with the receipt of Darling's despatches of 13 April and 4 June 1831 advising that, in response to the *Elizabeth* affair, he was appointing Barker and then (following Barker's death), Captain Charles Sturt (another impressive candidate<sup>137</sup>), as Resident at New Zealand.<sup>138</sup> By the time of Busby's return, Goderich had already written to the new Governor, Bourke, in response to Darling's 13 April 1831 despatch.<sup>139</sup> In the letter, Goderich wrote approvingly of Darling's proposal to install a Resident at New Zealand. He made no reference to Busby and seems to have expected that the appointment, if not already made, would be implemented without further reference to London. The only direction that Goderich gave to Bourke was that the office of Resident should not be a military one<sup>140</sup>:

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<sup>135</sup> See Busby to Goderich, 6 January 1832, AML MS 46, Box 2, Folder 4 (holograph) & Box 7, Volume 4 (typescript) and ATL qMS-0352 (typescript) (pp 48-51 of the typescript); Busby *Journal of a Tour*, above n 132; and Ramsden *The Prophet of Australian Viticulture*, above n 87, 5-6. On Busby the viticulturist, see also Keith Stewart *Chancers and Visionaries: A History of New Zealand Wine* (Godwit, Auckland, 2010) 18-35.

<sup>136</sup> "Précis of Mr. Busby's case for the Earl of Haddington", 3 February 1832, AML MS 46, Box 2, Folder 4 (holograph) & Box 7, Volume 4 (typescript) and ATL qMS-0352 (typescript) (pp 52-53 of the typescript).

<sup>137</sup> See HJ Gibbney "Sturt, Charles (1795–1869)" *Australian Dictionary of Biography*. In his 4 June despatch announcing his intention to appoint Sturt, Darling explained that "[t]he death of Captain Barker has occasioned some embarrassment, as it is difficult to find a person qualified for the situation I had intended to place him in at New Zealand". He had decided upon Sturt because "[i]t is an object to conciliate and keep the New Zealanders in good humour; and Captain Sturt's disposition and character give him the best chance of succeeding with them". Darling to Goderich, 4 June 1831, CO 209/1, 69a-74a at 70a & 71a.

<sup>138</sup> Darling to Goderich, 13 April 1831, CO 209/1, 28a-65a; Darling to Goderich, 4 June 1831, CO 209/1, 69a-71b. For an assessment of the likely sequencing, see above n 117.

<sup>139</sup> Goderich to Bourke, 31 January 1832, CO 209/1, 66a-68b.

<sup>140</sup> Ibid 66b-67a. Goderich advised that, at the urging of the Colonial Office, the Admiralty had given instructions that ships-of-war were to call "as frequently as possible" at New Zealand. Ibid 67a.

## Chapter Six: Busby's Residency

[A]s it does not appear advisable, in the first instance, to place a detachment of Troops, as proposed by General Darling, under the Orders of the Resident,<sup>141</sup> I am of opinion that a Civil rather than a Military Officer should be fixed upon for that duty. After the Resident shall have conciliated the good will of the Native Chiefs, and in some measure restored that confidence between them and British Subjects which the bad faith of the latter has so unhappily interrupted, you will be better able to judge in what manner it will be practicable to support the authority of the Resident without exciting the jealousy or ill-will of the Natives.

In the despatch, Goderich voiced “shame and indignation” about the role of the *Elizabeth*<sup>142</sup> and the involvement of British nationals (“who bear and disgrace the name of Christians”) in other outrages<sup>143</sup> by which, “for mercenary purposes”, Maori were being “inflamed against each other, and introduce[d] ... to the knowledge of depraved acts and licentious gratifications of the most debased Inhabitants of our great Cities”. The “inevitable consequence” was a “rapid decline of population preceded by every variety of suffering”, by which Maori were likely to be “shortly added to the number of those barbarous Tribes, who in different parts of the Globe, have fallen a sacrifice to their intercourse with civilized Men”.<sup>144</sup>

There can be no more sacred duty than that of using every possible method to rescue the Natives of those extensive Islands from the further evils which impend over them, and to deliver our own Country from the disgrace and crime of having either occasioned or tolerated such enormities.

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<sup>141</sup> It is not clear that Darling had intended troops to be stationed in New Zealand.

<sup>142</sup> Goderich expressed “much regret” that “the efforts of General Darling to bring to justice the Master and Crew of the Brig ‘Elizabeth’ were likely to prove unsuccessful”. He regarded the opinion of the Crown Solicitor, Moore, as to the difficulties in the way of proceeding against Stewart to be “not very intelligible.” He could not understand why Stewart had been given bail and thought that “the whole proceeding for the conviction of the Offenders appears to me to have been conducted in an inefficient and discreditable manner”. Bourke was to “have the goodness to institute the necessary enquiries to ascertain upon whom the censure justly falls, if, as there is much reason to apprehend the prosecution shall prove unsuccessful”. Goderich to Bourke, 31 January 1832, CO 209/1, 66a-68b at 68a-68b.

<sup>143</sup> Goderich referred also to the trade in human heads with which Darling’s despatch had “for the first time, made me acquainted”. Goderich was “at a loss to conjecture what the motive can be which induces any one to make such a purchase, unless indeed the heads be preserved in such a manner as to be regarded in the light of curiosities”. He directed the enactment of criminal legislation against such an “utterly detestable and inhuman” practice. Ibid 67b-68a.

<sup>144</sup> Ibid 66a-b.

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The despatch is also significant for Goderich's suggestion that, because the Resident on the grounds of necessity might be forced to adopt "measures of coercion and restraint" which might not "be strictly defended as legal", he would have to be indemnified against litigation at least where "he shall appear to have acted with upright intentions and becoming circumspection".<sup>145</sup> In this connection, it was observed by Goderich that:<sup>146</sup>

The want of legal authority to seize and confine persons found in the commission of outrages in the Islands would be a very serious difficulty if the Natives of New Zealand had made any approach towards a settled form of Government, were there any established system of Jurisprudence among them, however rude, their own courts would claim, and be entitled to the cognizance of all Crimes committed within their Territory.<sup>147</sup>

Busby was most put out to discover that the best he could hope for was a recommendation of employment from Goderich to Bourke. From his reaction, although other possibilities had been discussed, it seems that he had pinned his hopes on the New Zealand appointment. He was not minded to drop his case for the position of Resident and immediately enlisted the support of the Earl of Haddington to advocate his claim. Busby prepared a "précis" of his case for Haddington, setting out his qualifications for the job and the belief that the Colonial Office had assured him of a position.<sup>148</sup> He concluded that:<sup>149</sup>

[A]fter having spent eight years of the best portion of his life to so little purpose, as regards himself, he is confident he ought not now to be blamed for adhering to the determination ... of bringing this state of uncertainty to a conclusion, either by obtaining before he shall leave England an honourable and permanent employment from the Secretary of State, or of relinquishing all future thought of Government employment.

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<sup>145</sup> Ibid 67a-b.

<sup>146</sup> Ibid 67a.

<sup>147</sup> The reference to Maori government is of significance because it seems to have been later picked up by Governor Bourke in his instruction to Busby to "aid ... the Natives towards a settled form of Government, and ... the establishment of some system of jurisprudence ... [by which] their Courts may be made to claim the cognizance of all Crimes committed within their Territory ...". See text accompanying n 237 below.

<sup>148</sup> "Précis of Mr. Busby's case for the Earl of Haddington", 3 February 1832, AML MS 46, Box 2, Folder 4 (holograph) & Box 7, Volume 4 (typescript) and ATL qMS-0352 (typescript) (pp 52-53 of the typescript).

<sup>149</sup> Ibid (p 53 typescript).

## Chapter Six: Busby's Residency

Haddington succeeded in obtaining a meeting at the Colonial Office on 18 February, for which Busby prepared a further memorandum to be supplied to the officials.<sup>150</sup> In the memorandum, Busby's claim in preference to Captain Sturt was justified on the basis that Busby "was the first to bring the subject under the notice of the Government" and that, unlike Busby who would "be obliged to depend upon his friends for an eleemosynary support" ("so unprofitable to him has hitherto been the service of Government"<sup>151</sup>), Captain Sturt was receiving full pay as a serving army officer and had prospects for promotion.<sup>152</sup> It appears that it may have been suggested as a compromise that Sturt could be asked if he was willing to accept another position, freeing the New Zealand Residency for Busby. Busby, however, was not prepared to countenance the risk that Sturt would prefer the New Zealand appointment.<sup>153</sup>

Mr Busby cannot in justice to himself or his friends return to the Colony trusting to the contingency of Capt. Sturt's accepting the other employment which Lord Goderich has chalked out for that Officer. He considers that in common justice he is entitled either to the appointment at New Zealand, or to an official promise from the Secretary of State (not a mere recommendation to the Governor) that he shall be appointed to the first office in New South Wales of or above £500 a year which shall become vacant or shall be created—and that in the mean time he be entitled to the means of subsistence.

...

Finally Mr Busby submits this statement not only as what he considers himself in strict justice entitled to, but as the only terms on which it would be either his duty or his interest to continue longer to look to the public service as a means of support.

It will ever afford him sincere gratification that his official services have uniformly received the approbation of all who could judge of their merits; and he is confident that his gratuitous exertions to promote the advancement of the Colony of New South Wales, will, though little understood at present, be in due course fully appreciated. But he cannot

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<sup>150</sup> Busby memorandum dated 17 February 1832 (and marked at the top, "From Earl of Haddington, 18 Feb 1832"), CO 209/1, 173a-174b.

<sup>151</sup> In the memorandum, Busby suggested that he should receive further remuneration for his services in the period October 1829–December 1830.

<sup>152</sup> Busby memorandum dated 17 February 1832, CO 209/1, 173a-174b at 173a-b.

<sup>153</sup> Ibid 173b-174b.

## Chapter Six: Busby's Residency

conceal from himself that by his engagement in the service of Government he has hitherto been a grievous sufferer in a pecuniary point of view—and however much it would gratify him to extend the sphere of his public services there may be circumstances in which he would be bound not less by a respect for his own character than by pecuniary necessity to renounce all further thoughts of the subject.

There is no record of what passed at Haddington's interview at the Colonial Office, but Busby was appointed as Resident at New Zealand by Goderich in March 1832.<sup>154</sup> It is possible that Haddington's intervention by itself was decisive (the third Reform Bill had been introduced and Haddington's vote was hanging). It seems, however, more likely that the critical event was receipt of Darling's despatch of 7 September 1831 to Goderich.<sup>155</sup> It let the Colonial Office off the hook and free to act because Darling had written that he intended not to proceed with the appointment of a Resident due to his own recall as Governor.<sup>156</sup>

The new Governor, Bourke, was advised of the appointment by letter of 18 March 1832:<sup>157</sup>

I am desirous that Mr. J. Busby who has shewn much intelligence in the information which he has given to this Department, as well as to a Committee of the House of Commons, on matters connected with the Australian Provinces, should be employed in that situation; to whom you will recommend to the Council to assign a Salary at the rate of £500 per Annum. In this arrangement, I have been influenced by the consideration that it will be inexpedient, as well in point of policy, as with reference to expense, to detach any Troops to those Islands; at any rate, until they can be more easily spared from other

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<sup>154</sup> The appointment was all but confirmed by 2 March, shortly before Busby left on a visit to Edinburgh. See Busby to Hay, 2 March 1832, CO 209/1, 175a-b. The formal offer of appointment was made to Busby by Hay in a letter dated 28 March 1831 and accepted by Busby in Edinburgh by letter dated 31 March 1831. In this letter, Busby refers to his intention to investigate linen manufacture and flax and hemp preparation in northern manufacturing towns "as may enable me to point out to the New Zealanders some more effectual method than that they are accustomed to use in the preparation of the Phormium Tenax". Busby to Hay, 31 March 1832, CO 209/1, 177a-178a at 177b.

<sup>155</sup> This is surmise because, again, it is not possible to be certain of the date on which Darling's despatch of 7 September 1831 was received in London because of the absence of a date-stamp on the copy of the despatch in the New Zealand file. What is known is that it was received before 9 April 1832 because Hay drew heavily upon its enclosures in a paper he gave to the Royal Geographical Society on that date (see above n 122).

<sup>156</sup> Darling to Goderich, 7 September 1831, CO 209/1, 77a-78a (with enclosures at 79a-85b).

<sup>157</sup> Extract of a despatch from Goderich to Bourke, 18 March 1832, CO 209/1, 86a.

## Chapter Six: Busby's Residency

duties, and until the feelings of the New Zealand Chiefs, in regard to their appearance amongst them, can be correctly ascertained.

It was only by chance that Busby's appointment did not come unstuck. On Bourke's arrival in Sydney in December 1831, he had come under immediate pressure from a deputation of merchants to fulfil Darling's plan to appoint a New Zealand Resident. Bourke was prepared to act and put a proposal to his Executive Council.<sup>158</sup> It was lucky for Busby that the Council thought the appointment of a Resident "would be fruitless unless he had a military force under his command for his protection, and to give weight to his interference".<sup>159</sup> Bourke agreed with the advice but took the view that he could not send troops without approval from the Colonial Office. The delay, while he waited for a reply to his letter of 23 December 1831 seeking direction, meant that Goderich's 18 March 1832 despatch appointing Busby arrived before Bourke could take the appointment of a Resident further himself. The 23 December 1831 despatch from Bourke also enclosed the October 1831 letter of the chiefs at Kerikeri to King William IV asking him to become their "friend and the Guardian of these Islands" which had been forwarded to Bourke through Reverend William Yate.<sup>160</sup>

Busby was still in London when Bourke's 23 December 1831 despatch was received. He proposed that an answer should be made to the chiefs' letter and that it should be entrusted to him for delivery. This was one of a number of suggestions that Busby made intended to impress Maori and "command their respect" for him in circumstances where any influence he possessed "over the minds of the New Zealanders will be altogether of a moral character".<sup>161</sup>

The Colonial Office acceded to some of these requests. It agreed that Busby was to be provided with the frame of a house. It authorised him to wear the uniform of a vice consul (Busby had suggested that of a consul). It assured Busby that he would

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<sup>158</sup> Bourke to Goderich, 23 December 1831, CO 209/1, 87a-98a (includes minutes of a meeting of the Executive Council on 22 December 1831).

<sup>159</sup> Ibid 88b.

<sup>160</sup> Ibid 96a-98a.

<sup>161</sup> Busby memorandum dated 22 May 1832, CO 209/1, 181a-b.

be provided with “a few articles of trifling value” as presents for the chiefs. And it indicated that an answer to the chiefs' letter would be transmitted to Bourke “who will charge you with the delivery of it”. But it declined Busby's request for presentation to King William (which Busby had said would enhance his standing in the eyes of the chiefs “with their simple ideas of Majesty”<sup>162</sup>).<sup>163</sup>

### **Busby & Bourke**

Busby left for Sydney in mid-June 1832 bearing a despatch from Goderich to Bourke further explaining the purpose of his appointment and the means by which it might be made effective.<sup>164</sup> The objects for Busby were the protection of British commerce in New Zealand and “adjacent Islands in the South Seas” and the repression of the “outrages which, unhappily, British Subjects are found so often to perpetrate against the persons and property of the Natives, and the peace of Society in those Regions”. Goderich recognised that British law was “very inadequate” and, as Stewart's case had shown, “almost nugatory” to deal with crimes committed in New Zealand.<sup>165</sup> There were many practical difficulties in bringing criminals to trial in Australia. In addition, some offences of the “deepest malignity”, such as fomenting native wars or the trade in human heads, were not in fact recognised crimes in English law.<sup>166</sup> Goderich advised Bourke that legislation had been introduced into the British Parliament (a copy of the Bill was included with the despatch<sup>167</sup>) to authorise him as Governor, with the advice and consent of his Legislative Council, to enact laws for the punishment of crimes committed by British subjects outside His Majesty's dominions, in New Zealand or other islands within the Pacific Ocean.<sup>168</sup> The Governor and Council were specifically empowered by the Bill (which came to be known as the South Sea Islands Bill) to enact laws punishing “the fomenting or encouraging of warfare between ...

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<sup>162</sup> Ibid 181b.

<sup>163</sup> Hay to Busby, 30 May 1832, SRNSW NRS 905, 4/2164.2 (also ANZ Micro-Z 2711 & UoA Microfilm 09-006 Reel 5).

<sup>164</sup> Goderich to Bourke, 14 June 1832, CO 209/1, 100a-105a (including enclosures).

<sup>165</sup> Ibid 100a.

<sup>166</sup> Ibid 100b.

<sup>167</sup> Ibid 102a-b.

<sup>168</sup> Ibid 101a.

Tribes" or providing assistance to tribes in warfare. It also authorised the Governor and Council to legislate "to make effectual provision for the seizure, detention, trial and punishment of any such Offenders, either within the said Colony of New South Wales, or within the Islands in which any such Offences may have been committed, or within any adjacent Islands". In effect, this legislation would have permitted the Governor to set up policing and judicial authority in New Zealand for British subjects.

Goderich's letter to Bourke advised that, even should the Bill not pass, the Residency was to go ahead. It would "still not be unattended with important advantages, and His Majesty's Government will be acquitted of the reproach of an acquiescence in crimes which they will have done the utmost in their power to prevent".<sup>169</sup> Although not referred to in the letter, the fact that Goderich dealt with the eventuality that the Bill might not pass may well have been prompted by the mixed reception it had received in the Commons on introduction. Some Members of Parliament had questioned how Parliament could legislate for a foreign territory.<sup>170</sup>

Little guidance was given in the letter about the Instructions Bourke was to provide to Busby. Goderich wrote:<sup>171</sup>

You are so perfectly aware of the objects which have led to this appointment in a commercial point of view that I do not feel it necessary to enter into any detail as to the nature of the Instructions with which Mr Busby should be furnished by you in regard to this branch of his duty. But it is obvious that he will derive great advantage from a strict union and cordial co-operation with the Missionaries in the extension of Christian knowledge throughout the Islands, and you will not fail to impress this, among other points, upon his attention.

The despatch to Bourke also enclosed Goderich's response on behalf of the King to the letter of the chiefs at Kerikeri (which is discussed below).

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<sup>169</sup> Ibid.

<sup>170</sup> See 13 GBPD HC cc 505-506 (7 June 1832).

<sup>171</sup> Goderich to Bourke, 14 June 1832, CO 209/1, 100a-101b at 101a-b.

## Chapter Six: Busby's Residency

Busby arrived in Sydney on 16 October 1832.<sup>172</sup> News of his appointment had already leaked to the newspapers. The appointment, together with reaction to Busby's evidence to the Commons committee on secondary punishments, generated some hostile responses among those sections of the press with Whig and emancipist leanings. So, the *Sydney Monitor* commented:<sup>173</sup>

But why should we waste our own time, and the time of our readers, in exposing the absurdities of this religio-politico self-sufficient young man, fresh from the counter? ... . Jamie was obliged to go to France, and purchase some vine cuttings, in order to get himself *planted* in New Zealand; for there is no getting rid of your *Jamie's* when once they have set their minds on a good thing. By hook or by crook, with religion or without it, you can never get rid of them, till they have got what they want.

The same newspaper later complained that, although the British Consul at the Sandwich Islands (a person of "proper habits and acquirements") was paid for out of the British Treasury, in the case of Busby "we have a young linen-draper, with acquirements and habits truly ludicrous as qualifications for the office of *Consul*, paid for *British* purposes by the poor Colonists of New South Wales!"<sup>174</sup> *The Australian* was similarly scathing:<sup>175</sup>

Mr. *Borer Junior Busby*, we find, has come back to us again. The Governor has made him Justice of the Peace, and he expects to pocket £600 a-year of the public money for some fresh humbug or another at New Zealand. Oh my poor Country.

It is difficult to know what to make of the *Sydney Monitor's* comment about Busby's religiosity. From what is known, he was certainly observant and read, admired and recommended Evangelical writing and preaching.<sup>176</sup> Later, a visitor to

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<sup>172</sup> Colonial Secretary (NSW) to Busby, 4 December 1832, AML MS 91/75, Box 2, Folder 48, item 304.

<sup>173</sup> *The Sydney Monitor*, 12 September 1832, at 2.

<sup>174</sup> *The Sydney Monitor*, 27 October 1832, at 2.

<sup>175</sup> *The Australian*, Sydney, 19 October 1832, at 3.

<sup>176</sup> See, for example, James Busby to George Busby, 19 October 1829 ("By the bye the Colony seems to have made a great acquisition in the new Archdeacon [Broughton]. He preached yesterday week ... —it was entirely an Evangelical discourse and such a one as I have heard nothing like since I left Scotland") & 12 February 1830 (enclosing a copy of the charge delivered by Broughton at his primary visitation on 3 December 1829), AML MS 46, Box 1, Folder 2 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (pp 89

his home described “[t]oo many prayers at Why tanghie” and Busby himself as “rather too formal, and Religious for me to be quite at my ease with”.<sup>177</sup> On the other hand, there is little in the record, including in his correspondence, to suggest that he was unusually religious by the standards of the day. The references to “fresh from the counter” and “linen-draper” are obscure. They may point to a time (either in Edinburgh or Sydney) when Busby was employed in a shop, but nothing is known of this. A reproach of a humble background, however, from what is known of Busby's prickliness about the figure he cut in the world, is likely to have wounded him.

As the press comments indicate, a particular bone of contention in Busby's appointment was the fact that the colony of New South Wales was to bear the costs of the Residency rather than the British Treasury. The matter was raised at a public meeting on 26 January 1833 by William Charles Wentworth, one of the leading men of the colony.<sup>178</sup> (Wentworth's opposition to the Residency continued through the 1830s but, somewhat ironically, Wentworth and Busby were ultimately to become unlikely allies in respect of their pre-Treaty land purchases, as is described in Chapter 16.) Despite the hostility from some quarters, there was also praise for Busby in connection with his viticultural efforts on behalf of the Australian colonies.<sup>179</sup>

Busby's reaction to the adverse reports in Sydney about his appointment to the Residency is not known, but this was a happy time for him. He married Agnes

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& 112 of the typescript). See also James Busby to Alexander Busby, 5 September 1835, discussed in Chapter 7, text accompanying n 47.

<sup>177</sup> Edward Markham *New Zealand or Recollections of It* (1834), ed. by EH McCormick (RE Owen, Government Printer, Wellington, 1963) [“Markham *New Zealand*”] 65.

<sup>178</sup> Wentworth's speech at the meeting is reported in *The Sydney Herald*, 28 January 1833, at 2. Of Busby's appointment, Wentworth said: “There was a young gentleman who, during a visit to England, was calumniating this Colony by giving false information which he knew would be acceptable to his Majesty's Ministers, and for which he was rewarded with a snug berth, not the one he wanted, that of Protector of Convicts, but Resident at New Zealand, where he would strut about in his gold laced coat for the savages to gape at, and, perhaps, the next day be turned into a roast; he did not envy him, but to saddle the Colony with the payment of £500 to a British Resident, was not to be tolerated; the British Government might as well call upon the Colonists to pay a Resident at Malta, or the Courts of France and Petersburg ...”.

<sup>179</sup> For example, the *Sydney Gazette and New South Wales Advertiser*, 16 August 1832, at 2-3: “Mr Busby's consignment entitles him to the gratitude of the colony”.

## Chapter Six: Busby's Residency

Dow at Segenhoe on the Hunter River on 1 November 1832.<sup>180</sup> The couple returned to Sydney, where even living in the family home (which he had found so uncongenial before his departure for England) could not lower his good spirits.<sup>181</sup> Busby wrote at this time that he and Agnes had been “called upon by a great many” and that they had been entertained at dinner by the Archdeacon of New South Wales, William Broughton.<sup>182</sup>

In early 1833, Busby was engaged with personal preparations for his departure to New Zealand. He sold his grant of 2,000 acres in the Hunter Valley and obtained an assignment from William Hall, the former missionary to New Zealand, of “the Deed of the farm at Wythangee in the Bay of Islands”.<sup>183</sup> In a letter to Busby, Hall wrote that:<sup>184</sup>

The Rev<sup>d</sup> Henry Williams [to whom Hall had written separately requesting assistance for Busby in the matter] will explain it to the Natives. He will let them know that the ground was purchased and paid for to the old Chief Warrakee, in the presence of a great number of Natives assembled on the occasion. It is probable that you will have to make the Natives some further compensation for the land, but the Deed will enable you to remove all the Europeans that may be settled upon it.

While in Sydney, Busby also took the opportunity to publish the journal of his tour of the French and Spanish vineyards<sup>185</sup> and to distribute copies of it and his *Authentic Information Relative to New South Wales and New Zealand*, earlier published in London,<sup>186</sup> to people prominent in the Australian colonies (including Governor Bourke, Lieutenant-Governor Arthur of Van Diemen's Land, Chief

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<sup>180</sup> Ramsden *Busby of Waitangi*, above n 75, 51.

<sup>181</sup> James Busby to Alexander Busby, 18 December 1832, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 8 of the typescript): “... we have all been as happy as possible”.

<sup>182</sup> James Busby to Alexander Busby, 8 January 1833, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 9 of the typescript). Broughton was consecrated as the first Bishop of Australia in 1836.

<sup>183</sup> The deed has been lost. Busby did not rely upon it in his subsequent land purchase claims but rather his own 1834 direct purchases from Maori, as is discussed below.

<sup>184</sup> Hall to Busby, 15 April 1833, AML MS 46, Box 2, Folder 5 (holograph) & Box 7, Volume 5 (typescript) and ATL qMS-0347 (p 26 of the typescript).

<sup>185</sup> See above n 132.

<sup>186</sup> See above n 118.

## Chapter Six: Busby's Residency

Justice Forbes, Archdeacon Broughton, and the Reverend Samuel Marsden).<sup>187</sup> It is likely that at the same time Busby was engaged in distributing vine cuttings from his collection (now being cared for in the Botanical Gardens). To his brother Alexander in the Hunter Valley, Busby wrote that he would send cuttings and expressed complete confidence that “[t]he calcareous soil of your farm renders certain the production of a fine wine”.<sup>188</sup>

There were also official matters associated with his posting to be resolved during this time. One such concerned the gifts to be provided to Busby to confer on the chiefs. Busby suggested that gifts of European clothing would be suitable and would fulfil a didactic purpose. He wrote to the Colonial Secretary, Alexander McLeay, that:<sup>189</sup>

I mentioned to the Governor my great wish to make it an object of ambition with the leading chiefs to wear European Clothing, and adopt European habits of cleanliness. By industry they may always have sufficient means to procure them; and by the attention by which I shall distinguish those who adopt this practice I have no doubt of introducing a fashion in dress which will lead the way to other wants, and originate a trade more desirable than the present one for muskets and gunpowder.

This request for clothing was adopted without apparent difficulty.<sup>190</sup>

More difficult were the dealings Busby had with Bourke and McLeay about the provision of a house and payment of his salary. Busby argued that the commitment made to him in London entitled him to something closer to a full, prefabricated house, rather the mere framework mentioned in the Colonial Office's

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<sup>187</sup> See Busby's lists of recipients of his publications in AML MS 46, Box 4, Folder 15.

<sup>188</sup> James Busby to Alexander Busby, 11 January 1833, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 11 of the typescript). In later correspondence when Alexander had clearly expressed doubt about the idea of growing grapes in an area susceptible to frost in winter, Busby responded impatiently “are you aware that the vine is cultivated in 52°N, where the vines are under snow for three months of the year? ... I should be sorry if you dismiss the idea without giving it a fair trial”. James Busby to Alexander Busby, 27 March 1835, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 35 of the typescript).

<sup>189</sup> Busby to Colonial Secretary (NSW), 29 January 1833, ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 4 of the typescript).

<sup>190</sup> See Colonial Secretary (NSW) to Busby, 16 February 1833, AML MS 91/75, Folder 48, item 305.

correspondence or the partial dwelling of “two rooms and a lobby” that Bourke was prepared to give him.<sup>191</sup> The dispute about salary was concerned with the fact that Busby had been receiving half-pay only since arriving in Sydney.<sup>192</sup> Since he considered that the delay in leaving for New Zealand was not of his making (see below), Busby argued that he should have been receiving full pay from his arrival in Sydney. These two matters of dispute greatly affected Busby who became convinced that the Governor had taken a set against him. In this frame of mind, he wrote to Under-Secretary Hay through Bourke, complaining of the Governor's approach on these two matters.<sup>193</sup> He also used the opening apparently given by Buxton to be kept informed about New Zealand to write a letter of complaint about Bourke.<sup>194</sup> Buxton was potentially a very useful friend for Busby. It seems extraordinary that he lacked the judgement to avoid troubling Buxton with a minor domestic problem which Buxton had no ability to address and which amounted to little more than a swipe at Bourke, a man Buxton was known by Busby to hold in some esteem. As in the correspondence with his brother George about George Brooks, but this time beyond the family circle, Busby seems to have had no insight into the picture of himself given in voicing his suspicions about Bourke's disfavour:<sup>195</sup>

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<sup>191</sup> See Busby to Colonial Secretary (NSW), 29 January 1833, ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 1-3 of the typescript); Colonial Secretary (NSW) to Busby, 16 February 1833, AML MS 91/75, Folder 48, item 305; Busby to Colonial Secretary (NSW), 20 February 1833, ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 5-8 of the typescript); Colonial Secretary (NSW) to Busby, 25 February 1833, AML MS 91/75, Folder 48, item 306.

<sup>192</sup> Colonial Secretary (NSW) to Busby, 4 December 1832, AML MS 91/75, Folder 48, item 304.

<sup>193</sup> Busby to Hay, 12 March 1833, ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 8-15 of the typescript). The Colonial Office was later to side with Bourke on both matters. On the house, it affirmed its intention had been that Busby would be provided with framework only. Since this was less than Busby had led Bourke to believe had been promised—and therefore he had allowed him more—the effect of Busby's correspondence seems to have been to lead Bourke to conclude that Busby had misled him. In turn this led to a sharp letter to Busby, now in New Zealand, communicating the decision of the Colonial Office. See Colonial Secretary (NSW) to Busby, 24 June 1834, AML MS 91/75, Folder 51, item 335.

<sup>194</sup> Busby to Buxton, 12 March 1833, AML MS 46, Box 2, Folder 4 (holograph) & Box 7, Volume 4 (typescript) and ATL qMS-0352 (typescript) (pp 3-5 of the typescript): “When you had the kindness to request that I should send to you any communication I had to make to the Secretary of State ...”.

<sup>195</sup> Ibid (p 3 of the typescript).

## Chapter Six: Busby's Residency

... I have hesitated a good deal whether I should not give up the points now at issue between the Governor and myself. But every circumstance that has come under my observation has tended to convince me, that these are only the beginnings of a course of conduct which if followed up in the same spirit would greatly weaken my power of usefulness as a Servant of the Public; and I have accordingly decided that I cannot too early take the sense of the Secretary of State upon it.

It is an invidious and hateful task to attribute unworthy motives to any individual, or to ask you to judge between so high and responsible an officer, as General Bourke (of whom too I am aware you were disposed to entertain a very favourable opinion) and so humble an individual as myself. But in the Governor's conduct to me there has been so little of friendliness that it was natural I should endeavour to trace its cause ...

Busby attributed Bourke's animus to his jury paper which he had provided to Bourke on his return to Sydney and which he later discovered was contrary to the views expressed by Bourke, who in a speech to the Legislative Council soon after his own arrival in New South Wales had proposed the extension of trial by jury and the substitution of civil for military juries in criminal cases:<sup>196</sup>

I had twice seen the Governor before [giving him the paper] ... and although I had no private introductions to him his manner towards me might be characterized as that of marked attention. The next time I had occasion to call upon him his countenance towards me was changed, and the expression of a contrary feeling to that with which he at first received me was at least as strongly marked.

Busby considered that Bourke had taken a set against Darling's "friends" (in which group he seems to have included himself) and aligned himself with emancipist party and press (the quarters from which criticism of Busby's appointment had come).<sup>197</sup> Busby concluded the letter on a melodramatic note:<sup>198</sup>

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<sup>196</sup> Ibid.

<sup>197</sup> Ibid (pp 3-4 of the typescript). In the letter, Busby referred to having been made "an object of almost constant attack as an enemy of the Colony" for having suggested in his evidence to the Select Committee on Secondary Punishments and privately to Howick that the Government of New South Wales did not support an elected assembly for the colony. Although Busby may have been suggesting that the reports were inaccurate, it was indeed his view, as he explained to Buxton, that "every approach to Popular Institutions in this Colony must for many years to come be a departure from Good Government".

<sup>198</sup> Ibid (p 5 of the typescript).

## Chapter Six: Busby's Residency

I consider it most unfortunate for myself and I may say for the Public service that I have been placed under the orders of the Governor of N.S. Wales. If General Bourke proceeds in the same spirit my hands will be tied up from any usefulness whatever. My being paid from the Revenue of the Colony has excited a feeling or has given rise to clamour which appears to have led him to render my appointment virtually nugatory. If the Home Gov<sup>nt</sup> do not allow me some discretion or remove me from under the authority of General Bourke I shall certainly have cause to regret that I did not when in England abandon the public service and resort to a business which would at least have yielded me pecuniary gain.

Busby's departure for New Zealand was delayed pending the expected news of the enactment of the South Sea Islands Bill and a naval ship to convey him.<sup>199</sup> By early January 1833, Busby was "looking anxiously" for the Act. Since it had not been among the series of Acts to 11 August 1832 which had already arrived, and since Busby knew that Parliament had been prorogued on 16 August, he came to the realisation that the Bill had lapsed.<sup>200</sup> This was, Busby reported to Haddington by letter of 25 February, a matter of "no little disappointment" to him. It meant that he now expected "to be sent down, within a few weeks, with such instructions and authority as can be given me from the Colony".<sup>201</sup>

This was far from ideal as both Bourke and Busby appreciated. Without Imperial legislation, Busby as Resident could possess no policing or magisterial powers. Bourke seems to have entertained doubts about whether Busby should be dispatched before the fate of the legislation was clear (he seems to have thought it would undermine Busby's authority if he took up the Residency before he was invested with legal powers) but in the end was content to rely on Goderich's instruction that sending a Resident would be advantageous whether or not the Bill

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<sup>199</sup> Bourke to Goderich, 2 May 1833, CO 209/1, 106a-b at 106a: "I had delayed Mr Busby's departure for some time in the hope of receiving an Act of the Imperial Parliament containing the Provisions to which your Lordship referred in your Dispatch of the 14<sup>th</sup> June 1832."

<sup>200</sup> James Busby to Alexander Busby, 8 & 11 January 1833, AML MS 46, Box 1, Folder 1 (holographs) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 10 & 11 of the typescript).

<sup>201</sup> Busby to Haddington, 25 February 1833, AML MS 46, Box 2, Folder 4 (holograph) & Box 7, Volume 4 (typescript) and ATL qMS-0352 (typescript) (p 54 of the typescript).

passed.<sup>202</sup> On 18 March, Busby was directed to be ready to depart for New Zealand on the arrival in Sydney of HMS *Imogene*.<sup>203</sup>

Although Busby professed himself ready to depart, he immediately pressed for some armed force to be sent with him to enable him to deal effectually with convict runaways and to provide him and Agnes with some protection.<sup>204</sup> Bourke's answer was conveyed to Busby in an interview with the Colonial Secretary. Busby was told that he would have to look to the chiefs for his own protection and to secure convict runaways for shipment to Sydney. Busby could expect only an indemnity should he incur legal liability, as through mistaken apprehension of a free man.<sup>205</sup> This answer did not satisfy Busby who wrote to the Governor on 27 March to

place upon record what means appear to me to be absolutely essential to the due fulfilment of the duties the Home Govt and the Public will expect from me, in order (should Your Excellency not feel authorised or not see it expedient to afford me those means; and the object of my appointment unfortunately fail in consequence) that it may not hereafter be imputed to me that I had originated, and embarked in an undertaking which had altogether failed to yield those advantages I had led H.M. Govt to expect from it.<sup>206</sup>

In the letter, Busby expressed the conviction that the Colonial Office would have expected the Governor to provide Busby with means of removing the convicts whose presence was “not only incompatible with my personal safety, but ... a bar to the accomplishment of any and every useful object ... in my appointment”.<sup>207</sup> He proposed a compromise—that the Ship of War should remain in the Bay of Islands for three or four months, or that military or civil force of “not fewer than 15 or 20 with a steady and experienced Officer” should be stationed there for a “short period”, after which time, having “clear[ed] the Country” of the immediate convict

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<sup>202</sup> See Busby to Colonial Secretary (NSW), 19 & 27 March 1833, ATL qMS-0344 (holographs) & qMS-0345 (typescript) (pp 20-21 & 15-16 respectively of the typescript).

<sup>203</sup> Colonial Secretary (NSW) to Busby, 18 March 1833, AML MS 91/75, Folder 48, item 307.

<sup>204</sup> Busby to Colonial Secretary (NSW), 19 March 1833, ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 20-21 of the typescript).

<sup>205</sup> See Busby to Bourke, 27 March 1833, ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 16 of the typescript).

<sup>206</sup> Ibid (pp 16-17 of the typescript).

<sup>207</sup> Ibid (p 17 of the typescript).

problem, Busby expected to be able to organise a Maori constabulary for ongoing purposes. In addition to the indemnity proposed by the Governor, Busby also requested that he be provided permanently with a staff member from the Superintendent of Convicts' Department able to identify runaways and to act as jailor. In what was a breach of accepted channels of communication, Busby concluded his letter by advising Bourke that he was sending a copy of the letter and earlier correspondence directly to the Under-Secretary for the Colonies.<sup>208</sup> The action seems particularly discourteous in circumstances where matters were still unresolved and Bourke had yet to issue Busby with his Instructions. Indeed, when the Instructions were given, Busby wrote to his brother Alexander that they "are very satisfactory as far as they go—and allow me a large discretion".<sup>209</sup> This approval coincided with a shift in Busby's perception of the Governor's attitude to him (showing, as with the George Brooks's case, that the Governor's coldness was almost certainly in Busby's own imagination). To Alexander he wrote:<sup>210</sup>

A wonderful change has taken place in the Governor's countenance towards me since you left. I attribute it to the Chief Justice ... [who] had said to the Governor ... that in the whole progress of the Colony he had heard of no service rendered to it by an individual which could be compared in importance with my importation of vines & my journal.<sup>211</sup>

Governor Bourke's Instructions to Busby were dated 13 April 1833.<sup>212</sup> They were framed by the Governor himself and reflect his care in such matters and his broad experience and sympathies. Richard Bourke had been Governor of New South Wales for only 16 months at this time but he was already a seasoned colonial administrator and, before that, had had a distinguished military career. He had been

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<sup>208</sup> Ibid (pp 18-19 of the typescript).

<sup>209</sup> James Busby to Alexander Busby, 20 April 1833, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 12 of the typescript).

<sup>210</sup> Ibid.

<sup>211</sup> Busby had seen Chief Justice Forbes who had told him of his conversation with Bourke and the praise he had given to Busby's viticultural efforts. Busby also claimed to have received some advice from Forbes about his new appointment and expressions of sympathy from him that his viticultural efforts had not been publicly recognised. According to Busby, Forbes attributed this to "my differing in politics with those who took the leads in such matters". Forbes considered that was "no reason": "[t]hey should allow to me the freedom of opinion which they claimed for themselves".

<sup>212</sup> Bourke to Busby, 13 April 1833, CO 209/1, 107a-117a.

born in Ireland in 1777 but educated in England at Westminster School and Oxford. His vacations were spent at the home of his relation, the politician Edmund Burke, whose correspondence Bourke edited in his own retirement. Through Burke, he knew many of the important men of the day. From Oxford, Bourke took up a commission as ensign in the Grenadier Guards. In addition to active service in the Netherlands, South America, and the Peninsular in his 16 years of military service, Bourke also served for a period as superintendent of the junior department of the Royal Military College. In 1799, early in his military career, he was shot through both jaws (an injury which inhibited his public speaking and later caused him to turn down invitations to stand for Parliament). From 1812–14, after the Peninsular War, he was military resident in Galicia and achieved the rank of colonel in 1814.

After the Napoleonic Wars ended, Bourke retired on half-pay to his estate in County Limerick. He was by then married with a growing family. During this period of his life, Bourke was involved in local issues, including public education, and served as a magistrate. His wife's health was, however, poor and Bourke sought an appointment to a better climate for her benefit. In 1825, he had been appointed Major-General at Malta but political crisis at the Cape Colony led to his appointment as Lieutenant-Governor with responsibility for the separate administration that was to be set up for the Eastern District of the colony. In the absence of the Governor, who had been given leave to return to England to answer the charges against him, Bourke was appointed as Acting Governor of the whole colony. He was to undertake that role for two and a half years from March 1826 to September 1828. The administration of the colony was in total disarray and riven by the differences between the British and Dutch settlers and the native population. In the end, the proposed separation of the Eastern District and the Cape did not go ahead. Bourke was given the job of reorganising the administration of the colony, including its courts, without any prospect of succeeding to the governorship. Soon after successfully completing his instructions, he left the colony.

It is of particular interest that, during his administration, Bourke put great energy into an attempt to reform policy towards both the Khoikhoi population of the colony and the Xhosa tribes of the eastern frontier. In July 1828, his Council passed Ordinance 50 (discussed in Chapters 3-5<sup>213</sup>), a measure he had been forced to delay until after reform of the courts because the pre-existing courts could not be trusted to administer the law impartially. In relation to the Xhosa, soon after taking office, Bourke had prohibited commando raids into Xhosa territory. This was an unpopular move in the colony and in England. Bourke, however, thought it an essential first step in a longer-term strategy of conciliating the Xhosa and promoting their civilisation, particularly through conversion. He supported missionaries and tried to promote trade and friendly relations. Although his policies were reversed after he left, Bourke himself maintained the view that they were correct—a position effectively vindicated by the Aborigines Committee inquiry and report of 1836–37 referred to in Chapter 3.

After leaving the Cape, Bourke returned to Ireland. He turned down the governorship of the Bahamas on account of his wife's health but by 1830 was looking for another appointment. The return of a Whig government that November increased his prospects of favourable consideration (Bourke was himself an acknowledged Whig). In March 1831, he accepted the governorship of New South Wales. Bourke's was a successful governorship clouded by personal loss when his wife died in May 1832 and by difficulties posed by factionalism, including within his own administration. Bourke described himself as being "pretty much in the situation that Earl Grey would find himself in if all members of his Cabinet were Ultra Tories and he could neither turn them out nor leave them". Particular difficulties were caused to Bourke by Alexander McLeay, the Colonial Secretary, and C.D. Riddell, the Treasurer, and it was eventually his failed attempt to ease Riddell out that led to his resignation in January 1837. Bourke left the colony in December 1837 after George Gipps was appointed as his successor. Bourke's departure was not because of lack of confidence in him by the Colonial Office. He

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<sup>213</sup> See Chapter 3, text accompanying n 194; Chapter 4, text accompanying n 194; and Chapter 5, text accompanying n 51.

was immediately offered the governorship of Cape Colony, and later Jamaica and command of the armed forces in India, but preferred retirement.<sup>214</sup>

With Bourke's background, it is perhaps not surprising to see echoes of his Xhosa policy in the Instructions given to Busby. The Instructions (which were subsequently approved by the Colonial Office<sup>215</sup>) described the purpose of the appointment as arising out of the "acts of violence and inhumanity perpetrated on the Natives of New Zealand by the Crews of British Vessels".<sup>216</sup> They made it

no less a sacred duty, than a measure of necessary policy, to endeavour by every possible method to rescue the Natives of those extensive Islands from the evils to which their intercourse with Europeans had exposed them, and at the same time to avert from the well disposed of His Majesty's Subjects settled in New Zealand, the fatal effects which would sooner or later flow from the continuance of such Acts of unprincipled rapacity and sanguinary violence by exciting the Natives to revenge their injuries by an indiscriminate slaughter of every British Subject within their reach.<sup>217</sup>

With this background, Busby's "principal and most important duty" was "to conciliate the good will of the Native Chiefs, and to establishing upon a permanent basis that good understanding and confidence which it is important to the interests of Great Britain and of this Colony to perpetuate".<sup>218</sup> Bourke acknowledged there was no blueprint for the accomplishment of this task, which was to be achieved by influence:

[I]t is expected that by the skilful use of those powers which educated man possesses over the wild or half civilized savage, an influence may be gained by which the authority and strength of the New Zealand Chiefs will be arrayed on the side of the Resident for the maintenance of tranquillity throughout the Islands.

Busby had the advantage that, as the letter from the chiefs at Kerikeri showed, Maori had a favourable view of "the power and justice of Great Britain". The reply

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<sup>214</sup> Hazel King "Bourke, Sir Richard (1777–1855)" *Australian Dictionary of Biography*; HM Stephens "Bourke, Sir Richard (1777–1855)", rev. Hazel King, *Oxford Dictionary of National Biography*.

<sup>215</sup> See extract of a despatch from Stanley to Bourke, 28 September 1833, CO 209/1, 118a.

<sup>216</sup> Bourke to Busby, 13 April 1833, CO 209/1, 107a-117a at 107a.

<sup>217</sup> Ibid 107b-108a.

<sup>218</sup> Ibid 108a.

on behalf of the King was “calculated to augment this feeling”.<sup>219</sup> It was to be delivered “with as much formality as circumstances may permit, to as many of the Chiefs who subscribed the Address as can be conveniently assembled”. The presents supplied would be distributed at the same time. Busby was to use the opportunity to explain his mission and to claim from the chiefs “the protection and privileges ... accorded in Europe and America to British Subjects holding in Foreign States situations similar to yours”.<sup>220</sup>

Bourke followed Goderich<sup>221</sup> in instructing Busby to “communicate freely upon the objects of your appointment and the measures you should adopt in treating with the Chiefs” with the missionaries (to whom he was to be accredited<sup>222</sup>). Their knowledge of the “language, manners and customs of the Natives may thus become of the greatest service to you”.<sup>223</sup> The Missionaries would be the means of arranging the initial conference with the chiefs.<sup>224</sup> Busby would also have the “countenance and support” of HMS *Imogene* and Captain Blackwood.<sup>225</sup> The importance of the missionaries to Busby's work was returned to by Bourke at the end of the Instructions where he “impress[ed]” upon Busby “the duty of a cordial co-operation with them in the great objects of their solicitude, the extension of Christian knowledge throughout the Islands, and the consequent improvement in the habits and morals of the People”.<sup>226</sup>

Bourke instructed Busby to fix his residence in consultation with the chiefs and “claim protection for the persons and property of yourself, family and servants, either by the establishment of one or other of the Principal Chiefs at or near your dwelling, or by placing a Native Guard over it, or by any other means which, upon

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<sup>219</sup> Ibid 108b.

<sup>220</sup> Ibid 109a.

<sup>221</sup> See text accompanying n 171 above.

<sup>222</sup> See Colonial Secretary (NSW) to Acting Secretary, Church Missionaries in New Zealand, 12 April 1833, AML MS 91/75, Folder 48, item 308.

<sup>223</sup> Bourke to Busby, 13 April 1833, CO 209/1, 107a-117a at 109b.

<sup>224</sup> Ibid 109a.

<sup>225</sup> Ibid 109b.

<sup>226</sup> Ibid 117a.

conferring with the Missionaries, you shall think it expedient to require".<sup>227</sup> If, "contrary to all expectations", Busby could not secure from the chiefs "a well grounded assurance of perfect security for yourself and family, and the chance of being able to accomplish some at least of the objects of your Mission, you will consider yourself at liberty after all hope of succeeding by negotiation shall have failed, to re-embark on board the *Imogene* and return to this Colony".<sup>228</sup>

Bourke had only a "general outline for your guidance" as to the "manner of proceeding" Busby should adopt. It was left to Busby's discretion "to take such further measures as shall at any time seem needful".<sup>229</sup> The first point made was that, since Busby could not be "clothed with any legal power, or jurisdiction" which would enable him to arrest "British Subjects offending against British or Colonial Law in New Zealand" (due to the failure to enact the South Sea Islands Bill for reasons which remained unclear), Busby could therefore "rely but little on the force of Law, and must lay the foundation of your measures upon the influence which you shall obtain over the Native Chiefs".<sup>230</sup> Busby was, however, able to use the existing statutory provisions giving the Supreme Courts of New South Wales and Van Diemen's Land jurisdiction over crimes committed by British subjects in New Zealand ("prolix and inconvenient" though the procedure was). It was therefore important that the effort involved in using the provision was not rendered useless by absence of the means to apprehend those culpable, and escaped convicts too,<sup>231</sup> and if the identification and collection of evidence was not handled well.<sup>232</sup> For the seizing of criminals, Busby was obliged to work through the medium of the chiefs.<sup>233</sup> He would be provided with indemnity for error in identification, but efforts would also be made to furnish him with the names and descriptions of convicts known to be in New Zealand.<sup>234</sup> Busby should also take advantage of the

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<sup>227</sup> Ibid 110a.

<sup>228</sup> Ibid 110b.

<sup>229</sup> Ibid 111a.

<sup>230</sup> Ibid 111a-b.

<sup>231</sup> Ibid 113a-b.

<sup>232</sup> Ibid 111b-112b.

<sup>233</sup> Ibid 113a.

<sup>234</sup> Ibid 113b-114a.

visits of any ships of war.<sup>235</sup> And he was advised to forestall criminal behaviour by warning British subjects that they would be at risk if they committed offences.<sup>236</sup>

In addition to the instructions concerning British miscreants, Busby was directed to take an interest into the relations between Maori tribes and the fostering of Maori government, including potentially a system of justice that might apply to all in New Zealand including British subjects.<sup>237</sup>

There is still another form in which the influence which it is hoped the British Resident may obtain over the minds of the New Zealand Chiefs may be even more beneficially exhibited. It is possible that by your official mediation the evils of intestine War between rival Chiefs or hostile Tribes may be avoided, and their differences peaceably and permanently composed. It is also possible that at your suggestion, and by the aid of your counsels some approach may be made by the Natives towards a settled form of Government, and that by the establishment of some system of jurisprudence among them their Courts may be made to claim the cognizance of all Crimes committed within their Territory, and thus may the offending Subjects of whatever State be brought to Justice, by a less circuitous and more efficient process than any which I have been able to point out. If in addition to the benefits which the British Missionaries are conferring on those Islanders by imparting the inestimable blessing of Christian knowledge, and a pure system of morals, the Zealanders should obtain through the means of a British Functionary the institution of Courts of Justice established upon a simple and comprehensive basis, some sufficient compensation would seem to be rendered for the injuries heretofore inflicted by our delinquent Countrymen.

Bourke instructed Busby to keep his government “fully informed of every circumstance of importance occurring in New Zealand which in any way relates to the objects of your mission, or is brought under notice in these Instructions”.<sup>238</sup> He was also required “by every means in your power” to assist in developing commercial relations between Britain, its colonies, and New Zealand.<sup>239</sup> He was to provide a means of communication between ships' masters, merchants and settlers and the chiefs. He was to forward to Sydney shipping reports and reports upon the

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<sup>235</sup> Ibid 114a.

<sup>236</sup> Ibid 114b.

<sup>237</sup> Ibid 115a-116a.

<sup>238</sup> Ibid 114b.

<sup>239</sup> Ibid 116a.

agriculture, commerce and “general statistics” of New Zealand.<sup>240</sup> In particular, Busby was asked to report if it proved, contrary to Bourke's understanding, that the trade in human heads had not been abandoned. If so, Bourke indicated that some legislative enactment would be attempted.<sup>241</sup>

Happy enough with his Instructions,<sup>242</sup> and looking forward to the meeting with the chiefs (which promised, he told his brother, to be “an interesting affair”),<sup>243</sup> Busby left on HMS *Imogene* on 21 April.<sup>244</sup> Captain Blackwood had refused to transport the prefabricated materials for the house (which arrived by other transport at the end of May),<sup>245</sup> and Agnes was not to follow until Busby had established himself.

### Arrival at the Bay of Islands

When the *Imogene* arrived at the Bay of Islands on 5 May, bad weather kept Busby from moving ashore to stay with Henry Williams until after the conference with the chiefs, which had to be deferred until 17 May.<sup>246</sup> Before the meeting, Busby had already received representations from British subjects for his intercession in local disputes. Busby clearly regarded them as within the scope of his duties and reported his proposed course of action in respect of them to New South Wales by despatches dated 13 May. The first dispute, which was to have a long history, concerned the seizure in January 1833 of a schooner by Pomare, the Ngati Manu chief and leader of the southern alliance of Ngapuhi. The seizure was in

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<sup>240</sup> Ibid 116a-b.

<sup>241</sup> Ibid 117a.

<sup>242</sup> See text accompanying n 209 above.

<sup>243</sup> James Busby to Alexander Busby, 20 April 1833, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 12 of the typescript).

<sup>244</sup> *The Sydney Herald*, 22 April 1833, at 2; Bourke to Goderich, 2 May 1833, CO 209/1, 106a-b at 106a.

<sup>245</sup> See Colonial Secretary (NSW) to Busby, 12 April 1833, AML MS 91/75, Box 2, Folder 48, item 308; and Busby to Colonial Secretary (NSW), 3 June 1833, ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 48-49 of the typescript).

<sup>246</sup> Busby to Colonial Secretary (NSW), 17 May 1833 (no 5), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 35 of the typescript); James Busby “The British Government in New Zealand” (1844 or 1845), AML MS 46, Box 2, Folder 7 (holograph) [“Busby ‘The British Government in New Zealand’ (c. 1845)”], 12. There are two manuscripts in Folder 7, Busby's original draft and a neat copy of it. References in this thesis are to the neat copy. As indicated in Chapter 19, n 46, a note in the folder indicating that the manuscript was written in 1865 is incorrect. The comparison between the 1844–1845 and 1865 pamphlets is interesting, indicating how Busby's attitudes to Maori shifted between the mid-1840s and the mid-1860s.

vindication of a claim Pomare alleged against Thomas King, the owner of the schooner. King had, however, sold his interest to Gilbert Mair and William Powditch (described by Busby as "Settlers of respectability"). King, Mair and Powditch maintained that there was no validity to Pomare's claim and that Pomare had rejected all reasonable overtures to settle the matter. They urged on Busby the necessity of impressing upon Maori respect for British property and represented that it was "the general wish that [the schooner] be destroyed or taken from the natives in such manner as shall convince them they will not be allowed to distress British subjects and property at their pleasure". Busby's despatch contained the additional information that the vessel was being crewed by two Europeans (who had gone on board with their hands bound in what Busby, for himself, thought was a sham). Busby wrote seeking instructions but with the recommendation that the vessel's lack of registration be used as the reason for the *Imogene* or another warship to seize the vessel and its European crew and bring them to Sydney:

In this manner the offenders might be brought to justice; and Pomare might be taught a useful lesson without exciting his enmity against any of the residents here.

Busby considered there was "great difficulty in proceeding by any other means". Pomare was "a man of great boldness and considerable sagacity" but attached to the "most worthless class of Europeans residing here", too fond of rum, and on unfriendly terms with respectable settlers and missionaries.<sup>247</sup>

A second despatch dealt with the arrival in the Bay of Islands of a British whaler which had deposited 12 East Coast Maori with a local tribe to make slaves of. The East Coast Maori had been carried off by the ship from their home against their will.<sup>248</sup> Although the matter did not lead to irreparable harm because the East Coasters turned out to be connected to the local tribe and the missionaries intervened and were willing to help ship them home, Busby was concerned that if

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<sup>247</sup> Busby to Colonial Secretary (NSW), 13 May 1833 (no 1) and King, Mair & Powditch to Busby, 15 May 1833, ATL qMS-0344 (holographs) & qMS-0345 (typescript) (pp 25-28 of the typescript).

<sup>248</sup> The master of the whaler had given the story that the 12 were on board the vessel when it had been obliged to leave because of threats from the local people.

strong measures were not taken to prevent such outrages unsuspecting British ships would be at risk of reprisals. He recommended that consideration be given to a proclamation directed to British ships notifying them that British anti-slave trade laws would apply to such actions.<sup>249</sup>

The third despatch related to a further complaint by Mair and Powditch (again described by Busby as “respectable Settlers”) against John Poyner for seizing, with a help of a party of Maori, a house they had constructed on land said to have been purchased by them. Busby had deferred investigating this claim until after his meeting with the chiefs, but he wrote to make inquiries about the status of Poyner, who was suspected to be an escaped convict from Van Diemen's Land. It was thought that Poyner (“understood to be a feigned name”) was one of those who had “piratically carried off” the brig *Thalia* from Hobart in 1823 or 1824. Notwithstanding that Poyner was thought to be an escaped convict and responsible for the piracy of the *Thalia*, Busby seems to have been uncertain whether Poyner was “free” because the term of his sentence had expired. His enquiry was whether recent New South Wales legislation, that those who absconded from the colony during the period of their sentence would be required to served double the period of their absence, applied retrospectively and to convicts who had escaped from Van Diemen's Land.<sup>250</sup>

A further matter dealt with by Busby in his pre-conference correspondence was the desirability of the chiefs adopting, and the British Government recognising, a flag for the purpose of New Zealand shipping, a project for which Busby sought the sanction of Governor Bourke.<sup>251</sup> Busby had already in Sydney been approached by the proprietor of the schooner *New Zealander*, built in the Hokianga, about obtaining registration for his vessel from the chiefs of the Hokianga with certification from Busby that they had authority in the district. Busby wrote that

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<sup>249</sup> Busby to Colonial Secretary (NSW), 13 May 1833 (no 2), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 29-30 of the typescript).

<sup>250</sup> Busby to Colonial Secretary (NSW), 13 May 1833 (no 4), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 33-34 of the typescript).

<sup>251</sup> Busby to Colonial Secretary (NSW), 13 May 1833 (no 3), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 31-33 of the typescript).

since his arrival he had ascertained that Maori were “perfectly aware” of the value of a ship's register and “exceedingly indignant” at the seizure of the Hokianga-built *Sir George Murray* by Sydney Customs (an insult compounded by the fact that on board at the time were two leading chiefs).<sup>252</sup> Busby considered that tribal registration of vessels, such as the owner of the *New Zealander* had proposed, would set up conditions for conflict and that, in any event, the opportunity should be taken to encourage a wider cooperative solution between tribes to the shipping question which could lead to confederation in other matters of government over time.<sup>253</sup>

Busby described how, in the northern part of the North Island, there were “from 25 to 30 Tribes of natives who are in every respect independent of each other and who exercise separately, and each without reference to the rest, all the functions of Sovereignty which their simple state of Society requires”.<sup>254</sup> They never had “an idea of confederating for any national purpose”. Even in warfare it was “very unusual for more than two or three tribes to unite their forces”. It was therefore likely to prove “extremely difficult to persuade the Individual Chief or Tribe to yield to the majority”. Busby himself, however, was so convinced of the advantages to tribes of closer co-operation (not the least of which was “putting a stop to their frequent sanguinary conflicts”) that he was “resolved to bind the whole strength of my mind to effect this object”. In achieving this he thought it probable that “the surest method of commanding success” was to “discover a case in which such a union would prove to their advantage, and to give it the appearance of originating with themselves”. The very opportunity seemed to present itself in “the adoption of a National Flag” under which all vessels would be registered. It was therefore his intention to withhold certifying any registration given by

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<sup>252</sup> Ibid (p 31 of the typescript). Claudia Orange says that the chiefs were “almost certainly” Patuone and Taonui. Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987) [“Orange *The Treaty of Waitangi*”] 19. Busby's despatch itself refers to the presence on board of the “Principal Chief of the District where she was built”.

<sup>253</sup> Busby to Colonial Secretary (NSW), 13 May 1833 (no 3), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 31-32 of the typescript).

<sup>254</sup> Ibid (p 31 of the typescript).

individual chiefs<sup>255</sup> “unless all the Chiefs, who shall be acknowledged as Heads of Tribes at the approaching conference, shall have been consulted and two thirds of them shall have agreed upon a Flag, and upon a Petition to the King of England that their Flag shall be respected”. The shipping case well illustrated how desirable it was that the “Chiefs of New Zealand should be acknowledged, in any transaction which might be considered of an international character, in their collective capacity only”.<sup>256</sup> This was not, however, the only end. Busby had “good hopes” that, if the chiefs adopted a flag, they could also be brought “to consent that they will henceforth act in a collective capacity in all future negotiations with me”.<sup>257</sup>

Perhaps I may be able to make it a condition of my interesting myself in their Petition. A Tribunal will thus be brought into existence to which such cases as that of Pomare [the seizure of King's schooner] may be referred; and Individual Chiefs may thus be compelled to acquiesce in the delivering up of Runaway Convicts whom it might be their interest to detain; and to send out of their Country other Criminals or turbulent characters who as at present situated may occasion immense mischief with impunity.

Besides these advantages I contemplate so many others as likely to arise out of an established Government of which the confederation of the Chiefs may be considered the basis ... .

The meeting with the chiefs to present King William's reply to the Kerikeri chiefs was held at Paihia on 17 May. It was an impressive event, as a Sydney newspaper report indicates more fully than Busby's own account.<sup>258</sup> Busby left the *Imogene* to a seven-gun salute and was accompanied ashore by Captain Blackwood and the ship's officers. He was conducted by the missionaries and one of the chiefs to the gathering at the mission station, where some 600 Maori are reported to have been in attendance. After welcome speeches from Maori chiefs, followed by an

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<sup>255</sup> Busby followed through on this intention. See Busby to Colonial Secretary (NSW), 30 May 1833 (no 11), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 44-45 of the typescript).

<sup>256</sup> Busby to Colonial Secretary (NSW), 13 May 1833 (no 3), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 32 of the typescript).

<sup>257</sup> Ibid (pp 32-33 of the typescript).

<sup>258</sup> *Sydney Gazette and New South Wales Advertiser*, 2 July 1833, at 2; Busby to Colonial Secretary (NSW), 17 May 1833 (no 5), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 34-38 of the typescript).

impressive haka and the discharge of muskets, the discussions took place in front of the chapel where a table had been set up for Busby, Blackwood and Henry Williams, in front of which Maori sat in a semi-circle with the chiefs in front. Behind them, in chairs, sat the Europeans.

Busby first read Goderich's letter, and then made an address of his own.<sup>259</sup> Both were translated into Maori by Henry Williams. Goderich's letter on behalf of the King expressed the King's regret for "for the injuries ... that the people of New Zealand have suffered from some of His subjects". It explained that, "[i]n order to afford better protection to all classes, both Natives of the Islands of New Zealand, and British subjects who may proceed ... there for purposes of trade", the King had sent Busby "to reside amongst you as His Majesty's Resident, whose duties will be to investigate all complaints which may be made to him". Goderich expressed the confidence of the King that "on your parts you will render to the Resident that assistance and support, which is calculated to promote the object of his appointment, and to extend to your country all the benefits which it is capable of receiving from its friendship and alliance with Great Britain."

Busby's address reinforced Goderich's letter and observed Bourke's instruction that he was to emphasise the privilege and protection to which he was entitled as an envoy of the King. Busby explained to the chiefs "the honor the King of a great and powerful nation like Great Britain, has done their country, in adopting it into the number of those countries with which He is in friendship and alliance". The address contained, however, Busby's own stamp in its final passages:

All good Englishmen are desirous that the New Zealanders should be a rich and happy people; and it is my wish, when I shall have erected my house, that all the Chiefs shall come and visit me, and be my friends. We shall then consult together by what means they

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<sup>259</sup> Goderich to the Chiefs of New Zealand, 14 June 1832, CO 209/1, 104a-105a; Address by Busby to the Chiefs and People of New Zealand, 17 May 1833, CO 209/1, 208a-210b; *Letter of the Right Honorable Lord Viscount Goderich, and Address of James Busby, Esq. British Resident, to the Chiefs of New Zealand: Ko Te Pukapuka O Te Tino Rangatira O Waikautā Kōrerihā, Me Te Kōrero O Te Puhipi, Ki Nga Rangatira O Nu Tirani* (Anne Howe, Gazette Office, Sydney, [1833]).

## Chapter Six: Busby's Residency

can make their country a flourishing country, and their people a rich and a wise people, like the people of Great Britain.

At one time Great Britain differed very little from what New Zealand is now. The people had no large houses, or good clothing, nor good food. They painted their bodies, and clothed themselves with the skins of wild beasts. Every Chief went to war with his neighbour, and the people perished in the wars of their Chiefs, even as the people of New Zealand do now. But after GOD had sent HIS SON into the world to teach mankind that all the tribes of the earth are brethren, and that they ought not to hate and destroy, but to love and do good to one another; and when the people of England learned HIS words of wisdom, they ceased to go to war with each other, and all the tribes became one people.

The peaceful inhabitants of the country began to build large houses, because there was no enemy to pull them down. They cultivated their land and had abundance of bread, because no hostile tribe entered into their fields to destroy the fruits of their labors. They increased the numbers of their cattle because no one came to drive them away. They also became industrious and rich, and had all good things they desired.

Do you, then, O Chiefs and Tribes of New Zealand, desire to become like the people of England? Listen *first* to the word of GOD, which HE has put it into the hearts of HIS servants, THE MISSIONARIES, to come here to teach you. Learn that it is the will of GOD that you should all love each other as brethren, and when wars shall cease among you, then shall your country flourish. Instead of the roots of the fern, you shall eat bread, because the land shall be tilled without fear, and its fruits shall be eaten in peace. When there is abundance of bread, men shall labor to preserve flax, and timber, and provisions for the ships that come to trade; and the ships which come to trade, shall bring clothing, and all other things which you desire. Thus shall you become rich. For there are no riches without labor, and men shall not labor unless there is peace, that they may enjoy the fruits of their labor.

It seems to have been these paragraphs that provoked the caustic comment of *The Australian* about “the sermon which it was the pleasure of Mr Busby to deliver” in addition to what it described as “the condescending epistle of Lord Goderich”. *The Australian* thought that the “whole production” was “cant and humbug” that “goes down with the good Saints in England, and we in New South Wales may gulp it

down as we can, so long as we pay the £500 *per annum*, which Mr Busby gains by the *honour* done to the savages of New Zealand".<sup>260</sup>

Busby's address was followed by speeches from the chiefs of which the "general tenor", as advised to Busby, was thought to be "highly satisfactory". There were, however, some cautions: Busby was perhaps not displeased to hear that one or two chiefs thought he should have brought troops for his protection; and one chief gave voice to a view (Busby thought as "industriously circulated by some of the depraved characters living in this neighbourhood"<sup>261</sup>) that Busby's appointment was "only preparatory to the enslavement of the New Zealanders".<sup>262</sup>

Because of the number of chiefs attending, Busby's plan to hand out suits of European clothing had to be abandoned. Instead the missionaries provided Busby with presents of blankets and tobacco.<sup>263</sup> There followed a substantial feast, although the Europeans seem from a newspaper report to have partaken of a separate (and, in the perhaps wistful comparison of the reporter, less ample) "cold collation".<sup>264</sup>

Busby was well satisfied with the day. In his despatch, he expressed appreciation for the efforts of the missionaries and the attendance of Captain Blackwood, whose presence had helped "to render the conference imposing in the eyes of the natives—and to impress their minds with the importance of this event to the future welfare of the Country".<sup>265</sup> The Reverend William Williams seems to have been less certain of the effect on Maori of the speeches. He wrote in his diary that "[t]he natives do not as yet clearly understand the object for which Mr Busby is sent".<sup>266</sup>

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<sup>260</sup> *The Australian*, Sydney, 5 July 1833, at 2.

<sup>261</sup> Rev William Williams also wrote in his diary on 17 May that "some strange ideas have been industriously put into their minds by ill-disposed Europeans". Quoted in Phil Parkinson "Brief of Evidence for the Crown" (Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 8 September 2010, D1) ["Parkinson 'Brief of Evidence, Wai 1040'"'] 62.

<sup>262</sup> Busby to Colonial Secretary (NSW), 17 May 1833 (no 5), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 36 of the typescript).

<sup>263</sup> *Ibid* (pp 36-37 of the typescript).

<sup>264</sup> *Sydney Gazette and New South Wales Advertiser*, 2 July 1833, at 2.

<sup>265</sup> Busby to Colonial Secretary (NSW), 17 May 1833 (no 5), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 37-38 of the typescript).

<sup>266</sup> Quoted in Parkinson "Brief of Evidence, Wai 1040", above n 261, 62.

That may have been right but the messages conveyed were clearly of deep interest to Maori. A few days later, the missionary, George Clarke, wrote to Busby that “[t]he natives have commenced taking copies of the king’s letter and your address and I have no doubt but you will ere long, see them in the hands of the Natives about the Bay of Islands”.<sup>267</sup> That seems to have encouraged Busby to write to New South Wales requesting that both the letter and his address be printed.<sup>268</sup> One thousand copies were printed in Sydney and sent to Busby for distribution.<sup>269</sup> In it, the English and Maori texts are set out in opposed columns. Interestingly, Goderich is described as “te tino rangatira, and Busby’s address is made to “Nga Rangatira O Nu Tirana” (“the Chiefs of New Zealand”). Bourke himself, as Busby was advised by the Colonial Secretary, approved the “whole proceedings”.<sup>270</sup>

### Verdicts on Busby

Busby’s Residency during the 1830s seems to have been accounted a failure almost from the beginning by European settlers and visitors to New Zealand. This assessment was tied to the view that life on the frontier in New Zealand remained lawless and precarious and that the Residency was ineffectual to stop a downward spiral into increasing chaos. Settlers and traders criticised the Residency as useless in providing protection either from lawless Europeans or unchecked Maori power. Visitors passed on and embellished these grievances. In part this gloomy assessment of the utility of the Residency was fed by Busby’s own repeated laments about his lack of legal authority: in particular he was fond of repeating that he could not even administer an oath. As is further discussed below, these protestations were in part a tactic by Busby to obtain such powers, in part convenient excuse when he did not wish to act, and, in any event, in part overstated since there were things he did accomplish without coercive powers. The mixed

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<sup>267</sup> Clarke to Busby, 24 May 1833, ANZ AABS 8156, BR 1/1, 27.

<sup>268</sup> Busby to Colonial Secretary (NSW), 25 May 1833 (no 7), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 39-40 of the typescript).

<sup>269</sup> Colonial Secretary (NSW) to Busby, 23 July 1833, AML MS 91/75, Box 2, Folder 49, item 319. See above n 259.

<sup>270</sup> Colonial Secretary (NSW) to Busby, 13 July 1833, AML MS 91/75, Box 2, Folder 49, item 317.

reception given to Busby's appointment in Sydney hardened quickly into general resentment. The wits there said that for £700 per annum (£500 salary and £200 presents for the chiefs) all that the colonists of New South Wales received was an annual shipping report.<sup>271</sup> In similar vein, it was said that Busby's only function was that of daily hoisting the Union Jack at Waitangi.<sup>272</sup> A measure of the resentment in Sydney was that the costs of the Residency were made the subject of an annual protest in the Legislative Council by John Blaxland, who was known to be a puppet of William Wentworth.<sup>273</sup> In the end (as will be seen) the enduring verdict of Busby's Residency was that given by the visitor, Thomas Trapp, in his evidence to the Aborigines Committee in 1836:<sup>274</sup>

We have a representative there, who is to be compared now, in his present situation, to a man-of-war without guns.<sup>275</sup>

While some contemporaries (most notably the Attorney-General of New South Wales in comments in the Legislative Council in August 1838<sup>276</sup>) attributed the failure of the Residency to the inherent weakness that it lacked legal powers or

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<sup>271</sup> *The Australian*, Sydney, 6 June 1834, at 2; speech by Blaxland to the Legislative Council of New South Wales, 22 August 1838, reported in *The Sydney Herald*, 24 August 1838, 2-3 at 2.

<sup>272</sup> Letter to Commodore Du Petit Thoire of the French frigate *Venus* dated Bay of Islands, 20 October 1838, published without attribution of authorship in the *Sydney Gazette and New South Wales Advertiser*, 27 November 1838, at 2; SMD Martin *New Zealand; In a Series of Letters* (Simmonds & Ward, London, 1845) 52.

<sup>273</sup> See, for example, the *Sydney Gazette and New South Wales Advertiser*, 22 July 1834, at 2; *The Australian*, Sydney, 25 July 1834, at 2; *The Colonist*, Sydney, 24 August 1837, at 4; *The Sydney Herald*, 24 August 1838, 2-3 at 2.

<sup>274</sup> Evidence of Thomas Trapp (9 May 1836) in *Report from the Select Committee on Aborigines (British Settlements)*, GBPP 1836 (538) VII.1 at 460.

<sup>275</sup> This expression may have been current in New Zealand in Maori circles as Buick has suggested. See T Lindsay Buick *The Treaty of Waitangi: How New Zealand Became a British Colony* (3rd ed, Thomas Avery & Sons Ltd, New Plymouth, 1936) ["Buick *The Treaty of Waitangi* (3rd ed, 1936)"] 16.

<sup>276</sup> See *The Sydney Herald*, 24 August 1838, 2-3 at 2. It is notable that in this speech the Attorney-General, contrary to the position he and Governor Gipps were to take in 1840 (as is described in Chapter 16), clearly regarded New Zealand as a foreign territory outside the reach of New South Wales authority: "as regards this Colony, New Zealand is the same as France, and the utmost that the Government here can do is to write to the King of the Cannibal Islands to give Mr. Busby power to act as a Magistrate, for neither the Government of this Colony, nor the Home Government can do so without the authority of an Act of Parliament".

supporting military or civil force,<sup>277</sup> most were happy to hold Busby himself responsible. A number of criticisms were levelled at him: that he had not been up to the job in the first place and should never have been appointed (*The Australian* maintained that the appointment had been a jack-up, in part for the “convenience of getting rid of a troublesome place-hunter”<sup>278</sup>); that he isolated himself at Waitangi, away from Kororareka, the centre of European population and trade; that he was lazy (it was impossible even to get a clear account from him of what his duties were); that he looked down on most of the settlers and was not interested in their problems; and that he had not built up (in part through want of trying) good working relations with the chiefs, such as would have helped to resolve disputes between the races. So, for example, *The Colonist* newspaper of Sydney reported in August 1837:<sup>279</sup>

[W]e are credibly informed that Mr. Busby has failed to conciliate the good will of the natives, and that he has pursued a course which is, by no means, pleasing to the British residents. Instead of exerting himself to produce a favourable impression upon the natives, and to obtain influence over them, he is said to have continued in a dormant state, seldom daring to venture beyond the boundaries of his own residence, and, at the same time, unwilling to give advice to such individuals as might occasionally apply to him. The natural consequence of Mr Busby's inactivity is, that he possesses little or no control over the natives, and that he is considered altogether useless by the Europeans. ... And the simple fact that, in any case of emergency, the British residents, instead of applying to him, prefer the protection of the missionaries, is a sufficient demonstration of his utter inability to defend the lives and properties of His Majesty's subjects.

If these things were unavoidable, we should be inclined to pass over Mr. Busby's conduct without comment, and indeed, to pity him under his misfortunes. But we are assured that this is by no means the case. If what has been stated to us be correct, an active and enterprising man, holding the situation of consul at New Zealand, has it in his power to render essential service to the Europeans, and to obtain considerable influence

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<sup>277</sup> See also William Marshall *A Personal Narrative of Two Visits to New Zealand in His Majesty's Ship Alligator, AD 1834* (James Nisbet & Co, London, 1836) [“Marshall *Two Visits to New Zealand*”] 55-58.

<sup>278</sup> *The Australian*, Sydney, 25 November 1833, at 2. This article provoked Busby to write to New South Wales demanding that the proprietors of *The Australian* be prosecuted for criminal libel. See Chapter 7, text accompanying ns 10-11.

<sup>279</sup> *The Colonist*, Sydney, 10 August 1837, at 4.

## Chapter Six: Busby's Residency

over the natives. To accomplish any important good, it is absolutely necessary that the consul should shake off his lethargy, and mix freely amongst the people whenever it is expedient to do so. Unless exertion be made the appointment is altogether ridiculous—a manifest waste of the public money.

The *Sydney Gazette* in June 1839 described Busby as holding “as petty a sinecure as ever Radical railed at in the anti-reforming times of the four Georges”:<sup>280</sup>

Domiciled at the Bay of Islands (though for any useful purpose a complete nonentity), his Residentsip has enjoyed his *otium cum dignitate* undisturbed by the toils of office, or by aught save the occasional breaches of good manners among the New Zealanders.

The settler-trader Joel Polack, who had admittedly fallen out with Busby at an early stage of his Residency, described Busby as “unversed in the language, customs, or habits of the people”:<sup>281</sup>

[R]etiring within himself, avoiding the respectable class of Europeans, and choosing a locality distant from the natives and traders, the character of Mr. Busby as British Consul was early lost . . . .

The visitor Edward Markham, who found James and Agnes Busby to be “kind and civil” hosts,<sup>282</sup> made the assessment that Busby “has not Devil enough for the situation”:<sup>283</sup>

It requires a Man of some Nouse [sic]. His Orders are few, his duties undefined and his Instructions few. It seems Lord Goderick [sic] appointed him, and sent him to Genel Bourke at Sydney for Instructions and he has given none; he will not take on him self to administer an Oath (Mr B) as he is not Consul, but Resident, but if he had more (Suaviter in Modo<sup>284</sup>) he might do any thing.

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<sup>280</sup> *The Sydney Herald*, 13 June 1839, at 2.

<sup>281</sup> JS Polack *New Zealand: Being a Narrative of Travels and Adventures During a Residence in that Country between the Years 1831 and 1837* (Richard Bentley, London, 1838) vol 2, 221.

<sup>282</sup> Markham *New Zealand*, above n 177, 65: “Mrs Busby is very pleasant, he is rather too formal, and Religious for me to be quite at my ease with, but was particularly kind and civil. . . . NB Too many prayers at Why tanghie, but the Port was good, and the Reception good and a glimpse of Civilization. Be it known, I went there often and found myself a welcome Guest”.

<sup>283</sup> *Ibid.*

<sup>284</sup> The full phrase is “suaviter in modo, fortiter in re” (gently in manner, strongly in deed).

## Chapter Six: Busby's Residency

Captain Robert Fitzroy, a future Governor of New Zealand who visited on HMS *Beagle* in 1835, described Busby's isolation and helplessness (which Fitzroy said left him "taking great pains with his garden"<sup>285</sup>). (Busby's isolation, which is remarked upon by a number of contemporaries, may partly have resulted from the deafness which in later life caused him to use an ear trumpet, but which was already affecting him at this time.<sup>286</sup>)

Fitzroy's views about Busby were given in evidence to a House of Lords Committee on New Zealand in 1838<sup>287</sup> and in his 1839 published account of the voyage of the *Beagle*.<sup>288</sup> Fitzroy thought it not surprising that Busby was anxious to receive "definite instructions, and substantial support". Nor was he surprised at the "numerous complaints continually made by the English settlers".<sup>289</sup> Although sympathetic to Busby's position, the impression to be gained from Fitzroy's account of his own involvement in settling disputes referred to him by Europeans and Maori while the *Beagle* was in the Bay of Islands was that Busby could have been more useful in achieving resolution of disputes, even without coercive authority.<sup>290</sup>

[A]ppeals were made to me—by natives, by men of the United States of America, and by British subjects; but, not then aware of the peculiarity of Mr. Busby's position, I referred them to him, under the idea that his office was of a consular nature, and therefore that I ought not to act in these cases, excepting as his supporter. Finding him unwilling to take

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<sup>285</sup> Robert Fitzroy *Narrative of the Surveying Voyages of His Majesty's Ships Adventure and Beagle, Between the Years 1826 and 1836* (Henry Colburn, London, 1839) ["Fitzroy Narrative"] vol 2, 576. Fitzroy remarked upon Busby's hopes for his vines at Waitangi. He expressed admiration for Busby's knowledge about viticulture and expressed the view that "at a future day not only New Zealand, but Van Diemen's Land, and all New Holland, will acknowledge the obligation conferred upon them by this gentleman, who made a long and troublesome journey through France and Spain solely for the purpose of collecting vines for Australia, his adopted country". Following the *Beagle*'s visit to Australia, Fitzroy was also effusive about John Busby Snr.'s water works for Sydney. Ibid vol 2, 622.

<sup>286</sup> See Judith Binney "Whatever Happened to Poor Mr Yate?" (1975) 9:2 *New Zealand Journal of History* 111-125 ["Binney 'Poor Mr Yate'"] at 114; James Busby to Alexander Busby, 13 June 1839, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 105 of the typescript); and Claudia Orange "Busby, James (1802–1871)" *Dictionary of New Zealand Biography*.

<sup>287</sup> GBPP 1837-38 (680) XXI.327 at 161-170 passim.

<sup>288</sup> Fitzroy *Narrative*, above n 285, vol 2, ch 24 passim.

<sup>289</sup> Ibid vol 2, 576.

<sup>290</sup> Ibid vol 2, 590-591.

## Chapter Six: Busby's Residency

any steps of an active kind, not deeming himself authorised to do so: and the aggrieved parties still asking for assistance, I referred them to the only real, though not nominal, authority, in the place, that of the missionaries. By the active assistance of Mr. Baker, the more serious quarrels were ended without bloodshed, and those of a more trifling nature, in which the natives were not concerned, were temporarily settled: but I doubt not that in a few days afterwards anarchy again prevailed.

The Presbyterian minister, the Reverend John Dunmore Lang, who visited from Sydney in January 1839 wrote that:<sup>291</sup>

I cannot help remarking that the office itself has hitherto been totally useless; the Resident having no authority to enforce the observance of any law, no power to support his office by the punishment of offences, however atrocious, and no employment whatever that I could possibly ascertain, but that of standing sentinel upon the British ensign, which is hoisted close to his residence on one of the headlands of the Bay of Islands, and which I cannot help adding, is actually dishonoured by the prevalence of outrageous lawlessness, injustice, and oppression around the spot where it idly floats.

The missionaries in New Zealand also provided evidence which supported the conclusion that the Residency had failed. A petition to King William IV dated October 1836, organised by them and signed by 213 missionaries and settlers in New Zealand, referred to the problems caused by those British subjects “who fearlessly commit all kinds of depredations upon others of Your Majesty’s Subjects who are peaceably disposed”.<sup>292</sup> Busby, when appraised of these “acts of outrage”, had been unable to do anything except express “deep regret that he has not yet been furnished with authority and power to act; not even the authority of a civil Magistrate to administer an affidavit”.<sup>293</sup> In similar vein, in March 1838, George Clarke, as secretary of the committee of the northern district of the Church Missionary Society mission in New Zealand, wrote:<sup>294</sup>

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<sup>291</sup> John Dunmore Lang *New Zealand in 1839: Or Four Letters to the Right Hon. Earl Durham, Governor of the New Zealand Land Company, &c. &c. &c. On the Colonization of that Island, and On the Present Condition and Prospects of Its Native Inhabitants* (Smith, Elder & Co, London, 1839) [“Lang *New Zealand in 1839*”] 11.

<sup>292</sup> Petition enclosed in Busby to Glenelg, 20 April 1837, CO 209/2, 318a-324b at 321b.

<sup>293</sup> Ibid 323a.

<sup>294</sup> Clarke to the Home Secretaries of the Church Missionary Society, [1] March 1838, reproduced in Dandeson Coates *Documents Exhibiting the Views of the Committee of the Church*

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Europeans have appealed to the only public Officer, the British Resident, for redress against acts of outrage and violence from Europeans;—Natives have also appealed for redress; but all have alike received the same reply,—That nothing can be done, no protection can be afforded, as we are residing in a lawless country—no Government—no power to enforce a law, were there any in existence.

Nor did Busby's efforts to encourage the chiefs towards greater co-operation through first the adoption of a national flag (March 1834) and then the declaration of their independence (October 1835) greatly change Busby's reputation for being ineffectual. *The Australian* was predictably scathing about the flag. Referring to the "naked and savage cannibals", it exclaimed, "what in heaven's name, will they think is the meaning of a flag!"<sup>295</sup> Although Bourke was largely supportive of the Declaration of Independence,<sup>296</sup> his successor, Gipps, is likely to have more closely reflected the public mood when he later said of it:<sup>297</sup>

[Busby's] declaration of independence (for it was his) was indeed, I think, a silly as well as an unauthorized act, but it was no more; it was, in fact, as I have said before, a paper pellet fired off at the Baron de Thierry.

The groundswell of local adverse opinion about the failure of the Residency to control lawlessness in New Zealand shaped British opinion. In their evidence to the Aborigines Committee in 1836, Dandeson Coates of the Church Missionary Society and the Reverend John Beecham of the Wesleyan Missionary Society, still hoped that the Residency would succeed (and considered that it had already been "very advantageous to the natives") but advocated that Busby should receive more support.<sup>298</sup> By 1837, however, the prevalence of the view that New Zealand was in a state of anarchy and that the Residency was inadequate to cope with the situation, was playing into the hands of the newly formed New Zealand Association (the

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*Missionary Society on the New-Zealand Question, and Explanatory of the Present State of that Country* (Richard Watts, London, 1839) ["Coates Documents"] 41-45 at 42.

<sup>295</sup> *The Australian*, Sydney, 9 January 1835, at 3.

<sup>296</sup> See Chapter 7, text accompanying ns 92 & 100.

<sup>297</sup> Speech of Sir George Gipps on the second reading of the New Zealand Land Claims Bill, 9 July 1840, GBPP 1841 (311) XVII.493, 61-78 at 75.

<sup>298</sup> Evidence of Dandeson Coates and Rev John Beecham (8 June 1836) in *Report from the Select Committee on Aborigines (British Settlements)*, GBPP 1836 (538) VII.1 at 504-507.

colonisation plans of which are discussed in Chapter 9). Edward Gibbon Wakefield, who pulled the strings in the Association, wrote of Busby's position:<sup>299</sup>

[A]s he has no kind of authority, no physical means of enforcing his opinion whatever it may be, the inefficiency of that office may be seen without any evidence being adduced, by estimating the probable power of mere official advice upon the population of a seaport town in England.

Later that year, in another publication, Wakefield was to latch onto the description of Busby as a "man-of-war without guns", ensuring it as the enduring verdict of the Residency.<sup>300</sup> Wakefield thought Busby's "well-meant efforts have been of little or no avail". He had proved inadequate to stop "the evils of lawless British colonization", evils which had "increased since his appointment, and are steadily increasing".<sup>301</sup>

Since Wakefield's objective was to secure a royal charter for the Association under which orderly colonisation would address problems of lawlessness in New Zealand, he had no interest in suggesting that the failure of the Residency was attributable to its conduct by Busby. The missionary societies, which were concerned to stave off colonisation, had more incentive to explore how the Residency could be made more effective. Although Dandeson Coates tried belatedly to suggest that the Association was exaggerating the problems of lawlessness,<sup>302</sup> he was going against the tide, and indeed was undercut by the reports from his own missionaries in New Zealand (such as the March 1838 letter from George Clarke already cited). Instead, Beecham and Coates tried to suggest that the inadequacies of the Residency should be directly addressed either by

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<sup>299</sup> [Edward Gibbon Wakefield] *A Statement of the Objects of the New Zealand Association, with some particulars concerning the position, extent, soil and climate, natural productions, and natives of New Zealand* (London, 1837) 20.

<sup>300</sup> It was picked up by his son, Edward Jerningham Wakefield, in his book *Adventure in New Zealand, from 1839 to 1844* (John Murray, London, 1845) vol 1, 8-9.

<sup>301</sup> [Edward Gibbon Wakefield & John Ward] *The British Colonization of New Zealand; being an account of the principles, objects, and plans of the New Zealand Association; together with particulars concerning the position, extent, soil and climate, natural productions, and native inhabitants of New Zealand* (John W Parker, London, 1837) 32.

<sup>302</sup> See, for example, Dandeson Coates *The Present State of the New-Zealand Question Considered, in a Letter to J.P. Plumptre, Esq., M.P.* (Richard Watts, London, 1838) 18.

providing the Resident with the powers he lacked or by appointing “an efficient Consular agent”.<sup>303</sup>

Initially, Bourke seems to have given Busby the benefit of the doubt in terms of his performance. Largely that may have been because Bourke himself had doubts about whether the Residency could succeed without supporting force.<sup>304</sup> He had unsuccessfully recommended to the Colonial Office the permanent stationing of a ship of war “in these seas” so that British subjects in New Zealand would appreciate they were not “without pale of British protection”.<sup>305</sup> By December 1834, however, Bourke had come to the conclusion that the appointment had been “ineffectual” and that Busby had not “been able to accomplish any of the objects pointed out to him in my instructions”. In part that was because of Busby's failure to obtain the respect of the settlers and the confidence of the chiefs. Without the provision of legal powers through an Act of the Imperial Parliament or the stationing of a ship of war which might “aid his endeavours”, it would be “more creditable to withdraw him altogether, and intimate to the British residing in New Zealand, that they are not to expect the protection of His Majesty's Government in that country”.<sup>306</sup> A further letter to the Colonial Office of 1 February 1835 drew on enclosed correspondence from Busby himself to reinforce the point that Busby had “failed to obtain any considerable degree of respect among the New Zealanders”.<sup>307</sup>

By October 1835, the view that Busby was not the man for the job was shared by the Colonial Office, which authorised Bourke to remove him “to some other office for which he may be better fitted”, and to “appoint another Officer more calculated

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<sup>303</sup> See, for example, John Beecham *Colonization: Being Remarks on Colonization in General, with an examination of the proposals of the Association which has been formed for colonizing New Zealand* (Hatchards, London, 1838) 57; Coates to Glenelg, 23 July 1838, reproduced in Coates *Documents*, above n 294, 7-16 at 8-9.

<sup>304</sup> See text accompanying n 202 above.

<sup>305</sup> Bourke to Stanley, 23 September 1834, reproduced at GBPP 1835 (585) XXXIX.755 at 1 (also at CO 209/1, 132a).

<sup>306</sup> Bourke to Spring Rice, 6 December 1834, reproduced at GBPP 1835 (585) XXXIX.755 at 6 (also at CO 209/1, 134b).

<sup>307</sup> Bourke to Spring Rice, 1 February 1835, CO 209/1, 138a-162b at 139a.

to fill the Office of Resident at New Zealand".<sup>308</sup> The same despatch, however, also contained the information that the Government intended to try again for legislation to give the Resident legal powers. It mentioned that, if this course had not been decided upon, the Secretary of State, by then Glenelg, would "reluctantly" have felt compelled to direct Bourke to close down the Residency.<sup>309</sup> Although later internal Colonial Office comment expressed surprise that Bourke had not "superseded Mr. Busby by a more efficient officer" as Glenelg had authorised him to do (noting that Busby had "long been regarded as unfit for his Office"),<sup>310</sup> it seems in fact quite understandable that Bourke had not used the authority he had been given. The prospect of legislation would have profoundly altered the basis of the Residency. Even if Bourke had decided that Busby should be replaced, the terms of the instructions to his replacement would be quite different. Given the intimation in the correspondence that Glenelg was of a mind that the Residency should be closed if legislation could not be obtained, Bourke may have thought it premature to take any step until the outcome of the proposal to legislate was known and the status of the Residency had been confirmed one way or the other. The terms of the authority, requiring Bourke to find another position for Busby, may also have given him pause. There is evidence that Bourke, in March 1836, was expecting to receive a despatch with further instructions about New Zealand.<sup>311</sup> In August 1836, Glenelg wrote to advise that the legislation had not been introduced in the last session of Parliament. He continued, however, to hold out the hope that it would progress, and referred to the Cape of Good Hope Punishment Act,<sup>312</sup> passed in the last session, where Parliament had been prepared to provide extraterritorial authority in a manner comparable to that proposed for New Zealand.<sup>313</sup>

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<sup>308</sup> Glenelg to Bourke, 28 October 1835, CO 209/1, 163a-168a at 167b. This decision was reached notwithstanding support for Busby from Dandeson Coates of the Church Missionary Society and possibly Thomas Fowell Buxton. See Coates to Glenelg, 29 August 1835, CO 209/1, 361a-363a and Coates to Buxton, 31 July & 7 August 1835, ATL 89-096-3.

<sup>309</sup> Glenelg to Bourke, 28 October 1835, CO 209/1, 163a-168a at 165a-b.

<sup>310</sup> See CO 209/2, 289a (c. 24 October 1837) & 291a (15 November 1837).

<sup>311</sup> See Bourke to Glenelg, 10 March 1836, CO 209/2, 10a-15b at 10a.

<sup>312</sup> See Chapter 3, text accompanying n 92.

<sup>313</sup> Glenelg to Bourke, 26 August 1836, CO 209/2, 20a-22b.

By the time it became clear that the proposed legislative solution for New Zealand would not be pursued (no such Bill ever surfaced), events had moved on. Most significantly, Bourke had resigned and his replacement, Gipps, not only seems to have had less interest in New Zealand matters but arrived with knowledge that the whole question of New Zealand was under active consideration in London, prodded by the ambitions of the New Zealand Association. After that, it was a matter of public knowledge and comment in Sydney, picking up on English newspaper reports, that a Select Committee was inquiring into New Zealand and that a number of options were open.<sup>314</sup> From that point, it was clear that a decision on the future of the Residency would be made in London. In March or April 1839, Gipps received the advice that the British Residency would be superseded by the appointment of a Consul.<sup>315</sup>

Busby himself did not refute the suggestions that his Residency was ineffectual. Indeed his own complaints about his lack of authority in attempt to obtain powers fuelled the general opinion and may have exacerbated the weakness of his position. He even endorsed the 1836 missionary-organised petition that asserted that he was unable to do more than express regret about offending.<sup>316</sup> This was consistent with the position he had adopted from the outset,<sup>317</sup> that if his mission proved unsuccessful, it would not be his fault. The explanation for the failure of the Residency given by Busby at the time and maintained throughout his life was that

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<sup>314</sup> As is seen in the speeches of the Colonial Secretary and Governor in the Legislative Council on 22 August 1838, reported in *The Sydney Herald*, 24 August 1838, 2-3 at 2. The Colonial Secretary stated that “[b]y late English papers, it would be seen that a Committee of the House of Lords had been appointed to enquire into the state of New Zealand, and in all probability the result of that enquiry will be to give Mr. Busby more power”. Gipps said that it was “probable” that Busby would “soon receive more power from the Imperial Parliament, for besides the Committee of the House of Lords which is now sitting, in the Report of the House of Commons on the aborigines, the Committee recommend that Consuls should be appointed among the South Sea Islands, with powers resembling those of the Barbary Consuls, who have more power than other Consuls. It is also recommended that whenever a ship of war shall visit any of the Islands, the officers, presided over by the Consul, shall form a sort of Criminal Court for the trial of offenders.”

<sup>315</sup> See Chapter 9, text accompanying n 330. This communication overtook Gipps's own recent request for New South Wales to be relieved of the expense of Busby's salary. See Gipps to Glenelg, 21 March 1839, CO 209/4, 10a-11b at 11a-b.

<sup>316</sup> Busby to Glenelg, 20 April 1837, CO 209/2, 318a-319b.

<sup>317</sup> See text accompanying n 206 above.

he had been hung out to dry: he had been deprived of any legal authority; his suggestions for improvements to his position had been ignored by a governor who was personally antipathetic towards him (and had even preferred the views of Captain William Hobson, despite his knowledge of New Zealand being limited to the few weeks' cruise of HMS *Rattlesnake* in mid-1837);<sup>318</sup> his standing had been undermined when no steps were taken to punish Maori who had twice caused violence at his Residence (once to his own person).<sup>319</sup> An accurate echo of Busby's own attitude may perhaps be gleaned from the letter sent by his brother Alexander to *The Colonist* newspaper in August 1837 in response to its severe appraisal<sup>320</sup> of Busby's conduct of his Residency.<sup>321</sup> Alexander Busby acknowledged that it was "too true" that little benefit had been obtained by Busby's appointment. He remarked that "no one can be more painfully sensible of this than the Resident himself". He questioned whether the "odium of this fact" was justly applied to Busby:

Connected with the Government, it is, perhaps, too much to expect that he should wholly escape the obloquy his anomalous position—the shadow of authority without one its attributes—entails; but it is due, not more to him individually than to the public who are those mocked, to state that during his residence at New Zealand, the Government have not been in ignorance of its conditions and wants. He has to my knowledge been in a state of perfect *antagonism* in the cause of that country; unceasing and earnest have been his representations; that they have obtained little attention in the proper quarter he must regret, but can hardly be to blame. An Act of Parliament was, I believe, contemplated, to confer a necessary jurisdiction, but certain difficulties intervening, nothing was done. Without power to administer an oath—without a single constable, it needs not illustration

<sup>318</sup> Hobson made a report to Bourke in August 1837 about conditions in New Zealand, in which he proposed British intervention in the country along the lines of the East India Company's trading factories. The report is discussed in Chapters 7 and 10.

<sup>319</sup> See, for example, Busby to Colonial Secretary (NSW), 30 November 1838, CO 209/4, 43a-45b; Busby to Glenelg, 25 February 1839, CO 209/4, 47a-60b and ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 310-326 of the typescript); Busby to Colonial Secretary (NSW), 8 March 1839, CO 209/4, 71a-72a and ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 297-298 of the typescript); Busby "The British Government in New Zealand" (c. 1845), above n 246, 1-145; James Busby "Occupation of New Zealand, 1833-1843" (c. 1865), AML MS 46, Box 6, Volume 1 (typescript) ["Busby 'Occupation of New Zealand' (c. 1865)"], 1-62.

<sup>320</sup> See text accompanying n 279 above.

<sup>321</sup> Alexander Busby to the editor of *The Colonist*, 23 August 1837, published in *The Colonist*, Sydney, 31 August 1837, at 2.

## Chapter Six: Busby's Residency

of his “inability to protect the lives and property of His Majesty’s subjects”; nor can it be a matter of surprise that he should have lost much consideration with the natives, when they see him unprotected by his Government, so that the very Chief, who for plunder attacked his dwelling in the night, upwards of a year since, when a musket ball struck a splinter into his cheek while standing in his own door—lives, and lives to boast, that he is the man who shot the British Resident in his Residency!

Busby's confidence that he could not be blamed for the failure of his Residency proved to be misplaced. Belatedly, he attempted to introduce some balance by claiming that he had, in fact, managed by personal intervention to achieve some good.<sup>322</sup> This repositioning was made difficult by his continued assertion that the Residency model as implemented by Bourke had been flawed. Nor did Busby give chapter and verse to support the contention that he had been more successful than generally accounted or than Bourke was entitled to expect. While it might be possible to reconstruct a better picture of the day-to-day operations and achievements of the Residency, the task is not assisted either by the slant taken by Busby in his official despatches and personal correspondence or by loss from Archives New Zealand of the greater part of the inwards correspondence to the Resident from settlers, mariners and Maori seeking his help.<sup>323</sup> The partial record of letters to the Resident that remain and the tantalizing descriptive list of the lost correspondence that remains at Archives New Zealand indicate that Busby reported only a small proportion of the matters referred to him. None of his replies survive except where, exceptionally, he did make a report and enclosed copies of the correspondence. It is therefore difficult to recapture the work of the Residency from the written record (and the written correspondence itself is likely to have been part only of the approaches made to Busby).

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<sup>322</sup> See, for example, Busby to Glenelg, 25 February 1839, CO 209/4, 47a-60b at 49b-50a & 55b-56a and ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 312-313 & 318-319 of the typescript); Busby “Occupation of New Zealand” (c. 1865), above n 319, 54-60.

<sup>323</sup> The inwards letters to Busby that comprise the “British Resident’s Archives” are in two volumes, October 1832–October 1834 and January 1835–October 1839: see ANZ AABS 8156, BR 1/1 & BR 1/2 respectively. BR 1/2 (1835–1839) is missing. References to letters in BR 1/2 in this chapter are therefore references to the extant descriptive list of correspondence.

Claudia Orange, who did review the full record of inwards correspondence before much of it was lost, gives a richer picture of Busby's tenure as Resident than is to be found in other histories. Significantly, she considers that Busby's weakness and the "state of anarchy" in New Zealand were both "somewhat erroneous impressions". They were impressions that Busby himself had helped to create by his official reports which "should be judged as efforts of a man who had a vested interest in encouraging more decisive moves by the Crown". Orange points out that, privately in correspondence with his family, Busby was less concerned about his security in New Zealand than in his despatches.<sup>324</sup>

For the most part, historians have not critically reassessed the contemporary views that Busby's Residency was a failure either entirely attributable to his lack of support or also partly owing to his own personal deficiencies. Initially, opinion was adverse towards Busby. So, Arthur Thomson, writing in 1859, was happy to accept the summary of Busby as a "man of war without guns", but also credited the man himself with "more imagination than judgment", who had developed ideas for a Parliament of Chiefs, a flag, and a declaration of independence in order "to magnify the importance of his office".<sup>325</sup> He described him as "estranged from the settlers by his haughty manners and caustic wit".<sup>326</sup> Similarly, William Pember Reeves in 1898 repeated the ubiquitous verdict and described Busby's career as a "prolonged burlesque—a farce without laughter, played by a dull actor in serious earnest".<sup>327</sup> The Declaration of Independence was dismissed as one of "Mr. Busby's bloodless puerilities".<sup>328</sup> Again while he noted the lack of support for Busby, Reeves described him as "a well-meaning, small-minded person, anxious to justify his appointment".<sup>329</sup>

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<sup>324</sup> Orange *Treaty of Waitangi*, above n 252, 17-18.

<sup>325</sup> Arthur Thomson *The Story of New Zealand: Past and Present—Savage and Civilized* (John Murray, London, 1859) ["Thomson *The Story of New Zealand*"] vol 1, 271-272.

<sup>326</sup> Ibid 286.

<sup>327</sup> William Reeves *The Long White Cloud: Ao Tea Roa* (Horace Marshall & Son, London, 1898) 158-159.

<sup>328</sup> Ibid 161.

<sup>329</sup> Ibid 159.

## Chapter Six: Busby's Residency

His Alsations<sup>330</sup> did not like him, and complained that his manners were exclusive and his wit caustic. Probably this meant nothing more than he declined to join in their drinking-bouts.

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It has been well said of Mr. Busby that "his office resembled a didactic dispatch; it sounded well, and it did nothing else".

In the twentieth century a more benign view of Busby started with the writing of Lindsay Buick, and was continued by Guy Scholefield, JC Beaglehole, James Rutherford and Busby's biographer, Eric Ramsden (whose work received the imprimatur of Viscount Bledisloe, the then Governor General of New Zealand and donor of the Treaty House and grounds to the nation).<sup>331</sup> The gist of these writers—which reached their apogee in Ramsden's hagiography—was consistent with Busby's own account.<sup>332</sup> Busby had been given an impossible task, in which he succeeded beyond what could reasonably have been expected. Rather than being idle and naïve, he was conscientious, tactful, and a man of vision, with great public spirit and self-sacrificing (he beggared himself when, if he had stayed in New South Wales and devoted himself to pastoral and viticultural pursuits, he "would have died a wealthy man"<sup>333</sup>). Both the flag and the Declaration indicated his idealism and foresight, and paved the way for the Treaty of Waitangi. Busby deserved credit as a "faithful son of Empire",<sup>334</sup> and could have expected the New Zealand governorship or, at least, an important consular or pro-consular role in another part of the Empire.<sup>335</sup> In particular, these writers accept that he was insufficiently supported from New South Wales (which ignored the proposals he made for the improvement of the Residency) and that Bourke was prejudiced

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<sup>330</sup> An allusion to the area of London where law was not enforced.

<sup>331</sup> Buick *The Treaty of Waitangi* (3rd ed, 1936), above n 275, 12-32; Guy Scholefield *Captain William Hobson, First Governor of New Zealand* (Oxford University Press, Oxford, 1934) 61-63; JC Beaglehole *New Zealand: A Short History* (George Allen & Unwin Ltd, London, 1936) 18-19; Rutherford "Busby", above n 75; Ramsden *Busby of Waitangi*, above n 75 (with a foreword by Viscount Bledisloe at 7-10).

<sup>332</sup> See above n 319 and accompanying text.

<sup>333</sup> Ramsden *Busby of Waitangi*, above n 75, 39.

<sup>334</sup> Ibid 11.

<sup>335</sup> Bledisloe foreword to Ramsden *Busby of Waitangi*, above n 75, 10.

against him for reasons which vary but include class difference, political difference, the manner of Busby's appointment, his juries paper, and transferred animus from John Busby Snr. Although Buick considers that Busby could have worked more closely and effectively with the missionaries,<sup>336</sup> the main concession against Busby made by these writers is that he had no sense of humour.<sup>337</sup>

Post-war, historians tended to return closer to the earlier Thomson-Reeves line. There were early signs in Rutherford's revision of his earlier, less critical views.<sup>338</sup> From AH McIntock on, while the relative responsibilities of the British authorities and Busby continues to be weighed, Busby is not exonerated from blame in what continues to be accepted as the failure of the Residency in addressing the problems of order on the New Zealand frontier. McIntock "[g]ranted ... that the situation confronting Busby in May 1833 would have taxed the resources of a genius of statecraft" but yet conceded Busby's "singular inability to meet the challenge".<sup>339</sup> JW Davidson considers that Busby's lack of success, though to some extent a consequence of his lack of legal powers, was "almost equally ... a result of his personal qualities".<sup>340</sup> Keith Sinclair considers that "Busby proved unable to influence the chiefs, or to keep on speaking terms with the missionaries and settlers, or even to maintain an official appearance of dignity".<sup>341</sup>

No one in New Zealand took the Residency seriously except Busby, a pompous young man, who felt cut out to play some important role in life, but found himself cast as the central figure in a solemn farce. However, in view of the false position in which he had

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<sup>336</sup> Buick *The Treaty of Waitangi* (3rd ed, 1936), above n 275, 21.

<sup>337</sup> See, for example, Ramsden *Busby of Waitangi*, above n 75, 26; and Bledisloe foreward, *ibid* 10.

<sup>338</sup> James Rutherford "Busby, James (1801–1871)" in AH McIntock (ed) *An Encyclopaedia of New Zealand* (Government Printer, Wellington, 1966): "Party politics apart, Busby had little claim of promotion. His record of accomplishments in five years was unimpressive—only a file of plaintive dispatches, a broken set of shipping returns, and one or two isolated cases of active intervention."

<sup>339</sup> McIntock *Crown Colony Government*, above n 1, 21.

<sup>340</sup> Davidson "Busby", above n 75.

<sup>341</sup> Keith Sinclair *A History of New Zealand* (4th ed, Penguin Books, Harmondsworth, Middlesex, 1991) 51.

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been placed by the remissness of the authorities, it is a mistake to attribute his failure chiefly to his personal faults. It was inconceivable that he should succeed.

If Kendall awaits his Marlowe or Goethe, Busby (and his superiors) deserve the attention of a Ben Jonson, or perhaps a Gilbert and Sullivan.

While Peter Adams stresses the “lack of a lawfully constituted magisterial jurisdiction” as the principal reason why the Residency failed,<sup>342</sup> he allows that part of the reason was Busby's own personality.<sup>343</sup> Adams considers that Bourke was “undoubtedly prejudiced against Busby” both because of his father and because of the manner of his appointment: “[b]ut Busby did his cause no good by his pedantry and pomposity and seems to have successfully confirmed Bourke's prejudice for the duration of the Governor's term”.<sup>344</sup> Although others before him had mentioned Busby's service to Empire approvingly, Adams, writing in a post-colonial climate, claims that Busby had “a consciously imperialist conception of his role”.<sup>345</sup> (For his part, Adams regards the appointment of a Resident as setting Britain on the slippery slope to annexation.<sup>346</sup>) Adams, charting the Colonial Office decision-path to annexation in 1840, sees Busby as having played a significant role through his despatches in favour of greater intervention to curb the problems of lawlessness.<sup>347</sup> James Belich, too, takes the view that Busby's reports persuaded the British Government, wrongly in his view, that there was no option but to annex New Zealand in 1840.<sup>348</sup> He suggests that Busby's reports were a product of his own resentments at the position he found himself in:<sup>349</sup>

Wounded in one incident by the Maori he was supposed cheaply and effortlessly to dominate, humiliated and plundered in others, his busy pen scratched far into the night at

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<sup>342</sup> Adams *Fatal Necessity*, above n 86, 54.

<sup>343</sup> Ibid 64.

<sup>344</sup> Ibid 65.

<sup>345</sup> Ibid 66 (referring to writings by Busby in 1831 and 1856 and asserting that “his despatches during the 1830s bear out this self-confessed expansionism”).

<sup>346</sup> Ibid 73.

<sup>347</sup> Ibid 87.

<sup>348</sup> James Belich *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century* (Penguin Books, Harmondsworth, Middlesex, 1996) 134, 170, 171 & 187.

<sup>349</sup> Ibid 186.

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his Waitangi Residency at the Bay of Islands, writing myth into reality, Britain into New Zealand, and himself out of a job.

More recently, the work of historians engaged in the Waitangi Tribunal's Northland Inquiry has drawn attention to the extent to which Busby's work proceeded upon a linear path, from the plan he had already formed before reaching New Zealand to promote Maori adoption of a flag, through the Declaration of Independence and the formation of the Confederation of Chiefs, to proposals for a British protectorate in New Zealand.<sup>350</sup> Some would take this design forward into the Treaty.<sup>351</sup> With such focus, the success of Busby's Residency has a different measure. Ian Wards, who with Orange is one of the few historians to attempt an appraisal of Busby's Residency having had access to the full record of inwards correspondence, had in 1968 suggested that the "link" that Busby had forged between Britain and Maori "may yet be found pure gold".<sup>352</sup> Grant Phillipson, in a report for the Northland Inquiry, considers that Orange and Wards are on the right track when it comes to Busby:<sup>353</sup>

Both Orange and Ian Wards, who do not often see eye to eye in their interpretations of this period, agree that these actions on the part of Busby [the flag, the Declaration of Independence, and his role as a mediator in disputes between Maori and Europeans] contributed very significantly to the climate of consent to the Treaty in 1840. Thus, those historians who see Busby as a failure, such as Adams, are interpreting his actions in terms of failure to fulfil his grandiose instructions and single-handedly police the frontier. If instead, we interpret the impact of the Resident in terms of Treaty history, as establishing positive relationships with the chiefs, further personalizing the Crown in

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<sup>350</sup> Donald Loveridge "'The Knot of a Thousand Difficulties': Britain and New Zealand, 1769–1840" (Brief of Evidence for the Crown Law Office, Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 17 December 2009, A18) 54–86. See also Donald Loveridge "The 'Declaration of the Independence of New Zealand' of 1835, and the Confederation of the United Tribes, 1835–1840" (Wellington, 1998) ["Loveridge 'Declaration of Independence'"].

<sup>351</sup> Samuel Carpenter "Te Wiremu, Te Puhipi, He Wakaputanga Me Te Tiriti: Henry Williams, James Busby, A Declaration and the Treaty" (report for the Waitangi Tribunal, Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, November 2009, A17) ["Carpenter 'A Declaration and the Treaty'"] chs 1 & 4 and conclusion; Phillipson "Bay of Islands Maori and the Crown", above n 23, 232–262.

<sup>352</sup> Ian Wards *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852* (AR Shearer, Government Printer, Wellington, 1968) 10. My own chapter on Busby in my master's thesis on the bringing of English law to New Zealand is, as perhaps with Wards, too uncritical.

<sup>353</sup> Phillipson "Bay of Islands Maori and the Crown", above n 23, 233.

## Chapter Six: Busby's Residency

their eyes, explaining British intentions with a positive gloss, and accustoming them to a circumscribed role that they thought of as something like a kawana or "king", then the Resident's actions take on a much greater significance.

There is a risk in seeing the Treaty of Waitangi as the end point against which the success of the British Residency of 1833–40 is to be assessed. That is not only because it is almost impossible to weigh the relative importance of other factors which contributed to the "climate of consent to the Treaty", including changes in Maori society and aspirations and the influence of the missionaries. It is also because it would be wrong to assume that the achievement of the Treaty is the appropriate measure of the success of the Residency. If the Treaty was the end in view, then the Residency must be adjudged a success. But it is clear from the terms of Bourke's Instructions that the ends were open. So, for example, the Instructions looked to Maori government (or governments) and Maori systems of justice. Whether the Residency is properly accounted a success turns in part on how well Busby fulfilled the Instructions and whether other outcomes were possible in 1840 or beforehand. Ultimately any such assessment may be impossible to separate from the meaning of the Treaty and the extent to which it permitted Maori political and social autonomy. Wider questions about the meaning of the Treaty and the circumstances of its adoption are addressed throughout this thesis. In the present chapter, I concentrate on the narrower question of how well Busby fulfilled the Instructions he was given. In Chapter 7, I deal with the ideas Busby developed during the course of his Residency about the appropriate association between Great Britain and New Zealand.

### **Evading Instructions**

As can be seen from their terms,<sup>354</sup> Bourke's Instructions made it clear that the Resident was expected to influence events in New Zealand through the relationships he was to develop with the chiefs and the missionaries. It was through the "good will of the chiefs" that Busby was expected to achieve some specific objectives: securing British criminals and escaped convicts (for return to Sydney

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<sup>354</sup> See text accompanying ns 216-241 above.

or Hobart for trial under imperial legislation); promoting inter-tribal peace; assisting Maori in the development of “a settled form of Government” and courts (which might deal with European criminals). The Instructions were clear that Busby was not a magistrate or policeman and had no authority independent of the chiefs, even in respect of British subjects. The purpose of Busby's appointment was to protect Maori from British depredations and to avert Maori reprisals against “well disposed” settlers, but (except where criminal activity came within the imperial legislation) was not directly concerned with regulating the relations of British subjects among themselves. Co-operation with the missionaries was not only to assist Busby in securing the good will of the chiefs (because of the missionaries' knowledge of the language and customs of Maori). It was a stand-alone object of the Residency that the Resident would assist the missionaries to achieve their “great objects, the extension of Christian knowledge throughout the Islands, and the consequent improvement in the habits and morals of the People”. Ancillary functions were to develop trade (which also required him to develop relationships with British traders) and to keep New South Wales “fully informed” of what was happening in New Zealand.

With the emphasis on the need to build relationships, it might be thought that Busby's own history made him an unpromising choice for the position. As has been seen, he was lucky to have been appointed; Darling's preferred candidates had much better credentials. By personality, Busby was thin-skinned and querulous and disliked not getting his own way. When rebuffed or slighted (something he was over-quick to imagine), Busby could behave badly and display lack of judgement. He was jealous of his own status and preferred to command. His overwhelming self-belief caused him to disparage the ideas of others and maintain his own with great obstinacy. On the rare occasion when he did change his views, the shift was never acknowledged and certainly never attributed to the influence of anyone else.

These traits which can be seen in Busby's earlier history are evident also in his conduct as Resident. Busby seems never to have embraced the Instructions. He

seems rather to have clung to his 1831 vision that the British Resident in New Zealand should be “invested with the authority of a magistrate over his own countrymen”.<sup>355</sup> Busby was never reconciled to his lack of legal powers or coercive force: he kept hoping and agitating for both but also argued with Bourke that some lawful authority was inherent in his office, using inappropriate analogies with the powers exercised by British Consuls in Santiago and the Sandwich Islands and suggesting that he had “the jurisdiction of the Admiralty” in relation to “offences committed by British Subjects belonging to Ships in Harbour”.<sup>356</sup> In one despatch, he even described himself as a “Police Officer”.<sup>357</sup> Keeping to the role he had envisaged, Busby largely ignored his Instructions, preferring to regard them as giving him a wide discretion<sup>358</sup> to regulate the conduct of British subjects and to protect British interests, including from Maori. Thus his earliest despatches are dominated by issues concerning British subjects: the care and conveyance to Sydney of a sick sailor; possible prosecutions of British subjects for theft, bigamy, burglary, marooning, and causing a drowning; and an arbitration of a land ownership dispute between settlers.<sup>359</sup> In addition, two incidents with cross-racial dimensions indicate Busby's focus on the protection of British property and his neglect of the instruction to “conciliate the good will of the chiefs”.

In the first, Busby, having failed to persuade the captain of HMS *Imogene* to get involved in the recovery from Pomare of King's schooner,<sup>360</sup> spurned Pomare's attempts to obtain an interview (and his present of a “very fine mat and a large

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<sup>355</sup> Busby *Authentic Information*, above n 118, 68.

<sup>356</sup> Busby to Colonial Secretary (NSW), 27 May 1833 (no 10) & 25 February 1834 (no 36), ATL qMS-0344 (holographs) & qMS-0345 (typescript) (pp 42-43 & 77-81 of the typescript).

<sup>357</sup> Busby to Colonial Secretary (NSW), 13 January 1834 (no 34), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 75 of the typescript).

<sup>358</sup> See text accompanying n 209 above.

<sup>359</sup> See Busby to Colonial Secretary (NSW), 25 May 1833 (no 8), 31 May 1833 (no 13), 1 June 1833 (no 12), 17 June 1833 (no 18), 17 June 1833 (no 19), 17 July 1833 (no 23), 25 July 1833 (no 25), ATL qMS-0344 (holographs) & qMS-0345 (typescript) (pp 40-41, 45-47, 55-58, 65-67 of the typescript).

<sup>360</sup> Busby to Colonial Secretary (NSW), 24 May 1833 (no 6), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 38-39); Captain Blackwood to Busby, 17 May 1833, ANZ AABS 8156 BR 1/1, 23.

pig")<sup>361</sup> and continued to try to involve first HMS *Buffalo*<sup>362</sup> and then HMS *Alligator* to threaten Pomare with force. Captain Lambert of the *Alligator* was prevailed upon to allow his ship to be used to threaten bombardment of Pomare's pa but only on the basis that the Church Missionary Society missionaries would first attempt to arbitrate the matter. William Williams and William Yate persuaded Pomare to go aboard the *Alligator*. Pomare was found by Williams to have had a valid claim for non-payment of the timber to the value of £20 used in construction of the boat, and Lambert paid him the £20.<sup>363</sup> Although Busby in his despatch expressed himself well satisfied with the outcome, it is clear from the accounts of the *Alligator*'s surgeon, William Marshall, and Yate that Busby had escalated matters by assuming that Pomare was in the wrong and was defying him, justifying shelling the pa if he did not capitulate by giving up the schooner.<sup>364</sup> The involvement of the missionaries was at the suggestion of Lambert and not Busby. Indeed, when Pomare boarded the *Alligator*, by Busby's own account, he reminded him that "if he did not give up the Vessel of his own accord, she would certainly be taken by force".<sup>365</sup>

In the second incident, Busby led a chase by three boats of a muru party of twenty-four Maori who had stripped the settler, Joel Polack, of goods because he had cursed them.<sup>366</sup> In his despatch, Busby described how on coming up on the group, he had told them that such disputes should have been referred to him for enquiry "as it was for that purpose I was here". He told them that:

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<sup>361</sup> Busby to Colonial Secretary (NSW), 3 July 1833 (no 21), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 61-62).

<sup>362</sup> Captain Sadler to Busby, 21 November 1833, ANZ AABS 8156 BR 1/1, 112.

<sup>363</sup> Lambert transported the schooner to Sydney for sale. Governor Bourke directed that the proceeds of sale, net of costs (including the £20 paid by Lambert to Pomare), be given to Mair and Powditch. See Colonial Secretary (NSW) to Busby, 24 April 1834, AML MS 91/75, Box 2, Folder 51, item 334.

<sup>364</sup> Compare Busby to Colonial Secretary (NSW), 24 March 1834 (no 37), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 81-84 of the typescript) to: Marshall *Two Visits to New Zealand*, above n 277, 21-23; and Evidence of Rev William Yate (13 February 1836) & William Marshall (2 May 1836) in *Report from the Select Committee on Aborigines (British Settlements)*, GBPP 1836 (538) VII.1 at 188-189 & 447-448 respectively.

<sup>365</sup> Busby to Colonial Secretary (NSW), 24 March 1834 (no 37), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 82 of the typescript).

<sup>366</sup> Busby to Colonial Secretary (NSW), 3 July 1834 (no 22), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 62-65 of the typescript).

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King William would never allow his subjects to be plundered in such a manner without resenting it; and they were asked whether they were disposed to restore the property they had taken, or whether they wished King William for their enemy? They replied to the latter question "by no means".

Busby then told them it would be easy for King William to "send two or three Ships of War and destroy them all".<sup>367</sup> The chief then offered to return his share of the plunder (a musket and a shovel) but was told by Busby that "everything [was] to be delivered up". Busby reported that the chief was unable to achieve this and that his party had withdrawn. He was "sorry to add" that the muru party had then fired their muskets over the heads of his group. "This", he wrote, "could be considered in no other light than a defiance": "it was very painful to witness the manifestation of such a spirit". Busby reported that the tribe involved was a small tribe, unconnected with "any Chief or Tribe of note", and had a "very bad character among their neighbours".<sup>368</sup> The despatch did not seek any instructions about the incident or ask for any assistance. What is worth noting is Busby's ready dismissal of the insult and the customary response to it, his insistence on full restoration, and his willingness to resort to confrontation, backed up by extravagant threats.

The responses from Sydney to Busby's initial despatches concerning his activities did not start to arrive until August 1833. They cannot have pleased Busby. Indeed he sent no further despatches between mid-September 1833 and mid-January 1834, suggesting that he was put out. Bourke seems to have thought that some of Busby's efforts in relation to British subjects were outside his brief. The bigamy case elicited the response that "this is a business in which you should not at all interfere" as it "in no way affects the New Zealanders nor the intercourse between this Country and these Colonies or Great Britain".<sup>369</sup> The arbitrations<sup>370</sup> Busby had conducted to resolve disputes between British subjects were said to be unobjectionable, but it was "no part" of Busby's official duty to undertake them

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<sup>367</sup> Ibid (p 64 of the typescript).

<sup>368</sup> Ibid (p 65 of the typescript).

<sup>369</sup> Colonial Secretary (NSW) to Busby, 23 July 1833 (no 33/15), AML MS 91/75, Box 2, Folder 49, item 318[b].

<sup>370</sup> The Colonial Secretary's letter refers to other cases reported by Busby subsequent to the arbitration mentioned in his despatch of 1 June 1833 (above n 359).

and there was no need to report such cases "unless you find something so particular as to require the Communication".<sup>371</sup>

The incidents involving Pomare and the muru party drew rebukes from Bourke, delivered on his behalf by the Colonial Secretary.<sup>372</sup> While the outcome concerning Pomare and the schooner was satisfactory, Busby's course of action had been reckless.<sup>373</sup>

At the same time His Excellency desires me to represent to you that you should endeavour by all possible means to abstain from embarrassing yourself with Questions of the kind under consideration, and above all from committing yourself or the British Government by holding out threats which cannot be left unexecuted without reflecting discredit, but which it may be dangerous to carry into effect. If Pomare had made resistance in the case the consequence might have been destructive of our connexion with New Zealand, and being also aware of the weakness of your position, which His Excellency sees no means at present of strengthening, you should adopt in all cases the most conciliating proceeding, endeavouring to attain the object by persuasion and never by threats, unless when persuasion fails, and you are actually provided with the means of carrying them into effect, and that the occasion justifies the measure. Captain Lambert might, without blame, have declined interfering in the manner proposed by you in which case the non-performance of the measure threatened would certainly have brought discredit both on yourself and the Government.

The communication relating to the muru party was even more critical of Busby's actions. The Colonial Secretary wrote: "I am directed by His Excellency to inform you that he agrees with you in considering the occurrence you relate as unfortunate chiefly on account of the part you took in it." Bourke took the view that Polack's behaviour was offensive to Maori, even if it was unfortunate that he had been robbed. It was, however, "peculiarly unlucky that you should have engaged in an

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<sup>371</sup> Colonial Secretary (NSW) to Busby, 7 November 1833, SRNSW NRS 939, 4/3523, 279-280 at 280 (also ANZ Micro-Z 2710 & UoA Microfilm 09-006 Reel 4). Note that this letter is missing from the series of Colonial Secretary (NSW) correspondence retained by Busby and now in the Algar Williams Papers in the Auckland Museum Library (although we know Busby did receive it because he replied to it in a letter dated 13 January 1834).

<sup>372</sup> See also Colonial Secretary (NSW) to Busby, 30 August 1833 (received 18 October 1833), AML MS 91/75, Box 2, Folder 49, item 323: "I beg to caution you not to place too much reliance on all that you hear from Europeans settled in the Island for gainful objects."

<sup>373</sup> Colonial Secretary (NSW) to Busby, 24 April 1834, AML MS 91/75, Box 2, Folder 51, item 334.

## Chapter Six: Busby's Residency

affair foreign to the object of your employment in New Zealand, and in its result likely to bring your office into disrepute and diminish its usefulness". Bourke considered that Busby "should cautiously abstain from joining any expeditions of the kind you have narrated, or engaging in hostilities with any portion of the Natives unless absolutely required for your defence against aggression".<sup>374</sup>

The line of proceedings marked out for you in your instructions is of a higher character than that which is the duty of a police magistrate or constable, and you should be particularly anxious to preserve the dignity of your station by not making yourself too common, and by acting on all occasions through the instrumentality of the Native Chiefs. If you had strictly confined yourself to this mode of proceeding you might or might not have succeeded in convincing the Natives of the impropriety of their conduct and in recovering Mr Polack's property, but you would have avoided a personal collision with a band of Natives over whose minds it is your object to obtain a moral influence, and you would have escaped the discredit of joining in a pursuit from which your party was compelled to retire with so little advantage.

In conclusion His Excellency directs me to request that for the future you will abstain cautiously from taking part personally in these affrays, and to repeat that it is only through the medium of the Native Chiefs that you can obtain power and achieve anything [??] useful. It is sincerely hoped that your prospects of future usefulness may not be blighted by the unlucky adventure in which you have been engaged in the business above alluded to.

Busby's reaction to Bourke's divergent view of his functions can only be guessed at. The only direct response he made was to the suggestion that he was stepping outside his official role in undertaking arbitrations between British subjects. To this, he made the reply:<sup>375</sup>

I do myself the honor to acquaint you for the information of H.E. the Governor that I have taken every opportunity of making it generally known that I have no authority to interfere in matters of debt, or in disputes between parties which do not involve a criminal charge; altho I have always expressed my readiness to act as an arbitrator if

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<sup>374</sup> Colonial Secretary (NSW) to Busby, 31 August 1833, AML MS 91/75, Box 2, Folder 50, item 324.

<sup>375</sup> Busby to Colonial Secretary (NSW), 13 January 1834 (no 31), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 71-72 of the typescript).

## Chapter Six: Busby's Residency

applied to in writing by both parties; and I have in fact acted so in several cases which I have not thought it necessary to report for H.E. information.<sup>376</sup>

Busby does seem to have altered his pattern of reporting. A number of significant incidents which are recorded in the British Resident's Papers do not find themselves into his despatches. These were not confined to the arbitrations between British subjects which Bourke had indicated that there was no need for Busby to report, although there are a number of examples of work undertaken by him falling into that category. They include disputes between British subjects about employment, tenancies, debts and land.<sup>377</sup> There were dozens of cases referred to Busby concerning minor offending or nuisances.<sup>378</sup> Although he did not always intervene, in many he was instrumental in achieving reconciliation between parties. The picture to be obtained from the British Resident's Papers suggests more activity than is apparent from the contemporary verdicts of Busby and his official reports. Busby took good statements in matters requiring the checking of facts (whether relating to a death, the shooting of trespassing cattle, or the content of agreements). The fact that applications to him continued throughout the period of the Residency suggests that he was by no means ineffectual in such matters. It may be understandable that minor offending, although within the scope of his Instructions, was not reported, but it is strange that he did not think it advantageous to report his successes (which might have led to his Residency being viewed more favourably in New South Wales). What is more surprising is that some quite significant offending or unusual cases that might have been of interest to British officials and given them better insight into New Zealand conditions were not reported. A number of examples may be given.

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<sup>376</sup> See the Colonial Secretary's reply acknowledging, by direction of the Governor, Busby's letter "alluding in reference to mine of the 7 November 1833 ... to matters at New Zealand, which you conceive to come within your province as British Resident to investigate". Colonial Secretary (NSW) to Busby, 22 February 1834 (no 34/2), AML MS 91/75, Box 2, Folder 50, item 331.

<sup>377</sup> See ANZ AABS 8156 BR 1/1, 50-53, 88-89 & 102-104; and BR 1/2, 53-62, 65-66, 77, 108, 142 & 145.

<sup>378</sup> See, for example, ANZ AABS 8156 BR 1/1, 95-96 & 121-122; and BR 1/2, 41, 44-44A, 47 & 76, 107.

Busby did not provide reports on his assistance in the formation of the “Kororareka Union Benefit Society” in September 1833.<sup>379</sup> Nor did he mention the Kororareka Association formed in May 1838 or its policing activities (which included tarring and feathering).<sup>380</sup> He does not report a number of cross-racial disputes (assaults, plunder, and disputes about land) in which he seems to have successfully intervened.<sup>381</sup> Nor does he report the occasions on which he was invited to assist chiefs in judging or advising on the disposition of cases involving wholly Maori disputants or offending, or his encouragements to peace and to follow missionary teachings.<sup>382</sup> It seems odd that Busby did not report an inquiry in March 1834 into the death of a seaman, in which he concluded that the death was caused when the seaman drank “a quantity of sugar-of-lead water put before him instead of Gin, in a Public House on the Beach at Kororareka, Bay of Islands, kept by a person named Quigley”.<sup>383</sup> Surprising, too, is the absence of report about an alleged murder by a Maori of a seaman on board the *Nimrod* in March 1839.<sup>384</sup>

One of the matters most revealing of New Zealand conditions that was not reported by Busby, even though it must have occupied a great deal of his time, concerned a dispute in late 1833 about the ownership of the *Emma*, a vessel purchased in Sydney by British subjects for the Hokianga chief Pi for the purpose of a taua against Ngaiterangi.<sup>385</sup> Although there were overtones of the *Elizabeth* affair (the *Emma*, crewed by British seamen, undertook three raids against Ngaiterangi), and although Busby took careful statements which revealed this dimension to a dispute which concerned ostensibly simply Pi's claim to part ownership of the *Emma*, the case does not feature in despatches until 1835, when the ownership of the *Emma*

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<sup>379</sup> See ANZ AABS 8156 BR 1/1, 92-94.

<sup>380</sup> See Thomson *The Story of New Zealand*, above n 325, vol 1, 286; and Resolutions of the Kororareka Association, 23 May 1838, CO 209/3, 547 (reproduced in Coates *Documents*, above 294, 50-53). The Resolutions were sent to Busby; see ANZ AABS 8156 BR 1/2, 186.

<sup>381</sup> See, for example, ANZ AABS 8156 BR 1/2, 26-27, 50-51, 65-66 & 77, 93, 101 & 103, 141. In other cases, the outcomes of Busby's interventions are not known or appear to have been unsuccessful. See, for example, ANZ AABS 8156 BR1/1, 143; and BR 1/2, 127, 129-130, 176-178, 180-185 & 201.

<sup>382</sup> See, for example, ANZ AABS 8156 BR 1/2, 139, 189, 191, 192 & 195.

<sup>383</sup> ANZ AABS 8156 BR 1/1, 140-142.

<sup>384</sup> ANZ AABS 8156 BR 1/2, 149-153.

<sup>385</sup> ANZ AABS 8156 BR 1/1, 68-80.

arose in connection with the administration of John Poyner's estate.<sup>386</sup> The case is interesting because it reveals the sophistication of contractual dealings between Europeans and Maori: one of the agreements about payment for the *Emma* provided security against the eventuality that one of the contracting chiefs would not return from the taua and that others would have to step up to his obligations. The case indicates that Maori, at least in that period in the early 1830s, were able to bargain for consideration of value to them (in the case of Pi, modern transportation to war in exchange for timber and flax). The case is also interesting because it reflects the realities under which missionaries worked: missionaries accompanied the taua in their vessels, *Active* and *Karere*, hoping to make peace.<sup>387</sup>

There were, however, cases that Busby did report. In particular, he seems to have been conscientious in reporting issues concerning British shipping (complaints by captains against crew and crew against captains, incidents of desertion or "crimping",<sup>388</sup> and cases of shipwrecked or abandoned sailors)<sup>389</sup> and the administration of the estates of British nationals who died intestate.<sup>390</sup> In both cases, these reports were usually the occasion for Busby to request legal authority to deal with such matters. Busby's despatches did, however, also include reports of serious crimes and matters illustrative or arising out of the absence of law in New Zealand. As will be seen, it is arguable that the reports of lawlessness and the threat it posed to both British and Maori became more insistent as Busby moved to

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<sup>386</sup> See Busby to Colonial Secretary (NSW), 13 July 1835 (no 59), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 127-131 of the typescript).

<sup>387</sup> See Henry Williams *The Early Journals of Henry Williams, Senior Missionary in New Zealand of the Church Missionary Society, 1826-40*, ed. by Lawrence Rogers (Pegasus Press, Christchurch, 1961) 206-244 & 278-306; Ballara *Taua*, above n 36, 147-152 & 260-262; RD Crosby *The Musket Wars: A History of Inter-Iwi Conflict 1806-45* (Reed Books, Auckland, 1999) 250-252 & 267-269.

<sup>388</sup> "Crimping" refers to the practice of kidnapping or coercing men into service as sailors.

<sup>389</sup> Busby to Colonial Secretary (NSW), 13 January 1834 (no 33), 4 February 1834 (no 35), 25 February 1834 (no 36), 6 January 1836 (no 81), 6 January 1836 (no 82), 17 March 1836 (no 92), 27 July 1836 (no 100), 24 January 1838 (no 123), ATL qMS-0344 (holographs) & qMS-0345 (typescript) (pp 73-74, 76-77, 77-81, 172A-173, 174, 207-208, 224, 270-271 respectively of the typescript); Busby to Hay, 3 April 1834, CO 209/1, 213a-218b.

<sup>390</sup> Busby to Colonial Secretary (NSW), 13 July 1835 (no 58), 13 July 1835 (no 59), 10 August 1835 (no 62), 7 December 1835 (no 79), 24 February 1838 (no 124), ATL qMS-0344 (holographs) & qMS-0345 (typescript) (pp 122-127, 127-131, 136, 171-172A, 271-274 respectively of the typescript).

advocate direct British intervention to provide government in New Zealand. The cases included two in which Busby himself was directly affected: the robbery or plunder of the Residency on 30 April 1834 by the chief Rete and accomplices in which Busby received a splinter wound to the head when a shot hit the house after being fired in his direction;<sup>391</sup> and the bloodshed at the Residency caused in January 1836 when Busby tried unsuccessfully to mediate a land dispute between two tribes and one, Te Hikutu (under the chief Waikato) resorted to violence. In the second incident, two men were killed, another four were wounded, and the Residency floors were stained with blood when Maori sought refuge in it.<sup>392</sup>

Busby's despatches also included information about the involvement of British nationals in Maori disputes, such as the January 1836 report about the transportation by the *Lord Rodney* of an invasion party of Te Atiawa to the Chatham Islands,<sup>393</sup> the 1837 war at the Bay of Islands,<sup>394</sup> and the conflicts incited by the competition between William White, the former Wesleyan missionary, and Thomas McDonnell at the Hokianga.<sup>395</sup> They also included matters ranging from the scandal concerning the Reverend William Yate,<sup>396</sup> the removal to Australia of Europeans thought to be deranged,<sup>397</sup> violence between settlers arising out of debt, property or trespass disputes,<sup>398</sup> violence perpetrated by drunken seamen,<sup>399</sup> an

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<sup>391</sup> Busby to Hay, 3 May 1834, CO 209/1, 237a-238b. See EH McCormick's description of the incident and its aftermath in Markham *New Zealand*, above n 177, 102 n 159.

<sup>392</sup> Busby to Colonial Secretary (NSW), 18 January 1836 (no 84), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 175-185 of the typescript).

<sup>393</sup> Busby to Colonial Secretary (NSW), 6 January 1836 (no 82), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 173-174 of the typescript).

<sup>394</sup> Busby to Colonial Secretary (NSW), 4 May 1837 (no 111), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 242-245 of the typescript).

<sup>395</sup> The conflicts included the so-called "battle of plank". See Busby to Colonial Secretary (NSW), 30 January 1837 (no 107), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 228-232 of the typescript); and EH McCormick's description in Markham *New Zealand*, above n 177, 87-88 n 2.

<sup>396</sup> Busby to Colonial Secretary (NSW), 11 October 1836 (no 102), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 225-226 of the typescript). See Binney "Poor Mr Yate", above n 286.

<sup>397</sup> Busby to Colonial Secretary (NSW), 12 March 1838 (no 125) & 6 September 1839 (no 148), ATL qMS-0344 (holographs) & qMS-0345 (typescript) (pp 275-277 & 305-306 respectively of the typescript).

<sup>398</sup> Busby to Colonial Secretary (NSW), 17 March 1836 (no 93), 30 July 1839 (no 145) & 16 September 1839 (no 151), ATL qMS-0344 (holographs) & qMS-0345 (typescript) (pp 208-209, 300-303 & 307-309 respectively of the typescript).

aggravated robbery carried out by British subjects (which led to the execution in Sydney of one, Doyle),<sup>400</sup> and inter-racial violence (including the killings of the crew of the French ship *Jean Bart* at the Chatham Islands,<sup>401</sup> the killing of Captain Cherry at Mana Island,<sup>402</sup> and occasions of *murū* and *utu*<sup>403</sup>). In many of these there was nothing for Busby to do but to pass on the information.

One occasion in which Busby took a prominent, and unusual, role was in the “trial” at the Hokianga in 1838 of a Maori slave, Kati, for the murder of an Englishman, Henry Biddle. The proceedings were conducted in the Wesleyan chapel at Mangungu, which was packed with Europeans and Maori. The verdict was left to the Europeans who, in the event, were nearly unanimous in finding Kati guilty. He was handed over to the chiefs and executed the next day. A number of different accounts have been left of the facts of the offending and the trial. They include Busby's report to New South Wales and accounts of other participants, some written long after the event and perhaps unreliable.<sup>404</sup> John White,<sup>405</sup> for example, writing in 1871, thought the outcome to have been a travesty of justice because the

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<sup>399</sup> Busby to Colonial Secretary (NSW), 10 February 1837 (no 108), CO 209/2, 308a-310b; Busby to Colonial Secretary (NSW), 3 September 1839 (no 147), CO 209/4, 22a-25b.

<sup>400</sup> Busby to Colonial Secretary (NSW), 3 July 1837 (no 113), CO 209/2, 353a-354b; Busby to Colonial Secretary (NSW), 4 July 1837 (no 114), CO 209/2, 355a-360b; *R v Doyle*, Supreme Court of New South Wales, 1 & 18 November 1837 <[www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1837/r\\_v\\_doyle](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1837/r_v_doyle)> .

<sup>401</sup> Busby to Colonial Secretary (NSW), 12 November 1838 (no 137), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 294 of the typescript).

<sup>402</sup> Busby to Colonial Secretary (NSW), 20 September 1838 (no 133), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 286-287 of the typescript). See also Gipps to Glenelg, 6 October 1838, CO 209/3, 11a-17b (itself duplicating material at FO 58/1, 106a-129b).

<sup>403</sup> Busby to Colonial Secretary (NSW), 21 March 1838 (no 126) & 16 September 1839 (no 150), ATL qMS-0344 (holographs) & qMS-0345 (typescript) (pp 277-279 & 306-307 respectively of the typescript).

<sup>404</sup> See Jennifer Ashton “‘So Strange a Proceeding’: Murder, Justice and Empire in 1830s Hokianga” (2012) 46:2 *The New Zealand Journal of History* 142-156; Busby to Colonial Secretary (NSW), 28 May 1838 (no 127), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 280-282 of the typescript); John White “English Law: How it was Administered in New Zealand in 1837 [sic]”, 23 August 1871, ATL MS-Papers-0075-109; Journal of Nathaniel Turner (1836–1846), SLNSW A1873 (entries for May 1838); “The Life and Adventures of John Marmon, the Hokianga Pakeha Maori” (ch 20), as reproduced in the *Otago Witness*, Dunedin, 18 March 1882, at 26. According to the Alexander Turnbull Library record of John White's manuscript, other accounts are provided by William Colenso and William Woon, but they have not been consulted here.

<sup>405</sup> Nephew of the Wesleyan missionary, Rev William White.

death was an accidental drowning not related to an early altercation between Biddle, Kati and a young chief (whose age was put by White at 15 years but who seems from other accounts to have been aged between 8 and 10 years). The Wesleyan missionary, the Reverend Nathaniel Turner, was disturbed by the outcome which he thought was not murder but manslaughter. There were suggestions that the boy's role in the death of Biddle may have been minimised and the culpability of the slave exaggerated. Busby himself acknowledged that, if the boy had been on trial, it would have "roused the whole tribe to arms".<sup>406</sup> The Attorney-General of New South Wales considered that the "whole proceedings" were "extraordinary",<sup>407</sup> but the Secretary of State for the Colonies later approved them.<sup>408</sup> Busby defended the role he had played on the basis that it was the "first time in New Zealand" that justice had been administered "without violence or vindictive feelings" and was "a triumph of order which persons unacquainted with New Zealand can ill appreciate".<sup>409</sup> Earlier, however, he had acknowledged that the case was of little precedent because the accused was a slave.<sup>410</sup>

### **Frontier chaos?**

A significant question in the history of 1830s New Zealand is the extent to which the country was in, or moving towards, a crisis of lawlessness. Certainly Busby's official despatches portray a deteriorating picture in alarmist terms. Privately, he seems to have been less anxious about the position.<sup>411</sup> Some historians have questioned whether Busby exaggerated the situation.<sup>412</sup> That view appears justified, especially in connection with his later despatches. They took the line that warfare was endemic in Maori society because of its "law of retaliation" and because

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<sup>406</sup> Busby to Colonial Secretary (NSW), 28 May 1838 (no 127), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 282 of the typescript).

<sup>407</sup> See opinion of the Attorney-General of New South Wales enclosed in Colonial Secretary (NSW) to Busby, 27 September 1838, AML MS 91/75, Box 2, Folder 60, item 404.

<sup>408</sup> See Normanby to Gipps, 3 March 1839, enclosed in Colonial Secretary (NSW) to Busby, 8 August 1839, AML MS 91/75, Box 2, Folder 62, item 418.

<sup>409</sup> Busby to Colonial Secretary (NSW), 9 November 1838 (no 135), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 290-293 of the typescript).

<sup>410</sup> Busby to Colonial Secretary (NSW), 28 May 1838 (no 127), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 282 of the typescript).

<sup>411</sup> See, for example, Chapter 7, text accompanying n 16.

<sup>412</sup> See text accompanying ns 324 & 345-349 above.

disputes inevitably drew in ever-widening circles of those associated with the initial protagonists by kinship. Busby reported that disputes that could escalate into war were often fomented by unscrupulous Europeans (as, for example, through purchases of disputed land) to the danger of respectable settlers and traders.<sup>413</sup> The emphasis in Busby's later reports on inter-Maori conflict and inter-racial violence is stronger than in accounts by other contemporary observers. The musket wars had been subsiding for some time<sup>414</sup> and, in the Bay of Islands at least, Maori and Pakeha had long since worked out a "middle ground" on which to coexist.<sup>415</sup> Incidents such as that of the *Jean Bart* at the Chathams, entailing significant conflict between groups of Europeans and Maori, were exceptional and were not regarded as marking a new era of inter-racial violence.

On the other hand, there is plenty of support for the view that New Zealand had a significant law and order problem, principally among the Europeans but spilling over and affecting Maori living in proximity to them. Busby was by no means a lone voice in describing the state of order in New Zealand as unsatisfactory, damaging to Maori and settler interests, and unlikely to be able to be addressed except by direct British intervention in the government of the country. Kororareka was widely regarded as the hell-hole of the Pacific.<sup>416</sup> It is beyond the scope of this thesis to assess whether these opinions were objectively sound. Such assessment would need to consider sources well beyond Busby's reports, papers and letters which tell only part of the story. Even in relation to what was known to Busby, they are likely to be incomplete because the British Resident's Papers (a much richer source than either Busby's reports to New South Wales or his private letters)

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<sup>413</sup> Busby to Colonial Secretary (NSW), 16 June 1837 (no 112), GBPP 1840 [238] XXXIII.587, 12-18 at 13. See also generally Chapter 7.

<sup>414</sup> See above n 24.

<sup>415</sup> O'Malley *The Meeting Place*, above n 3.

<sup>416</sup> See, for example, Robert Jarman *Journal of a Voyage to the South Seas, in the "Japan", Employed in the Sperm Whale Fishery, Under the Command of Capt. John May* (London, 1838) 226; Petition of settlers to William IV dated October 1836, CO 209/2, 321a-323b; Correspondence of Captain Bethune (HMS *Conway*) and Lieutenant Chetwood (HMS *Pelorus*), July-October 1838, FO 58/1, 92a-135b; Lang *New Zealand in 1839*, above n 291, 5-24 (see Chapter 10, text accompanying ns 109-118); and Patrick Matthew *Emigration Fields: North America, the Cape, Australia, and New Zealand* (Adam & Charles Black, Edinburgh, 1839) 129-136.

contain only written correspondence received by him. Unless personal approaches to Busby or information received by him feature in despatches or correspondence, they are unrecorded. The written record of the Residency may therefore itself understate the law and order situation. Busby's knowledge of the position in New Zealand was also largely confined to the Bay of Islands and, to a lesser extent, the Hokianga. It is clear that law and order issues were taken up with missionaries, naval captains and Thomas McDonnell at the Hokianga, without reference to Busby. Disputes were sometimes resolved by the mediation of such people, but often conflict will not have come to attention at all, because the parties themselves did not seek outside help and settled it, peaceably or otherwise. Some civil claims, as where contracts had been made in New South Wales, were litigated in Sydney.<sup>417</sup> In a few instances, criminals were prosecuted in the Australian colonies for offences committed in New Zealand without Busby's involvement: McDonnell played a part in sending three sailors to Hobart where they were convicted and executed for the murder of the captain of their vessel, who had been thrown overboard 300 miles west of the Hokianga;<sup>418</sup> another man, Edwin Palmer, the superintendent of a whaling station at Preservation Inlet in Fiordland, was put on trial in Sydney but acquitted for the manslaughter of a boy who died after a flogging.<sup>419</sup>

To obtain a better, though necessarily incomplete, picture of the position in New Zealand would require examination of missionaries' records, reports of naval captains, court reports from New South Wales and Van Diemen's Land, petitions and letters to authorities in Australia and London, and the journals and letters of settlers, traders, sailors and travellers. Without this work, however, it seems safe to conclude that such accounts would contain information to confirm the generally-held contemporary opinion that British commerce and missionary effort were being seriously affected by the absence of lawful restraints upon antisocial and criminal Europeans—although the fact that settlement was not deterred would indicate that

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<sup>417</sup> See, for example, *De Mestre v Hindson* (1835) NSW Sel Cas (Dowling) 480.

<sup>418</sup> See CO 209/3, 462a-473b; Hill *Policing the Frontier*, above n 51, 74.

<sup>419</sup> *R v Palmer* [1838] NSWSupC 52.

a picture of complete anarchy is exaggerated. Whether the position of lawlessness in the mid to late-1830s provided a serious threat to Maori society (such as to justify British intervention in 1840) is more difficult to gauge. Busby's alarms on this score do seem exaggerated and, as is further discussed below, are likely to have been tactical.

It is, however, likely that by the late 1830s it was becoming apparent to everyone, including Maori, that in the absence of authority able to achieve order, increasing settlement was increasing the scope for inter-racial tensions and was putting strain on Maori society, particularly in relation to land dealings. It is telling in this connection that, by the end of the 1830s, the Church missionaries were purchasing land to hold in trust for Maori as a protection against improvident and unauthorised sale by them.<sup>420</sup> The realisation of the need to control the impacts of settlement, rather than immediate problems of lawlessness, may in the end have been more influential in Maori thinking in agreeing to the Treaty—although Maori motives (a topic well outside mine) may well have been occasioned less by concerns that the level of lawlessness was likely to impact adversely on Maori society and more by a positive wish to move into the modern world in association with the British.<sup>421</sup>

### **How well did Busby fulfil his Instructions?**

If judged by the manner in which he discharged his Instructions, Busby's Residency cannot be accounted a success. In addition to his resistance to Bourke's directions, Busby was not adept at obtaining influence with the chiefs and channelling their goodwill to achieve the objects of his mission in seizing convicts and criminals, settling intertribal quarrels and developing Maori government, laws and courts. Nor was he successful in developing a close working relationship with the missionaries, even though they shared many of the same views about Maori society and the need for British Government intervention in New Zealand. He showed little interest in fostering British trade interests and was poor at keeping New South Wales informed about developments in New Zealand.

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<sup>420</sup> See text accompanying n 465 below.

<sup>421</sup> See Head "Pursuit of Modernity", above n 25.

At the outset of his Residency, it seems that Busby ignored the instruction to fix his Residence in consultation with the chiefs<sup>422</sup> because of his determination to settle on the land he had already purchased from Hall at Waitangi.<sup>423</sup> Although the framing for the house was delivered in late May 1833,<sup>424</sup> it took some time to finish.<sup>425</sup> Busby and Agnes, who had arrived in August or September 1833, may not have moved in until early in 1834. Busby's title to the land may well have been the reason he fell out with Rete (the chief who wounded Busby in late April 1834). Hall had told Busby that he was likely to have to make a further payment to Maori for the land at Waitangi<sup>426</sup> and in June 1834 Busby entered into the first of his land purchase deeds at Waitangi, which included the land conveyed to him by Hall. The purchase was witnessed by Henry Williams and contained a certification by Williams that "the conveyance, which is as complete as the language will allow, is understood by them [the vendor chiefs] to convey the land without any reservation, and in as complete a manner as property is conveyed in England".<sup>427</sup> A further deed was entered into for additional land in November 1834 with similar

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<sup>422</sup> See text accompanying n 227 above.

<sup>423</sup> Given that he had purchased land at Waitangi from Hall before leaving Sydney, it is hard not to be sceptical about Busby's 18 June 1833 report to New South Wales explaining the choice of Waitangi as the site for the Residency. Busby wrote:

I have now the honor to report that I applied to the Missionaries to know whether they would be willing to part with a small portion of Land near their Settlement, in order that I might establish myself in their immediate neighbourhood; but altho they saw little objection under present circumstances they conceived that occasions might hereafter arise which would render such an arrangement prejudicial to the objects of the Mission. I have therefore fixed upon a place about a mile & a half from the Mission Station, which was recommended by the majority of the Chiefs, and is in my own estimation the most eligible site for my dwelling.

Busby to Colonial Secretary (NSW), 18 June 1833 (no 20), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 59 of the typescript).

<sup>424</sup> Busby to Colonial Secretary (NSW), 3 June 1833 (no 15), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 48-49 of the typescript).

<sup>425</sup> Busby to Colonial Secretary (NSW), 13 January 1834 (no 32), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 72 of the typescript): "the unfinished state of my house to which I have not yet been able to remove".

<sup>426</sup> See text accompanying n 184 above. Hall had also predicted that his deed to the land would enable Busby to remove all Europeans settled upon it. It seems, however, that soon after his arrival in New Zealand, Busby was required to pay compensation to two settlers for houses they had built on the land. See Busby to Robert Campbell, 22 July 1833, AML MS 46, Box 2, Folder 4 (holograph) & Box 7, Volume 4 (typescript) and ATL qMS-0352 (typescript) (p 7).

<sup>427</sup> Copy of Waitangi deed (Old Land Claim number 14; in Maori, with English translation), 30 June 1834, ANZ ACGO 8347 IA15 1/5d. On this purchase, see Bruce Stirling with Richard Towers "'Not With the Sword But With the Pen': The Taking of the Northland Old Land Claims: Part 2" (report for the Crown Forestry Rental Trust, 2007, Wai 1040, A9) ["Stirling 'Not With the Sword But With the Pen'"] 1443-1445.

certification.<sup>428</sup> It is interesting that Busby's land purchases at Waitangi and elsewhere after the Declaration of Independence drop this certification, although they are identical in most other respects. Whether the certification was dropped because by then Busby thought it redundant because of Maori familiarity with sale of land, or whether he thought it unnecessary because the assertion of sovereignty made it clear that Maori had authority to dispose of property in this way without reference to "the manner in which property is conveyed in England" is unclear.<sup>429</sup>

In his subsequent post-1840 land claims, Busby did not rely on his purchase from Hall but instead on his own purchases, suggesting perhaps that the purchase by Hall was suspect or, at least, was known not to permit on-sale without further consideration. Rete was one of those named as vendor in the first deed Busby concluded for the Waitangi land in June 1834.<sup>430</sup> The June purchase was before Rete had been identified as Busby's assailant in May (that was not known till October). It appears from Busby's later acknowledgements of the conflicts he had had from the beginning with Rete (referred to below) that his occupation of the land may have been a source of dispute, at least until the new deed was entered into and payment made. Whether or not the land dispute was behind Rete's robbery of the Residency or whether it was Busby's treatment of him that caused that incident, the origin of the bad feeling seems to have been dispute about ownership of the land.

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<sup>428</sup> Copy of Waitangi deed (Old Land Claim number 15; in Maori, with English translation), 22 November 1834, ANZ ACGO 8347 IA15 1/5d. On this purchase, see Stirling "Not With the Sword But With the Pen", above n 427, 1445-1449.

<sup>429</sup> It is outside the scope of this thesis to consider the validity according to Maori custom, effect, or fairness of these and other land transactions entered into by Busby with Maori during the period of his Residency. The only careful consideration of Busby's purchases (and his subsequent efforts to have them confirmed) is that undertaken by Bruce Stirling in a report for the Waitangi Tribunal's *Te Paparahi o Te Raki—Northland Inquiry*. See Stirling "Not With the Sword But With the Pen", above n 427, 1421-1520 (Waitangi) and 1586-1664 (Ruakaka, Waipu and Ngunguru). Busby's three decade campaign after 1840 to obtain title to the lands he purchased is also described in Ned Fletcher & Sian Elias "A Collusive Suit to 'Confound the Rights of Property Through the Length and Breadth of the Colony'? *Busby v White* (1859)" (2010) 41 Victoria University of Wellington Law Review 563-604. There is a note on the original materials relating to Busby's purchases at 564 n 2 of that essay.

<sup>430</sup> The fact that Rete was an owner of the Waitangi land seems not to have been noticed by those who have described the robbery at the Residency.

Busby's personal dealings with the chiefs were marked by intemperate episodes: as is later discussed, he acknowledged insulting Rete to his face, and his threatening and unjustified behaviour towards Pomare has already been seen. According to William Marshall's account of the 20 March 1834 meeting at Waitangi on the occasion of the adoption of a flag by the chiefs, Busby omitted Pomare from those invited and cut discussion short.<sup>431</sup> He also seems deliberately to have been meagre in his hospitality, apparently out of a wish to discourage the chiefs bringing their tribes with them to further meetings.<sup>432</sup> These examples may not tell the full story. There are warm communications between Busby and chiefs contained in the British Resident's Papers and he seems to have enjoyed their confidence to some extent.<sup>433</sup> When he visited Sydney in 1840, he seems either to have taken a chief's watch for repairs or to have undertaken to purchase one for him.<sup>434</sup> A charming family story has Nene partaking of a meal with Busby and his

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<sup>431</sup> Marshall *Two Visits to New Zealand*, above n 277, 107-118 at 109 ("... and, had any thing like freedom of debate been encouraged, instead of suppressed, before proceeding with the election, I have little doubt that the real sentiments of those present would have been elicited; and, assuredly, an opportunity might have been afforded of answering any objections as they arose, and, in that way, more completely satisfying the minds of the people as to the objects contemplated by our Government") & 112.

<sup>432</sup> See Busby to Colonial Secretary (NSW), 22 March 1834 (no 38), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 86 of the typescript). (Busby adopted this approach notwithstanding that New South Wales had already approved him "including in your Contingent account the Expense of providing Food for the Chiefs and their Followers." Colonial Secretary to Busby, 22 February 1834, AML MS 91/75, Folder 50, item 330.) The chiefs appear, however, to have arranged their own feast. See Marshall *Two Visits to New Zealand*, above n 277, 109-110. Marshall was disappointed that the chiefs had not been invited to dine with the Europeans.

<sup>433</sup> So, for example, Nopera Panakareao wrote to Samuel Marsden in May 1837:

Here am I, Nopera Puna, [desiring?] a Governor [Kawana] to defend us. Will you consent for a person to take care of us? On your arrival here, I fully consented; and thought you would have remained longer.

Mine is a similar letter to you. Will you consent to some Soldiers for us? If the Natives possessed Soldiers they would not perhaps be fighting as Ngapuhi are now fighting.

If Mr. Busby were here, we the 'Rawara', would not be fighting perhaps as Ngapuhi are now combating in the presence of the Man, who they asked for to be a defender of the Natives.

Nopera Panakareao to Marsden, 9 May 1837 (in Maori, with English translation), SLNSW A1994, 136-137 & 139.

<sup>434</sup> Busby to Colenso, 4 July 1840, ATL MS-Papers-10533-2.

family and coping with the shock of his first, liberal, helping of hot English mustard.<sup>435</sup>

After early declarations of resolve to rid the country of runaway convicts,<sup>436</sup> Busby seems to have lost enthusiasm after finding matters were complicated by the integration of convicts into Maori society and after Bourke rejected a proposal he had made (for the purpose of establishing “a surveillance”) to require all Europeans entering New Zealand to be issued with a “passport or letter of licence” to be issued by him as Resident.<sup>437</sup> This loss of interest on Busby's part in pursuing runaway convicts was not communicated to New South Wales or Van Diemen's Land. The authorities in Van Diemen's Land in particular, continued to send lists and descriptions (“Complexion—Fresh”, “Head—Round”, “Hair—Reddish Brown”, “Whiskers—None”, “Nose—Medium Length”) of convicts thought to be in New Zealand.<sup>438</sup>

There is little to suggest that Busby was particularly active in averting Maori warfare. His influence was essentially confined to the Bay of Islands and Hokianga, from which locations he hardly travelled.<sup>439</sup>

In respect of the instruction to promote Maori government, Busby had, by October 1835, a little more success. On 20 March 1834, he hosted a meeting at Waitangi at which 25 northern chiefs voted to adopt as the national flag of New Zealand (from a choice of three flags which had been made up in Sydney on designs supplied by

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<sup>435</sup> See Sandra Coney “Agnes Busby (1800–1889)” in Charlotte Macdonald, Merimeri Penfold & Bridget Williams (eds) *The Book of New Zealand Women: Ko Kui Ma Te Kaupapa* (Bridget Williams Books Ltd, Wellington, 1991) 113–117 [“Coney ‘Agnes Busby’”] at 115.

<sup>436</sup> See text accompanying n 208 above; and James Busby to Alexander Busby, 22 June 1833, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 14 of the typescript).

<sup>437</sup> See Busby to Colonial Secretary (NSW), 3 June 1833 (no 16) & 17 June 1833 (no 17), ATL qMS-0344 (holographs) & qMS-0345 (typescript) (pp 49–54 of the typescript); Colonial Secretary to Busby, 9 November 1833, AML MS 91/75, Folder 50, item 329.

<sup>438</sup> See examples at ANZ AABS 8156 BR 1/1, 42–49, 55–67, 83–86 & 125–132.

<sup>439</sup> Indeed the farthest Busby travelled may have been to the Whangarei district when purchasing land in December 1839. He did not return to Sydney once during the whole period of his Residency.

Henry Williams through Busby<sup>440</sup>) a white flag with a red Saint George's cross and, in the upper left quarter, a blue field with a red cross (with narrow white edging) and four white stars. The flag was hoisted alongside the Union Jack and acknowledged with a salute of 21-guns by HMS *Alligator*.<sup>441</sup> In his report to London asking for the flag to be recognised by the King, Busby wrote that the adoption of the flag could "be considered the first National act of the New Zealand chiefs".<sup>442</sup>

[I]t derives additional interest from that circumstance. I found it, as I had anticipated, a very happy occasion for treating with them in a collective capacity, and I trust it will prove the first step towards the formation of a permanent Confederation of the Chiefs which may prove the basis of civilized Institutions in this country.

The flag, which was recognised by the British Crown and gazetted in Sydney, was flown not only by New Zealand-built ships but also on shore as a national flag and manifestation of the mana of the chiefs.<sup>443</sup>

In his report to New South Wales on the meeting to adopt the flag, Busby had indicated that he intended "to assemble the Chiefs periodically".<sup>444</sup> There is, however, no evidence of his having done this before 35 northern chiefs assembled at Waitangi on 28 October 1835 to declare that the "Northern parts of New Zealand" (from North Cape to the Thames) were an "Independent State, under the designation of The United Tribes of New Zealand" and to entreat the King of England "that he will continue to be the parent of their infant State, and that he will

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<sup>440</sup> Busby to Colonial Secretary (NSW), 13 January 1834 (no 32), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 72-73 of the typescript).

<sup>441</sup> For more detailed descriptions of the meeting, see Busby to Colonial Secretary (NSW), 22 March 1834 (no 38), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 84-86 of the typescript); Bourke to Stanley, 29 April 1834, CO 209/1, 121a-128b; Marshall *Two Visits to New Zealand*, above n 277, 107-118 ("a day ... on which the New Zealanders may be said to have received a name, and to have been enrolled among the nations of the earth"); and Orange *The Treaty of Waitangi*, above n 252, 20.

<sup>442</sup> Busby to Hay, 3 April 1834, CO 209/1, 213a-218b at 213b.

<sup>443</sup> Aberdeen to Bourke, 21 December 1834, CO 209/1, 129a-131b; Colonial Secretary (NSW) to Busby, 21 July 1835 & 19 August 1835, AML MS 91/75, Folder 53, items 355 & 356; Orange *The Treaty of Waitangi*, above n 252, 20-21.

<sup>444</sup> Busby to Colonial Secretary (NSW), 22 March 1834 (no 38), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 86 of the typescript).

become its Protector from all attempts upon its independence".<sup>445</sup> This Declaration of Independence and its background are further considered in Chapter 7, where I explain how, beginning only a few weeks after the Declaration was signed, Busby largely gave up on the project of developing Maori government. The agreement of the chiefs in the Declaration to meet "in Congress at Waitangi" each autumn "for the purpose of framing laws for the dispensation of justice, the preservation of peace and good order, and the regulation of trade" came to nothing.

It should not be thought from lack of involvement by Busby that no inter-tribal political co-operation was taking place. The Waitangi Tribunal's Te Paparahi o Te Raki (Northland) inquiry has drawn attention to the meetings between chiefs and tribes that had taken place long before the Confederation of United Tribes came into being.<sup>446</sup> There is no reason to believe that these meetings did not continue after the Declaration of Independence. Indeed, it has been suggested that the Declaration itself should be regarded as a Maori initiative.<sup>447</sup> There is every reason to believe that the chiefs were intensely interested in new forms of political association, as indeed the adoption of a flag and the articles of confederation indicate. In 1839, some chiefs seem to have contemplated the election of a King from among themselves. One chief even made the suggestion that Busby might be King with Queen Victoria's approval, a proposal he declined on the basis (as he explained it) that the authority "must be in the confederation of chiefs". (In 1839,

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<sup>445</sup> He Whakaputanga o te Rangatiratanga o Nu Tirene (The Declaration of Independence of New Zealand), ANZ AAAC 6248 W292 1/618; reproduced in [H Hanson Turton] *Facsimilies of the Declaration of Independence and the Treaty of Waitangi* (2nd ed, AR Shearer, Government Printer, Wellington, 1976). Turton provides a typescript of the copy of the English translation of the Declaration enclosed in Busby's 2 November 1835 despatch to the Colonial Office (at CO 209/2, 102a-103a). Ibid iv-v.

<sup>446</sup> William Marshall, the *Alligator's* surgeon, appears to refer to one such meeting taking place following the meeting to select the flag. See Marshall *Two Visits to New Zealand*, above 277, 110-111.

<sup>447</sup> Lindsay Cox *Kotahitanga: The Search for Maori Political Unity* (Oxford University Press, Auckland, 1993) 42-43; Manuka Henare "The Changing Images of Nineteenth Century Maori Society—From Tribes to Nation" (PhD thesis, Victoria University of Wellington, 2003) 195; Margaret Mutu "The Humpty Dumpty Principle at Work: The Role of Mistranslation in the British Settlement of Aotearoa" in Sabine Fenton (ed) *For Better or Worse: Translation as a Tool for Change in the South Pacific* (St Jerome Publishing, Manchester, 2004) 12-35 at 15-16; Hazel Petrie & Hohipere Tarau "Maori Texts and Official Ventriloquism" (2012) 46:2 *New Zealand Journal of History* 129-141 at 139.

Busby also had his own “battle to fight” and thought that if the idea were to “get abroad ... it might do much to defeat for a time the object we all have in view of establishing peace and order in the Country”).<sup>448</sup>

The trial by Europeans of Kati for the murder of Biddle indicates that the development of Maori courts had not been progressed. This is despite indications that Maori and missionaries were asking for the provision of laws.<sup>449</sup> While Busby may on occasion have assisted chiefs in resolving cases between Maori disputants, this does not seem to have been part of any plan to educate Maori about the forms and principles of British justice, and it may be that the chiefs in fact took the lead in initiating matters because of their own interest in a new approach to justice.<sup>450</sup>

As is further developed in Chapter 7, Busby was fixed in the view that some form of British intervention in New Zealand was essential. In such intervention, he envisaged that he would be at the centre of government. Developing Maori government without British intervention did not fit with, and indeed threatened, his ambitions. If he had been less preoccupied with his own concerns and more interested in Maori, he might have taken the Declaration further—an enterprise which Bourke would have encouraged. As it was, from the beginning of his Residency, Busby showed very little interest in Maori society. His private and official correspondence shows little curiosity about or attempt to understand Maori society. There is nothing in Busby that is comparable to the engagement with local cultures of such British colonial officials as Sir William Johnson in British North America and the British Residents of India described by William Dalrymple.

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<sup>448</sup> See Rev Richard Davis to Busby, 29 June 1839 & Busby to Davis, 11 July 1839, AML MS 46, Box 2, Folder 4 (holographs) & Box 7, Volume 4 (typescript) and ATL qMS-0352 (typescript) (p 36 of the typescript); and James Busby to Alexander Busby, 29 July 1839, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 112-113 of the typescript).

<sup>449</sup> See Alan Ward *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland University Press, Auckland, 1973) 26-27. For the 1837 letter of a young Christian chief to Marsden, quoted by Ward, *ibid* 27, see Chapter 9, n 139 and accompanying text.

<sup>450</sup> On the other hand, the translation of Kite's trial may have been intended by Busby to serve a didactic purpose.

## Chapter Six: Busby's Residency

Busby's relations with the missionaries, and in particular Henry Williams, were up and down. He was heavily reliant on them in everything he did: they were generally involved in his mediations; they translated his letters (Busby himself achieved only fair competency in speaking and writing in Maori); they helped with his land purchases; they provided him with news and social company. He stayed with Henry and Marianne Williams when he first arrived in the Bay of Islands. Marianne helped to deliver Agnes' first child.<sup>451</sup> The night after the robbery at the Residency (itself a mere 36 hours after Agnes gave birth), Henry Williams stood guard armed with a garden rake.<sup>452</sup> Later their families were to intermarry.<sup>453</sup>

Busby admired the work of the missionaries with Maori, and never waived in his praise of it.<sup>454</sup> He seems to have given some modest assistance to their work (as in his encouragements to Maori to follow missionary teachings, and his involvement as examiner in June 1839 at the boy's school at Waimate, about which he wrote enthusiastically to his brother: "30 boys—some of them reading Cicero and Homer! What think you of that for New Zealand?"<sup>455</sup>).

On the other hand, Busby resented the missionaries' influence with Maori, their independence from him, and his dependence on them. Despite what seems to have been their best efforts to treat him with kid gloves, relations were often strained, sometimes to breaking point. Relations between Busby and the Church

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<sup>451</sup> Coney "Agnes Busby", above n 435, 115.

<sup>452</sup> See Henry William's diary, 2 May 1834, quoted in Hugh Carleton *The Life of Henry Williams, Archdeacon of Waimate* (vol 1, Upton & Co, Auckland, 1874) ["Carleton Henry Williams"] 159.

<sup>453</sup> Busby's daughter Sarah (born 1835) married Henry Williams's fifth son, John William Williams, in 1854. Busby's son William (born 1841) married Henry Williams's granddaughter, Marianne Caroline Davies, in 1870. Ramsden *Busby of Waitangi*, above n 75, 375-376.

<sup>454</sup> See, for example, James Busby to Alexander Busby, 27 March 1835, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 34 of the typescript); James Busby *Letter to the Right Hon. The Earl of Chichester, President of the Church Missionary Society, in Vindication of the Character of Archdeacon Henry Williams and Other Missionaries of the Church Missionary Society in New Zealand* (Williamson & Wilson, Auckland, 1850); James Busby *Colonies and Colonization: A Lecture Delivered in the Hall of the Mechanics' Institute, at Auckland, With Especial Reference to New Zealand* (Philip Kunst, Auckland, 1857) 1-3; Busby "Occupation of New Zealand" (c. 1865), above n 319, (2)-(3).

<sup>455</sup> James Busby to Alexander Busby, 25 June 1839, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 110 of the typescript).

## Chapter Six: Busby's Residency

Missionaries as a group were at a particularly low ebb in mid-1837, when war had broken out at the Bay between Ngapuhi groups, as indicated by the following letter from Busby to his brother Alexander:<sup>456</sup>

... We have been for some time in a state of civil war here. Armed parties are constantly in motion. I find it difficult to interfere in any way, and the Missionaries are acting precisely as they would act if no such person as I were here. They are the influential body, and though they would gladly adopt me under their wing—the idea of their deferring to me, or consulting with me before doing what ought to be my duty—or even giving me information, seems never to enter their minds. ...

... Indeed it is scarcely to be expected that they should bring their information to me, and act under my directions—nor would it do for them to forbear acting—for they are in fact the only conservators of the peace of the country. The majority of them would I am quite sure be glad to be rid of interfering in secular matters, if I had the power and means of relieving them from them. But I have always felt and never so much as now that I can never recover from the effects of the false position into which I have been thrown. You will naturally ask am I on bad terms with the Missionaries? I am by no means so. And yet I think I may say that not one man in a thousand would have kept on terms of friendship with them as I have done, so obnoxious to the production of jealousies and quarrels our respective situations and circumstances, when viewed in reference to each other. I came here to assume an influence which they already professed. But so far from being able to assume a commanding attitude, I was literally thrown upon them for the most necessary assistance in the most trivial affairs. They had the command of whatever means they judged necessary for the effectual performance of their duty, and their well founded influence had become not less necessary both to the Natives and their own countrymen in secular affairs, than in enforcing their religious instructions. While I was not only without an individual upon whom I had a right to call for information, but absolutely destitute often of the means of moving from place to place to acquire it for myself—had it been proper that I should do so. They find too that I have often preferred my single judgement to the combined experience and judgement of them all—and being in no degree under

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<sup>456</sup> James Busby to Alexander Busby, 5 May 1837, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 67-68 of the typescript). See also Busby to George Clarke, 9 June 1837 & Clarke to Busby, 11 June 1837, SLNSW A1994, 141-142 & 144-145 respectively; Busby to Colonial Secretary (NSW), 16 June 1837 (no 112), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 257-259 of the typescript); and James Busby to Alexander Busby, 20 December 1837, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 70 of the typescript).

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my authority it is hardly to be expected that they should become the gratuitous agents of my measures in which their judgement does not coincide. In the present state of affairs they are all activity—every where present to protect the settlers from the plundering to which they are exposed and in constant communication with the natives on both sides. While I have not the command of a boat's crew—and if I had, it would be quite inconsistent with my official character to place myself in such situations. This they will not understand. It is evident they think it more my duty than theirs and it is not difficult to understand the nature of their feelings under such an idea.

It is not clear how far Busby's relations with the Church missionaries had recovered by 1840. In January 1838, Busby had what he described to Alexander as a "partial reconciliation" with Henry Williams, but one in which "I made him expressly understand that on my part the reconciliation was only outward". In the same letter, Busby wrote that "[u]nder these circumstances you may suppose that even those of the Missionaries who are well disposed towards me wish me 'well away'. Our communications are all but closed—and are likely to continue so until they are put by authority upon a different footing".<sup>457</sup> True to his word, Busby advised Glenelg in February 1839 that "I am ready again to renew my official intercourse with the Missionaries, as soon as it shall be settled by the authorities to which they and I are respectively subject, what each party shall have a right to expect from the other; or, should such an arrangement occasion embarrassment to Her Majesty's Government, I am prepared, after nearly two years' experience of its practicability, to conduct the business of my office without any official connection with them".<sup>458</sup>

While the relationship between Busby and the missionaries was never an easy one, their views about Maori society and the need for British intervention were not dissimilar. The missionaries considered that the authority of the chiefs was "merely nominal" and that Maori lacked government.<sup>459</sup> While accepting that Maori had the sovereignty of the country, the view of a Church Missionary Society sub-

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<sup>457</sup> James Busby to Alexander Busby, 26 January 1838, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 74 of the typescript).

<sup>458</sup> Busby to Glenelg, 25 February 1839, CO 209/4, 47a-60b at 55a and ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 318 of the typescript).

<sup>459</sup> For example, Rev James Buller (WMS) to Miss Davies, 2 January 1837, ATL qMS-0306.

committee of missionaries in New Zealand as late as May 1839 was that Maori “cannot understand what is meant by Sovereign rights” and “could not comprehend what is implied in a cession of sovereign rights”.<sup>460</sup> It may be noted that non-missionary European observers expressed similar views.<sup>461</sup> As early as 1836, the missionaries had been behind a petition to the King for protection for respectable settlers and Maori from the “depredations” of lawless British subjects. The view taken in the petition was that the Confederation of United Tribes could not be expected to establish “proper Government” and that the chiefs themselves acknowledged this to be “impracticable”. The petition took the view that “considerable time must elapse before the Chiefs of this Land can be capable of exercising the duties of an Independent Government”.<sup>462</sup> Henry Williams sent a copy of the petition to his brother-in-law, Edward Marsh, in March 1837, hoping that he could prevail upon “Mr. Buxton, or some one else” to present it to the House of Commons. In his covering letter, Williams stressed the seriousness of the situation.<sup>463</sup>

Without some immediate interposition on the part of the Government for our protection, our position will become very desperate, as we may expect to be surrounded ere long by a swarm of rogues and vagabonds, who indeed carry all before them, both as respects the respectable Europeans and also the natives.

On 1 March 1838, George Clarke wrote, as secretary of the committee of northern missions, to the home Society to voice concern about the plans of the New Zealand Association which the missionaries considered “must terminate in the total ruin of the people, as a nation”. Since there was “no shadow of a Government in this country” and “each Tribe, and each individual of a Tribe, acts independently of

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<sup>460</sup> “Minutes of Sub-Committee appointed to examine the Report from the Select Committee of the House of Lords, on the present state of N.Z., May 1839”, CMS CN/M vol 11, 423-437 at 430 & 428. I am grateful to Hazel Petrie for drawing my attention to these minutes. Trevor Williams pointed out that these views are not easy to reconcile with the post-Treaty protestations of missionaries that the Treaty was fully understood by Maori. As he remarked wryly, “[e]ither missionary education of the Maori had proceeded at an unparalleled rate or the missionaries had changed their minds”. He considered that the change was “not reputable”. Trevor Williams “The Treaty of Waitangi” (1940) 25:99 *History* 237-251 at 241-242.

<sup>461</sup> See above n 416.

<sup>462</sup> Copy of petition to the King dated October 1836, CO 209/2, 321a-323b.

<sup>463</sup> Williams to Marsh, 28 March 1837, reproduced in Carleton *Henry Williams*, above n 452, 200.

every one", there was nothing to prevent the Association purchasing "the whole island without fear of opposition, and, consequently, claim[ing] a right of sovereignty—to prescribe laws to all within their dominions, setting at defiance any means which might be afterward entered upon for the protection of this people". The missionaries had not succeeded in devising a means to preserve Maori land to its "rightful owners" or of making sale "more difficult or less general".<sup>464</sup> The letter referred to earlier missionary efforts to become trustees of Maori land to protect its alienation, which the letter noted had been disapproved of by the home Society "though no better means pointed out". (The home Society was to change its mind on this method of preserving Maori land through missionary ownership on trust.) The consequence of the land sales was that most of the land in the Bay of Islands, Hokianga, and "in various places along the coast", was "in the hands of the English". Maori were "daily losing their influence, and the Europeans gaining ascendancy".<sup>465</sup>

In a proposal not unlike those put forward by Busby (discussed in the following chapter), the missionaries put forward "[t]he means which we should recommend to be adopted".<sup>466</sup>

That the whole country be received under the protection and guardian care of the British Government, for a certain number of years, with a Resident Governor and other Officers; with a military force, to support their authority, and insure obedience to all laws which may be enacted—That the principal Chiefs of Tribes be regarded as Members of Congress, under the guidance of the Governor and Council; who collectively shall enact all laws, and by whose authority all offenders shall be punished.—This mode of proceeding we consider the most salutary, as a commencement; and most likely to redeem the people from that degraded and immoral state in which they are. Their ideas will gradually expand, and their condition daily improve: they will form a mutual support to each other—a protection to those who do well, and a dread to evil-doers—and gradually rise in the scale of nations. Foreigners will then be more circumspect in their conduct, seeing that crime can be punished here, as in other countries.

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<sup>464</sup> Clarke to the Home Secretaries of the Church Missionary Society, [1] March 1838, reproduced in Coates *Documents*, above n 294, 41-45 at 41.

<sup>465</sup> Ibid 41-42.

<sup>466</sup> Ibid 44.

## Chapter Six: Busby's Residency

With regard to land, every district has its respective owner; as it belongs to distinct Tribes, the boundaries of which are clearly defined. But it is highly expedient that each family, and each member of a family, should know their and his particular portion; and that it be divided, and subdivided, and lawfully set apart, to prevent any single person having the power of disposing of the whole, as at present.<sup>467</sup>

This letter, a copy of which was sent privately to Glenelg, the Secretary of State for the Colonies, by Dandeson Coates, the secretary of the home Society, was considered significant enough by the Colonial Office for it to ask Coates if it could be considered as “an Official Document”.<sup>468</sup> Eight months later, the northern mission committee confirmed the position earlier taken in March 1838 and, referring to the 1836 petition they had organised, described its object as “the maintenance of the Sovereign rights of the New Zealanders” through the British Government extending “its fostering care and becom[ing] the guardians of this interesting people”.<sup>469</sup>

In a letter of 23 August 1839 to Coates (not received by him until after the signing of the Treaty), George Clarke repeated the view that British Government intervention was necessary. But for missionaries securing land for Maori “in the course of a very little time a place would not be left in the vicinity of the Bay of Islands where they could go to to eat cockles and drag their nets”. While the efforts of Coates and others in England to assert the independence of New Zealand was “praiseworthy in the extreme”, Maori had “lost the sovereignty of their land” and would not regain it from settlers by their own efforts. The “withdrawal of British protection” would simply establish “the Independency of the Whites” in a “world

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<sup>467</sup> See also letters of Henry Williams dated 11 January 1838 (“unless some protection be given by the British Government, the country will be bought up, and the people pass into a kind of slavery, or be utterly extirpated. ... The only protection that I can propose, is, that the English Government should take charge of the country, as the Guardians of New Zealand; and that the Chiefs should be incorporated into a General Assembly, under the guidance of certain Officers, with an English Governor at their head, and protected by a military force”) and 18 June 1838 (“no time should be lost, for the preservation of the Tribes”), quoted in Coates *Documents*, above n 294, 45 & 46. Similar concerns were raised in correspondence by other missionaries. See letters from Richard Davis, Charles Baker and Richard Maunsell, reproduced in Coates *Documents*, above n 294, 46-48.

<sup>468</sup> See Chapter 9, n 334.

<sup>469</sup> Clarke to Coates, 16 November 1838, quoted in Carpenter “A Declaration and the Treaty”, above n 351, 136.

... big with adventurers”, where every ship brought new settlers and land speculators. Clarke wrote that “[a]ll my hopes for the peaceable settlement of this country is from the British Government by becoming the Sovereign, or if you like the Guardian of the people.”<sup>470</sup> Richard Davis, in a letter to Coates of 18 November 1839 which James Stephen later (who received it from Coates in June 1840) marked as “deserves reading”, expressed continuing concern about land sales. He discussed the efforts made by missionaries to protect land in the “splendid District of Kaikohe” from sale by an absentee chief by purchasing the chief’s interest and supporting a “compact” among other Maori “proprietors” against sale. “What is to become of the Natives is a question of vast importance.” For his part, Davis considered his “path of duty” to be with Maori—“to rise or fall” together.<sup>471</sup>

Given that the views of Busby and the missionaries in relation to Maori were broadly congruent, Busby’s performance of the instruction given to him to work closely with the missionaries must be accounted disappointing. Nor was he more successful in fulfilling Bourke’s instruction to assist in developing commercial relations between British subjects and Maori. For all his earlier talk when seeking the Residency, there is little evidence that he exerted himself very much at all in this direction. Perhaps his language skills were not adequate to the job. But perhaps a main reason was his concern that going on board ships would be “derogatory to my station”: “I would in many instances be exposing my office to contempt and myself to insult.”<sup>472</sup>

Busby was also poor at keeping New South Wales “fully informed” of everything to do with his Instructions. It is difficult to know why he reported some matters and

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<sup>470</sup> Clarke to Coates, 28 August 1839 (extract), CO 209/8, 147a-b.

<sup>471</sup> Davis to Coates, 18 November 1839 (extract), CO 209/8, 164a-165a; Stephen to Smith, 13 June 1840, CO 209/8, 165b. For further missionary expressions of concern about Maori land sales and the need for government to secure law and order, see Diary of Rev John Hobbs (1823–1860), 16 January 1840, AML MS 144, Box 1, Volume 5 (typescript), 576; Fairburn to Busby, 20 November 1838 & 20 December 1839, ANZ AABS 8156 BR 1/2, 133 & 180; and “Minutes of Sub-Committee appointed to examine the Report from the Select Committee of the House of Lords, on the present state of N.Z., May 1839”, CMS CN/M vol 11, 423-437 at 431-433. See also Adams *Fatal Necessity*, above n 86, 81-85.

<sup>472</sup> Busby to Colonial Secretary (NSW), 12 August 1835 (no 63), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 137 of the typescript).

## Chapter Six: Busby's Residency

not others. As we have seen, he was not particularly observant or curious, perhaps because he was so self-absorbed and anxious to promote himself. A measure of this is that his private letters are hardly more illuminating about New Zealand conditions and his work than his official reports. Of the reports he was required to send relating to shipping, agriculture, commerce and "general statistics", shipping reports were sent only grudgingly.<sup>473</sup> He did not ever report whether the trade in human heads had come to an end. It is not an exaggeration to say that understanding of Maori society in London and in Sydney was not greatly assisted by the six and a half years of Busby's reports. There is, for example, almost no information in his despatches about the progress of the various Christian missions. Nor is there any proper explanation in them of the political situation in the Bay of Islands of the various hapu of Ngapuhi.

With this background of the man and his performance as Resident, it is now possible to examine the proposals Busby advanced during his Residency for closer political association between Great Britain and New Zealand.

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<sup>473</sup> See *ibid* & Busby to Colonial Secretary (NSW), 2 December 1835 (no 75), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 169-170 of the typescript).

## CHAPTER SEVEN

### **A DEPENDENCY IN EVERYTHING BUT NAME—BUSBY’S VISION**

The objective of the Residency in promoting Maori government and law was significantly advanced by Busby, as has been seen, only through the confederation of chiefs, by adoption of a flag and by the 1835 Declaration of Independence. Both measures also developed the political connection between Britain and New Zealand. Ultimately, however, the Maori government they could have prefigured did not eventuate. In Chapters 8 and 9, the steps by which, in the period from May 1837 to August 1839, the Colonial Office came to the decision to send Hobson to New Zealand to treat with Maori for the sovereignty of the country are discussed. Here, however, the focus is why Busby himself abandoned the notion that the Confederation could be the basis of Maori government (associated with Britain through treaties to protect mutual interests) and himself promoted the different path of direct British intervention in the government of New Zealand, through a range of ideas which included options short of the acquisition of sovereignty.

#### **First thoughts, 1831–34**

As has been seen, even in 1831, well before Busby set foot in New Zealand, he had proposed that a British magistrate be located in New Zealand with authority to conclude treaties with Maori for the protection and promotion of trade and the delivery up of convicts and criminals.<sup>1</sup> Busby envisaged in his 1831 “Memoir” that treaties might be negotiated with individual chiefs or with a collective, in which case “the whole number of chiefs could be made to guarantee their performance, by each separate individual”.<sup>2</sup> He expressed confidence that “the most refractory of

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<sup>1</sup> See Chapter 6, text accompanying ns 116-118.

<sup>2</sup> Early on in his Residency, consistently with this proposed method of proceeding, Busby wrote of his intention to bring his complaint against Pomare (for seizure of King’s schooner) to the attention of the “influential Chiefs” expected to assemble for a hahunga. He intended to point out to them that the dispute was “one in which all their interests are concerned; as if not settled amicably, it may affect the friendly feeling which the British Govt are desirous to maintain towards the Chiefs of New Zealand”. Busby to Colonial Secretary (NSW), 3 July 1833 (no

them” could be kept to their treaty obligations by the threat to prohibit trade in their districts. Busby considered that “[f]rom the character and intelligence of the chiefs, there cannot be the least doubt of their capacity to understand the obligations of such a treaty, or of their power to cause them to be fulfilled”. Busby was also confident that the British Resident would be in a position to influence Maori society:

Without assuming any authority over the natives, beyond what might be voluntarily conceded to his character, or attempting any interference in their internal government, except by persuasion and advice, it is beyond a doubt that the influence of the resident would be sufficient to induce the New Zealanders to abandon the worst practices to which they are at present addicted, and which, even now, a respect for the opinions of Europeans, leads them to conceal and deny; and that, joined to the exertions of the Missionaries in their education, and the humanizing influence of commerce, and the domestic industry it would produce, their respect for the British character would lead them at length to abandon the ferocious character of the savage and the cannibal, for the principles of a milder religion, and the habits of a more civilized people.

Busby suggested that it “would be necessary to enter into a separate treaty with the chief of the Bay of Islands tribe, for the cession of a tract of country at that harbour, and for the property of the harbour itself, reserving to the natives its free navigation”:<sup>3</sup>

A similar right might also be acquired at the River Thames, on the eastern coast, and at some other harbour to the southward; and from the numerous British and American whaling vessels, which call at these harbours to refit, it is probable that a small duty levied upon each, for permission to wood and water, would cover all the expenses of such an establishment, or if not, a small fee made payable at the Custom House of Sydney, on the clearing out of vessels for the New Zealand trade, would make up the difference.

As has been seen, upon arrival in the Bay of Islands, Busby addressed the chiefs on the theme that the tribes should abandon warfare, becoming “one people” under the

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21), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 61-62 of the typescript). There is, however, no report of Busby acting on this proposal.

<sup>3</sup> James Busby *Authentic Information Relative to New South Wales, and New Zealand* (Joseph Cross, London, 1832) 69.

word of God.<sup>4</sup> He also immediately wrote to New South Wales recommending that the British Government should recognise a flag if adopted by the chiefs acting in concert. He suggested that, in coming together for this purpose (of benefit to New Zealand shipping), the chiefs would lay a foundation for political confederation.<sup>5</sup> These proposals were consistent with Bourke's Instructions to him to promote Maori government and to support the work of the missionaries, although he himself did not acknowledge the Instructions when putting forward his proposals.

As we have seen, Busby began his Residency with much energy. His reports indicate his enthusiasm to play the part of a lawman. In his private correspondence in June 1833, he exuded confidence about the difference his appointment had immediately made: "The King's name is a Tower of Strength" and "respectable traders" now thought they had a future in New Zealand; convicts had decamped in fear of his arrival (and if the Governor adopted his passports proposal, he was confident there would "not be 20 convicts or mischievous characters in the Northern part of the Island 2 years hence"). Busby expected to establish an influence with Maori which would give him "almost entire authority over the Northern part of the Island". He spoke of his optimism that he would be able to get the chiefs to "act in concert" and referred to his intention, "by and bye to build them a Parliament House! where they will meet & discuss matters affecting them all":

I have no fear but I shall be able to bring them forward in the formation of political Institutions, as fast as the circumstances of the people will admit—when I have once got them to assemble and taught them to decide questions affecting them all by the will of the Majority the foundation of a Government is laid.

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<sup>4</sup> See Chapter 6, text accompanying n 259.

<sup>5</sup> See Chapter 6, text accompanying ns 251-257.

## Chapter Seven: Busby's Vision

Busby also remarked how busy he was with his despatches. He was obliged to make many copies of for distribution and for his own records, and often laboured over his correspondence long into the night.<sup>6</sup>

Although, as has been described in Chapter 6, Bourke's responses to Busby's earlier despatches were cool about his policing efforts and expectations of magisterial powers, Busby was not initially deterred. He continued to pursue the same course and to press for more powers, including by direct correspondence with the Colonial Office. He was confident that the Colonial Office would respond positively to the letters he had sent in March–May 1833 both to it and to those such as Buxton and Haddington who might intercede on his behalf. In February 1834, in writing to the Colonial Secretary in New South Wales to suggest that he could exercise similar powers to the British Consul at Santiago, he indicated that he was “daily in the expectation of receiving additional powers and instructions”.<sup>7</sup> To his brother in May, he wrote that he believed that the delay in obtaining word from London may have been because the despatches had gone down with the *Amphitrite* (a convict ship destined for Sydney which had been lost off Boulogne in August 1833).<sup>8</sup>

In case his earlier correspondence had not been sufficiently compelling, Busby put forward additional arguments for the powers he was seeking in a further despatch of 3 April 1834 to the Colonial Office. In it, he referred to being “daily in the painful situation of being appealed to for protection without being able to afford assistance which they appear to claim as a right from an accredited agent of the British Government”.<sup>9</sup> Busby's sensitivity about the weakness of his position may have been exacerbated by criticism in the Sydney press. In January 1834, he had written to the Colonial Secretary in New South Wales asking that the proprietors of

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<sup>6</sup> James Busby to Alexander Busby, 22 June 1833, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 14-15 of the typescript).

<sup>7</sup> Busby to Colonial Secretary (NSW), 25 February 1834 (no 36), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 77 of the typescript).

<sup>8</sup> James Busby to Alexander Busby, 17 May 1834, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 18 of the typescript).

<sup>9</sup> Busby to Hay, 3 April 1834, CO 209/1, 213a-218b at 214b.

*The Australian* be prosecuted for criminal libel for a “calumnious attack upon my character” in suggesting that Busby was “an absolute nullity as far as regards his services or his protection to the inhabitants” of the Bay of Islands, “but ... a most *industrious* ‘dealer in small wares’ on his own account”.<sup>10</sup> Busby received advice in mid-March 1834 that Bourke did not propose to prosecute the owners of *The Australian*.<sup>11</sup>

Busby's hopes that his correspondence would cause Bourke to reassess the extent of his powers (and confirm that he could exercise magisterial authority at least in relation to British crew on “Ships in Harbour”<sup>12</sup>) were dashed when he received the 23 August 1834 reply from New South Wales that, without imperial legislation (which the Governor considered was “not likely to be imparted”), there was “no other course for you to pursue than to act upon the Spirit of your Instructions and to endeavour to obtain such an influence with the New Zealand Chiefs as may enable you to use their power in aid of your purpose”. The Admiralty jurisdiction of the Governor of New South Wales could not provide Busby with any authority since it was “limited to the Colony”. With respect to a suggestion by Busby that ships' captains should be compelled to provide him with a sworn list of crewmen on arrival in the Bay of Islands, New South Wales made reply that this requirement could not be imposed by the New South Wales legislature which could not legislate “beyond the limits of the Colony”.<sup>13</sup>

This information, which must have been a considerable disappointment to Busby, arrived on 14 October 1834 after adoption of the flag by the chiefs at Waitangi in March and just before the chief Rete was identified as the perpetrator of the armed robbery of the Residency in May. Busby's reaction to the identification of Rete seems to have been fuelled by his disappointment to learn that Governor Bourke

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<sup>10</sup> *The Australian*, Sydney, 25 November 1833, at 2; Busby to Colonial Secretary (NSW), 13 January 1834 (no 34), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 75-76 of the typescript).

<sup>11</sup> Colonial Secretary (NSW) to Busby, 22 February 1834 (no 34/3), AML MS 91/75, Box 2, Folder 50, item 332.

<sup>12</sup> See Chapter 6 n 356.

<sup>13</sup> Colonial Secretary (NSW) to Busby, 23 August 1834, AML MS 91/75, Box 2, Folder 51, item 337.

could not be relied upon to provide him with the resources and authority he thought due to his office. The fracas at the Residency (which Busby had initially responded to relatively mildly<sup>14</sup>) became a principal plank in Busby's further efforts to persuade Bourke and the Colonial Office to revisit the question of his powers. The pessimism he expressed about the practicality of working through the chiefs to achieve the objects of his Residency was initially an argument he used to support the provision of resources and authority to enable him to act independently. Indeed, he treated the attack as proving his case and was confident that it would lead to change.<sup>15</sup> Busby, initially, does not seem to have felt he and his family were in personal danger. He wrote to his brother Alexander that, after a few nights of uneasiness, "I still feel as secure as I could in any part of the Bush of N.S. Wales".<sup>16</sup>

When it became clear, later, that he could not expect to receive further powers himself, it came to dominate his thinking and eventually led him to advocate direct British intervention in New Zealand, in support of which he was not motivated to make the Residency work on its own terms and was impelled to build up the picture of lawlessness in New Zealand and the inability of the Confederation to move to effective government. This was, however, in the future.

In late October and November 1834, Busby's principal concerns were to ensure that Rete was properly punished for what he had done (perhaps in part because of the lack of sympathetic reaction from Bourke) to regard as "a deliberate attempt at murder" and "the crisis of British affairs at this place", and to make best use of the incident in support of his continuing campaign to obtain better resourcing and

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<sup>14</sup> See Busby to Hay (Colonial Office), 3 & 10 May 1834, CO 209/1, 237a-238b & 239a-243a; James Busby to Alexander Busby, 17 May 1834, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 16-17 of the typescript); Busby to Colonial Secretary (NSW), 7 June (no 42) & 2 July 1834 (no 43), ATL qMS-0344 (holographs) & qMS-0345 (typescript) (pp 91-95 of the typescript); Busby to Captain Sadler (HMS *Buffalo*), 9 June 1834, ANZ AABS 8156 BR 1/1, 146.

<sup>15</sup> James Busby to Alexander Busby, 17 May 1834, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 17 of the typescript).

<sup>16</sup> Ibid.

## Chapter Seven: Busby's Vision

authority.<sup>17</sup> Now that Rete had been identified as the perpetrator of the assault at the Residency, Busby was privately vengeful. That may in part have been because of Busby's past run-ins with Rete, whom he described in a letter to Alexander as:<sup>18</sup>

a thorough bad fellow, whose conduct to me from the beginning has been such that I always treated him as a Scoundrel and told him over & over again that he was a thief and every thing that was bad . . . .

Busby went along with the missionary proposal that compensation in land and banishment would be adequate redress only grudgingly—his personal view was that death sentences would be appropriate punishment for Rete and his associates and he could not resist reminding the chiefs who assembled on 30 October to decide the punishment how HMS *Alligator* had recently dealt with Ngati Ruanui for its conduct towards British subjects.<sup>19</sup> Busby reported that the chiefs had adopted the missionary solution but, for himself, left it to Bourke to decide whether the punishment was adequate vindication for British interests.<sup>20</sup> To his brother, Busby wrote that he had “taken care to leave the whole responsibility of future

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<sup>17</sup> Busby to Colonial Secretary (NSW), 30 October (no 47) & 28 November 1834 (no 48), ATL qMS-0344 (holographs) & qMS-0345 (typescript) (pp 97-107 of the typescript).

<sup>18</sup> James Busby to Alexander Busby, 17 November 1834, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 19 of the typescript).

<sup>19</sup> For the “Harriet affair” (which was inquired into by the Aborigines Committee), see James Belich *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century* (Penguin Books, Harmondsworth, Middlesex, 1996) 169-170. Another indication of Busby's mood at the time is his further request to Captain Lambert of HMS *Alligator* to threaten to fire on Pomare's pa unless compensation was provided “for several outrages of a very gross character which have been lately committed upon British Subjects by natives of Pomare's Tribe”. Lambert seems to have agreed to this course, but Busby declined to proceed any further, apparently in some indignation with Lambert for having recovered by unilateral action “without reference to me” a boat which was the subject of the principal matter of complaint. See Busby to Colonial Secretary, New South Wales, 29 October 1834 (no 46), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 96-97 of the typescript); and Busby to Alexander Busby, 17 November 1834, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 20-21 of the typescript). It was, therefore, not entirely accurate for Busby to tell the chiefs at the meeting on 30 October that he had not allow Lambert to burn down Pomare's pa. See Busby to Colonial Secretary, 30 October 1834 (no 47), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 100 of the typescript).

<sup>20</sup> Busby to Colonial Secretary (NSW), 30 October 1834 (no 47), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 97-100 of the typescript).

## Chapter Seven: Busby's Vision

consequences upon the Governor". In the same letter, Busby made clear his antipathy towards Bourke:<sup>21</sup>

It would surprise any one who does not know the character of Gen<sup>l</sup> Bourke's Govt. to be informed—that he did not think it worth while so much as to acknowledge the receipt of my letter detailing the circumstances of the attack upon my house . . . .

...

I verily believe that the same dishonest fear of incurring the responsibility necessary to a faithful discharge of his duty which has characterized his proceedings in other matters, will prevent his doing any thing on the present occasion.

Busby went so far as to express "great pain" at the news that Alexander and his father "would go to dine with the Governor":<sup>22</sup>

I am certainly more out of the way than either of you but if I were to go to Sydney tomorrow I should flatly decline any invitation he might send me.

Busby was still optimistic that the Rete affair would turn out to his advantage. To his brother he wrote of a despatch of 28 November which he had sent to Sydney and London "relative to my situation here and the footing upon which my appointment stands":<sup>23</sup>

I have submitted whether the Honor of the British Gov<sup>t</sup> is not concerned in keeping me here with less protection than any other European possessing property in the Bay of Islands—perhaps in New Zealand. And I think it quite impossible that the Gov<sup>r</sup> or the Gov<sup>t</sup> at home can pass over such statements. The British shipping which visited this place during the 6 months ending 30 June was 58 and 15187 Tons. We are all perfectly well and free from any sense of danger but feel the suspense of our situation very unpleasant.

In his despatch of 28 November 1834, Busby used the Rete affair to respond to the Colonial Secretary's 23 August advice that he could not expect to receive the

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<sup>21</sup> James Busby to Alexander Busby, 17 November 1834, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 19 of the typescript).

<sup>22</sup> Ibid (p 21 of the typescript).

<sup>23</sup> Ibid (addendum dated 20 December 1834) (p 25 of the typescript).

magisterial powers he had hoped for, even though the connection between the Rete raid and the control of British nationals was tenuous at best.<sup>24</sup> In the despatch, he made the points in relation to Rete that he later summarized for his brother (that the honour of the British Government was at stake and that he was the least protected settler in New Zealand, inhibited in carrying out his duties by the fact that, since the attack, he had “not ventured to be absent myself from my family for a single night”).<sup>25</sup> Moving to his own conditions of appointment, he indicated that, until the letter of 23 August, he had “the strongest hopes” that his earlier correspondence would have convinced Bourke that he needed “authority competent to control the Crews of Ships, and other British Subjects at this place” and that it was only “in a case of the greatest extremity” that it would be appropriate to work through the chiefs.<sup>26</sup> That was because “the New Zealanders have no conception of abstract justice, or the right of a community to interfere with its members for the general good”.<sup>27</sup>

[T]he punishment of crime is simply compensation to the party injured which he or his connections are alone entitled to take. If the conduct of a Slave becomes intolerable to his master, he puts him to death—he knows of no other punishment. But if injured by a person whose connections are of equal rank with his own, the punishment or impunity of the offence will depend upon the relative strength of the Tribes to which the aggressor and the injured party respectively belong. Compensation will be taken in the easiest way that it can be procured; and however innocent those may be from whom it is exacted, it is enough to meet their ideas of retributive justice, that they are the connections of the guilty party. When the suspicion of the attack upon my house rested upon a party belonging to the district in which Mess<sup>rs</sup> Clendon & Stephenson are established, it was proposed by those of my District to take amends by plundering the Stores of those Gentlemen!

However desirable therefore, and however loudly called for, may be the exercise of power for the protection of the well disposed Settlers, and for the apprehension and removal of those individuals who are living in a course of the most flagrant and

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<sup>24</sup> Busby to Colonial Secretary (NSW), 28 November 1834 (no 48), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 101-107 of the typescript).

<sup>25</sup> Ibid (pp 102 & 106 of the typescript).

<sup>26</sup> Ibid (p 103 of the typescript).

<sup>27</sup> Ibid (pp 103-104 of the typescript).

## Chapter Seven: Busby's Vision

uncontrolled criminality—not only watching every opportunity to plunder the more respectable of their Countrymen, but inciting the Natives to acts of aggression upon them, I trust H.E. will perceive that until the Native Chiefs have acquired some idea of the extents and limits of legal authority their power could not be employed for the purpose of maintaining order without risking greater evils than it could remedy. It would shock a New Zealander's ideas of justice to be made instrumental in punishing a crime which did not injure himself or his connections. And if prevailed upon to interfere he would consider himself entitled to appropriate for his own behoof whatever of the offender's property might come within his reach. In fact the arrest of an individual by means of the natives would justify according to the custom of the Country the plunder of his property by whomsoever it could be laid hold of.

In these circumstances, Busby argued that there was “little hope of being able to maintain order through the power of the Native Chiefs”.<sup>28</sup> Although Busby believed that his “simple residence here” would prevent those “acts of violence and inhumanity upon the natives of New Zealand by the Crews of British Vessels” of the kind that had led to his appointment, he maintained that other “excesses” and “evils” required him to have both independent authority and “the means of enforcing it”.<sup>29</sup> These means entailed “trivial” expense, “when compared with the magnitude of the interests which are involved”.<sup>30</sup>

All I require is the employment of two Constables with such salaries as will ensure the Services of trustworthy men. And two young Chiefs, of sufficient influence to protect them in the discharge of their duty, and to communicate generally with their own Countrymen. This added to the allowance of £3 for each Native to the number of 20 whom I can prevail upon to live with me, would not I apprehend exceed from £200 to £300 p.a. This much is necessary and it would remove all grounds of apprehension for the safety of my family. At the same time it would be a liberal and wise policy to allow £100 p.a. additional to be spent in conciliating the Chiefs; and especially in procuring the sons of the most influential of them to be educated under my direction.

Busby asked Bourke to “bring the whole subject under the especial notice of H.M. Govt”.<sup>31</sup> He argued that both “the natural resources of the Country and its political

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<sup>28</sup> Ibid (p 104 of the typescript).

<sup>29</sup> Ibid (pp 104-106 of the typescript).

<sup>30</sup> Ibid (p 106 of the typescript).

<sup>31</sup> Ibid (p 104 of the typescript).

## Chapter Seven: Busby's Vision

condition are such as to make it well worthy the attention of the British Nation". He was optimistic that "eventually" he would be able to obtain "such an influence over the Chiefs as to secure to British Enterprise, both in the settlement of the Country & the prosecution of Trade most of the advantages which would result from its being a direct dependency of the British Crown".<sup>32</sup>

With regard to the people themselves I consider them to be on the very threshold of civilization. Alive to every distinction which marks the superiority of the European visitors, it is only necessary to acquire their confidence in order to lead them to whatever changes in their social condition may best afford them the blessings of established Government, and impartial laws. This will no doubt be a work of time, and advantage may be taken of incidents which may arise to shew them the benefits of a change, and the means by which it can be accomplished. But the foundation is already laid in the Christian instructions imparted by the Missionaries who have laboured in this Country with a singleness of aim which is above all praise; and with a degree of success which demonstrates the blessing of the Most High upon their Labours.

While sensible that the power of Great Britain needs only to be put forth to annihilate their whole race, the New Zealanders have learnt from the Missionaries that it is possible for strangers to take an interest in their welfare; and with this mixed feeling of fear and confidence, I have no doubt they will receive any suggestion for the improvement of their social condition with the docility of little children.

Busby's hopes that this despatch of 28 November would lead change in his terms of appointment would have been boosted by the advice of the Colonial Secretary of 31 January 1835 that Bourke, before Busby's despatch had been received, had written to the Colonial Office on 6 December 1834 suggesting that unless the British Resident was invested with legal powers and a naval ship "appointed to these Seas" it would be "more creditable" to withdraw the Resident altogether "and to inform the British residing there, that they are not to expect the protection of His Majesty's Government in that Country". Busby was advised that "in several

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<sup>32</sup> Ibid (pp 105-106 of the typescript). In clear reference to this letter, Busby wrote in July 1835 to his brother Alexander that with "two steady Europeans and ... 2 young Chiefs" he "could undertake to make this country a British Dependency in everything but the name". James Busby to Alexander Busby, 23 July 1835, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 40 of the typescript).

material points your own views are met by the sentiments expressed in [Bourke's] Despatch". He was also told that Bourke's Executive Council had considered his despatch and been "forcibly impressed with the importance of your representations" but had recommended that until the Home Government had answered Bourke's despatch "no expense should be incurred in addition to that which has been heretofore authorised" for New Zealand.<sup>33</sup>

Bourke's despatch of 6 December 1834 was not forwarded to Busby. Nor was a subsequent letter of 1 February 1835 to the Secretary of State. Both were critical of Busby's failure to establish good relations with the chiefs and reported that he was disregarded by the European population.<sup>34</sup> In the second letter, which commented on Busby's despatch of 28 November 1834, Bourke considered that the provision of two constables "could not add materially to his authority or security if he lost the good will and respect of the natives".<sup>35</sup> Bourke's letters were much less supportive of the case for strengthening the Residency than Busby appears to have taken from the 31 January 1834 communication to him. He may also have picked up the wrong impression from an informal letter written to him by Alexander McLeay, the Colonial Secretary, which (according to Busby) expressed the hope that "the Governor's letter to the Secty. of State would produce a better arrangement".<sup>36</sup> As has been seen, Bourke's correspondence elicited the response from the Colonial Office that Busby could be replaced by a more capable officer (a course Bourke

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<sup>33</sup> Colonial Secretary (NSW) to Busby, 31 January 1835, AML MS 91/75, Box 2, Folder 52, item 341.

<sup>34</sup> See Chapter 6, text accompanying ns 306-307.

<sup>35</sup> Bourke to Spring Rice, 1 February 1835, CO 209/1, 138a-162b at 140b.

<sup>36</sup> See James Busby to Alexander Busby, 27 March 1835, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 32 of the typescript). McLeay's letter does not survive. It is difficult to infer from Busby's commentary on it to his brother (with the indication that McLeay had invited Busby to write "a statement of the effect produced upon the minds of the natives") whether McLeay was trying to help him against Bourke (with whom McLeay had a bad relationship). Whatever his motive, Busby decided not to answer the letter at all, giving up an initial impulse to complain to McLeay about the Governor's failure to send copies of his despatches to London ("from which alone the Secretary of State could ascertain the real state of affairs here"), while "telling him at the same time that I myself had sent duplicates home".

did not adopt, for reasons already discussed).<sup>37</sup> Busby, however, seems to have had no inkling how precarious his position was.

### **Conjecturing treaties**

Busby realised that there would be a lag of some months before a reply from London to Bourke could be expected. Although in the first half of 1835 he appears to have been marking time<sup>38</sup> and, “till something be done”, was “unsettled”, Busby seems to have been confident that there would be a change for the better in his circumstances. He looked to add further land to his holding at Waitangi and his family was growing.<sup>39</sup> Busby is also likely to have been buoyed by some positive communications from New South Wales received on 31 August: approval of the manner in which the Rete matter had been finally resolved; vindication of his conduct towards Polack (on complaint by Polack to the Governor); advice that the King had recognised the flag adopted by the chiefs; and acknowledgment that his mediation in resolving some cases of plunder of British property was “very satisfactory”.<sup>40</sup>

Apart from the annoyance provided by Rete's continued trespass on Busby's land (which led to Busby burning down some “fishing huts”),<sup>41</sup> the only cloud hanging over Busby at this time was the appointment of Thomas McDonnell as Additional British Resident at the Hokianga. This appointment, which was not a paid position and which was subordinate to Busby's Residency, was obtained by McDonnell, a former naval lieutenant who had been settled in the Hokianga for about five years, from the Colonial Office without reference to Bourke or Busby. Although the appointment had been made in July 1834, there was no news of it until McDonnell

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<sup>37</sup> See Chapter 6, text accompanying ns 308-315.

<sup>38</sup> James Busby to Alexander Busby, 23 July 1835, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 40 of the typescript): “My own time is frittered away in the most trifling engagements you can possibly conceive.”

<sup>39</sup> Ibid (p 41 of the typescript). Agnes gave birth to a daughter, Sarah, on 28 September 1835. Their other children were: James (born 1837, died 1840), George Alexander (born 1839), William (born 1841) and Agnes (born 1843).

<sup>40</sup> See Colonial Secretary (NSW) to Busby, 25 April 1835 (x3) & 21 July 1835, AML MS 91/75, Box 2, Folder 52, items 347-349 & Folder 53, item 355.

<sup>41</sup> See Busby to Colonial Secretary (NSW), 11 May 1835 (no 54), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 118-119 of the typescript).

himself arrived back in the country in August 1835.<sup>42</sup> Busby immediately protested the appointment to Bourke on the basis that the justification for the appointment (the distance of the Hokianga from the Bay of Islands) was groundless<sup>43</sup> and on the basis that McDonnell's commercial interests would impinge on his ability to discharge an official function impartially.<sup>44</sup> To Alexander, Busby wrote that McDonnell's appointment was "as ever shameful a transaction as disgraced a Minister of the King". He wrote that he had received only "one short letter" from McDonnell in his first six weeks at the Hokianga "which I answered as shortly".<sup>45</sup> Matters did not improve, and for the next year, until McDonnell resigned, Busby was largely consumed by competition with McDonnell and strategies for getting rid of him.<sup>46</sup>

In early September 1835, however, Busby seems to have been in a generally positive frame of mind. A letter written to Alexander on 5 September contains expression of spiritual ecstasy.<sup>47</sup> The letter is striking because it is so very different from the others written to Alexander during the period of Busby's Residency. Busby expressed concern that Alexander, who was prospering in New South Wales, was neglecting his spiritual side and urged on him some books to elevate his mind: Alexander Keith's *Evidence of the Truth of the Christian Religion Derived from the Literal Fulfilment of Prophecy* ("a book I never think of without thanking God it was written");<sup>48</sup> a work by Joseph Gurney (the Quaker banker,

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<sup>42</sup> Colonial Secretary (NSW) to Busby, 29 June 1835, AML MS 91/75, Box 2, Folder 53, item 351 (enclosing Spring Rice to Bourke, 8 July 1834—a letter apparently delivered to Sydney by McDonnell himself).

<sup>43</sup> Busby also argued that some distance was an advantage because it prevented him being drawn into every "petty squabble" and permitted passions to cool before he became involved.

<sup>44</sup> Busby to Colonial Secretary (NSW), 7 August 1835 (no 61), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 131-135 of the typescript).

<sup>45</sup> James Busby to Alexander Busby, 6 September 1835, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 47 of the typescript).

<sup>46</sup> See Busby's 1835–36 despatches to New South Wales, ATL qMS-0344 (holographs) & qMS-0345 (typescript).

<sup>47</sup> James Busby to Alexander Busby, 5 September 1835, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 43-45 of the typescript).

<sup>48</sup> Ironically, given his view that there were "[t]oo many prayers at Why tanghie", this book was given to Agnes Busby by Edward Markham. Alexander Keith was a Church of Scotland minister.

brother of Elizabeth Fry, and brother-in-law of Thomas Fowell Buxton);<sup>49</sup> and Isaac Taylor's *Saturday Evening* (a book recommended by Busby to elevate the mind from "things carnal to things spiritual"). Busby himself seems to have been in some turmoil about the insignificance of man in the cosmos, referring to James Bradley's calculation that the star Gamma Draconis was "distant from our earth at least 38,000,000,000,000 of miles" and which a cannon ball "continuing at the velocity with which it is discharged from the cannon's mouth" would not reach in three million years. Busby exclaimed: "Compare with this the 6,000 years of 'this world's history'. Compare with this the 70 years which makes up the 'good old age' of man!". It is perhaps no wonder that the next day when Busby resumed his letter he wrote that he had gone to bed "with my hair almost upon end at the prospect which presented itself on endeavouring to look into the womb of time. No, of eternity ...". He was concerned whether these were, indeed, the "ideas of truth and soberness".<sup>50</sup>

The enormity of the universe and the state of his brother's soul did not prevent Busby developing at the same time more ambitious proposals for the government of New Zealand. In the first week of September, missionaries and settlers at the Bay of Islands had approached Busby about a prohibition on the importation of spirituous liquor. Busby acknowledged in his despatch of 10 September to New South Wales that the proposal was widely supported, including, he said, by Maori. He had rejected it, however, on the basis that using "the instrumentality of the native Chiefs" to effect the ban risked bringing Maori and British subjects into conflict. Although "there would be no difficulty in prevailing upon the Chiefs to enact a Law prohibiting the importation and sale of spirits", Busby wrote to New South Wales that "it ought scarcely to be admitted on principle that these people are entitled to commence their first rude essays in the act of Govt in matters which

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<sup>49</sup> This work was probably *Essays on the Evidences, Doctrines and Practical Operations of Christianity* (1825).

<sup>50</sup> Given these ruminations, it seems an amazing coincidence that less than four months later Busby played tour guide to Charles Darwin who visited New Zealand on HMS *Beagle*. See Charles Darwin *Narrative of the Surveying Voyages of His Majesty's Ships Adventure and Beagle, Between the Years 1826 and 1836* (Henry Colburn, London, 1839, vol 3) 502-504 & 512-514.

have exclusive reference to British Subjects unless in direct co-operation in every case of a British authority". Such British involvement would be enabled if Busby obtained the authority and police capacity he was expecting "shortly".<sup>51</sup> In that case, Busby would be "most happy to give the measure all the support in my power, as one which I have always looked forward to as the first and most desirable exercise of Established authority". Without British involvement in this way, however, there was too much risk of conflict and corruption:

Even in civilized Countries, the Revenue or other Laws enacted for the prohibition or regulation of trade in particular commodities, require all the force of established order & immemorial usage as well as the most perfect discipline, and tried conduct in the functionaries employed, to prevent their administration from being a frequent cause of riot and disorder; and it is to be feared that many years will elapse before so delicate a trust as the right to search or interfere with property can be safely conceded to the rival Chiefs of this Country and their lawless followers.

There was a more fundamental objection: Maori were "by their ignorance equally incapable of their rights as an independent people; and by the absence of all established authority for the exercise of this or any other function of Govt".<sup>52</sup> Setting up the conditions in which such established Maori authority could develop and could enter into agreements to enable the British Resident to exercise authority in matters such as the prohibition on the importation of spirits was the project to which Busby turned in a despatch written the next day.

This important despatch,<sup>53</sup> which prefigures much of Busby's later proposals for the future government of New Zealand, is similar to the proposal put forward by Busby in his "Memoir" of 1831. In the expectation that "the decision of H.M. Govt relative to the British Residency in this Country will shortly be received at Sydney", Busby referred to the "approaching necessity for placing the trade carried

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<sup>51</sup> With such resource, Busby would be "able to depute a Constable to be present on every occasion when a search was to be instituted or a seizure to be made".

<sup>52</sup> Busby to Colonial Secretary (NSW), 10 September 1835 (no 65), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 138-142 of the typescript).

<sup>53</sup> Busby to Colonial Secretary (NSW), 11 September 1835 (no 65/2), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 142-147 of the typescript).

on by British Subjects at this place under such regulations as the Native Chiefs of themselves are manifestly incompetent to enact or to maintain”:

For the British Govt to take upon itself to frame and give effect to regulations for the conduct of trade in this country would be an undoubted assumption of authority which of right belongs exclusively to the natives, but which is nevertheless required by the necessity of the case; being even more necessary to protect the native Chiefs from the consequences of a responsibility which in the present social and political condition it would be unjust to impose upon them, than to the well being of the British Traders themselves.

But while it is necessary to the maintenance of peace and good order that the Natives should be allowed to exert no authority in matters which involve the interests or safety of British Subjects unless with the co-operation and under the control of a British authority, there is not the slightest reason to doubt that whatever relates to this matter may be arranged as much with the entire concurrence of the Natives as for their real advantage.

Busby proposed that British laws relating to the crew of British ships should be extended to New Zealand, enforced by him as magistrate supported by “two Constables or Peace Officers of good character & conduct”, “two young Chiefs”, and “periodical visits of a Ship of War” (“provided her Commander were encouraged to place confidence in the discretion which I would find it necessary on my own responsibility to exercise”).<sup>54</sup> The cost of the expanded role for the Resident could, Busby thought, be passed on to ship owners by duties according to tonnage (which might even be levied on ships leaving Sydney harbour for New Zealand), especially if the owners would thereby be exempted from Maori charges for anchorage and watering (which were “pretty regularly exacted”, at least in the

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<sup>54</sup> The proposals for the support of two constables and two chiefs had been put forward by Busby in his despatch of 28 November 1834. The “periodical visit of a Ship of War” was in accordance with the suggestion made by Bourke to the Colonial Office. See Colonial Secretary (NSW) to Busby, 31 January 1835, AML MS 91/75, Box 2, Folder 52, item 341. The additional gloss by Busby (that the commander should follow his advice) attempts to overcome the difficulties Busby had encountered in getting naval captains to follow his directions. See, for example, n 19 above.

Bay of Islands and Hokianga).<sup>55</sup> Additional revenue might be obtained through the establishment a post office.

Busby recognised that British intervention along these lines required Maori consent. To this end, Busby recommended that the British Government treat with the chiefs of the Bay of Islands, among whom there was “a sufficient degree of connexion” to allow a single treaty to be negotiated (extending perhaps also to the chiefs of other major harbours on the east coast of Northland, including Whangaroa and Mangonui), and separately with the chiefs of the Hokianga. The treaties would be for purchase of harbour, water and other privileges used by shipping for a period of 21 years, with right of renewal “unless the natives should in the interim have established such a Govt as could cause itself to be respected, and entitled to raise from this and other sources the means of its support”. Such treaties could include provisions for:

the exemption of British subjects settled here from all the exertions of power and authority on the part of the Natives, unless exercised with the concurrence and under the direction of the British authority; and from the payment of any tax or impost of whatever nature during the period specified. It might also stipulate for the delivering up of all deserters from Ships, or escaped Convicts—and for the active aid of the Chiefs in supporting the authority of the British Resident over British Subjects. It might provide for the security of the title to Land acquired by purchase from the natives after a previous registration by the Resident on his being satisfied that the sale was effected by persons duly authorised.

Busby considered that expenditure of £1,000 (£500 for the Bay of Islands; £500 for the Hokianga and other harbours) would be “sufficient to purchase the required privileges ... for the space of twenty one years”. Such a payment “would be an absolute gain to the natives when compared with any revenue there is the least probability of their being able to raise within the period stated”.

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<sup>55</sup> Busby also expressed optimism that American Government would acquiesce in duties imposed on American ships because the arrangements would have the object of “the preservation of order”.

### The Declaration of Independence

As has been seen, Busby was always on the lookout for incidents which might be used to develop Maori political cohesion and government.<sup>56</sup> The 11 September treaty proposal did not undermine that objective and explicitly bought time during which Maori government could be established to take over, among other things, the regulation and revenues to be derived from British shipping. An opportunity to further advance the initial step taken in adoption of the flag towards Maori confederation and government and to prepare the way for a treaty or treaties (in the event that New South Wales or London accepted the 11 September proposals) was handed to Busby, only a few weeks later, by the absurd adventurer, Charles Philippe Hippolyte de Thierry.<sup>57</sup> De Thierry claimed to have purchased 40,000 acres at the Hokianga and proposed to establish a colony there. Busby and the Church Missionary Society missionaries received letters from de Thierry on 9 October, sent from Tahiti (where he styled himself King of Nuka Hiva, in the Marquesas Islands), in which he referred to his pending arrival in New Zealand and to his declaration of the independence of New Zealand: “that is my own Independence as Sovereign Chief”.<sup>58</sup>

Busby was first inclined to treat the letters as “the production of a madman” but on further reflection thought there was “sufficient method in the madness of such a man to be productive of much mischief” and that he should take steps to thwart de Thierry’s intentions.<sup>59</sup> Within a day, he produced a statement for British subjects resident in or trading at New Zealand, printed for distribution by the missionary press at Paihia, in which he warned them “against turning a favourable ear to such

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<sup>56</sup> Busby to Colonial Secretary (NSW), 13 May 1833 (no 3) (“the surest method of commanding success is if possible to discover a case in which such a union would prove to their advantage, and give it the appearance of originating with themselves”) & 28 November 1834 (no 101) (“advantage may be taken of incidents which may arise to shew them the benefits of a change, and the means by which it can be accomplished”). See Chapter 6, text accompanying ns 255; and Chapter 7, text accompanying n 32.

<sup>57</sup> See JD Raeside “Thierry, Charles Philippe Hippolyte de” *Dictionary of New Zealand Biography*.

<sup>58</sup> De Thierry to Busby, 14 September 1835, CO 209/2, 85a-86b; de Thierry to Williams & King, 14 September 1835, CO 209/2, 87a-93b at 89a.

<sup>59</sup> Busby to Colonial Secretary (NSW), 10 October 1835 (no 68), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 150 of the typescript).

## Chapter Seven: Busby's Vision

Insidious Promises” as were being made by de Thierry, which were contrary to King William’s acknowledgement of “the sovereignty of the chiefs of New Zealand in their collective capacity, by the Recognition of their Flag”. The King would not “permit his Humble and Confiding Allies to be Deprived of their Independence upon such Pretensions”. De Thierry’s claim to property was suspect: the chiefs from whom the purchase was said to have been made had “only a partial property in these districts” and part of the land was “now Settled by British Subjects, by virtue of Purchase from the rightful Proprietors”—“lawful” rights which Busby believed the British Government would protect if necessary. De Thierry’s claim to have obtained sovereignty was invalid because the chiefs with whom he had dealt had no right “as Individuals ... to the Sovereignty of the Country, and, consequently, possessed no authority to convey a right of Sovereignty to another”. Busby announced that he was calling together the chiefs “to Inform them of this proposed Attempt upon their Independence”. He urged British residents and traders to “use all the Influence they possess with the Natives of every Rank, in order to Counteract [de Thierry’s plans]” and to inspire them to resist those who came “with the Avowed Intention of Usurping a Sovereignty over them”.<sup>60</sup>

In his despatch of 10 October describing these developments, Busby explained his purpose in calling the chiefs together:<sup>61</sup>

I have also resolved to call at as early a day as possible a meeting of the Chiefs in order that they may declare the Independence of their Country, and assert as a collective body their entire and exclusive right to its Sovereignty; and their determination to maintain that right in its integrity; and treat as a public enemy any person who professes to assume a right of Sovereignty within their Territories; and especially to warn the writer of these Letters against approaching these shores, on pain of being treated as Independent States have a right to treat persons who attempt the usurpation of Sovereign rights within their borders. I shall probably also be induced to apply to H.M. so far to take them under his protection, as to guarantee their Country against the intrusion of such adventurers.

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<sup>60</sup> “The British Resident at New Zealand, to His Britannic Majesty’s Subjects, who are Residing or Trading in New Zealand”, CO 209/2, 94a.

<sup>61</sup> Busby to Colonial Secretary (NSW), 10 October 1835 (no 68), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 151-152 of the typescript).

## Chapter Seven: Busby's Vision

In his circular letter to the chiefs, Busby invited the chiefs to Waitangi so that he might hear their opinions of “this interfering person” who desired to be “king of the Maori people”. They could then consider what was to be done: “shall the land be handed over to him and all you be his slaves, or not”.<sup>62</sup>

The meeting took place at Waitangi on 28 October and resulted in a formal declaration by 34 chiefs that the “Northern parts of New Zealand” (from North Cape to the Thames) were an “Independent State, under the designation of The United Tribes of New Zealand”. By article 2 of the Declaration,<sup>63</sup> in its English text, “[a]ll sovereign power and authority within the territories of the United Tribes of New Zealand” was declared to “reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity”.<sup>64</sup> As to the government of the independent state, the chiefs declared:

[T]hat they will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of government to be exercised within the said territories, unless by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled.

For this purpose, the chiefs also agreed in the Declaration to meet “in Congress at Waitangi” each autumn “for the purpose of framing laws for the dispensation of justice, the preservation of peace and good order, and the regulation of trade”. The Declaration also extended a cordial invitation to southern tribes “to lay aside their private animosities and to consult the safety and welfare of our common country, by joining the Confederation of the United Tribes”. Finally, the chiefs agreed in the

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<sup>62</sup> Busby to the chiefs, 12 October 1835, AML MS 46, Box 6, Vol 1 (at end of volume, with English translation by Elsdon Best). See also Phil Parkinson “Brief of Evidence for the Crown” (Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 8 September 2010, D1) [“Parkinson ‘Brief of Evidence, Wai 1040’”] 62-63.

<sup>63</sup> See Chapter 6 n 445.

<sup>64</sup> Busby described the difference between the hereditary chiefs and others in his later despatch to the Colonial Secretary of New South Wales of 31 October 1835 (no 69), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 154 of the typescript): “The terms in which this has been expressed [that the powers of government were vested in the chiefs in their collective capacity] includes, not only those Chiefs whose influence is altogether derived from their birth, but also [those Chiefs] whose talents and conduct have obtained for them a tacit acknowledgment of leadership in matters which concern the general welfare of the Tribe. This I conceived to be the form of Government which naturally springs from the actual condition of the people.”

Declaration to send a copy of it to the King of England “to thank him for his acknowledgment of their flag”, to promise to continue to extend “friendship and protection” to British settlers and traders, and, in return, to entreat the King “that he will continue to be the parent of their infant State, and that he will become its Protector from all attempts upon its independence”.<sup>65</sup> In the Maori text of the Declaration (the text signed by the chiefs), “hereditary chiefs and heads of tribes ... of New Zealand” is given as “nga Tino Rangatira o nga iwi o Nu Tireni”, “independence” as “Rangatiratanga”, “Independent State” as “Whenua Rangatira”, “The United Tribes of New Zealand” as “te wakaminenga o nga Hapu o Nu Tireni”, “Confederation” as “wakaminenga”, “All sovereign power and authority” as “Ko te Kingitanga ko te mana”, “function of government” as “te tahi Kawanatanga”, and “Congress” as “huihuinga”. Busby continued to collect signatures to the Declaration. By 1839, a total of 52 had signed, including the southern chiefs, Te Hapuku from Hawke's Bay and Te Wherowhero from the Waikato.<sup>66</sup>

It is possible to see in the idea of a “Declaration of Independence” roots that go back to the 1776 American declaration (which had inspired the adoption of many such documents around the globe by 1835).<sup>67</sup> It is also likely (as suggested by

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<sup>65</sup> Six chiefs unable to attend due to bad weather signed subsequently, agreeing “to the introduction of a new status of Chieftainship upon New Zealand”. See He Whakaputanga o te Rangatiratanga o Nu Tirene (The Declaration of Independence of New Zealand), ANZ AAAC 6248 W292 1/618—reproduced in [H Hanson Turton] *Facsimilies of the Declaration of Independence and the Treaty of Waitangi* (2nd ed, AR Shearer, Government Printer, Wellington, 1976); and Codicil to the Declaration of Independence in Busby's hand with signature of Nene and list of six chiefs, ATL f-76-048 (with English translation).

<sup>66</sup> Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987) [“Orange *The Treaty of Waitangi*”] 22.

<sup>67</sup> See David Armitage *The Declaration of Independence: A Global History* (Harvard University Press, Cambridge, Massachusetts, 2007). Armitage refers to the New Zealand Declaration of Independence at pages 124-125 and 142 of his “global history” of the legacy of the American Declaration of Independence. His account wrongly attributes to Busby the statement by de Thierry that he had “declared the Independence of New Zealand—that is my own Independence as Sovereign Chief”. This contributes to the confidence with which he expresses the views that the Declaration “recognized the territorial sovereignty and landownership of the Maori only in order to allow British penetration of the islands before the French could lay claim to them” and “declared independence on behalf of indigenous groups only as the basis for a reduction in their autonomy by agents of the British Crown”.

Samuel Carpenter<sup>68</sup>) that de Thierry's own declaration of independence prompted Busby to think of making a response in kind. But it was also a measure that assisted with longstanding aims for development of sufficient Maori unity to enable them to undertake effective government or, as an initial step, to enable them to enter into agreements under which Britain could provide assistance with aspects of government.

Although, as will be seen, the proposals for an annual meeting at Waitangi did not eventuate, it would be wrong to think that in October 1835 Busby had no serious belief that the Congress would eventuate as a legislative body as the Declaration envisaged. Indeed, he wrote to New South Wales on 3 November to request funds to build a "House of Assembly".<sup>69</sup> Although Bourke was ultimately to turn down this request, he did express the hope that Busby would persuade the chiefs "to perform this useful work for themselves".<sup>70</sup> Busby himself described the Declaration to his brother as "the Magna Charta of New Zealand Independence".<sup>71</sup>

It was suggested by Arthur Thomson in his 1859 history that the Declaration was accompanied by a Constitution, which he described from a "parchment document in the Native Secretary's office, New Zealand".<sup>72</sup> Claudia Orange and Donald Loveridge and Richard Hill accept this possibility in reliance upon Thomson, although the parchment has not been located.<sup>73</sup> Thomson's description, however, is

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<sup>68</sup> Samuel Carpenter "Te Wiremu, Te Puhipi, He Wakaputanga Me Te Tiriti: Henry Williams, James Busby, A Declaration and the Treaty" (report for the Waitangi Tribunal, Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, November 2009, A17) 25.

<sup>69</sup> Busby to Colonial Secretary (NSW), 3 November 1835 (no 70), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 158-159 of the typescript).

<sup>70</sup> Colonial Secretary (NSW) to Busby, 30 January 1836, AML MS 91/75, Box 2, Folder 55, item 368.

<sup>71</sup> James Busby to Alexander Busby, 10 December 1835, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 50 of the typescript).

<sup>72</sup> Arthur Thomson *The Story of New Zealand: Past and Present—Savage and Civilized* (John Murray, London, 1859) vol 1, 276-277.

<sup>73</sup> Orange *The Treaty of Waitangi*, above n 66, 22; Donald Loveridge "'The Knot of a Thousand Difficulties': Britain and New Zealand, 1769–1840" (Brief of Evidence for the Crown Law Office, Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 17 December 2009, A18) ["Loveridge 'Knot of a Thousand Difficulties'"] 70-72; Donald Loveridge "The 'Declaration of the Independence of New Zealand' of 1835, and the Confederation of the United Tribes, 1835–1840" (Wellington, 1998) 39-40.

so close to the plan of government put forward in London in November 1838 by the New Zealand Company of 1825 (described in Chapter 9) as to make it more likely that he is describing it.<sup>74</sup> Loveridge remarks on the similarity between the document described by Thomson and the New Zealand Company plan of government, but is “fairly certain” that Thomson saw a set of notes or draft constitution prepared by Busby. He explains the similarities with the Company plan as the result of “some unrecorded cross-fertilization”.<sup>75</sup> If Busby had indeed prepared such an elaborate draft constitution, it seems highly unlikely that he would have made no reference to it in his correspondence<sup>76</sup> or drawn on it in his future proposals. It is also inconsistent with his explanation of the Declaration at the time: he described it in his correspondence with the Colonial Secretary of New South Wales as “sett[ing] the basis of a Govt for the Country” upon the principles he had urged in connection with the adoption of the “National Flag”:<sup>77</sup>

viz that the powers of a Govt should be vested exclusively in the Chiefs of Tribes, in their Collective capacity. ... This I conceived to be the form of Govt which naturally springs from the actual condition of the people. And it is the only one which (leaving the conquest of the Country by a Foreign power out of the question) is at all likely to promote the improvement of the people themselves; or to afford any degree of safety & protection to British subjects, who are settled, or may settle among them.

In this despatch, Busby maintained that the Declaration of Independence was “perfectly accordant with my instructions, and further borne out by the acknowledgment of the N.Z. Flag on the part of H.M.”. He considered that it did not preclude a change in British policy if the only way to protect British interests

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<sup>74</sup> See Chapter 9, text accompanying ns 259-276.

<sup>75</sup> Loveridge “Knot of a Thousand Difficulties”, above n 73, 71 n 211, 72 & 129 n 365.

<sup>76</sup> Loveridge suggests that there may be a reference to such a constitution in a letter to the Earl of Haddington: “I drew up for them articles of Confederation constitution & declaring New Zealand to be an Independent State ...”. Busby to Haddington, 28 October 1836, AML MS 46, Box 7, Volume 4 (typescript) and ATL qMS-0352 (typescript) (p 58 of the typescript). However, the typescript is in error: the word is “constituting” not “constitution”. See AML MS 46, Box 2, Folder 4 (holograph). Loveridge himself had correctly concluded without inspecting the original letter that “constituting” was the word intended and that Busby was referring in this letter simply to the Declaration of Independence and not to a separate constitution. Loveridge “Knot of a Thousand Difficulties”, above n 73, 71.

<sup>77</sup> Busby to Colonial Secretary (NSW), 31 October 1835 (no 69), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 154 of the typescript).

and Maori was to “to take possession of the Country”.<sup>78</sup> That was because he was confident that the British Government would not seek to “promote the ascendancy of British Power, or the extension of British Interests, at the sacrifice of the just rights of the natives”.<sup>79</sup>

As far as has been ascertained every acre of Land in this Country is appropriated among the different Tribes; and every individual in the Tribe has a distinct interest in the property; although his possession may not always be separately defined. Under such circumstances I conceive it would be contrary to all precedent in British Settlements if the property in Land were not confirmed to the original Owners. And this right being acknowledged, I have little doubt that the Chiefs might be led to enact, and to aid by their influence & power, the enforcement of whatever Laws the British Govt might determine, to be most advantageous to the Country, were their execution supported by a Military Force just sufficient to enforce them against individuals. While on the other hand, any attempt to rule the people by the exercise of a power distinct from that which might be exercised through their natural leaders, would make it necessary to overawe them by an Army capable of crushing all resistance that the whole Country might be able to offer.

It appears to me therefore, that even should H.M. Government establish in this Country a system of Govt supported by Military Force, it would be based upon the principle of protecting a Nation in its minority, and preserving it from those evils to which the intercourse of a Civilised people, would, under the circumstances, expose its simple inhabitants; that no interference would be permitted with the rights of the people, individually or collectively, but what should be exercised in trust for the Country, and be more than justified by the advantages conferred. And that the establishment of the Independence of the Country under the protection of the British Govt would be the most effectual mode of making the Country a Dependency of the British Empire in everything but the name.

This vision is impossible to reconcile with the New Zealand Company plan for government shared between the chiefs and settlers. Nor was it consistent with the acquisition or assertion of British sovereignty. Rather, it expanded the limited British intervention envisaged in the proposals for regulation of British shipping, to permit Britain to administer the country in trust and protect Maori property under

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<sup>78</sup> Ibid (p 156 of the typescript).

<sup>79</sup> Ibid (pp 156-157 of the typescript).

legislation enacted by the chiefs and enforced partly through them, for the period of “minority” of the “Nation”. It would be “a dependency ... in everything but the name”. What is described by Busby as a possible development is a protectorate (although the term had not been coined<sup>80</sup>) along the lines of the administration of the Ionian Islands he was later to promote explicitly.

It has been suggested that Busby's motive in promoting the Declaration was to justify his refusal to work through the chiefs in the Bay of Islands in banning the importation of spirits and to lock in place the approach adopted in the Declaration that the only legislative authority in New Zealand was the chiefs acting in concert through confederation. This was not the view taken in the Hokianga by the Additional Resident, Thomas McDonnell, who chaired a public meeting of British settlers and Maori at Mangungu on 21 September at which a “Native Law” banning the importation and sale of ardent spirits was adopted.<sup>81</sup> Busby had directed McDonnell that the Hokianga law (which authorised two settlers and a chief to board a vessel to search for spirits and to issue a warning that any attempt to land spirits would result in the seizure not only of the liquor but also of the vessel) was not to be implemented.<sup>82</sup> Some historians have seen the Declaration of Independence as having been prompted by Busby's vendetta against McDonnell.<sup>83</sup> Busby was certainly predisposed to be critical of McDonnell and resented his appointment. But a personal motive alone seems inadequate explanation for the initiative taken in the Declaration, which had been foreshadowed by the adoption of the flag and its recognition by the British government, and which was consistent with Busby's Instructions to develop Maori government and his 11 September proposal. Busby may well have overreacted both in his own stance in the Bay of

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<sup>80</sup> See Chapter 3, text accompanying ns 76-79.

<sup>81</sup> See McDonnell to Colonial Secretary (NSW), 26 September 1835 (enclosing regulations dated 21 September), enclosed in Colonial Secretary (NSW) to Busby, 28 October 1835 (no 35/21), AML MS 91/75, Box 2, Folder 54, item 360.

<sup>82</sup> Busby to McDonnell, 6 October 1835, CO 209/1, 343a-345a at 344b.

<sup>83</sup> John Ross “Busby and the Declaration of Independence” (1980) 14:1 *New Zealand Journal of History* 83-89. See also Richard Hill *Policing the Frontier: The Theory and Practice of Coercive Social and Racial Control in New Zealand, 1767-1867* (VR Ward, Government Printer, Wellington, 1986) Part 1, 70-71; and Parkinson “Brief of Evidence, Wai 1040”, above n 62, 114.

Island and in criticism of McDonnell for acting at the Hokianga (allowing others, including Bourke, to think that there was cause and effect in the position Busby took over liquor regulation and the Declaration of Independence<sup>84</sup>). But it may be that Busby did believe that using the chiefs in local initiatives in the manner of the liquor ban in the Hokianga would undercut his more ambitious plans for confederation.

As his correspondence indicates, Busby was confident that his role as Resident was about to be enlarged by instructions from London. He was well satisfied with the Declaration and the scope he had to work with the Confederation, particularly if the relationship between Britain and the Confederation could be developed by treaty. In this optimistic frame of mind, he set about significantly expanding his Waitangi landholding (from 300 to 2,800 acres), completing two purchases on 26 November.<sup>85</sup>

### **Changing direction**

Unfortunately for Busby, his hopes for the future were about to be dashed. On 26 and 27 November, Busby received a number of discouraging and highly critical despatches from New South Wales. Bourke rejected all Busby's criticisms of McDonnell's appointment.<sup>86</sup> Nor did Bourke agree with Busby's assessment that the proposal to ban the importation of spirituous liquor through the agency of chiefs in the Bay of Islands was too risky. Busby was instructed to follow McDonnell's lead in the Hokianga,<sup>87</sup> and McDonnell's conduct was praised as

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<sup>84</sup> See Busby to Colonial Secretary (NSW), 30 November 1835 (no 73), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (especially p 163 of the typescript); Colonial Secretary (NSW) to Busby, 12 February 1836, AML MS 91/75, Box 2, Folder 55, item 370; and Bourke to Glenelg, CO 209/2, 10a-18b at 12a-15a.

<sup>85</sup> See Bruce Stirling with Richard Towers "'Not With the Sword But With the Pen': The Taking of the Northland Old Land Claims: Part 2" (report for the Crown Forestry Rental Trust, 2007, Wai 1040, A9) ["Stirling 'Not With the Sword But With the Pen'"], 1450-1455.

<sup>86</sup> Colonial Secretary (NSW) to Busby, 28 October 1835 (no 35/20), AML MS 91/75, Box 2, Folder 54, item 358.

<sup>87</sup> Colonial Secretary (NSW) to Busby, 28 October 1835 (no 35/21), AML MS 91/75, Box 2, Folder 54, item 360.

## Chapter Seven: Busby's Vision

being “at once intelligent, prudent and active”.<sup>88</sup> Busby's further representations against McDonnell's course of action received the answer that the Governor remained of the view the Colonial Secretary had already communicated and drew a further rebuke:<sup>89</sup>

Sir Richard Bourke desires me to acquaint you that He continues to think that you have altogether a wrong view of this case, and that in conformity to your instructions you should use your influence with the Native Chiefs to induce them to adopt beneficial measures, availing yourself of their agency to carry them into effect.

As if this criticism of Busby over the matter of the liquor law was not bad enough, the Colonial Secretary responded to Busby's elaborate proposal of 11 September laconically:<sup>90</sup>

Having laid before the Governor your letter of the 11<sup>th</sup> Ultimo, No 65/2, I am directed to inform you, that no communication relative to the British Residency at New Zealand of the kind to which you allude has been received from His Majesty's Government; and that His Excellency has therefore to request, that you will continue to act in accordance with the Instructions furnished to you from hence.

This disappointment in the hoped-for news from London was reinforced in a further despatch replying to a letter in which Busby had again sought the power to take statements on oath:<sup>91</sup>

I am further directed to inform you that His Excellency sees little probability of you being vested with the authority which you appear so anxious to obtain and that you should therefore endeavour to make your appointment useful in the manner that has been pointed out by your instructions and subsequent communications from this Office.

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<sup>88</sup> Colonial Secretary (NSW) to McDonnell, 24 October 1835, enclosed in Colonial Secretary (NSW) to Busby, 28 October 1835 (no 35/22), AML MS 91/75, Box 2, Folder 54, item 361. The letter to McDonnell is striking for the support given by Bourke to the objective of advancing Maori government and law and a preference for enforcement of penalties “under the Native Law by New Zealanders, and not by British”.

<sup>89</sup> Colonial Secretary (NSW) to Busby, 6 November 1835 (no 35/26), AML MS 91/75, Box 2, Folder 54, item 365.

<sup>90</sup> Colonial Secretary (NSW) to Busby, 28 October 1835 (no 35/23), AML MS 91/75, Box 2, Folder 54, item 362.

<sup>91</sup> Colonial Secretary (NSW) to Busby, 28 October 1835 (no 35/24), AML MS 91/75, Box 2, Folder 54, item 363.

The despatches from New South Wales had been written before news of the Declaration of Independence had been received but included a reply to Busby's despatch of 10 October indicating how he proposed to deal with the threat from de Thierry. These measures met with the approval of the Governor and Executive Council and were "deemed sufficient". While the Governor did not think that the threat from de Thierry was serious, Busby was advised that he could not expect any military or naval co-operation in resisting de Thierry and that, if resistance proved necessary, it would have to be "by the efforts of the New Zealanders".<sup>92</sup>

Unwisely, before his indignation and disappointment could subside, Busby wrote back to the Colonial Secretary on 30 November.<sup>93</sup> The letter is an extraordinary one for a subordinate officer to have written. It protests Busby's devotion to duty and records his "grief and pain that I have seen month after month, and I may now say, year after year, pass away without those means I have represented as essential to my further usefulness being afforded me". He complained again about McDonnell<sup>94</sup> and the fact that Bourke had "eulogised [his conduct] as 'at once intelligent, prudent, and active'". At great length he repeated and developed his reasons for thinking it his duty to point out why using the chiefs to make and enforce law against British interests was "little better than authorised outrage, in which I humbly think it would be derogatory to a civilised nation to participate". For Busby as Resident to take an active part in it would be "betraying the interests he is bound to protect". Busby advised that "consistently with my views of duty", he would not be able to "take any step in the matter without specified and detailed instructions from H.E." While professing his "full determination, honestly and

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<sup>92</sup> Colonial Secretary (NSW) to Busby, 6 November 1835 (no 35/25), AML MS 91/75, Box 2, Folder 54, item 364. The single bright spot in correspondence that Busby must have regarded as particularly bleak was approval of his actions in settling the affairs of the estate left by John Poyner. (On the report that the chief Moka had withdrawn his claim to the land on which Poyner's house was build, Busby was advised that the Governor was sending Moka a present of a plough.) Colonial Secretary (NSW) to Busby, 17 October 1835, AML MS 91/75, Box 2, Folder 53, item 357.

<sup>93</sup> Busby to Colonial Secretary (NSW), 30 November 1835 (no 73), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 160-167 of the typescript).

<sup>94</sup> In a separate despatch of the same day, Busby asked for the correspondence about McDonnell's appointment to be referred to the Secretary of State. Busby to Colonial Secretary (NSW), 30 November 1835 (no 74), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 167-168 of the typescript).

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faithfully” to follow any instructions given by Bourke, Busby reserved the right to enter “my solemn protest” against any departure from the “only safe foundations upon which British Interests in this Country can be established; or upon which the fabric of National Laws and Institutions can be raised”:

These principles are the recognition of only one authority, from which all Laws, and acts of Govt must emanate in New Zealand. And the exemption of British Subjects from the operation of all Native Laws except such as are enacted with the concurrence, and exercised under the direction and control, of the British Legal Authority.

Busby expressed the view that there was no point (and would cause the laws to be held in contempt) in assisting Maori to promulgate laws (whether for regulation of British subjects, as Bourke expected in relation to the banning of liquor, or as a code of native laws to repress the internal disorders which occasionally occur, as the missionaries had been urging) without “authority to enforce them”. Busby hoped that “the experiment may soon be tried” but he himself could “only wait with what patience I may be able to exercise for the opportunity of acting upon the suggestions of my own judgement”:

I have cherished the hope that being entrusted with a Legal Jurisdiction, as concerns British Subjects, I might commence by procuring the Chiefs to enact such Laws, as should have a primary reference to my own Countrymen; and by availing myself of the assistance of the Chiefs in carrying those Laws into effect, exhibit to them Legal authority in actual operation. By this means I conceived they might gradually be made to understand the nature and advantages of delegated and responsible authority, as it exists among civilised nations—and by a patient improvement of incidents calculated to illustrate the evils arising from the want of this amongst themselves; that I might lead them to the gradual establishment of such Laws and Regulations, as should seem most suited to their own wants, and most obvious to their own capacity, and which should at the same time offer the best prospects of being carried into effect by the Chiefs; and of being acquiesced in and submitted to by the people. The late incident of the threatened invasion of their Country, brought about the settlement of a foundation for future Legislation & Government, at an earlier period than I had intended. I certainly consider it fortunate that such foundations should have been established under circumstances well calculated to impress it upon the minds and hearts of the people—but I cannot

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recommend any further experiments in Legislation, till they can be tried with better prospects of success.

It is significant that, while Busby thought that legislation through the confederated chiefs was the best approach to follow in the future, in this letter he suggests that the Confederation had been established earlier than was ideal, in order to meet the de Thierry threat, and that "further experiments in Legislation" should wait. This hardly seems consistent with Busby's request for materials to build a House of Assembly or with the terms of the Declaration, with its expectation that the Congress would meet annually in the autumn to frame laws. Nor does the covering letter to the Colonial Secretary of New South Wales which enclosed the Declaration suggest that it was ahead of its time and that the framing of laws was a project for the future.<sup>95</sup> The letter of 30 November seems to represent an extreme reaction to criticisms and disappointments in the despatches received on 26 and 27 November.

A further indication of how badly Busby took the despatches is shown by his letter of 10 December to his brother Alexander. Busby complained that the Governor had "not met fairly one single question of the many important ones I have brought before him, so far as I can recollect". His latest conduct was so bad that Busby expressed himself as at a loss to "know how to characterize it": "[h]e seems to have caught at the chance of putting me down through the medium of his hot-brained countryman", a reference to the Irishman, McDonnell. With breathtaking self-deception, Busby describes his own response of 30 November to the Governor as "quite triumphant":

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<sup>95</sup> Busby to Colonial Secretary (NSW), 31 October 1835 (no 69), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 152-157 of the typescript). See also Busby to McDonnell, 6 October 1835, CO 209/1, 343a-345a at 343b-344a: "It is my intention to convene at this place such an Assembly statedly once every twelve months, and occasionally as circumstances may make it desirable, and I have hopes that eventually the Principal Chiefs from every part of the Island may be procured to take part in such Assemblies. Among the first propositions to be submitted at the next meeting of the Chiefs which may be convened will probably be the enactment of a law interdicting the landing or sale of Ardent Spirits at all such places as it may be possible to enforce its provisions without risking greater disorders than such a law would tend to prevent."

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I think I have succeeded in shewing that I knew as much as they did on the subject and had taken deeper views than they had ever dreamed of.

The Governor's "animus" against him was demonstrated by a comparison between the "warm panegyric" received by McDonnell from the Governor (something Busby complained he himself had never received) with the approval of Busby's own measures in relation to de Thierry as "'deemed sufficient'—not one word more". Busby believed his own "solemn protest" that he would not act against principle or against British interests would leave the Governor "in a Sad Quandary".<sup>96</sup>

Busby had since 1831 looked to a direct role for Britain in the control of British subjects. By the time of the Declaration, he seems to have accepted that even this limited objective in government could not be achieved except with Maori consent and participation. Such consent and participation he had suggested could be achieved through treaty arrangements with the chiefs acting in concert. Through such confederation ultimately the objective of promotion of Maori government (stressed in his Instructions) could also be achieved. In the short term, any Maori government would require British assistance, which in turn would require Maori consent to British presence in New Zealand and British protection of Maori property and rights. Busby may well have seen the Declaration (as his reference to it being a "Magna Charta" suggests) as a critical step towards the future development of Maori government but seen it as ahead of its time if treated as establishing in itself Maori government. Instead, as the terms of the Declaration suggest, and as Busby's letter of 11 September 1835 (proposing that direct British authority over its ships in New Zealand be obtained by treaty) and his 31 October 1835 despatch (referring to the protection of a Nation in its minority) also indicate, Busby seems to have continued to press for direct British authority, negotiated by Treaty, which would enable Maori government to develop. The critical issue, as it

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<sup>96</sup> James Busby to Alexander Busby, 10 December 1835, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 48-50 of the typescript).

had been throughout was to establish an incentive and basis for such British intervention, against the reluctance expressed by Bourke and the Colonial Office delays. Busby, therefore, once advised that his hopes of securing magisterial powers and some force were forlorn, had no incentive to make the Declaration work and the Congress effective in passing and enforcing laws. The Congress never met at Waitangi. And, from this time, Busby in his reports was concerned to deflate expectations of Maori social and political development and to demonstrate the necessity of direct British intervention by developing a picture that law and order was deteriorating. In this he also began to stress the responsibility of the British Crown to its subjects. All this he did in dogmatic reports of the next four and a half years. In these reports, he stayed resolutely on message that the only feasible option was for Britain to take the country under its protection.

### **A New Zealand Protectorate**

Shortly afterwards, Busby had the gloomy satisfaction of being able to report the loss of life during the fight at the Residency on 12 January 1836. Busby described the affray as an “insult upon the British Govt” requiring that the tribe responsible should be “thoroughly humbled” and that those who were directly responsible for the deaths should be executed for murder. Although the perpetrators of the outrage were known, Busby described them as “all connected with the most influential families, and ... among the last whom their Tribe would abandon to their fate”. Only intervention by the British Government would result in the matter being properly dealt for the protection of British subjects (entitled to the protection which the “parent State can alone afford”) and “the well disposed of the native population, who are exposed to evils to which they were strangers till the apples of discord were scattered among them by British Visitors”. It was not possible for the confederated chiefs to act. The duties they had taken on by their “late act of union” existed “as yet only in theory”:

[N]othing short of Creative power could change the savage of yesterday to the Legislator of today; or bring into operation the functions of an efficient Govt among a people whose minds have not yet conceived the ideas of authority and subordination. It is much that

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they will consent to be led with the confidence of children, to be the passive instruments of enacting laws, and establishing Institutions of which time will gradually evolve the effects. But while in this state of transition from barbarism to order, the well disposed portion of the natives, give up to the cause of religion and civilization, the defences of the Savage, is it consistent with humanity that they should be exposed without protection to the violence of that party of their own Countrymen, whom the dread of vengeance will alone restrain? or with justice that the subjects of a civilised state should be suffered to excite that violence by every motive which can tempt the cupidity of the Savage, aided by every false and wicked suggestion which can stimulate his passions to outrage.

If the confederated chiefs were prevailed upon to act,<sup>97</sup> Busby thought it likely that the followers of Waikato (the chief responsible) would be joined by other tribes and that there would be warfare. He urged that instead the British Government “should make such a demonstration as should put its intentions beyond a doubt” to forestall the conflict spreading.<sup>98</sup> In a further despatch of 26 January 1836, Busby said the dispute had now become a “party question”. Reasons of humanity, national honour, and the safety and interests of the British settlers required that interference should be “prompt, decided and effectual”. British interference in the government of the country could no longer be deferred and was now a “necessity”:

[T]he question is nothing less than whether the Govt will yield up the Country to the evil ascendancy of its own unprincipled subjects; or interpose the protection of Law and Govt in favour of the peaceable and well disposed inhabitants whether native or Europeans.

Busby reiterated his 1831–35 opinions that the costs of such intervention could be met out of duties on shipping and other sources of revenue which might be “made the subject of convention with the native chiefs”. Alternatively, “a revenue from them might be levied with their concurrence”. Busby referred to the chiefs’ appeal for British protection in the Declaration of Independence and claimed that “[t]hey

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<sup>97</sup> Busby expressed confidence that it would be possible to persuade the Confederation to proceed against the culprits but in a despatch of 20 February said that it would be “almost impossible” to procure their being punished by their countrymen: “The Congress of Chiefs might be prevailed upon to pass sentences upon them; but I believe it would be impossible to procure native executioners”. Busby to Colonial Secretary (NSW), 20 February 1836 (no 69), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 196 of the typescript).

<sup>98</sup> Busby to Colonial Secretary (NSW), 18 January 1836 (no 84), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 175-185 of the typescript).

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are perfectly convinced of their incapacity to govern themselves, or to cope unaided with the novel circumstances to which they are constantly exposed by the encroachments of their civilized visitors”:

They have as yet I believe confidence in the British Govt, and if protected in the enjoyment of their Landed property, and their personal rights, they would I am sure gladly become the subjects of the King of England; and yield up the Govt of their Country to those who are more fitted to conduct it; and not only feel, but acknowledge the blessings which they would derive from equal Govt and impartial Laws. But it is not necessary to require from them even this sacrifice; and I submit for the consideration of H.M. Govt whether the Islands of New Zealand might not be received under the protection of H.M. on the same principle as that upon which the Ionian Islands are constituted an Independent State, in all things which pertain to the real advantage of the Inhabitants, in giving them such a share in the Govt of the Country as is consistent with its welfare, but reserving the ultimate authority for that power which affords that protection its weakness requires.

This despatch broached the suggestion of Maori becoming British subjects and surrendering the government of the country but expressed preference for a protectorate on the lines of the Ionian Islands. If that preference were adopted, Busby maintained the view expressed in his 31 October 1835 despatch that the country “might be governed through the instrumentality of the Chiefs, and Heads of Tribes” supported by British military force “sufficient to carry the Laws into execution against individuals”. He was still inclined to this opinion “provided the late insult upon the British Govt should be immediately followed up by the punishment of the offenders, if it be possible to reach the individuals most guilty; or at least by the complete dispersion and degradation of the Tribe”. A force of no less than 100 men and a ship of war would be required to accomplish this object. Busby stressed that this was a “critical period” for the peace of the country and advised New South Wales that threats had been made to burn the Residency down and that he was sending his wife and family to Sydney for safety.<sup>99</sup>

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<sup>99</sup> Busby to Colonial Secretary (NSW), 26 January 1836 (no 85), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 185-191 of the typescript). Agnes and the children left for Sydney in March 1836 and returned to the Bay of Islands late that year.

Before response was received from New South Wales about the affray at the Residency, Busby received the reply of Bourke and his Executive Council to Busby's despatches about the Declaration of Independence and his stance against enforcement by the chiefs of a ban on the importation of spirits. The Governor and Council were happy to approve the Declaration of Independence as "an approach to a regular form of Government in New Zealand" (although they sniffed that the assertion of exclusive authority was premature since the Confederation was "part only of the Chiefs inhabiting a very limited portion of one of the Islands of the New Zealand Group"). But they disapproved of the prohibition on the exercise of "any legislative authority ... [or] any function of government" except by the Confederation itself or "by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled" as apparently "pointed at, and intended to subvert, the local Law previously passed at the Hokianga". Busby was told that he should have submitted this provision for the approval of the New South Wales Government. Busby was to recommend to the Congress ratification of the Hokianga law and the adoption of a "general Law to the same effect".<sup>100</sup>

With some justification, Busby wrote to assure the Governor that article 2 of the Declaration was not aimed at the Hokianga law but was simply a consequence of the constitution of a Confederation. Before that, there was no legislature or government to make law either at the Hokianga or elsewhere (so that the Hokianga law was "a nullity from the commencement", as Busby said he had treated it). He also pointed out that authority of the Confederation was limited by the terms of the Declaration to the territories of those who agree to join it and that it was intended that ultimately it would include all tribes in New Zealand. On the subject of the liquor laws, Busby was not minded to acquiesce until he found out whether the affray at the Residency had changed Bourke's view of the matter.<sup>101</sup>

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<sup>100</sup> Colonial Secretary (NSW) to Busby, 12 February 1836, AML MS 91/75, Box 2, Folder 55, item 370.

<sup>101</sup> Busby to Colonial Secretary (NSW), 16 March 1836 (no 91), SLNSW DL N Ar/1. (Note—the typescript of this despatch at ATL qMS-0345 pp 205-207 is incomplete.)

Bourke's response to news of the incident at the Residency was received in April 1836. He declined to accede to Busby's request for armed intervention. The "dispute which led to the affray arose between Natives of New Zealand" and did not directly involve British subjects or their interests. There was no sufficient justification for armed interference by Britain which would amount "in fact to the invasion of an independent state". Nor did Bourke consider that the fact that the attack took place at the Residency justify its treatment as an "intended insult to the British Nation requiring immediate reparation or chastisement for the vindication of National honor": "such affrays between Savages are of common occurrence, and the New Zealanders [were] ... but little removed from the savage state". "[I]t would be an act wholly unjustified to take the lives of those People under colour of British Law to which they owe no obedience, in retribution of an offence committed by one New Zealander against another." Pursuing the aggressors with British troops into the interior of the country was hazardous and risked "confounding the innocent with the guilty", setting up "permanent hostility ... between Great Britain and New Zealand", which would in turn require the constant presence of a British force to prevent the animosity being taken out on British subjects. Instead of direct action, the chiefs were to be warned that the British Government would not tolerate loss of British lives in private disputes or intestine wars, or insult to the British Resident. The immediate dispute, however, should be adjusted along lines similar to the resolution achieved with Rete, with banishment and confiscation of property for the benefit of those directly effected. It was suggested that Busby himself, with caution, might call a general meeting of chiefs for this purpose. If such a meeting proved too dangerous the Governor was prepared to let the event pass without punishment rather than risk tribal war. Cold water was poured on Busby's suggestion for change to the basis of British involvement in New Zealand. No change to Busby's Instructions was required.<sup>102</sup>

In response to this communication, Busby wrote on 18 May 1836 that it had "filled me with alarm and apprehension":

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<sup>102</sup> Colonial Secretary (NSW) to Busby, 23 March 1836, AML MS 91/75, Box 2, Folder 55, item 371.

## Chapter Seven: Busby's Vision

I have now for three years struggled with the difficulties of my situation consoling myself with the hope that the important matters which I was from time to time bringing under H.E. notice could not fail at length to force upon the Governor's mind the conviction that the time was come when it had ceased to be a question of expediency, and had become a positive duty on the part of the British Government to extend its paternal protection to this Country.

The "necessity for a change must have been obvious" from his despatches. British subjects and Maori both had a "legitimate claim upon the attention of the Govt": British subjects because of the "degree of magnitude" their interests in New Zealand had attained; Maori on the basis of the "higher claims of humanity ... and ... the evils to which they are exposed by their intercourse with men who in the majority of cases have only manifested the advantages of civilized life by their superiority in vice and fraud". Busby wrote that he had expected Bourke's 6 December 1834 letter to the Secretary of State to lead to a change (and that he could only account for its not having done so on the basis of the "all engrossing importance of those domestic questions which have occupied the minds of H.M. Ministers, and which could leave little room for the consideration of the comparatively unimportant questions connected with New Zealand"). But the time "to sit down and calmly await the course of events" (while "evils of the worst character are impending over my Countrymen here") had come and gone. After a "mature consideration" of the matter, Busby had come to the decision "of soliciting H.E. to permit me to proceed direct to England, in order fully without delay to bring the state of this Country before H.M. Govt".

As to the instructions he had been given regarding the adjustment of the affray at the Residency, Busby advised New South Wales that he had taken the advice of the missionaries. They agreed with him that any attempt by the Confederation to punish Waikato and his followers "would occasion a general war in the northern part of the Island". Notice to the chiefs that a British force would not be deployed "would release Waikato from the only restraint which prevents his proceeding ... to take possession of the disputed territory by force". He had already explained that the settlement in Rete's case had been "an entire failure" (as the missionaries now

agreed), demonstrating that it would not do in the case of Waikato, as the Governor had suggested. Maori considered that Rete had suffered no punishment at all. If Waikato's crime (in which "he violated the sacredness of my residence, and converted even my wife's bedchamber into a scene of bloodshed") now also "passed without notice", Busby could not "with honor to the Govt" continue in his office "as at present constituted". Because of these views, Busby advised that he could not act on any of the instructions in the Colonial Secretary's 23 March letter. Nor ("after the maturest consideration") could he see how he could act on his general April 1833 Instructions, or those given "from time to time" since, "without compromising the honor of the British Govt and the peace of this Country":

I therefore consider my office to be in fact in abeyance; and I respectfully submit to H.E. that altho the British Resident could not be withdrawn without extreme danger, if not of certain destruction to the mercantile Establishments here, that these reasons make it necessary & proper that the office should be considered & understood to be in abeyance, until the final determination of H.M. shall be ascertained.

Busby expressed confidence that Bourke would change his opinion when he learnt that the chiefs and missionaries<sup>103</sup> were in favour of the deployment of a British force in New Zealand for the maintenance of peace and good order. Bourke would "see the necessity of recommending the state of this Country to the immediate consideration of H.M. Ministers" and support Busby's proposed visit to London. With Busby's recommendation and the testimony of the missionaries, Busby believed that the British Government would be able to reconcile other nations to the proposal for the administration of New Zealand which he had suggested in his 26 January 1836 despatch. This proposal—"originated not by my desire for the aggrandisement of Great Britain or the extension of its Territory but by the higher claims of humanity and justice"—was:

[a]n arrangement for preserving an infant nation in the full enjoyment of its natural rights, and protecting its simple members from the encroachments of men who exercise over them the power of knowledge over ignorance—a power which can be exercised at

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<sup>103</sup> The missionaries had "gone so far as to take the lead in preparing a petition to H.M. to extend the protection to his subjects in this Country".

## Chapter Seven: Busby's Vision

present to an indefinite extent of mischief, without responsibility or control—and which indeed has already been exercised to a melancholy extent of devastation and bloodshed.

In the expectation that his proposal to go to England to lobby the Government would be acceptable to Bourke, Busby proposed that the duties of the Resident during his absence could be undertaken either by his brother<sup>104</sup> or by the missionaries so that Maori would not gain the impression that the Resident had been withdrawn (but was “only absent for a time”). He advised that he had already written to inquire whether his brother could take this assignment on and had also ascertained from the missionaries that, if need be, three of them (Henry Williams, George Clarke and Charles Baker) could act as a “Commission” for the same purpose.<sup>105</sup>

Further despatches from Busby demonstrated that he had little interest in following his instructions from Bourke and was pinning his hopes on what could be achieved from a visit to London.<sup>106</sup> On 19 May, he advised the Governor that the missionaries now agreed with him that bringing in a ban on importing spirits (as Bourke had directed him to do) was inadvisable “owing to the agitated feelings of the Tribes in consequence of the late outrage”.<sup>107</sup> The Governor had approved his request to travel south to gain adherence to the confederation from southern tribes and thereby “extend our influence over the Country, as to exclude all Foreign

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<sup>104</sup> Although not named in his letter to Bourke, Busby had in mind Alexander. See James Busby to Alexander Busby, 9 May 1836, with addendum dated 30 May 1836, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 52 of the typescript): “it would be a very gentlemanly way for you to pass your time to take my place for 12 or 15 months”.

<sup>105</sup> Busby to Colonial Secretary (NSW), 18 May 1836 (no 95), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 210-217 of the typescript).

<sup>106</sup> In a letter to Alexander, Busby described his visit as “absolutely necessary for this country’s sake if the Whigs continue in office”. If the Tories won office, as Busby thought probable, Busby considered that by “stirring up matters by my personal presence” he would be able to “get full justice done to the matter” and “at once step to the highly honourable & extensively useful station which you see to be open for me”. (It seems—although Alexander’s letter does not survive—that this may have been a reference to a consulship or governorship.) James Busby to Alexander Busby, 9 May 1836, with addendum dated 30 May 1836, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 52 of the typescript).

<sup>107</sup> Busby to Colonial Secretary (NSW), 19 May 1836 (no 96), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 217-218 of the typescript).

## Chapter Seven: Busby's Vision

interference of a political character”.<sup>108</sup> Busby on 18 June now advised him that he no longer intended to undertake the visit since he thought it would interfere with his plan to go to England “from whence ... I would entertain little doubt of returning with full powers to negotiate such a treaty with the Chiefs as would prove the basis of a Government capable of maintaining peace and good order, and of affording full protection, both to H.M. Subjects and to the Natives”.<sup>109</sup>

That Busby was confident in succeeding against what he viewed to be the hostility of Bourke towards him appears from a letter he wrote to Alexander immediately after sending his 18 and 19 May despatches:<sup>110</sup>

You wish me back to the Colony to share in the general prosperity. I assure you I desire no such thing. I am satisfied with the field that is before me. And as for withdrawing from it, I shall not be driven from it till General Bourke and I try the question at the very highest authority known to the constitution. Do you know I have an idea that he thinks I only want a plausible pretext for resigning. I can only account for his last despatch on that idea—for it was really most wantonly insulting. But I have so completely foiled him in every point that I can easily conceive the difficulty he must feel in repressing his spleen. Even the spirit business has been almost too triumphant. You are perhaps aware that the Missionaries and I almost quarrelled about it. He laid hold of this, and has acted as if I stood in opposition to them. He will now see how egregiously he has been mistaken & misled (I think) by that mad knave McDonnell. The Missionaries have written me a letter stating that the experience of the last 6 months has convinced them that the spirit prohibition business had better be deferred and it so happens that the experience was what I predicted in every essential point. The Governor sided with them however and commanded me to do as they wished against my protest. I have however foiled them all and the Missionaries now agree with me that no step could be taken without endangering the peace of the country.

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<sup>108</sup> Busby to Colonial Secretary (NSW), 12 March 1836 (no 89), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 199 of the typescript); Colonial Secretary (NSW) to Busby, 20 April 1836, AML MS 91/75, Box 2, Folder 56, item 375. Bourke had authorised HMS *Zebra* to transport Busby on this mission. Although *Zebra* had to return to Sydney to reprovision, causing delay, Busby was concerned that Bourke would send it back.

<sup>109</sup> Busby to Colonial Secretary (NSW), 18 June 1836 (no 97), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 221-223 of the typescript).

<sup>110</sup> James Busby to Alexander Busby, 9 May 1836, with addendum dated 30 May 1836, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 52 of the typescript).

## Chapter Seven: Busby's Vision

Busby had not received a reply from New South Wales to his despatches of May and June, when he wrote to Alexander on 9 September 1836 referring to the prospects of legislation for New Zealand by the British Parliament (of which the Governor “has not ... condescended to give me the slightest hint”<sup>111</sup>), the proceedings of the Aborigines Committee, and continuing to fulminate against Bourke. Busby expressed the view that the time when legislation along the lines of the 1832–33 South Sea Islands Bill would suffice had passed. He hoped, but was not confident, that his despatches would be referred to the Aborigines Committee and would influence its recommendations against the views likely to be expressed by the Reverend William Yate who “would be all against such an assumption of authority in this country as is now absolutely necessary for the Peace of its Inhabitants”. Without favourable recommendations from the Committee, Busby was doubtful that his despatches would themselves “induce the Ministry to do what is now necessary”. As to Bourke, Busby considered the “shifts” in the Governor’s conduct towards him to be “truly pitiable”, “excit[ing] my compassion more than any other feeling”. Busby considered his replies to these “attacks” to be “such as an honorable mind would writhe under through life”. Busby was determined not to resign his appointment but would maintain it without “the slightest sacrifice of principle or character”: “He will have to condescend to plain & honest dealing before he is a match for me”.<sup>112</sup>

Busby’s triumphalism was misplaced. On 29 September, he received the Colonial Secretary’s reply of 23 August to his May and June despatches. Busby was rebuked for having “followed in these despatches ... a course of observation, and used a style of language, totally uncalled for, and unwarrantable”:

It is not for you to state that you cannot act upon your instructions without compromising the honor of the British Government or that you consider your office in abeyance whilst you remain in receipt of the salary paid to you for discharging its duties. The Instructions

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<sup>111</sup> Bourke did write to inform Busby about the prospects of legislation on 23 August (a letter received by Busby on 29 September). See below n 114 and accompanying text.

<sup>112</sup> James Busby to Alexander Busby, 9 September 1836, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 57-59 of the typescript).

## Chapter Seven: Busby's Vision

you received from this Government on proceeding to your Station have met the fullest approbation of His Majesty's Ministers and in controlling the rash and imprudent measures you have recommended, the Governor and Council have acted upon those principles of policy which guide the British Cabinet in deliberating upon the affairs of New Zealand and are calculated to preserve at once the peace and honor of the British Nation. I am therefore commanded by His Excellency to require that you give the strictest attention to the instructions you have received and shall receive from the Government until you shall be relieved by a Successor, who I am to inform you will be immediately nominated if His Excellency shall find it necessary to take this step.<sup>113</sup>

Nor was Bourke prepared to authorise Busby to proceed to England:

The Secretary of State for the Colonies is fully aware of the general condition and circumstances of New Zealand. It has been the business of this Government to communicate with the Minister upon the affairs of those Islands.

Busby was advised that Glenelg was attempting again to pass the legislation earlier proposed which would "enable the Resident at New Zealand to fulfil more completely and beneficially the object of his appointment". Busby would be advised immediately if the Act was passed and would then be provided "such means as His Excellency shall judge necessary for carrying its provisions into effect".<sup>114</sup> Even this prospect was soon lost: two weeks later Busby learnt from the Earl of Haddington (who had been to Colonial Office<sup>115</sup>) that Glenelg had given up the idea of legislation for New Zealand.<sup>116</sup> As Busby was to tell both Haddington and his brother Alexander, he was by this time pleased that the legislation was not

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<sup>113</sup> Busby was not told that Glenelg had authorised Bourke to replace Busby.

<sup>114</sup> Colonial Secretary (NSW) to Busby, 23 August 1836, AML MS 91/75, Box 2, Folder 56, item 378.

<sup>115</sup> Haddington's letter to Busby included a summary of Glenelg's 28 October 1835 despatch to Bourke, but omitted the information that Glenelg had authorised Busby's removal by Bourke. Haddington indicated to Busby that there were other matters in Glenelg's despatch that he did not feel at liberty to divulge. Busby, erroneously, seems to have thought from this that Glenelg's despatch contained something that Bourke would not have found "palatable". See James Busby to Alexander Busby, 4 November 1836, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 64 of the typescript).

<sup>116</sup> Haddington to Busby, 20 April 1836, AML MS 46, Box 2, Folder 5 (holograph) & Box 7, Volume 5 (typescript) and ATL qMS-0347 (p 24 of the typescript).

to proceed as he thought it would “pave the way for my suggestions” that the British Government take a direct role in the government of New Zealand.<sup>117</sup>

In his reply to Haddington, Busby remained optimistic that his despatches of the past year would convince the British Government that a change in policy was necessary. He thought Glenelg's renewed attempt to legislate showed that his despatches were having an effect. He thought his more recent despatches would bring the Government to the conclusion that “both justice and humanity require that they should step in effectually to shield the natives from the mischiefs to which they are exposed by their intercourse with British subjects—as well as to extend to the latter a share of that paternal protection which it has never been the wont of the British Government to withhold from its subjects however remote”. British subjects were “already responsible for a serious amount of bloodshed among various tribes” and there was not “the slightest chance of any authority being established amongst the natives themselves to check these evils”. The alternatives were therefore “foreign intervention for their protection, or ultimate extermination of the natives of New Zealand”.<sup>118</sup>

In emphasising the adverse consequences of British settlement upon Maori (a theme Busby was to emphasise over the remaining period of his Residency), Busby may have been picking up on the developing concern about the impact of British emigration on aboriginal peoples which was behind the setting up of the Aborigines Committee (and which the Committee itself did so much to foster). Busby's purpose may have been tactical as much as genuinely prompted by events in New Zealand; certainly the tone of his reports from this time seems to have been more alarmist than appears to have been warranted or than was expressed by other contemporary observers.

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<sup>117</sup> James Busby to Alexander Busby, 4 November 1836, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 64 of the typescript); Busby to Haddington, 28 October 1836, AML MS 46, Box 2, Folder 4 (holograph) & Box 7, Volume 4 (typescript) and ATL qMS-0352 (typescript) (p 57 of the typescript).

<sup>118</sup> Busby to Haddington, 28 October 1836, AML MS 46, Box 2, Folder 4 (holograph) & Box 7, Volume 4 (typescript) and ATL qMS-0352 (typescript) (pp 57-58 of the typescript).

## Chapter Seven: Busby's Vision

To Haddington, Busby explained the Declaration of Independence as having been promoted by him principally to prevent any non-British subject purporting to establish authority in New Zealand, occasioning “great embarrassment and mischief”. Despite the terms of the Declaration, the Confederation of the United Tribes was not capable of government. The chiefs themselves in adopting the Declaration had “sagacity enough” to recognise that the enactment of laws in themselves “would tend nothing to the establishment of order amongst them”. If one was disposed to break any such law either the crime would have to go unpunished or there would have to be war (“Tribe against Tribe as at present”).<sup>119</sup> That is why, Busby explained, he had proposed in his despatch that government be established “upon the principle adopted in the Gov<sup>t</sup> of the Ionian Islands”.<sup>120</sup>

The basis of such a proposition being the preservation of the Independence of the country and the administration of its Government in trust as it were for the Inhabitants, would, I should hope, be acquiesced in by Foreign powers. The country has ample resources to bear the necessary expense as two companies of soldiers would be sufficient to keep the country in Peace, and enforce the execution of the laws. This proposition is known to the Missionaries, who, however strongly opposed formerly to the idea of soldiers being introduced into the country, are now satisfied of its necessity to prevent the extinction of the natives. The have originated a Petition to the King which is now in course of signature by the English settlers praying that some protection may be afforded them.

In correspondence both with Haddington and Alexander in late October and early November, Busby rejected the criticism of him in the Colonial Secretary's 23 August letter. In referring to the “crisis ... close at hand” with Bourke (in connection with the warning that he was at risk of being removed), Busby reassured Haddington that he had not “given way to petulance in my correspondence or unnecessarily set myself in opposition to the wishes of Sir Richard Bourke” but had “drawn his persecution upon me solely by a conscientious discharge of Public duty”<sup>121,122</sup>.

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<sup>119</sup> Ibid (p 58 of the typescript).

<sup>120</sup> Ibid (p 59 of the typescript). Note—the typescript has “*Tasman* Islands”, which is incorrect.

<sup>121</sup> Ibid (p 55 of the typescript).

<sup>122</sup> Ibid (p 59 of the typescript).

## Chapter Seven: Busby's Vision

On a review of all my proceedings, I cannot recollect any point in which I could desire to have acted differently from what I have done, and a train of events could scarcely have been imagined better calculated for my justification than what my successive despatches have detailed. I have, it is true, incurred the hostility of the Governor & can expect from him nothing but continued persecution, but I have done so by saying what I could not have omitted to say without a sacrifice of principle or character.

Busby had been required to defend his conduct and opinions “from the unjust animadversions of the Governor”. His letters, even though written in “the mildest and most guarded terms”, could not avoid “in effect so many severe and bitter reflections upon his conduct or rather demonstrations of his injustice to me”. The end result was that “nothing has been done for New Zealand and the Governor’s policy with regard to this country seems now to be concentrated upon one object—and that object is to get rid of me”.<sup>123</sup>

Despite the complexion he had put on matters to Haddington, Busby seems to have been less confident that he would be regarded in the right with Bourke and sought reassurance both from Alexander and from the missionaries. He was heartened that Alexander did not see anything “disrespectful” in his despatches. The missionaries, he said, “all expressed great admiration at my forbearance and wondered how I could continue to keep my temper”. Busby himself undertook an anxious reconsideration of his correspondence, in case the missionaries had been flattering him and with the insight that his more recent letters had been written in the absence of Agnes (“my good genius”) “who has on more than one occasion moderated my tone (and who indeed prevented my sending the only letter in which I had given vent to something like indignation)”. Despite this “very careful consideration”, Busby expressed himself satisfied that he could “only find one expression which it

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<sup>123</sup> Ibid (p 57 of the typescript).

seemed important to alter".<sup>124</sup> What this final comment indicates is that Busby was not above doctoring the copies of the correspondence he sent to London.<sup>125</sup>

Although Busby may have rejected in his own mind the Colonial Secretary's 23 August 1836 rebuke, it seems to have caused him to abandon entirely efforts to work with New South Wales. He did not reply to the Colonial Secretary's letter. He sent four despatches only in the next five months, none of them of significance. To his brother, he wrote that he had "ceased to make representations".<sup>126</sup> When he resumed correspondence at the end of January 1837, it was to request a ship of war and an armed force to protect British subjects in consequence of inter-tribal fighting at the Hokianga.<sup>127</sup> Subsequent despatches through to May 1837, reported that war was spreading, including to the Bay of Islands. In these despatches, Busby took the line that New Zealand society was "more unsettled than at any former period since the arrival of the Missionaries in the Country". They dwelt on European responsibility for fomenting conflict, particularly in connection with the purchase of land (Busby, perhaps with some satisfaction, reported that the Hokianga conflict arose because the same dispute that had given rise to the affray at the Residency in 1836 had not been properly addressed). They also emphasised the precarious position of respectable British settlers and a new "spirit of insolence and encroachment" observable in Maori behaviour towards them (which Busby claimed was attributable to the failure to hold Rete to account for his 1834 assault on Busby). He reported the development in Waikato's tribe of the Papahurihia cult

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<sup>124</sup> James Busby to Alexander Busby, 4 November 1836, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 63 of the typescript).

<sup>125</sup> In this thesis, I have drawn on Busby's outward letter book of despatches to New South Wales. I have not set out to compare them with the despatches held in New South Wales and in the Colonial Office Papers at Kew.

<sup>126</sup> James Busby to Alexander Busby, 5 May 1837, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (p 158). Note—the second half of this letter used to be in MS 46, Box 1, Folder 2, explaining why the relevant typescript volume is Volume 2.

<sup>127</sup> Busby to Colonial Secretary (NSW), 25 January 1837 (no 106), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (p 228 of the typescript).

(based on the serpent of the Old Testament<sup>128</sup>) as indicating new challenges to Christianity and the influence of the missionaries—two Christian Maori who had gone to preach were killed by the adherents of the cult (leading in turn to retaliation in which 12 or 13 people were reported by Busby to have been killed in a cycle he feared was not yet complete).<sup>129</sup>

These disturbing reports culminated in a despatch of 4 May 1837 which reported the outbreak of war at the Bay of Islands and enclosed the missionary-organised petition to the King for protection signed by 213 settlers.<sup>130</sup> In Busby's covering letter to the Colonial Office for the petition (a copy of which was also sent to New South Wales with the 4 May despatch), Busby wrote that the British subjects and their families were "exposed to the appalling evils of Civil War carried on by Independent Tribes of Fierce Barbarians who, collectively, or as individuals, own no subjection to Military Authority or Civil Government".<sup>131</sup>

By this stage, Busby had completely given up. He did not even attempt to tell the chiefs that the King had acknowledged their Declaration of Independence and sent them a message which the Governor had been commanded and was pleased to pass on to them.<sup>132</sup> In private correspondence, he described his own situation as "near being intolerable".<sup>133</sup> He thought that "nothing is to be accomplished with the New Zealanders" (although he thought that if Britain "could only assume an appearance of authority", "[e]very thing tends to shew how easily this people might be

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<sup>128</sup> See Judith Binney "Papahurihia, Pukerenga, Te Atua Wera and Te Nakahi" in Binney *Stories Without End: Essays 1975–2010* (Bridget Williams Books Limited, Wellington, 2010) 275–283; and Chapter 6, text accompanying n 44.

<sup>129</sup> See Busby to Colonial Secretary (NSW), 30 January 1837 (no 107) & 28 March 1837 (no 110), ATL qMS-0344 (holographs) & qMS-0345 (typescript) (pp 228–235 & 237–241 of the typescript).

<sup>130</sup> Busby to Colonial Secretary (NSW), 4 May 1837 (no 111), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 242–245 of the typescript).

<sup>131</sup> Busby to Glenelg, 20 April 1837, CO 209/2, 318a–319b at 318b–319a. (The petition is at CO 209/2, 321a–323b.)

<sup>132</sup> See Busby to Colonial Secretary (NSW), 22 March 1837 (no 109), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 236–237 of the typescript); Colonial Secretary (NSW) to Busby, 19 November 1836, AML MS 91/75, Box 2, Folder 57, item 382.

<sup>133</sup> James Busby to Alexander Busby, 5 May 1837, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 67 of the typescript). This is the same letter in which Busby described his fraught relationship with the missionaries (as described in Chapter 6, text accompanying n 456).

governed").<sup>134</sup> The Bay of Islands was in a "state of civil war", with "[a]rmed parties ... constantly in motion" and Busby unable to interfere in any way. It is difficult to know how seriously Busby viewed the situation. In the same letter in which he referred to the "state of civil war", he remarked that it seemed "burlesque" to call it a war.<sup>135</sup>

Although there are indications that Bourke viewed the despatches about war as exaggerated,<sup>136</sup> they made it necessary for him to take action to protect British subjects and to obtain independent assessment of the situation in New Zealand. It was for these purposes that he sent Captain William Hobson of HMS *Rattlesnake* to the Bay of Islands in May 1837.

### **Last words**

When Hobson arrived, he brought with him a despatch of 16 May from the Colonial Secretary for Busby. It contained the further information from Glenelg's 28 October 1835 despatch that the British Government considered there were "insuperable objections" to stationing British military force in New Zealand and that it was not able to incur the expense of maintaining a ship of war in New Zealand waters. Although Busby was told that the Secretary of State had approved the payment to him of an additional £300 per annum to meet the costs of constabulary and other arrangements Busby had proposed in November 1834, he was also advised that Bourke had taken the view that the failure to obtain imperial legislation, and the state of the country as represented by Busby, made such expenditure "altogether fruitless". The Colonial Secretary advised Busby that the Governor had asked Hobson to report his observations about the condition of New Zealand. He invited Busby himself to proffer any suggestions for making his Residency more effective in protecting British subjects and Maori, "and for the

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<sup>134</sup> James Busby to Alexander Busby, 5 May 1837, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 2 (typescript) and ATL qMS-0349 (typescript) (pp 158-159).

<sup>135</sup> James Busby to Alexander Busby, 5 May 1837, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 67 & 68 of the typescript).

<sup>136</sup> See Colonial Secretary (NSW) to Busby, 13 February 1837, AML MS 91/75, Box 2, Folder 58, item 386.

furtherance of civilized habits amongst the latter". Any such suggestions were to "fall within the limits defined by His Majesty's Government". Upon receiving Busby's suggestions, the Governor would then decide whether it would be proper to apply to the Legislative Council for a further vote of money. Pointedly, Busby was reminded that "the usefulness of your employment must in a great measure depend upon the influence which you may be enabled to acquire and exercise over the Native Chiefs and towards obtaining such influence any of the expedients mentioned above can only be considered as remotely subsidiary".<sup>137</sup> Bourke was clearly not interested in the ambitious proposals for direct British intervention in New Zealand that Busby had developed in his despatches to date. There was little prospect that Busby would observe these strictures.

Busby's reply of 16 June 1837 was written less for Bourke than for London.<sup>138</sup> He took little notice of the Governor's attempt to limit the scope of his proposals to a level that could be addressed in New South Wales. The despatch was evidently written by Busby as his entire position on the subject of the government of New Zealand. He never deviated from it and cited it in most subsequent correspondence, referring to it in private letters as "my 40 page despatch". This despatch was in essence a more elaborate version of Busby's 26 January 1836 Ionian Islands protectorate recommendation.

The letter began by updating the Governor on the progress of the war in the Bay of Islands. The mediation of Busby, Hobson and the missionaries had not succeeded. There was no probability of a speedy end and Busby continued to stress its alarming and serious potential (an assessment that may well have been exaggerated since, on 13 July, he was to report that peace had been concluded).<sup>139</sup> Because of these circumstances, Busby agreed that further expenditure to bolster up his office "as at present constituted" would be fruitless. Nor did he think that the powers

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<sup>137</sup> Colonial Secretary (NSW) to Busby, 16 May 1837 (no 37/8), AML MS 91/75, Box 2, Folder 58, item 389.

<sup>138</sup> Busby to Colonial Secretary (NSW), 16 June 1837 (no 112), GBPP 1840 [238] XXXIII.587 at 12-18 (also CO 209/2, 333a-352b and ATL qMS-0345, pp 245-263).

<sup>139</sup> Ibid 12-13. Busby to Colonial Secretary (NSW), 13 July 1837 (no 117), GBPP 1840 [238] XXXIII.587 at 18 (also ATL qMS-0345, pp 266-267).

provided by the Act of the Imperial Parliament as proposed would be sufficient “in the state to which the affairs of this country have arrived”. What was wanted was “a paramount authority, supported by a force adequate to secure the efficiency of its measures”.<sup>140</sup>

Without the establishment of such an authority by some civilised state, I cannot, after a full consideration of every circumstance connected with the actual condition of this people, see the least prospect of any permanent peace being established amongst them whilst there remains a stronger man to murder his weaker neighbour. There are few persons so insignificant as not to have it in their power, at any time, to plunge the country into war. The crime of an individual involves his most distant connexions, as each of them is a legitimate object of retaliation to the connexions of the injured party. It is in vain to represent to them that the criminal alone should suffer; their answer is ready, and it is perfectly consistent with the dictates of natural justice, namely, that his tribe will not surrender him to suffer for his crime, and by standing up in his defence they have become participators in it; while on the other hand, provided the criminal be not a slave, his connexions are never without a grievance, more or less ancient, which they bring forward as justification of his crime. Thus, by every attempt to administer the law of retaliation—the rude justice of nature—the breach is made wider. New deaths involve more distant connexions. Tribe after tribe becomes a party to the contest; and peace, or rather an intermission of murders, can only be procured when one of the parties becomes too weak to continue the contest, or when the loss on both sides happens to be so nearly balanced, that neither party has an advantage over the other.

In this way has the depopulation of the country been going on, till district after district has become void of its inhabitants; and the population is, even now, but a remnant of what it was in the memory of some European residents.

Busby speculated as to the causes of Maori depopulation, which he thought included, in addition to war (and the introduction of European firearms), diseases, liquor, tobacco, prostitution, infanticide and a form of cultural depression in which Maori concluded that “the God of the English is removing the aboriginal inhabitants to make room for them; and it appears to me that this impression has produced amongst them a very general recklessness and indifference to life”.

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<sup>140</sup> Busby to Colonial Secretary (NSW), 16 June 1837 (no 112), GBPP 1840 [238] XXXIII.587, 12-18 at 13.

Although Busby did not attribute the “present miserable condition of the New Zealanders” to their interactions with British subjects, he considered that Maori nevertheless had “at least some claim of justice upon the protection of the British Government; and certainly a very strong claim not to be overlooked in those measures which are dictated by the present humane policy of the British Government towards the aboriginal inhabitants of countries where British settlements are formed”.<sup>141</sup> These considerations, which had not assumed nearly the same prominence in Busby's earlier despatches, may in part have been an attempt to play upon the humanitarian concern for aboriginal peoples to which the Aborigines Committee was a response.

Busby expressed the view that Maori would “go on destroying each other” unless the country was taken under the “efficient protection of Great Britain, or some other foreign power”. British subjects, too, would “continue to suffer the accumulating evils of a permanent anarchy”. They could not “make common cause against the natives” for their “general security” because “[t]he nature of their pursuits, the distance of their habitations, and, above all, the character of the majority of them, would render any combination for their general defence at once unworthy of reliance, and incompatible with the objects of their settlement in the country”.<sup>142</sup>

With this background, Busby submitted “the outline of a plan of government, which I humbly venture to think would give as great a degree of peace and security to all classes of persons in this country as is enjoyed by the inhabitants of the majority even of civilised states”:

The plan which I would now more fully submit was suggested in my Despatch of the 26th January 1836, No. 85. It is founded upon the principle of a protecting state, administering in chief the affairs of another state in trust for the inhabitants, as sanctioned by the treaty of Paris, in the instance of Great Britain and the Ionian Islands, and as applied, I believe, in various instances, on the borders of our Indian possessions.

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<sup>141</sup> Ibid 13-14.

<sup>142</sup> Ibid 14.

## Chapter Seven: Busby's Vision

All my experience subsequent to the date of that suggestion has strengthened my belief that the principle is peculiarly applicable to this country; and that the details could be arranged with a degree both of efficiency and economy which at first sight might appear far from probable.

The Declaration of Independence (with its articles of confederation) provided some foundation on which Britain could enter into treaty relations with the Confederated Chiefs and others whose adherence to the Declaration “could at any time be procured”. In an important passage indicating his views of the nature of the sovereignty of the chiefs, individually and in the Confederation, Busby explained their competence through the Confederation to enter into a treaty under which they could receive British assistance in establishing order:<sup>143</sup>

Whatever acts approaching to acts of sovereignty or government have been exercised in the country, have been exercised by these chiefs in their individual capacity as relates to their own people, and in their collective capacity as relates to their negotiations with the British Government, the only Government with which the chiefs or people of New Zealand have had any relations of a diplomatic character. Their flag also has been formerly recognized by the British Government as the flag of an independent state.

The Articles of Confederation having centralized the powers of sovereignty exercised both *de jure* and *de facto* by the several chiefs, and having established and declared the basis of a constitution of government founded upon the union of those powers, I cannot, I think, greatly err in assuming that the congress of chiefs, the depository of the powers of the state as declared by its constitution, is competent to become a party to a treaty with a foreign power, and to avail itself of foreign assistance in reducing the country under its authority to order.

If this approach was correct, Busby thought that all difficulty would “vanish”:<sup>144</sup>

The appearance of a detachment of British troops, in fulfilment of a treaty with the confederated chiefs, would not be a taking possession of the country, but a means of strengthening the hands of its native government; while, in return for this subsidiary force, it might be stipulated that the British settlers should be subject to the operation of no laws but should as should emanate from or be consented to by their own Government

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<sup>143</sup> Ibid.

<sup>144</sup> Ibid 14-15.

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and exercised under the control and directions of its officers; and that the revenues of the country should be made applicable, in the first instance, to the support of a civil government, to be established by the protecting power, and the maintenance of the quota of troops stipulated for by the treaty.

In theory and ostensibly the government would be that of the confederated chiefs, but in reality it must necessarily be that of the protecting power.

This reasoning was consistent with Busby's proposals as developed since 1835 (if not 1831) in establishing a dependency "in everything but the name". It also gave the British Resident the sort of role that Busby had always coveted. (Busby was later to express confidence to his brother that the British Government "cannot I think adopt my plan without leaving me to conduct it".<sup>145</sup>)

Under these arrangements, the chiefs would "nominally enact the laws proposed to them" by the British Resident. They would have "in truth" no real discretion since at their present state of civilisation "moral principle", if it existed among them at all, was "too weak to withstand the temptation of the slightest personal consideration". Under this vision, the Congress "would, in fact, be a school in which the chiefs would be instructed in the duties required of them". Busby did not think that there was "the slightest danger of any law which should be submitted to the chiefs being unpalatable to them":

[S]o little complicated are their social relations, that the most simple and obvious principles of natural justice and equity require only to be stated and explained, in order to form a code which would meet every case that is likely for many years to occur.

In their separate districts the chiefs would have authority as "conservators of the peace". It is not clear whether Busby envisaged this authority as being delegated by the Confederation or whether he saw the chiefs as continuing to exercise an original authority over territory and people except where the Confederation had legislated. (It is striking that similar questions can be asked about the Treaty of Waitangi: did the chiefs of the Confederation cede only what they had earlier

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<sup>145</sup> James Busby to Alexander Busby, 20 June 1838, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 78 of the typescript).

conferred on the Confederation? Did the original authority both of the individual chiefs of the Confederation and the independent chiefs not of the Confederation survive the transfer of sovereignty except to the extent contemplated by the Treaty? To what extent does considering the meaning of the Treaty require consideration of the terms of the Declaration of Independence?)<sup>146</sup> The employment of the chiefs as “conservators of the peace”, and the provision of a small salary, “would secure beyond all doubts the entire devotion of the chiefs to the wishes of the resident”. Busby also proposed that each chief receive, as another “highly esteemed distinction”, a medal bearing his name and “the district over which his authority extended”.

That difficulties “would for a time arise in the administration of the laws” there was “little doubt”. It was “scarcely to be expected” that chiefs would apprehend criminals “immediately connected” with themselves. But Busby was confident that a chief would not afford protection to a such criminal “against a native police force which could fall back upon the British troops for support”:

In many cases the vengeance of the laws might not overtake the guilty party, but the act of a single criminal would at once and for ever cease to be the occasion of civil war.

Busby envisaged that schools, with missionary schoolmasters, would be established in every “considerable village”. They would be the “means of establishing an entire control over the population”. An “annual examination” of the schools (involving distribution of prizes of inconsiderable value) would provide a means of bringing “the whole population under the supervision of the government”. Busby thought a newspaper might also be established which could “be made the means of instructing the natives in those relative duties of the people and their rulers which are familiar to all ranks of the population under established governments, but of which the New Zealanders have scarcely as yet conceived an idea”. Busby thought that these arrangements for the “government of the native population” would not cost more than £1,000 per annum. This sum excluded, however, “a more considerable salary to certain of the leading chiefs, to be elected

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<sup>146</sup> A view on these questions is expressed in the Conclusion (Chapter 20).

by the congress, with the sanction of the resident, for the purpose of acting with him as a native council and executive authority". Busby also flagged the additional cost that would arise out of "the accession of more distant tribes, who would hasten to join the confederation when its objects should become understood". Their adhesion was, however, "highly necessary to procure, as a bar to the interference of any foreign power".

Busby explained why the chiefs would want to accept subordination to the British Resident and British protection ("a power which would claim the right of maintaining peace [and] deciding disputes"):<sup>147</sup>

To those unacquainted with the actual *status* of a New Zealand chief, it may perhaps appear improbable that he would give up his own proper rank and authority, and become what would be, in fact, little better than an instrument in the hands of the British resident. But, in truth, the New Zealand chief has neither rank nor authority but what every person above the condition of a slave, and indeed the most of them, may despise or resist with impunity. It would, in this respect, be to the chiefs rather an acquisition than a surrender of power.

But the conduct of the chiefs in their individual capacity would of course be regulated by the laws enacted by themselves as a collective body, and provision might be made for punishing by a pecuniary mulct [i.e. a fine], by a temporary suspension from office as a conservator of the peace, or by a degradation from the rank of a chief of congress of any chief who should fail in the duties required of him. This could in almost all cases be done without the disaffection of his tribe, who would without any difficulty be induced to propose another of their leading men to be elected by the congress and sanctioned by the resident in his stead.

These views of Maori society may indicate the limits of Busby's own understanding. Some of his more fanciful proposals were subjected to marginal exclamation marks on the copy received in the Colonial Office on 18 December

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<sup>147</sup> Busby to Colonial Secretary (NSW), 16 June 1837 (no 112), GBPP 1840 [238] XXXIII.587, 12-18 at 15.

1837, and the suggestion that “in reality” the government would be by the British Resident was noted “a pretty Gov<sup>t</sup>!”.<sup>148</sup>

Busby considered that it would be necessary for the administration of justice among Maori (“consequent upon the establishment of a government, and the enactment of laws”) to establish a “supreme court of criminal and civil jurisdiction”:

The country itself, possessing no materials for such institutions, can look alone to the protecting power to afford this as well as the other means of making its government effective.

Missionaries and catechists of the Church and Wesleyan missionary societies could act as justices of the peace. There were “even now” also two or three settlers “who are competent to the same office”. The missionaries would also be “an invaluable and almost indispensable adjunct to the judge of a criminal court, by acting as assessors in all cases in which natives should be concerned”. Criminal trials of Maori accused “might also be conducted in the presence of a jury of natives”. They would not, however, be “constituted in any respect as judges in the case” but rather would be “compurgators with the accused, and ... witnesses to the country of his having had a fair trial”<sup>149,150</sup>:

Thus would the way be prepared for confiding to the people the trust of jurymen, in like manner as to the chiefs of congress that of legislators, when a generation should arise sufficiently enlightened and virtuous to be capable of those high functions.<sup>151</sup>

As to the government of British subjects, “[i]t would of course rest with the wisdom of the British Government to determine what measures should be resorted to”. (In a marginal note beside this in the Colonial Office copy appears the

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<sup>148</sup> CO 209/2, 341a.

<sup>149</sup> A compurgator was a type of character witness. Busby had the idea from the writings of Sir Francis Palgrave on the original purpose of juries in England.

<sup>150</sup> Busby to Colonial Secretary (NSW), 16 June 1837 (no 112), GBPP 1840 [238] XXXIII.587, 12-18 at 16.

<sup>151</sup> As condescending as these views are, it will be recalled that Busby had not favoured the introduction of civil juries in New South Wales. See Chapter 6, text accompanying n 196.

comment, "This is the real point".<sup>152</sup>) But the recognition of a "New Zealand Government" would remove "all difficulties in the way of such an arrangement"<sup>153</sup>:

Whatever laws His Majesty's Government should consider suitable for the protection and control of the King's subjects would be proposed to, and, as of course, become acts of the legislature of New Zealand.

The Supreme Court (or "[w]hatever courts of judicature His Majesty might deem necessary") would also be established by the New Zealand legislature.

Busby suggested that a Council of two or three missionaries and two settlers could be selected to advise the Resident.<sup>154</sup> The settler councillors would "more immediately represent the interests and wishes of the settlers generally".<sup>155</sup> While it would be necessary to station troops in New Zealand, their numbers could be kept to a minimum. Anyone acquainted with "military tactics" and who had seen "the warfare of the natives" would know that "one hundred English soldiers would be an overmatch for the united forces of the whole islands". Moreover, there was "little risk of even two tribes uniting to oppose them":

There is no dominion any where existing to rival that which would call the British government to its aid; nor is any chief possessed, as such, of any sovereignty or territorial rights, in support of which he might induce others to join him in resisting the established power.

Busby considered that if "rights of property" were recognised and steps taken to "ascertain and fix" them, the only possible object for which even "the smallest number of men could be induced to unite in resisting the government" was in relation to the "administration of justice". But "even ... the least perfect system of

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<sup>152</sup> CO 209/2, 344a.

<sup>153</sup> Busby to Colonial Secretary (NSW), 16 June 1837 (no 112), GBPP 1840 [238] XXXIII.587, 12-18 at 15-16.

<sup>154</sup> Busby wrote that "[u]nless a defined and specific share in the government of the country be allotted to the missionaries, the British Government has no right to expect that that influential body will give a hearty support to its representative". He then discussed at some length his relationship with the missionaries, perhaps in an attempt to indicate that the missionaries would have to accept direction from him.

<sup>155</sup> Busby to Colonial Secretary (NSW), 16 June 1837 (no 112), GBPP 1840 [238] XXXIII.587, 12-18 at 16.

government and judicature” was “so great and manifest a blessing ... to the distracted inhabitants of this country” that Busby considered that the “most influential men amongst them would succeed in inducing few indeed to resist its exercise”. Busby allowed, however, that English settlers could be enrolled and trained as a militia to support the troops in an emergency; and that a “native force” might also be trained (“although it appears to me that the natives are too independent in their circumstances to submit to military discipline for military pay”). As sources of Government revenue, Busby pointed to duties on shipping and taxes on tobacco and spirits.

Busby considered that, “[s]imultaneously with the establishment of a government”, it was “absolutely necessary” to ascertain and fix “upon equitable principles” the titles to land claimed by British subjects by purchase from Maori. This was a subject of “so much importance, and which involves so deeply the character of the British Government” that commissioners, without connections to New Zealand, should be specially appointed by the King to undertake it. Busby also proposed that laws should be passed declaring “absolutely null and void” all land claims by non-British foreigners and all future purchases “of which sufficient notice had not been given to the Government, in order that the real proprietors of the Land might be ascertained”. Additionally, as required by “[h]umanity”, “certain districts should be fixed in perpetuity in the native proprietors”.

Busby wrote that these proposals were “principally the views which, in applying to His Excellency Sir Richard Bourke for leave to proceed to England, it was my object to bring under the immediate notice of the Home Government”. They were “an attempt to point out by what means the extension of efficient protection to His Majesty’s subjects might be made compatible with such a regard to the rights of the New Zealanders, as an independent state, as might satisfy the reasonable scruples of foreign governments”.<sup>156</sup>

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<sup>156</sup> Ibid 17.

Busby, however, had an alternative proposal to make: a Crown charter of government could be issued to the colony of British subjects in New Zealand. The basis for such a grant of powers was that, as owners of considerable property in New Zealand, British settlers were entitled “to require from the actual sovereigns of the country the ordinary protection of a government, and, if this is from incapacity or other causes withheld, to obtain the aid of the parent state in governing themselves”. The grant of a charter would leave Maori “in the full possession of their abstract rights, so far as they have not conceded them to the colonists, and providing only against their suffering injustice at the hands of the latter”.<sup>157</sup>

Busby concluded his despatch by writing that “the establishment of any authority whatever would be an incalculable advantage”. It was in accordance with the “arrangements of Divine Providence” that an “infant people” suffering “injury and injustice” from “its intercourse with a powerful state” should be taken under the protection of that state, just as a child was entitled to the protection of its parents. This was, moreover, “the instinct of natural justice, as exemplified in the reference which the chiefs made to the King of England in their declaration of independence”.<sup>158</sup>

They prayed “that His Majesty would continue to be their parent, and that he would become their protector.” The sentiment and the language were their own.

This view that Maori looked to the protection of the British Crown because they were unable to achieve order themselves links to the Declaration, as Busby said, but also anticipates a principal theme of the Treaty of Waitangi and Busby's language here is reminiscent of that he was to use in the subscription he drafted to the Treaty (but which was heavily edited by Hobson).<sup>159</sup> Busby's despatch is his last significant exposition of his thinking before the Treaty was concluded. As has

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<sup>157</sup> Ibid 17-18.

<sup>158</sup> Ibid 18.

<sup>159</sup> See Appendix 4: “And having understood and seriously considered the gracious invitation of the Queen of England: And being sensible of our own weakness and inability to repress internal dissensions and to defend our Country from external enemies ...”.

been seen, it was consistent with proposals he had made since November 1834. No contemporary letters by Busby relating to the drafting and meaning of the Treaty survive.<sup>160</sup> His consistency of thought and obstinacy of character (which meant that even direct orders did not deflect him from his own convictions) may suggest that the despatch of 16 June 1837 represents the attitude Busby brought to the Treaty drafting. Whatever the truth of the matter, his competitive nature meant that he is likely to have seen the Treaty as vindication of all his struggles against Bourke and other opponents.

Busby sent his 16 June 1837 despatch to London as well as New South Wales, as was his practice. Unlike most of his despatches copied to London (which rarely reached the senior officials, much less the Secretary of State), this despatch was widely read and distributed. The picture of escalating disorder painted by Busby is suggested by Peter Adams to have been key in Government's offer of a charter to the New Zealand Association, two days after the despatch was received in London (although in Chapter 9 I express doubt that there was this cause and effect<sup>161</sup>). The despatch was also received in London on 1 February 1838 from Bourke, together with Hobson's 8 August 1837 report. Hobson's report, which is described in more detail in Chapter 10,<sup>162</sup> provided some balance to Busby's. In relation to the war at the Bay of Islands, Hobson wrote that Busby "stands alone in the opinion he has formed" of the risk to British lives and property: "those who have every thing at stake,—their lives, their families and their properties,—entertain not the slightest apprehension of any change".<sup>163</sup> Hobson's assessment that the war was "in a fair train for adjustment", was shortly proved to be correct.<sup>164</sup> On the other hand,

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<sup>160</sup> Given Busby's constant letter-writing to his family in the period to 1840, and the opportunity the Treaty provided for him to paint himself at centre stage, there is reason to wonder whether some correspondence has been destroyed, perhaps together with further correspondence in the 1840s and 1850s (which is also very sparse). If so, that may have occurred when, in the 1860s, Busby substantially revised his earlier views of Maori rights under the Treaty (a topic touched upon in Chapter 18). Some systematic attempt to discover Busby's correspondence of the period beyond his family circle would be worthwhile. For example, the uncatalogued papers of the ninth Earl of Haddington in Edinburgh might be worth consulting.

<sup>161</sup> See Chapter 9, text accompanying ns 97-102.

<sup>162</sup> See Chapter 10, text accompanying ns 44-53.

<sup>163</sup> Hobson to Bourke, 8 August 1837, GBPP 1840 [238] XXXIII.587, 9-11 at 9.

<sup>164</sup> Ibid 10.

Hobson took the view that “with respect to the abandoned ruffians from our own country ... there is much to be dreaded”.<sup>165</sup> For the protection of Maori and “the better classes of our fellow-subjects”, he, too, proposed direct British intervention, in his case along the lines of the East India Company's trading factories.<sup>166</sup>

Bourke's 9 September 1837 covering letter to the two reports praised Hobson's as containing “suggestions of great value”. It was described by Bourke as being premised on the “inflexible condition” that “nothing whatever be established on the part of the British Government, which is not cheerfully conceded on terms of clear mutual interest by the natives”. Bourke considered that it was “neither possible nor desirable” to prevent the growing contact between the Australian colonies and New Zealand. Although it was an option to withdraw the Resident and to warn British subjects that they traded in New Zealand at their own risk, such “stern principle of absolute non-interference” would be hard to maintain if British lives or property were in jeopardy. Bourke felt “unable to submit a better arrangement than this, which Captain Hobson has proposed”. Busby's report on the other hand, while it contained suggestions “which are not without value”, was thought by Bourke likely to be difficult to reconcile with the British Government's objectives for New Zealand.<sup>167</sup>

### **Running down the clock**

Busby's “40 page despatch” was effectively his last word on the subject of British intervention and the “antidote to all that Sir R. Bourke could do against me”.<sup>168</sup> For the next two and a half years he coasted, pinning most of his hopes on the despatch

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<sup>165</sup> Ibid 9.

<sup>166</sup> Ibid 10-11.

<sup>167</sup> Bourke to Glenelg, 9 September 1837, GBPP 1840 [238] XXXIII.587, 8-9 at 8.

<sup>168</sup> James Busby to Alexander Busby, 20 June 1838, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 77-78 of the typescript).

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achieving a change in policy in London. In December 1837, he wrote to Alexander:<sup>169</sup>

I do think that two years of such a life as I have spent for the last six or 8 months would unfit me for any thing requiring study or thought. As regards Govt business I have been absolutely idle. My 40 page despatch of the 16<sup>th</sup> May [sic] was the last of my communications to Sir R. Bourke (unless perhaps one or two letters on mere matters of routine)<sup>170</sup> ... . I have never made any enquiry and have never happened to hear the source from whence proceeded the article in the *Colonist*.<sup>171</sup> But I have said here that I would say with Lord Brougham that "if little had been done hitherto, less would be done in future" till some change should take place and this was my answer to those who wished me to "shake off my lethargy".

During this period, Busby seems to have spent a great deal of time in his garden.<sup>172</sup> And, as is discussed below, from mid-1838 he turned his attention to land purchases and plans for subdividing his estate at Waitangi. He had some hopes that George Gipps, who arrived to replace Bourke as Governor of New South Wales in February 1838, either would bring with him new instructions concerning New Zealand or could be prevailed upon to support Busby's views in London.<sup>173</sup> He saw the proposed visit to New Zealand by Bishop Broughton, whom he knew to be a school friend of Gipps, as providing an opportunity for influencing the Governor.<sup>174</sup> Unfortunately for Busby, Broughton's visit was long delayed and did not occur until December 1838. Although Broughton read Busby's 40-page

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<sup>169</sup> James Busby to Alexander Busby, 20 December 1837, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 69 of the typescript).

<sup>170</sup> This is accurate and Busby in fact sent no despatches between 13 July 1837 and 16 January 1838.

<sup>171</sup> *The Colonist* had called the Residency a failure and suggested that a more energetic man could have achieved more. See Chapter 6, text accompanying n 279.

<sup>172</sup> See James Busby to Alexander Busby, 16 November 1838, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 82 of the typescript); and James Busby to Alexander Busby, c. 11 August 1839, AML MS 46, Box 2, Folder 4 (holograph) & Box 7, Volume 4 (typescript) and ATL qMS-0352 (typescript) (p 37 of the typescript).

<sup>173</sup> See James Busby to Alexander Busby, 26 January, 13 March & 20 June 1838, AML MS 46, Box 1, Folder 1 (holographs) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 73, 76 & 77 of the typescript).

<sup>174</sup> See James Busby to Alexander Busby, 20 December 1837, 26 January 1838 & 26 November 1838, AML MS 46, Box 1, Folder 1 (holographs) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 72, 74 & 87 of the typescript).

despatch and was said by Busby to be sympathetic, he made it clear that he did not expect Gipps to seek his views or take a direct interest in New Zealand affairs unless directed to do so by London.<sup>175</sup> While Busby initially hoped that Gipps would be more satisfactory than Bourke, he soon gave up any expectations from that quarter. By November 1838, he was expressing the view that there was “a sad want of manly independence” about Gipps.<sup>176</sup> Later, he was to say that Gipps was “a shuffler”.<sup>177</sup>

Busby remained expectant and anxious for news from England of a change to his situation. An indication that he still hoped his 16 June 1837 plan would be accepted is his unsuccessful attempt to get passage, with some Bay of Islands chiefs, on HMS *Conway* to the Thames apparently in part to obtain adherents to the Declaration of Independence.<sup>178</sup> Busby also continued to send reports to New South Wales and London suggesting that law and order issues were not improving.

From mid-1838, Busby became aware of the developments in London concerning the New Zealand Association and the opposition of the missionary societies to the Association's colonisation plans. These were the “pamphlet wars” described in Chapter 5 which ultimately pushed the British Government to intervene in New Zealand. Busby wrote to Alexander on 20 June 1838 that there could be no doubt that “something is in contemplation respecting New Zealand”:

You will no doubt have heard of the “New Zealand Association”—which is supported certainly by a string of very influential names—although the principium mobile of the whole affair is no other than Mr. Edward Gibbon Wakefield of Newgate celebrity. It would appear that the Church Missionary Society at home had entered the field very warmly in opposition to this scheme. I have seen (but not read) a very spirited and able pamphlet—a letter to Lord Glenelg by Mr. Coates the Secretary to the Church Mission—

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<sup>175</sup> See James Busby to Alexander Busby, 3 January & 26 April 1839, AML MS 46, Box 1, Folder 1 (holographs) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 88-89 & 101 of the typescript).

<sup>176</sup> James Busby to Alexander Busby, 16 November 1838, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 83 of the typescript).

<sup>177</sup> James Busby to Alexander Busby, 8 August 1839, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 115 of the typescript).

<sup>178</sup> Captain Bethune to Rear Admiral Maitland, 5 October 1838, FO 58/1, 92a-94a at 92a-b.

## Chapter Seven: Busby's Vision

and another pamphlet in reply from Edward G. Wakefield. There is also a book of 400 and odd pages by the latter on the subject . . .

Busby heard from one the missionaries that the Government “had at length determined to do something for New Zealand” either on the basis of Coates’s pamphlet or Busby’s 40-page despatch. Busby thought that Coates’s plan “amounts to little more than I myself suggested four years ago, if not in my first (printed) communication”<sup>179</sup> and was “quite inapplicable to the present state of affairs”.<sup>180</sup> Over the next few months, the missionaries showed him copies of the latest publications.<sup>181</sup> Broughton brought with him a copy of the New Zealand Association’s Bill which had been rejected by Parliament in June 1838.<sup>182</sup> In November 1838, Busby saw for the first time Hobson’s factories proposals and Bourke’s endorsement of it (which had been printed, together with his despatch, in the Parliamentary Papers<sup>183</sup>). As might have been expected, Busby was outraged by Bourke’s recommendation of Hobson’s plan over his own.<sup>184</sup> He sent letters to Gipps (copied to London) criticising the factories proposal as impractical and complaining about Bourke’s endorsement of it.<sup>185</sup> Not long afterwards, in early 1839, Busby was galvanised into a considerable quantity of letter writing when he saw the criticisms made of him by Robert Fitzroy in his evidence to the 1838 House of Lords Committee on New Zealand.<sup>186</sup> Stung by Fitzroy’s comments, Busby wondered darkly whether Fitzroy was intriguing with the Church Missionary Society to be appointed a “floating” Resident in a frigate. He also

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<sup>179</sup> A reference to his 1831 “Memoir”.

<sup>180</sup> James Busby to Alexander Busby, 20 June 1838, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 77 of the typescript).

<sup>181</sup> James Busby to Alexander Busby, 16 & 26 November 1838, AML MS 46, Box 1, Folder 1 (holographs) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 81 & 84 of the typescript).

<sup>182</sup> James Busby to Alexander Busby, 3 January 1839, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 88 of the typescript). For the Association’s Bill, see Chapter 9, text accompanying ns 228-249.

<sup>183</sup> GBPP 1837-38 (122) XL.209 (7 February 1838).

<sup>184</sup> James Busby to Alexander Busby, 26 November 1838, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 84-86 of the typescript).

<sup>185</sup> Busby to Gipps, 30 November 1838, CO 209/4, 43a-45b; Busby to Colonial Secretary (NSW), 8 March 1839 (no 141), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 297-298 of the typescript) (also CO 209/4, 71a-72a).

<sup>186</sup> See Chapter 6, n 287.

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suspected that Bourke, now in London, was working against him.<sup>187</sup> Busby was concerned to justify his position to the Colonial Office.<sup>188</sup> He could not “accomplish impossibilities” with Maori.<sup>189</sup> While there was a “foundation in truth” for the criticism that he had told settlers that he had no authority to act in their interests,<sup>190</sup> he defended himself by reference to the state of New Zealand:<sup>191</sup>

It is not easy I fear for one who has never lived beyond the supremacy of established laws and the exercise of undisputed authority, to form a just conception of the state of things where neither Law nor authority has existence—where all exertion of power is violence, and the only law that of the strong arm.

Busby explained that Bourke had not grasped the fact that securing the co-operation of the chiefs was not the issue for Busby. It was that he could not control the consequences of procuring action by the chiefs:<sup>192</sup>

In our minds the idea of a Chief is naturally associated with the ideas of power and authority, as that of the sun is with light and heat. But it is not so with the word which has been so translated from the New Zealand language.<sup>193</sup> The Natives have not in fact acquired the ideas of authority and subordination. I in vain endeavoured to persuade Sir R. Bourke that it was from no inability to obtain the cooperation of the Chiefs, that I was slow to avail myself of their power; but from the necessity of caution in bringing a power into action which I had not the means to control. It would have been very easy for me to have procured from them the enactment of a code of Laws. But the enactment of Laws is a different thing from their enforcement. The Laws would have been from the first a dead letter. Whoever undertook to enforce them would have been considered as committing an act of aggression which would have been resisted and resented, and matters would have been in no respect different from what they are, save in the mischief which such attempts would have occasioned.

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<sup>187</sup> James Busby to Alexander Busby, 1 March 1839, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 90 of the typescript).

<sup>188</sup> Busby to Glenelg, 25 February 1839, CO 209/4, 47a-60b (holograph) and ATL qMS-0345, pp 310-326 (typescript).

<sup>189</sup> Ibid (p 314 of the typescript).

<sup>190</sup> Ibid (p 318 of the typescript).

<sup>191</sup> Ibid (p 314 of the typescript).

<sup>192</sup> Ibid (pp 314-315 of the typescript).

<sup>193</sup> This is probably a reference to *rangatira*.

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I could not therefore accomplish impossibilities, and I would not lend myself to a delusion. I was “not able to make straight what God made crooked”. Divine Providence has denied to this people the blessing of Social Institutions, and the protection of established Laws. The New Zealander is still the son of Ishmael—“the wild man whose hand is against every man, and every man’s hand against him”—and he is likely so to continue till the race has become extinct: unless some civilized state should take them not only nationally, but individually, under its protection.

Busby claimed that his view of the matter was “now undisputed by the Missionaries, and by all others whose knowledge of this Country entitles them to hold an opinion on the subject, but it is a truth for which I had long contended alone”.<sup>194</sup>

Some of the scraps of information that came Busby’s way were false. Thus, in April 1839, he heard second-hand that the New Zealand Association had been given a charter.<sup>195</sup> In June, he heard the rumour current in Sydney that the British Government had decided to appoint a Consul only for New Zealand.<sup>196</sup> That horrified Busby, who considered that New Zealand had to have government and that the appointment of a Consul meant “the virtual abandonment on the part of the British Government of any interference for the protection of British subjects”. At this point, Busby formed the intention of travelling to England to “battle the Govt for this country”.<sup>197</sup> He even considered taking a deputation of chiefs with him, “Plenipotentiaries” with “full powers from the rest to treat with the English Government”.<sup>198</sup>

On 19 June, Busby received what appeared to be direct confirmation of the rumour, with a letter from the Colonial Secretary of New South Wales advising him that his office was to be discontinued upon the arrival of a Consul. In a letter to Alexander,

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<sup>194</sup> Busby to Glenelg, 25 February 1839, ATL qMS-0345 (p 315 of the typescript).

<sup>195</sup> James Busby to Alexander Busby, 9 April 1839, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 95 of the typescript).

<sup>196</sup> See Chapter 11, text accompanying n 7.

<sup>197</sup> James Busby to Alexander Busby, 13 June 1839, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 105 of the typescript).

<sup>198</sup> James Busby to Alexander Busby, 29 July & 14 September 1839, AML MS 46, Box 1, Folder 1 (holographs) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 113 & 126-127 of the typescript).

Busby said that he was not surprised at this news given Fitzroy's evidence and the likely machinations of Bourke and McDonnell (also in England at the time). He speculated that McDonnell himself might be the Consul. Busby reported that the missionaries, too, were unhappy and believed "we must have a Govt.". He said that William Williams was "gratified" that Busby intended to go to London to press the case, "as if he anticipated that I should be able to set matters right".<sup>199</sup> In replying to New South Wales, Busby indicated that he wished to leave New Zealand by the end of September (rather than waiting for the arrival of the Consul).<sup>200</sup>

Busby seems to have expected that there would be some delay in the arrival of a Consul (believing that the old proposal for enabling legislation would be necessary<sup>201</sup>). He still entertained hope that, with the support of the missionaries, he might come to an arrangement with the Government in London which would "place me at the head of affairs here probably with little change in the plan of my 40 page letter beyond that of affixing a P to my present title".<sup>202</sup> Even with this hope, and despite receiving permission from New South Wales to resign his office early,<sup>203</sup> Busby delayed his departure. In part such delay was consistent with his prevarication in such matters. But it may have been prompted by the realisation the closer British association with New Zealand now imminent, however inadequate from Busby's point of view, offered opportunities. Busby had for some time taken the view that the establishment of a government under British protection would

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<sup>199</sup> James Busby to Alexander Busby, 25 June 1839, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 110 of the typescript). The Colonial Secretary's letter suggested that Busby would have been prepared for this news by Glenelg's despatch of 28 October 1835 to Bourke. As Busby indicated in his reply, he had not seen this despatch "or information which could lead me to expect such a result".

<sup>200</sup> Busby to Colonial Secretary (NSW), 8 July 1839 (no 143), ATL qMS-0344 (holograph) & qMS-0345 (typescript) (pp 299-300 of the typescript).

<sup>201</sup> See, for example, James Busby to Alexander Busby, 8 August 1839, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 116 of the typescript): "I think it is likely he will not be dispatched till an act of Parliament shall pass to give him some jurisdiction."

<sup>202</sup> Ibid. See also Busby to Rev Richard Davis, 11 July 1839, AML MS 46, Box 2, Folder 4 (holograph) & Box 7, Volume 4 (typescript) and ATL qMS-0352 (typescript) (p 36 of the typescript).

<sup>203</sup> Colonial Secretary (NSW) to Busby, 8 August 1839, AML MS 91/75, Box 2, Folder 62, item 417.

lead to great increase in the value of property.<sup>204</sup> He worried that if he were absent in England he would lose the opportunity to sell his Waitangi allotments to any party of emigrants which might arrive.<sup>205</sup>

Busby had also become aware in mid-August 1839 that the Consul being sent to New Zealand was William Hobson. He sourly remarked that he had no doubt that the appointment had been “all settled” between Hobson and Bourke before Hobson left Sydney.<sup>206</sup> Soon after he heard the news about Hobson's appointment, Busby read for the first time a copy of the report and evidence of the Aborigines Committee. He noted that the Committee had shown “strong feeling” in favour of the evidence of the missionaries at the Cape Colony (“tending to the discredit of the Colonial Govt”) and considered that Hobson's instructions and powers as Consul would be “regulated” by the recommendations of the Committee.<sup>207</sup>

Busby was now caught up in a wave of land speculation—it seems with the encouragement of Alexander (who visited New Zealand in 1838 and 1839 and may have financed Busby into some of his acquisitions). Between July 1838 and November 1839, he made an additional five purchases totalling more than 7,000 acres at Waitangi.<sup>208</sup> He was also engaged in surveying for sale allotments in his “Victoria” township at Waitangi, which were first offered in November 1839.<sup>209</sup> He toyed with the idea of setting up a mercantile firm, and even a bank, in partnership with his brothers and the purchase of 30-40,000 acres of land on the East Coast.<sup>210</sup> In the end, Busby was to conclude purchases of vast blocks of land at Ruakaka, Waipu and Ngunguru, the last two by deeds dated 29 January 1840,

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<sup>204</sup> James Busby to Alexander Busby, 20 June 1838, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 78 of the typescript).

<sup>205</sup> James Busby to Alexander Busby, 24 August 1839, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 120 of the typescript).

<sup>206</sup> Ibid.

<sup>207</sup> James Busby to Alexander Busby, 14 September 1839, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 127 of the typescript).

<sup>208</sup> See Stirling “Not With the Sword But With the Pen”, above n 85, 1455-1480.

<sup>209</sup> Ibid 1425; *The New Zealand Journal*, London, 20 June 1840, at 143.

<sup>210</sup> James Busby to Alexander Busby, 9 April & 24 May 1839, AML MS 46, Box 1, Folder 1 (holographs) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (pp 97 & 103 of the typescript).

the day that Hobson arrived in the Bay of Islands on HMS *Herald*.<sup>211</sup> By the time these last two purchases were made Busby knew (from a minute of the British Treasury published in newspapers in Sydney in late November and early December 1839<sup>212</sup>) that Hobson was “eventually” to be Lieutenant-Governor and therefore that New Zealand was to be constituted a British Colony. With this knowledge, he gave up his plans to go to London.<sup>213</sup>

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<sup>211</sup> See Stirling “Not With the Sword But With the Pen”, above n 85, 1586-1597 & 1605-1609. Henry Williams was critical of Busby's last-minute purchases. See Henry Williams to Alfred Brown, 31 January 1840, quoted in Parkinson “Brief of Evidence, Wai 1040”, above n 62, 32. Although Busby's land dealings are outside the scope of this thesis, it may be noted that three of the eight purchases made in the period 1838–40 entailed resettlement of part of the lands on the Maori vendors. Stirling “Not With the Sword But With the Pen”, above n 85, 1461-1466 (OLC 20), 1472-1475 (OLC 21), 1593-1597 (OLC 23 & 24). Stirling poses the question whether these re-giftings were an attempt by Busby to put “a humanitarian gloss on his speculation” since “his vast claims were unlikely to prove palatable to the Crown”. Ibid 1595-1596.

<sup>212</sup> See Chapter 11, text accompanying n 11.

<sup>213</sup> Busby to the Under-Secretary for the Colonies, 13 January 1840, CO 209/7, 273a-274a. Busby seems not to have suspected this before he became aware of the minute in January 1840. Indeed in August 1839 he discounted a suggestion that a Bishop was to be appointed for New Zealand on the basis that that “[i]f the Queen appoints a Consul only, what right has she to appoint a Bishop?” James Busby to Alexander Busby, 24 August 1839, AML MS 46, Box 1, Folder 1 (holograph) & Box 7, Volume 1 (typescript) and ATL qMS-0347 (typescript) (p 120 of the typescript). It is, however, unlikely that Busby knew anything about Hobson's dealings in Sydney with a deputation of New Zealand landholders (which are discussed in Chapter 11). He would not have known of Gipps's 14 January 1840 proclamations, which were not published until after the *Herald* left Sydney harbour.

## CHAPTER EIGHT

### NORMANBY'S INSTRUCTIONS TO HOBSON

The purposes for which Hobson was dispatched to treat with Maori were explained in the 14 August 1839 letter of instruction he received from the Secretary of State for the Colonies, the Marquess of Normanby. The Instructions are critical to an understanding of the Treaty entered into by Hobson. A view developed in this thesis is that the Treaty of Waitangi fulfils the terms of the Instructions. That is how the Treaty was regarded by the Colonial Office. And, as is explained in later chapters, Colonial Office policies in the early years of the colony remained essentially consistent with Normanby's Instructions, providing further substantiation for the view that Hobson carried them out as intended.

There is no reason not to take the Instructions at their word since they encapsulated Colonial Office thinking as it had evolved by August 1839, as Chapter 9 seeks to demonstrate. The Instructions were the culmination of an intense political debate during the preceding two years about whether Britain should intervene in New Zealand and, if so, in what manner. Protagonists in the debate included the New Zealand Association (later consecutively the New Zealand Land Company and the New Zealand Company), which was promoting organised settlement, and the missionary societies with missions in New Zealand, whose opposition to settlement drew support from the 1837 report of the House of Commons Select Committee on Aborigines. The attitudes of the Colonial Office developed in response to changing information, and shifted in response to political pressures. Some principles remained, however, remarkably constant throughout the period and may be thought to represent fixed positions. This is the subject of Chapter 9. Although the twists and turns of political debate and decision-making have been described by Peter Adams in a work of meticulous scholarship,<sup>1</sup> the questions posed in this thesis

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<sup>1</sup> Peter Adams *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland University Press, Auckland, 1977) chs 3-5. See also Donald Loveridge “‘The Knot of a Thousand Difficulties’: Britain and New Zealand, 1769–1840” (Brief of Evidence for the

require a different focus on the materials and ultimately reassessment of some of his conclusions about Colonial Office purpose.

First, however, it is convenient in this chapter to describe the terms and drafting of the Instructions and supplementary instructions, written in response to Hobson's request for some clarification, so that the context provided in Chapter 9 has focus.

Normanby's Instructions to Hobson were drafted in the Colonial Office by James Stephen on 9 July 1839. They were amended on 10 July by the Parliamentary Under-Secretary, Henry Labouchere. Normanby himself approved them on 11 July.<sup>2</sup> The Instructions were not formally issued to Hobson until 14 August, but a copy was provided to him on about 11 July.<sup>3</sup> On 1 August, Hobson wrote to Labouchere to seek clarification and elaboration of certain parts of his Instructions.<sup>4</sup> Instead of revising the Instructions to answer Hobson's questions, the Colonial Office issued them as Normanby had approved them on 11 July and responded to Hobson's queries by separate letter dated 15 August.<sup>5</sup>

### **The Instructions issued to Hobson on 14 August 1839**

Normanby's Instructions informed Hobson about the objects of his "mission" and recorded the British Government's motives for entering into it. The "principal

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Crown Law Office, Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 17 December 2009, A18) Parts IV-V; and Patricia Burns *Fatal Success: A History of the New Zealand Company* (Heinemann Reed, Auckland, 1989) chs 5-13.

<sup>2</sup> Stephen's draft, with Labouchere's and Normanby's revisions, is at CO 209/4, 251a-282b. The 14 August 1839 Instructions as issued to Hobson are in type at GBPP 1840 [238] XXXIII.587 at 37-42.

<sup>3</sup> See the crossed-out references to Instructions dated "the 11th Ult[im]o" (that is, 11 July 1839) in Normanby to Hobson, 15 August 1839, CO 209/4, 157a-163b at 157a and in Hobson to Labouchere, [1] August 1839, CO 209/4, 151a-156b at 151a. The date was struck-out for printing in the Parliamentary Papers (to avoid the potential confusion of two different dates for the Instructions).

<sup>4</sup> Hobson to Labouchere, [1] August 1839, CO 209/4, 151a-156b and in type at GBPP 1840 [238] XXXIII.587 at 42-44. Hobson's letter is dated simply "August 1839". However, it is date-stamped as received in the Colonial Office on 3 August (CO 209/4, 151a); and Hobson would later give 1 August as the date of the letter (Hobson to Gipps, 24 December 1839, ANZ ACHK 16591, G36/1, 1-7 at 4).

<sup>5</sup> Normanby to Hobson, 15 August 1839, CO 209/4, 157a-163b (draft prepared by Stephen on 8 August and approved by Normanby on the 11th); reproduced in GBPP 1840 [238] XXXIII.587 at 44-45.

object” of Hobson’s mission was to establish “a settled form of civil government” over British subjects already living in New Zealand and those in the process of immigrating there.<sup>6</sup> To this end, Hobson was authorised “to treat with the Aborigines of New Zealand for the recognition of Her Majesty’s sovereign authority over the whole or any parts of those islands which they may be willing to place under Her Majesty’s dominion”.<sup>7</sup>

Normanby explained that the Government had come to its decision to intervene in New Zealand with “extreme reluctance”, in reversal of the preference it had earlier held. It had been of the view, consistent with the advice of the Aborigines Committee, that, notwithstanding that there was probably “no part of the earth in which colonization could be effected with a greater or surer prospect of national advantage”, the acquisition of New Zealand

would be a most inadequate compensation for the injury which must be inflicted on this kingdom itself, by embarking in a measure essentially unjust, and but too certainly fraught with calamity to a numerous and inoffensive people, whose title to the soil and to the sovereignty of New Zealand is indisputable, and has been solemnly recognized by the British Government.<sup>8</sup>

The Government was said to retain these opinions with “unimpaired force”, notwithstanding that “circumstances entirely beyond our control have at length compelled us to alter our course”.<sup>9</sup> Those circumstances were that information had been received that at the beginning of 1838 there were at least 2,000 British subjects living in New Zealand, amongst whom

were many persons of bad or doubtful character—convicts who had fled from our penal settlements, or seamen who had deserted their ships; and that these people, unrestrained by any law, and amenable to no tribunals, were alternatively the authors and the victims of every species of crime and outrage.

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<sup>6</sup> Normanby to Hobson, 14 August 1839, GBPP 1840 [238] XXXIII.587 at 37.

<sup>7</sup> Ibid 38.

<sup>8</sup> Ibid 37.

<sup>9</sup> Ibid.

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In addition to these settlers, “many persons in this kingdom have formed themselves into a society, having for its object the acquisition of land, and the removal of emigrants to those islands”. Indeed it appeared that “extensive cessions of land have been obtained from the natives, and that several hundred persons have recently sailed from this country to occupy and cultivate those lands”. The “spirit of adventure having thus been effectually roused”, it was not to be doubted “that an extensive settlement of British subjects will be rapidly established in New Zealand”.<sup>10</sup>

The existing character of British settlement in New Zealand and its expansion was a problem necessitating the “interposition of the Government” because,

unless protected and restrained by necessary laws and institutions, they will repeat, unchecked, in that quarter of the globe, the same process of war and spoliation, under which uncivilized tribes have almost invariably disappeared as often as they have been brought into the immediate vicinity of emigrants from the nations of Christendom.<sup>11</sup>

Accordingly, Hobson was advised that:<sup>12</sup>

To mitigate and, if possible, to avert these disasters, and to rescue the emigrants themselves from the evils of a lawless state of society, it has been resolved to adopt the most effective measures for establishing amongst them a settled form of civil government.

The “principal object” of his mission was “to accomplish this design”.

With this background explained, the Instructions turned to the means by which Hobson was to acquire the sovereignty of New Zealand for the British Crown and the relations he was to establish between the Crown and Maori chiefs. The Instructions expressed both the British Government's “binding” recognition of

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

“New Zealand as a sovereign and independent state” and the limits of this recognition:<sup>13</sup>

I have already stated<sup>14</sup> that we acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown.

The acceptance of Maori sovereignty meant that the British Crown disclaimed “every pretension to seize on the islands of New Zealand, or to govern them as a part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages, shall be first obtained”.<sup>15</sup>

In explaining the fractured and uncoordinated nature of Maori sovereignty (“petty tribes ... incompetent to act ... in concert”), Normanby's object may not have been to undercut earlier British recognition of Maori sovereignty, but rather to advance a further justification for intervention based on lack of Maori capacity to control irregular British settlement. This is perhaps suggested by the way in which the Instructions next explained the advantage that would accrue to Maori from cession of their sovereign rights:<sup>16</sup>

Believing, however, that their own welfare would, under the circumstances I have mentioned, be best promoted by the surrender to Her Majesty of a right now so precarious, and little more than nominal, and persuaded that the benefits of British protection, and of laws administered by British judges, would far more than compensate for the sacrifice by the natives, of a national independence, which they are no longer able to maintain, Her Majesty's Government have resolved to authorize you to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands which they may be willing to place under Her Majesty's dominion.

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<sup>13</sup> Ibid 37-38.

<sup>14</sup> See text accompanying n 8 above.

<sup>15</sup> Normanby to Hobson, 14 August 1839, GBPP 1840 [238] XXXIII.587 at 38.

<sup>16</sup> Ibid.

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Normanby instructed Hobson how he was to explain to Maori the need for a treaty ceding their sovereignty. He acknowledged that Maori were likely to view British motives with suspicion. They would probably “regard with distrust a proposal which may carry on the face of it the appearance of humiliation on their side, and of a formidable encroachment on ours”. The difficulties that Maori would have understanding “the technical terms in which that proposal must be conveyed” and its “exact meaning” and “probable results” could very well “enhance their aversion to [the] arrangement”. Hobson was to overcome these obstacles “gradually ... by the exercise, on your part, of mildness, justice, and perfect sincerity in your intercourse with them”. Hobson was told that he had been selected “for the discharge of this duty ... by a firm reliance on your uprightness and plain dealing”. He was therefore to

frankly and unreservedly explain to the natives, or to their chiefs, the reasons which should urge them to acquiesce in the proposals you will make to them. Especially you will point out to them the dangers to which they may be exposed by the residence among them of settlers amenable to no laws or tribunals of their own; and the impossibility of Her Majesty's extending to them any effectual protection unless the Queen be acknowledged as the sovereign of their country, or at least those districts within, or adjacent to which, Her Majesty's subjects may acquire lands or habitations.<sup>17</sup>

Hobson was authorised to “propitiate their consent by presents or other pecuniary arrangements” should that prove necessary (with the Instructions providing that he could “advance at once” presents “to a certain extent, in meeting such demands” but that “beyond those limits you will reserve and refer them for the decision of Her Majesty's Government”). Hobson was further instructed that, in overcoming the reluctance he might encounter from Maori to entering into a treaty ceding their sovereignty, he was likely to “find powerful auxiliaries amongst the missionaries, who have won and deserved their confidence, and amongst the older British residents who have studied their character, and acquired their language”.<sup>18</sup>

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

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In addition to the cession of sovereignty, there was another term for which Hobson was to negotiate:<sup>19</sup>

It is further necessary that the chiefs should be induced, if possible, to contract with you, as representing Her Majesty, that henceforward no lands shall be ceded, either gratuitously or otherwise, except to the Crown of Great Britain.

The Instructions entered into a long discussion of land-related issues, as they affected not only Maori, but also present and future settlers and the interests of the colonial administration to be established in New Zealand.<sup>20</sup>

The reason why it was necessary for the chiefs to contract that they would not alienate land except to the Crown was explained (at least in this section of the Instructions) as essential to the future prosperity of the British colony in New Zealand:<sup>21</sup>

Contemplating the future growth and extension of a British colony in New Zealand, it is an object of the first importance that the alienation of the unsettled lands within its limits should be conducted, from its commencement, upon that system of sale of which experience has proved the wisdom, and the disregard of which has been so fatal to the prosperity of other British settlements. With a view to those interests, it is obviously the same thing whether large tracts of land be acquired by the mere gift of the Government, or by purchases effected on nominal considerations from the Aborigines. On either supposition, the land revenue must be wasted; the introduction of emigrants delayed or prevented, and the country parcelled out amongst large landholders, whose possessions must long remain unprofitable, or rather a pernicious waste. Indeed, in the comparison of the two methods of acquiring land gratuitously, that of grants from the Crown, mischievous as it is, would be the less inconvenient, as such grants must be made with at least some kind of system, with some degree of responsibility, subject to some conditions and recorded for general information. But in the case of purchases from the natives, even these securities against abuse must be omitted; and none could be substituted for them.

Accordingly, in addition to the term to be negotiated for in the treaty, Hobson was on his arrival in New Zealand to

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid 38-39.

<sup>21</sup> Ibid 38.

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announce, by a proclamation addressed to all the Queen's subjects in New Zealand, that Her Majesty will not acknowledge as valid any title to land which either has been, or shall hereafter be acquired, in that country which is not either derived from, or confirmed by, a grant to be made in Her Majesty's name, and on her behalf. You will, however, at the same time, take care to dispel any apprehensions which may be created in the minds of the settlers that it is intended to dispossess the owners of any property which has been acquired on equitable conditions, and which is not upon a scale which must be prejudicial to the latent interests of the community.<sup>22</sup>

The Instructions explained that the "embarrassments" occasioned by "extensive" British<sup>23</sup> acquisitions of land (those "already obtained" and the "great addition" that would probably be made before Hobson's arrival in New Zealand) would have to be met in two ways. As was to be explained in a later part of the Instructions, the Governor and Legislative Council of New South Wales were to have the power of legislation for any British colony established in New Zealand. It was "from that relation" that Normanby proposed to "derive the resource necessary for encountering the difficulty ... mentioned":<sup>24</sup>

The Governor of that colony will, with the advice of the Legislative Council, be instructed<sup>25</sup> to appoint a Legislative Commission to investigate and ascertain what are the lands in New Zealand held by British subjects under grants from the natives, how far such grants were lawfully acquired, and ought to be respected, and what may have been the price or other valuable considerations given for them. The Commissioners will make their report to the Governor, and it will then be decided by him how far the claimants, or any of them, may be entitled to confirmatory grants from the Crown, and on what conditions such confirmations ought to be made.

The Governor and Council were also to consider a second law immediately to subject "to a small annual tax all uncleared lands within the British settlements in New Zealand". It was envisaged that

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<sup>22</sup> Ibid 38-39.

<sup>23</sup> The fact that British subjects were not the only Europeans to claim land in New Zealand was not acknowledged in the Instructions. Nor did the Instructions consider issues around the extension of British sovereignty over non-British nationals.

<sup>24</sup> Normanby to Hobson, 14 August 1839, GBPP 1840 [238] XXXIII.587 at 39.

<sup>25</sup> In fact, Normanby's Instructions to Hobson doubled as instructions to Governor Gipps. See Chapter 9, text accompanying ns 513-514.

## Chapter Eight: Normanby's Instructions to Hobson

[t]he forfeiture of all lands, in respect of which the tax shall remain for a certain period in arrear, would probably, before long, restore to the demesne of the Crown so much of the waste land as may be held, unprofitably to themselves and to the public, by the actual claimants.

By these two methods (Commissioners investigating land claims and a tax on uncleared lands) it was envisaged that “the dangers of the acquisition of large tracts of country by mere land-jobbers” would be “obviated”.<sup>26</sup>

Having thus dealt with the problems of past and future European land purchasing and their threats to the interests of the Crown and the prosperity of the future colony, the Instructions returned to the subject of Crown-Maori dealings over land. Hobson was instructed that:<sup>27</sup>

[I]t will be your duty to obtain, by fair and equal contracts with the natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers resorting to New Zealand.

“All such contracts” were to be entered into by Hobson himself, “through the intervention” of a Protector “expressly appointed to watch over” Maori interests. It was envisaged that land would be purchased from Maori for “comparatively small sum[s] of money” relative to the price at which it would be re-sold by the Government to settlers. No unfairness was seen in this:<sup>28</sup>

To the natives or their chiefs much of the land of the country is of no actual use, and, in their hands, it possesses scarcely any exchangeable value. Much of it must long remain useless, even in the hands of the British Government also, but its value in exchange will be first created, and then progressively increased, by the introduction of capital and of settlers from this country. In the benefits of that increase the natives themselves will gradually participate.

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<sup>26</sup> Normanby to Hobson, 14 August 1839, GBPP 1840 [238] XXXIII.587 at 39.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

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The Government's profit on land sales would fund future acquisitions.<sup>29</sup> As in New South Wales,<sup>30</sup> Hobson's Government was to keep separate accounts of the land revenue derived from the purchase and re-sale of "waste lands":

[S]ubject to the necessary deductions for the expense of surveys and management, and for the improvement, by roads and otherwise, of the unsold territory; and, subject to any deductions which may be required to meet the indispensable exigencies of the local government, the surplus of this revenue will be applicable, as in New South Wales, to the charge of removing emigrants from this kingdom to the new colony.<sup>31</sup>

In addition to ensuring that the contracts he entered into with Maori for the sale of lands were "fair and equal" and overseen by the Protector, the Instructions emphasised that Hobson was to negotiate for land "on the same principles of sincerity, justice, and good faith, as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands." But "this [was not] all".<sup>32</sup>

[T]hey must not be permitted to enter into any contracts in which they might be ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence. The acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves. To secure the observance of this,—will be one of the first duties of their official protector.

The Instructions discussed those "other duties owing to the aborigines of New Zealand, which may be all comprised in the comprehensive expression of promoting their civilization,—understanding by that term whatever relates to the religious, intellectual, and social advancement of mankind".<sup>33</sup>

For their religious instruction, liberal provision has already been made by the zeal of the missionaries, and of the missionary societies in this kingdom; and it will be at once the

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<sup>29</sup> Ibid.

<sup>30</sup> See *ibid* 41.

<sup>31</sup> Import duties on tobacco, wines, and sugar were identified as another source of government revenue. *Ibid*.

<sup>32</sup> *Ibid* 39.

<sup>33</sup> *Ibid* 39-40.

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most important, and the most grateful of your duties to this ignorant race of men, to afford the utmost encouragement, protection, and support, to their Christian teachers. I acknowledge, also, the obligation of rendering the missions such pecuniary aid, as the local Government may be able to afford, and as their increased labours may reasonably entitle them to expect. The establishment of schools for the education of the aborigines in the elements of literature, will be another object of your solicitude; and until they can be brought within the pale of civilized life, and trained to the adoption of its habits, they must be carefully defended in the observance of their own customs, so far as these are compatible with the universal maxims of humanity and morals.

There was, however, one exception to the defence of Maori in their customs:<sup>34</sup>

But the savage practices of human sacrifice, and of cannibalism,<sup>35</sup> must be promptly and decisively interdicted. Such atrocities, under whatever plea of religion they may take place, are not to be tolerated within any part of the dominions of the British Crown.

The final sections of Normanby's Instructions to Hobson dealt with the "manner [in which] provision is to be made for carrying these instructions into effect, and for the establishment and exercise of your authority over Her Majesty's subjects who may settle in New Zealand, or who are already resident there". In this, explanation was given as to how and why the Government had come to its decision "to place whatever territories may be acquired in sovereignty by the Queen in New Zealand, in relation to a dependency of the Government of New South Wales".<sup>36</sup> Although open to objection, this course was in Normanby's view the most practical on offer. He "trust[ed]" that the time might not be too distant "when it may be proper to establish in New Zealand itself a local legislative authority".<sup>37</sup> As to

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<sup>34</sup> Ibid 40.

<sup>35</sup> The additional words in Stephen's draft "and every other such hateful usage (if any other really exists among them)" were omitted here, possibly even by Stephen himself. See Normanby to Hobson, draft of 9–11 July 1839, CO 209/4, 251a-282b at 270b.

<sup>36</sup> The "impracticability" of other proposed schemes, and the "extreme difficulty" of creating institutions to promote law and order "without some more effective control than could be found amongst the settlers themselves in the infancy of their settlement", were referred to. Normanby to Hobson, 14 August 1839, GBPP 1840 [238] XXXIII.587 at 40.

<sup>37</sup> Ibid. Until a local legislature was constituted, the Governor and Council of New South Wales would enact all the laws required for the government of New Zealand, taking notice of any recommendations Hobson might make. Ibid 41.

representative government, however, the Instructions appeared to offer less immediate hope.<sup>38</sup>

It is impossible to confide to an indiscriminate body of persons, who have voluntarily settled themselves in the immediate vicinity of the numerous population of New Zealand, those large and irresponsible powers which belong to the representative system of Colonial Government. Nor is that system adapted to a colony struggling with the first difficulties of their new situation. Whatever may be the ultimate form of government to which the British settlers in New Zealand are to be subject, it is essential to their welfare, not less than to that of the aborigines, that they should at first be placed under a rule, which is at once effective, and to a considerable degree external.

By his Instructions, Hobson received his Commission as Lieutenant-Governor “of that part of the New South Wales colony which has thus been extended over the New Zealand islands”.<sup>39</sup> Normanby explained that he did not “for the present” propose to appoint any subordinate officers, being “unwilling to advance at first beyond the strict limits of the necessity which alone induces the Ministers of the Crown to interfere at all on this subject”. Hobson was to consult with Gipps as to temporary or “provisional” appointments “dependent on the future pleasure of the Crown”. It was anticipated that the officers he and Gipps would find “indispensible” to appoint were a judge,<sup>40</sup> a prosecutor, a Protector of Aborigines, a colonial secretary, a treasurer, a surveyor-general of lands, and a superintendent of police.<sup>41</sup>

In concluding his Instructions to Hobson, Normanby wrote that he had attempted to touch upon all important topics, but that “[m]any questions have been unavoidably passed over in silence, and others have been averted to in a brief and cursory manner” because it was his “conviction” that in any such undertaking as

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<sup>38</sup> Ibid 40.

<sup>39</sup> For Hobson's Commission, see Chapter 9 n 509 and accompanying text.

<sup>40</sup> The judge would require not only a New South Wales law to “create and define his functions” but also a law of the Imperial Parliament to enable the Governor and Legislative Council of New South Wales to establish a judicial system in New Zealand separate from the existing Supreme Court of New South Wales. It was said that the Act “now pending in Parliament for the revival, with amendments, of the New South Wales Act” would achieve this. Normanby to Hobson, 14 August 1839, GBPP 1840 [238] XXXIII.587 at 41.

<sup>41</sup> Ibid.

Hobson's "much must be left to your own discretion, and many questions must occur which no foresight could anticipate or properly resolve before-hand".<sup>42</sup> He left for consultation between Hobson and Gipps, "many subjects on which I feel my own incompetency at this distance from the scene of action to form an opinion".<sup>43</sup>

### **The changes made by Labouchere and Normanby to Stephen's draft**

Labouchere made only three changes of any consequence to Stephen's draft.<sup>44</sup> One was to omit a paragraph in which Stephen would have authorised Hobson to take advantage of any opinion among Maori that they had already ceded the sovereignty of land purchased by British subjects, while at the same time assuring Maori that they would not lose their proprietary rights to territory they now ceded in sovereignty. In Stephen's draft, this paragraph, which immediately followed that dealing with how Hobson was to explain the need for the treaty to Maori (and that, if necessary, Maori consent could be propitiated by presents) read:<sup>45</sup>

I am induced to believe that the New Zealanders neither understand, nor are able to appreciate, the distinction, so familiar to ourselves, between the rights of Sovereignty, and those of property, but that regarding them as identical, they suppose that the Lands they have already ceded have passed from their own Dominion and that a general acknowledgement of the Sovereignty of the Queen would involve a Cession of the Lands which they still retain. Such apprehension would facilitate your task in one direction and impede it in another. The reorganization of British Sovereignty over Districts owned by British Subjects would be promptly made and the same recognition would be as resolutely refused in regard to other Districts. Should this prove to be the fact, you will of course exert all your power to explain to the Chiefs and to convince them that the security of their proprietary rights will not be impaired but greatly strengthened by the abdication of their Sovereign authority. But you will avail yourself of the opinion,

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<sup>42</sup> Hobson was, however, provided with a copy of *Rules and Regulations For the Information and Guidance of the Principal Officers and Others in His Majesty's Colonial Service* (W Clowes & Sons, London, 1837).

<sup>43</sup> Normanby to Hobson, 14 August 1839, GBPP 1840 [238] XXXIII.587 at 42.

<sup>44</sup> Normanby to Hobson, draft of 9–11 July 1839, CO 209/4, 251a-282b. In addition to the changes discussed here, see the minor amendments at *ibid* 259a-b, 272b & 282b.

<sup>45</sup> *Ibid* 260b-262a.

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(supposing it really prevalent) in order to abridge the difficulty of establishing a British sovereignty coextensive with the British Possessions in the Island. It is in this question a point of primary and essential importance to fix distinctly the principle, that all Lands possessed by the Queen's Subjects in New Zealand are within HM's Dominion.

A second change made by Labouchere was to that part of Stephen's draft where he had discussed the alternative options to annexing the territories acquired in sovereignty in New Zealand to New South Wales. Stephen had written that there was "no other practical course which would not be opposed by difficulties still more considerable". Labouchere added to this the qualification that this was the situation "for the present" and the encouragement that "although I trust that the time is not distant when it may be proper to establish in New Zealand itself a local legislative authority".<sup>46</sup>

The third change was an alteration of very few words but possibly, and perhaps quite unintentionally, of great significance. It concerned the requirement (to be announced by Hobson by proclamation on his arrival in New Zealand) for a Crown grant to land in order for any British title to land to be "acknowledged as valid" by the Queen, and the measures to be taken by the Governor and Council of New South Wales to address the "embarrassments" caused by land purchases already made.

Stephen's draft, following on from the instruction to Hobson to negotiate with the chiefs for an agreement that "henceforward no lands shall be ceded ... except to the Crown of Great Britain" (and explanation of the British motive for wanting this concession), had read before Labouchere's changes:<sup>47</sup>

You will, therefore, immediately on your arrival, announce, by a proclamation addressed to the Queen's subjects in New Zealand, that Her Majesty will not acknowledge as valid any title to Land in that Country which is not derived from, or confirmed by, a grant to be made in Her Majesty's name, and on her behalf.

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<sup>46</sup> Ibid 273a-b.

<sup>47</sup> Ibid 264a-b.

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Extensive acquisitions of such Lands have however been already made, and it is probable that, before your arrival, a great addition will have been made to them. The embarrassments occasioned by such claims will demand your earliest and most careful attention.

It had then explained the two methods by which the Governor and Council were to deal with land claims: by establishing a Commission to investigate whether land had been “lawfully” and fairly acquired and to recommend to the Governor whether, and to what extent, they should receive a “confirmatory grant”; and by putting a tax on uncleared lands.<sup>48</sup>

Labouchere altered the first two above-quoted paragraphs of this section of the draft Instructions as follows (with his insertions underlined and his deletions of words from Stephen's draft shown struck-through):<sup>49</sup>

You will, therefore, immediately on your arrival, announce, by a proclamation addressed to the Queen's subjects in New Zealand, that Her Majesty will not acknowledge as valid any title to Land which either has been, or shall hereafter be acquired, in that Country which is not derived from, or confirmed by, a grant to be made in Her Majesty's name, and on her behalf. You will, however, at the same time, take care to dispel any apprehensions which may be created in the minds of the settlers that it is intended to dispossess the owners of any property which has been acquired on equitable conditions, and which is not upon a scale which must be prejudicial to the latent interests of the community.

Extensive acquisitions of such Lands have ~~however~~ undoubtedly been already ~~made~~ obtained, and it is probable that, before your arrival, a great addition will have been made to them. The embarrassments occasioned by such claims will demand your earliest and most careful attention.

Labouchere left unaltered the paragraphs relating to the land claims Commission to be established and the uncleared land tax to be imposed.<sup>50</sup>

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<sup>48</sup> Ibid 265a-266a; and see text accompanying ns 23-26 above.

<sup>49</sup> Ibid 264a-b.

<sup>50</sup> Ibid 265a-266a.

What was the effect of these changes? Whether Labouchere intended by his alternations to make a change of substance in the Instructions or, rather, was merely attempting to give them greater clarity, is considered below. It is sufficient to note here that Labouchere's changes may have introduced ambiguity, not present in Stephen's draft, as to the nature of Maori property. It is argued in a later chapter that it allowed Gipps after the Treaty had been signed to adopt measures touching upon Maori rights of property in land which were not consistent with the Instructions or the Treaty.

Stephen's draft seems largely to have separated the treatment of land purchases before and after the acquisition of sovereignty. In Stephen's draft future land purchases by individual British subjects were to be prevented in two ways: by securing Maori agreement that they would only sell their lands to the Crown, and by warning British subjects by proclamation that the only titles the Government would recognise were ones "derived from, or confirmed by" a Crown grant. Stephen's draft seems to have regarded past land purchases as a problem in a different category, to be tackled by different means: by investigation of titles by a Commission and a tax on uncleared lands.

Labouchere's changes, in both quoted paragraphs, destroyed the sense of separate approaches to separate problems. The proclamation was now to announce that past and future purchases alike would only be valid if derived from or confirmed by a Crown grant. It was also—"however"—to assure land purchasers that they would not be dispossessed if they could be shown to have purchased land equitably and "not upon a scale which must be prejudicial to the latent interests of the community". It may not have been Labouchere's meaning, and it may not have been the most natural reading of the Instructions as amended by him and approved by Normanby, but one reading was that the only good or legal title a British subject could have to land in New Zealand (presently and in the future) was a Crown-backed title; but ("however") that as a matter of grace the Government was willing to give a Crown grant to British subjects whose purchasers were fair, not excessive, and according to Maori custom. For the reader of this part of the

Instructions who might interpret it as asserting the legal invalidity of existing purchases under English law, such legal invalidity could arise in one or both of two ways: because settlers in New Zealand pre-acquisition of British sovereignty were somehow incapable of acquiring property in land, or because Maori were somehow incapable of giving good title to land (for instance, because they did not have any property in land to give). As we shall see, both were positions advanced by Gipps in 1840, after the signing of the Treaty, in defending his legislation to establish, in pursuance of Normanby's Instructions, a Land Claims Commission to investigate European claims to titles to land in New Zealand.

Stephen's draft would arguably not have supported at least the interpretation that Maori could not give good title to land. And arguably it was not what Labouchere had intended by his changes or even how the altered Instructions were to be interpreted. The Instructions still spoke of the Commission's task as being "to investigate and ascertain what are the lands in New Zealand *held* by British subjects *under grants* from the natives, how far such grants were *lawfully* acquired, and ought to be *respected*" and to make recommendations about whether claimants should receive "*confirmatory* grants". And they had described Maori as having an "indisputable" "title to the soil" of New Zealand.

Normanby approved the draft and Labouchere's amendments with only a few minor changes of his own. The only one of note is that he altered the very end of Stephen's passage about the need for "savages practices" to be "promptly and decisively interdicted" by removing the further words that "there is no real cause to believe that even the forcable [sic] prevention of them would wound any feelings which it is fitting or necessary to respect."<sup>51</sup>

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<sup>51</sup> Ibid 271a. For other possible changes by Normanby see ibid 270b & 282b.

### Supplementary Instructions of 15 August 1839

Hobson would later write that his Instructions were “generally ... comprehensive and clear”<sup>52</sup> and his 1 August 1839 letter to the Colonial Office suggests he thought so at the time too, as his queries related more to points passed over in the Instructions than to any ambiguity for him in what had been written. Hobson made no comment at all about what he called the “preamble” to the Instructions in which the purpose of his mission was explained.<sup>53</sup> The instructions as to securing Maori agreement to sell lands only to the Crown and the land titles proclamation were “quite explicit”, although he asked for the proclamation to be drafted in London “in order to convey exactly the views of Government, and to guard against misconception”.<sup>54</sup> Similarly, the instructions about the accounts to be kept of land revenues and the uses such revenues could be applied to (or what Hobson referred to in shorthand as the paragraph “regarding waste lands”) were “very clear and satisfactory”.<sup>55</sup>

Few of Hobson's queries potentially bear upon the meaning of the Treaty. Only those that may do are considered here. Hobson asked for the duties of the Protector of Aborigines to be better defined so as to protect the Government against the “captious opposition” of that officer. Such opposition could arise because, while “there could not be two opinions” on the subject of “the protection of the natives from physical injury or injustice”, “in matters which relate to their general welfare, he and I, with equal zeal in their cause, may entertain very different ideas”.<sup>56</sup> Hobson also queried the instruction to prohibit “savage practices” (which he may not have done if Normanby had let the reference in Stephen's draft to “forcable [sic] prevention” stand).<sup>57</sup>

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<sup>52</sup> Hobson to Gipps, 24 December 1839, ANZ ACHK 16591, G36/1, 1-7 at 5.

<sup>53</sup> Hobson to Labouchere, [1] August 1839, GBPP 1840 [238] XXXIII.587, 42-44 at 42.

<sup>54</sup> Ibid 43.

<sup>55</sup> Ibid 44.

<sup>56</sup> Ibid 43. Hobson later explained to Gipps that he had asked this question in the belief that “a Gentleman rather remarkable for his love of litigation was applying to the Secretary of State for the Situation [as Protector]”. Hobson to Gipps, 24 December 1839, ANZ ACHK 16591, G36/1, 1-7 at 5.

<sup>57</sup> Hobson to Labouchere, [1] August 1839, GBPP 1840 [238] XXXIII.587, 42-44 at 43.

## Chapter Eight: Normanby's Instructions to Hobson

May I request more explicit instructions on this important subject? Shall I be authorized, after the failure of every other means, to repress these diabolical acts by force? And what course am I to adopt to restrain the no less savage native wars, or to protect tribes who are oppressed (probably for becoming Christians) by their more powerful neighbours[?]

He returned to this point at the end of his letter in discussing the absence of provision for a "military force" to support him or instructions for the "arming and equipping of militia". He wrote that the "presence of a few soldiers would check any disposition to revolt, and would enable me to forbid in a firmer tone those inhuman practices I have been ordered to restrain".<sup>58</sup>

Hobson's most significant question concerned the method of obtaining sovereignty over the South Island. It may have had other ideas bound up in it, as further discussed in Chapter 10.<sup>59</sup> Hobson wrote that in respect "of the acquisition of the sovereign rights by the Queen over the Islands of New Zealand":<sup>60</sup>

Under this head I perceive that no distinction is made between the northern and southern islands of New Zealand, although their relations with this country, and their respective advancement towards civilization are essentially different.

The declaration of independence of New Zealand was signed by the united chiefs of the northern island only (in fact, only of the northern part of that island), and it was to them alone that His late Majesty's letter was addressed on the presentation of their flag; and neither of these instruments had any application whatsoever to the southern islands.<sup>61</sup> It may be of vast importance to keep this distinction in view. Not as regards the natives, towards whom the same measure of justice must be dispensed, however their allegiance may have been obtained: but as it may apply to British settlers, who claim a title to property in New Zealand, as in a free and independent state.

I need not exemplify here the uses that may hereafter be made of this difference in their condition; but it is obvious that the power of the Crown may be exercised with much greater freedom in a country over which it possesses all the rights that are usually assumed by first discoverers, than in an adjoining state, which has been recognized as

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<sup>58</sup> Ibid 44.

<sup>59</sup> See Chapter 10, text accompanying ns 98 & 156-160.

<sup>60</sup> Hobson to Labouchere, [1] August 1839, GBPP 1840 [238] XXXIII.587, 42-44 at 42-43.

<sup>61</sup> The reference to the "southern islands" is to the South Island (then sometimes referred to as the Middle Island) and Stewart Island.

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free and independent. In the course of my negotiations, too, my proceedings may be greatly facilitated by availing myself of this disparity. For, with the wild savages in the southern islands, it appears scarcely possible to observe even the form of a treaty, and there I might be permitted to plant the British flag in virtue of those rights of the Crown to which I have alluded.

In his 15 August reply, Normanby wrote that there could be no clash of authority between Hobson and the Protector because the Protector was “in the fullest sense of the term, your subordinate officer, yielding implicit obedience to all your lawful instructions”.<sup>62</sup> (In this way, Normanby avoided having to define the Protector's duties.) As to Hobson's query about suppressing savage practices, perhaps also including tribal wars, by force, Normanby replied:<sup>63</sup>

It is impossible for me to prescribe the course to be pursued for the prevention of cannibalism, human sacrifices, and warfare among the native Tribes. But I have no difficulty in stating that, if all the arts of persuasion and kindness should prove unavailing, practices so abhorrent from the first principles of morality, and so calamitous to those by whom they are pursued, should be repressed by authority, and, if necessary, by actual force, within any part of the Queen's dominions. I am, however, convinced that habits so repulsive to our common nature as cannibalism and human sacrifice, may be checked with little difficulty; because the opposition to them will be seconded by feelings which are too deeply rooted in the minds of all men, the most ignorant and barbarous not excepted, to be eradicated by any customs however inveterate, or by any errors of opinion however widely diffused. The New Zealanders will probably yield a willing assent to your admonitions, when taught to perceive with what abhorrence such usages are regarded by civilized men.

As to providing Hobson with a military force, Normanby acknowledged that this would be a “great advantage” to Hobson, and that its absence would “expose” him to “inconvenience”. But that was “a difficulty that must be encountered”. There was no present prospect of a detachment of troops being sent to New Zealand. It

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<sup>62</sup> Normanby to Hobson, 15 August 1839, GBPP 1840 [238] XXXIII.587, 44-45 at 45.

<sup>63</sup> Ibid.

would probably therefore be “necessary to raise a militia, or to embody an armed force”, but that was a matter for Hobson and Gipps to determine.<sup>64</sup>

In respect of the establishment of the Queen's sovereignty in the South Island of New Zealand, Normanby wrote:<sup>65</sup>

The remarks which I have made respecting the independence of the people of New Zealand, relate, as you correctly suppose, to the tribes inhabiting the northern island only. Our information respecting the southern island is too imperfect to allow me to address to you any definite instructions as to the course to be pursued there. If the country is really, as you suppose, uninhabited, except but by a very small number of persons in a savage state, incapable from their ignorance of entering intelligently into any treaties with the Crown, I agree with you that the ceremonial of making such engagements with them would be a mere illusion and pretence which ought to be avoided. The circumstances noticed in my instructions, may perhaps render the occupation of the southern island a matter of necessity, or of duty to the natives. The only chance of an effective protection will probably be found in the establishment by treaty, if that be possible, or if not, then in the assertion, on the ground of discovery, of Her Majesty's sovereign rights over the island. But in my inevitable ignorance of the real state of the case, I must refer the decision in the first instance to your own discretion, aided by the advice which you will receive from the Governor of New South Wales.

With this 15 August letter, Normanby purported to enclose the draft of the land titles proclamation to be issued by Hobson on his arrival in New Zealand, with whatever modifications Hobson and Gipps considered necessary.<sup>66</sup> However, as is further discussed in Chapter 11, not only did Hobson not receive such a proclamation with his Instructions but also there is no record on the Colonial Office files of one having been drafted.<sup>67</sup> Nor is there any evidence of a draft of a treaty having been prepared or of Hobson having been provided with any treaty precedent which he could adapt for New Zealand.

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<sup>64</sup> Ibid.

<sup>65</sup> Ibid 44.

<sup>66</sup> Ibid 44.

<sup>67</sup> See Chapter 11, text accompanying n 109.



## CHAPTER NINE

### THE FORMATION OF BRITISH POLICY

As discussed in Chapter 6, the behaviour of British subjects in New Zealand was a matter of long-standing concern to the British Government and to Australian Governors.<sup>1</sup> Within a few years of the appointment of the British Resident, the Colonial Office had come to accept that Busby, partly for reasons of personality and partly because of his lack of resources, was unable to exercise sufficient authority over British nationals to quell their lawlessness.<sup>2</sup> Busby's despatches accepted the weakness of his own position and canvassed options for the necessary authority to deal with the problem of lawlessness, including inter-tribal conflict. But Busby's reports did not of themselves constitute sufficient incentive to cause the Colonial Office to become more active in New Zealand affairs. A combination of lack of enthusiasm for imperial expansion, with its responsibilities and costs, and humanitarian scruples about colonisation where indigenous peoples were involved, contributed to a reluctance to become further involved. This attitude was increasingly challenged from May 1837 with the formation of the New Zealand Association.

#### **The New Zealand Association**

The New Zealand Association, in which a number of Members of Parliament were prominent but in which the controversial Edward Gibbon Wakefield was a driving force, was formed for the purpose of promoting systematic British settlement in New Zealand.<sup>3</sup> In *A Statement of the Objects of the New Zealand Association* published anonymously in May 1837, but written by Wakefield, the Association looked to Parliament to confer upon its officers the authority to form and regulate

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<sup>1</sup> See Chapter 6, text accompanying ns 50-57.

<sup>2</sup> See Chapter 6, text accompanying ns 308-309.

<sup>3</sup> For biographical information about the committee members of the New Zealand Association of 1837, see Peter Adams *Fatal Necessity: British Intervention in New Zealand 1830-1847* (Auckland University Press, Auckland, 1977) ["Adams *Fatal Necessity*"] 254-255. For Wakefield, see Chapter 3 n 120.

## Chapter Nine: The Formation of British Policy

settlements in New Zealand.<sup>4</sup> Such settlements would also require Maori consent: the pamphlet acknowledging that Britain had “no right to form settlements” except “by treaty with the native inhabitants” for the purchase of their “unoccupied and waste” lands.<sup>5</sup>

Supposing that, merely as against other nations, England obtained such a right by the acts of Captain Cook, the first European that visited the country, and who took possession of it in the name of his sovereign, still it will not be held in these times, that the British circumnavigator established any right for his country, as against the native inhabitants of New Zealand—an intelligent people, who have so far advanced beyond the savage state as to recognise property in land, and whose national independence has been virtually, not to say formally acknowledged by the British Government.<sup>6</sup>

The *Statement* claimed that it was “an end ... [of] the highest importance” that Maori benefit from the plan and that, “instead of being gradually exterminated by intercourse with civilized men, this people may be brought to adopt the language, usages, laws, religion, and social ties of a superior race”. Maori who resided within the British settlements would have “bestowed unconditionally” upon them “the rights and privileges of British subjects”.<sup>7</sup> A further benefit of the Association’s plan of organised settlement was that Englishmen would be under “the sanction and control of a proper authority”.<sup>8</sup>

The *Statement* claimed that a Bill had been prepared to authorise the Association’s scheme, which would be submitted to the Government and Parliament as soon as the Association was assured that the “indispensable funds” it required would be raised by advances from “a body of intending settlers”.<sup>9</sup> The Bill would declare as

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<sup>4</sup> [Edward Gibbon Wakefield] *A Statement of the Objects of the New Zealand Association, with some particulars concerning the position, extent, soil and climate, natural productions, and natives of New Zealand* (London, 1837) [“Wakefield A Statement”] 7-8. It may be that the second part of this pamphlet (“Some Particulars Concerning New Zealand”) was written by George Samuel Evans. See Wakefield to Evans, 11 May 1837, SLNSW C184, 12-14.

<sup>5</sup> Ibid 3-4.

<sup>6</sup> A note referred to British acknowledgment of Maori independence being “[b]y the appointment of a Resident at the Bay of Islands, and the recognition of a New Zealand flag”. Ibid.

<sup>7</sup> Ibid 4.

<sup>8</sup> Ibid 19 (under “Some Particulars Concerning New Zealand”).

<sup>9</sup> Ibid 8.

“fundamental law of the colony” that land was to be acquired from the Association only by “payment in ready money at the rate of not less than 12s per acre” and that the purchase-moneys were to be employed only to reimburse the Association for the costs of purchasing the land from Maori in the first place and as an emigration fund to bring out labourers to the settlements.<sup>10</sup> The *Statement* invited intending settlers to join the Association and made the case that “no part of the world present a more eligible field for exertion of British enterprise” by providing descriptions of New Zealand’s soil, climate, and natural productions (with particular attention to timber, flax, and fisheries).<sup>11</sup>

The *Statement* was issued when the Aborigines Committee of the House of Commons was still considering its Report of late June 1837. The Committee had heard evidence about conditions in New Zealand. It is likely that Wakefield and the Association realised that Parliamentary approval of their scheme would need to meet the humanitarian concerns being expressed to the Committee. In relation to New Zealand, the impression given to the Committee, mainly by missionary interests, was that Maori were progressing in “civilisation” under the influence of Christianity, a process that should not be interfered with. The corrupting influence of transient Europeans was a problem which should, however, be addressed by Britain. While Maori would resist direct interference with their own society, they were likely to support measures to make Busby more effective in dealing with European lawlessness. In particular, some witnesses suggested that Busby should be given the powers of a magistrate and sufficient force to maintain order against Europeans.<sup>12</sup>

It may be that the New Zealand Association’s *Statement* was drafted with a weather-eye on the pending Aborigines Committee Report and on humanitarian sympathies in Parliament and among key members of the Government and officials in the Colonial Office. Certainly, the Association made an early approach to the

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<sup>10</sup> Ibid 5-6.

<sup>11</sup> Ibid 8 & (under “Some Particulars Concerning New Zealand”) 6-12.

<sup>12</sup> Evidence of Rev William Yate (12 & 13 February 1836), Thomas Trapp (9 May 1836), and Dandeson Coates and Rev John Beecham (6, 8 & 11 June 1836), GBPP 1836 (538) VII.1 at 188-206, 459-461 & 481-543.

Church Missionary Society for support, which was rebuffed.<sup>13</sup> A resolution of the Church Missionary Society Committee gave three reasons for its opposition to the New Zealand Association scheme: New Zealand was a foreign country over which Britain had no claim to sovereignty; the scheme involved colonisation which had been shown by experience to lead to “the greatest wrongs and most severe injuries” to native populations; the plan would “interrupt if not defeat” the current favourable progress by missionaries for “religious improvement and civilization” of Maori.<sup>14</sup>

A result of the Association’s approach to the Church Missionary Society was that the Society tipped off Thomas Buxton, the chair of the Aborigines Committee, to the plans.<sup>15</sup> Whether or not that knowledge was influential, the Aborigines Report in late June 1837 took the approach that further interference with the internal affairs of New Zealand and other South Sea Islands should be limited to measures for the control of British subjects settling in or visiting them.<sup>16</sup> In probable reference to the New Zealand Association’s plan, the Report referred to “various schemes for colonizing New Zealand and other parts of Polynesia”, including “one such project ... at present understood to be on foot”. It recommended that the Government “not countenance, still less engage in any of them” until they had been considered by Parliament.<sup>17</sup> As described in Chapter 3, the Report took the view that British settlement could only be reconciled with the interests of aborigines on the basis of Christian instruction, “fair dealing”, and protection of aboriginal “civil rights”.<sup>18</sup>

In mid to late-June 1837, the Association made approaches to the Government by direct lobbying of the Prime Minister, Melbourne. Melbourne involved Howick, the Secretary of State for War, who was known to be attracted to Wakefield’s

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<sup>13</sup> See minutes of Church Missionary Society Committee, 6 June 1837, CMS G/C1 vol 16, 123-124.

<sup>14</sup> Ibid 124-125 (reproduced in GBPP 1837-38 (680) XXI.327 at 243).

<sup>15</sup> Ibid 124.

<sup>16</sup> *Report from the Select Committee on Aborigines (British Settlements)*, GBPP 1837 (425) VII.1 at 85-86.

<sup>17</sup> Ibid 86.

<sup>18</sup> Ibid 44-58. See Chapter 3, text accompanying ns 212-214.

theories. The direct approach to Melbourne may have been an attempt to bypass Glenelg and the Colonial Office, who may have been thought less well disposed given their evangelical and humanitarian sympathies.<sup>19</sup> Unknown to the Association, its draft Bill, and an earlier “heads” for a Bill, were in fact brought to the attention of the Colonial Office by Melbourne and Howick.<sup>20</sup> The Colonial Office reacted adversely to the Bill. Glenelg scrawled across it, as his only comment, “[t]his is a plan for colonising N Zealand”. Stephen wrote that it was a proposal to acquire sovereignty which would “infallibly issue in the conquest and extermination of the present inhabitants”. He was also critical of the lack of experience of colonial administration evident in the proposals.<sup>21</sup> The strength of its

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<sup>19</sup> Wakefield was later to tell an 1840 House of Commons Select Committee on New Zealand that the Association “had always avoided going to the Colonial-office”: “[a]fter Mr Dandeson Coates ... told us that he would thwart us by all means in his power, we avoided the Colonial-office; and we did so because the three principal officers of that department at that time, Lord Glenelg, Sir George Grey, and Mr Stephen, were all officers of the Church Missionary Society; and we knew, partly from the Court Circular and partly from notoriety, that the Church Missionary Society, or at least its lay secretary, exercised a great deal of influence in the Colonial Department with respect to New Zealand, so much so as to lead us to believe that he enjoyed a sort of governing power there”. Evidence of Edward Gibbon Wakefield, 13 July 1840 in *Report from the Select Committee on New Zealand*, GBPP 1840 (582) VII.447 at 7-8. See also Edward Jerningham Wakefield *Adventure in New Zealand, from 1839 to 1844* (John Murray, London, 1845) vol 1, 12-13.

<sup>20</sup> The “heads” of a Bill, forwarded to Glenelg by Melbourne on 14 June 1837, is in the Colonial Office Records at CO 209/2, 388a-389a. Melbourne’s covering letter and Glenelg’s and Stephen’s comments on the “heads” of Bill are at CO 209/2, 386a-387b. A copy of the Association’s draft Bill of mid- to late-June 1837 is in Howick’s private papers; DUL GB-0033-GRE-B, GRE/B126/11 at 62-74. Howick arranged for Stephen to receive a copy of the draft Bill on 1 July; see Stephen to Howick, 30 June & 1 July 1837, DUL GB-0033-GRE-B, GRE/B126/11 at 52-53 & 78. Adams *Fatal Necessity*, above n 3, 96 does not distinguish between the “heads” of a Bill and the draft Bill.

<sup>21</sup> Glenelg to Stephen, c. 14 June 1837, CO 209/2, 387b; Stephen to Glenelg, 16 June 1837, CO 209/2, 386b-387a (“These suggestions are so vague & so obscure as to defy all interpretation”). See also Stephen to Howick, 1 July 1837, DUL GB-0033-GRE-B, GRE/B126/11 at 78-89 enclosing a memorandum on the New Zealand Association’s draft Bill: “The settlement of a British Colony in New Zealand, and the extermination of the existing population, are events which cannot be slow to follow each other. The contact between civilized & uncivilized men in every other part of the globe has hitherto produced this effect. Witness the West Indies, South America, North America in past times & at the present moment, New South Wales, Van Diemen’s Land and Western Australia. It is needless to trace the limits in this chain of sequences, but every one who has attended to the subject will perceive that this evil is inherent, and not accidental. In New Zealand itself, this process is going on at the present time tho’ very gradually, because hitherto the English have not attempted to colonize, or to acquire lands. The Church Missionary Society, who for many years have had settlements in the Islands most earnestly deprecate any such measure, perceiving in it a certain destruction of their converts, and of those whom they hope to convert. The Committee on Aborigines which has just concluded its sittings, has made a report strongly dissuading any such plan of colonization”; “Passing from more general topics, it may

concerns does not seem to have been communicated to the Association. It appeared to be confident of securing the Government's support for its Bill despite the fact that Howick (who had provided personal feedback on it) had emphasised that the Government had not taken a position.<sup>22</sup>

The Association's Bill was not introduced before Parliament was dissolved upon the death of William IV. Before it resumed in November 1837, after a general election, the Association worked to refine its proposals. Such revision was partly in response to Howick's comments on the draft Bill, but perhaps also prompted by increasing realisation of the gathering opposition, which drew support from the Aborigines Committee's Report. Wakefield and John Ward, the Association's secretary, published (again without attribution of authorship) a more ambitious exposition of a plan under the title *The British Colonization of New Zealand*.<sup>23</sup>

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be observed that the Draft of the bill bears manifest tokens of having been prepared by a hand very unpracticed in this kind of legislation. It is thro'out, loose, ambiguous, & indistinct, and if the measure itself should be persisted in, it seems indispensable that the Bill should be redrawn". But see Mark Hickford's view that there was no visceral reaction against the Association's plans in the Colonial Office. Mark Hickford "Making 'Territorial Rights of the Natives': Britain and New Zealand, 1830–1847" (DPhil Thesis, University of Oxford, 1999) ["Hickford 'Making Territorial Rights'"] 80–81.

<sup>22</sup> See minutes of New Zealand Association committee, 16 July 1837, GBPP 1840 (582) VII.447 at 101 (also reproduced in Wakefield and Ward *The British Colonization of New Zealand*, below n 23, x); Melbourne to Howick, 26 June 1837, DUL GB-0033-GRE-B, GRE/B115/1 at 74; Howick to Henry Ward, 27 June 1837 (enclosing two papers on the Association's draft Bill), DUL GB-0033-GRE-B, GRE/B147/1. See also Ward to Howick, 28 June 1837, DUL GB-0033-GRE-B, GRE/B147/2; Francis Baring to Howick, 28 June 1837, DUL GB-0033-GRE-B, GRE/B147/3; Howick to Ward, 29 June 1837, DUL GB-0033-GRE-B, GRE/B147/4; Ward to Howick, 30 June 1837, DUL GB-0033-GRE-B, GRE/B147/5; Howick to Ward, 30 June 1837, DUL GB-0033-GRE-B, GRE/B147/6; Ward to Howick, 2 July 1837, DUL GB-0033-GRE-B, GRE/B147/7.

<sup>23</sup> [Edward Gibbon Wakefield & John Ward] *The British Colonization of New Zealand; being an account of the principles, objects, and plans of the New Zealand Association; together with particulars concerning the position, extent, soil and climate, natural productions, and native inhabitants of New Zealand* (John W Parker, London, 1837) ["Wakefield & Ward *The British Colonization of New Zealand*"]. According to Patricia Burns, Rev Samuel Hinds had helped to prepare Chapter 7 on "Religious Establishment", and Rev William White (formerly of the Wesleyan Missionary Society mission in New Zealand) had assisted with the description of New Zealand given in later sections of the book. This may explain why White borrowed freely from this description, without acknowledgment, in his own pamphlet *Important Information Relative to New Zealand* published in Sydney in 1839 (see Chapter 11 n 24). Patricia Burns *Fatal Success: A History of the New Zealand Company* (Heinemann Reed, Auckland, 1989) ["Burns *Fatal Success*"] 61 & 121.

The book expounded upon the position of lawlessness in New Zealand and its adverse impact on Maori.<sup>24</sup> Its approach was to present the Association's scheme as a solution for these problems which the Residency and Maori alike had been unable to solve.<sup>25</sup> The plan was to transport an entire society bound by agreed laws.<sup>26</sup> The settlements were to be established on lands that Maori did not require and that were obtained from them by treaties which passed both sovereignty and property.<sup>27</sup> Europeans within the settlements would be subject to English law.<sup>28</sup> British subjects who committed crimes in Maori territories would be extradited under treaties for trial in the British settlements.<sup>29</sup>

The book envisaged that mechanisms would have to be devised for confining future purchases of Maori land to Crown agents and for dealing with existing European "purchases". While many claims to land, almost certainly fraudulent, would not be recognised, in those others "fairly purchased", the "equitable right of the proprietors ... should be respected; and the more because they are, in fact, native rights; that is, rights derived from and existing by a native authority".<sup>30</sup> This

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<sup>24</sup> Ibid 30-40 & 131-165. See also Robert Burford *Description of a View of the Bay of Islands, New Zealand, and the Surrounding Country; Now Exhibiting at the Panorama, Leicester Square* (G Nichols, London, 1837) ["Burford *Description of a View of the Bay of Islands*"] 4-5.

<sup>25</sup> Ibid 31-32 & 40-42. It was claimed that Maori "anxiously desire the benefits of regular government". Ibid 30.

<sup>26</sup> Ibid xii-xv.

<sup>27</sup> Ibid 54. While "it follow[ed]" from Cook's act of taking possession of the country and an 1814 New South Wales Governor's "proclamation declaring New Zealand to be a British dependency" that Britain was "the only state which possesses any right to colonize the New Zealand group", it did not follow "that we possess such a right as against the native inhabitants of the country":

Not long ago, if the British government had desired to colonize New Zealand, the rights of the natives would have been wholly disregarded; a recent change of opinion in this country on the subject of the rights of uncivilized nations, now forbids the invasion and confiscation of a territory which is as truly the property of its native inhabitants as the soil of England belongs to her landowners.

Ibid 52-53. Under the Association's scheme, Maori would "part with land which they scarcely known how to cultivate, and with a dominion which they are incapable of exercising beneficially". Ibid 54. The Association's plan was described as one for "civilizing the natives" and "colonizing their waste lands". Ibid 43. See also Burford *Description of a View of the Bay of Islands*, above n 24, 5 ("purchase waste lands").

<sup>28</sup> Ibid 54 & 66.

<sup>29</sup> Ibid 57-58.

<sup>30</sup> Ibid 63. See also ibid 53: "... property in land and the sovereign rights of chiefs be well established native institutions ...".

whole subject was reserved for “future determination”, with expression of confidence that a number of ways could be devised to respect such rights “without defeating the uniform system of colonization which it is proposed to adopt”.<sup>31</sup>

The book suggested that Maori civilisation was best promoted through the Association’s scheme. Under it, Maori who joined a settlement would do so on terms of equality with the settlers. They would have the rights and privileges of British subjects. Slavery would not be recognised within the settlements. Courts within the settlements would be open to Maori litigants. The magistrates would be familiar with the native language and able to receive the evidence of non-Christians. Each settlement would have a Protector of Natives who would represent Maori litigants at public expense.<sup>32</sup> Over time, the evident advantages of this form of government could be expected to result in complete cession of all parts of New Zealand.<sup>33</sup> By this “deliberate and methodical scheme” a “savage people” would be led “to embrace the religion, language, laws, and social habits of an advanced country”.<sup>34</sup> Maori civilisation would eventually be achieved in this way through “amalgamation” of the races on conditions of equality.<sup>35</sup> Wakefield and Ward considered that the proposals for Maori civilisation set the Association’s plan apart from earlier schemes of “*mere* colonization”, which they acknowledged had led to the extermination of aboriginal races.<sup>36</sup>

Although details of how Maori were to be reconciled and assimilated within the settlements to British laws, religion and society were not greatly developed in the book itself, an appendix to the book, known to have been written by the Reverend Montague Hawtrey, does contain suggestions for promoting assimilation.<sup>37</sup> It is not

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<sup>31</sup> Ibid 63.

<sup>32</sup> Ibid 54-55: “... it would be idle, or rather deceitful, to declare them entitled to the rights of British subjects, if we did not also give them the means of enforcing such rights”.

<sup>33</sup> Ibid 56-57.

<sup>34</sup> Ibid 42.

<sup>35</sup> Ibid 29 & 54-55: “... there is good reason to hope that, under favourable circumstances, future generations of Europeans and natives may intermarry and become one people”.

<sup>36</sup> Ibid 42.

<sup>37</sup> [Montague Hawtrey] “Exceptional Laws in Favour of the Natives of New Zealand” in Wakefield & Ward *The British Colonization of New Zealand*, above n 23, appendix A, 399-

clear to what extent Hawtrey's views were shared by Wakefield and Ward. They describe it in the introduction simply as a essay on a "difficult and most interesting subject", and in some respects Hawtrey's more elaborate suggestions for transition do not sit well with the more confident approach taken by Wakefield and Ward as to the speed of assimilation.<sup>38</sup> Hawtrey's view was that the assumption that equal treatment under law of Maori and settlers would be just was "eminently fallacious" and would "destroy the weaker under a show of justice".<sup>39</sup> English law would have to be adapted in its application to Maori through the adoption of "exceptional laws", reflecting Maori usage not in itself "radically bad".<sup>40</sup> Until Maori notions of crime, criminal responsibility and punishment changed under the influence of Christian teaching, a special criminal code should be applied to Maori.<sup>41</sup> The "institution of chieftainship" had to be protected. Maori society would be thrown into chaos if the chiefs were "place[d] ... upon the same level" as commoners.<sup>42</sup> Chiefs and their families were to have land reserved to them and were to be encouraged in social alliances with the leading settler families.<sup>43</sup>

In addition to *The British Colonization of New Zealand*, the New Zealand Association prompted interest in New Zealand settlement by commissioning and publishing pictures of New Zealand. Robert Burford was commissioned to paint a panorama of the Bay of Islands taken from drawings by Augustus Earle, the draughtsman of the *Beagle* voyage. It was displayed in a two-level rotunda in Leicester Square from Christmas Eve 1837 to great success (and was later

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422 ["Hawtrey 'Exceptional Laws'"]. Hawtrey acknowledged authorship of this essay in his 1861 book *Justice to New Zealand, Honour to England* (Rivingtons, London, 1861) 5.

<sup>38</sup> Wakefield & Ward *The British Colonization of New Zealand*, above n 23, xii. See also *ibid* 55-56.

<sup>39</sup> Hawtrey "Exceptional Laws", above n 37, 399-400.

<sup>40</sup> *Ibid* 401-403.

<sup>41</sup> *Ibid* 413-414.

<sup>42</sup> *Ibid* 404-405.

<sup>43</sup> *Ibid* 405-413. Hawtrey looked to the adoption by such chiefs of coats of arms and other trappings "of the picturesque and romantic institutions of the feudal age".

displayed in New York). Earle's drawings of New Zealand were also published by Association in a handsome folio edition.<sup>44</sup>

On 21 November 1837, the Association sent to Melbourne the "Abstract of an Act of Parliament for the British Colonization of New Zealand", reflecting the developing thinking to be seen in Wakefield and Ward's book.<sup>45</sup> As did the book, it also took into account Howick's suggested improvements to the Association's earlier draft Bill. The preamble to the Abstract recorded its purpose in "regulat[ing] the settlement of her Majesty's subjects in New Zealand". Under the Abstract, named "Founders" were authorised to enter into treaties with Maori or "other competent persons" for the cession of "all sovereign rights" over "all or any part of the Islands of New Zealand".<sup>46</sup> The inhabitants of the ceded territories were to enjoy "the same rights and privileges, as her Majesty's free subjects in other foreign possessions". The Act would not have affected "the right already competent to the Crown, to the Sovereignty of New Zealand", nor "the right of any aboriginal natives, to any lands at present occupied by them, excepting in so far as

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<sup>44</sup> Philip Temple *A Sort of Conscience: The Wakefields* (Auckland University Press, Auckland, 2002) ["Temple *The Wakefields*"] 195-196; Burford *Description of a View of the Bay of Islands*, above n 24; Augustus Earle *Sketches Illustrative of the Native Inhabitants and Islands of New Zealand* (Robert Martin & Co for the New Zealand Association, London, 1838).

<sup>45</sup> "Abstract of an Act of Parliament for the British Colonization of New Zealand", CO 209/2, 402-407 ["Abstract of an Act"], possibly enclosed in Baring to Melbourne, 21 November 1837, CO 209/2, 398a-400a. But see Donald Loveridge "The Knot of a Thousand Difficulties": Britain and New Zealand, 1769-1840" (Brief of Evidence for the Crown Law Office, Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 17 December 2009, A18) ["Loveridge 'Knot of a Thousand Difficulties'"] 94 & 105. Loveridge argues that the version of the Bill enclosed in Baring's letter to Melbourne was that later reproduced in the Parliamentary Papers as "Abstract of a Bill sent to Lord Howick, on the part of the New Zealand Association, in June 1837", GBPP 1840 (582) VII.447 at 163-164. It is, however, apparent that, whatever version Melbourne received from the Association in late November (and which he in turn may or may not have provided to the Colonial Office—see marginal note on CO 209/2, 398b), it was the "Abstract of an Act" at CO 209/2, 402a-407a that the Colonial Office considered in mid-December 1837. The "Abstract of a Bill" reproduced in the Parliamentary Papers does not appear on the Colonial Office file. Peter Adams does not discuss the "Abstract of an Act". See Adams *Fatal Necessity*, above n 3, 99. Mark Hickford discusses only clause 19 and notes the Colonial Office annotation against it that "aborigines restricted from selling except to the Founders—even to one another". Hickford "Making Territorial Rights", above n 21, 88.

<sup>46</sup> "Abstract of an Act", above n 45, cls 1 & 5.

voluntarily ceded”.<sup>47</sup> Within the settlements, the Founders would have the power to make laws and to set up courts.<sup>48</sup>

Lands “acquired as private property” by British subjects before the passing of the Act would, by the Act, “be deemed British territory”. The “proprietors” would be entitled to pasture the land and “dispose of its natural produce”, but it would not be lawful for them “to cultivate any portion beyond what shall have been cultivated before the passing of this Act” without paying the “uniform price per acre” demanded for public lands in the colony and without “all sovereign rights” having first been ceded “by Treaty between the Founders, and the Natives, exercising the same over such lands”.<sup>49</sup> The Act would have conferred a monopoly right of purchase of land from Maori from the date of its passing by providing:<sup>50</sup>

No title to lands in New Zealand or to possession thereof shall have force after passing of this Act, unless it shall have arisen from a title existing prior to the passing of this Act, or unless derived under a Contract from the Founders or Council—saving only the right of aboriginal natives, in their own persons, or in the persons of their descendants of lands actually occupied at the date of passing this Act.

Consistently with Wakefield and Ward’s book and Hawtrey’s appendix, the Founders were obligated to provide laws and regulations “for the protection of the aboriginal natives in their persons and property, and exceptional laws suitable to their circumstances, and for their moral, and religious instruction and improvement in the arts of civilized life”.<sup>51</sup> The Abstract also provided, in cases where there was a dearth (“penury”) of other evidence, for the taking of evidence of Maori with “such weight as the circumstances of the case, and a regard to the safety & due protection of parties shall appear to render proper”.<sup>52</sup> Civil cases between Maori and settlers were to be conducted for Maori by a “Protector of Natives” at public

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<sup>47</sup> Ibid cl 5.

<sup>48</sup> Ibid cl 7.

<sup>49</sup> Ibid cl 17. The words “not be lawful to cultivate any portion beyond what shall have been cultivated before” are underlined in the Colonial Office copy of the Bill.

<sup>50</sup> Ibid cl 19.

<sup>51</sup> Ibid cl 33.

<sup>52</sup> Ibid. This clause is underlined and marked in the margin in the Colonial Office copy of the Bill.

expense.<sup>53</sup> Some proportion of Maori land ceded was to be held “in trust for the use and benefit of such Natives and their descendants”.<sup>54</sup>

It is likely that, while the Association was putting together the book and Abstract of the Act, it was also continuing its political activity. In the unsettled political climate—the Whig majority was cut to 29 in the July–August election—the Association, with the high proportion of Members of Parliament on its Committee, was potentially a powerful block which Melbourne may have hesitated to alienate.<sup>55</sup> The Association seems also to have used the Parliamentary recess to achieve some sort of accommodation with the New Zealand Company of 1825,<sup>56</sup> or at least to have persuaded Lord Durham, the leading Radical politician of the day, to switch horses and become a member of the Association’s Committee.<sup>57</sup>

### **Pamphlet wars**

While the Association’s plans were taking shape, the Church Missionary Society’s understanding of what was afoot seems to have lagged.<sup>58</sup> It was not until the end of August 1837 that Dandeson Coates, the Society’s Lay Secretary, became aware that the Association was pushing for an Act of Parliament under which systematic settlement would take place. Unsure at first how to proceed, after Wakefield and Ward’s book was published he hit upon writing “a good, biting, forcible pamphlet on the subject”.<sup>59</sup> The pamphlet was published in late November 1837 and was addressed to Glenelg.<sup>60</sup>

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<sup>53</sup> Ibid cl 34.

<sup>54</sup> Ibid cl 35.

<sup>55</sup> Colin Rallings and Michael Thrasher (eds) *British Electoral Facts, 1832–2006* (7th ed, Ashgate Publishing Ltd, Aldershot, England, 2007) 59.

<sup>56</sup> For the 1825 Company, see Chapter 6, text accompanying n 40; Richard Wolfe *A Society of Gentlemen: The Untold Story of the First New Zealand Company* (Penguin Books, London, 2007) [“Wolfe *A Society of Gentlemen*”]; and Burns *Fatal Success*, above n 23, ch 1.

<sup>57</sup> Adams *Fatal Necessity*, above n 3, 99; Wolfe *A Society of Gentlemen*, above n 56, 159–160; Temple *The Wakefields*, above n 44, 199; Burns *Fatal Success*, above n 23, 48.

<sup>58</sup> See Adams *Fatal Necessity* above n 3, 98.

<sup>59</sup> Coates to Buxton, 29 August 1837, quoted in Adams *Fatal Necessity*, above n 3, 88. Buxton also received from Wakefield a copy of *The British Colonization of New Zealand*. While telling Wakefield that he thought the book contained “many good sentiments & excellent principles”, Buxton expressed doubt that “any scheme for colonization can be made beneficial

The pamphlet emphasised that colonisation “however and by whomsoever administered” had always proved disastrous for native populations.<sup>61</sup> If even the good intentions of the Sierra Leone Company had ended in failure, a scheme whose “main-spring and ultimate end” was “gain” would not succeed, and the professed “benevolent regard to the civilization and moral improvement of the New Zealanders” was a “fairy dream”.<sup>62</sup> The British Government alone could remedy the problems of lawlessness of British nationals. Any intervention by the Government should be limited to that necessary to protect Maori (an independent people at international law) from British subjects.<sup>63</sup> In Coates’ view, intervention should maintain the independence and rights of Maori and exclude colonisation altogether. Coates looked to the appointment of consular agents with judicial authority backed up by naval power and, with the consent of the chiefs, a native police force.<sup>64</sup> Coates emphasised the risk the Association’s scheme posed to missionary hard-won successes (achieved because of, rather than despite, absence of “coercive power”<sup>65</sup>) and pleaded for “one half century more” of missionary

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to the Aborigines of barbarous lands”. He feared that “however fair the regulations may appear, that the practical effect will always result in the crushing of the less civilized or weaker race”. He also expressed concern that Wakefield’s book did not state the price at which lands were to be purchased from Maori, a point “of first rate importance”. Buxton said he would “entirely object to [lands] being procured on American terms” and that he was left with the uneasy impression by the book that the purchase price of lands “was not meant to be very liberal”. Buxton to Wakefield, 1 November 1837, SLNSW C184, 24-26.

<sup>60</sup> Dandeson Coates *The Principles, Objects, and Plan of the New-Zealand Association Examined, in a letter to the Right Hon Lord Glenelg, Secretary of State for the Colonies* (Hatchards, London, 1837) [“Coates Plan of the New-Zealand Association Examined”]. The pamphlet is dated 27 November 1837. Coates sent a copy to Glenelg on 29 November. Coates to Glenelg, 29 November 1837, CMS G/AC 19/2, 183-184. He also sent copies on 11 December to Governor George Gipps, Bishop Broughton, Rev Samuel Marsden and Rev Henry Williams. CMS G/AC 19/2, 184-189.

<sup>61</sup> Ibid 3-9.

<sup>62</sup> Ibid 9-15.

<sup>63</sup> Ibid 28-32.

<sup>64</sup> Ibid 33-35.

<sup>65</sup> “The Mission of the Church Missionary Society has, under the blessing of Almighty God, risen to its present hopeful and promising state, not only without the intervention of a coercive power, but, I very believe, because the Missionaries have had it not;—for it is the possession of coercive power on the part of the Colonists which is the occasion of collision and bloodshed. Where this is possessed, it will most certainly, sooner or later, be used in furtherance of the interests or security of the possessor. The Missionary, on the other hand, has simply the religious and social good of the people in view; and for success rests, under God, on the substantial blessings which he has it in his power to impart, and on his own prudence, forbearance, and moderation, totally exclusive of human power. He, therefore, is in a state of constant dependence on the Chiefs; and can maintain his position, and advance his object, only

work “spared of colonization”. If left on this basis it could be expected that civilisation would be achieved “with the complete preservation of the Aboriginal race, and their national independence and sovereignty”.<sup>66</sup>

Wakefield counter-attacked strongly in a pamphlet of his own, published under his own name.<sup>67</sup> He pointed out that the option of no colonisation was not available: New Zealand was already being colonised in an irregular way. It was “the very worst of all systems, or rather sorts of colonization”.<sup>68</sup> It was impossible to stop the tide of emigration to New Zealand: “New Zealand ... must be colonized in one way or another”.<sup>69</sup> The choice was between Coates’ “gloomy proposition” that it was “beyond human wisdom to devise a plan for colonization not fatal to the aborigines” and devising the best scheme possible to benefit Maori.<sup>70</sup> Wakefield argued that Coates was inconsistent because his plan to establish British law and order (dressed in “native garb”) itself undermined Maori independent nationhood and would inevitably encourage further British emigration: the plan of the Association was at least “far more downright and above-board”.<sup>71</sup>

Wakefield wrote that the Association had not advocated that the British Government had any right to impose settlement upon Maori. As was “over and over again explained in the Book”, the right to establish settlements had to be acquired by formal treaty.<sup>72</sup> Wakefield castigated Coates for not engaging with the proposals in the book for Christianisation of Maori and, in the interim, for the provision of exceptional laws for them.<sup>73</sup> He distinguished the Association’s plan

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by the influence which he acquires from his character and labours. If wronged, he suffers it. If exposed to alarms and dangers, he *patiently endures*. He has no means of forcible resistance; and therefore with him there is no place for collision and its consequences”. Ibid 39-40. See also *New Zealand Colonization: from the Christian Observer for February 1838* (Nuttall & Hodgson, London, 1838) [“*New Zealand Colonization: from the Christian Observer*”] 8-9.

<sup>66</sup> Coates *Plan of the New-Zealand Association Examined*, above n 60, 36-41.

<sup>67</sup> Edward Gibbon Wakefield *Mr Dandeson Coates, and the New Zealand Association; in a letter to the Right Hon Lord Glenelg* (Henry Hooper, London, 1837) [“*Wakefield Mr Dandeson Coates*”]. The letter is dated 12 December 1837.

<sup>68</sup> Ibid 5.

<sup>69</sup> Ibid 8.

<sup>70</sup> Ibid 8.

<sup>71</sup> Ibid 10-11.

<sup>72</sup> Ibid 16.

<sup>73</sup> Ibid 21-23.

from those that had gone before, writing that it bore “no resemblance whatever, as respects the natives, to any plan but that of William Penn”.<sup>74</sup> He argued that there was precedent for the delegated powers of colonisation the Association was seeking. In any event, the powers of the Association were limited and controlled.<sup>75</sup> He attacked the Church Missionary Society for the land dealings of its missionaries and the meagre conversion it had achieved after 23 years and much expenditure. Regular colonisation was likely to assist in the work of the Society in bringing Christianity to Maori.<sup>76</sup>

By early December 1837 the Church Missionary Society itself came to the conclusion that some British Government intervention in New Zealand was desirable.<sup>77</sup> It influenced the Wesleyan Missionary Society to come to the same position.<sup>78</sup> Both Societies sought to see Glenelg to make representations.<sup>79</sup> Before

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<sup>74</sup> Ibid 6. As to Penn, see Chapter 3, text accompanying n 9.

<sup>75</sup> Ibid 18.

<sup>76</sup> Ibid 19-20 & 23-24.

<sup>77</sup> Coates *Plan of the New-Zealand Association Examined*, above n 60, 27-29; Resolution of the Church Missionary Society Committee, 5 December 1837, CMS G/C1 vol 16, 372-373 (reproduced in Coates *Notes for the Information*, below n 129, 4): “The propriety of taking measures to correct, if practicable, the evils arising out of the residence in New Zealand of Runaway Convicts, Sailors who have quitted their ships, and other British Subjects of immoral and criminal conduct, having been brought under the consideration of the Committee, it was ‘Resolved, that a Deputation to Lord Glenelg be appointed, to represent to his Lordship the serious evils to the Natives of New Zealand, and the hindrance to the Mission, from the immoral and criminal conduct of British Subjects resident in New Zealand; and strongly to urge the adoption of measures, on the part of Her Majesty’s Government, for the prevention and effectual punishment of crimes committed by British Subjects in New Zealand ...’”.

<sup>78</sup> Evidence of Rev John Beecham to the 1838 Select Committee on New Zealand, GBPP 1837-38 (680) XXI.327 at 294 & 299; Resolutions of the Wesleyan Missionary Society Committee, 20 December 1837, quoted in Bunting to Glenelg, 21 December 1837, CO 209/2, 393a-394a (reproduced in Coates *Notes for the Information*, below n 129, 5): “I. ... that the proposed Plan [of the New Zealand Association] ... is one which most seriously affects the Rights and Interests of the Natives of New Zealand, and which is likely, under present circumstances, very injuriously to interrupt and impede the operations of Christian Missionaries in that country. II. That this Committee (while they ... fully admit the propriety and necessity of devising some plan for the protection of the Natives from the injuries connected with the present system,) are nevertheless impelled ... to express their painful and anxious apprehension of the evils which, in their judgment, are likely to result from the scheme of Colonization for which the sanction of Her Majesty’s Government, and of Parliament, is about to be solicited.”

<sup>79</sup> Resolution of the Church Missionary Society Committee, 5 December 1837, CMS G/C1 vol 16, 372-373; Resolutions of the Wesleyan Missionary Society Committee, 20 December 1837, quoted in Bunting to Glenelg, 21 December 1837, CO 209/2, 393a-394a (Resolution no 3). The Resolutions of the two Committees are reproduced in Coates *Notes for the Information*, below n 129, 4-6.

the interviews took place, however, they became aware that the Government was considering providing the New Zealand Association with a charter for the establishment of settlements in New Zealand.

On 20 December, Glenelg indicated to the Association that the Government was considering granting it a charter. Such a possibility had not seemed in prospect one week earlier when the Association had met with Melbourne and Glenelg. The meeting, on 13 December, was most unsatisfactory as far as the Association was concerned.<sup>80</sup> According to Wakefield, whose account is the only record of what passed at the meeting, Melbourne “appeared to have forgotten” his earlier encouragement of the Association in June.<sup>81</sup> He deferred to Glenelg, who marshalled a number of objections to the Association’s scheme, which seemed, to the members of the Association present, to be fatal if maintained. They protested that they had been led on by the Government and that some had sold property and left their professions in the expectation of being able to settle in New Zealand. Melbourne, not appreciating that one man whose case had been mentioned was present, remarked, rather unfortunately, that the man “must be mad”. That led to the gentleman in question standing up and saying that Melbourne was the madman. Wakefield recalled that the meeting had broken up “very much dissatisfied”.<sup>82</sup> It appears, however, that Melbourne had indicated that the Government would move quickly to decide on its course after giving an opportunity to the Association to respond to Glenelg’s objections, which he would provide in writing.<sup>83</sup>

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<sup>80</sup> In his evidence to an 1840 Select Committee, Wakefield gave the date of this meeting as 9 December 1837. However, he also stated that the meeting on the 20th had occurred “on that day week” after the earlier interview, and that the two meetings had taken place on consecutive Wednesdays, statements that fit with the date of the first meeting having been 13 December. Compare evidence of Wakefield, 13 & 22 July 1840, GBPP 1840 (582) VII.447 at 2, 3 & 109.

<sup>81</sup> Evidence of Wakefield, 13 July 1840, GBPP 1840 (582) VII.447 at 2-3. According to Wakefield, Melbourne had, at an interview in June, personally encouraged the Association by saying that “he saw no objection to the views of the society, and that he perceived in some of their purposes a laudable object; but that, not being himself familiarly conversant with such subjects, he was desirous then to do no more than express his general approbation, and to refer the committee of the association, for discussion of all questions of detail, to Lord Howick”. Ibid 2. In this, it would have been quite in character for Wakefield to have been exaggerating.

<sup>82</sup> Ibid 2-3.

<sup>83</sup> See Glenelg memorandum, 15 December 1837, CO 209/2, 411a-422a at 411a.

Glenelg provided a memorandum of his objections on 15 December.<sup>84</sup> It raised both general objections to colonisation of New Zealand and, should those general objections be overcome, the specific objection that any colonisation should be undertaken under the authority of a Royal Charter (thus preserving Colonial Office control) rather through an Act of Parliament.<sup>85</sup> In addition, the memorandum looked to “questions of detail” that would have to be dealt with in any charter.

The memorandum conceded the “necessity for coercion” of “convicts and other people of a desperate character” but took the view that the nature and extent of what was proposed by the Association exceeded what was necessary to achieve this end.<sup>86</sup> It pointed to the recommendation of the Aborigines Committee, which was against colonisation.<sup>87</sup> It identified that the Association’s proposal would make it impossible for Britain to oppose American encroachment in the Pacific on the moral high ground of protection of native rights.<sup>88</sup> It raised the potential adverse impact on Australian colonisation (“the opportunity of Colonizing the whole of the available Territory of New Holland can scarcely be neglected without manifest

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<sup>84</sup> Ibid. Adams *Fatal Necessity*, above n 3, 100 n 122 takes literally the later statement of a Colonial Office clerk that Glenelg “drew up” the memorandum following the meeting on the 13th (see Gairdner minute, 28 February 1839, CO 209/4, 316a-325a at 318b). However, the clerk may have meant only that Glenelg approved the draft—see Glenelg’s initial on CO 209/2, 411a. The memorandum reads like one of Stephen’s productions and the handwriting may be that of his amanuensis. It refers to Glenelg by name and in the third person. It also raises similar objections to the Association’s proposals as those raised by Stephen in his 1 July 1837 memorandum to Howick on the Association’s then draft Bill; see above n 21. Wakefield refers to Glenelg “reading from a paper” at the 15 December meeting, and possibly this paper was Stephen’s 1 July memorandum. See evidence of Wakefield to the 1840 House of Commons Select Committee on New Zealand, 13 July 1840, GBPP 1840 (582) VII.447 at 3.

<sup>85</sup> The memorandum relates that Royal Charters for colonisation had been usual from the reign of the Elizabeth I. The only exception had been the case of South Australia, but it would be a “startling innovation” for the Royal Prerogative to be transferred by Parliament to the founders of a colony. More safeguards were available in respect of a charter, which was under the supervision of the Court of Queen’s Bench. A charter could be more readily amended should experience show up “errors and omissions unforeseen in the original project”. Glenelg memorandum, 15 December 1837, CO 209/2, 411a-422a at 416a-419a.

<sup>86</sup> Ibid 413a-b.

<sup>87</sup> Ibid 413b.

<sup>88</sup> Ibid 415a-b. The memorandum also identified that the “violent resistance” of American settlers and commercial interests in New Zealand, and the “strenuous objections” of the United States Government, could be anticipated to any plan to bring New Zealand within the sovereignty of Great Britain. Ibid 414a-415a.

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improvidence”).<sup>89</sup> The major objection of general principle was, however, the “unrighteousness” of any plan that was not based upon the prior consent of Maori, freely given:<sup>90</sup>

It is difficult or impossible to find in the History of British Colonization an example of a Colony having been founded in derogation of such rights, whether of sovereignty or of property, as are those of the Chiefs and People of New Zealand. They are not Savages living by the chase, but Tribes who have apportioned the Country between them, having fixed abodes, with an acknowledged property in the Soil, and with some rude approaches to a regular system of internal Government. It may therefore be assumed as a basis of all reasoning and of all conduct on this subject, that Great Britain has no legal or moral right to establish a Colony in New Zealand, without the free consent of the Natives, deliberately given, without compulsion, and without fraud. To impart to any individuals an authority to establish such a Colony, without first ascertaining the consent of the New Zealanders, or without taking the most effectual security that the contract, which is to be made with them, shall be freely and fairly made, would, as it should seem, be to make an unrighteous use of our superior power.

The memorandum treated it as “premature to enter into any full discussion” of the details of a charter but identified a number of issues.<sup>91</sup> In evident response to the proposals in the Association’s Bill,<sup>92</sup> they included the need for legislative measures to be undertaken at a local level (reserving to the Crown a power of disallowance),<sup>93</sup> concern about “the retrospective rules as to the sale or cultivation

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<sup>89</sup> Ibid 415b. It was reasoned that: “[l]ooking to the dispersion of our present Australian Colonies & to the weakness of which it is productive, it would seem a doubtful policy to divert the stream of Emigration to Islands so distant from the existing Settlements.”

<sup>90</sup> Ibid 411b-413a. The more political objection, that the missionary societies would provoke opposition in Parliament, was omitted from the final memorandum. Ibid 413b-414a.

<sup>91</sup> Ibid 419b.

<sup>92</sup> See the underlining and marginal comments on the Colonial Office’s copy of the Association’s “Abstract of an Act of Parliament for the British Colonization of New Zealand”, CO 209/2, 402-407.

<sup>93</sup> The Association had proposed that the Founders, based in England, would legislate for the colony. Glenelg’s attitude was that experience showed that distant dependencies could not be governed properly except by “leaving to the local authorities the initiative of almost every measure, reserving to the Ministers of the Crown nothing beyond a controlling authority”. Glenelg memorandum, 15 December 1837, CO 209/2, 411a-422a at 420b.

of lands already acquired”,<sup>94</sup> and the proposals regarding native evidence.<sup>95</sup> These were “unripe for discussion”.<sup>96</sup>

The Association was not required to respond to this memorandum. It was sidelined by Glenelg’s announcement to the Association on 20 December that the Government was indeed prepared to offer a charter to the Association. What caused the change in attitude (which seemingly overtook the need for the Association to address the objections of principle to colonisation) has been the subject of discussion among historians, especially Adams.<sup>97</sup> The shift coincided with receipt of Busby’s 16 June 1837 despatch<sup>98</sup> reporting deteriorating conditions in New Zealand and proposing greater British role in developing Maori government under a form of British protectorate. Adams considers that receipt of this despatch, and the realisation that British involvement in New Zealand could not be averted, was the main factor in the willingness to engage with the idea of a charter.

Adams also points to the Association’s continued lobbying of Melbourne.<sup>99</sup> Melbourne, who may have felt on the back-foot following the meeting on 13 December, and whose Parliamentary majority was vulnerable, may have been wary of the consequences of alienating those Members of Parliament who supported the Association. He instructed Howick to “make up Glenelg’s mind on the subject”, saying that people involved with the Association had “a right to an answer”.<sup>100</sup> It

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<sup>94</sup> See text accompanying n 49 above.

<sup>95</sup> See text accompanying n 52 above.

<sup>96</sup> Glenelg memorandum, 15 December 1837, CO 209/2, 411a-422a at 421b-422a.

<sup>97</sup> See Adams *Fatal Necessity*, above n 3, 104-108; Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987) 26; Hickford “Making Territorial Rights”, above n 21, 86-92; Loveridge “Knot of a Thousand Difficulties”, above n 45, 113; Burns *Fatal Success*, above n 23, 60-61.

<sup>98</sup> See Chapter 7, text accompanying ns 138-158. The Colonial Office received the despatch on 18 December.

<sup>99</sup> Wakefield and others met with Melbourne on at least two occasions in the short period between 14-20 December, at one of which Wakefield presented Melbourne with a petition from “South Sea merchants” (from whom it had been solicited by Charles Enderby, a member of the Committee of the Association with whaling interests in the Pacific) in support of British intervention. Adams *Fatal Necessity*, above n 3, 101.

<sup>100</sup> Melbourne to Howick, 16 December 1837, DUL GB-0033-GRE-B, GRE/B115/1 at 107. See also Melbourne to Howick, 14 December 1837, DUL GB-0033-GRE-B, GRE/B115/1 at 85.

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seems highly probable that Howick did speak to Glenelg in support of some accommodation with the Association. Although Adams is more doubtful,<sup>101</sup> it seems likely that Howick's intervention with Glenelg was, in the political circumstances, highly influential. Busby's despatch may have been convenient to explain why the Government's objections of principle to colonisation did not need to be further addressed.<sup>102</sup>

The announcement of the Government's intention to offer a charter at the meeting on 20 December was followed up by Glenelg in a letter of 29 December.<sup>103</sup> The first draft of this letter had been prepared by Stephen on 21 December.<sup>104</sup> The letter in its ultimate form, in apparent reference to the latest despatches from Busby, explained that "intelligence ... received from the most recent and authentic sources" had brought the Government to the conclusion that

it was an indispensable duty, in reference both to the Natives and to British Interests,<sup>105</sup> to interpose, by some effective authority, to put a stop to the evils and dangers to which all those interests are exposed, in consequence of the manner in which the intercourse of foreigners with those Islands is now carried on.<sup>106</sup>

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<sup>101</sup> Adams regards Melbourne's request of Howick to "make up Glenelg's mind" as neutral as to the outcome of their discussions. Adams *Fatal Necessity*, above n 3, 104. Compare Burns *Fatal Success*, above n 23, 60-61.

<sup>102</sup> Wakefield's view, as expressed to the 1840 House of Commons Select Committee on New Zealand, was that it must have been "in consequence of some injunction or persuasion to that effect from Lord Melbourne, that Lord Glenelg, who, on one Wednesday, had occupied himself for an hour in urging fatal objections to the measure, on the following Wednesday said that the Government had reviewed the subject, and were prepared to assent to the views of the association". See evidence of Wakefield, 13 & 22 July 1840, GBPP 1840 (582) VII.447 at 3 & 109. For a view that Busby's despatch did not support the Association's case, see John Beecham *Remarks upon the Latest Official Documents Relating to New Zealand* (Hatchards, London, 1838) ["Beecham *Latest Official Documents*"] 6-14.

<sup>103</sup> Glenelg to Durham, 29 December 1837, CO 209/2, 423a-432a (also GBPP 1840 (582) VII.447, appendix 8, 148-149).

<sup>104</sup> Stephen draft of Glenelg to Durham, 21 December 1837, CO 209/3, 274a-283b. Peter Adams considers that significant changes to Stephen's draft, annotated on it, are in the hand of Grey. Adams *Fatal Necessity*, above n 3, 104. Better analysis of the handwriting is required, but it seems that many of the corrections may well have been the work of Glenelg.

<sup>105</sup> Stephen's draft had not referred to "British interests" but instead to the British Government's "indispensable duty, to interpose by some effective authority, for the prevention of abuses committed by British Subjects resident there under which the Aborigines are enduring the greatest calamities". Stephen draft of Glenelg to Durham, 21 December 1837, CO 209/3, 274a-283b at 274b-275a.

<sup>106</sup> Glenelg to Durham, 29 December 1837, CO 209/2, 423a-432a at 423a-b.

Glenelg wrote that the suggestions of the Aborigines Committee (which were that the problem of lawlessness in the Pacific could be met by consular agents with judicial authority over British subjects, supported by regular visits of the navy) now appeared “inadequate to meet the existing Evil” and that “the repression of practices of the most injurious tendency to the Natives of New Zealand” could only be met, it would seem, “by the establishment of some settled form of government within that territory, and in the neighbourhood of places resorted to by British Settlers”.<sup>107</sup> The decision had been arrived at in the knowledge of the risk it entailed for Maori but in the belief that there was no other choice:<sup>108</sup>

Her Majesty’s Government are fully aware of the danger with which European settlements among uncivilized men must always be attended to the weaker party. They would feel it their duty to oppose any scheme, however inviting in other respects, which might involve the probability of a repetition in another quarter of the Globe of the calamities by which the Aborigines of the American and African continents have been afflicted. Rather than incur such a danger Her Majesty’s Government would leave the social improvement of New Zealand to be worked out by the gradual influence of Christian Missions; but experience has shown that it is impossible to take that line in this case. Colonization to no small extent is already effected in those Islands. The only question therefore is between a Colonization, desultory, without law and fatal to the Natives, and a Colonization organized and salutary.

In such a situation, the Government was “disposed to entertain the proposal of establishing such a Colony”. It was not prepared to support the establishment of a colony by an Act of Parliament but was “willing to consent to the Incorporation by Royal Charter, of various persons to whom the Settlement and Government of the projected Colony, for some short term of years would be confided”.<sup>109</sup>

The letter did not set out the full terms of a charter. Glenelg was at pains to point out that “other points” would probably occur to the Government.<sup>110</sup> But as a starting-point for discussion, he identified a number of conditions “to which the

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<sup>107</sup> Glenelg to Durham, 29 December 1837, CO 209/2, 423a-432a at 423b-424a.

<sup>108</sup> Ibid 424a-425a.

<sup>109</sup> Ibid 425a-b.

<sup>110</sup> Ibid 431a-432b.

Government attach special value and importance".<sup>111</sup> The Government reserved the right to veto appointments to the governing body of the chartered corporation and officers in positions of "considerable trust or authority" in the colony.<sup>112</sup> The colony was to be "limited in extent" and "not ... co-extensive with the whole of the New Zealand Islands".<sup>113</sup> The settlement of the colony was to be "effected, if at all, with the free consent of the existing inhabitants or their chiefs".<sup>114</sup> Contracts with natives for land for the proposed colony would be made only through officers nominated by the Crown. Even then, the Crown would retain the right to disallow purchases within a set period, during which time the corporation would be unable to on-sell the land (except at the purchaser's risk of disallowance).<sup>115</sup> A fixed proportion of the proceeds of land sales was to be applied to churches and schools, for the benefit of Maori as well as settlers.<sup>116</sup> A similar charge would pay for officers appointed for the protection of Maori.<sup>117</sup> In a nod to the Association's "fundamental law" proposals, the charter was to establish the principle of sale of land by auction at a fixed upset price and would prohibit "gratuitous grants".<sup>118</sup> Although no proposals were put forward in the letter, it flagged for further consideration the protection of rights "already lawfully acquired in New Zealand by British Subjects" and to secure the freedom of missionaries to carry on their work of religious instruction.<sup>119</sup> Finally, it was to be a condition of the charter that minimum capital in the company be subscribed, of which some "definite portion" was to be paid up before it exercised any authority provided for by the charter.<sup>120</sup>

These proposals enabled the Colonial Office to justify the scheme of colonisation, to itself and others, on the basis that the Crown retained control and that Maori interests were protected and their welfare enhanced, contrary to the experience of

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<sup>111</sup> Ibid 425b.

<sup>112</sup> Ibid 425a (N.B. There are two pages stamped 425.).

<sup>113</sup> Ibid 426Aa-b. The Government also reserved the right to make similar charter grants to other bodies.

<sup>114</sup> Ibid 427a.

<sup>115</sup> Ibid 427a-b.

<sup>116</sup> Ibid 427b-428a.

<sup>117</sup> Ibid 428a-b.

<sup>118</sup> Ibid 428b.

<sup>119</sup> Ibid 429a.

<sup>120</sup> Ibid 428b & 431a.

native populations in other colonies. Effectively, the Association was to be the agent of the Crown, sparing the Government the expense of administering settlements in New Zealand but permitting the Crown to limit their impact.<sup>121</sup> While the offer of the charter purported to take at face value the Association's claims that its scheme was intended to benefit Maori, it may be that the Colonial Office suspected that the terms would not prove to be acceptable to the Association. Whatever its expectations, the offer did indeed prove unacceptable to the Association.

A major stumbling block was the Government's insistence that the company to undertake the settlement be properly capitalised. But while Wakefield was later to say that this was the principal impediment to agreement (and one he thought had been deliberately inserted without discussion in order to wreck the negotiations), it is clear from the correspondence that the Association was also deeply unhappy with the territorial limitation imposed on its ambitions. It is likely that, had the negotiations continued, other significant impediments to agreement would also have emerged.<sup>122</sup> It rapidly became clear, however, that the charter route was not going to suit the Association's aspirations. It turned its attention again to obtaining Parliamentary authorisation of its plans. A Colonial Office letter of 5 February

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<sup>121</sup> See Stephen draft of Glenelg to Durham, 21 December 1837, CO 209/3, 274a-283b at 276b: "They [the Government] consider themselves however as bound to take the utmost possible security against the abuses of which it [the establishment of a colony] may be productive, and for attaining those benefits to the Natives, to which the scheme may be rendered subservient". See also minutes of Church Missionary Society Committee regarding its deputation's 4 January 1838 meeting with Glenelg: "Lord Glenelg then stated ... that they felt the necessity of adopting measures to correct the evils arising out of the residence of British subjects on the Islands; that to effect this was a matter of difficulty, under the peculiar circumstances of the case; that the New Zealand Association having been formed it was thought that it might be employed in subserviency to the object just mentioned under such Regulations as Government might prescribe; that an idea was entertained of forming one or more Settlements on the coast of New Zealand under the sanction of a Charter from the Crown, with such limitations and restrictions as might render the arrangement beneficial to the Natives; ... that in the event Lord Glenelg did not state what course he intended to pursue but that it was the impression of the Deputation that it was in contemplation to employ the agency of the New Zealand Association with a view to correct the existing evils arising out of the residence of British Subjects in New Zealand by the grant of a Charter to form a Settlement or Settlements in New Zealand". Minutes of Church Missionary Society Committee, 16 January 1838, CMS G/C1 vol 16, 627-628.

<sup>122</sup> Compare Burns *Fatal Success*, above n 23, 59: "While the association did not care for the thought of these checks, it could have come to terms with them."

confirmed, in what was obviously a negotiated deal, that the offer of a charter was withdrawn on the basis that a Bill would be introduced into Parliament on behalf of the Association and that the Government would allow a “free and fair” debate on it.<sup>123</sup>

While the discussions with the New Zealand Association were proceeding, the missionary societies continued to express opposition to the Association’s proposals and to advocate for British Government intervention in New Zealand on a limited basis. Although not told until 25 January 1838 that the Government had made an offer of a charter to the Association,<sup>124</sup> the Church Missionary Society became aware, as early as 19 December, that a charter was under active consideration.<sup>125</sup> It seems to have thought that the Government was still open to representations on the subject.<sup>126</sup> Although hoping to persuade Glenelg at the interview it had already arranged for a deputation of its Committee, as a fall-back, the Church Missionary Society prepared to raise questions in Parliament and took advice from Sergeant Henry Stephen (James Stephen’s brother) as to whether it could prevent the Privy Council from advising the Queen to grant a charter without its being heard on the matter.<sup>127</sup> The question of a charter was raised in Parliament by Sir Robert Inglis, a Vice-President of the Church Missionary Society, on 22 December. He seems to have received an assurance from Sir George Grey, the Parliamentary Under-

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<sup>123</sup> Glenelg to Durham, 5 February 1838, CO 209/4, 295a-297a (also GBPP 1840 (582) VII.447, appendix 11, 153.

<sup>124</sup> Grey to Coates & Bunting, 25 January 1838, CO 209/3, 151a-b.

<sup>125</sup> See minutes of the Church Missionary Society Committee, 26 December 1837, CMS G/C1 vol 16, 608 (reporting Coates’s understanding from interviews with Glenelg on 19 and 20 December that the Government intended “to accede in some way to the views of the Association, and in doing so to proceed by granting a Charter”); Coates to Glenelg, 22 December 1837, CO 209/2, 395a-b (expressing dismay at a rumour that a charter had been “promised” at a time when the missionary societies had deputations pending); minutes of the Church Missionary Society Committee, 16 January 1838, CMS G/C1 vol 16, 627-628 (referring to the interview with Glenelg on 4 January; on which see above n 121).

<sup>126</sup> Minutes of the Church Missionary Society Committee, 26 December 1837, CMS G/C1 vol 16, 608.

<sup>127</sup> Ibid. The minutes record that Stephen, “without giving a decided opinion”, was “doubtful whether it would be advisable for the Committee to pursue that course”.

Secretary, that nothing would be finally decided until all interested parties had been heard.<sup>128</sup>

In preparation for the Society's meeting with Glenelg on 4 January 1838, Dandeson Coates produced a printed pamphlet setting out the Society's objections to the New Zealand Association's plans and its own view that Crown intervention was required to protect Maori while their society evolved under the influence of missionary teaching. The pamphlet was provided to Glenelg at the meeting on 4 January, and copies were sent the following day to Grey and Stephen. The pamphlet maintained the Society's position that colonisation, particularly by a private organisation interested in "gain", would be detrimental to Maori and would undermine the progress the missionaries were making.<sup>129</sup> The Association was said to have exaggerated the problem of the lawlessness of British subjects (although the existence of the problem was "fully admitted").<sup>130</sup> The Association's scheme for colonisation, however, would be "utterly powerless ... to correct existing evils—will probably aggravate them—and cannot fail to introduce others still more grievous".<sup>131</sup> By the Association's scheme, British authority would be limited to its settlements, leaving British subjects living among the tribes, "untouched".<sup>132</sup> The plan was an "extreme measure" and could not be undertaken "with any show of justice" as a remedy for lawlessness until other options had been "fairly and fully

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<sup>128</sup> There is no Hansard record of the question of the Association's charter being raised in Parliament on 22 December 1837 but the fact that the matter was raised by Inglis, and Grey's response, are referred to in Church Missionary Society Committee minutes and in the *Christian Observer*. See minutes of the Church Missionary Society Committee, 26 December 1837, CMS G/C1 vol 16, 608; and *New Zealand Colonization: from the Christian Observer*, above n 65, 1. The Hansard record for 22 December discloses that both men participated in the proceedings of the House of Commons on that day. See 39 GBPD HC cc 1469-1472 (Grey) & cc 1486-1488 (Inglis).

<sup>129</sup> Dandeson Coates *Notes for the Information of those Members of the Deputation to Lord Glenelg, respecting the New-Zealand Association, who have not attended the meetings of the Committee on the Subject* (Richard Watts, London, 28 December 1837) ["Coates Notes for the Deputation"]; Coates to Stephen & Grey, 5 January 1838, CO 209/3, 131a-132b.

<sup>130</sup> Coates *Notes for the Deputation*, above n 129, 6.

<sup>131</sup> *Ibid* 7.

<sup>132</sup> *Ibid* 8-9.

tried by Government”.<sup>133</sup> The responsibility for addressing the problem of British lawlessness rested exclusively with the Government.<sup>134</sup>

The Society’s own proposed “remedial measures” were grounded on two propositions: the rejection of colonisation and the maintenance of “the national rights and sovereignty of the New Zealanders”.<sup>135</sup> As to the last, the pamphlet expressed the view that although Cook’s taking possession of the country might be effective against other nations, it was “[no title] at all against the rights and sovereignty of the Natives”.<sup>136</sup> With this “moral” basis, the proposals followed closely those earlier made by Coates in November 1837.<sup>137</sup> In development of those proposals, the pamphlet suggested that the Consular Agent (“the pivot on which the success of the scheme mainly depended”) would have as one of his principal tasks impressing upon the chiefs that “the only method of completely remedying the existing evils will be by establishing laws and institutions in their several Tribes”.<sup>138</sup> In support of this proposal, the pamphlet quoted a letter of a young Maori chief recently received by the Society from the Reverend Samuel Marsden seeking the provision of laws to deal with new issues that had arisen for Maori society because of contact with Europeans and conversion to Christianity.<sup>139</sup> Missionaries would assist the Consular Agent in encouraging law and government among Maori, and the spread of Christianity tended “to the inculcation and establishment of those principles which lead to government, law, and order”.<sup>140</sup> The means of establishing law and order in New Zealand were “already within the

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<sup>133</sup> Ibid 9.

<sup>134</sup> Ibid 15.

<sup>135</sup> Ibid 9.

<sup>136</sup> Ibid 22.

<sup>137</sup> Ibid 9; and see text accompanying ns 59-66 above.

<sup>138</sup> Ibid 10.

<sup>139</sup> Ibid 12-13. The chief identified conflicts arising out of damage caused by pigs to unfenced cultivations, between Christian and non-Christian Maori over customs relating to the remarriage of widows and repudiation of polygamous marriages, and “slaves exalting themselves above their masters”.

<sup>140</sup> Ibid 14.

reach of Government” so that “no valid reason can be alleged for sanctioning the proposed colonization of the country”,<sup>141,142</sup>

Let the Chiefs only be helped over the present crisis by the friendly hand of the British Government, in the judicious use of that influence which its position and advantages supply, and the beneficent object would be accomplish, of averting from them the horrors of colonization, and of preserving their race and national independence.

Before the meeting on 4 January, Coates despatched a further letter to Glenelg after reviewing Busby’s 16 June 1837 despatch, which Glenelg had copied to him at his request.<sup>143</sup> Coates expressed the view that Busby’s proposals (effectively to permit the Resident to govern through the Congress of the United Tribes) were “far too complicated to be practicable” and that the extent of British meddling within “what is in strictness a foreign state” was likely to lead to “collision” with Maori.<sup>144</sup> Coates did, however, agree with Busby that it was desirable for a special commission to investigate the position in New Zealand.<sup>145</sup> Coates did acknowledge that some “departure from the strict letter of the law of nations” was warranted provided that it was “strictly limited to the necessity of the case” and was “specially directed to the promotion of the natives’ welfare”.<sup>146</sup>

—that welfare including the preservation of their national sovereignty—the introduction of government and laws suited to their circumstances—and their religious and moral improvement.

The suggestion made by Coates to meet the anomalous circumstances in New Zealand was that the British Government should treat with Maori for the cession of a small territory, preferably an island in the Bay of Islands, sufficient for the purposes of setting up a Court of Judicature for the purposes of administering

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<sup>141</sup> Ibid 14.

<sup>142</sup> Ibid 13.

<sup>143</sup> Coates to Glenelg, 3 January 1838, CO 209/3, 127a-130b; Coates to Glenelg, 1 January 1838, CO 209/3, 125a-b.

<sup>144</sup> Coates to Glenelg, 3 January 1838, CO 209/3, 127a-130b at 129a-b. See also Beecham *Latest Official Documents*, above n 102, 27-35.

<sup>145</sup> Coates to Glenelg, 3 January 1838, CO 209/3, 127a-130b at 130a.

<sup>146</sup> Ibid 127b-128a.

justice to British subjects.<sup>147</sup> This proposal recognised that the 1828 statute conferring jurisdiction on the New South Wales and Van Diemen's Land Supreme Courts had not succeeded for New Zealand: "[t]he tribunals are too distant to secure the ends of justice".<sup>148</sup> In this concession, further than the Society had gone in the past, it was a "sine qua non" that the arrangement be "strictly limited" to the object of controlling British subjects and that it was "absolutely exclusive of colonization in usual acceptance of the term, and of all gain or commercial speculation".<sup>149</sup> If this was done, and if the "entire administration" of the government of the territory was to be in the Crown, "the usual consequence of modern colonization—the fraudulent & unjust acquisition of territory, and the extermination of the natives—might be prevented".<sup>150</sup>

The deputation of the Church Missionary Society Committee met with Glenelg, Grey and Stephen on 4 January 1838. It appears that the position outlined in the pamphlet and in Coates's 3 January letter was put forward without modification. The deputation also urged Glenelg to delay a decision on a charter until the views of the Society's missionaries in New Zealand on the Association's plans had been received. Glenelg, for his part, indicated that the Government was seriously considering using the New Zealand Association as its agent to bring British settlement in New Zealand under control.<sup>151</sup>

The meeting was followed up by a letter from Coates in which he enclosed a letter written by William Garratt (who had been part of the deputation), developing the reasons why the option of using the New Zealand Association to bring the lawlessness of British subjects under control was inferior to the object being accomplished by the Crown directly. Whereas the setting up of a court of justice by the British Government would easily be explained to the native chiefs outside the limited British territory as being solely for their protection against the misconduct

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<sup>147</sup> Ibid 128a-b.

<sup>148</sup> Ibid 128a.

<sup>149</sup> Ibid 128a.

<sup>150</sup> Ibid 128a-b.

<sup>151</sup> Minutes of the Church Missionary Society Committee, 16 January 1838, CMS G/C1 vol 16, 627-628; and see above n 121.

of British subjects in their districts, the Association, with its conflicting private interests, would not so easily obtain confidence and co-operation of the chiefs and tribes of districts adjoining its purchased settlements.<sup>152</sup>

As a result of the intimation at the 4 January meeting that a charter appeared likely, the Church Missionary Society concentrated its hopes on Parliamentary intervention.<sup>153</sup> That was a course that seemed to be the only one left when, on 25 January, Grey, on behalf of Glenelg, advised the Society that a charter had been offered to the Association. Grey described the offer as having been made on conditions “framed with a due regard to the objections which were urged by the deputation to the original plan of the Association” (a disingenuous statement since the conditions had been framed before the deputation’s meeting, although the conditions may well have been arrived at on the basis of similar concerns held by Colonial Office officials).<sup>154</sup> Coates was not mollified. He wrote back saying that licensing such a body as the New Zealand Association was unacceptable under any conditions. There were no conditions that could “effectively guard against the evils to be apprehended both to the Society’s Mission and to the Natives from such a proceeding if it should be adopted”.<sup>155</sup>

The arguments against the colonisation proposed by the New Zealand Association were marshalled in a further pamphlet written by Coates for use by J.P. Plumptre, the Member of Parliament who was co-ordinating the Church Missionary Society’s

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<sup>152</sup> Coates to Glenelg, 9 January 1838, enclosing Garratt to Coates, 6 January 1838, CO 209/3, 145a-149b. This argument was later used by Coates to maintain that the only way to make the administration of justice effective if given to the Association was to transfer to them the sovereignty of the whole country, a solution that Coates doubted would be acceptable to the Government, Parliament or the country given its “flagrant injustice”. Dandeson Coates *The Present State of the New-Zealand Question Considered, in a letter to JP Plumptre, Esq, MP* (Richard Watts, London, 1838) [“Coates *Present State of the New-Zealand Question*”] 24. Garratt’s letter is reproduced in this pamphlet at 19-23. See also Beecham *Latest Official Documents*, above n 102, 21-22.

<sup>153</sup> Minutes of the Church Missionary Society Committee, 16 January 1838, CMS G/C1 vol 16, 628-629.

<sup>154</sup> Grey to Coates & Bunting, 25 January 1838, CO 209/3, 151a-b (reproduced in Coates *Present State of the New-Zealand Question*, above n 152, 6-7).

<sup>155</sup> Coates to Grey, 30 January 1838, CO 209/3, 153a-b. See also Coates *Present State of the New-Zealand Question*, above n 152, 7-8 (also reproducing the 30 January letter).

parliamentary attack.<sup>156</sup> It invoked the authority of the Aborigines Committee which had stipulated that any scheme for the colonisation of New Zealand should be scrutinized by Parliament. It criticised the Government for breaching this stricture.<sup>157</sup>

The Wesleyan Missionary Society, which until this time had left it to the Church Missionary Society to make the running, also weighed in with the publication by its secretary, the Reverend John Beecham, of a long pamphlet on “colonization in general” and the New Zealand Association’s proposals in particular. A copy of the pamphlet was sent by Beecham to Glenelg.<sup>158</sup> Beecham’s view was that the disastrous effect of European colonisation on aboriginal peoples was not accidental. It resulted from “wrong principles, or radical defects inherent in the system which has been pursued”.<sup>159</sup> The “evils” of colonisation arose from unjust usurpation of aboriginal lands and “the want of a comprehensive and adequate provision for the religious instruction of the aborigines”.<sup>160</sup> The usurpation of aboriginal lands was the “primary cause” of “all the injurious effects which the native population has experienced from our colonizing plans”.<sup>161</sup> Legislation treating aboriginal lands as “waste lands” he regarded as “a flagrant violation of the rules of essential and immutable justice”.<sup>162</sup> Even if no lands were obtained except by “fair and equitable purchase”, and natives were secured in “all their rights and privileges”, European colonisation would still be destructive for native peoples unless they had been brought, by religious instruction, “to recognise and act according to the rules by which civilized communities are regulated”.<sup>163</sup>

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<sup>156</sup> Coates *Present State of the New-Zealand Question*, above n 152.

<sup>157</sup> Ibid 9-11. See also *New Zealand Colonization: from the Christian Observer*, above n 65, 1.

<sup>158</sup> John Beecham *Colonization: Being Remarks on Colonization in General, with an examination of the proposals of the Association which has been formed for colonizing New Zealand* (Hatchards, London, 1838) [“Beecham Remarks on Colonization”]; Beecham to Glenelg, 26 January 1838, CO 209/3, 205a-b (enclosing pamphlet at 209a-242a).

<sup>159</sup> Beecham *Remarks on Colonization*, above n 158, 3.

<sup>160</sup> Ibid 4 & 12.

<sup>161</sup> Ibid 4.

<sup>162</sup> Ibid. Beecham does not indicate what legislation or colonies he is referring to here. The only colony he alludes to is South Australia. As is indicated in Chapter 5, it was by no means general British policy to treat aboriginal lands as unowned “waste lands”.

<sup>163</sup> Ibid 12.

## Chapter Nine: The Formation of British Policy

They have to acquire a taste for social order, and need to be instructed as to the benefits which result from it. It is necessary that they should be taught to respect, from principle, the rights of others, and to seek redress when their own rights are invaded, from the operation of the laws, and not by resorting to violence and arms. It is requisite that they should learn something of the decencies and proprieties of civilized life, before they can be mixed up with civilized, well-ordered society.

Beecham was sceptical of the “plausible pretensions” of the New Zealand Association to wish to avoid the past errors which had led to destruction of native races through “*mere* Colonization”.<sup>164</sup> But he argued that it was necessary to subject the plans of the Association to a “careful scrutiny”.<sup>165</sup> “The cardinal question” was that of land, “from which no benevolent professions must divert our attention”.<sup>166</sup> While the Association claimed that land would be purchased only with “full, free and perfectly-understanding consent and approval”, Beecham considered that standard unachievable because of Maori ignorance.<sup>167</sup> Indeed he pointed to the Association’s publications in which all calculations were formed upon the expectation that the price paid would be extremely low—“a mere nominal consideration”.<sup>168</sup> It was clear from the same publications that the Association envisaged that the whole of the Islands would ultimately be purchased. That itself suggested the Association would not fully communicate its plans to Maori. If it were to be the ultimate outcome, the Association’s colonisation would have exactly the same result as other colonising schemes had for other indigenous peoples.<sup>169</sup>

The proposals of the Association to “enlighten and elevate” Maori were also lacking.<sup>170</sup> They turned on the proposals for “exceptional laws” and “religious instruction” in the Association’s book *The British Colonization of New Zealand*. Beecham did not criticise Hawtrey’s proposals for modifying English law in its application to Maori, nor did he take issue with the emphasis on supporting the

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<sup>164</sup> Ibid 23.

<sup>165</sup> Ibid 26.

<sup>166</sup> Ibid 28.

<sup>167</sup> Ibid 28-33.

<sup>168</sup> Ibid 30-31.

<sup>169</sup> Ibid 31-33.

<sup>170</sup> Ibid 34.

position of the chiefs.<sup>171</sup> But he was highly critical of the paradox of reserving their lands for their protection and the proposals for “principal English families” to adopt Maori chiefly families and associated flights of fancy such as the provision of coats of arms and instruction in chivalry and heroic poetry.<sup>172</sup> He described it as

a reverie in which the classical student might benevolently and safely enough indulge on the banks of the Isis or the Cam; but calculated to fill all sober minds with alarm when they find it proposed by a public Company, as exhibiting something like a sketch or outline of their actual plan of proceeding.<sup>173</sup>

Beecham was concerned that, contrary to the findings of the Aborigines Committee that Christianity was critical to aboriginal advancement, the Association had not put religious instruction at the forefront of its proposals. It apparently intended to rely on the efforts of missionaries without following their views that colonisation would undermine the progress they were making.<sup>174</sup> A Protector would not be sufficient safeguard against collision between the races, particularly over land,<sup>175</sup> and the Association’s scheme for civilising Maori was “one of the most Quixotic which ever entered into the mind of man”.<sup>176</sup>

Beecham acknowledged the problems of lawlessness among British subjects in New Zealand but supported the more targeted suggestions of the Aborigines Committee and Church Missionary Society.<sup>177</sup> Colonisation, in his view, was an “extreme expedient” which could only be justified by “imperative necessary” if other measures had failed.<sup>178</sup>

The pamphleteering continued even after the New Zealand Association rejected the charter on offer. In February 1838, the Reverend Samuel Hinds, a member of the

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<sup>171</sup> Ibid 34-35.

<sup>172</sup> Ibid 35-38.

<sup>173</sup> Ibid 38.

<sup>174</sup> Ibid 42-52.

<sup>175</sup> Ibid 53-54.

<sup>176</sup> Ibid 63.

<sup>177</sup> Ibid 56-59. See also Beecham *Latest Official Documents*, above n 102.

<sup>178</sup> Beecham *Remarks on Colonization*, above n 158, 60-61.

committee of the Association, citing recent reports from New Zealand,<sup>179</sup> argued that the need for intervention was indisputable and was most appropriately undertaken under the Association's scheme.<sup>180</sup> Hinds argued that there was no inevitability that colonisation would be fatal to Maori because the Association's scheme had been designed to meet "the warnings of experience".<sup>181</sup> The colonisation of New Zealand could not be prevented. The choice was between "a regular Colony" and "irregular Colonization".<sup>182</sup> He defended the proposals to purchase the "fee-simple" of large tracts of land cheaply from Maori on the basis that Maori had an "immense overplus of land" not required for cultivation which was "nearly valueless": "[i]t is colonization that is to give the value to the land".<sup>183</sup>

Hinds distinguished between acquisition of sovereignty and property in land. In respect of sovereignty, he acknowledged that it would have to be acquired by agreement but thought there was no injustice in such acquisition because, although it might be a violation of the rights of "civilized men", it was for the ultimate benefit of Maori if they were to be "rear[ed] ... for civilization": "when it does not go beyond this, there is no more injustice in it, than there is in our dealings with children".<sup>184</sup> In this, Hinds queried whether it was realistic to regard aboriginal people as having sovereignty over "all continuous, but untenanted lands, over which, perhaps, they occasionally wander, but which they have never made theirs by cultivation, or by any of those acts whereby man impresses his title of sovereignty upon the earth which he has subdued". He pointed to the "counter-right" of "civilized society to spread its overflowing population, and to create for

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<sup>179</sup> Bourke's despatch to Glenelg dated 9 September 1837; Busby's despatch to Bourke dated 16 June 1837; Hobson's report to Bourke dated 8 August 1837; and the 1836–37 petition of New Zealand settlers to William IV.

<sup>180</sup> Samuel Hinds *The Latest Official Documents Relating to New Zealand; with introductory observations* (John W Paker, London, 1838) ["Hinds *The Latest Official Documents*"] 5-8. Hinds was the vicar of Yardley, Hertfordshire.

<sup>181</sup> Ibid 7.

<sup>182</sup> Ibid 8.

<sup>183</sup> Ibid 8-12.

<sup>184</sup> Ibid 11-13.

itself new sources of production and commerce”.<sup>185</sup> While these points were not pressed by Hinds to the point of denying Maori sovereignty, they counted against “a fastidious adherence to an abstract principle of right”.<sup>186</sup> He argued that the Association’s colonisation would be a boon, rather than a hindrance, to the work of the missionaries.<sup>187</sup>

In April 1838, Edward Marsh, the cousin and brother-in-law of Henry Williams, published *An Inquiry into the Equity, Practicability, and Expediency of the Proposal for Colonizing New Zealand*.<sup>188</sup> The pamphlet criticised the Association’s proposals, while admitting that “things cannot long remain as they are”.<sup>189</sup> Before colonisation could be put forward as a solution to New Zealand problems, attempts should be made to extend and strengthen the Residency system.<sup>190</sup> In New Zealand, “there is a great work now in progress ... for the conversion of the natives to Christianity”.<sup>191</sup> The only “effectual means of imparting the benefits of civilization” was, as the Aborigines Committee had recognised, “the propagation of Christianity, together with the preservation, for the time to come, of the civil rights of the natives”.<sup>192</sup> Marsh cited in support the “remarkable instance of the power of the Gospel” afforded by the Credit River Mississauga and St. Clair Chippewa Indians, providing long descriptions of the improvements in their condition following their conversion.<sup>193</sup> It could not be expected that a trading company, “actuated by a desire of gain”, would put the improvement of Maori first; “[it will be] at best but a secondary consideration; and even respect for their

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<sup>185</sup> Ibid 12.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid 13-15.

<sup>188</sup> Marsh was vicar of Aylesford, Kent, and a member of the Church Missionary Society. Robin Fisher “Williams, Henry (1792–1867)” *Dictionary of New Zealand Biography*.

<sup>189</sup> Edward Marsh *An Inquiry into the Equity, Practicability, and Expediency of the Proposal for Colonizing New Zealand* (L&G Seeley, London, 1838) 10.

<sup>190</sup> Ibid 11.

<sup>191</sup> Ibid 13.

<sup>192</sup> Ibid 14.

<sup>193</sup> Ibid 16-21. As to the Credit River Mississauga, see Chapter 3, text accompanying ns 207-209; and Chapter 4, text accompanying ns 98-102.

just rights will (it is to be feared) too often prove, after the first novelty of the scheme has subsided, a feeble principle”.<sup>194</sup>

Although the efforts of the missionary societies did not lead to the collapse of the charter negotiations (it was the terms of the offer that were unacceptable to the Association), their known opposition may have stiffened the Government’s resolve to hold to the conditions of the offer. Adams suggests that the Colonial Office is likely to have regarded the missionary society suggestions as unworldly because it now appreciated that New Zealand conditions “demanded a more comprehensive and far-reaching intervention”.<sup>195</sup> But, as will be further shown, in the evolution of its own policies to 1840, the Colonial Office remained largely in step with the general thinking expressed by the missionary societies, even if differing on matters of detail. It never embraced colonisation (although it was forced to deal with the reality of settlement). It regarded the justification for intervention (the disruption of Maori society by contact with Europeans unconstrained by law) as limiting the scope of intervention. It insisted on Government control of British administration in New Zealand (as can be seen even in the form of the charter offered to the Association). It saw it as essential to provide the missionaries with space to achieve the preservation and advancement of Maori through Christianisation. And throughout, it accorded priority to Maori interests and rights, including to the sovereignty of their territories (until ceded), the property in their lands, and the preservation of their society.

### **Political manoeuvring, 1838**

Although with the offer of a charter to the New Zealand Association in December 1837, the Colonial Office had come to the point of acceptance that British intervention in New Zealand could no longer be restricted to the provision of a Resident, it did not decide what step to take until December 1838 when the decision was taken to appoint a Consul. Initially matters drifted while the

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<sup>194</sup> Ibid 21.

<sup>195</sup> Adams *Fatal Necessity*, above n 3, 114-115. See also Temple *The Wakefields*, above n 44, 199-200.

Government allowed the Association to pursue its Bill through Parliament. The Bill was not introduced until June. Before then Glenelg's handling of the New Zealand question was one of a number of criticisms made of his performance as Secretary of State for the Colonies in an unsuccessful no confidence motion brought in the House of Commons by Sir William Molesworth, a committee member of the New Zealand Association. In a speech eulogising colonisation, Molesworth described Glenelg as indecisive and supine.<sup>196</sup> The "most striking example" of Glenelg's inadequacy was said by Molesworth to be New Zealand where, despite the "urgent necessity" of action, Glenelg seemed content to "sleep" through the problem "until the native race shall have disappeared altogether".<sup>197</sup>

It seems that the New Zealand Association was not confident about the reception its Bill would get in Parliament. On 30 March, the Earl of Devon moved the House of Lords for the appointment of a select committee to inquire into "the present state of the Islands of New Zealand, and the expediency of regulating the settlements of British subjects therein". Although Devon thought it unnecessary to enlarge upon the reasons for the motion (expressing the view that its desirability would be obvious to the House), he was challenged by the Duke of Richmond who inquired whether the House was being used for the purposes of a private company. Devon, in response, explained that, although it had been proposed to bring a Bill for the settlement of New Zealand before Parliament, the "propriety" of that measure depended on the "state of facts" in New Zealand, which should be investigated by the Committee.

Glenelg, in speaking on the motion, also expressed scarcely veiled scepticism about the motives behind those seeking the setting up of a select committee. But he and Richmond, taking Devon at his word, expressed the view that an open-minded inquiry would be beneficial. Glenelg said that the introduction of a Bill authorising settlement on terms that the Government had already rejected would be "useless", but that, if as a result of the select committee inquiry, "a bill were introduced and

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<sup>196</sup> William Molesworth (6 March 1838) 41 GBPD HC cc 476-512 at 491.

<sup>197</sup> Ibid 495-496.

carried, the effect of which would be to protect the natives of the country, and the British settlers consistently with the interests of the natives, an act of humanity and justice would be done reflecting the highest praise on the policy of this country”.<sup>198</sup>

If Devon had hoped to establish a committee friendly to the aims of the New Zealand Association, he would have been disappointed. During the debate, he felt obliged to add Richmond to the list of those proposed for the committee, and the final composition of the committee included, in addition to Richmond, Glenelg, the Earl of Chichester (the President of the Church Missionary Society) and three bishops.<sup>199</sup> Dandeson Coates, who began lobbying committee members almost immediately, was confident, even before hearings began, that the Select Committee would be supportive of the work of the missionaries and protective of Maori.<sup>200</sup>

The Select Committee heard evidence from 18 witnesses over nine days between 3 April and 21 May 1838.<sup>201</sup> Only nine of the witnesses had visited New Zealand. Of these, only three, including one Maori witness, had lived in the country for any appreciable time. They were John Flatt (who was attached as catechist to the Church Missionary Society’s Matamata mission for two years), Joel Polack (a trader who had spent six years living in the Hokianga and Bay of Islands), and “Nyati” (a Maori from Cloudy Bay who had joined a French whaling ship and at

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<sup>198</sup> Glenelg (30 March 1838) 42 GBPD HL cc 152-155. Compare Adams *Fatal Necessity*, above n 3, 118: “Glenelg said that ... a Bill which protected Maoris and British settlers alike would be welcome.”

<sup>199</sup> The 21 members of the Committee were: Viscount Canning (future governor-general and viceroy of India), the Bishops of London, Lincoln and Hereford, Lord Glenelg, the Marquess of Lansdowne (the lord president of the council), the Duke of Richmond, the Duke of Wellington (field marshal and former prime minister), the Earl of Devon, the Earl of Hillsborough, Lord Dacre, Lord Ellenborough (former president of the Board of Control and future governor-general of India), Lord Colchester, Lord Brougham and Vaux (former lord chancellor), Lord Ashburton (merchant and banker, former president of the Board of Trade, uncle to Francis Baring and father of William Baring, both committeemen of the New Zealand Association), the Earl of Carnarvon, the Earl of Wicklow, the Earl of Chichester, the Earl of Durham (president of the New Zealand Association, and recently-appointed high commissioner and governor-in-chief of British North America), the Earl of Ripon (formerly Viscount Goderich, former prime minister and colonial secretary, and future president of the Board of Trade and Board of Control), Viscount Gordon of Aberdeen (former foreign secretary and colonial secretary and future prime minister). *Journals of the House of Lords*, 30 March 1838, vol 70, 217-218.

<sup>200</sup> See Adams *Fatal Necessity*, above n 3, 118-119.

<sup>201</sup> GBPP 1837-38 (680) XXI.327 at iv. A nineteenth witness, Octavius Brown, appeared only to confirm the authorship of a letter, and gave no evidence of substance.

the time of giving evidence had been in England for 9 months living with Wakefield).<sup>202</sup> The other visitors were John Nicholas and the Reverend Frederick Wilkinson (both of whom visited New Zealand briefly in the company of Samuel Marsden in, respectively, 1814-1815 and 1837), John Watkins and John Tawell (two surgeons who visited on trading ships in 1833 and 1837 respectively), Joseph Montefiore (a trader who visited in 1830 on the *Elizabeth*), and Captain Robert Fitzroy (who visited New Zealand in command of HMS *Beagle* in 1835). The remaining witnesses had no first-hand knowledge of New Zealand. They included four officials of the New Zealand Association, Charles Enderby, the Reverend Samuel Hinds, Francis Baring, and Lord Petre, as well as George Evans, a barrister who was proposing to emigrate with the Association. The missionary societies gave evidence through Coates and Beecham.<sup>203</sup> Although unable themselves to give first-hand accounts of New Zealand conditions, they were permitted to read into the record much missionary correspondence about conditions in New Zealand.<sup>204</sup> An official, Frederick Elliott, also gave evidence about state-assisted emigration to other colonies.

As Dandeson Coates was later to say of the evidence of the witnesses, it was contradictory and, in large part, self-evidently unreliable. The Church Missionary Society used this to support its calls for a commission to investigate the circumstances of European settlement in New Zealand, including the basis upon which Europeans held land in New Zealand, whether Maori retained interests in

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<sup>202</sup> “Nyati” was Te Whaiti (1812?-1842) of Ngati Toa. See Paul Meredith “Who was ‘Nyati’?” (September 2004) 8 Te Matahauariki Newsletter 2; Temple *The Wakefields*, above n 44, 196-197; and Burns *Fatal Success*, above n 23, 50, 85, 90 & 113.

<sup>203</sup> William Garratt, who had been a member of the Committee of the Church Missionary Society’s 4 January 1838 deputation to Glenelg, also gave evidence in relation to his 6 January 1838 proposal for the Government to establish a court of justice in New Zealand (see text accompanying n 152 above). Garratt now suggested that an “even better scheme” would be for a “Species of Assize Court” (with criminal jurisdiction only) to visit New Zealand periodically from Sydney. The court would not have jurisdiction over Maori. It would be a court “not interfering with their own Rights and their own Privileges, but having only to deal with British Subjects”. If, however, the court proved effective “for Criminal Purposes” and Maori “were disposed to adopt any thing like a System of Law”, Garratt considered that the system could be extended. But for his part, Garratt said he “should be sorry to see any Measure to interfere with their national Independence, or forcing upon them a System of English Law”. GBPP 1837-38 (680) XXI.327 at 277-279.

<sup>204</sup> GBPP 1837-38 (680) XXI.327 at 180-275 & 286-315 (Coates and Beecham).

lands “purchased” by Europeans, whether Maori law could provide the basis of a code for application to Maori and non-Maori, and Maori attitudes towards British efforts to bring European malefactors to justice.<sup>205</sup>

The Committee made no formal recommendation when it reported on 8 June beyond indicating that whether New Zealand should be added to Britain’s colonial possessions was a matter of policy for the Government to develop. In that development of policy it expressed an expectation of support for “the Exertions which have already beneficially effected the rapid Advancement of the religious and social Condition of the Aborigines of New Zealand” as affording “the best present Hopes for their future Progress in Civilization”.<sup>206</sup>

Perhaps because the Committee did not make any more significant report, its work has been generally neglected by historians.<sup>207</sup> It is to be hoped that more systematic consideration of the Committee and the evidence it received will yet be attempted. The Committee was particularly concerned to understand the extent of the Maori population (whether in decline and, if so, what its causes were), its cultivation of land and the availability and suitability of surplus land for the purposes of settlement (conveying the impression that the settlements in New Zealand were expected to be based upon arable farming—rather than pastoral farming, as in Australia—in addition to whaling and timber and flax trades<sup>208</sup>).

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<sup>205</sup> Coates to Glenelg, 23 July 1838, CO 209/3, 163a-170b at 168b-169b.

<sup>206</sup> *Journals of the House of Lords*, 8 June 1838, vol 70, 412. The Committee’s report was printed in the *Journals of the House of Lords* (vol 70, Appendix no 2, 65-204) and published in accordance with a direction of the House of Commons given on 8 August 1838. It is probably this direction, and the notation on the report that it was “brought from the Lords 7<sup>th</sup> August 1838”, that has led historians (for example Adams *Fatal Necessity*, above n 3, 123) to incorrectly assume that the Committee reported in August 1838.

<sup>207</sup> See, for example, Adams *Fatal Necessity*, above n 3, 118 & 123-124; Loveridge “Knot of a Thousand Difficulties”, above n 45, 122-123; Orange *The Treaty of Waitangi*, above n 97, 26; AH McIntock *Crown Colony Government in New Zealand* (RE Owen, Government Printer, Wellington, 1958) 40-41. But see Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) [“Hickford *Lords of the Land*”] 76-80.

<sup>208</sup> See, for example, the evidence of Montefiore (GBPP 1837-38 (680) XXI.327 at 59-60 & 64); Enderby (ibid 71-72); Baring (ibid 152-153); Fitzroy (ibid 162-163 & 174—although see 336 agreeing that livestock would probably do well in the inland parts of New Zealand as “the Country abounds in Pasture”); and Evans (ibid 320). Montefiore considered that New

## Chapter Nine: The Formation of British Policy

Witnesses were closely questioned as to Maori society and character. Maori perception of rights of sovereignty, the role of chiefs, the prevalence of slavery, and the regulation of Maori society by law or custom were explored with witnesses. In relation to Maori character, the Committee was particularly interested in the work of the missionaries and Maori receptiveness to Christianity. Particular emphasis is to be seen in attempts to gain insight into Maori understanding and practice in relation to property and understanding of and likely attitudes to British assumption of sovereignty. In relation to property in land, questions concerned the nature of ownership interests, methods of alienation, and whether Maori regarded uncultivated lands as property or “waste” lands. Witnesses were asked to express opinions on the attitude likely to be taken by Maori to British exercise of sovereignty (for example, especially in relation to any prohibition of war, but also more generally in relation to the acceptability of laws impacting on their freedom of conduct more generally). Of interest too was likely Maori attitude to further British settlement. In addition to these topics relating to Maori attitudes, the Committee was also concerned to understand the character of the European population, the extent and manner of European land purchases, the fairness of such purchases and whether they should be investigated and/or restrictions placed upon further Maori land sales, and the impact of missionary effort upon Maori (not only

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Zealand’s soil and climate was adapted for growing “the finest Wheat in the World”. New South Wales, on the other hand, was “not a Wheat Country”. Montefiore had in 1836 had a Government contract to import wheat from India. He stated that New South Wales “has never been able to produce sufficient Wheat to supply the Inhabitants, and it never will”. It was “a very fine Country, but it is quite a pastoral one”; whereas New Zealand, on account of its soil and climate, “must become an Agricultural Country”. New South Wales would “contain a large Population; but it will be much dispersed”. In this connection, see also the series of articles on the “Commercial Prospects of New Zealand” in *The New Zealand Journal*, London, 7 March 1840 at 25-26 (“Among the productive resources of New Zealand, the first which demands our notice is what has been called New Zealand flax”); 21 March 1840 at 37-38 (“We have adduced abundant proof ... that New Zealand is destined to become the granary of Australasia”); 4 April 1840 at 50-51 (“The climate of New Zealand at once points it out as the future seat of a considerable trade in the production of Southern Europe—the produce of the vine, the olive, of the silk-worm, and, perhaps even the orange”); 20 June 1840 at 138-139 (“[New Zealand will become] the timber yard, so to speak, of the Australasian Colonies”); and 4 July 1840 at 152-153 (“New Zealand will be the seat of the South Sea whale-fishery ... [and] the commercial marine of New Zealand will probably, at no very distant day, cover the Southern Seas”).

in relation to the acceptance of Christianity, but also in relation to literacy, agricultural instruction, peacemaking and through missionary land purchases).

For present purposes, however, it is sufficient to point to some of the evidence given which bears on understanding of the topics covered in Normanby's Instructions to Hobson, especially in relation to Maori sovereignty, Maori property in uncultivated lands, and the continuance of Maori political systems under British sovereignty. It is also interesting to highlight some of the questions asked of witnesses. The questions are often more illuminating than the answers received in understanding the options being contemplated for British intervention. Unfortunately, the report of the proceedings of the Committee does not identify which of the members of the committee were present at each hearing. Nor does it identify the questioners (whose questions may indeed have been put through the chair). Chairing of the Committee was shared by the Earl of Devon and the Duke of Richmond.<sup>209</sup>

Maori sovereignty of New Zealand was accepted or appears to have been assumed by all witnesses to the Committee with the exception of those from the Association. The Association's witnesses, while careful to point out that their Bill, in order "not to offend any Scruples", did not advance a claim to British sovereignty of New Zealand (which would be purchased "as well as of Fee Simple of the Land"), nevertheless maintained that sovereignty belonged to the British Crown and not to the chiefs.<sup>210</sup> Samuel Hinds stated his view (in expansion of opinions expressed in his February 1838 pamphlet<sup>211</sup>) that "civilized People have a Right, an inherent Right, over Countries that have not been subject to Civilization, whether those Countries are uninhabited, or partially inhabited by Savages, who are never likely to cultivate the Country". The Maori population was small in comparison to the size of the country, and there was not "the least chance of their

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<sup>209</sup> The Earl of Devon was in the chair on 3, 6 and 10 April and 14, 15, 18 and 21 May. The Duke of Richmond chaired the Committee on 1 and 11 May.

<sup>210</sup> GBPP 1837-38 (680) XXI.327 at 129-130, 141, 146 & 154 (Hinds and Baring).

<sup>211</sup> See text accompanying n 185 above. See also Patrick Matthew *Emigration Fields: North America, the Cape, Australia, and New Zealand* (Adam & Charles Black, Edinburgh, 1839) 127-128, 159 & 173-174.

ever becoming Cultivators or Sovereigns of the Soil”.<sup>212</sup> Accordingly, Hinds held it to be

no Infringement of any natural Rights to claim the Sovereignty of the Island; and this is a Claim which, until lately, would never have been questioned. There has been often a Question as to the Mode in which Sovereign Rights over Savage Countries should be distributed among civilized People, but it has been a Question between one civilized Country and another. Formerly the Pope used to claim the Disposal of Sovereignty; subsequently it has been more conveniently settled by allowing the Priority of Claim of the first Discoverers,—a Course as convenient, probably, as can be devised. Within the last few Years, however, the Justice of this Claim has been questioned; and it has been asserted that Savages as well as civilized Men have Sovereign Rights. I do not myself think that they have ...<sup>213</sup>

Francis Baring told the Committee that his “own Private Opinion” was that Queen Victoria was the Sovereign of New Zealand but that “public Opinion would not allow me to maintain that”.<sup>214</sup> George Evans grounded British sovereignty on Cook’s discovery and Governor Macquarie’s 1814 “proclamation”, and dismissed the 1835 Declaration of Independence as:<sup>215</sup>

not, in our European Sense of the Word, a Declaration of Independence or Sovereignty, but merely of Chieftainship of those particular Individuals who placed themselves under the Protection of the Sovereign of Great Britain.

The chiefs were, he said, “a Sort of Feudatories of the Crown; and ... themselves understand it in that Way”.<sup>216</sup>

It is a striking aspect of the evidence given to the Select Committee that not one witness suggested that British subjects were legally unable to acquire land in New Zealand from Maori, or that Maori did not own the land in the first place. Additionally, no witness (not even Hinds) sought to argue that Maori ownership of

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<sup>212</sup> GBPP 1837-38 (680) XXI.327 at 129 (Hinds). Evidence of other witnesses to the Committee established that Maori were cultivators.

<sup>213</sup> GBPP 1837-38 (680) XXI.327 at 129.

<sup>214</sup> Ibid 154.

<sup>215</sup> Ibid 320.

<sup>216</sup> Ibid.

land was confined to lands occupied and under cultivation. Maori did not consider uncultivated land “as waste or unappropriated Land” but looked upon “the whole ... as Property”.<sup>217</sup> The lands they sold were the lands they were not occupying, including kauri forests which Europeans placed a high value on.<sup>218</sup> There were “[no] Lands which are unappropriated”—“every Acre of Land in those Islands is the property of one or another Tribe”.<sup>219</sup>

I have heard it asserted, that there is a great deal of waste Land which anybody may make Use of; but from what I saw myself, I should say that every Acre of Land is owned, and that there is much Tenacity with respect to a particular Boundary.

As to likely Maori attitude to British exercise of sovereignty and as to the form that British intervention might take, the opinion of Joseph Montefiore was that Maori would be “very willing” to cede sovereignty “provided they retained a Rank and Position in the Island, and were left sufficient Land for such Purposes as they might require”.<sup>220</sup> In answer to the question whether Maori “[w]ould ... be satisfied with a Law which should prevent their going to war without the Governor’s leave”, he considered that it was doubtful that they would, but noted that in Australia “the Natives go to war, but the Government never interferes with them; we think it very bad Policy to do so”.<sup>221</sup> He agreed, however, that telling the chiefs that “their condition” would be that of “subordinate chiefs” after a cession of sovereignty, would be sufficient inducement for them to “give up their Independence”.<sup>222</sup> Another witness, George Evans, suggested that a Board of Commissioners could be authorised by Act of Parliament to treat with the chiefs for a cession of sovereignty and of property in land on terms such as had been agreed for Singapore with the Sultan of Johor. By that treaty, “the Sovereignty was purchased for a Sum of Money, certain Reserves of Land, however, having been

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<sup>217</sup> GBPP 1837-38 (680) XXI.327 at 10 (Nicholas).

<sup>218</sup> Ibid 25-26 (Watkins) & 149 (Baring).

<sup>219</sup> Ibid 168 & 178 (Fitzroy).

<sup>220</sup> Ibid 60.

<sup>221</sup> Ibid 64.

<sup>222</sup> Ibid 65.

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made for some of the Malay Proprietors, and exceptional Laws, as we term them, established, out of Deference to the native Customs and Prejudices”.<sup>223</sup>

A further interesting insight into British understanding, first, of the impact of British assumption of sovereignty on indigenous political systems and, secondly, of aboriginal rights of property in land, is given in the following exchange between the Committee (presumably the Chair, the Duke of Richmond) and Robert Fitzroy.<sup>224</sup>

[*Duke of Richmond*] Your Plan would suppose an Assumption of paramount Sovereignty on the Part of Great Britain, subject to leaving the Natives Masters for their own Government, and leaving them Masters of their Property in the Land?

[*Fitzroy*]. Entirely so.

[*Duke of Richmond*] It would assume Sovereignty as towards other Countries?

[*Fitzroy*] That would be precisely the Distinction I should wish to make, if it were possible, to ward off Foreign Interference, but to desist from interfering ourselves.

[*Duke of Richmond*] Was it not upon that Principle the whole of our American Colonies were originally established, the System of the Assumption of paramount Authority, but leaving the Tribes to the Government of their own Concerns and the Property in their Lands?

[*Fitzroy*] I was not aware of it; I supposed that in our American Colonies the Land had been considered bona fide the Property of this Country from the Time of its Purchase from the Natives.

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<sup>223</sup> Ibid 320. Evans gives the date of this treaty as 1825 but presumably it is the 1823 treaty discussed in Chapter 4, text accompanying n 260. The reference to a provision in the treaty for “exceptional laws” would seem to be a reference to article 6 which had provided that: “In all cases regarded the ceremonies of religion, and marriages, and the rules of inheritance, the laws and customs of the Malays will be respected, where they shall not be contrary to reason, justice, or humanity. In all other cases the laws of the British authority will be enforced with due consideration to the usages and habits of the people.” This treaty was also referred to by Hinds in his evidence. Ibid 130.

<sup>224</sup> Ibid 175-176. Fitzroy further stated: “If Colonization takes place in the Island under any other Circumstances than those under which it has taken place hitherto, that of acknowledging the Authority of the Chiefs as the paramount Authority, if any other System of Colonization should take place it appears to me that it will be necessary for the British Government to protect the Property of the Natives in some Manner, and to protect even the Chiefs themselves.” Ibid 337.

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[*Richmond*] Is it not the Case even now, that in those States no Land is taken from a Tribe without Barter?

[*Fitzroy*] But then the Chiefs give up their Sovereign Authority over it.

[*Richmond*] The Principle there, is, that the Tribe cannot deal with a White Man; but the State has a Right of Pre-emption. No White Man can deal with an Indian Tribe; they are Masters of their own Property within themselves, and it cannot be taken from them?

[*Fitzroy*] In the Case of our North American Colonies from the Time of their Purchase from the Natives, I had understood that they became the Property bona fide of the Crown.

[*Richmond*] William Penn took the Proprietorship and Ownership of the Country, but he did not take it without a Bargain with the Tribes; receiving from the Crown the Right that no other Person should bargain with the Tribes but himself?

[*Fitzroy*] Some such Plan would answer, probably, in New Zealand.

[*Richmond*] Is not the Case in Australia, the first Case of an English Colony where the Land has been taken without any Bargain with the Natives?

[*Fitzroy*] I believe not. In Newfoundland, in Guiana, when Sir Walter Raleigh first established himself there, no Bargain was made with the Natives.

It must have become apparent to the New Zealand Association that the Select Committee was unlikely to produce a Report that would advance its case. While the Committee was still hearing evidence, Glenelg was urged by Daniel O'Connell, the Irish nationalist leader on whose support the Whig majority depended, to permit the Association's scheme to go forward.<sup>225</sup> At the conclusion of the hearings and before the Committee reported, the Association wrote to Glenelg urging him to drop the subscribed capital condition for a charter.<sup>226</sup> Those representations were rejected by the Cabinet, which confirmed the position taken by Glenelg in February when the charter offer had been withdrawn.<sup>227</sup> With

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<sup>225</sup> O'Connell to Glenelg, 18 May 1838, CO 209/3, 502a-503b. See reply at CO 209/3, 504a-b.

<sup>226</sup> Baring to Glenelg, 28 May 1838, CO 209/3, 284a-285a.

<sup>227</sup> Colonial Office to Baring, 1 June 1838, CO 209/3, 286a-287a. See also Gairdner briefing paper for Normanby, 28 February 1839, CO 209/4, 316a-325a at 322a-b.

nowhere else to go, and without waiting for the Select Committee report, the Association took its Bill to Parliament, which was introduced on 1 June.<sup>228</sup>

The Bill was an expansion of the “Abstract” produced by the Association in November 1837 with adaptations to meet some of the Colonial Office comments on the earlier draft. Governmental powers could be delegated by the named “Commissioners” to a “Council of Government” “in and for” the settlements (perhaps going some way to meet the Colonial Office objection that British settlements in New Zealand could not be governed from England).<sup>229</sup> The original proposal for the taking of Maori evidence, which the Colonial Office had flagged as a matter of difficulty requiring further thought, was dropped from the new Bill. Perhaps to meet Colonial Office concerns about the earlier proposals relating to “the retrospective rules as to the sale or cultivation of lands already acquired”, the Bill made more elaborate provision for the treatment of lands acquired before the establishment of British sovereignty.<sup>230</sup>

Other concerns raised by the Colonial Office, however, received scant attention (a matter later remarked on in the debates in the House<sup>231</sup>). Although the Protector of Natives was to be appointed directly by the Crown, Colonial Office criticism of the lack of Crown supervision of the appointment of other senior officials was met, not with the veto it had suggested, but with more limited rights of veto in respect only of the appointment of new Commissioners and the proposed Commissioner for Native Titles.<sup>232</sup> The protections proposed by the Colonial Office for contracts with Maori for sale of land (requiring sale only through officers nominated by the Crown and the Crown ability to set aside any such contract), were watered down in the Bill to a requirement that the Protector was to be a “subscribing witness” and that contracts would be void only if entered into without the free consent of

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<sup>228</sup> “A Bill for the Provisional Government of British Settlements in the Islands of New Zealand” GBPP 1837-38 (443) VI.695 [“Bill for the Provisional Government of British Settlements”]. A copy of the Bill appears on the Colonial Office file at CO 209/4, 731a-743b.

<sup>229</sup> Ibid cl 16.

<sup>230</sup> See text accompanying ns 246-247 below.

<sup>231</sup> See text accompanying n 252 below.

<sup>232</sup> “Bill for the Provisional Government of British Settlements”, above n 228, cls 1, 25 & 34.

Maori.<sup>233</sup> The provisions made in the Bill for the application of revenues to Maori from the sale of land were not generous (one-twentieth of the revenues were to be applied for the benefit and improvement of the native inhabitants in the territories acquired, whereas three-eighths of the revenues were to be applied to an emigration fund<sup>234</sup>).<sup>235</sup> The capital threshold of £100,000 under the Bill was to be obtained by sale of lands or by loans.<sup>236</sup>

The preamble to the Bill recited its twin purposes as being the promotion of colonisation and the protection of Maori who were at risk of being “shortly exterminated” by the evils of contact with British subjects, unrestricted by law. To that end it sought powers to enable “just and equitable treaties” for the “purchase and session [sic] of lands” and the establishment of law and government. Law and government were necessary “not only for the prevention of the many evils arising as aforesaid, from the want thereof” but also in order that Maori

may, for the future, be preserved from injury and wrong, may be instructed in the knowledge of religion, and the useful arts, and accustomed to the manners of social life, whereby, under the favour of Providence, colonization will be the means of diffusing amongst them the blessings of Christianity, and promoting their civilization and happiness.

Under the Bill, the Commissioners were empowered to enter into “treaties or contracts” with “any chiefs or inhabitants of the native race, or other competent persons” for the cession to the Queen of “any sovereign rights, territories, lands or hereditaments, within the said Islands, or any of them, or appurtenant thereto”.<sup>237</sup> Such treaties were not valid unless “made with the free will and full consent” of Maori, without “force or intimidation, fraud, deceit or concealment”. Every such treaty or contract was to “be made and ratified publicly, and with all the forms and

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<sup>233</sup> Ibid cls 12 & 25.

<sup>234</sup> One-fifth of the revenues were to be applied to erecting schools and churches from which Maori inhabitants of the territories were entitled to benefit.

<sup>235</sup> “Bill for the Provisional Government of British Settlements”, above n 228, cls 28 & 40.

<sup>236</sup> Ibid cl 46.

<sup>237</sup> Ibid cl 10.

solemnities customary among the native inhabitants, and in the presence of the Protector of the native inhabitants”.<sup>238</sup>

Consistently with the Association’s earlier proposals, the Bill maintained the position that any Maori within the territories ceded would “enjoy the same rights and privileges ... as Her Majesty’s free subjects in the most favoured British colony or possession”.<sup>239</sup> Within the territories ceded, slaves would be freed, a condition that the Commissioners were required “full and particularly” to make known to the chiefs and others on the making of each treaty.<sup>240</sup> Within the territory, the “law of England” would apply subject to local conditions and subject to “such temporary and exceptional laws” as the Commissioners adopted for Maori as adapted to their “uncivilized state”.<sup>241</sup> The Commissioners’ treaty-making authority was subject to the specific proviso that “nothing herein contained shall prejudice or affect the rights of any chiefs or others of the native race in the said Islands, which shall not be freely and voluntarily ceded in pursuance of this Act”.<sup>242</sup>

The Bill provided also for “treaties or contracts” with “any native chiefs or others” for the exercise by the Commissioners of criminal jurisdiction and the regulation and settlement of “other matters affecting the relations between ... British subjects and the native inhabitants” in territories “whereof the sovereignty shall not have been ceded as aforesaid”.<sup>243</sup>

The Commissioners were empowered to set apart and reserve on trust for the use and benefit of the “former native owners” land to the value of that on which an equivalent number of British labourers would be settled as “the number of native inhabitants who shall, by such cession, have been introduced into and become

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<sup>238</sup> Ibid cl 12.

<sup>239</sup> Ibid cl 10. Within the territories, Maori were “entitled to share equally with such British subjects in the benefit of all public provisions made for the advantage or enjoyment of the inhabitants of the said settlements”. Ibid cl 13.

<sup>240</sup> Ibid cl 10.

<sup>241</sup> Ibid cls 10 & 13.

<sup>242</sup> Ibid cl 10.

<sup>243</sup> Ibid cl 11. Wakefield and Ward’s *The British Colonization of New Zealand* had suggested this extraterritorial jurisdiction but no provision for it had been made in the “Abstract of an Act”.

inhabitants of such British settlements”. This provision was to enable the “former native owners” to “preserve in civilized life a relative superiority of condition over the lower orders of inhabitants of the native race”.<sup>244</sup>

The Bill provided that, after proclamation of the Act in New Zealand, purchases by individuals from Maori were to be void “other than such titles or claims as shall be acquired or derived by or through the said Commissioners, according to the provisions of this Act”, thus effectively giving the Commissioners exclusive power to treat with Maori for the purchase of land.<sup>245</sup> The Bill also provided that pre-proclamation purchases in any part of New Zealand were to be investigated by a “Commissioner for Native Titles” to determine whether the purchases were “bona fide”. Any Maori interested was entitled to be heard through the Protector. Maori and purchasers had rights of appeal to “some one of the Courts of Justice in the said settlements”.<sup>246</sup> If lands were found to have been purchased “bona fide”, the purchaser had three options under the Bill. He could continue to hold the land under Maori sovereignty. He could sell the land to the Commissioners but, in that case, the land would not become British territory until the Commissioners had obtained a cession of sovereignty by treaty. Or he could “convert” the land into British territories, including in part or over time, but only with the express consent through treaty of the “native chiefs or authorities”. If that option were taken, the purchaser was required to pay the going price for public lands to the Commissioners. In cases where sovereignty of the lands changed, the Commissioners were required to reserve the same proportion for Maori as in the case of direct sale by Maori.<sup>247</sup>

Of particular interest for the themes of this thesis, is the clear distinction in the Bill between Maori sovereignty and property in land, and the acceptance that “bona fide” purchasers could hold property under Maori sovereignty. Unlike the “Abstract”, the Bill made no claim of existing sovereign rights in relation to any

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<sup>244</sup> Ibid cl 29.

<sup>245</sup> Ibid cl 33.

<sup>246</sup> Ibid cl 34.

<sup>247</sup> Ibid cls 35-36

part of New Zealand. It treated all land in New Zealand as subject to the sovereignty, and as property, of Maori; the Commissioners had to enter into treaties for sovereignty and had to purchase all land for resale. Indeed the terms in which Maori property interests were described in the Bill (“territories, lands or hereditaments”) are the same as those used of the property interests acquired by the Commissioners from the 1825 Company.<sup>248</sup> There is no indication in the Bill to support the notion that Maori property in land depended on occupation or cultivation. Indeed the impression is conveyed by the preamble to the Bill that purchases will be from the “waste lands” owned by Maori.

The Association’s Bill was rejected by the House of Commons at a vote on its second reading on 20 June, by a division of 92 to 32 votes.<sup>249</sup> 13 Members of Parliament spoke in the debate on the Bill, five for and eight against it. The speakers for the Bill were all committeemen of the New Zealand Association. The speakers against the Bill included Sir George Grey, Viscount Howick and Sir Robert Inglis of the Church Missionary Society. It was objected that, New Zealand being an independent country, Parliament had no right to legislate to give a private company the right to purchase and then to exercise rights of sovereignty there.<sup>250</sup> It was said that any British interference in New Zealand should be undertaken by the Government.<sup>251</sup> It was pointed out that the Bill did not overcome the concerns that had prevented the Association from receiving the Charter. There was risk to emigrants in the undercapitalisation of the venture. There was no security for Maori in relation to “the observance of justice” towards them. The powers conferred on the Commissioners were too extensive.<sup>252</sup> In addition, Grey and

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<sup>248</sup> Ibid cl 43.

<sup>249</sup> 43 GBPD HC cc 871-882 at 882.

<sup>250</sup> For example, Sir Robert Inglis stated that: “We had had no right to colonize New Zealand by an act of the Imperial Legislature, than we had to colonize France. New Zealand was an independent state. We had already diplomatic relations with that country, and our cruisers had orders to respect its flag. The real point at issue was this—whether by a Bill not brought in by her Majesty’s Government any body of private gentleman should be permitted, first to purchase and exercise the rights of sovereignty in a foreign country, and then to form laws at their pleasure for the country so acquired.” Ibid 872.

<sup>251</sup> See particularly the speech of William Gladstone. Ibid 873-874. (Note Gladstone was of the opinion that the Government did need to take some action in New Zealand.)

<sup>252</sup> See particularly the speech of Viscount Howick. Ibid 876-880.

Howick disputed that the Government had ever held out an assurance to the Association that it would support its scheme, as the Members of Parliament supporting the Bill claimed.<sup>253</sup> Despite the arguments put forward in opposition to the Bill, there is no suggestion in the debate that further grounds for opposition were to be found in the way in which it treated Maori sovereignty, Maori property in land, or British land claims.

After the failure of its Bill, the Association again tried to convince the Government to waive the subscribed capital requirement,<sup>254</sup> but once more without success.<sup>255</sup> After this rebuff, the Association ceased to function.<sup>256</sup> The understanding between the Association and the 1825 Company fell apart and each went their own way during the remainder of 1838.

Members of the Association formed the New Zealand Colonisation Association in August 1838 which was intended to be incorporated as a joint-stock company by charter or Act of Parliament. Its capital (initially £25,000 in £500 shares) was to come from intending emigrants and was to be used to purchase land in New Zealand. The new Association entered negotiations to purchase Thomas McDonnell's land on the Kaipara and Hokianga harbours and set about planning an expedition to New Zealand to obtain and survey further land.<sup>257</sup>

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<sup>253</sup> Speeches of Grey and Howick, *ibid* 872 & 876-878 respectively.

<sup>254</sup> Ward? to Melbourne?, 3 July 1838, CO 209/3, 544a-545b. In this note, Ward made clear that while the Association offered security for its undertaking in the form of borrowings against future land sales, it objected to putting up the money itself. See Adams *Fatal Necessity*, above n 3, 120.

<sup>255</sup> The Colonial Office also resisted the representations of George Samuel Evans on behalf of intending emigrants. Evans to Glenelg, 25 June 1838 & Colonial Office to Evans, 7 July 1838, CO 209/3, 290a-293b. See also Adams *Fatal Necessity*, above n 3, 120.

<sup>256</sup> See Adams *Fatal Necessity*, above n 3, 120.

<sup>257</sup> Adams *Fatal Necessity*, above n 3, 124; Wolfe *A Society of Gentlemen*, above n 56, 166; Temple *The Wakefields*, above n 44, 223-224; Burns *Fatal Success*, above n 23, 72-73; Motte to Normanby, 4 March 1839, CO 209/4, 517a-522 enclosing the prospectus of the New Zealand Colonisation Company and the "resolutions adopted as the basis of the company" on 29 August 1839. The prospectus drew attention to the New Zealand's natural productions including timber, flax and the whale fishery. The suitability of the country for arable farming was also emphasised. It was said that "[t]he whole of New Zealand is most favourable to the cultivation of corn; indeed, these islands promise to become the granary of the New Southern World". *Ibid* 521a-b. An agreement to purchase McDonnell's lands was not concluded until April 1839. See Burns *Fatal Success*, above n 23, 12 & 85.

## Chapter Nine: The Formation of British Policy

The 1825 Company put forward its own plans.<sup>258</sup> The first, put forward in November 1838, proposed British protection for “an Independent Native Government in the Islands of New Zealand”.<sup>259</sup> A “resident Commissioner” would be sent by a new chartered company<sup>260</sup> to New Zealand to negotiate with Maori chiefs “for the establishment of a regular form of Government with their consent and by their authority”.<sup>261</sup> “In the first instance”, the negotiations would be with those northern chiefs who were parties to the 1835 Declaration of Independence.<sup>262</sup> They would be invited to meet “in Congress at Waitanger [sic], in the manner proposed by the third Article of the declaration of Independence”,

for the purpose of establishing a Provisional Council of Government, and of considering and adopting the principles of a constitutional code for the future Government of the United Tribes of New Zealand.<sup>263</sup>

In accordance also with the third article of the Declaration, the chiefs of the “Southern tribes” were to be invited to meet in Congress to join “in the establishment of a General Government”.<sup>264</sup> At the meeting of the Congress, the Commissioner<sup>265</sup> would “formally accept, on behalf of Her Majesty, the invitation contained in the fourth Article of the Declaration of Independence to become the Parent and Protector of the Infant State of New Zealand”.<sup>266</sup>

The Commissioner would propose the establishment of a “Provisional Council of Government of the United Tribes of New Zealand” as a temporary government for a period of 21 years. The Council would consist of the British Commissioner as President and various other British officials appointed by the Crown or

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<sup>258</sup> Adams *Fatal Necessity*, above n 3, 136-137.

<sup>259</sup> Colonel Robert Torrens to Stephen, 6 November 1838, CO 209/3, 297a-b, enclosing at 299a-312a an “Outline of a Plan for establishing under the protection of the British Crown an Independent Native Government in the Islands of New Zealand” [“Torrens ‘Outline of a Plan’”]. Torrens was a Colonisation Commissioner for South Australia.

<sup>260</sup> To be styled “The New Zealand Society of Christian Civilization”. Ibid 299a.

<sup>261</sup> Ibid 299a-b.

<sup>262</sup> Ibid 299b-300a.

<sup>263</sup> Ibid 300a-300b.

<sup>264</sup> Ibid 300b.

<sup>265</sup> The terms “Commissioner” and “Resident” seem to be used interchangeably in this plan.

<sup>266</sup> Torrens “Outline of a Plan”, above n 259, 300b-301a.

Commissioner, as well as Maori representatives elected by the chiefs.<sup>267</sup> Two judges were to be appointed, one by the Queen and one by the British Commissioner “from amongst the most intelligent of the Native Chiefs”. English law would apply in respect of European criminal and civil cases *inter se*.<sup>268</sup> Such cases would be heard by the “Chief Justice” and a jury “taken from Inhabitants not of the native race”.<sup>269</sup> Maori would not “in the first instance” be subject to English criminal law but instead to a “Provisional Criminal Code assimilated, as far as the different States of Society may render expedient and practicable, to the Laws of England, and enacted by the authority of the Hereditary Chiefs and Heads of Tribes in Congress assembled”. This Code was to be altered “from time to time” by the Council of Government “with a view of ultimately bringing the Inhabitants of the different Races under one and the same Code”.<sup>270</sup> Maori criminal and civil cases *inter se* were to be tried by the “Native Judge with a Native Jury”. Mixed cases were to be heard by both the Chief Justice and the Native Judge with a mixed jury in equal racial proportions.<sup>271</sup>

The plan contained elaborate and utopian schemes for shared responsibility between the races as to administration, criminal justice, policing and military at “district”, “municipal” and “county” levels.<sup>272</sup> Overall it looked to a transition after 21 years to even more ambitious constitutional arrangements ultimately entailing union of the races under a General Assembly and a “Chamber of Chiefs” of New Zealand, a rank to which Europeans as well as Maori were to be admitted. Executive power would reside in a chief, initially elected by the two chambers but thereafter a hereditary position.<sup>273</sup>

It was proposed that, “by a resolution of the Congress of the Chiefs”, land “not in the occupation of the Natives” (and which had not already been sold to Europeans)

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<sup>267</sup> Ibid 301a-302a.

<sup>268</sup> Ibid 302a-b.

<sup>269</sup> Ibid 303b.

<sup>270</sup> Ibid 302b-303a.

<sup>271</sup> Ibid 303b.

<sup>272</sup> Ibid 308a-311a.

<sup>273</sup> Ibid 311a-312a.

should be declared “public property”. Such land was to be held by the Company (acting as Commissioners of public lands appointed by the chiefs).<sup>274</sup> The land so held would be available for sale in 160-acre lots and could be borrowed against to pay for the costs of establishing and maintaining government.<sup>275</sup> The scheme for land sales was according to a formula which, over a 21-year term, would achieve development of the land, with half “resumed” for the benefit of Maori at the end of the term as “their inalienable property” to endow churches and schools. The formula ensured that the half returned to Maori would not be the least productive land. Only at the end of the 21-year term would the purchaser (who was only required to pay for half of the property at the outset) receive the land not “resumed” for Maori as his “absolute property”.<sup>276</sup>

In correspondence with the Colonial Office in December 1838, the 1825 Company maintained its November plan but included also a further proposal predicated on a direct establishment of government in New Zealand by the British Crown and a delegation of powers to the Company limited to the organisation of British settlement there.<sup>277</sup> Under this proposal, the Company would have no role in government beyond the British settlements, and it therefore did not deal with Maori participation in government, as in the November plan. Although the Company would have the power to dispose of “public lands” (also referred to as “unappropriated lands”), the concept attached only to lands already purchased from Maori.<sup>278</sup> The Company also sought, “for the protection of the natives”, the power to declare null and void future contracts for the purchase of land to Europeans and also the power to extract payment for British protection (at “the minimum upset

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<sup>274</sup> Ibid 304b-305a.

<sup>275</sup> Ibid 305a-b.

<sup>276</sup> Ibid 305b-306b.

<sup>277</sup> George Lyall to Grey, 28 December 1838, CO 209/3, 317a-320b, enclosing at 324a-332a an “Explanatory statement of the Powers required by the New Zealand Colonization Society”. Lyall was a director of the East India Company.

<sup>278</sup> Ibid 325a-328a.

price of public land for the time being”) in respect of land “already acquired under bona fide purchases”.<sup>279</sup>

There is an undated memorandum in the Colonial Office file which combines features of the 1825 Company’s November and December plans and the New Zealand Association’s 1837 “Abstract of an Act”.<sup>280</sup> It may be that this was put together before, and was superseded by, the November-December proposals, but since it suggests intervention by the Queen, in reliance on the 1835 Declaration of Independence, “without waiting for any cession of Sovereignty from the natives”, it may well have been put together later, as the inevitability of direct British Government intervention became apparent in early 1839.<sup>281</sup> This memorandum suggested that the Queen, assuming “the character of Protectress of the Tribes of New Zealand” (as envisaged by the Declaration of Independence), would announce “that the wild and unimproved lands of New Zealand are held by the British Crown in trust for the natives”.<sup>282</sup> A Land Board would “manage and dispose of the lands thus held in trust, with due regard to native rights, and to the preservation of the native race”.<sup>283</sup> “Unappropriated” or “waste” lands would be sold on a formula reminiscent of 1825 Company’s November 1838 plan, but on terms far less generous to Maori. Under the arrangements proposed, purchasers would immediately secure ownership of two-thirds of the 120-acre sections, leaving one-third only available to be conveyed for the benefit of Maori after the expiry of a 21-year lease in favour of the purchaser (with no comparable protection for the quality of the land to be returned as was suggested in the November plan).<sup>284</sup> The proceeds of sale of land were to be applied for the costs of government and emigration, as well as for setting up such “establishments” for the support and

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<sup>279</sup> Ibid 328a-b. See also *ibid* 329a: “... lands which they hold under native titles ...”. A further, slightly amended, version of this plan was given to the Colonial Office by a deputation of the 1825 Company in January 1839. “Paper received from the New Zealand Deputation”, 22 January 1839, CO 209/4, 287a-293a.

<sup>280</sup> “Outline of an Arrangement for the disposal of waste land in the Islands of New Zealand”, CO 209/4, 745a-747b.

<sup>281</sup> *Ibid* 745a.

<sup>282</sup> *Ibid*.

<sup>283</sup> *Ibid* 745b.

<sup>284</sup> *Ibid* 746b-747a.

instruction of Maori as the Secretary of State for the Colonies should see fit to provide.<sup>285</sup>

As with the proceeding plans, future purchases from Maori were to be void unless made by the Land Board.<sup>286</sup> In a manner reminiscent of the New Zealand Association's "Abstract", the memorandum permitted the Board to tax pre-existing purchased land where it remained "wild and uncultivated". Unpaid tax would result in the forfeiture of land and its sale at public auction, with "equitable compensation" (for his outlay in the purchase from Maori) being given to the purchaser for the "resumed lands".<sup>287</sup>

In January and again in February 1839, the 1825 Company asked the Colonial Office to confer upon it a charter for colonisation, as it said it had been promised by the Government in 1826.<sup>288</sup> On both occasions, the request was declined. The Colonial Office said it had no record of any such commitment in 1826 and that, in any event, matters had moved on to the extent that it could not regard itself as bound should any such commitment have been given. For the first time, the Colonial Office indicated that the Government itself meant to adopt measures to establish government in New Zealand and that there was no place for the Company in its plans.<sup>289</sup>

While the 1825 Company was making its approaches to the Colonial Office, the New Zealand Colonisation Association (calling itself the "New Zealand Association of 1838") advised the Colonial Office that it now had sufficient subscribed capital to comply with the conditions of Glenelg's December 1837 offer

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<sup>285</sup> Ibid 747a-b.

<sup>286</sup> Ibid 745b.

<sup>287</sup> Ibid 746a-b.

<sup>288</sup> See "Paper received from the New Zealand Deputation", 22 January 1839, CO 209/4, 287a-293a at 287a; and Lyall to Normanby, 25 February 1839, CO 209/4, 307a-310b. As to whether the Government had promised the Company a charter in 1826, see Wolfe *A Society of Gentlemen*, above n 56, 55-57, 95-100 & 159-160.

<sup>289</sup> Grey to Lyall, 8 February 1839, CO 209/3, 322a-323a; draft Colonial Office letter to Lyall, 28-29 February 1839, CO 209/4, 313a-315b. This last letter to Lyall may not have been sent: see CO 209/4, 316a-b.

of a charter.<sup>290</sup> The matter of a charter was not pressed until late February and early March 1839, it seems because the Association was in internal dispute and was seeking a reconciliation with the 1825 Company (ultimately achieved through formation of the New Zealand Land Company in May 1839).<sup>291</sup> In late February and early March, in demanding its charter from the Colonial Office, the Association stressed that settlers had committed themselves on the basis of the Government's promises and that, in any event, their efforts "to extend the political & commercial relations of Britain" were entitled to the support of the Government.<sup>292</sup> The Association advised that it had purchased one million acres "under the most perfect title" and was about to despatch a "pioneer expedition" and surveyors to New Zealand.<sup>293</sup> For the first time in correspondence (although the point had been made by the Association witnesses at the House of Lords Select Committee on New Zealand hearings), the Association put forward the view that the Government should not delay "for one moment to confirm the sovereignty of these Islands to the Crown of Great Britain".<sup>294</sup>

The Colonial Office refused the demand for a charter pointing out that the earlier offer of a charter had been rejected by the Association, which had chosen to pursue a Parliamentary solution. It was no longer live. Additionally, the composition of the Association itself had changed and events in New Zealand had moved on.<sup>295</sup> In those circumstances, the Colonial Office did not regard itself as bound by the 1837 offer. The Association was, however, granted an interview with the Marquess of

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<sup>290</sup> John Wright to Glenelg, 31 January 1839, CO 209/4, 298a-b.

<sup>291</sup> See Evans to Glenelg, 4 February 1839, CO 209/5, 211a-212a; Gairdner minute, 28 February 1839, CO 209/4, 316a-325a at 324a-325a; Adams *Fatal Necessity*, above n 3, 136-137.

<sup>292</sup> Hutt to Normanby, 20 February 1839, CO 209/4, 301a-302b at 302a-b; Standish Motte to Normanby, 4 March 1839, CO 209/4, 517a-522a at 519a-b.

<sup>293</sup> Hutt to Normanby, 20 February 1839, CO 209/4, 301a-302b at 302b; Motte to Normanby, 4 March 1839, CO 209/4, 517a-522a at 519b.

<sup>294</sup> Motte to Normanby, 4 March 1839, CO 209/4, 517a-522a at 520a.

<sup>295</sup> Stephen was particularly concerned by the number of Roman Catholics now on the Association's Committee: "[i]f the business is committed to them, New Zealand will infallibly become a Roman Catholic country.... As long as we have our choice of establishing Popery or Protestantism in any part of the World, I cannot image any man who is not a Roman Catholic doubting what the choice should be". Adams, however, suggests that Stephen's fears are unlikely to have carried much weight with Normanby, whose maiden speech in Parliament was in favour of Roman Catholic emancipation. See memorandum of Stephen to Labouchere, 6 March 1839, CO 209/4, 523a-524b at 523a-b; and Adams *Fatal Necessity*, above n 3, 138.

Normanby, who had by then succeeded Glenelg.<sup>296</sup> The day before the meeting, which was set for 14 March, the Colonial Office received advice from William Hutt of the Association that he intended to present another Bill to Parliament.<sup>297</sup> It is possible that the Government's plans, which were firming up at this time, were communicated at the meeting. But it seems that more detail, particularly in relation to a Crown monopoly purchase of land from Maori, was given in a private conversation between Labouchere and Hutt.<sup>298</sup> This conversation appears to have occurred at the suggestion of Stephen, in an attempt to soften the Government's refusal to support the Bill by assuring the Association that its plans would not prevent some later arrangement between them.<sup>299</sup>

The news of the Government's plans in respect of land acquisition was, however, a shock to the Association. It did not regard it as comfort that the Government was prepared to deal further with it because, it was appreciated, Crown monopoly purchasing would greatly increase the price that the Association would have to pay for land. A meeting of the Association estimated that the increase in price compared with purchase from Maori could be in excess of 500%. The Association decided that strong counter-measures were required to avert this "injurious" result. Wakefield advocated an immediate expedition to New Zealand to "acquire all the land you can" before the Government could act on its purpose. The Association seemed to have expected the Government would act by legislation to prohibit purchases of land in New Zealand by British subjects, but made the calculation

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<sup>296</sup> Labouchere to Motte, 11 March 1839, CO 209/4, 525a-527b.

<sup>297</sup> Hutt to Labouchere, 12 March 1839, CO 209/4, 531a-b (stamped as having been received by the Colonial Office on 13 March). This Bill may be that on CO 209/4, 345a-350a, as Donald Loveridge has suggested. Loveridge "Knot of a Thousand Difficulties", above n 45, 143. The draft Bill on the file is clearly not the work of the Colonial Office itself, as put forward by Cheyne. Sonia Cheyne "Act of Parliament or Royal Prerogative? James Stephen and the First New Zealand Constitutional Bill" 24:2 (1990) NZJH 182-189 at 186-187. See also Loveridge "Knot of a Thousand Difficulties", above n 45, 143 n 405. Cheyne has also mis-transcribed the note in the margin against the preamble of the Bill which reads: "[i]f this recital is objectionable, the same end would be answered by enabling the Crown by order in Council to declare any parts, or the whole, of New Zealand to be British Settlements, whereupon Section 1st of this Bill to take effect".

<sup>298</sup> See Adams *Fatal Necessity*, above n 3, 137-139.

<sup>299</sup> Memorandum of Stephen to Labouchere, 15 March 1839, CO 209/4, 326a-331a at 326a-b.

that, because of the press of other Parliamentary business, there was opportunity to get to New Zealand and make purchases before any legislation could be enacted.<sup>300</sup>

The realisation of what the Government intended, set in train the events by which the Association's ship, the *Tory*, was despatched to New Zealand on 12 May and purchases of approximately 20 million acres of land were claimed to have been made by October 1839 on behalf of the new company, the New Zealand Land Company.<sup>301</sup> As soon as it was formed, the Company itself began promoting its plans, appointing agents to encourage groups of settlers throughout the British Isles, and, from June, allotting land to settler investors and as Maori reserves.<sup>302</sup> When in June, the Government's developing plans were further explained to it, the reaction of the Company was to redouble its efforts to extend its purchases.<sup>303</sup>

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<sup>300</sup> EB Hopper's diary, 20 March 1839, as drawn on in Adams *Fatal Necessity*, above n 3, 139-140; Hickford "Making Territorial Rights", above n 21, 133-134; Temple *The Wakefields*, above n 44, 226; and Burns *Fatal Success*, above n 23, 11-14.

<sup>301</sup> See Adams *Fatal Necessity*, above n 3, 140-142; Jack Lee *The Old Land Claims in New Zealand* (Northland Historical Publications Society, Kerikeri, 1993) ["Lee *Old Land Claims*"] 25-26; Wolfe *A Society of Gentlemen*, above n 56, 175-179; Temple *The Wakefields*, above n 44, 228-258 & 263-264; Burns *Fatal Success*, above n 23, chs 12 & 15-16. The Company's "purchases" were undertaken by Edward Gibbon Wakefield's brother, William, as "Principal Agent" of the Company. His Instructions advised him that: "[a]s all the world is free to purchase lands in New Zealand upon the same terms as the Company, it should be your especial business to acquire spots which enjoy some peculiar natural advantage". One-tenth of the lands purchased by Wakefield were to be reserved "in trust ... for the future benefit of the chief families of the tribe". "Instructions from the New Zealand Land Company to Colonel Wakefield, Principal Agent of the Company", enclosed in Hutt to Normanby, 29 April 1839, CO 209/4, 532a-545a (also GBPP 1840 [238] XXXIII.587 at 22-27).

<sup>302</sup> See Hickford *Lords of the Land*, above n 207, 86-87; Lee *Old Land Claims*, above n 301, 25; Temple *The Wakefields*, above n 44, 260-261; Burns *Fatal Success*, above n 23, 16-17, 94-95 & ch 14; "The Anglo-Zealand Lottery", *The Spectator*, London, 3 August 1839, reproduced in *The Colonist*, Sydney, 4 December 1839. The Company's publicity also included publication of a book entitled *Information Relative to New-Zealand For the Use of Colonists* (John W Parker, London, 1839). (Attribution of authorship to John Ward, the Company's secretary, was made in the enlarged second edition published in early 1840.) The first four chapters of this book conveyed the impression that New Zealand was "the natural seat of a maritime population, and the natural centre of a vast maritime trade" centered on refitting and reprovisioning whalers, and on the export of timber, flax, potatoes and wheat. While it noted some opportunity for pastoral farming in New Zealand, it seemed to assume as sensible a division in production between the Australian colonies focused on "pastoral pursuits" and the New Zealand economy concerned with arable farming.

<sup>303</sup> See minutes of New Zealand Land Company directors' meeting, 14 June 1839, CO 208/180, 23.

Ultimately it brought forward its own plans and, in September, its first settlers embarked for New Zealand.<sup>304</sup>

While the New Zealand Land Company's schemes were developing, the Church Missionary Society continued to stay in touch with the Colonial Office. Coates suggested in May 1838 that Glenelg should sound out whether Captain Robert Fitzroy would accept appointment in New Zealand.<sup>305</sup> The Church Missionary Society remained alert to New Zealand Association schemes and organised opposition to its 1838 Bill in Parliament.<sup>306</sup> It also readied itself to oppose the New Zealand Colonisation Association's 1839 proposed Bill: Coates published yet another pamphlet in anticipation of the emergence of the Bill.<sup>307</sup> During the period, the Society continued to make proposals for New Zealand, including for the development of a code of laws for adoption by the chiefs.<sup>308</sup> These proposals involved few new suggestions, as was commented on in the Colonial Office.<sup>309</sup> By mid-1839, the Church Missionary Society seems to have appreciated that the Colonial Office was not being swayed by the New Zealand Land Company and

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<sup>304</sup> See Adams *Fatal Necessity*, above n 3, 142. All of this activity of the Company did not extend to introducing Hutt's Bill into Parliament. See *ibid* 139.

<sup>305</sup> Coates to Glenelg, 12 May 1838, CO 209/3, 155a-156a. Fitzroy succeeded Hobson as Governor of New Zealand in 1843.

<sup>306</sup> See the petition of the Church Missionary Society Committee to the House of Commons in opposition to the New Zealand Association's Bill, a copy of which was provided to Stephen by Coates on the day of its presentation. Coates to Stephen, 20 June 1838, CO 209/3, 160a-162a. The petition is a good summary of Church Missionary Society objections to the Association's plans for colonising New Zealand.

<sup>307</sup> Minutes of the Church Missionary Society Committee, 19 March 1839, CMS G/C1 vol 17, 553; Dandeson Coates *Documents Exhibiting the Views of the Committee of the Church Missionary Society on the New-Zealand Question, and Explanatory of the Present State of that Country* (Richard Watts, London, 1839) ["Coates *Documents Exhibiting*"]. Coates sent a copy of this pamphlet to Stephen. Coates to Stephen, 9 April 1839, CO 209/5, 114a-b enclosing pamphlet at *ibid* 115a-142a.

<sup>308</sup> Coates to Glenelg, 21 May 1838, CO 209/3, 157a-158a; Chichester to Glenelg, 24 June 1838, CO 209/3, 366a-367a enclosing "a very rough minute of ... suggestions" at *ibid* 368a-372a; Coates to Glenelg, 23 July 1838, CO 209/3, 163a-170b (reproduced in Coates *Documents Exhibiting*, above n 307, 7-16).

<sup>309</sup> Memorandum of Grey to Glenelg, 24 August 1838, CO 209/3, 171a-172b. Grey was also unconvinced that courts could be established in New Zealand without enabling legislation of the Imperial Parliament. See also the Colonial Office notations on Coates's 23 July letter to Glenelg at CO 209/3, 164b & 167b.

that the Government's firming objectives were congruent with the Society's own aspirations.<sup>310</sup>

### **The Colonial Office acts**

While, by February 1838, the Government was committed to intervene in New Zealand, the New Zealand Association's rejection of the charter meant that alternative means had to be found. The Colonial Office plans, however, took shape only slowly through the course of 1838 and the first half of 1839.<sup>311</sup> Initially the delay could be attributed to the House of Lords Select Committee deliberations and, after its report on 8 June 1838, to Parliamentary consideration of the Association's Bill, which was not rejected until its second reading on 20 June.

In the meantime, the Colonial Office received on 1 February 1838 Hobson's factories proposal of August 1837, with Governor Bourke's endorsement.<sup>312</sup> Hobson's plan appears to have had immediate appeal. Glenelg provided a copy to the New Zealand Association with his 5 February letter withdrawing the offer of a charter. He wrote that it gave "important bearing" to the New Zealand question.<sup>313</sup> Hobson's plan, together with the despatches of Bourke and Busby, were laid before Parliament at this time.<sup>314</sup> Glenelg, in a speech in the House of Lords on 30 March, seems to have been adopting a proposal included in Hobson's plan that the courts of New South Wales be given clear authority to deal with crimes committed by British subjects in New Zealand, when he indicated that the Government was

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<sup>310</sup> See Adams *Fatal Necessity*, above n 3, 145.

<sup>311</sup> See Adams *Fatal Necessity*, above n 3, 118: "The failure of the association to meet the Government's conditions for a charter did not affect the validity of the reasons which had led the Government to offer the charter in the first place. The logic of the Colonial Office's interpretation of the worsening situation in New Zealand remained. The decision to intervene still stood. Now the Colonial Office had to find an alternative method of carrying out that decision. This search, pursued with neither energy nor haste, occupied almost the whole of 1838."

<sup>312</sup> See Chapter 7, text accompanying ns 162-167; and Chapter 10, text accompanying ns 44-53.

<sup>313</sup> Glenelg to Durham, 5 February 1838, CO 209/4, 295a-297a at 296b-297a.

<sup>314</sup> See GBPP 1837-38 (122) XL.209.

considering legislation for New South Wales with provisions relating to New Zealand.<sup>315</sup>

A memorandum on the Colonial Office file dated 4 May 1838 and addressed to Glenelg, if indeed an internal memorandum as is generally thought to be the case,<sup>316</sup> also records support for Hobson's factories proposal.<sup>317</sup> This memorandum suggests that factories would be established by "a free concession of the rights of Sovereignty" of the chiefs over "two or three" of the "settled Districts", which by legislation would be created dependencies of New South Wales.<sup>318</sup> The legislation would authorise the New South Wales Legislative Council to create courts within "one or more" of the factories, with "jurisdiction for the trial of all Offences committed within New Zealand by any British Subject", and to make "all such laws as may be requisite for giving effect to that jurisdiction".<sup>319</sup> The memorandum looked to the appointment of two or three "Factors", as well as "a Jailor and ... a few policemen", with "[t]he natives ... probably [to] act in the latter character". These arrangements were considered to be "all that is essential for the present".<sup>320</sup> The plan was acknowledged not to provide for colonisation, which was said to

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<sup>315</sup> Glenelg (30 March 1838) 42 GBPD HC cc152-155 at 155. See also Glenelg to Howick, 11 July 1838, as referred to by Adams *Fatal Necessity*, above n 3, 121; and draft of Stephen to Backhouse, 12 December 1838, CO 209/5, 28a-34b at 32b-33a.

<sup>316</sup> See Trevor Williams "James Stephen and British Intervention in New Zealand, 1838-40" (1941) 13:1 *The Journal of Modern History* 19-35 at 21 n 7; Sinclair *A History of New Zealand* (4th ed, 1991), above n 21, 57; Adams *Fatal Necessity*, above n 3, 123; Hickford "Making Territorial Rights", above n 21, 114-115; Loveridge "Knot of a Thousand Difficulties", above n 45, 122.

<sup>317</sup> Colonial Office memorandum, 4 May 1838, CO 209/3, 374a-375a. See also Sir George Grey's view, as expressed in a memorandum to Glenelg, that, as between Coates's and Hobson's proposals, "I think Capt[ain] Hobson's of factories & Courts of Justice infinitely preferable". Grey to Glenelg, 24 August 1838, CO 209/3, 171a-172b at 172b. Adams identifies Gairdner as the author of this memorandum. Adams *Fatal Necessity*, above n 3, 123. Hickford attributes authorship to Grey. Hickford "Making Territorial Rights", above n 21, 113. The handwriting in this memorandum is exceedingly difficult to decipher. In some places, as for instance where Grey proposes as "unexceptionable" (?) a candidate to replace Busby as Resident, it is indecipherable.

<sup>318</sup> Colonial Office memorandum, 4 May 1838, CO 209/3, 374a-375a at 374a. The memorandum recited that "[t]here are at present at the Bay of Islands and at several other points on the Coast houses and lands owned by British subjects". *Ibid.*

<sup>319</sup> *Ibid* 374a-b.

<sup>320</sup> *Ibid* 374b.

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“seem an advantage”, “altho each Factory will of course be a nucleus [around?] which hereafter a Colony will form itself”.<sup>321</sup>

If this be an evil, it is at least less so than the growth of the lawless population which is inflicting on that Country every evil of Colonization unattended by any of its advantages.

The memorandum referred to defraying “all unavoidable expense” through duties levied on imported spirits and tobacco.<sup>322</sup> This possibly points to a pressure the Colonial Office was under to avoid expense on the Treasury in any scheme for New Zealand.<sup>323</sup> As the United Kingdom economy was in recession in 1838, the requirement for economy seems to have continued to be a consideration in framing the terms of intervention.<sup>324</sup>

Further delay after Parliament had rejected the Association’s Bill may partly be explained by concern about cost, but also may have been contributed to by the long Parliamentary recess from August 1838 to February 1839, since the Colonial Office seems at this time to have been contemplating that legislation would be necessary.<sup>325</sup> It may also have been that some urgency went out of the question because of the disarray among the New Zealand Association following defeat of its Bill.<sup>326</sup> The Colonial Office tended not to be proactive in decision-making<sup>327</sup> and

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<sup>321</sup> Ibid 375a.

<sup>322</sup> Ibid 374b-375a.

<sup>323</sup> This probably partly explains the appeal to the Colonial Office of chartering the New Zealand Association as its agent in New Zealand.

<sup>324</sup> At a Cabinet meeting on 16 June, at which the Chancellor of the Exchequer drew attention to extravagance across all government departments, Howick and Melbourne leveled particular criticism at the Colonial Office. Melbourne apparently remarked that Britain “had the smallest army and the largest colonies of any nation in the world” and that the Government was “asked day after day to add to our colonies, and more colonies required more troops”. As Hickford has suggested, Melbourne’s comments may have been “a coded reference to New Zealand”, coming as they did only four days before the defeat of the New Zealand Association’s Bill. See Hickford “Making Territorial Rights”, above n 21, 119.

<sup>325</sup> See above n 315 and accompanying text.

<sup>326</sup> See text accompanying ns 256 and 257 above. The New Zealand Association, reorganised as the New Zealand Colonisation Association in August 1838, did not renew its applications to the Colonial Office until late February 1839. For much of 1838, it was without the animating influence of Wakefield, who accompanied Durham to Canada. See Hickford “Making Territorial Rights”, above n 21, 131; and Temple *The Wakefields*, above n 44, 204-222.

<sup>327</sup> See Chapter 3, text accompanying n 114.

may, additionally, have been distracted by other pressures around the Empire.<sup>328</sup> Whatever the reason, there are indications that Glenelg did not feel under pressure to progress a decision.<sup>329</sup>

On 1 December 1838, the Colonial Office finally took action. On that date, Glenelg wrote to Governor Gipps of New South Wales advising him that the Government intended to appoint a Consul at New Zealand. He hoped to be able to communicate the name of the Consul “very shortly”, but in the meantime Gipps was to advise Busby that his office would be discontinued.<sup>330</sup> The Colonial Office record does not disclose what, if any, trigger there was for the decision. Adams has suggested two possibilities in letters received in the Colonial Office on 30 November.<sup>331</sup> The first was a long-delayed communication from the Admiralty advising that instructions had been given to the Commander-in-Chief of the Indian Station for regular visits by naval ships to New Zealand, as requested by the Colonial Office in August 1838.<sup>332</sup> Adams considers this was the probable trigger for Colonial Office action because it had been waiting for such a response and because it included the correspondence with the Admiralty in the letter to Gipps.<sup>333</sup> The second letter received was that written in March 1838 to the Church Missionary Society by George Clarke, on behalf of the Society’s missionaries in New Zealand, urging that New Zealand be taken under the “protection and guardian care of the

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<sup>328</sup> See Adams *Fatal Necessity*, above n 3, 122. Stephen wrote to his wife on 15 August 1838: “I am bothered,—I have been bothered,—I shall be bothered, with business; and so you may conjugate the whole verb”. James Stephen to Jane Stephen, 15 August 1838, quoted in Caroline Stephen (ed) *The Right Honourable Sir James Stephen K.C.B., LL.D.* (John Bellows, Gloucester, 1906) [“Stephen (ed) *Sir James Stephen*”] 56.

<sup>329</sup> See, for example, Glenelg’s direction on Grey’s 24 August 1838 memorandum, CO 209/3, 171a.

<sup>330</sup> Glenelg to Gipps, 1 December 1838, CO 209/4, 80a-82a (also GBPP 1840 [238] XXXIII.587 at 19).

<sup>331</sup> Adams *Fatal Necessity*, above n 3, 124-125.

<sup>332</sup> Stephen to Wood, 15 August 1838, CO 209/3, 104a-105b and Barrow to Stephen, 15 August 1838, CO 209/3, 102a-b (also GBPP 1840 [238] XXXIII.587 at 19). Stephen wrote on the Admiralty’s letter on 30 November: “I presume that this Letter has been acted upon. It is dated in August last though registered only today”.

<sup>333</sup> Adams *Fatal Necessity*, above n 3, 125.

British Government” and opposing the plan for colonisation of the New Zealand Association.<sup>334</sup>

As the first draft of the Colonial Office’s letter to Gipps had been prepared on 29 November, however, it seems that neither letter brought about the decision, unless the contents of one or both had been informally communicated to the Colonial Office before 29 November.<sup>335</sup> It seems likely that the decision to appoint a consul would have been made some time before 1 December since it is unlikely that it would have been taken without the prior approval of either the Foreign Office or perhaps even the Cabinet. Although the Colonial Office did not formally write to the Foreign Office to ask it to appoint a British Consul at New Zealand until 12 December, a later Colonial Office memorandum records that the subject of the letter had “previously met the concurrence of [the Foreign Secretary] Lord Palmerston”.<sup>336</sup> It may be that there was no final trigger for the decision to appoint a Consul or it may be that the decision was simply prompted by the return to England of Captain Hobson and HMS *Rattlesnake*, as is discussed in Chapter 10.<sup>337</sup>

The 12 December letter to the Foreign Office explained that the Residency had failed to “answer the purposes contemplated in its adoption”, and that the “strong disposition” of the chiefs was, as demonstrated by the Declaration of Independence, “to place themselves under British protection”.<sup>338</sup> Appointment of a Consul would enable relations with Maori to be “placed on a more permanent

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<sup>334</sup> Clarke to the Home Secretaries of the Church Missionary Society, [1] March 1838, reproduced in Coates *Documents Exhibiting*, above n 307, 41-45. Adams considers that Clarke’s letter “contained nothing very new” but it was a significant formal representation of missionary concern. It had been sent to Glenelg privately by Coates and it is perhaps a measure of the importance the Colonial Office attached to it that Coates was asked if he would object to Clarke’s letter “being recorded in the Office and considered as an Official Document”. Stephen? to Coates, 11 December 1838, CO 209/3, 173a-b. The copy of Clarke’s March 1838 letter sent to Glenelg on 30 November by Coates, and Coates’s covering note to it, do not appear on the Colonial Office file. Clarke’s letter is discussed in Chapter 6, see text accompanying ns 464-468.

<sup>335</sup> See draft of Glenelg to Gipps, 29 November–1 December 1838, CO 209/4, 80a-82a.

<sup>336</sup> Gairdner briefing paper for Normanby, 28 February 1839, CO 209/4, 316a-325a at 323a.

<sup>337</sup> See Chapter 10, text accompanying ns 64-69.

<sup>338</sup> Stephen to Backhouse, 12 December 1838, CO 209/3, 111a-116a at 111a-114a (also GBPP 1840 [238] XXXIII.587 at 3-4).

footing”.<sup>339</sup> The “more permanent footing” looked to was almost certainly the cession of some sovereign rights by chiefs, as was consistent with the Colonial Office’s support for Hobson’s factories proposal, as in the 4 May 1838 memorandum. That the consul was to be appointed to effect such a transition is also indicated by the fact that he was to report, not to the Foreign Office, but to the Colonial Office.<sup>340</sup> The letter contained no details about the “more permanent footing” envisaged. That may well be, as Adams suggests, because Colonial Office intentions were “only half-formed”.<sup>341</sup>

The approval of the Foreign Office was not received until 31 December.<sup>342</sup> Before then, on 28 December, Glenelg had already offered the consulship to Hobson.<sup>343</sup> The fact that the Colonial Office did not wait for a written response from the Foreign Office suggests that the approval of the Foreign Office either had already been informally obtained or was treated as a purely formal step. The selection of Hobson is an indication that, although the detail of the Colonial Office plans may not have been fully developed, in December 1838 they were developing along the lines suggested by Hobson’s factories plan.

Hobson did not jump at the appointment. Before accepting, he wanted to be satisfied “that the Power and means with which I am supplied are adequate to the duties I shall be called upon to fulfil”.<sup>344</sup> In particular, he asked

to be informed if Her Majesty’s Government contemplate any change in our present relations with the Natives of New Zealand? and what means will be afforded to the executive for the repression of crime, and the adjustment of differences, which are sure to occur amongst Men who are all in pursuit of the same object?<sup>345</sup>

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<sup>339</sup> Ibid 115b.

<sup>340</sup> Ibid 115b-116a.

<sup>341</sup> Adams *Fatal Necessity*, above n 3, 126.

<sup>342</sup> Backhouse to Stephen, 31 December 1838, CO 209/3, 107a-b (also GBPP 1840 [238] XXXIII.587 at 18-19).

<sup>343</sup> Glenelg to Hobson, 28 December 1838, CO 209/3, 395a-396b.

<sup>344</sup> Hobson to Glenelg, 1 January 1839, CO 209/4, 83a-84a at 83b.

<sup>345</sup> Ibid 83b-84a.

Stephen minuted Hobson's letter that he presumed that "the answer must be that the topics to which the Writer refers are under Lord Glenelg's consideration". As suggested by Stephen, Hobson was invited to London to discuss matters with Glenelg.<sup>346</sup> A meeting was held in early to mid-January 1839. Hobson's account of the meeting was written 11 months later and may be affected by what followed. He recollected that Glenelg "clearly explained" to him the "reluctance" with which the Government intended to intervene in New Zealand and the "force of circumstances [which] had left them no alternative". Rather than Glenelg setting out the terms of British intervention, Hobson was invited to make suggestions for the form of intervention.<sup>347</sup>

In response to this invitation, Hobson wrote a rather muddled letter to Glenelg on 21 January.<sup>348</sup> He explained that his original factories proposal (which he developed at some length in the letter<sup>349</sup>) had been put forward "under the impression that Government had resolved to treat the States of New Zealand as an independent nation".<sup>350</sup> His own view, not earlier expressed, had been that it would be a step towards the chiefs agreeing to "incorporate" their country with the British Empire.<sup>351</sup> Although, "short of the actual assumption of Sovereignty" (if it was still the Government's preference that New Zealand remain an independent nation), he still regarded the factories proposal as the "the only measure ... calculated to afford protection to our fellow subjects who settle in New Zealand", his own recommendation now was that the sovereignty of the whole country should be

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<sup>346</sup> Minute of Stephen to Grey, 3 January 1839, CO 209/4, 84b; Grey? to Hobson, 3 January 1839, CO 209/4, 85a.

<sup>347</sup> Hobson to Gipps, 24 December 1839, ANZ ACHK 16591, G36/1, 1-7 at 2.

<sup>348</sup> Hobson to Glenelg, 21 January 1839, CO 209/4, 87a-93a. Adams does not discuss the letter, but Orange, Hickford and Loveridge do. Orange *The Treaty of Waitangi*, above n 97, 27-28; Hickford "Making Territorial Rights", above n 21, 120-121; Loveridge "Knot of a Thousand Difficulties", above n 45, 134-135.

<sup>349</sup> Hobson to Glenelg, 21 January 1839, CO 209/4, 87a-93a at 88a-92a. See also Loveridge "Knot of a Thousand Difficulties", above n 45, 134.

<sup>350</sup> Hobson to Glenelg, 21 January 1839, CO 209/4, 92b.

<sup>351</sup> Ibid 87a. Hobson explained that "from the first moment of my acquiring any knowledge of the actual condition of New Zealand it was clear and evident to my mind, that the tide of Emigration which had already begun to flow towards that country would eventually oblige Her Majesty's Ministers to extend to it, in some shape or other, the protection of British Laws". Ibid 92b.

sought.<sup>352</sup> Hobson's recommendation was made in acknowledgment of weaknesses in the factories proposal. First, it would leave territories outside the factories open to the encroachments of foreign nations. Secondly, British subjects and Maori would be left exposed to "the aggressions of Foreigners, for whom it is not in the power of this Country to legislate". Thirdly:<sup>353</sup>

Vast tracts of land will be held by British Subjects without recognized title, and these will be [devised?] and sold without any legal record, creating confusion and strife, that I fear will at last baffle the Powers of the executive to control.

To these problems, Hobson was unable to suggest a remedy, "unless Her Majesty's Government at once resolve to extend to that highly gifted Land the blessings of civilization and liberty, and the protection of English Law, by assuming the Sovereignty of the whole Country, and by transplanting to its Shores, the nucleus of a moral and industrious population".<sup>354</sup>

It is difficult to understand why Hobson regarded his original factories proposal as not entailing acquisition of sovereignty over the districts in which the factories were to be situated.<sup>355</sup> Certainly the Colonial Office had treated the proposal as entailing acquisition of sovereignty of the territories on which the factories were to be established.<sup>356</sup> Hobson's notion that sovereignty should be acquired over the whole country was, however, new.

### **Developing a plan for intervention**

Hobson's letter was received in the Colonial Office on the day it was written, 21 January 1839. The same day, Stephen wrote a memorandum for Grey and Glenelg

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<sup>352</sup> Ibid 88a & 92b-93a.

<sup>353</sup> Ibid 93a.

<sup>354</sup> Ibid.

<sup>355</sup> Hobson himself described his August 1837 proposal as recommending that "tracts of land should be purchased by her Majesty's Government from the Natives of New Zealand, and with the concurrence of the Native Chiefs, that Factories should be established thereon, which should become British Territory and form an integral part of her Majesty's dominions as a dependency of New South Wales, and be in all respects subject to British Laws". Ibid 88a-b.

<sup>356</sup> See, for example, text accompanying n 318 above.

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on the New Zealand question.<sup>357</sup> Stephen's memorandum does not refer to Hobson's letter and seems uninfluenced by it.<sup>358</sup> Perhaps, at the time it was written, Stephen was yet to see Hobson's letter. The memorandum seems written to bring matters to a head:<sup>359</sup>

The question of Colonizing New Zealand is no longer a subject of discussion. A Colony of 2,000 British Subjects is in fact established there. They are daily increasing their numbers by Recruits from this Kingdom and from the Australian Colonies, and are living under a conventional form of Government established by themselves.<sup>360</sup> They are however for the most part people of disorderly habits, and profligate character, the scourge of the Aborigines, who, if unchecked, they will ere long exterminate. The only question therefore is between acquiescence in a lawless Colonization, and the establishment of a Colony placed under the authority of Law.

Since the "establishment of a Colony placed under the authority of Law" was the only proper outcome, what needed to be decided was "upon what principles, and in what manner, the Colony should be established".<sup>361</sup> Stephen proposed that an agent of the Crown ("whether called a Consul, or however else designated") "should be authorized to acquire from the Chiefs, a Cession of fair terms, of the Sovereignty of such parts of New Zealand as may be best adapted for the proposed Colony". The agent should have a commission constituting him Governor of the colony "when so acquired" and authorising him to establish courts and to appoint judges, magistrates, and other officers for the administration of justice.<sup>362</sup> He should be provided with Instructions "having for their object, amongst other things, the

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<sup>357</sup> Stephen memorandum, 21 January 1839, CO 209/4, 193a-201b.

<sup>358</sup> Compare Tony Ballantyne "The State, Politics and Power, 1769–1893" in Giselle Byrnes (ed) *The New Oxford History of New Zealand* (Oxford University Press, South Melbourne, 2009) 99-124 at 103-104. Ballantyne argues that Hobson played a "pivotal role" in determining the terms of British intervention in New Zealand and that his 21 January letter, "advocating a much more aggressive and extensive form of 'protection'", enunciated a "vision of colonization as a form of 'protection' [that] was increasingly consolidated" in Colonial Office thinking. Ballantyne considers that this more aggressive idea of "protection" "was prominent in the Treaty" and was "the legitimating device for Empire".

<sup>359</sup> Stephen memorandum, 21 January 1839, CO 209/4, 193a-201b at 193a-b. Stephen also explained that the memorandum excluded "all unnecessary topics ... in order to disembarass, as far as possible, a question which will hardly bear any further delay". Ibid 201b.

<sup>360</sup> This is possibly a reference to the Kororareka Association. See Chapter 6, n 380 and accompanying text.

<sup>361</sup> Stephen memorandum, 21 January 1839, CO 209/4, 193a-201b at 194a.

<sup>362</sup> Ibid 195a-b.

protection of the Aborigines by every method which can be devised for that end”.<sup>363</sup>

Stephen proposed that a power of legislation be conferred by Act of Parliament on the Governor and Council, “without an Assembly”.<sup>364</sup> There is no suggestion in this memorandum of the New Zealand territories being annexed to New South Wales. Stephen proposed that the legislation would authorise the courts of the colony to try offenders for offences committed in New Zealand “beyond the precincts of the Colony”. The same Act of Parliament should also “prohibit any future acquisition of Land by British Subjects in New Zealand, except by a Title derived from, or through the Crown”.<sup>365</sup> Although Stephen was opposed to delegating the “essential powers of Government” to any Body “distinct from the Gov<sup>t</sup> itself”,<sup>366</sup> Stephen saw a role for a joint-stock “New Zealand Company” (formed from those who had already expressed interest in a charter). The Company would be the agent of government in selling Crown lands to finance emigration (“for which service the Company should be allowed a fair Brokerage or Commission”) and lending money to the Government for public works and to supply “any deficiency of the ordinary Revenue of the Colony”.<sup>367</sup>

Stephen considered that such arrangements would go “far to meet the wishes of the New Zealand projectors”, while maintaining “the ancient prerogative and the legitimate authority of the Crown”.<sup>368</sup> The proposal also had the advantage that it

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<sup>363</sup> Ibid 196a.

<sup>364</sup> The necessity of such legislation was explained as follows: “That as the Royal prerogative of creating Legislative Bodies extends only to such Legislatures as are constituted on the Representative principle, application should be made to Parl<sup>t</sup> as in the case of Western Australia, to confer this power on a Governor & Council, without an Assembly, for a certain term of years”. Ibid 196a-b.

<sup>365</sup> Ibid 196b-197a.

<sup>366</sup> Ibid 194a-b. Stephen expressly rejected the adoption of the South Australian Commissioners model.

<sup>367</sup> Ibid 197a-198a. See also Stephen’s 31 December 1838 minute for Glenelg on the proposals of the 1825 Company: “I would propose (subject to the decision of the general question of Colonizing New Zealand) that the various projectors of plans of that nature should be desired to meet together to ascertain the practicability of their all cooperating in some one scheme”. CO 209/3, 321b.

<sup>368</sup> Stephen memorandum, 21 January 1839, CO 209/4, 193a-201b at 198b.

would not, at least at the outset, increase the national expenditure.<sup>369</sup> Because these arrangements would not create expense, the proposal was to be judged in terms of “humanity and justice towards the Aborigines, and of national policy”.<sup>370</sup>

Stephen acknowledged that it was “perhaps to be regretted that the New Zealand Islands were ever visited by our Countrymen”. The “evil”, however, was “irreparable, and is daily increasing”. An “unauthorized British Colony” was “rising into sufficient strength, to render it formidable as a Body of Pirates to our own Commerce”, and was “still more formidable” to Maori through propagation of “Drunkenness, vice, disease, war, and every other evil which terminates in the depopulation of barbarous Countries”.<sup>371</sup> The pace of land acquisition was also a threat to the establishment of a soundly-based colony.<sup>372</sup>

In the mean time [until some “legal control” over British subjects was established] large tracts of the most valuable Lands are obtained from the Chiefs, and in proportion as the erection of a regular government shall be delayed, the possibility of any well regulated Land system being introduced, will be diminished.

Stephen raised two possibilities for dealing with the problem “whenever a Colony should be established”. They were through the imposition of a “discriminating Land Tax upon all Lands not held by a title derived through the Crown” (“a measure practicable now, but which will become more and more difficult with every fresh extension of such unauthorized acquisitions”) or through declaring any land title to land not acquired through the Crown to be invalid (“a declaration which might safely be made when the preponderating numerical interest is in favor of it, but not afterwards”).<sup>373</sup> Although the land tax notion had been floated in proposals of the 1825 Company,<sup>374</sup> this memorandum is the first indication of Colonial Office thinking about how land acquired before the acquisition of sovereignty might be treated. The possibility of declaring such titles to be invalid

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<sup>369</sup> Ibid 199a.

<sup>370</sup> Ibid 199b.

<sup>371</sup> Ibid 199b-200a.

<sup>372</sup> Ibid 200a-200b.

<sup>373</sup> Ibid 200b-201a.

<sup>374</sup> See text accompanying n 287 above.

was entirely new. Stephen ended his memorandum with the view that a decision about New Zealand would “hardly bear any further delay”.<sup>375</sup>

It is not clear whether Stephen’s memorandum was read by Glenelg or Grey. There are no notations on the document to indicate that they did (as was usual for documents passed on). It seems, however, that the topics covered by the memorandum must have been the subject of discussion between Stephen and one or both of Glenelg or Grey, because on 24 January Stephen prepared the first draft of Hobson’s Instructions, which would hardly have been undertaken without a decision having been made between 21 and 24 January to proceed broadly on the basis of his recommendations. The first draft of the Instructions differs from the memorandum in leaving out a role for a “New Zealand Company”.<sup>376</sup> Nor does the draft deal with lands already acquired in New Zealand by British subjects (suggestions not central to Stephen’s 21 January memorandum). Nor did the draft of 24 January proceed on the assumption that it would be possible to obtain legislation through Parliament constituting a legislature for New Zealand in advance of Hobson’s mission. These differences from Stephen’s memorandum must have reflected decisions by Glenelg or Grey before 24 January.

The 24 January draft of the Instructions recited again the reluctance with which the Government viewed the acquisition of sovereignty in New Zealand and its doubts as to “the propriety of bringing the Civilized Nations of Europe into contact with the Aborigines of New Zealand”.<sup>377</sup> It had come to the view that intervention was “indispensible” because of the “disorders which have pervaded in consequence of ... unauthorized Colonization” (with “extensive acquisition of Lands under alleged<sup>378</sup> Contracts with the Native Chiefs”) and the “still more formidable evils which it appears to threaten”.<sup>379</sup> The “course of events” had “reduced us” to choosing between acquiescing in colonisation “without the restraints of Law” and

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<sup>375</sup> Stephen memorandum, 21 January 1839, CO 209/4, 193a-201b at 201b.

<sup>376</sup> 24 January 1839 draft of Hobson’s Instructions, CO 209/4, 203a-220b.

<sup>377</sup> Ibid 204a-b.

<sup>378</sup> The word “alleged” was inserted into Stephen’s draft by Grey.

<sup>379</sup> 24 January 1839 draft of Hobson’s Instructions, CO 209/4, 203a-220b at 203b-204a.

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“the formation of a Colony in which lawful authority may be exercised for the protection of the Natives and the benefit of the Settlers themselves”.<sup>380</sup>

In this alternative we have felt it our duty to advise the Queen to exercise HM’s prerogative by establishing a settled form of Gov<sup>t</sup> for Her Subjects in New Zealand.

Consistently with the 21 January memorandum, the draft Instructions authorised Hobson to negotiate for a cession “in full sovereignty” not of the whole country but of those districts and ports “within which it is most important that British Sovereignty should be established for the government of the existing Settlers, for the promotion of Trade, and for the protection of the Natives”.<sup>381</sup> It was envisaged that it was

sufficient to acquire, at least at the commencement, a legal title to some few Districts, especially at the Bay of Islands, and at any other places to which British Shipping usually resorts, or where the Settlements of HM’s Subjects have been actually formed.<sup>382</sup>

Restriction of the acquisition of sovereignty to these districts was all that was necessary.<sup>383</sup>

It may not be practicable, nor am I convinced that it would be expedient, to obtain from the Chiefs a cession of the absolute Sovereignty of the whole of New Zealand Islands. The reciprocal obligation of protection would be a difficult and might become a very costly duty, and, with a view to the objects which we at present contemplate, so great an extension of Territorial Dominion is not necessary.

Although the draft Instructions recognised “the right of the Native Chiefs in New Zealand to the Sovereignty of those Islands”,<sup>384</sup> it was with the qualification (maintained in subsequent drafts of the Instructions) that:<sup>385</sup>

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<sup>380</sup> Ibid 204b-205a.

<sup>381</sup> Ibid 208a-b.

<sup>382</sup> Ibid 207a-b.

<sup>383</sup> Ibid 206b-207a. The word “absolute” was inserted into Stephen’s draft by Glenelg or Grey.

<sup>384</sup> Ibid 205a. Stephen had originally drafted that “Her Majesty recognises *to the fullest extent* the right of the Native Chiefs in New Zealand to the Sovereignty of those Islands”, but either Glenelg or Grey, it would seem, crossed the italicised words out.

<sup>385</sup> Ibid 205b.

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amongst a people who have made so few advances in the acts of Civilized life, there cannot exist a lawful dominion in that full and absolute sense in which it is ascribed to the Sovereigns and ruling Powers of the more civilized parts of the World.

Despite this caveat, the Instructions took the view that this was “not a distinction on which we could justly ground any claim to disregard the rights, imperfect and inartificial as they may be, which the common consent of the Inhabitants of New Zealand concedes to their Chiefs”.<sup>386</sup>

The Instructions envisaged that, although ceding sovereignty of some of their territories, chiefs would retain sovereignty of their unceded territories. In exchange for ceding some territories, the chiefs could be given presents (either one-off or annual)<sup>387</sup> and were to be promised in respect of their remaining territories:<sup>388</sup>

protection against external enemies, and the aggressions of all persons upon their rights, whether of dominion or of property over the Soil of the unceded Territory, or in other words an alliance offensive and defensive with the Crown of Great Britain.

Hobson was given further instructions to deal with the chiefs with “openness and sincerity”, injunctions which were carried through into Normanby’s Instructions to Hobson.<sup>389</sup> Hobson was, however, instructed to “urge” the proposal on Maori because their interests, “rightly understood”, would be “best promoted by the proposed Cession”.<sup>390</sup> He was to endeavour to convince the chiefs of the “real motives by which Her Majesty is influenced”, the “first and most important” being:<sup>391</sup>

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<sup>386</sup> Ibid 205b-206a.

<sup>387</sup> Ibid 209a-210a. The subsequent February draft of the Instructions made clear that these presents were to be “implements of husbandry, or articles of domestic use, or personal comfort for which any desire may exist or can be created amongst them”. CO 209/4, 221a-242b at 239b-240a.

<sup>388</sup> 24 January 1839 draft of Hobson’s Instructions, CO 209/4, 203a-220b at 208b-209a.

<sup>389</sup> Ibid 210a-b.

<sup>390</sup> Ibid 211a-b.

<sup>391</sup> Ibid 210a-b.

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to rescue themselves and their people from the outrages of lawless Bands of men, over whom the Queen can exercise no effective control, so long as New Zealand shall remain, as at present, an entirely Foreign Country.<sup>392</sup>

The Instructions also contained details about how government in the ceded colony would be administered. They envisaged a delay in creating a legislature for the colony.<sup>393</sup> They identified that revenue for the colony would be obtained from import duties and sale of land (apparently assuming that the territories to be acquired would exceed those presently occupied by British subjects). Revenues from land sales, surplus to the needs of government, could be “devoted to the expense of introducing Emigrants from this Country”.<sup>394</sup>

Legislation by the Imperial Parliament would be necessary to create a local legislature,<sup>395</sup> and to confer jurisdiction on the courts of the colony for crimes committed within New Zealand “beyond the Colonial precincts” (“[a]ssuming that the proposed Colony will occupy but a part<sup>396</sup> of New Zealand”).<sup>397</sup> Parliament would also be asked to declare that no land within the colony should be granted “gratuitously”, but rather should be sold at “such upset prices as shall from time to time be fixed for that purpose by the Lords Comm<sup>rs</sup> of the Treasury”.<sup>398</sup> This was consistent with New Zealand Association proposals and also reflected the importance placed on a well-regulated system of land sales as a means to ensuring the success of the colony. Finally, it was thought that legislation would also “be probably necessary” to “declare invalid any title to Land in New Zealand which

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<sup>392</sup> See also *ibid* 206a-b: “In order to the exercise of a lawful authority in those Islands, it is necessary that some parts of them should be brought under the Sovereignty of the Queen, and a title to that dominion can be legitimately acquired in no other method than that of the voluntary cession of it by the Chiefs in whom it is at present vested.”

<sup>393</sup> *Ibid* 212a-b.

<sup>394</sup> *Ibid* 216a-217a.

<sup>395</sup> *Ibid* 212b-213a: “It is not within the scope of the Royal prerogative to create a Legislature in the proposed Colony except by the Convention of a Representative Assembly.... Resort must ... be had to Parl<sup>t</sup> to sanction ... the creation of a Legislative Body ... to be composed of persons to be named by the Queen for that purpose, under the title of a Legislative Council”.

<sup>396</sup> Stephen had originally drafted that the colony would occupy “but a *small* part of New Zealand”, but Glenelg or Grey crossed out the word “small”. *Ibid* 213b.

<sup>397</sup> *Ibid* 213b.

<sup>398</sup> *Ibid* 214a-b.

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may hereafter be acquired unless such title be founded upon a grant from the Crown”.<sup>399</sup>

The draft explained that the effect of the arrangements was that, while “within the British Territory in New Zealand”, Hobson would “possess the character & powers of a British Governor”, outside that territory, he would be “invested with the rights and privileges of a British Consul”.<sup>400</sup>

The power of either class will be used for establishing and enforcing Law and Order amongst the British Inhabitants and for protecting the Natives from violence and injustice.

Stephen’s draft was read by Sir George Grey on 24 January.<sup>401</sup> He made a few changes to the draft, commenting that the offer to chiefs beyond the colony of “an alliance offensive and defensive with the Crown of Great Britain” appeared “hazardous”.<sup>402</sup>

It might compel us to resist by force any attempt at a settlement on any part of the unceded territory by the French or Americans.

In a covering note to Glenelg, to whom the draft was then sent, Grey wrote that the “latter part” of the draft seemed to him to “require much consideration”. He suggested that the “first step” should be to pass the draft to Hobson for his comment.<sup>403</sup> It would seem that Glenelg read the draft and passed it to Hobson.<sup>404</sup>

Hobson’s few comments were concerned with the manner of cession of sovereignty, the necessity of treating for the sovereignty of lands already purchased by British settlers, the scope of the proposed legislation relating to land titles of

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<sup>399</sup> Ibid 214b & 216a.

<sup>400</sup> Ibid 218a-219a.

<sup>401</sup> See ibid 203a.

<sup>402</sup> Ibid 209a.

<sup>403</sup> Ibid 203a.

<sup>404</sup> Glenelg did not mark the draft as having been read by him or make any comment on it (or at least any comment that survives in the Colonial Office files). However, some of the corrections to the draft, such as those at CO 209/4, 205b, 206b and 210b-211, may be in his handwriting rather than Grey’s.

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British subjects, and impact of a duty on imported tobacco upon Maori.<sup>405</sup> As to the clarification as to “what constitutes a voluntary cession by the chiefs”, he asked whether it would be “requisite to obtain their unanimous consent, or the consent of the majority?”.<sup>406</sup>

The New Zealanders, I fear, have no idea of deputing a limited number of chiefs to represent the wants and wishes of the whole Body, for even in the Purchase of the Land it is requisite to treat with every member of the tribe before they will consent to surrender possession.

In questioning whether it was necessary to treat for the sovereignty of lands already purchased by British subjects, he suggested that “the possession of the land carries with it, the full sovereign & territorial rights”.<sup>407</sup>

At present nearly all the Land round the Bay of Islands, and on the Coast on both sides of it for some distance, is held by Europeans and I understand the whole Country adjacent to Hokianga is similarly circumstanced ... according to the idea of the New Zealanders, the English there already possess the sovereignty.

As to treatment of land purchases in the proposed legislation, Hobson, apparently mistaking Stephen’s proposal, wrote:<sup>408</sup>

The clause of the act of Par<sup>t</sup> which provides for the validity of the title to land which may hereafter be acquired should be extended to that which is already possessed by British subjects—All of which should be legally conveyed by the Crown to the present holders provided their right to it is undisputed, upon payment of a tax equal to the upset price of the land.

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<sup>405</sup> Ibid 207b & 215a-b.

<sup>406</sup> Ibid 207b.

<sup>407</sup> Ibid. This was an opinion reminiscent of some of the evidence given to the House of Lords Select Committee on New Zealand in April and May 1838. See GBPP 1837-38 (680) XXI.327 at 22 & 26 (Watkins), 44 (Flatt) and 102 (Williamson). But see ibid 256 (Coates).

<sup>408</sup> 24 January 1839 draft of Hobson’s Instructions, CO 209/4, 203a-220b at 215a. Hobson’s suggestion that British landholders should have to pay a tax equivalent to the otherwise applicable upset price of Crown lands in order for their purchases to be “legally conveyed” by the Crown was similar to the proposals made by the New Zealand Association in its 1838 Bill and by the 1825 Company in its December 1838 plan. See text accompanying ns 247 and 279 above. In identifying the proviso to this arrangement that British subjects’ rights to the land be “undisputed”, Hobson may also, as with those other plans, have contemplated a preliminary investigation into the validity of British claims to titles to land.

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By early February 1839, the draft of Hobson's Instructions was advanced, and the Colonial Office seemed close to a decision on the terms of British intervention in New Zealand.<sup>409</sup> Then, in a move "utterly unforeseen" by him, Glenelg was forced from the office of Secretary of State for the Colonies.<sup>410</sup> He tendered his resignation to the Queen on 8 February, but evidently stayed on for a short time to finalise outstanding matters at the Colonial Office. New Zealand was one of those outstanding matters. Glenelg seems to have hoped to be in a position to put a proposal to the Cabinet before leaving office. In the event, however, he had to settle for getting the proposal into a form which would enable his successor in office to take that step.

With this aim, Hobson's Instructions were refined through a further draft suitable for submission to Cabinet for authorisation to proceed.<sup>411</sup> The draft is undated, and historians have differed about the date to be properly ascribed to it, but, for reasons given in Appendix 13, it is suggested that the preferable view is that the redraft was in fact prepared by Stephen between 5 and 12 February and was the basis upon which, on 12 February, Glenelg completed a minute probably intended for his successor in office to which the latest draft Instructions were annexed.<sup>412</sup> There had

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<sup>409</sup> See also Grey to Lyall, 8 February 1839, CO 209/3, 322a-323a (both as first drafted on 4 February and as approved by Glenelg on 5 February with changes made by himself and/or Grey).

<sup>410</sup> Glenelg (8 February 1838) 45 GBPD HL cc183-184. Glenelg resigned after Melbourne wrote to him on 5 February to tell him that he was to be moved from the Colonial Office and offered him the privy seal instead. Melbourne had had this decision forced on him by senior ministers including Howick and Russell, with Russell having on 2 February threatened to resign from office if Glenelg was not moved. See Ged Martin, "Grant, Charles, Baron Glenelg (1778-1866)" *Oxford Dictionary of National Biography* (Oxford University Press, Oxford, 2004). Stephen considered that Glenelg's resignation had been brought about in an "offensive manner". It was a "sad subject" for him as not only did he regard Glenelg as the "most laborious, the most conscientious, and the most enlightened Minister of the public" of the 10 Secretaries of State he had served, but also Glenelg had been his "intimate personal friend" with whom he had passed for four years "some hours daily with him, with few occasional intervals, in an intercourse the most perfectly free and unrestrained". Stephen had never detected in Glenelg "one disingenuous or indirect motive". "His real and only unfitness for public life" arose from the "strange incompatibility of his temper and principles with the tempers and with the rules of action to which we erect shrines in Downing Street". Stephen to Mrs Austin, 12 February 1839, reproduced in Stephen (ed) *Sir James Stephen*, above n 328, 56-57.

<sup>411</sup> See memorandum of Stephen to Labouchere, 15 May 1839, CO 209/4, 243a-247a at 243a-b.

<sup>412</sup> February 1839 draft of Hobson's Instructions, CO 209/4, 221a-242b; Glenelg minute, 12 February 1839, CO 209/4, 191a-192b.

been a change in view as to the extent of the sovereignty to be acquired (now to be limited to lands “already settled” by British subjects) and a change in attitude towards emigration (which was not to be encouraged), necessitating the revision of the 24 January draft.

In his minute, Glenelg summarized the revised plan as being based upon the view that “[t]he necessity for some interposition by the British Government for the protection, both of the British Settlers, and of the Natives, is established”:<sup>413</sup>

The plan which I propose is not one for the encouragement of an extended system of Colonization, but for the establishment of a regular form of Government, urgently demanded by existing circumstances.

For this purpose it is proposed to obtain by negotiation and Cession from the Chiefs, the Sovereignty for the Queen, of certain defined portion or portions of Land—the portion or portions being those where the British are already settled. Here the British authority would be established under proper Officers.<sup>414</sup>

The draft Instructions acknowledged that “direct intervention in the internal affairs of New Zealand” was contrary to the recommendation of the Aborigines Committee. It explained that, either the Committee had not had the full facts about New Zealand, or the position had deteriorated since 1836. The “same principles of humanity and justice” which had actuated the Committee’s opposition now necessitated intervention.<sup>415</sup>

The position in New Zealand at 1839 was that a “self-instituted colony” was “continually increasing”, under claims of “proprietary right to a very extensive Territory, under Contracts said to have been made with the Native Chiefs”. For the most part, the settlers were not law-abiding people but “fugitives from our penal

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<sup>413</sup> Glenelg minute, 12 February 1839, CO 209/4, 191a-192b at 191a-b.

<sup>414</sup> The minute also recorded Glenelg’s intention (subject to the approval of the Admiralty) to send Hobson to New Zealand in command of a Ship of War, which ship and command he would retain “at least for a considerable time”. Ibid 192a-b.

<sup>415</sup> February 1839 draft of Hobson’s Instructions, CO 209/4, 221a-242b at 222a-223a. In apparent reference to Glenelg’s Boxing Day 1835 despatch repudiating the annexation of Queen Adelaide Province, the Select Committee was said to have grounded its advice “upon the principles on which His late Majesty had acted in the case of South Africa”.

Colonies” and “Deserters from Ships which have visited the Islands”.<sup>416</sup> Without law or legal institutions of government, oppression of Maori could not be prevented and “war, disease and the other Calamities which seem unhappily to follow as often as barbarous Tribes are brought into contact with civilized men” could not be averted.<sup>417</sup> A continuation of these conditions would be unjust alike to Maori and respectable settlers and was likely to lead to this community becoming “the nucleus of piratical Adventurers, dangerous to the peaceful Commerce of all Nations in the Southern Hemisphere”.<sup>418</sup> Hobson was therefore advised that:<sup>419</sup>

To subjugate these people to Law and Order and to secure the Aborigines against the perils of their vicinity are the principal objects of the Mission with which you are charged.

The Instructions explained that the acquisition of sovereignty was a solution arrived at as an “unwelcome necessity” in the absence of any other adequate solution.<sup>420</sup> As a result Hobson was to obtain from the chiefs:<sup>421</sup>

a Cession in full sovereignty to the Queen of some part of the Territory of New Zealand, in order that within that Territory there may be established a Government derived from Her Majesty’s prerogative, and administered according to the Laws of England in the same manner as in other British Colonies.

Although “[i]n certain views” the easier course was to obtain a cession in sovereignty of the whole country, the draft took the view that the objects of British intervention did not “for the present” require such “needless encroachment upon

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<sup>416</sup> Ibid 223a-224a.

<sup>417</sup> Ibid 224b-225a.

<sup>418</sup> Ibid 225a-b.

<sup>419</sup> Ibid 225b-226a.

<sup>420</sup> Ibid 227a-230a. In apparent reference to Busby’s 16 June 1837 proposals, the draft discussed the option of deriving from a Confederation of Chiefs under British protection “all such Laws and Institutions as would be necessary for the prevention or punishment of Crime, and for the good government of all the Inhabitants, whether of European or of Native origin”. This option was, however, rejected as “impractical or ... inadequate” (for reasons developed at *ibid* 228a-229a) and as likely to involve the Queen’s representative, who would in fact be the real authority in the arrangement, in a “most hazardous responsibility” (as explained at 229a-230a). These objections to Busby’s plan echoed those expressed on it by Dandeson Coates of the Church Missionary Society. See text accompanying n 144 above.

<sup>421</sup> February 1839 draft of Hobson’s Instructions, CO 209/4, 221a-242b at 230a-b.

the rights of the Aborigines”.<sup>422</sup> More extensive sovereignty might not be “unattended with the risk of collisions with Foreign powers” and could be onerous in the obligations assumed. It was a measure that might become “indispensable” but which the Government was not justified to adopt “unless the necessity could be more clearly shown than at present”.<sup>423</sup> For the present it was enough “those parts of New Zealand which are actually occupied by British Subjects, and in the Soil of which they assert a proprietary right were ceded to the Queen in Sovereignty”.<sup>424</sup>

The free consent of Maori to cession of sovereignty in the territories acquired was recognised to be essential:<sup>425</sup>

The Queen disclaims any pretension to regard their Lands as a vacant Territory open to the first future occupant, or to establish within New Zealand a sovereignty to the erection of which the free consent of the Natives shall not have been previously given.

Although it was acknowledged that a “collection of separate Tribes of men occupying so extensive a Territory without any definite union” (each tribe lacking “the Civil polity, or social institutions of Civilized Communities”) meant that the full extent of “international relations” practised between nations “properly so called” could not be conducted between Great Britain and New Zealand, the right of Maori to be regarded as “one independent Community” was to be “observed in fact as well as acknowledged in theory”.<sup>426</sup>

The draft also acknowledged (probably in response to the suggestion made by Hobson in his comment on the 24 January draft<sup>427</sup>) that it was to be “doubted” whether Maori made a distinction between rights of sovereignty and property, so that “strictly speaking” it was unnecessary to negotiate for cession of sovereignty

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<sup>422</sup> Ibid 230b.

<sup>423</sup> Ibid 231a.

<sup>424</sup> Ibid 231a-b.

<sup>425</sup> Ibid 227a.

<sup>426</sup> Ibid 226a-227a.

<sup>427</sup> See text accompanying n 407 above.

over British-owned lands. The draft insisted, however, that no advantage was to be taken of Maori “ignorance” in this respect.<sup>428</sup>

The draft acknowledged the need to obtain Parliamentary authority to create a legislature in New Zealand and to enlarge the jurisdiction of courts of the colony (which could be otherwise established under the Royal Prerogative) to crimes committed in New Zealand beyond the colony.<sup>429</sup> To prevent further alienation of lands by chiefs beyond the colony, it was also possible that Parliament would be asked to legislate that “no title to Land in New Zealand to be hereafter acquired by any British Subject shall be of any validity unless it be founded upon or derived from a Grant from Her Majesty”.<sup>430</sup> Before such legislation was enacted, and to prevent “a much wider extension of the evil than at present”, Hobson was instructed to issue a Royal proclamation “immediately upon the foundation of the Colony” that:<sup>431</sup>

Her Majesty would not recognize any title to Land in any part of New Zealand which should be subsequently acquired from the Natives, or afford any protection to such acquisition even if they should at any future time be brought within the limits of the British Sovereignty.

With such notice, it was thought that there would be no “serious difficulty” in dispossessing purchasers, and that further purchasing would be deterred.<sup>432</sup> This proclamation proposal was similar to that provided for in the New Zealand Association’s June 1838 Bill.<sup>433</sup>

The Instructions regarded it as not “practicable” to recommend the necessary legislation to Parliament “in anticipation of the proposed Cession of

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<sup>428</sup> February 1839 draft of Hobson’s Instructions, CO 209/4, 221a-242b at 238b-239a.

<sup>429</sup> Ibid 232a-235a. Confidence was expressed that Parliament would confer extraterritorial criminal jurisdiction on the New Zealand courts as the precedent for such legislation existed in “several corresponding instances of which South Africa affords the most recent and apt illustration” (a reference to the Cape of Good Hope Punishment Act 1836, for which see Chapter 3, text accompanying n 92).

<sup>430</sup> Ibid 235a-b.

<sup>431</sup> Ibid 235b-236a.

<sup>432</sup> Ibid 236a-b.

<sup>433</sup> See text accompanying n 245 above.

Sovereignty”.<sup>434</sup> This would mean a delay in constituting a legislature which would cause “some embarrassment” and “inconvenience”. But the view was expressed that this inconvenience would not be “so considerable” that it could not be “safely encountered and endured in the Commencement of the undertaking”.<sup>435</sup> In the meantime, there “there would exist all those Laws and Institutions which are indispensable to order and good government”.<sup>436</sup> The Queen in exercise of her prerogative powers could establish courts within the limits of the colony, and appoint officials including customs officers to collect import duties and revenues from sale of Crown lands (indicating that at least some acquisition of sovereignty and property beyond land already acquired by British subjects was envisaged). The inhabitants would “live under the Law of England” as adapted to their circumstances.<sup>437</sup> Hobson would have a commission constituting him “Governor of the British Settlements in New Zealand”.<sup>438</sup>

Beyond the limits of the colony, it was important that “British influence or authority should in some manner be made so extensive with the limits of the Islands” if “unauthorized Settlements”, with their deleterious effect on Maori, were to be prevented.<sup>439</sup> This would be accomplished by entering into a confederation with the chiefs by which the chiefs would agree not to allow settlement without approval of the Governor, while giving access to British trade and to missionaries. It was hoped that agreement to abolish human sacrifice, to prevent native wars, and to encourage native industry, might also be obtained.<sup>440</sup> In return, the Crown “might guarantee to the Chiefs and people the undisturbed possession of their

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<sup>434</sup> Ibid 233a.

<sup>435</sup> Ibid 233a-b

<sup>436</sup> Ibid 232a.

<sup>437</sup> Ibid 231b-232a.

<sup>438</sup> Ibid 240b.

<sup>439</sup> Ibid 237a. Legislation to confer an extraterritorial jurisdiction on the courts of the colony and to prevent further alienation of lands by the chiefs in the unceded territories “would still leave all those parts of New Zealand lying beyond the limits of the Colony open to whatever calamities might be implicated on them by British Subjects not engaged in the Commission of actual Crime or by the subjects of other Foreign Powers ...”. Ibid 236b.

<sup>440</sup> Ibid 237b-238a.

rights whether territorial or sovereign, and the recognition of their National character and national Flag”.<sup>441</sup>

The draft ended by reaffirming the reasons for intervention and the reluctance with which it was being undertaken:<sup>442</sup>

The course of events has forced on HM Gov this measure which they would gladly have avoided had it been possible, and which they now reluctantly undertake. It is a reluctance not founded on the slightest doubt of the value of New Zealand as a possession or Dependency of the British Crown. On the contrary they are well convinced of the importance of such an acquisition. But they regard with deep solicitude the results which may follow from the vicinity of a British settlement to the feeble and barbarous Tribes of Aborigines. It is because they think such a Colony destitute of Law, order, and Government as pregnant with dangers far more urgent and serious, that they have resolved on this step. It is the alternative to a far more disastrous and perilous system. But regarding Colonization in New Zealand as at best but an escape from a greater evil, they do not at present propose to encourage its extension. It is not their policy to promote the settlement of British Subjects or the Sale of Lands in those Islands. Their views for the present at least terminate in establishing there the authority of Law, partly for the protection of the Settlers of European origin, but chiefly in the hope that by a wise, humane, and firm administration of the local Government, the Natives may not only be rescued from the Calamities impending over them, but may be gradually introduced to the blessings of Civilized Society, and to the enjoyment of the advantages inseparable from it.

### Further delay

Glenelg's departure from office resulted in further delay in a final decision on New Zealand. He was replaced as Secretary of State for the Colonies by the Marquess of Normanby.<sup>443</sup> Sir George Grey was also replaced as Parliamentary Under-

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<sup>441</sup> Ibid 238a-b. These instructions indicate that Glenelg did not share Sir George Grey's concerns, expressed in relation to the 24 January draft, about formal British alliances with the chiefs and tribes of the unceded territories. The agreement of the chiefs not to allow settlement without the Governor's approval may, however, have been thought to address Grey's fear that such alliances would require the British Government to forcibly resist any attempts at settlement by the French or Americans in the unceded territories.

<sup>442</sup> Ibid 241a-242b.

<sup>443</sup> Normanby was a former Governor of Jamaica, who had held Cabinet posts in Melbourne's government as Lord Privy Seal and, mostly recently, as Lord Lieutenant of Ireland. Richard

Secretary by Henry Labouchere.<sup>444</sup> Normanby was in no hurry to make a decision about New Zealand. In this he may have been following his own advice that the art of governing colonies was to identify the problems that demanded solution and those “which might by postponement dispose of themselves” (as he thought many colonial questions did).<sup>445</sup> As minuted by Stephen on 14 March, Normanby directed that a briefing paper that had been prepared for him in late February, and to which were annexed Glenelg’s 12 February minute and the latest draft of Hobson’s Instructions, “should be put by for his Lordship’s future reference whenever this question shall be ripe for decision, which at present it is not”.<sup>446</sup>

Stephen, for his part however, seems to have thought that further delay could not be countenanced. On 15 March, he wrote a memorandum for Labouchere identifying the questions requiring decision and suggesting how they might be brought to a conclusion.<sup>447</sup> He took it as “established” that “the Colonization of New Zealand” was “if not an expedient, at least an inevitable measure”.<sup>448,449</sup>

It is in fact colonized already by British subjects of the worst possible character, who are doing the greatest possible amount of evil with the least possible amount of good, and who are living under no restraint of Law or Government.

Assuming the necessity of some British intervention, Stephen identified as the first question whether the Government should entrust the establishment of a “regular” colony in New Zealand to a chartered corporation. Stephen considered that chartering a company on the conditions of Glenelg’s 1837 offer of a charter to the New Zealand Association (with its “various elaborate provisions for the defence of the Natives”) was the “best practicable course” available, if a suitable list of directors of the company could be obtained to “disarm the opposition of the great

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Davenport-Hines “Phipps, Constantine Henry, first marquess of Normanby (1797–1863)” *Oxford Dictionary of National Biography* (Oxford University Press, Oxford, 2004).

<sup>444</sup> Grey became Judge Advocate General. Labouchere was the Master of the Mint and Vice-President of the Board of Trade.

<sup>445</sup> Normanby to Russell, 2 September 1839, TNA PRO 30/22/3D, 5a-12b at 5a.

<sup>446</sup> Stephen minute dated 14 March 1839 on 28 February 1839 briefing paper for Normanby, CO 209/4, 316a-325a at 316a.

<sup>447</sup> Memorandum of Stephen to Labouchere, 15 March 1839, CO 209/4, 326a-331a.

<sup>448</sup> Ibid 326b.

<sup>449</sup> Ibid 326b-327a.

Missionary Societies” (a view that suggests that the decision not to make provision for a chartered company in the January and February drafts of Hobson’s Instructions had been Glenelg’s and not Stephen’s).<sup>450</sup> Stephen suggested that communications should be held between the Government and the various promoters of New Zealand colonisation “to ascertain distinctly their common views upon the right mode of proceeding, and to report the result to Lord Normanby for the decision of his Lordship and his Colleagues”.<sup>451</sup> In the event, however, that the Government would not entertain granting a charter to a private body to establish and manage settlements in New Zealand, Stephen considered that the “next best course” was Glenelg’s “second, or substituted scheme”, of appointing a Consul to negotiate a cession of sovereignty of particular districts and to become the Governor of any territories so acquired.<sup>452</sup> If this option was preferred, there was “nothing to be done but to select the Consul and future Governor” and to prepare his Commissions and Instructions.<sup>453</sup>

The only alternative that Stephen could see to “these two modes of Colonizing New Zealand” (chartering a company or establishing Crown Colony government) was to establish “at once ... a Governor, Council, and Assembly” (that is to say, a representative system of government).<sup>454</sup> Stephen did not, however, recommend this option. While as a matter of principle his view was that settler self-government (“to the extent in which that principle can be reconciled with allegiance to the Crown, and with the Colony moving in the same political orbit with the parent state”) was one of “two cardinal points to be kept in view in establishing a regular Colony in New Zealand” (the other being the protection of Maori),<sup>455</sup> and while he considered that a representative system of government was “the best possible

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<sup>450</sup> Ibid 327b-328a.

<sup>451</sup> Ibid 330b-331a.

<sup>452</sup> Ibid 328a-b. Stephen’s memorandum also explained the proposal for legislation to create a nominated Legislative Council for the colony, to confer extraterritorial criminal jurisdiction on the courts of the colony, and to declare “invalid any future acquisitions of Land by British Subjects within New Zealand from the Native Chiefs or people”. Ibid 328b.

<sup>453</sup> The reference to selecting a Consul and Governor may suggest that the Colonial Office was not yet committed to appointing Hobson to these positions.

<sup>454</sup> Memorandum of Stephen to Labouchere, 15 March 1839, CO 209/4, 326a-331a at 329a.

<sup>455</sup> Ibid 327a.

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scheme for any Colonial Society of the Anglo-Saxon Race”, that was only where colonial society was “exempt from the disaster of Caste”:<sup>456</sup>

It is only because in New Zealand that calamity would prevail between the European and the Aboriginal Colonists that I should hesitate in at once convening an assembly, if I had any voice in such a decision.

Apart from the general decision as to the form British intervention in New Zealand should take, Stephen’s memorandum also identified that there were “other questions of great difficulty” to be decided, only two of which were discussed. The first, said to be the “most considerable”, was whether Britain should treat with Maori for the sovereignty of the whole country or of limited portions only:<sup>457</sup>

Shall we acquire the Sovereignty of all the Islands and brave the discussions which must follow with the United States and with France with all the arduous responsibility of protecting the Inhabitants of so extensive a Dominion? Or, shall we take on the sovereignty of particular Districts only, and hazard the evils of a new unauthorized Colonization beyond our own limits? Or, shall we attempt the middle course of obtaining from the Chiefs an agreement to place under British protection so much of the Islands as are not to be placed under British Dominion? The distinction may perhaps truly be said to be verbal rather than substantial; but in this, as in other Cases, an unsubstantial verbal distinction may be of very great practical use.

In raising this question, Stephen seems to have thought it important that Normanby and Labouchere should be comfortable with the position tentatively reached in the earlier drafts of the Instructions.

The second matter raised concerned British land purchases in New Zealand.<sup>458</sup> Stephen was concerned at the extent of the reported purchases, citing (in evident reference to recent advice from the New Zealand Colonisation Association) the example of “one Body in London which possesses or claims no less than a Million Acres”. If not checked, “this abuse” would result in New Zealand becoming “ere long ... like Prince Edward’s Island, the property of the same Forty or Fifty

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<sup>456</sup> Ibid 329a-b.

<sup>457</sup> Ibid 329b-330a.

<sup>458</sup> Ibid 330a-b.

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English Absentees”.<sup>459</sup> The result would be that local government would be “undersold and thwarted to a great extent in its operation respecting Land by the present Claimants of the soil”.<sup>460</sup>

Stephen’s attempt to convince Normanby and Labouchere of the urgency of a decision on New Zealand intervention was not successful. Other business became more pressing.<sup>461</sup> Nothing occurred until, at the very end of April 1839, the Colonial Office learnt first hand from the New Zealand Land Company that the *Tory* was to sail in early May.<sup>462</sup> This communication spurred the Colonial Office to action. It wrote to the Company to express dismay at the plans.<sup>463</sup>

Lord Normanby now, for the first time, learns that a body of Her Majesty’s subjects are about to proceed to New Zealand to purchase large tracts of land there, and to establish a system of Government independent of the authority of the British Crown. It is impossible that his Lordship should do any act which could be construed into a direct or indirect sanction of such a proceeding.

The Colonial Office advised the Company that it was “probable” that the Queen would be advised “without delay” to “obtain cession in sovereignty to the British Crown of any part of New Zealand, which are or shall be occupied by Her Majesty’s subjects”, in which event officers appointed by the Queen would administer the government within the ceded territory.<sup>464</sup> The Company was further advised that the Government could give no promise “for the further recognition by Her Majesty of any proprietary titles to land in New Zealand, which the Company or any other persons may obtain by grant or by purchase from the natives”.<sup>465</sup>

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<sup>459</sup> Ibid 330b.

<sup>460</sup> Ibid 330a.

<sup>461</sup> See Adams *Fatal Necessity*, above n 3, 135 & 148. Adams refers to Stephen’s remark in September 1839 that he had been “living for the last six months in a tornado”.

<sup>462</sup> A deputation from the New Zealand Land Company explained the Company’s plans to Normanby at an interview on 29 April 1839. See also Hutt to Normanby, 29 April 1839, CO 209/4, 532a-545a (also GBPP 1840 [238] XXXIII.587 at 22-27), enclosing the Company’s Instructions to Colonel Wakefield (on which see above n 301).

<sup>463</sup> Labouchere to Hutt, 1 May 1839, CO 209/4, 546a-549a at 546a-547b (also GBPP 1840 [238] XXXIII.587 at 27-28).

<sup>464</sup> Ibid 547b-548a.

<sup>465</sup> Ibid 548a-b.

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On the contrary, with a view to the protection of the interests of the aborigines, as well as to the future prosperity of any colony which may be established in New Zealand, it is probable that application to Parliament may hereafter become necessary to provide for the investment in the Crown of any proprietary rights which may be thus acquired by private parties, with such equitable compensation to them as under all the circumstances of the case may appear to be expedient.<sup>466</sup>

### Decision-time

The Colonial Office's hand had been forced.<sup>467</sup> On 18 May, Stephen outlined in a memorandum to Labouchere the matters that needed to be attended to before Hobson could be sent to New Zealand. There was "much to be done, which will necessarily occupy a considerable time, and which will therefore ill brook any further delay".<sup>468</sup> The "first and most important" step to take was to obtain "the concurrence of the Gov<sup>t</sup> collectively" for Hobson's mission, in respect of which Stephen urged haste.<sup>469</sup> He suggested that the latest draft of the Instructions, with Glenelg's accompanying minute, which had been drawn up for the "express purpose" of explaining "the motives and the nature of the measure" advanced by the Colonial Office to the Cabinet, "still ... might perhaps be a most convenient mode of bringing the question under the notice of the Gov<sup>ty</sup>".<sup>470</sup>

If the Cabinet should accept the proposal, Stephen identified a number of further actions required before Hobson could be dispatched: the Foreign Office would have to provide a Commission appointing him British Consul at New Zealand;<sup>471</sup> the Treasury approval for the costs of the undertaking would have to be obtained

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<sup>466</sup> Labouchere had altered this last paragraph from Stephen's draft, which before Labouchere's changes had read: "On the contrary, with a view to the future welfare of any Colony which may be established in New Zealand, it is probable that application may be made to Parliament to declare that all Titles to Land acquired in New Zealand by British Subjects shall be held liable to be repurchased by the Crown on the repayment of the price given for such Lands". Ibid 548b; and Stephen minute, 30 April 1839, CO 209/4, 533b.

<sup>467</sup> There was a further slight delay in May possibly attributable to the Chartist crisis, the short-lived resignation of Melbourne's Government, and the Bedchamber Crisis that kept the Whigs in office. Normanby's wife was one of the ladies of the Bedchamber. See Adams *Fatal Necessity*, above n 3, 134.

<sup>468</sup> Memorandum of Stephen to Labouchere, 18 May 1839, CO 209/4, 243a-247a at 243a.

<sup>469</sup> Ibid 246b-247a.

<sup>470</sup> Ibid 243a-b.

<sup>471</sup> Ibid 244a.

(although Stephen stressed that “very few public Officers” would be required initially, and that unpaid appointments for the administration of justice could be made until “much more accurate knowledge shall have been obtained as to the practicability of the Scheme and the extent of the necessary Establishments”);<sup>472</sup> the Admiralty would have to make arrangements for Hobson’s passage and possibly for his temporary command of a ship;<sup>473</sup> the Colonial Office would have to prepare a Commission for Hobson as Governor and Instructions to accompany that Commission;<sup>474</sup> either application would have to be made to Parliament for legislation to create a “local Legislature” for New Zealand (which legislature could then make provision for the administration of justice in the colony) or the Colonial Office would have to consult with the Law Officers as to how Hobson might “by the mere Royal prerogative” establish courts of civil and criminal jurisdiction in the colony;<sup>475</sup> and the Colonial Office would need to write to the Australian Governors explaining the proceeding and instructing them to co-operate with Hobson.<sup>476</sup>

As to the necessity of Parliamentary legislation, Stephen considered that recourse to Parliament in its present session was the “best course”. He felt that there was not “much weight” in the objection as to Parliament legislating for a colony “not actually in existence”:<sup>477</sup>

In fact, the Colony does exist altho’ by mere usurpation on the rights of the New Zealanders. The Law would be made to meet a real and practical evil, and not to provide for a theoretical and speculative advantage. An Act of Parl<sup>t</sup> was passed to establish a Legislature at Western Australia before a single settler had arrived there.

Hobson was recalled to London.<sup>478</sup> He met with Normanby, Labouchere, and possibly Stephen on Saturday 25 May when the subject of existing European

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<sup>472</sup> Ibid 244a-b.

<sup>473</sup> Ibid 245a. See above n 414.

<sup>474</sup> Ibid.

<sup>475</sup> Ibid 245b-246b.

<sup>476</sup> Ibid 246b.

<sup>477</sup> Ibid 245b-246a.

<sup>478</sup> It is not known when the Government made the necessary decisions but it was probably in late-May or early June 1839. For the period, there are no formal records of Cabinet meetings.

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claims to land in New Zealand was discussed.<sup>479</sup> Adams considers that the option of annexing territories that might be acquired in sovereignty in New Zealand to the government of New South Wales as a dependency of that colony was probably also discussed at this meeting, because on the following Monday, the chief clerk in the Colonial Office drafted a new Commission for Governor Gipps extending the boundaries of the New South Wales.<sup>480</sup> The Colonial Office's reason for seeking to annex the New Zealand territories to New South Wales was in order for the ceded territories to come automatically within the jurisdiction of the Governor and Legislative Council of New South Wales (and thus avoid the delay in obtaining legislation through Parliament), as was explained in a subsequent letter to the Law Officers dated 30 May. In that letter, Normanby explained that:<sup>481</sup>

Circumstances have recently occurred which impose on Her Majesty's Government the necessity of establishing some system for governing the numerous body of British Subjects who have taken up their abode in the New Zealand Islands, and who are still repairing thither. It is proposed to obtain from the Chiefs of New Zealand the Cession in Sovereignty to the British Crown, of the Territories which have been, or which may be, acquired by Her Majesty's Subjects by proprietary Titles derived from the Grants of the different Chiefs. It is further desired, if possible, to add the Sovereignty thus obtained to the Colony of New South Wales as a Dependency ... .

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The brief letters written by Melbourne to Queen Victoria about Cabinet meetings do not refer to New Zealand; see *Cabinet Reports by Prime Ministers to the Crown 1837-1867* (The Harvester Press, Hossocks, Sussex, 1978). These letters are, however, so scanty (tending to report only the most important decision taken by the Cabinet) and, seemingly, so incomplete as a series (eg there are no letters between 10 May 1839 and 1 August 1839) that they cannot be relied upon as an accurate record of what the Cabinet may or may not have decided. The private papers of Cabinet Ministers may shed light on when, or if, the Cabinet made a decision on New Zealand, but they have not been consulted for this thesis.

<sup>479</sup> No record of this meeting exists. Hobson, in a letter to Labouchere on 30 May, referred to "the very important subject mooted on Saturday last [i.e. 25 May] ... of Lands already in the possession of Europeans in New Zealand". Hobson to Labouchere, 30 May 1839, CO 209/4, 104a-107b at 104a. Hobson's letter made additional suggestions for dealing with this problem—see Chapter 10, text accompanying n 83. It also possibly indicates that investigation of land titles by Commissioners was an option under consideration at this time.

<sup>480</sup> Adams *Fatal Necessity*, above n 3, 151; "Draft of Letters Patent for annexing to the Gov<sup>t</sup> of NSWales such parts of the Territory of New Zealand as may be ceded in Sovereignty to Her Majesty, Her Heirs or Successors", CO 380/122, 5a-8b.

<sup>481</sup> Normanby to the Attorney-General & Solicitor-General, 30 May 1838, CO 209/5, 76a-77b at 76a-b.

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Normanby asked for the opinion of the Law Officers as to whether it was lawful for the Crown to annex to New South Wales “any Territory in New Zealand, of which the Sovereignty might be acquired by the British Crown”, and whether “the Legislative authority of the Governor and Council of New South Wales could then be exercised over British Subjects inhabiting that Territory”.<sup>482</sup> The Law Officers returned the answer on 4 June that annexation by the Crown of territory in New Zealand to New South Wales would be lawful, and that “the legislative authority of New South Wales ... may then be exercised over British subjects inhabiting that territory”.<sup>483</sup> The draft Commission for Gipps was “properly framed”.<sup>484</sup>

Following receipt of the Law Officer’s advice, Stephen advised Normanby that Governor Gipps’s new Commission would now be finalised, and that Instructions for Gipps and Hobson would “be ready within a very short time”.<sup>485</sup> In view of advertisements in the newspapers for the sale of land by the New Zealand Land Company, Stephen also asked whether:<sup>486</sup>

it would be right to make known with at least equal publicity the course which the Gov<sup>t</sup> are about to pursue, and to warn all purchasers that the Government cannot recognize the validity of any purchases of Land, which may hereafter be made, by any of the Queen’s Subjects or others from any of the Chiefs or other Inhabitants of New Zealand.

Stephen suggested that this warning could be given in Parliament or by notice in the Gazette.

There is no reply in writing from Normanby regarding this suggestion for a warning about land purchasing in New Zealand. However, at a meeting with a deputation of directors of the New Zealand Land Company on 13 June, Normanby is said to have advised the directors that, on British assumption of sovereignty, “an examination would take place of Purchases made from the Natives by British Subjects so as to ascertain whether they had been made bona fide or for an

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<sup>482</sup> Ibid 77b.

<sup>483</sup> Attorney-General & Solicitor-General to Normanby, 4 June 1839, CO 209/5, 74a-75b at 74b.

<sup>484</sup> Ibid 75a-b.

<sup>485</sup> Memorandum of Stephen to Normanby, 7 June 1839, CO 209/5, 78a-b at 78a.

<sup>486</sup> Ibid 78a-b.

adequate consideration”.<sup>487</sup> According to the Company report of this meeting, Normanby

could not say precisely whether there would be a Commission of Enquiry into Titles or what particular steps would be taken in that respect, but that no purchases would be interfered with which had been made bona fide or equitably acquired: on the contrary he considered it desirable to encourage the investment of British Capital in New Zealand.<sup>488</sup>

Normanby also advised the directors of the New Zealand Land Company about the developing plans of the Government more generally. The minutes record that:<sup>489</sup>

Lord Normanby said ... that having found it was the unfinished intention of Lord Glenelg to despatch Captain Hobson R.N. to New Zealand in command of a Ship of War, he had determined to give effect to that Intention. Capt<sup>n</sup> Hobson would proceed shortly to New Zealand taking with him a Commission whereby he would be authorized to protect the Persons and Property of British Settlers. He would be styled Consul for the present at least, and would be instructed to treat with the Natives for cession of Sovereignty to England, so that their Country might become a Dependency of the British Crown.

The minutes further record that Normanby stated that New Zealand would be administered as part of the colony of New South Wales “as more convenient than introducing a Bill into Parliament at this period of the Session”.<sup>490</sup>

On the same day that Normanby met with the directors of the New Zealand Land Company, the Colonial Office wrote to the Treasury about the financial arrangements for New Zealand, seeking the Treasury’s approval in principle (with more precise estimates of expenditure to follow).<sup>491</sup> The letter enclosed the December 1838 correspondence between the Colonial Office and the Foreign Office regarding the appointment of a British Consul at New Zealand. It advised the Treasury that, since the date of that correspondence, “circumstances have transpired which have further tended to force upon Her Majesty’s Government the

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<sup>487</sup> Minutes of New Zealand Land Company directors’ meeting, 13 June 1839, CO 208/180, 21-22 at 22.

<sup>488</sup> Ibid.

<sup>489</sup> Ibid 21-22.

<sup>490</sup> Ibid 22.

<sup>491</sup> Stephen to Spearman, 13 June 1839, GBPP 1840 [238] XXXIII.587 at 32-33.

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adoption of measures for providing for the government of the Queen's subjects resident in or resorting to New Zealand".<sup>492</sup> It explained that, with that object in view, it was proposed:<sup>493</sup>

that certain parts of the islands of New Zealand should be added to the colony of New South Wales as a dependency of that government; and Captain Hobson, R.N., who has been selected to proceed as British Consul, will also be appointed to the office of Lieutenant-Governor.

The letter identified that, in addition to Hobson's appointment as Consul and Lieutenant-Governor, it would probably also be necessary to appoint a judge, a public prosecutor, a colonial secretary, a "police establishment", a treasurer, and subordinate revenue officers, but recommended that "in the present stage of the business" it was best left to Governor Gipps to decide the number of officers and their salaries.<sup>494</sup>

The Treasury, in reply, expressed agreement with the Colonial Office "as to the necessity of establishing some competent control over British subjects in the New Zealand Islands", and approved in advance the proposed financial arrangements for the new colony "upon the contemplated cession in sovereignty to the British Crown of territories within those islands which have been, or may be, acquired by Her Majesty's subjects under grants from the different chiefs being obtained".<sup>495</sup> Additionally, the Treasury felt it necessary to advise the Colonial Office that its support for what was proposed was conditional on Maori agreement to cede sovereignty:<sup>496</sup>

[A]dverting to the peculiar circumstances which have attended the location of British subjects within the territory in question, [we] deem it necessary to suggest that the annexation of any part of that territory to the Government of New South Wales, and the exercise of the powers it is intended to confide to the Governor and Council of New

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<sup>492</sup> Ibid 32.

<sup>493</sup> Ibid.

<sup>494</sup> Ibid 33.

<sup>495</sup> Pennington to Stephen, 22 June 1839, GBPP 1840 [238] XXXIII.587 at 33-34. The language used by the Treasury draws on the Colonial Office's 30 May letter to the Law Officers—see text accompanying n 481 above.

<sup>496</sup> Ibid 34.

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South Wales, or to the officer about to proceed to New Zealand in his capacity of Lieutenant-Governor, or any assumption of authority beyond that attaching to a British Consulate, should be strictly contingent upon the indispensable preliminary of the territorial cession having been obtained by amicable negotiation with, and free concurrence of, the native chiefs.

This correspondence between the Colonial Office and the Treasury was subsequently summarized in a Treasury minute tabled in Parliament.<sup>497</sup> The minute, which referred to the Colonial Office's 13 June letter as "adverting to circumstances which had appeared to the Marquis of Normanby, and to Viscount Palmerston, to force upon Her Majesty's Government the adoption of measures for establishing some British authority in New Zealand, for the government of the Queen's subjects resident in, or resorting to, those islands", came to be used by the Colonial Office to answer queries it received about the Government's intentions relative to New Zealand.<sup>498</sup>

By 15 June, Governor Gipps's new Commission was ready to be issued. It extended Gipps's jurisdiction to include "any territory which is or may be acquired in sovereignty by Her Majesty, Her Heirs or successors, within that group of Islands in the Pacific Ocean, commonly called New Zealand".<sup>499</sup> By late June, the Government's plans for intervention in New Zealand were sufficiently settled for it to make a public statement. The opportunity was taken to give a warning about land titles, as Stephen had pressed for in early June. By arrangement with the Church Missionary Society,<sup>500</sup> Labouchere was asked in the House of Commons what the intentions of the Government were in respect of New Zealand and the New Zealand Land Company.<sup>501</sup> As to New Zealand generally, while saying that

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<sup>497</sup> Treasury Minute, 19 July 1839 (tabled 29 July), reproduced in *Correspondence with the Secretary of State Relative to New Zealand*, GBPP 1840 [238] XXXIII.587 at 34-35.

<sup>498</sup> See, for example, Labouchere to Petre, 19 August 1839, GBPP 1840 [238] XXXIII.587 at 46; and Stephen to Sharpe, 7 September 1839, GBPP 1840 [238] XXXIII.587 at 49. The Treasury Minute referred to Hobson as being "about to proceed to New Zealand as Her Majesty's Consul, and as eventually Lieutenant-Governor of such territory as may be ceded to Her Majesty in the New Zealand islands".

<sup>499</sup> Copy of the Commission under the Great Seal extending the limits of the colony of New South Wales so as to include New Zealand, 15 June 1839, ANZ ACGO 8341, IA9 1/2.

<sup>500</sup> See Adams *Fatal Necessity*, above n 3, 152.

<sup>501</sup> Robert Inglis (25 June 1839) 48 GBPD HC c 828.

he could not enter into the details because “those measures were still under consideration”, Labouchere gave the answer that.<sup>502</sup>

the Government had come to the determination of taking steps which would probably lead to the establishment of a colony in that country ... . A number of persons had gone out to New Zealand, and in order to protect the aborigines, and for the maintenance of good order among the inhabitants, it was thought fit that measures should be taken to establish law and peace.

As to the Company, Labouchere explained that it was not recognised by the Government. It had “sent expeditions from this country upon their own responsibility, and without any sanction from the Government”. He felt “bound to say, with an explicit declaration” that.<sup>503</sup>

in any future step which the Government might take ... they would not consider themselves bound to recognise any title to land set up which might appear to be fraudulent or excessive. He felt it better to give this explanation, because he perceived, by the newspapers, that some wild schemes were afloat, and if it should be the course of the Government to urge persons to assist in the progress of colonization in these islands, yet, at the same time, it was necessary that they should understand that, in the case of land acquired from the aborigines—a class quite unable properly to protect their own interests—it was the duty of the Government to protect them, and to see that no title to land should be set up of the kind he had described.<sup>504</sup>

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<sup>502</sup> Henry Labouchere (25 June 1839) 48 GBPD HC c 828.

<sup>503</sup> Ibid cc 828-829.

<sup>504</sup> A somewhat different report of Labouchere’s speech was given in the *Mirror of Parliament*:

With regard to the New Zealand land companies, I need hardly assure the Honourable Gentleman that these companies could not have been hitherto recognised by the Government. They have sent expeditions from this country on their own responsibility, and without any sanction from the Government; at the same time an explicit declaration was made to them, that in any future step which the Government might take with reference to New Zealand it would not consider itself bound to recognise any title to land that might be set up which should appear to be fraudulent or excessive.

I feel it better to give this explanation, because I perceive by the newspapers that various schemes have been projected relative to the island; although, in the event of a British colony being established in New Zealand, the Government would by no means discourage emigration to it which would be conducted in a manner not to interfere with the rights of the aboriginal inhabitants, or with any titles to land which shall have been fairly acquired; yet at the same time it is necessary that parties should understand, that in the case of land acquired from the aborigines, a class quite unable to protect properly their own interest, it is the duty of the Government to protect them, and to see that no title to land be set up which, as I before said, should appear either fraudulent or excessive.

In this statement, Labouchere did not give the warning suggested by Stephen that the Government would not recognise the validity of any future purchases of land by British subjects in New Zealand. Instead he indicated that, following the establishment of a colony, there would be an examination of titles to separate those that were “fraudulent or excessive” (which, for the protection of Maori, would be disallowed) from those that were not (which would be allowed). This suggested that legitimate purchases, on a moderate scale, could still be made in New Zealand with some surety of their being recognised by the Government after any transfer of sovereignty. In indicating likely Government encouragement for expanded British settlement of New Zealand, Labouchere seems also to have been expressing a personal view judging from a speech he gave later the same day to the House of Commons on a debate of the disposal of waste lands in the colonies in which he spoke strongly in favour of emigration as of national benefit.<sup>505</sup>

Matters now came together quite quickly. The Admiralty put HMS *Druid* (captained by Lord Henry John Spencer Churchill) at the disposal of Hobson and his family for the voyage to Australia.<sup>506</sup> It was envisaged that the further travel to New Zealand would be on another naval ship unless no other ship was available in Sydney, in which case the *Druid* would continue.<sup>507</sup> These arrangements meant that Hobson was not to have command of a ship, as the Colonial Office had at one time discussed.

Stephen prepared what was to be the final draft of Hobson’s Instructions on 9 July, as discussed in Chapter 8. Treasury approval for the estimate of costs for establishing the colony in New Zealand was given on 24 July.<sup>508</sup> Hobson’s Commission appointing him Lieutenant-Governor of the territory “which is or may be acquired in Sovereignty” in New Zealand was prepared by 30 July.<sup>509</sup> The

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Quoted in “Statement of the Committee of the Church Missionary Society, relative to the New Zealand Mission”, 29 November 1839, GBPP 1840 (582) VII.447, 165-173 at 173.

<sup>505</sup> Henry Labouchere (25 June 1839) 48 GBPD HC cc 841-919 at 888-895.

<sup>506</sup> Wood to Stephen, 5 July 1839, CO 209/5, 4a.

<sup>507</sup> Colonial Office to Hobson, 22 August 1839, CO 209/5, 4b.

<sup>508</sup> Pennington to Stephen, 24 July 1839, CO 209/5, 101a-102b.

<sup>509</sup> Commission appointing Hobson Lieutenant-Governor of New Zealand, 30 July 1839, ANZ ACGO 8341, IA9 2/3.

Foreign Office provided Hobson with his Commission and Instructions as British Consul on 13 August.<sup>510</sup> Colonial Office then formally issued Hobson with his Instructions (including supplementary instructions in relation to his 1 August queries) and Commission as Lieutenant-Governor. Hobson received these Commissions and Instructions at Plymouth on 20 August.<sup>511</sup> He also received papers for delivery to Gipps, including Gipps's new Commission and a copy of Hobson's Instructions. In addition to the Instructions with its various enclosures (such as, for instance, the Colonial Office's 1838 correspondence with the Foreign Office and 1839 correspondence with the Treasury), Gipps received as part of this package, Hobson's 1 August letter and the Colonial Office's 15 August supplementary instructions, and a copy of the Foreign Office's Instructions to Hobson in his capacity as Consul.<sup>512</sup> In its covering letter to Gipps, the Colonial Office did not expand on Hobson's Instructions, which were provided to Gipps for his "information and guidance".<sup>513</sup> They were said to have been addressed to Hobson "on his embarkation to assume the government of the British Settlements in progress in New Zealand" and to leave Normanby "nothing to add" in addressing Gipps beyond that he was to give Hobson "the full benefit" of his "knowledge and experience".<sup>514</sup> Hobson sailed from Plymouth on HMS *Druid* on 24 August.<sup>515</sup>

### Public relations

While the Colonial Office was considering the terms on which it would intervene in New Zealand, it was obliged to respond to a number of queries from intending

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<sup>510</sup> Fox Strangways to Labouchere, 14 August 1839, enclosing two letters dated 13 August 1839 from Palmerston to Hobson, GBPP 1840 [238] XXXIII.587 at 36. The drafts of Palmerston's letters are at FO 58/1, 41a-46a. The Colonial Office had asked the Foreign Office to appoint Hobson as British Consul at New Zealand on 3 July. Labouchere to Backhouse, 3 July 1839, GBPP 1840 [238] XXXIII.587 at 34 (also enclosing a copy of recent correspondence with the Treasury).

<sup>511</sup> See Hobson to Colonial Office, 21 August 1839, CO 209/4, 179a-180a.

<sup>512</sup> See as reproduced in Robert McNab (ed) *Historical Records of New Zealand* (John Mackay, Government Printer, Wellington, 1908) vol 1, 729-755.

<sup>513</sup> Normanby to Gipps, 15 August 1839, CO 209/4, 282b-283b at 282b.

<sup>514</sup> Ibid 283a.

<sup>515</sup> Hobson to Colonial Office, 24 August 1839, CO 209/4, 185a.

emigrants. These responses provide further evidence of official attitudes to such topics as Maori sovereignty and the scope for emigrants to acquire land in New Zealand.

In such correspondence, the Colonial Office was concerned to dampen any expectations built on the New Zealand Land Company's promotions. Correspondents were advised that the Government did not, and had no plans to, recognise the Company or its activities.<sup>516</sup> None who sought it were given any encouragement to emigrate, whether with the Company or privately. Those choosing to settle in New Zealand did so "entirely on their own responsibility" and could not expect "any other protection from the British Govt than British Subjects receive while resident in other Foreign Countries".<sup>517</sup> Even the Society for the Propagation of the Bible was told that the Government "cannot at present hold out to the Society ... or to any other Body of Men, any inducement to dispatch any persons from this Country to become Settled Inhabitants of the Islands of N Zealand".<sup>518</sup>

In July 1839, the Colonial Office moved to correct a newspaper report which misquoted its advice that matters were in train which would "probably" lead to the establishment of a British colony in New Zealand.<sup>519</sup> The misquotation was in the omission of the word "probably" in the newspaper report. This was described by the Colonial Office as "a very material inaccuracy" which might, "if uncorrected, propagate an erroneous impression, as to the intentions and measures of the

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<sup>516</sup> See, for example, Colonial Office to J Burton Gooch & W Batts, 26 June 1839, CO 209/5, 217a-b; and Labouchere to Robert Strang, 12 August 1839, CO 209/5, 347a-348a at 348a (also GBPP 1840 [238] XXXIII.587 at 47).

<sup>517</sup> Colonial Office to Alex Miller, 4 September 1838, CO 209/3, 410a. See CO 209/3, 406a-407b & 409a-b for the full sequence of correspondence which includes the following minute by Stephen on 407b: "Answer that Lord G can promise to the Writer no other protection in New Zealand than such as HM Gov<sup>t</sup> are bound to the utmost of their power to afford to Her Majesty's subjects inhabiting the territories of a Foreign & independent state."

<sup>518</sup> Colonial Office to AM Campbell, 1 August 1839, CO 209/5, 153a-b at 153b.

<sup>519</sup> July 1839 was a point when the Colonial Office's plans were well-advanced. In earlier correspondence, the Colonial Office had declined to be drawn on the question of annexation at all, saying that the matter was still under consideration. See, for example, Colonial Office to Hamilton, 7 March 1839, CO 209/5, 237b.

Government respecting New Zealand”.<sup>520</sup> It sought a printed correction, a course that would hardly have been necessary if the annexation of New Zealand had been regarded as a foregone conclusion.<sup>521</sup> In the same way, the Colonial Office declined to entertain applications for appointments to Hobson’s administration. It advised those who sought such appointments that Hobson’s was the only appointment to be made at that time and that “it will not be in the power of HM Gov<sup>t</sup> for many months to come to appoint any Public Officers in those Islands, or even to ascertain decidedly that any such appointments can be made”.<sup>522</sup> While it may have been convenient for the Colonial Office to take this line when importuned, it was consistent with the maintenance of the principled position that acquisition of sovereignty could not be anticipated. That may also be indicated by its refusal in late June 1839 to grant an interview to the directors of the Bank of Australia, then considering the establishment of a branch in New Zealand. The directors were told that Government approval of the course was “impossible” as “no part of New Zealand is at present under the dominion of the British Crown”.<sup>523</sup>

A number of enquiries received from would-be emigrants concerned the acquisition of land. One intending emigrant was advised in January 1839 that “there is no land in New Zealand the property of the Crown, & consequently none which can be granted by the Crown to persons emigrating there”.<sup>524</sup> The Colonial Office declined a request by another in February 1839 to “confirm” by registration in the Supreme Court of New South Wales or Van Diemen’s Land any purchase he might make from the chiefs of New Zealand. In response the Colonial Office advised that the Government could “in no sense make themselves parties to a

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<sup>520</sup> Labouchere to John Fleming, 20 July 1839, CO 209/4, 649a-650b (see 644a-654b for the full sequence of correspondence).

<sup>521</sup> The uncorrected article, however, appeared in Sydney newspapers in late November 1839. See the *Sydney Gazette and New South Wales Advertiser*, 23 November 1839, at 3; and the *Australasian Chronicle*, Sydney, 29 November 1839, at 1.

<sup>522</sup> Colonial Office to Edward Hawes, 1 August 1839, CO 209/5, 243a. See also Colonial Office to Thomas McDonnell, 1 August 1839, CO 209/5, 308a-b; and Colonial Office to James Kearns, 1 August 1839, CO 209/5, 258a-b.

<sup>523</sup> Colonial Office to JS Brownrigg, 29 June 1839, CO 209/5, 145a-b.

<sup>524</sup> Colonial Office to James Graham, 9 January 1839, CO 209/3, 378a. See also Colonial Office to John Vivian, 18 February 1839, CO 209/5, 381a-b.

transaction of that nature”.<sup>525</sup> In response to a Glasgow solicitor’s query in mid-August 1839 as to whether the Government would annul purchases from Maori by the New Zealand Land Company or “exercise her right of Pre-emption to the exclusion or prejudice of those deriving right from the Company”, the reply was made that the Marquess of Normanby was unable to return any answer because he “has no knowledge whatever of the title under which the Society acting under the name of the New Zealand Company claim to be Proprietors of land in those Islands”.<sup>526</sup> Leaving to one side what the Glasgow solicitor understood by the Crown’s “right of Pre-emption”,<sup>527</sup> the Colonial Office responses of February and August 1839 contain no indication that British subjects were unable as things stood to acquire title to land in New Zealand. Such replies are not consistent with Colonial Office subscription to a view that, as a matter of legal doctrine, only the Crown and not its subjects could acquire land in a country circumstanced as New Zealand.<sup>528</sup>

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<sup>525</sup> Gabriel Cooke to Grey, 9 February 1839, CO 209/5, 319a-320b at 319b; Colonial Office to Cooke, c. 16 February 1839, CO 209/5, 321a-b at 321b.

<sup>526</sup> Robert Strang to Labouchere, 15 August 1839, CO 209/5, 351a-b; Labouchere to Strang, 20 August 1839, CO 209/5, 352a-b (also GBPP 1840 [238] XXXIII.587 at 48).

<sup>527</sup> It is not clear whether he may have been aware of the views published by John Dunmore Lang in July 1839, discussed in Chapter 10, which were soon to influence New Zealand Land Company advocacy, as discussed in Chapters 13 and 15.

<sup>528</sup> The Colonial Office views discussed in this section were adhered to in the period between Hobson’s dispatch and word in London of the signing of the Treaty of Waitangi, as is discussed in Chapter 13, text accompanying ns 8-21.



## CHAPTER TEN

### THE CONSUL

William Hobson, the Consul dispatched to treat with Maori for sovereignty and the first Governor posted to New Zealand, is not someone whose character and capacities are well described in New Zealand histories. He appears to have been well liked by contemporaries and the general assessment of historians seems to be that he was a sound administrator whose stroke in March 1840 and premature death in September 1842 meant that he did not shape the New Zealand colony as effectively as he might otherwise have done. An alternative picture is that, although a decent and honest official, he was sometimes muddled in his thinking and was at times out of his depth as Consul and Governor. It is difficult to assess his own contributions because he was keen to follow orders and the preferences of his superiors and was obliged by his health to delegate much of his responsibilities to subordinates, particularly in the drafting of the Treaty and obtaining signatures to it around the country. The verdict of Major Thomas Bunbury, one of the officials to whom Hobson entrusted the work of gathering signatures, was that Hobson “was not without abilities, but had not the necessary grasp of thought to seize the main point of a question; in other words, to separate the grain from the chaff”.<sup>1</sup>

This chapter describes something of Hobson’s background and traces his career until he received his Commission as Consul and was dispatched to New Zealand. Chapter 11 deals with his time in Sydney in December 1839 and January 1840 and his arrival at the Bay of Islands.

#### **William Hobson: the early years**

When HMS *Druid* left Plymouth on 24 August 1839, William Hobson was 46 years old. He was born in Waterford, Ireland, one of eight children of Samuel and

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<sup>1</sup> [Thomas Bunbury] *Reminiscences of a Veteran: Being Personal and Military Adventures in Portugal, Spain, France, Malta, New South Wales, Norfolk Island, New Zealand, Andaman Islands, and India* (Charles J Skeet, London, 1861) vol 3, 55-56.

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Martha Hobson. His wife and friends called him “Pat”,<sup>2</sup> perhaps in reference to his Irish roots. His father was a barrister. His mother came from a prominent Anglican family in Ireland. One of his brothers was to become Archdeacon of Waterford. Hobson had spent his life in the Royal Navy since joining as a “gentleman volunteer” in 1803, soon after the Napoleonic Wars began, when he was 10 years old. He was at sea almost continuously for the next 13 years, first in blockade and convoy duties of the Royal Navy in the North Sea, and then in the West Indies where he was engaged in protecting merchant shipping from French privateers and pirates. By the end of the Napoleonic Wars he was a first lieutenant and served on a ship that was involved in the War of 1812 with America and that was part of the squadron that took Napoleon to St Helena in 1815.<sup>3</sup>

After 18 months ashore at the end of the Napoleonic Wars, Hobson returned to active service, first in the Mediterranean (at Malta and the Ionian Islands), and then in the West Indies and along the Cuban Coast. In both theatres he was chiefly involved in the suppression of piracy, being given charge of small craft for the purpose of hunting pirates down. In these missions, Hobson established a reputation for daring. Although he was successful, he was twice captured by pirates, on one occasion being tortured. Hobson seems from his portraits to have been a handsome man and certainly cut a dashing figure.<sup>4</sup> It is said that he was the

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<sup>2</sup> See, for example, William Hobson to Eliza Hobson, 5 April 1836, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript) (“your Pat”); and Eliza Hobson to Emma Smith, 29 June 1840, ATL MS-Papers-0046-2 (holograph) and MS-1010 (typescript) (“Pat has been obliged to dispatch W Shortland ... to Port Nicholson”).

<sup>3</sup> Unless otherwise indicated, the biographical information about Hobson in this chapter comes from the following sources: Guy Scholefield *Captain William Hobson, First Governor of New Zealand* (Oxford University Press, Oxford 1934) [“Scholefield *Captain William Hobson*”] chs 1-5; KA Simpson “Hobson, William (1792–1842)” *Dictionary of New Zealand Biography*; Claudia Orange “Hobson, William (1792–1842)” *Oxford Dictionary of National Biography*; Alan Lambourn *The Treaty-makers of New Zealand: Heralding the Birth of a Nation* (Benton-Guy Publishing Ltd, Auckland, 1990) chs 26-27; T Lindsay Buick *The Treaty of Waitangi: How New Zealand Became a British Colony* (3rd ed, Thomas Avery & Sons Ltd, New Plymouth, 1936) ch 3; RCJ Stone *From Tamaki-Makau-Rau to Auckland* (Auckland University Press, Auckland, 2001) 206-208; Paul Moon *Hobson: Governor of New Zealand 1840–1842* (David Ling Publishing Ltd, Auckland, 1998) ch 1; Memorial of Captain William Hobson to Sir James Graham, n.d., c. December 1833, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript).

<sup>4</sup> Watercolour portrait of Lieutenant-Governor William Hobson by Mary Ann Musgrave, December 1839 or January 1840, NLA NK 5277; Portrait of Captain William Hobson by

inspiration for more than one hero of popular naval fiction of the 1830s. While stationed in the West Indies, however, Hobson suffered three bouts of yellow fever, which undermined his health. From this date, he complained of frequent migraines. His wife was later to say that, at the time of his appointment as British Consul to New Zealand, he had not been in good health,<sup>5</sup> and his subsequent illness and early death in New Zealand in 1842 suggest a constitution that was precarious.

By May 1824, aged only 31 years, Hobson had been promoted to Commander, and by 1826 he had advanced to Post Captain and the command of HMS *Scylla*. Soon after he married Eliza Elliot, then only 16 years old, the only daughter of a Scots merchant living in the Bahamas. The marriage was a close one, as is demonstrated from Hobson's later journal and letters.<sup>6</sup> In 1828, Hobson was paid off at Portsmouth, and, in common with many other naval officers of the time, began six and a half years on shore on half-pay.

Very little is known about the next period of Hobson's life. He and Eliza settled at Plymouth, and the first three of their five children were born there. Hobson actively sought a new command, but it was not until Lord Auckland became the First Lord of the Admiralty that he was successful. George Gipps, who was then Auckland's private secretary, recalled later, as Governor of New South Wales, that Auckland had declared that Hobson was one of only "three or four persons in the navy whom, when he took office, he was anxious to serve".<sup>7</sup> In December 1834, Hobson was given command of HMS *Rattlesnake*, one of the new class of "donkey frigates", although Hobson expressed himself well pleased with its sailing

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James Ingram McDonald, 1913, ATL G-826-1 (copy of oil painting by Collins of Bristol, at one time owned by Lady Rendal, England).

<sup>5</sup> Memorial of Eliza Hobson to Lord Stanley, 4 December 1843, ATL MS-Papers-0046-6 (typescript).

<sup>6</sup> William Hobson's journal of a voyage from England to Bombay and Ceylon in HMS *Rattlesnake* (27 March–3 August 1835), ATL MSY-6847 ["Hobson's Journal"]; William Hobson's letters, ATL MS-Papers-0046-1 (holographs) and MS-1010 (typescript). See also Journal of Felton Mathew, APL NZMS 88 (manuscript) & ATL MS-1620 (typescript), 26 January 1840 (p 12 of the typescript): "There is an excellent trait in Hobson—he is so fond of his wife & family ...".

<sup>7</sup> Speech of Sir George Gipps in the Legislative Council of New South Wales on the second reading of the New Zealand Land Claims Bill on 9 July 1840, GBPP 1841 (311) XVII.493 at 77.

capabilities.<sup>8</sup> Auckland himself wrote to Hobson of his pleasure “to give the service the advantage of having you again in active employment”.<sup>9</sup>

### **Cruise of the *Rattlesnake***

Hobson was ordered to take the *Rattlesnake* to join the East India Station for an expected tour of three years. He sailed from Plymouth in late March 1835, leaving his wife and children with a “heavy heart” but delighted to be gainfully employed and determined to make the most of the opportunity for himself and for his family. He now had a “motive of action by which I was uninfluenced when formerly at sea”.<sup>10</sup> His journal and letters indicate a purposeful approach in researching and recording useful information about the places visited by the *Rattlesnake*. They attempt an understanding of history and social and political organisation, as well as containing descriptions of natural features and people. On the voyage out, the *Rattlesnake* called at Madeira, Cape Verde, Rio de Janeiro, Cape of Good Hope and Bombay, before meeting up with the fleet at Trincomalee in Ceylon.<sup>11</sup>

Hobson’s comments on these different societies indicate his personal abhorrence of slavery<sup>12</sup> and belief in the beneficial effects of free trade and British influence,<sup>13</sup>

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<sup>8</sup> William Hobson to Eliza Hobson, 9 April 1835, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript); Hobson’s Journal, above n 6, 30 March & 10 April 1835.

<sup>9</sup> Auckland to Hobson, n.d., quoted in Scholefield *Captain William Hobson*, above n 3, 45.

<sup>10</sup> Hobson’s Journal, above n 6, 27 March 1835.

<sup>11</sup> Hobson’s Journal, above n 6.

<sup>12</sup> Hobson’s Journal, above n 6, 21 April (“that nefarious traffic”) & May 1835 (“to the shame of Brazil be it told: the Inhuman and Revolting Traffic in Human Beings is still openly, though not legally, carried on”).

<sup>13</sup> Hobson’s Journal, above n 6, May 1835 (“The Portuguese like the Spaniards trampled over the Liberties of Her Colonies and cramped the energies of Her subjects by exclusive priviledges [sic] in trade but in the year 1806 Bouonaparte [sic] having invaded Portugal drove the Royal Family of that Kingdom for shelter to their Transatlantic Possessions. Thus Rio de Janeiro became the seat of Government and the residence of Ministers of State, Foreign Ministers, Consuls and all the Foreign and domestic appendages of an old established Court. This increased intercourse with Foreigners, and above all the influence of the British Government, obliged the Portuguese to relax their Colonial System. Free Trade followed and with it the first dawn of Liberty”); William Hobson to Eliza Hobson, n.d., 1836?, incomplete, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript) (“I think too the Saibs [sic] [at Madras] understand oriental luxuries better than my old friends on the Western side of India. The reason of that is—free trade has scarcely made any progress in Madrass, and the wealthy gentlemen, or Saibs, as the Natives call them, are all Company’s Servants, whereas in Bombay there are a vast number of Mercantile houses set up within these ten years, which has done a great deal towards the introduction of English habits”).

education,<sup>14</sup> agricultural development,<sup>15</sup> and encouragement of British liberties and participative government.<sup>16</sup> In relation to British colonies with native populations, Hobson expressed no embarrassment about British rule. In respect of the Cape Colony, while acknowledging wrongs on the part of both settlers and Xhosa in the recent eastern frontier conflict, he was ultimately neutral in his judgement and did not mention the contribution of the colonial administration.<sup>17</sup> He admired the prosperity achieved through the industry of the settlers.<sup>18</sup> In relation to Ceylon (the older history of which he had discovered through using “Robertson’s Historical

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<sup>14</sup> Hobson’s Journal, above n 6, May 1835, comparing the former Spanish colonies of South America, where “Education was wanting”, with Brazil, where “[r]apid strides were made in the education of the People”.

<sup>15</sup> Hobson’s Journal, above n 6, 21 April 1835, commenting of the volcanic formation of St Jago (Santiago in the Cape Verde) and the reportedly “luxurient [sic] pasture” lands of its inland valleys that “nature ever bountiful often forms its richest treasures from ... if man will only exert the Power he derives from ‘Nature’s God’ for its development”.

<sup>16</sup> Hobson’s Journal, above n 6, May 1835, comparing the former Spanish colonies of South America, where “True Liberty was a stranger on their Shores and was but ill understood”, with Brazil, where “an elective form of Government was established, and the Emancipation of the People in some degree kept pace with their more enlightened condition”. Hobson predicted that Brazil’s legislators “will learn to enact Laws suited to the exigencies of the State; and Her acknowledged and Legitimate Governors to execute them with even handed justice to all classes[,] [w]hilst Her Neighbours in grasping at the Shadow of Liberty, have really lost the substance and must (it is to be feared) still wade through an ocean of Blood, before the true Rights of Man are defined and understood and before Firm and Permanent Governments are established”.

<sup>17</sup> Hobson’s Journal, above n 6, May 1835: “vast numbers of our Countrymen have of late years emigrated to its Shores—Who in spite of the vicissitudes to which new settlers are for ever liable from Excessive Rains—Drouth [sic]—and the Opposition of the Aborigines have managed to attain a tolerable degree of prosperity. Within the last six months however they have experienced a most terrible reverse from the Caffres having invaded the frontiers. Who, though eventually beaten back, left most appalling proofs of their ferocity and rapacity, by murdering every Male adult they laid hands on, and carrying off many thousand head of Sheep and Cattle. I may here mention in extenuation of the conduct of the Caffres, that it is the universal belief that the Colonists first exasperated them by frequent insults, & predatory incursions, before they visited them with such awful retribution. It is also an honorable trait in these warlike savages that in every instance they spared the women and children, the former even from Pollution [i.e. rape]. It is not quite clear to me that European Soldiers in this latter particular would have been so forbearing.”

<sup>18</sup> See above n 17; and William Hobson to Eliza Hobson, 31 January 1837, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript), commenting on Hannibal McArthur of New South Wales, “the son of the Tailor I employed when I first went to Devonport”: “I speak not this to his disparagement. He is himself deservedly one of the first men in the Colony and his father was always considered superior to his caste both in manners, and in principles—but I mention it as an odd coincidence, & if I were disposed to moralise I might enlarge on it to shew the benefits that sooner or later result from a steady course of honorable, and industrious conduct.”

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disquisition as my guide”<sup>19</sup>), Hobson was comfortable with the conquest of the Kandyan Kingdom and expressed the complacent view that, despite the chiefs being “so humbled by our interference with their Authority that they are always ripe for revolt”,<sup>20</sup> “our mild and just laws, and liberal institutions will do more to preserve our authority than any Coercive Power will ever accomplish”.<sup>21</sup>

Hobson had no qualms about passing judgement on other races, as later he was also to do in respect of Aborigines in Australia and Maori in New Zealand. Although he regarded the Ceylonese as “the finest race of men I have yet seen in this quarter of the Globe”,<sup>22</sup> he described a religious procession in dismissive terms:<sup>23</sup>

The whole was as primitive as could be conceived, the attempts at representation were wretched, & the whole procession was such as might be expected from New Zealanders, rather than from an educated race of Beings, such as the Brahmins are.

Hobson’s first impressions of his own countrymen at Bombay were that these “would be great men” looked down on him. Since he feared he could not “at all at once conquer the prejudices of education”, he expected to be forced to accept “estrangement” from their society.<sup>24</sup> In fact, Hobson was warmly received, contrary to his own insecurities about his status. Five days after his arrival, he wrote to his wife that he had not dined aboard ship during his stay to date and that

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<sup>19</sup> Hobson’s Journal, above n 6, 3 August 1835. William Robertson (1721–1793) was an important figure in the Scottish Enlightenment, an historian and Principal of Edinburgh University. He wrote histories of Scotland and America, in addition to *An Historical Disquisition Concerning the Knowledge which the Ancients had of India* (1791), which ran to a number of editions.

<sup>20</sup> William Hobson to Eliza Hobson, 5 April 1836, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript).

<sup>21</sup> Hobson’s Journal, above n 6, 3 August 1835.

<sup>22</sup> William Hobson to Eliza Hobson, 5 April 1836, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript).

<sup>23</sup> Hobson’s Journal, above n 6, 3 August 1835.

<sup>24</sup> Hobson’s Journal, above n 6, 27 July 1835. To Eliza he wrote of the “cursed India Company [which] instead of promoting the intercourse with England throw[s] every obstacle in its way”—although his immediate complaint was that it had lost his mail from her. William Hobson to Eliza Hobson, 1 August 1835, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript).

parties had been held for him, which he had “enjoyed ... extremely well”.<sup>25</sup> On his return from Ceylon too, he praised the hospitality he received at Bombay.<sup>26</sup> Hobson’s background seems to have left him socially ill at ease at times, although apparently not in the company of women.<sup>27</sup>

In February 1836, Hobson received instructions to take the *Rattlesnake* to New South Wales via Mauritius. He was very pleased about his orders. He would be his “own Commanding Officer” and the assignment would bring “variety”.<sup>28</sup> Although he does not seem to have suffered badly from migraines in India,<sup>29</sup> he was happy to escape “this broiling parching country”. In New South Wales he looked forward to “a most genial climate and good society something in the English style”.<sup>30</sup> He wrote:<sup>31</sup>

Perhaps I have no right to reflect on India, or on Indian society, both of which have contributed all they are capable of for my gratification. But they are not to my taste. And much as I have been charmed by the splendour of the country & by the hospitality of the people, I contemplate a change to a cooler region, & to less ostentatious style, with a portion of that delight I should feel if ordered to serve the remainder of my three years in Barn Pool [Plymouth]. Were I a man of five & twenty with my present rank, & no tye [sic] at home, possessing fortune enough to induce the women to flatter & court me, & sufficiently unsusceptible to avoid entanglements, then indeed I would say India for Ever!!! The last condition savors a little of libertinism—but I don’t mean it. The plain

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<sup>25</sup> William Hobson to Eliza Hobson, 1 August 1835, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript).

<sup>26</sup> William Hobson to Eliza Hobson, 20 February 1836, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript).

<sup>27</sup> See entries in Hobson’s Journal, above n 6, about Mrs Gordon of Madeira and Lady Capel. See also Hobson’s letter of 23 February 1836 to Miss Emma Smith of Plymouth, ATL MS-Papers-0046-6 (holograph) and MS-1010 (typescript) (as partly quoted in the text accompanying n 31 below).

<sup>28</sup> William Hobson to Eliza Hobson, 20 February 1836, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript).

<sup>29</sup> Shortly after his arrival in Bombay, Hobson wrote to his wife that, despite “all this raking”, he had suffered no migraines since two, easily overcome with a teaspoon of soda in a glass of water, on the voyage out; William Hobson to Eliza Hobson, 1 August 1835, ATL MS-Papers-0046 (holograph) and MS-1010 (typescript). His journal and letters after this time do not make mention of further attacks. He had written to his wife from Bombay that “[t]hank God in this particular I am much better off than when at home, being much less liable to that curse”. Ibid.

<sup>30</sup> William Hobson to Emma Smith, 23 February 1836, ATL MS-Papers-0046-6 (holograph) and MS-1010 (typescript).

<sup>31</sup> Ibid.

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English is Let me have an Indian Lady to dance & flirt with, but God defend me from an Indian wife.

The *Rattlesnake*'s route to Australia took it around the coast of India (with brief stops at Goa, Mangalore, Ceylon and Madras) and then via Mauritius. After visiting Hobart, the *Rattlesnake* arrived at Sydney in August 1836. Almost immediately the *Rattlesnake* was sent to Port Phillip (Melbourne) to assist in the establishment of the new settlement.

During the nearly three months that Hobson was at Port Phillip, he had the opportunity to undertake excursions into the interior, going shooting in the company of Aborigines. Back in Sydney in December, there was opportunity to explore the countryside there too. In correspondence to Eliza, Hobson expressed enthusiasm about the prospects for Australian colonisation:<sup>32</sup>

The Prosperity of the Colony could not be credited without an intimate knowledge of the vast resources of the Interior of the Country, which only now wants the means [of] transport and hands to cultivate it to be the most productive country under the Sun.

He was less taken with the native inhabitants. Although he described them in one letter as “an inoffensive and rather an intelligent race of people”,<sup>33</sup> in another he commented:<sup>34</sup>

The Aboriginal Natives of this Country are amongst the lowest in the scale of Humanity. The men are undersized and frightfully ugly. The women when young are not remarkable either way, but when past middle life they become absolutely hideous. They appear to have no idea [of] a Deity, and are to a certain extent Cannibals—that is they eat their Enemies from motives of revenge & their children for Love. Infanticide is of every day occurrence & the charitable motive assigned for this revolting Brutality is to spare them from the misery of want which they say must be the consequence if they do not destroy a considerable portion of their offspring. The Natives here appear to be a degree better than

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<sup>32</sup> William Hobson to Eliza Hobson, n.d., incomplete, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript).

<sup>33</sup> William Hobson to Eliza Hobson, 16 December 1836, with addendum dated 20 December 1836, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript).

<sup>34</sup> William Hobson to Eliza Hobson, n.d., incomplete, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript).

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those of Sydney. In Physical [prowess?] they are certainly Superior & I am told they display more intellect, but their Habits are the same, although their Language is perfectly different. In summer time the Men & Women go perfectly naked. In winter they clothe with Skins of the Kangaroo & Opossum, but throw their drapery so open in front when the weather happens to be warm that they might as well, so far as decency is concerned, throw it off altogether.

While in Sydney in December 1836, Hobson received a letter from the Governor of Bombay<sup>35</sup> advising him that his name had been put forward to the Board of Control and the Directors of the East India Company for the position of Superintendent of the Bombay Marine. By that stage, however, an Indian appointment seemed less attractive to Hobson than an opportunity in Australia. Hobson even allowed himself to dream that he might be considered for the governorship of Port Phillip.<sup>36</sup> After a further visit to Port Phillip with Governor Bourke in February and March 1837 (returning to Sydney in early April), a new direction was set for Hobson by Bourke, following receipt of despatches from Busby, reporting the outbreak of inter-tribal fighting at the Hokianga and Bay of Islands.<sup>37</sup> Hobson was sent to ensure that British lives and property were not at risk, but was also asked to report on conditions and to make recommendations for such future British involvement in New Zealand as would “secur[e], with the least possible overt interference, the common interests of the natives, and of the British settled amongst them”.<sup>38</sup>

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<sup>35</sup> Sir Robert Grant, brother of Lord Glenelg, the Secretary of State for the Colonies. Grant died in Bombay in July 1838.

<sup>36</sup> William Hobson to Eliza Hobson, 16 December 1836, with addendum dated 17 December 1836, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript): “Port Phillip will soon become a place of great importance and will no doubt be the seat of a new Government .... Should this happen the recommendation of Sir Rob<sup>t</sup> Grant which will go before Ministers, may impress Lord Glenelg, Sir Robert’s brother, with a favourable impression towards me, and maybe induce His Lordship to appoint me Governor. Four of my brother officers have similar appointments in this part of the Globe. Although the salary will not in the first instance exceed 800£ a year, I am quite sure that it will not [sic] present advantages superior to the 2000£ a year at Bombay. The climate is better—it affords a better chance of providing for children—and there can be no doubt of increasing my income very considerably by the acquisition of land. These are fine castles dear—but don’t be alarmed, I will not stir an inch without your full concurrence”.

<sup>37</sup> See Chapter 7, text accompanying ns 127-136.

<sup>38</sup> Bourke to Glenelg, 9 September 1837, GBPP 1840 [238] XXXIII.587, 8-9 at 8.

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The *Rattlesnake* arrived in the Bay of Islands at the end of May 1837. Hobson was in the country for five weeks. Initially he was occupied in attempting, unsuccessfully, to promote peace between the protagonists Pomare (“a violent fellow”) and Titore (an “excellent chief”).<sup>39</sup> He warned the chiefs that any interference with settlers would be swiftly punished. He spoke with leading settlers, missionaries and Busby. Titore died while Hobson was in the Bay of Islands and Hobson attended his tangi. Hobson then took the *Rattlesnake*, with the Reverend Samuel Marsden on board, down the east coast to Cloudy Bay, calling in at places in the Hauraki Gulf and in the Thames.<sup>40</sup> (Hobson later commented to the missionary, Alfred Brown, on the “striking contrast” between the appearance and behaviour of the Christian Maori at Waimate and Kerikeri and those at Cloudy Bay.<sup>41</sup>) He had intended also to visit Kapiti and Mana Islands but was prevented by rough weather from anchoring. He “stood close to both islands” in the view that.<sup>42</sup>

the very appearance of a man-of-war in that quarter will have considerable weight from the terror in which we are held by the natives, in consequence of the severe chastisement inflicted on them by the *Alligator*, and the detachment of H.M. 50th regiment, in 1835; and, for the same reason, I have no doubt but our visit to the Thames will also be productive of benefit, for there the natives are in a more primitive state than at the Bay of Islands, and when engaged in war have not always been so scrupulous about the property of British subjects, although in no instance has any violence been done to their persons.

Hobson returned to the Bay of Islands briefly before leaving for Sydney with Marsden and two prisoners, Doyle and Goulding, being transported for trial for aggravated robbery.<sup>43</sup>

From Sydney on 8 August, Hobson wrote a report of his visit to Governor Bourke.<sup>44</sup> He reported that the war in the Bay of Islands (“the only one now

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<sup>39</sup> Hobson to Bourke, 8 August 1837, GBPP 1840 [238] XXXIII.587, 9-11 at 10.

<sup>40</sup> Scholefield *Captain William Hobson*, above n 3, 54-55.

<sup>41</sup> Letter of Rev Alfred Brown, July 1837, quoted by Dandeson Coates in evidence to the House of Lords Select Committee on New Zealand, 11 May 1838, GBPP 1837-38 (680) XXI.327 at 205.

<sup>42</sup> Hobson to Bourke, 8 August 1837, GBPP 1840 [238] XXXIII.587 at 10.

<sup>43</sup> See Chapter 6, n 400.

<sup>44</sup> Hobson to Bourke, 8 August 1837, GBPP 1840 [238] XXXIII.587 at 9-11.

prevailing in New Zealand”<sup>45</sup>) was “in a fair train for adjustment”,<sup>46</sup> in part because of the intervention of Tamati Waka Nene (described as a powerful Christian chief from the Hokianga who was determined to compel peace) and the missionaries (who were treated “with the greatest respect” by both sides).<sup>47</sup> Hobson reported that Busby alone was concerned about British lives and property. He remarked upon the care taken by the Maori combatants to ensure that Europeans were not injured (“it is a remarkable fact, and worthy of imitation by more civilized powers”). He expressed concern, however, about “the abandoned ruffians from our own country who have from time to time found their way to the Bay of Islands”, from whom “indeed there is much to be dreaded”. He cited the case of the men being transported to Sydney for trial, expressing the hope that “the 9th of George the Fourth<sup>48</sup> will be found applicable to their case, and that they may be made an example to many of a similar character who remain behind to disgrace our nation even in the eyes of savages”.<sup>49</sup> (It proved effective for Doyle, who was convicted and hanged.<sup>50</sup>)

In reporting more generally on the condition of Maori, Hobson acknowledged the potential of Maori, while expressing regret that they had not progressed more in civilisation.<sup>51</sup>

In reporting to your Excellency my views and observations on the social condition of the New Zealanders, I cannot repress a feeling of deep regret that so fine and intelligent a race of human beings should, in the present state of general civilization, be found in barbarism; for there is not on earth a people more susceptible of high intellectual attainments, or more capable of becoming a useful and industrious race under a wise government. At present, notwithstanding their formal declaration of independence, they have not, in fact, any government whatever; nor could a meeting of the chiefs who

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<sup>45</sup> Ibid 9.

<sup>46</sup> Indeed, perhaps as a result of Titore’s death, what Ron Crosby has described as an “uneasy peace” was made in late July 1837. RD Crosby *The Musket Wars: A History of Inter-Iwi Conflict 1806–45* (Reed Books, Auckland, 1999) 326.

<sup>47</sup> Ibid 10.

<sup>48</sup> It is not clear whether Hobson was referring to the Australian Courts Act 1828 (9 Geo IV c 83) or the Offences Against the Person Act 1828 (9 Geo IV c 31).

<sup>49</sup> Hobson to Bourke, 8 August 1837, GBPP 1840 [238] XXXIII.587, 9-11 at 9.

<sup>50</sup> See Chapter 6, n 400.

<sup>51</sup> Hobson to Bourke, 8 August 1837, GBPP 1840 [238] XXXIII.587, 9-11 at 10.

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profess to be the heads of the united tribes, take place at any time without danger of bloodshed. How, then, can it be expected that laws will be framed for the dispensation of justice, or the preservation of peace and good order, even if native judgment were sufficiently matured, to enact such laws, or to carry them into execution.

Whilst the disunited state of the tribes, and the jealousy of each other, render it impossible to enact or execute laws, it also lays them open to the designs of turbulent individuals, and destroys all confidence in the permanency of peace.

That their wars, which are fast depopulating their beautiful country, may sooner or later be extended to our countrymen, is a circumstance that it would be the height of rashness to doubt; and as British subjects are fast accumulating, and are every day acquiring considerable possessions of land, it must become a subject of deep solicitude with the British government to devise some practicable mode of protecting them from violence, and of restraining them from aggression.

Heretofore the great and powerful moral influence of the missionaries has done much to check the natural turbulence of the native population; but the dissolute conduct of the lower orders of our countrymen not only tends to diminish that holy influence, but to provoke the resentment of the natives, which, if once excited, would produce the most disastrous consequences. It becomes, therefore, a solemn duty, both in justice to the better classes of our fellow-subjects and to the natives themselves, to apply a remedy for this growing evil.

The report outlined Hobson's factories proposal, which he promoted as enabling "sufficient restraint ... [to] be constitutionally imposed on the licentious whites", "without exciting the jealousy of the New Zealanders or any other power". He looked to such factories being established at the Bay of Islands, Cloudy Bay and the Hokianga, "and in other places, as the occupation by British subjects proceeds".<sup>52</sup> The factories proposal looked to the conclusion of "a treaty" with the chiefs for "the recognition of the British factories, and the protection of British subjects and property". Land was to be purchased and "inclosed and placed within the influence of British jurisdiction, as dependencies of [New South Wales]". The chief factor, to whom the factors of each factory would report, was to be accredited to "the united chiefs of New Zealand as a political agent and consul".

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<sup>52</sup> Ibid 10.

The proposal did not envisage that the factories would be coextensive with British landholdings but required British subjects and their “landed property” to be registered at the factories. The costs of administration were to be met by “a small fee on the registration of the purchase of land from the natives” and by taxes on shipping and imports and exports. The factors were to be magistrates, assisted by “[t]wo or more of the most respectable British residents” as justices of the peace. Prisons were to be constructed within the factories.

Hobson envisaged that the proposal would require an Act of the United Kingdom Parliament to give the courts of New South Wales “more perfectly than at present, jurisdiction over offences committed by British subjects in New Zealand” and to authorise the New South Wales Legislative Council to enact laws in respect of the factories and British subjects in New Zealand. In a way not explained, Hobson thought such system could become (it seems by example) “the means of introducing amongst the natives a system of civil government which may hereafter be adopted and enlarged upon”. In the meantime, the factories would be a “safe retreat” for British settlers at times of Maori war.<sup>53</sup>

The factories proposal in the report was not capable of addressing in itself the problems Hobson identified with lack of Maori self-government. The report was also partly self-contradictory in first minimising the threat to settlers from Maori conflict and then, in accepting a duty upon the British Government to protect settlers from violence and in advocating the factories as places of refuge, asserting the inevitability that British subjects would be caught up in such conflicts. Given the extent of the problem identified with lawless Europeans, the solution for bringing them under control seems optimistic. It should be noted that Hobson’s factories proposal was not one for controlling the places of British settlement in New Zealand. Nor, at this time, did he seem to have regarded British land purchasing as a problem requiring regulation. It is likely that Hobson himself saw this as first step from which British authority over the country would be gradually obtained. Hobson seemed to envisage the factories as concessions obtained from

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<sup>53</sup> Ibid 10-11.

Maori by treaty. He did not deal explicitly with questions of sovereignty, leaving the impression that British authority was to be personal over British subjects within or attached to the factories rather than territorial.

After refitting the *Rattlesnake* at Sydney, Hobson returned to the East India Station via Kupang (Timor) (“a wretched place subject to the Dutch”<sup>54</sup>). From Kupang, Hobson wrote to Eliza.<sup>55</sup> His description of New Zealand and his summary of his factories proposal in this letter may be compared with his official report. In the letter he acknowledges his own aspirations in relation to a position in New Zealand. It is striking that what comes through the letter is the view that Maori, who were in a state of decline, would inevitably be supplanted by British settlers, and that it was very much in British interests to acquire the country, both to pre-empt any other foreign power and to protect British subjects. Unlike the official report, there is no mention in the letter of a need to assist Maori to become “a useful and industrious race under a wise government”.<sup>56</sup> The letter suggests that the official report was written with an eye to political reality (and perhaps Hobson’s own advancement) as he understood that “it is not the Policy of our Government to take formal possession of New Zealand”.

Hobson told his wife that he had been “officially called on to make enquiry into the state of [New Zealand]”.<sup>57</sup> He had “made a long report of my observations, accompanied by a suggestion for the better Government of our Countrymen who have settled there”. Hobson related with “pride & pleasure” that the Governor of New South Wales and the influential people of the colony, to whom the plan had been communicated, “most unequivocally approve of it”. Hobson thought that it was “not improbable” that he would be asked to appear before a Committee of the

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<sup>54</sup> William Hobson to Eliza Hobson, 25 August 1837, with addendum dated 6 September 1837, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript).

<sup>55</sup> William Hobson to Eliza Hobson, 25 August 1837, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript).

<sup>56</sup> See text accompanying n 51 above.

<sup>57</sup> The letter remarks upon the comparative paucity of information about New Zealand in Cook’s *Voyages* as against other places Cook visited in the South Seas. Hobson speculated that the “fierceness” of Maori may have “precluded that familiar intercourse which he [Cook] was enabled to carry on with the more pacific inhabitants of the smaller Islands”.

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House of Commons on the subject of New Zealand, “for which I have prepared myself with all the information I could collect”. He also expressed the hope to Eliza that, if his plan was accepted, he might be appointed “Head Factor”, a prospect he obviously regarded with enthusiasm, saying:

I assure you the climate is so fine I would rather, on account of the children, hold a situation of one thousand a year in New Zealand, than go to India on three times the amount.

To put his proposals in context for Eliza, Hobson referred to the strategic importance of New Zealand for the Australian colonies and the need to protect British settlement and interests in New Zealand:

As the Aboriginal race are rapidly diminishing in numbers, the day is not far distant when that Country will be wholly occupied by White people, even now the most valuable districts, having been purchased from the Natives are under their Control and all the trade and Fisheries are entirely engrossed by them.

The principal settlers who have as yet purchased lands, or formed establishments, are Englishmen, and all the lower order of whites who have gone in search of employment are likewise from our Country. Three fourths of the whole trade in shipping come either from New S<sup>o</sup> Wales or Great Britain, and all the Capital invested in Fisheries is British. It is therefore just and politic, from the two-fold motive, of averting the danger to our Colonies of allowing a Hostile people to anticipate us in the acquisition of that Country, and of affording protection to our Fellow Subjects to adopt the course that will ensure to us the ascendancy there in regard to Power, and the means of defending our people from insult, and of restraining them from aggression.

The factories proposal was put forward because “it is not the Policy of our Government to take formal possession of New Zealand”. In describing the scheme to Eliza, Hobson referred to the factories as becoming “territorial dependencies” of New South Wales, within which “British laws” would apply. The chief factor would be accredited to “the New Zealand chiefs”.<sup>58</sup>

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<sup>58</sup> It is not clear whether this was a departure from the terms of the report, which had proposed accreditation to the United Tribes, or whether Hobson thought such detail would mean little to Eliza.

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Hobson's letter also described Maori as a "Fine, Manly, intelligent race, but notwithstanding the zealous exertions of our Missionaries they have made but slow advances in civilization":

It is true the influence of our Missionaries has in a degree ameliorated their Character and the wholesome lessons they have from time to time learned of our Power, has impressed them with considerable respect for us. Still they are at this moment in a state of deplorable Barbarism. Their Ferocity towards each other is unabated, and on the most trivial provocation a War is waged that depopulates whole districts.

They have not amongst themselves any form of Government whatsoever. But each Tribe has its own usages, that seldom require to be enforced by penal adjudication, the delinquent being well aware of the consequence of his transgression, to which, if he is not too powerful, he submits quietly.

Hobson cited the letter from a chief to Marsden discussed in Chapter 9 as showing the principal causes of war among Maori.<sup>59</sup> He expressed the opinion, however, that "the greatest destruction to life is not actually in their Battles" but

arises more from the vindictive character of the people which prompts them to lay in wait for the unprotected and to slaughter indiscriminately men, women, & children who fall into their Power.

Hobson described the "hideous Dance", the haka: "the more inhuman they can make themselves appear, the more they are considered to excel". Nor was he impressed by chiefly oratory, which he described as a "harangue",

not in the sober Senatorial style of our Country, but in a [Hard?] Gallop from one extremity of the Group to the other, forcibly slapping his naked thigh at every turn. The subject of his discourse was mere repetition of words to this effect, 'Be Brave', 'Don't Spare'.

Hobson was, however, impressed by the chief Patuone, to whom he presented a sword.

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<sup>59</sup> See Chapter 9, n 139 and accompanying text.

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Hobson's conclusions about "this extraordinary people" were that "they are Brave, vindictive, intelligent Savages, capable of very sincere and lasting attachment, Honorable in their dealings, & indefatigable in their [pursuits?] & where their minds have been cultivated, they have proved themselves industrious, orderly members of society":

Many of their worst Native practices are falling into disuse, such as Cannibalism, Polygamy, Infanticide & Murdering their Slaves, but that reformation only occurs near the mission stations.

The Missionaries have great influence but they are not successful in making converts to Christianity, although they have effected a great & beneficial change in the general character of the People. The Wesleyans profess to have done a great deal, & they certainly preach to large congregations, but they receive and baptise [sic] all who present themselves. Whilst the Church men only count on those who have given proof of a "Changed Heart" & those only will they baptise [sic]. I consider both Societies most zealous in the good work they have undertaken but of the two, I certainly believe that the Church men have done most to disseminate the Christian Faith.<sup>60</sup>

After leaving Timor, the *Rattlesnake* called in at Calcutta and Madras, before catching up with the East India fleet at Trincomalee in November 1837. While in Calcutta, Hobson wrote to Eliza about the prospects for war with Burma. Hobson thought this war might be a "lark" for someone who "now fills the honorable Post of Senior Captain on the Station".<sup>61</sup> On reaching Madras, however, Hobson was told to expect a mission to China instead, a prospect he regarded with much less favour.<sup>62</sup> The *Rattlesnake* did visit Cape Negrais in Burma in February 1838, perhaps as part of a British show of strength. Certainly Hobson wrote from Cape Negrais:<sup>63</sup>

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<sup>60</sup> Hobson referred approvingly to the Church Missionary Society missionaries' permanent settlements upon the land, which formed "the nucleus of a large Colony", and which he regarded as giving them an advantage over the Wesleyan missionaries who, serving only for terms of three or four years, "are therefore less known to & less identified with their Flock".

<sup>61</sup> William Hobson to Eliza Hobson, 10 October 1836, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript).

<sup>62</sup> William Hobson to Eliza Hobson, 10 October 1836, with addendum dated 24 October 1836, ATL MS-Papers-0046-1 (holograph) and MS-1010 (typescript).

<sup>63</sup> Hobson to unknown recipient, 16 February 1838, reproduced in Hobson's Journal, above n 6.

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I believe it is a received axiom that the best means of preserving peace (especially with a semi Barbarous people) is to shew that we are fully prepared for War, & if I clearly understand the politics of the Court of Ava, no other means will attain that end. But we must on the other hand be cautious not to inflame a Belligerent spirit by too much display of Power, which might lead the Burmese Government to think that our intentions are at variance with our professions, and induce them to strike the first blow.

For whatever reason, the war did not proceed. Hobson was ordered home with the prospect of being paid off again.

### Securing appointment

Hobson arrived in England in late November 1838, too late to be a witness at the House of Lords Select Committee hearings on New Zealand in April and May 1838.<sup>64</sup> As seen in Chapter 9, by this time the Colonial Office had had Hobson's August 1837 factories proposal for 10 months. It seems throughout this time to have looked upon the proposal as providing an appropriate model for British intervention in New Zealand, now that the necessity for intervention had been accepted and the alternative of a charter for the New Zealand Association had been rejected in early February 1838.<sup>65</sup> It is not clear why intervention was delayed once that point had been reached as is discussed in Chapter 9.<sup>66</sup> It may be that the Colonial Office was waiting for Hobson to arrive home from the East Indies, having decided to offer him the Consulship. It may be that Glenelg was aware of the favourable opinion held of Hobson by his late brother, Sir Richard Grant, when Governor of Bombay, and the similarly favourable opinion held by Lord Auckland, now Governor-General of India.<sup>67</sup> Eliza Hobson later wrote that Hobson had not solicited appointment as Consul and that it had been made by Glenelg on the basis of the opinion of Hobson's "friends" that he was capable of "carry[ing] the views

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<sup>64</sup> "Shipping Intelligence" (Plymouth, 27 November 1838), *The Morning Chronicle*, London, 30 November 1838. Dandeson Coates was the only witness to the House of Lords Select Committee on New Zealand to discuss Hobson's factories proposal. While he considered that it was less objectionable than Busby's plan of 16 June 1837, he nevertheless regarded it as "inadmissible" as involving "the fundamental Objection, of an Infringement upon the national Rights of the Natives". GBPP 1837-38 (680) XXI.327 at 269.

<sup>65</sup> See Chapter 9, text accompanying ns 312-321.

<sup>66</sup> See Chapter 9, text accompanying ns 325-337.

<sup>67</sup> See text accompanying ns 7, 9 & 35 above.

of the Government into effect”.<sup>68</sup> In any event, knowledge that the *Rattlesnake* had arrived in Plymouth in late November 1838 was followed on 1 December by the Colonial Office letter to Governor Gipps about the appointment of a British Consul at New Zealand.<sup>69</sup>

Hobson was offered the consulship in late December 1838 but hesitated to accept it. He wished to know more about the Government’s plans in relation to New Zealand and, in any event, may have wanted to know whether there was the alternative prospect of advancement in the navy through another command.<sup>70</sup>

Hobson’s meeting with Glenelg in early to mid-January 1839 apprised him of British intentions in intervening in New Zealand and invited him to make further suggestions about its terms.<sup>71</sup> In his letter of 21 January to Glenelg (discussed in Chapter 9), Hobson, while not abandoning the factories project, advanced a preference for the acquisition of sovereignty over the country.<sup>72</sup> This seems to have been Hobson’s preference throughout. As he identified in the letter, and as had been foreshadowed in his private letter to Eliza from Kupang in August 1837, the factories proposal had been put forward in the expectation that the Government was not prepared to acquire the sovereignty of New Zealand. And, as Hobson explained to Glenelg, he had seen the proposal as a first step towards overall acquisition.

Hobson’s letter does not seem to have influenced Colonial Office thinking. The 24 January and early February drafts of the Instructions continued to look to a limited acquisition of sovereignty at places where British subjects were resident or trading. What emerges, however, is that there were differences in significant areas between Hobson’s views and those of the Colonial Office. It is not clear whether these differences were appreciated. Hobson’s concern that another European nation

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<sup>68</sup> Memorial of Eliza Hobson to Lord Stanley, 4 December 1843, ATL MS-Papers-0046-6 (typescript).

<sup>69</sup> See Chapter 9, text accompanying n 330.

<sup>70</sup> See Chapter 9, text accompanying ns 344-345.

<sup>71</sup> The date of Hobson’s meeting with Glenelg is not known. He arrived in London from Plymouth on 8 January. See marginal note on CO 209/4, 95a.

<sup>72</sup> See Chapter 9, text accompanying ns 348-355.

might pre-empt British sovereignty if the extent of British interest was confined to the factories is not reflected in the Colonial Office record. Nor does the Colonial Office seem to have thought that the acquisition of the sovereignty of the whole country was inevitable, with the factories being a first step to that end, as Hobson clearly thought to be the case. Hobson expressed support for British colonisation in New Zealand, a position that was the reverse of that adopted by Glenelg in his 12 February minute and in the second draft of the Instructions. Hobson's 21 January letter also appears to advocate immediate assumption of sovereignty, not contingent on prior consent of Maori. Again, this was never Colonial Office policy, except possibly at a later stage in relation to the South Island only.

Hobson was next given the opportunity to comment on the 24 January draft Instructions. His comments have been described in Chapter 9.<sup>73</sup> In later drafts of the Instructions, Stephen picked up the point made by Hobson that Maori did not distinguish between rights of property and sovereignty but insisted that sovereignty should be obtained from Maori even where lands had been sold to Europeans (contrary to the approach suggested by Hobson).<sup>74</sup> Hobson also queried Stephen's proposal for legislation to deal with future land purchases by British subjects from Maori, which were to be invalid unless founded upon Crown grant. Hobson took the view that the same approach should be adopted for existing purchases of land "which should be legally conveyed by the Crown to the present holders provided their right to it is undisputed, upon payment of a tax equal to the upset price of the land". The proposal clearly contemplated some sort of investigation of title and, in the suggestion of the payment of the upset price of Crown lands, echoes proposals of the New Zealand Association and the New Zealand Company of 1825.<sup>75</sup> In stressing a need for some method of dealing with existing purchases, Hobson may have been influenced by the view, earlier expressed in his letter of 21 January in relation to future land purchases outside the factories that, "without recognised title", future dealings in such land would produce "confusion and strife, that I fear

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<sup>73</sup> See Chapter 9, text accompanying ns 405-408.

<sup>74</sup> See Chapter 9, text accompanying n 428 (February 1839 draft) & Chapter 8, text accompanying n 45 (July 1839 draft).

<sup>75</sup> See Chapter 9, text accompanying ns 49, 247 & 279.

will at last baffle the Powers of the executive to control”.<sup>76</sup> He may also have had a better appreciation of the scale and pace of European land purchasing than the Colonial Office at this time. Hobson’s concern about pre-existing purchases was to continue and may have influenced the eventual shape of the Instructions on that point.

Hobson returned to Plymouth on 7 February.<sup>77</sup> At this stage it is possible that he knew that Glenelg was about to relinquish office.<sup>78</sup> He may also have read the early February draft of his Instructions.<sup>79</sup> On 14 February, Hobson wrote to Grey to accept “appointment to New Zealand”, having accepted that there was now no immediate prospect he would be appointed to the command of a ship.<sup>80</sup> At this point came the lull which followed Glenelg’s leaving of office and Normanby’s reluctance to take the final decision about annexation of New Zealand. It was not until the plans of the New Zealand Land Company became known at the very end of April 1839 that Normanby’s hand was forced. Even then little happened before late May, when Hobson was recalled to London.<sup>81</sup> On Saturday 25 May, he met

<sup>76</sup> See Chapter 9, text accompanying n 353.

<sup>77</sup> Hobson to Grey, 7 February 1839, CO 209/4, 96a.

<sup>78</sup> See Chapter 9, n 410 and accompanying text.

<sup>79</sup> See Appendix 13, text accompanying n 32 and final paragraph.

<sup>80</sup> Hobson to Grey, 14 February 1839, CO 209/4, 100a-103b at 100a-b. The Colonial Office’s plan at this time was to send Hobson out to New Zealand in command of a ship of war. See *ibid* 100b and Chapter 9, n 414 (Glenelg minute, 12 February 1839). In his 14 February letter to Grey, Hobson urged that the ship be a frigate, ideally one of 42 guns, which would be “more imposing” in appearance than a sixth rate ship. Although a temporary command of a ship for Hobson remained a possibility for some time to come (see, for example, Stephen to Labouchere, 18 May 1839, CO 209/4, 243a-247a at 245a), and although Hobson continued to press for it (see Hobson to Labouchere, 6 June 1839, CO 209/4, 108a-110a at 108a-b), in the end the Colonial Office decided that the Admiralty was unlikely to accede to the request and arrangements were instead made for HMS *Druid* to convey Hobson to Sydney, and for it or another naval ship to then bear him on to New Zealand (see Stephen to Gairdner, 8 June 1839, CO 209/4, 113a-115b at 113a; Labouchere to Hobson, 12 June 1839, 117a-118a at 117b-118a; and Chapter 9, text accompanying ns 506-507). Hobson was frustrated that the vessel that would carry him on to New Zealand from Sydney might be a mere brig “and therefore insufficient for the support of that moral influence by which alone I can hope to impress the Native Chiefs with the importance Her Majesty’s Government attaches to my mission. ... It must not be overlooked that the French have lately had the Finest Frigates in those seas and the Natives will not fail to draw a contrast between them, and the Puny Brig that may come to take possession of their Country.” Hobson to Colonial Office, 20 August 1839, CO 209/4, 177a-178b. See also Hobson’s similar complaint to Governor Gipps on his arrival in Sydney, in Chapter 11, text accompanying n 53.

<sup>81</sup> See Chapter 9, text accompanying ns 462-479. Hobson would later claim, in a letter written to Governor Gipps in December 1839, that he had been summoned to London at “the latter end

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with Normanby, Labouchere and, possibly, Stephen. No record of the meeting exists, but Hobson wrote to Labouchere on 30 May regarding the “very important subject mooted on Saturday last ... of Lands already in possession of Europeans in New Zealand”.<sup>82</sup> In this letter, Hobson offered the following suggestions:<sup>83</sup>

[O]n the First assumption of the Sovereignty of New Zealand a Proclamation should be issued Commanding all Persons, not of Native Origin, to make a return according to a given form of the Lands they may possess or Claim; with a distinct declaration that unless such return be made within a given time no subsequent claim will be admitted, without a sufficient and satisfactory cause being shewn for the delay.

That all Titles to Property by Persons, not of Native origin, must in the first instance be conveyed by the Crown.

Those who already possess Land will obtain their Titles upon paying the minimum price (say £5) per acre—the Crown reserving to itself the right of making roads, and bridges, through any property.

The Crown should reserve the right to all Mineral productions, and the Privilege of working them.

All disputed property to be held in Trust by the present possessors, subject to the decision of the Commissioners, who shall be appointed and authorized to settle finally all conflicting Claims.

Hobson spent most of the next four months in London, at the disposal of the Colonial Office. Apart from a few weeks at Plymouth in July to make

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of March [1839]” (and had had “several interviews and much communication with the Marquis of Normanby which terminated in my appointment as Lieut<sup>t</sup> Governor and Consul of New Zealand”). Hobson to Gipps, 24 December 1839, ANZ ACHK 16591, G36/1, 1-7 at 3-4. This claim does not appear to be correct. There is no indication from the Colonial Office files that Hobson returned to London before late May 1839 (or indeed correspondence of any kind between him and the Colonial Office in the period between mid-February and late May 1839). Additionally, a letter from Hobson to Labouchere dated 13 August 1839 refers to “the last four months in which I have been in attendance in London”, i.e. May-August. CO 209/4, 169a-b.

<sup>82</sup> Hobson to Labouchere, 30 May 1839, CO 209/4, 104a-107b at 104a.

<sup>83</sup> Ibid 104b-105b.

arrangements for his departure, he did not return to Plymouth until the third week of August, eventually departing on 24 August on HMS *Druid*.<sup>84</sup>

During the four months Hobson was in London, most of his correspondence with the Colonial Office related to the conditions of his employment, the support he would receive,<sup>85</sup> and the arrangements for taking him to New Zealand.<sup>86</sup> There is no evidence in the Colonial Office file to suggest that he participated in development of the larger questions of policy. As already indicated, he had no direct input into the final draft of the Instructions.<sup>87</sup> In a letter of 30 May to Labouchere, Hobson referred to being “perfectly uninformed of the intentions of the Government relative to my appointment” and requested “a brief outline of the plan of proceeding”.<sup>88</sup>

In a private letter on 5 June, Hobson wrote that he had been selected as “the Humble Instrument” for carrying out the Government’s plan in relation to New Zealand but that “[t]heir arrangements are not yet completed and I am myself uninformed of the exact course intended, but it must be settled in a few days, and then I will begin in earnest to prepare for my voyage to Sydney with my Wife and Family.”<sup>89</sup> On 28 June, Hobson asked to see a draft of his Instructions “being desirous to have a clear understanding of the views of the Government before I

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<sup>84</sup> See Hobson correspondence at CO 209/4, 141a, 145a, 147a, 169a, 177a & 185a.

<sup>85</sup> For example, Hobson urged the appointment in England of a judge, legal adviser and secretary “instead of trusting to the chance of meeting with Persons abroad, who are at once worthy of confidence, and in a position to accept those situations with the limited salary that is usually assigned to them in new colonies”. Hobson to Stephen, 28 June 1839, CO 209/4, 141a-142a. In view, however, of the cost that this would incur and the claims that it would create, “which it will be impossible to satisfy without permanently securing to such officers some considerable emolument”, the Colonial Office decided that “at the commencement of this undertaking, the best course will be that of confining it to that which is absolutely indispensable, viz. the Appointment of the Queen’s Representative”. Colonial Office to Hobson, CO 209/4, 143a-144a. See also Stephen memorandum to Labouchere, 29 June 1839, CO 209/4, 142b.

<sup>86</sup> See correspondence at CO 209/4, 104a-176a.

<sup>87</sup> See Chapter 8, text accompanying ns 2-5.

<sup>88</sup> Hobson to Labouchere, 30 May 1839, CO 209/4, 104a-107b at 106b & 107b.

<sup>89</sup> Hobson to Thompson, 5 June 1839, ATL MS-Papers-0046-05. In the same letter, Hobson referred to having had breakfast that morning with Sir Richard Bourke, who had given him “the full benefit of his clear judgement on some of the New Zealand affairs by which I hope to profit”.

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leave Town”.<sup>90</sup> While some correspondence on the Colonial Office’s New Zealand files was referred to him,<sup>91</sup> he does not seem to have had open access to the files, and on the whole seems to have had little involvement in the key decisions about the terms of British intervention made between May and August.<sup>92</sup>

On the other hand, Hobson seems to have undertaken his own preparation for the New Zealand assignment. He called upon Dandeson Coates on 27 May and left him “a favourable opinion” both of the “intended measures with regard to New Zealand” and “the views of Capt Hobson in carrying them into effect”.<sup>93</sup> It seems likely that Hobson, if he had not done so already, read the House of Lords Select Committee report and evidence. It seems from the similarity between some of the New Zealand Association literature and Hobson’s own expressed views that he may have considered that literature, and perhaps therefore the missionary pamphlets responding to it. It is also likely that he read the Reverend John Dunmore Lang’s *New Zealand in 1839*, published in London in July 1839.<sup>94</sup> Indeed Lang would claim in an appendix to the second edition of the book, published in Sydney in 1873, that:<sup>95</sup>

My pamphlet was published on the 7th or 8th of July, 1839 ... . Captain Hobson, who was then waiting for his instructions in Downing Street, obtained a copy of my pamphlet as soon as it had issued from the press; and I ascertained immediately thereafter, from naval gentlemen connected with Somerset House,<sup>96</sup> that he highly approved of it, and that

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<sup>90</sup> Hobson to Stephen, 28 June 1839, CO 209/4, 141a-142a at 141a.

<sup>91</sup> See, for example, Stephen’s directions at CO 209/4, 29b, 37b & 60b, and CO 209/5, 102b. See also Hobson to Glenelg, 21 January 1839, CO 209/4, 87a-93a at 87a, referring to the “documents respecting the affairs of New Zealand which Sir George Grey did me the honor to put into my hand”.

<sup>92</sup> There is also no evidence that he was “elaborately briefed” on North American precedents as Sorrenson claims. See Chapter 2, text accompanying n 139.

<sup>93</sup> Minutes of the Church Missionary Society Committee, 28 May 1839, CMS G/C1 vol 18, 26.

<sup>94</sup> John Dunmore Lang *New Zealand in 1839: Or Four Letters to the Right Hon. Earl Durham, Governor of the New Zealand Land Company, &c. &c. &c. On the Colonization of that Island, and On the Present Condition and Prospects of Its Native Inhabitants* (Smith, Elder & Co, London, 1839) [“Lang *New Zealand in 1839* (1st ed, 1839)”].

<sup>95</sup> John Dunmore Lang *New Zealand in 1839: Or Four Letters to the Right Hon. Earl Durham, Governor of the New Zealand Land Company, &c. &c. &c. On the Colonization of that Island, and On the Present Condition and Prospects of Its Native Inhabitants. With a Preface and Appendix for 1873* (2nd ed, Sydney, 1873) [“Lang *New Zealand in 1839* (2nd ed, 1873)”] 87-88.

<sup>96</sup> Somerset House was the headquarters of the Admiralty.

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he considered the course it recommended, by annexing New Zealand at once to the British Crown, as the only one that ought to have been adopted in the case.

Lang also claimed that Normanby's 14 August 1839 Instructions to Hobson were influenced by his book.<sup>97</sup> Although the latter claim is unlikely to be correct for reasons to be shortly discussed, Hobson's 1 August 1839 queries of his Instructions suggest that they were prompted at least in part by Lang's analysis of the "right to colonize" obtained with discovery under the law of nations. It will be recalled that Hobson suggested a distinction in the treatment of the North and Southern Islands of New Zealand based on the relationship of the northern chiefs with Britain and their greater "advancement towards civilization".<sup>98</sup> The letter seems to assume that Britain was committed to deal with the northern chiefs as leaders of a "free and independent state". In the Southern Islands, the state of Maori and the absence of any political relationship with Britain, caused Hobson to suggest that the British Crown possessed "all the rights that are usually assumed by first discoverers". This, he suggested, would give the Crown more freedom in relation to British settlers who claimed a title to property "as in a free and independent state". He also asked permission to obtain sovereignty in the Southern Islands by "plant[ing] the flag" on the basis of discovery, rather than attempting a treaty with "wild savages", in respect of whom "it appears scarcely possible to observe even the form of a treaty". Hobson emphasised that, such an approach, would have no impact upon the natives "towards whom the same measure of justice must be dispensed, however their allegiance may have been obtained". Although the suggested method of obtaining sovereignty over the Southern Islands (by planting the flag in assertion of discovery) does not appear in it, the treatment of property in discovered territories with "uncivilised" inhabitants echoes Lang's pamphlet which argued that from Cook's discovery Britain had a "right to colonize" in preference to all other nations, which gave it the "right of pre-emption from the natives". In consequence, European, including British, purchases of land from Maori were invalid as against the British Crown. This "right of pre-emption" in respect of

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<sup>97</sup> Lang *New Zealand in 1839* (2nd ed, 1873), above n 95, 88.

<sup>98</sup> Hobson to Labouchere, [1] August 1839, GBPP 1840 [238] XXXIII.587, 42-44 at 42-43. See Chapter 8, text accompanying n 60.

purchases of land from Maori not in a “free and independent state” seems to be what Hobson was referring to in suggesting that, in the Southern Islands, the claims of British settlers to titles to property were in a different category than in the North Island.

There are other reasons why it is likely that Hobson read Lang’s pamphlet before leaving England. They are discussed below. Independently, however, of its influence on Hobson and his Instructions, the ideas contained in the pamphlet gained currency both in New South Wales (where Lang was an influential figure) and within the New Zealand Land Company. The pamphlet seems to have been the catalyst for importation into contemporary debates in Sydney and London of American law on Indian title. Although these debates concerned the validity of pre-1840 European purchases of land, and the existence of a Crown right of pre-emption, they spilled over into questions about the nature of Maori sovereignty and property which had not greatly exercised the framers of the Treaty and which they would probably have answered differently.

### **Lang’s *New Zealand* in 1839**

John Dunmore Lang (1799–1878) was a Presbyterian minister in Sydney. Born in Renfrewshire in the Scottish Lowlands, Lang received his education for the ministry at the University of Glasgow. He was the first Presbyterian minister in Sydney when he emigrated there in 1823, raising funds to build Scots Church, which was completed in 1826. Lang had many careers, which mostly overlapped: clergyman, politician, educationalist, immigration organiser, historian, anthropologist, journalist and gaol-bird.<sup>99</sup> The interests of his church and the causes of colonial education and migration to Australia, led to Lang making frequent visits to Britain during his life, the first five of which were made before 1840 (on the first in 1824–25 he obtained his doctorate of divinity from the

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<sup>99</sup> As described by DWA Baker “Lang, John Dunmore (1799–1878)” *Australian Dictionary of Biography* [“Baker ‘Lang’”]. The biographical information about Lang in this section comes from this and the following sources: DWA Baker “Lang, John Dunmore (1799–1878)” *Oxford Dictionary of National Biography*; DWA Baker *Days of Wrath: A Life of John Dunmore Lang* (Melbourne University Press, Melbourne, 1985).

University of Glasgow). On the voyages to and from Britain, he would write books or pamphlets.<sup>100</sup>

In 1835, Lang launched *The Colonist* newspaper, the first of three Sydney newspapers in which he shared ownership, which ran until December 1840. In 1836, when it was published on a weekly basis, its circulation at 900–1,000 per issue was second only to *The Sydney Herald* (at 1,600 per issue). By 1839, *The Colonist*'s circulation was said to have fallen to 800, although by then it was publishing twice a week (and for a time in 1840 before it closed it was publishing three times a week). Lang was not the named proprietor or editor of the paper but—except when he was not in the colony, as was the case in 1839–40—did most of the writing for it.<sup>101</sup> He was elected to the Legislative Council of New South Wales in 1842, beginning a parliamentary career that lasted until 1869. His promotion of emigration was particularly active after 1846, although on a visit to Britain in 1830–31 he had obtained a loan from the Colonial Office to take 140 free Scottish migrants to Australia. In 1850 he advocated that Australia should immediately become a republic.

*New Zealand in 1839*, as with other Lang pamphlets, was written by him on a voyage to England via Cape Horn in 1839. The purpose of his trip was not connected with New Zealand<sup>102</sup> (and Lang does not appear to have lobbied the Colonial Office about New Zealand while he was there), and the pamphlet seems only to have been written due to the happenstance of the ship that Lang was a passenger on having sprung a leak passing through Cook's Strait and having had to

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<sup>100</sup> In 1833–34, for example, he wrote *An Historical and Statistical Account of New South Wales*, revised editions of which appeared in 1837, 1852 and 1875. Baker notes of it that the "*Westminster Review* suggested that its title should read 'The History of Doctor Lang, to which is added the History of New South Wales'" but that "it was among the most widely read and fully informed accounts of Australia". Baker "Lang", above n 99.

<sup>101</sup> RB Walker *The Newspaper Press in New South Wales, 1803–1920* (Sydney University Press, Sydney, 1976) 56 & 145–146.

<sup>102</sup> The purpose of Lang's trip was to secure the disallowance of an 1837 Presbyterian Church Act of the New South Wales Legislative Council which recognised not Lang's Synod of New South Wales but the rival Presbytery of New South Wales as the controlling body of the Presbyterian Church in the colony. Baker "Lang", above n 99.

put up for repairs in the Bay of Islands for 10 days in late January and early February 1839.<sup>103</sup>

Later Lang would write that he had written the pamphlet in the knowledge of the “great efforts making at the time in England for colonization of New Zealand”<sup>104</sup> and of the “very interesting and critical crisis of its history” that New Zealand was in.<sup>105</sup> The pamphlet as published was in the form of a series of four letters addressed to the Earl of Durham, as governor of the New Zealand Land Company. Casting it in this form was a late decision taken after Lang’s arrival in London when he became aware of the extent of the contest about New Zealand between the Company, the missionary societies and the Government. Lang wrote that he had addressed the pamphlet to Durham because he had been impressed by Durham’s “admirable” report on Canada, which he had obtained at Pernambuco (Brazil) on his voyage to England.<sup>106</sup>

Lang described his subject as the consideration of

what is really practicable, and what ought decidedly to be done forthwith by Her Majesty’s Government, for the preservation of a numerous and most interesting race of Aborigines, as well as for the advancement of the maritime power of Britain, and the extension of her colonial empire ...<sup>107</sup>

Lang wrote that he was confident that Durham, rather than being interested in “making money” through the New Zealand Land Company, shared his hope that the colonisation of New Zealand would

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<sup>103</sup> John Lang *Reminiscences of My Life and Times Both in Church and State in Australia for Upwards of Fifty Years by John Dunmore Lang D.D., A.M.*, ed. by DWA Baker (Heinemann, Melbourne, 1972) [“Lang *Reminiscences*”] 170-171; Lang *New Zealand in 1839* (2nd ed, 1873), above n 95, iii-iv.

<sup>104</sup> Lang *Reminiscences*, above n 103, 171.

<sup>105</sup> Lang *New Zealand in 1839* (2nd ed, 1873), above n 95, iv.

<sup>106</sup> Lang *New Zealand in 1839* (1st ed, 1839), above n 94, 106-107.

<sup>107</sup> *Ibid* 6.

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extend to the farthest regions of the habitable globe, and ... perpetuate to the close of time, the noble language, the equitable laws, and the Protestant religion of this favoured land ... .<sup>108</sup>

Lang's four letters concerned, in sequence, "the character and influence of the present European population of New Zealand, as regards the Aborigines", "the character and influence of the missions hitherto established in New Zealand, as regards the Aborigines", "the prospect which New Zealand affords for the establishment of a British colony", and "the principles on which a British colony in New Zealand ought to be established and conducted".

In the first letter Lang made the case for immediate British Government intervention in New Zealand to prevent the continuation of Maori "demoralization" and "depopulation", which were chiefly the results of contact with Europeans.<sup>109</sup> "With a few honourable exceptions", the European population consisted of "the veriest refuse of civilized society".<sup>110</sup> The Maori population in the northern part of the North Island was under severe stress and had declined by "at least one-half, during the last fifteen years", giving rise to fears that their "final extinction ... cannot be far distant".<sup>111</sup> Apart from the "demoralizing" influence of Europeans and tribal wars caused or exacerbated by Europeans,<sup>112</sup> Maori were being reduced to "hopeless poverty" through being "wheedled out of their land" by Australian "Land Sharks."<sup>113</sup> The lifting of the minimum upset price for land in Australia had turned the attention of these land speculators to New Zealand "where extensive tracts of the first quality can at present be purchased from the ignorant and deluded natives for the merest trifle".<sup>114</sup> Durham and the British public could have "no conception" of the extent of their operations.<sup>115</sup> The land sharks had acquired tracts of land "of sufficient extent to constitute whole earldoms in England" for "a few

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<sup>108</sup> Ibid iii-iv.

<sup>109</sup> Ibid 13.

<sup>110</sup> Ibid 7.

<sup>111</sup> Ibid 13.

<sup>112</sup> Ibid 8-9 & 17-18.

<sup>113</sup> Ibid 13-15.

<sup>114</sup> Ibid 14.

<sup>115</sup> Ibid 13.

English muskets, a few barrels of gunpowder, a few bundles of slops [i.e. cheap clothing], or a few kegs of rum or tobacco”.<sup>116</sup> Those Maori who had sold all their land were “compelled to take up ... residence ... among the lawless crews of ... whalers”.<sup>117</sup> Lang urged that it was Britain’s “duty” to put an end to land-sharking “immediately”.<sup>118</sup>

The only remedy was “regular and energetic Government established in the island”.<sup>119</sup> The “native chiefs” were incapable of providing this government and establishing “a system of equal laws both for natives and Europeans”, and it was “actually dishonest” to suggest otherwise.<sup>120</sup>

[T]he whole inhabited territory of the New Zealand group of islands, as is well known in New South Wales, is parcelled out among innumerable chiefs, each of whom is independent of every other. The authority of these chiefs, moreover, like that of the chiefs among the ancient Germans, according to the historian Tacitus, is recognised only in time of war ... .

Lang’s second letter was a stinging attack on the Church Missionary Society missionaries in New Zealand. He thought it ironic that the New Zealand Association’s 1838 Bill had been defeated on the basis that Maori were best left to the “charities of the Church Mission in New Zealand”.<sup>121</sup> The mission had made little progress. Even though there were “probably fewer obstacles to overcome in the way of missionary enterprise among the New Zealanders than among any other heathen people on the face of the earth”, Christianity had taken only a “slight ... hold ... on [their] hearts and affections”. The reason was that the missionaries had not carried out their duties “with a single eye to the glory of God, and the extension of the Kingdom of Christ” but had instead been “the principals in the grand conspiracy of the European inhabitants of the island to rob and plunder the natives

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<sup>116</sup> Ibid 14.

<sup>117</sup> Ibid 17.

<sup>118</sup> Ibid 13.

<sup>119</sup> Ibid 18.

<sup>120</sup> Ibid 11-12. See also *ibid* 46: “The idea of the New Zealanders being able to form a government for themselves, or even to protect themselves from the aggressions of unprincipled and rapacious Europeans, is pre-eminently absurd”.

<sup>121</sup> Ibid 25-26 & 42.

of their land!”<sup>122</sup> Lang named several of the missionaries, including Henry Williams, as having established the “largest seignories in New Zealand”.<sup>123</sup> The case was “the most monstrous that has occurred in the whole history of missions since the Reformation—the most disgraceful to Protestant Christianity”. It was “one of the greatest breaches of trust, on the part of its own office-bearers, that the evangelical portion of the Christian Church has witnessed for a century past”.<sup>124</sup>

The only hope of “preserving the New Zealanders from the ruin and extermination with which they are at present threatened, as well from their professed friends as from their undoubted foes”, was for the British Government to interfere and to establish a Colony “founded and conducted on Christian principles”.<sup>125</sup>

Lang’s third letter on “the prospects which New Zealand affords for the establishment of a British Colony” encompassed a vision of coastal settlements of British settlers involved in the whale, timber and flax trades. Reflecting what seems to have been the prevailing opinion in New South Wales<sup>126</sup> (as it was in

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<sup>122</sup> Ibid 32-33.

<sup>123</sup> Ibid 34-36. As to the size of the missionaries’ estates, Lang wrote that “[i]t is extremely difficult to get at the real extent of European estates in New Zealand. There is a laudable obscurity on the subject in particular cases, which might almost be supposed designed to hold out a premium for the future gentlemen of the long robe [i.e. judges] in that island”. Ibid 36.

<sup>124</sup> Ibid 37-38.

<sup>125</sup> Ibid 46. Lang only briefly discussed the Methodist and Catholic missions in New Zealand. The Wesleyan Mission was “in a highly prosperous state ... ascribed in no small degree to the fact, that the Wesleyan Missionaries are strictly prohibited, by the fundamental law and constitution of their society, from acquiring property of any kind”. As to the Roman Catholic Mission, Lang had “serious apprehensions of M. Pompallier’s success”. Ibid 42-45.

<sup>126</sup> See, for example, *The Colonist*, Sydney, 4 September 1839, at 2 (“New Zealand ... shall soon become, what has often been anticipated, the granary of New South Wales—an important maritime, agricultural and commercial depôt”); *The Australian*, Sydney, 21 September 1839, at 2 (from an unidentified “forthcoming publication”: “New Holland must always remain a pastoral, and consequently a thinly inhabited country. ... New Zealand, on the other hand, if ever it flourishes, must do so as an agricultural country”); the *Australasian Chronicle*, Sydney, 24 September 1839, at 4 (from a correspondent: “it is a wise ordination of Providence, that [New Zealand] was selected for colonization in these seas, to supply our deficient granaries in times of dearth and flood”); the *Sydney Gazette and New South Wales Advertiser*, 24 September 1839, at 2 (“New Zealand is fitted by nature to become the garden of New South Wales; the fertility of the soil, the excellence of the climate, and above all the regularity of the seasons, eminently combine to fit it for an agricultural country. But it is only as an agricultural settlement that New Zealand can flourish; as a pastoral country it can never compete with New South Wales”); *The Colonist*, Sydney, 4 January 1840, at 2 (from “A Scottish Highlander”: “This country [New South Wales] must always be a pastoral, but never an agricultural and grain growing country; so that in the rearing of sheep and cattle and the sale of wool, we shall

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England<sup>127</sup>), Lang regarded New Zealand as being more suited for agricultural development than the Australian colonies since it was “free from droughts and hot winds”, blessed with a “constant and copious supply of rain”, and had a “vast extent of alluvial land of the first quality, which would produce in the greatest abundance all the roots, fruits, vegetables, and grains of Europe, including wheat, maize, and potatoes, tobacco, the olive, and the vine”.<sup>128</sup> While New Zealand did offer some prospects for pastoral farming (especially around Cook’s Strait), it was unlikely that it would “ever come into extensive competition with the Australian Colonies, as a pastoral country”.<sup>129</sup> Lang envisaged the northern North Island becoming “the cradle of a great agricultural, maritime, and commercial nation”:<sup>130</sup>

and if large bodies of free emigrants, with their ministers and schoolmasters, and missionaries to the heathen, were settled under a regular Government in each of the important localities I have enumerated, I have no doubt that their influence on the natives would be salutary in the highest degree, and that both New Zealanders and Europeans would coalesce into one christian and virtuous people in a comparatively short period of time. There are not a few instances already of Europeans forming connections with native women, which have afterwards been rendered reputable and permanent by marriage; and the offspring of such marriages will undoubtedly constitute a very fine race of men.

It was thus “one of the beautiful arrangements of that beneficent providence which governs the world” that, in intervening in New Zealand as a matter of “duty ... for

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have it always our own way as far as the other country is concerned”); *The Australian*, Sydney, 21 January 1840, at 2 (“[New Zealand] will probably be the future granary of New South Wales. We shall never know what it is to be distressed for wheat or corn generally. ... And, in addition, ... it is gratifying to reflect that New Zealand will furnish pine wood, and that splendid cordage, which in time of need shall enable our beloved ‘Queen of the Sea’ [the Royal Navy] to maintain her ancient supremacy on the ‘mountain waves’”); and the *Sydney Monitor and Commercial Advertiser*, 17 February 1840, at 2 (“The aridity of New South Wales has stamped it irrevocably as a *sheep* country. ... New Zealand, therefore, will become the homestead, the milk, butter, cheese, grain, and pulse homestead of this colony. ... New Zealand is covered with fern, and is the opposite of a pastoral Country. In a few years, its indigenous grass and [herbs?] will not keep [5,000?] head of Cattle, fine woolled sheep will not *live* there. Hence, whatever is produced in New Zealand, will be the product of the plough and the spade”). See also [William White] *Important Information Relative to New Zealand* (Thomas Brennand, Sydney, 1839) 1-34.

<sup>127</sup> See Chapter 9, text accompanying ns 208, 257 & 302.

<sup>128</sup> Lang *New Zealand in 1839* (1st ed, 1839), above n 94, 55-57.

<sup>129</sup> Ibid 55-56.

<sup>130</sup> Ibid 58.

the protection and preservation of the natives”, the British Government would also be promoting “British interests”.<sup>131</sup>

Lang’s fourth and final letter addressed “the principles on which a British colony in New Zealand ought to be established and conducted”. Lang considered the colony should be established on “Christian and philanthropic principles”, protecting native rights, and providing a rallying point for missionary labour among Maori.<sup>132</sup> Given the plight of Maori and the need for immediate British intervention on humanitarian grounds, it was “quite unnecessary ... to consult Puffendorff [sic] or Grotius as to the right of Her Majesty’s Government to colonize New Zealand, and to assume the sovereignty of the island”. Lang believed that “every independent chief” would “assuredly hail it as a blessing to himself and his country”.<sup>133</sup>

This was not to say that the law of nations was irrelevant. Lang maintained that Cook’s discovery of New Zealand gave Britain rights under international law.<sup>134</sup> It was a “maxim or first principle of the law of nations” that the discoverer of an inhabited country, “under a Government of any kind”, obtained a “right to colonize it ... in preference to all other civilized nations” but, by that fact of discovery, “no right of sovereignty over it” and “no right of property to a single inch of its territory”.<sup>135</sup> This “equitable principle” had been acted upon by the British Crown in the colonisation of America and “appear[ed] to have regulated the transactions of the more respectable civilized nations with semi-barbarous tribes from the remotest times”.<sup>136</sup> Lang wrote that this principle had been explained by “the late eminent Chief Justice Marshall” in “the celebrated case of the Cherokee nation against the State of Georgia, tried before the Supreme Court of the United States in

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<sup>131</sup> Ibid 47.

<sup>132</sup> Ibid 73.

<sup>133</sup> Ibid 74. See also *ibid* 80-81. Hugo Grotius (1583–1645) was a Dutch jurist; Samuel von Pufendorf (1632–1694) was a German jurist.

<sup>134</sup> Lang expressed the view that Dutch rights of discovery had been renounced. The British right based on Cook’s discovery had been maintained in the Commission appointing Phillip Governor of New South Wales and by subsequent actions such as Governor Macquarie’s appointment of Rev John Butler as a justice of the peace for New Zealand. *Ibid* 76-78.

<sup>135</sup> *Ibid* 74-75.

<sup>136</sup> *Ibid* 75.

the year 1832". Marshall had shown that, since the United States had "merely inherited British rights", under "the principle on which the British Government had uniformly acted towards the Indians in the colonization of America, ... they could have no right of property whatever upon the territory of a free and independent Indian nation".<sup>137</sup> It is clear, from the date of the judgment given by Lang and the description of what was settled by the case, that Lang was referring to *Worcester v State of Georgia* rather than to *Johnson v M'Intosh* or *Cherokee Nation v State of Georgia*.<sup>138</sup> *Worcester* had in fact been quoted extensively in an April 1838 article in *The Colonist*, almost certainly written by Lang,<sup>139</sup> on "The Law of Nations in Reference to Colonization" (although in the article the author of the judgment is wrongly referred to as Chancellor Kent, "the Blackstone of America").<sup>140</sup>

Lang argued that, in relation to Maori, the "right to colonize" was no more than the "right of pre-emption, or, in other words, of treating exclusively with the natives for their land".<sup>141</sup>

[T]he right to colonize ... most certainly gives Her Majesty no right whatever to occupy a single inch of the territory of New Zealand, except on such terms as its native inhabitants shall accede to ...

Lang considered that all land in New Zealand belonged to Maori and that none could be settled by colonists "without the express consent of the natives, and

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<sup>137</sup> Ibid 75.

<sup>138</sup> It is debatable whether *Worcester* is indeed authority for the proposition that "no right of sovereignty" was obtained by Britain over America by discovery (or whether it simply held that any territorial rights obtained by discovery did not confer sovereignty over Indian nations).

<sup>139</sup> The April 1838 article contains similar material and language to that found in Lang's *New Zealand in 1839*. For example, *The Colonist* article refers to "those splendid butchers, Cortez and Pizarro, and ... the ten thousand atrocities of the numerous host of Spanish robbers that followed them, and that spread themselves like a pestilence over the unfortunate empires of Mexico and Peru", while in *New Zealand in 1839* Lang wrote of "the brutal atrocities of Cortez and Pizarro, and of the goal-gang of Spanish ruffians that followed these bandit chiefs in Mexico and Peru". Lang *New Zealand in 1839* (1st ed, 1839), above n 94, 110.

<sup>140</sup> *The Colonist*, Sydney, 21 April 1838, at 2. The source for *Worcester* drawn on by Lang, in 1838 and in 1839, is not known. The mistaken attribution to Kent and the misnaming of the case as "the Cherokee nation against the State of Georgia", suggest that Lang's source was not Calvin Colton's *Tour of the American Lakes* (1833), drawn on by *The Colonist* (during Lang's absence from Sydney) in its 25 July and 4 August 1840 articles discussed in Chapter 16. Colton correctly named *Worcester* and correctly attributed the judgment to Marshall.

<sup>141</sup> Lang *New Zealand in 1839* (1st ed, 1839), above n 94, 78-79.

without having been previously purchased from the natives at what they consider a fair and adequate price”.<sup>142</sup>

The implications of the “right of pre-emption” were, however, profound for European land claimants:<sup>143</sup>

That important right, however, neither Her Majesty, nor any of her royal predecessors has yet renounced in any way; and as it is a right clearly available, not merely against all European foreigners, but against all Her Majesty’s own subjects, it follows unquestionably that whoever has purchased land from the natives in New Zealand, has done so at his own risk—has done so in defiance of Her Majesty’s right of pre-emption  
...

This right of pre-emption had been seen in action in Port Phillip (in respect of Batman’s treaty<sup>144</sup>) where the Crown had “very properly disallowed the whole transaction, and the native deeds were consequently held null and void”. European land purchases in New Zealand were “precisely similar”. Maintaining the right of pre-emption would allow the Government to review purchases, “confirming honest men in their possessions, and ... obliging persons of a different description to restore to the natives, or to the Government on their behalf, the land they have acquired dishonestly”.<sup>145</sup>

Lang considered that there was sufficient authority to obtain sovereignty and set up British government in New Zealand under the Imperial legislation for New South Wales (which provided authority over adjacent islands in the Pacific).<sup>146</sup> On obtaining sovereignty, Lang suggested that a Board should be appointed (“like the Court of Claims in New South Wales”) to decide the “individual merits” of all prior purchases.<sup>147</sup> The “holder of the native deed” would either be entitled to receive “a deed of grant from the Crown” to the extent that the purchase was

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<sup>142</sup> Ibid 81-82.

<sup>143</sup> Ibid 78-79.

<sup>144</sup> For Batman’s treaty, see Chapter 5, text accompanying ns 64-65.

<sup>145</sup> Lang *New Zealand in 1839* (1st ed, 1839), above n 94, 79-80.

<sup>146</sup> Ibid 81.

<sup>147</sup> Lang accepted that there were “reputable men in New Zealand, who have acquired the lands they occupy by fair and honourable means”. Ibid 103-104.

shown to be fair or “should merely have the right of pre-emption within a certain period at the Government minimum price”.<sup>148</sup>

Lang said that he was supportive of the general objects of the New Zealand Land Company but believed it had to go through the same process of investigation and purchase in relation to its land claims as other claimants. He indicated, however, that the Company would not know whether its purchases were fair and apprehended that “the less ... that is said about the validity of the Company’s title, the better”.<sup>149</sup>

The minimum price proposal envisaged by Lang tied in with his suggestions for how post-sovereignty purchases of land should be undertaken. The Government (or Commissioners on its behalf) should be the “sole purchaser” of land from Maori, on the prior certification of a Board of Protectors of Aborigines that “the interests and feelings and wishes of the natives have been duly consulted”. Land so purchased would then be sold at a minimum fixed price per acre. The proceeds would be applied towards recouping the price paid to Maori for the land, paying the salaries of the Board of Protectors of Aborigines, supporting schools and similar institutions “for promoting the intellectual and moral advancement of the natives”, and encouraging and supporting emigration from the United Kingdom.<sup>150</sup>

Lang frankly acknowledged that “a vast extent of eligible land of the first quality” would be purchased from Maori at a “merely nominal price”. He argued that this was not unjust for two reasons. First, most of the land was of little value to Maori because they were “not a pastoral people” and there was “no game on the islands to employ them in hunting”, so that “a comparatively small portion of the land is adequate to all the wants of a New Zealand tribe or family”. Secondly, in the present circumstances of Maori, they would squander purchase monies and their interests would be better served by “the establishment of some permanent

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<sup>148</sup> Ibid 104. “Pre-emption” is used here in its sense of a right of first offer.

<sup>149</sup> Ibid 108 & 113.

<sup>150</sup> Ibid 82.

provision for the furtherance of their intellectual and moral advancement”.<sup>151</sup> Under Lang’s proposals, Maori advancement would come not only from schools and other institutions but also from British colonists who would “settle with their ministers and schoolmasters in the midst of the natives, to set them the example of European arts and industry, and to allure them by acts of brotherly-kindness to the reception and practice of the Christian religion”.<sup>152</sup> Colonisation on the basis put forward by Lang would “not only afford a sufficient guarantee of [Maori] protection and preservation, but would greatly hasten their adoption of the manners and religion of Christian Europeans, and their final amalgamation with the other subjects of the British crown”.<sup>153</sup> Lang favoured colonisation on a large scale. To be “of any real benefit to the natives”, it had to be “engaged in vigorously, and pursued to a great extent”. He was convinced that there was both British capital and surplus population (particularly the “tens of thousands of the half-starved semi-maritime population of the north and west of Scotland”) for New Zealand to “one day be the Great Britain of the Southern Hemisphere”.<sup>154</sup>

Organised colonisation was clearly preferable for Maori advancement to “a few straggling European adventurers”.<sup>155</sup>

It would therefore be of importance to the New Zealanders to prevent such dispersion, and to induce the Europeans settling in the island to concentrate themselves in suitable localities. In a pastoral country like New South Wales, this would doubtless be both absurd and impracticable; but in a maritime and agricultural country, like the northern parts of New Zealand, it would be comparatively easy. Besides, the Government Commissioners, and Board of Protectors, would have it fully in their power to prevent any European colonist from acquiring property in land wherever his settlement might be deemed likely to prove unfavourable to the natives.

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<sup>151</sup> Ibid 82-83.

<sup>152</sup> Ibid 85.

<sup>153</sup> Ibid 97-98.

<sup>154</sup> Ibid 98 & 115.

<sup>155</sup> Ibid 96.

### Lang's influence

Lang's 1873 claim that Hobson "obtained a copy of my pamphlet as soon as it had issued from the press" on 7 or 8 July 1839 cannot be proved.<sup>156</sup> Hobson may have been in Plymouth when the pamphlet first came out.<sup>157</sup> It does, however, seem likely that he would have sought it out if aware of its publication, at least on his return to London later in July. Certainly there is indication in Hobson's 1 August 1839 letter to Labouchere querying the draft of his Instructions that he considered that Cook's discovery might provide justification for different treatment of European purchases of land outside the territories of the United Tribes who whose Declaration of Independence had been recognised by the British Crown (although Hobson seemed prepared to stretch this to the whole of the North Island).<sup>158</sup> Although this query indicates a different approach to that taken by Lang (who treated Britain as having, by discovery, the sole right to purchase land from Maori throughout New Zealand, without exception for the territories of the United Tribes), it seems quite possible that Hobson's emphasis on discovery was derived from Lang. His approach, that discovery gave the Crown power in relation to European native titles but did not affect the "measure of justice" to be accorded to Maori interests, is consistent with Lang's view (derived from *Worcester*) that discovery gave the colonising power no direct interest in native lands but only a right of purchase as against non-natives. It is difficult to understand Hobson's question to the Colonial Office except as prompted by the ideas discussed by Lang and derived from *Worcester*. If so, it is significant that Hobson had an understanding of the *Worcester* approach to Indian title (rather than the *Johnson v M'Intosh* approach) and that he did not think it applied to the territories of the United Tribes, on the basis that the British Government regarded them as a "free and independent state".

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<sup>156</sup> See above n 95. Lang's recollection that it came out on 7 or 8 July may also not be accurate. Lang's preface in the first edition is dated 6 July. Ibid iii.

<sup>157</sup> See text accompanying n 84 above.

<sup>158</sup> See Chapter 8, text accompanying n 60; and text accompanying n 98 above.

If Hobson had the *Worcester* approach to “discovery doctrine” in mind in his 1 August letter, the property implications of asserting sovereignty by discovery seem to have eluded the Colonial Office. The 15 August response to Hobson authorised him, under certain conditions, to claim sovereignty by discovery over the South Island but did not suggest any different consequences would flow for the treatment of European purchases.<sup>159</sup> As will be seen, the Colonial Office never deviated from the view that pre-emption was derived from the terms of the Treaty of Waitangi not from discovery or any other legal doctrine.<sup>160</sup>

If Hobson did read the pamphlet, it is likely that he would have approved of many of Lang’s views (as Lang was to claim<sup>161</sup>). As Donald Loveridge points out, Hobson, too, had recommended an immediate assumption of sovereignty in his 21 January 1839 memorandum.<sup>162</sup> As has been seen, Hobson, like Lang, was in favour of extensive British colonisation of New Zealand and believed that British intervention was required because Maori were not capable of setting up effective government. Hobson, too, considered that European claims to land should be investigated and that those approved should receive a Crown grant upon payment of the Government minimum price for land. Although Hobson is unlikely to have agreed with Lang’s personal criticisms of the Church Missionary Society missionaries, he also believed that they had made little progress with Maori. It would give Hobson further comfort that, as he knew, Lang’s proposals were not too dissimilar to those being developed by the Colonial Office (for example, in relation to the investigation of European land purchases, in the importance placed on the Crown having an exclusive right of purchase from Maori, and in the reasons

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<sup>159</sup> See Chapter 8, text accompanying n 65.

<sup>160</sup> As is seen most clearly in Hope’s draft report for the 1844 House of Commons Select Committee on New Zealand (see Chapter 17, text accompanying ns 155-156), the Colonial Office saw the legal basis for interfering with pre-Treaty European purchases as assertion of the sovereign power immune from challenge as an act of state.

<sup>161</sup> See text accompanying n 95 above.

<sup>162</sup> Donald Loveridge “‘The Knot of a Thousand Difficulties’: Britain and New Zealand, 1769–1840” (Brief of Evidence for the Crown Law Office, Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 17 December 2009, A18) [“Loveridge ‘Knot of a Thousand Difficulties’”] 244.

given for wanting such an exclusive right, which included financing schools, the machinery of government, and immigration).

In the 1873 second edition to *New Zealand in 1839*, Lang claimed that it was “quite evident” from the 14 August 1839 Instructions to Hobson that Normanby “had not only read my pamphlet ... but had resolved on pursuing the very course it recommended”. This was based on Lang’s view that the British Government had in 1840 annexed New Zealand to New South Wales, relying on the 1787 Commission to Governor Phillip. Although Hobson had been instructed to acquire sovereignty by “concessions” from Maori, in fact “a Government was actually established and laws passed for New Zealand by the Legislature of New South Wales from the very first”.<sup>163</sup> This claim by Lang that the British Government did not see Maori agreement as necessary for its assumption of sovereignty is quite wrong, as has been seen in Chapters 8 and 9. Nor, as Loveridge points out, was Lang correct to say that the Legislative Council of New South Wales passed legislation for New Zealand before it received news of the signing of the Treaty of Waitangi.<sup>164</sup> The annexation of New Zealand to the colony of New South Wales also followed cession of sovereignty in New Zealand.

Quite apart from the reasons Lang advanced for thinking his pamphlet influenced Normanby’s Instructions to Hobson, the timing makes any such influence unlikely. The pamphlet was published on Lang’s later account on 7 or 8 July. Stephen’s draft of the Instructions, which did not substantially alter before they were issued to Hobson on 14 August, was prepared on 9 July, a fact that Lang would not have known. The pamphlet does not appear on the Colonial Office files, unlike other pamphlets published by sympathisers of the New Zealand Association and missionary societies. There are no memoranda in the Colonial Office record referring to Lang’s pamphlet. Lang does not himself suggest that he sent a copy of the pamphlet to the Colonial Office. What is more, the draft of the Instructions did not come out of the blue. Intervention in New Zealand had been under discussion

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<sup>163</sup> Lang *New Zealand in 1839* (2nd ed, 1873), above n 95, 88.

<sup>164</sup> Loveridge “Knot of a Thousand Difficulties”, above n 162, 245.

for some considerable time, as is attested by a number of memoranda and two earlier draft Instructions. The reasons for British intervention given in the Instructions may have been similar to those given by Lang but had in fact been identified as earlier as December 1837, when the New Zealand Association had been offered its charter. Concern about European land purchasing in New Zealand had been long expressed and Labouchere had even announced to Parliament that land claims would be investigated. Annexation of the territories to be acquired in sovereignty to New South Wales was a course that had been determined well in advance of the publication of Lang's pamphlet and not on the basis of discovery and the Commission of Governor Phillip. Loveridge considers that any similarities between the Instructions and Lang's pamphlet are "only coincidence".<sup>165</sup> Moreover, there were important differences between the two. The Colonial Office required prior Maori consent before the assumption of sovereignty. The 14 August Instructions made no claim of right based on discovery and it was not until Normanby's 15 August response to Hobson's 1 August queries about the South Island that reliance on discovery on a heavily qualified basis was authorised should the need arise. The 14 August Instructions were not consistent with a view that the British Crown already had an exclusive right to purchase land from Maori by operation of legal doctrine: Hobson was not instructed that existing European purchases were invalid<sup>166</sup> and he was directed to treat with Maori for cession of an exclusive right to purchase land. Finally, the instruction that Hobson was to seek the assistance of the missionaries in his dealings with Maori is hardly consistent with Lang's vituperative opinion of them.

Although Lang's claimed impact on British policy in 1839 is doubtful, it would be wrong to think that his pamphlet was without influence. His attacks on the Church Missionary Society missionaries were picked up on by the New Zealand Company and others. It put the missionaries on the back foot for some time and their

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<sup>165</sup> Ibid.

<sup>166</sup> As has been discussed, this was clearer in Stephen's draft than in the Instructions issued to Hobson after Labouchere's amendments. Even though Gipps was later to argue that his Land Claims Bill conformed to the Instructions (see Chapter 16), it is difficult to read them as asserting the invalidity of all European native titles. Certainly, they provide no support for the doctrine of Crown pre-emption advanced by Lang.

## Chapter Ten: The Consul

reputations never fully recovered. The damage to missionary standing was to have some impact on their effectiveness as advocates for Maori. The main influence of Lang's pamphlet, however, may well have been in the introduction of American case-law into post-1840 debates about pre-Treaty settler land titles and Maori property in land. The use of this case-law, in Sydney, London and New Zealand, is described in Chapters 13-18. Although Lang himself had referred to *Worcester v State of Georgia*, those who took the more restrictive view of native title were to rely on the earlier United States Supreme Court case-law, in particular *Johnson v M'Intosh*.

## CHAPTER ELEVEN

### HOBSON & GIPPS—SYDNEY, DECEMBER 1839–JANUARY 1840

Hobson received his instructions and commissions at Plymouth on 20 August 1839.<sup>1</sup> He sailed for Sydney on HMS *Druid* on 24 August with a party that included his wife and three children.<sup>2</sup> The *Druid* sailed to Sydney via the Cape of Good Hope,<sup>3</sup> reaching its destination on 24 December after a voyage apparently made eventful only by the birth of Hobson's fourth child, Emma Churchill, on 13 December.<sup>4</sup>

Governor George Gipps had not had official warning of Hobson's appointment and mission from the Colonial Office. Hobson's arrival is, however, unlikely to have

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<sup>1</sup> See Chapter 9, n 511. The instructions received were Normanby's Instructions of 14 August and his further letter of 15 August, in response to Hobson's 1 August queries.

<sup>2</sup> See Chapter 9, n 515. The party also included a governess, five servants, and Lieutenant Willoughby Shortland. Guy Scholefield *Captain William Hobson, First Governor of New Zealand* (Oxford University Press, Oxford, 1934) ["Scholefield *Captain William Hobson*"] 79 & 80-81. Shortland came from a Plymouth naval family and was the eldest of three brothers who served with Hobson at different times. Willoughby Shortland had served under Hobson in the West Indies (and is said to have nursed him through an attack of yellow fever). He had been invalided home from the West Indies in 1833 and appears to have held no position between then and leaving with Hobson for New Zealand. Peter Shortland had been a mate on the *Rattlesnake*. The third brother, Edward, became Hobson's private secretary as Governor in 1841. Willoughby Shortland appears to have accompanied Hobson in the expectation of appointment to some New Zealand office, and was appointed police magistrate by Gipps before Hobson departed from Sydney for New Zealand. When Hobson was incapacitated in 1840, Shortland acted as the principal government officer. In 1841, when New Zealand became a separate colony from New South Wales, he was appointed colonial secretary. When Hobson died, he became acting governor. Shortland resigned as colonial secretary when Fitzroy arrived as Governor in December 1843. He returned to England and was later appointed president of Nevis in the Leeward Islands and, in 1854, lieutenant-governor of Tobago. Scholefield describes Willoughby Shortland as "vain and overbearing, lacking both tact and experience" and as "the least talented of the three [brothers]". Ibid 57, 161, 180 & 186-187; GC Boase "Shortland, Willoughby (1804–1869)", rev. Jane Tucker, *Oxford Dictionary of National Biography*; "Shortland, Willoughby (1804–1869) in Guy Scholefield (ed) *Dictionary of New Zealand Biography* (Department of Internal Affairs, Wellington, 1940) vol 2, 299-300.

<sup>3</sup> The *Druid* reached the Cape on 29 October and departed for Sydney on 7 November. Hobson to Bidwell, 6 November 1839, FO 58/1, 57a-b.

<sup>4</sup> Scholefield *Captain William Hobson*, above n 2, 79. The "Churchill" was in honour of Captain Lord Henry John Spencer Churchill of HMS *Druid*. Churchill was an important member of the Freemasons. Membership records do not establish that Hobson was a Freemason but the destruction of many Freemason records in the Plymouth Blitz during World War II means that it is not possible to be certain whether he was a member.

taken him by surprise. Glenelg's 1 December 1838 letter, received by Gipps in March or April 1839, advised that a Consul for New Zealand was to be dispatched.<sup>5</sup> Sydney newspapers, which followed developments in London about New Zealand closely, reported in November 1839 that Hobson had been appointed "to the government" of a "new settlement" in New Zealand and that his departure on HMS *Druid* had been imminent in July.<sup>6</sup>

### The Sydney press

The development of British plans for New Zealand had been closely followed in Sydney before Hobson arrived. The intention to send out a Consul was publicly known from June 1839 when Gipps tabled Glenelg's 1 December 1838 letter in the Legislative Council and local newspapers republished it.<sup>7</sup> Throughout 1839, Sydney newspapers had also kept readers abreast of contemporary British interest in New Zealand settlement, including the plans of New Zealand Land Company,<sup>8</sup> of which the Sydney newspapers were largely supportive.<sup>9</sup> British newspaper

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<sup>5</sup> See Chapter 9, text accompanying n 330.

<sup>6</sup> The *Sydney Gazette and New South Wales Advertiser*, 16 November 1839, at 2 & the *Sydney Monitor and Commercial Advertiser*, 18 November 1839, at 2 (taking their reports from the *Hampshire Telegraph*). The Sydney newspapers, as is further described below, doubted that Hobson was coming out as Governor (see text accompanying n 15).

<sup>7</sup> The *Sydney Herald*, 14 June 1839, at 2; the *Sydney Gazette and New South Wales Advertiser*, 15 June 1839, at 3. Gipps's tabling of Glenelg's letter, and the discussion of it by the Legislative Council, were reported in *The Colonist*, Sydney, 12 June 1839, at 2, the *Sydney Monitor and Commercial Advertiser*, 12 June 1839, at 2, and the *Sydney Gazette and New South Wales Advertiser*, 13 June 1839, at 2.

<sup>8</sup> See, for example, *The Colonist*, Sydney, 4 September 1839, at 2, *The Sydney Herald*, 6 September 1839, at 4, and the *Australasian Chronicle*, Sydney, 6 September 1839, at 2 (each publishing the prospectus of the New Zealand Land Company); the *Sydney Gazette and New South Wales Advertiser*, 7 September 1839, at 2-3 (giving a long report of the celebrations and speeches to mark the fitting out of the *Tory*); *The Sydney Herald*, 16 October 1839, at 2, the *Sydney Gazette and New South Wales Advertiser*, 19 October 1839, at 2-3, and the *Australasian Chronicle*, Sydney, 22 October 1839, at 2 (publishing an article from the *Glasgow Chronicle* about the prospects for British colonisation of New Zealand); *The Colonist*, Sydney, 6 November 1839, at 2 (providing a report from a "Devonport paper of the 29th of June" about the "very rapid" sale of New Zealand lands—in excess of 55,000 acres—by the New Zealand Land Company in England); the *Sydney Gazette and New South Wales Advertiser*, 14 November 1839, at 4 (printing New Zealand Land Company publicity information including an extract from Colonel Wakefield's Instructions); *The Colonist*, Sydney, 16 November 1839, at 4 (publishing articles from the *The Scotsman* and *Scottish Pilot*).

<sup>9</sup> See, for example, *The Colonist*, Sydney, 4 September 1839, at 2. But see *The Hobart Town Courier and Van Diemen's Land Gazette*, 13 September 1839, at 2 (reprinting an article from

reports of Labouchere's 25 June 1839 Parliamentary statement (advising that the Government had decided on measures that would probably lead to the establishment of a colony in New Zealand and warning that "fraudulent or excessive" purchases would not be recognised)<sup>10</sup> and the Treasury's 19 July 1839 Minute tabled in Parliament (approving the costs associated with sending Hobson to New Zealand "as Her Majesty's Consul, and as eventual Lieutenant-governor of such territory as may be ceded to Her Majesty")<sup>11</sup> were reproduced in Sydney newspapers in November 1839.

The Sydney newspaper reports during 1839 were confused as to British intentions. That is in part because the British newspapers that were their sources contained inaccurate speculation or actively sought to misrepresent British Government policy because of an editorial line that was pro-settlement or pro-New Zealand Land Company. In part, however, the errors in the Sydney newspaper reports are attributable to wrong inferences being drawn from the pieces of information they had. So, *The Colonist* and *The Sydney Herald* persisted in thinking, even after the Treasury Minute had been published in Sydney, that the New Zealand Land Company would have an official role in the new British order to be established in New Zealand (creating "an *imperium in imperio*").<sup>12</sup> *The Sydney Herald* expressed concern that the colony of New South Wales would finance "Mr Abductionist Wakefield" in the colonisation of New Zealand.<sup>13</sup> *The Sydney Gazette* accepted the

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*The Times*, London, 1 May 1839, warning its readers to be wary of the "specious pretences and pompous narratives" of the Company's promoters).

<sup>10</sup> *The Australian*, Sydney, 12 November 1839, at 2; the *Sydney Gazette and New South Wales Advertiser*, 14 November 1839, at 2; *The Sydney Herald*, 15 November 1839, at 3; the *Australasian Chronicle*, Sydney, 15 November 1839, at 2. These reports differed slightly between themselves (reflecting the different English newspapers drawn on) and from the Hansard report (see Chapter 9 n 504). The *Australasian Chronicle* report, for example, related that Labouchere had told the Commons that the Government "would consider themselves bound in making grants of land to recognise the rights of parties to property in that country, unless it had been acquired fraudulently".

<sup>11</sup> *The Colonist*, Sydney, 30 November 1839, at 3; the *Australasian Chronicle*, Sydney, 3 December 1839, at 2; and *The Sydney Herald*, 4 December 1839, at 2.

<sup>12</sup> *The Colonist*, Sydney, 4 December 1839, at 2. See also *The Colonist*, Sydney, 4 September 1839, at 2 (advising its readers that the Company had "received the assurance of Her Majesty's Government, that a Bill would be introduced into Parliament for the purpose of sanctioning the proceedings, and consolidating the interests of the Company by Royal Charter").

<sup>13</sup> *The Sydney Herald*, 4 December 1839, at 2.

view, derived from the opinion of the London correspondent of *The Australian* (reporting on Labouchere's 25 June 1839 statement to Parliament), that the most likely course was the establishment of British factories along the model of the Gold Coast "and which was recommended by Sir Richard Bourke some years before".<sup>14</sup>

At the time of the *Sydney Gazette* report, it was not known in Sydney that Hobson had been dispatched to New Zealand. Within a few weeks, both the facts that Hobson was on his way<sup>15</sup> and that he was the progenitor of Bourke's factories recommendation became known.<sup>16</sup> This seemed to those in Sydney to confirm the view that the mission of the Consul, whose appointment had been advised to Gipps in Glenelg's letter of 1 December 1838, was to set up factories in New Zealand.<sup>17</sup> That reasonable deduction was, as has been indicated in Chapter 9, at variance with policy, which had moved on from the limited intervention entailed in Hobson's

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<sup>14</sup> The *Sydney Gazette and New South Wales Advertiser*, 14 November 1839, at 2; *The Australian*, Sydney, 12 November 1839, at 3.

<sup>15</sup> See above n 6. The *Sydney Gazette* and the *Sydney Monitor* considered that the *Hampshire Telegraph* was mistaken in saying that Hobson was appointed "to the government" of the "new settlement" (or as they put it, "in calling him Governor"). Rather, the *Sydney Gazette* believed it to be "generally understood" that Hobson was "to be appointed British Consul at New Zealand, with extraordinary powers in the room of Mr Busby, the present British Resident". The *Sydney Monitor*, for its part, considered that Hobson "is either a Consul, or takes charge of one of the speculative companies which have lately united to establish a little private colony in New South Wales".

<sup>16</sup> By early December 1839, Hobson's 1837 factories report (together with the despatches by Busby and Bourke of June and September 1837) had been published as an appendix to a book by William White, the former Wesleyan missionary at the Hokianga (see below n 24), and reproduced in Sydney newspapers. See *The Sydney Herald*, 27 November 1839, at 3 (short extract only); and the *Sydney Gazette and New South Wales Advertiser*, 3 December 1839, at 2 (long extract).

<sup>17</sup> See *The Sydney Herald*, 25 November 1839, at 2 and 27 November 1839, at 3 ("As Captain Hobson was to leave England for New Zealand in the *Druid*, ... it is probable that the Factory system is to be commenced, and that Captain Hobson is to receive the appointment of Chief Factor"); and the *Sydney Gazette and New South Wales Advertiser*, 3 December 1839, at 2 ("We insert the following extract from Captain Hobson's letter to his Excellency Sir Richard Bourke, as containing the rough sketch of the plan on which, it is understood, the British purpose [sic] extending the jurisdiction, of the Government of New South Wales over the British residents in New Zealand"). See also the review of William White's *Important Information Relative to New Zealand* (see below n 24) by an unidentified correspondent to *The Australian*, Sydney, 7 December 1839, at 2: "Captain Hobson's letter and Sir Richard Bourke's despatch display a large measure of intelligence and proper feeling, and the intimate knowledge which Captain Hobson evinces of the native character and peculiarities, and of the circumstances of the British population, seem, in these respects, at least, eminently to qualify him for a responsible official situation in the proposed colonies or factories. The latter mode of settlement is the one which Captain Hobson and Sir R. Bourke seem to consider best adapted to the circumstances of New Zealand. We are sorry that we cannot discover the same measure of intelligence in the letter from James Busby".

1837 factories proposal. Although the Treasury Minute, published in Sydney in late November, clearly signalled that the consulship was with a view to obtaining cession of territory to the Crown, to be administered by a Lieutenant-Governor, the press in Sydney seems to have thought this was consistent with discrete settlements, some privately organised as through the New Zealand Land Company acting under royal charter or under legislative authority, facilitated by a British Consul with more authority than a Resident. They complained about New South Wales having to finance the costs of elevating British representation in New Zealand without achieving any real advance on the Residency.<sup>18</sup>

Appreciation that some British authority was to be established in New Zealand, and that the New Zealand Land Company was committed to settlement, almost certainly was responsible for acceleration in land purchases in New Zealand by Australian speculators. Reports of the booming prices being paid for land in New Zealand (including Busby's auction of land at "Victoria" in November 1839) were published in the newspapers.<sup>19</sup> Advertisements were placed in October 1839 by a land purchase agent, claiming the assistance of a native speaker and the use of "blank forms of Deeds, drawn up by one of the ablest Conveyancers in Sydney, to be filled up and witnessed in due form on purchases being completed".<sup>20</sup> Maori chiefs at Kapiti with interests in Cook's Strait and the top of the South Island, apparently alarmed that "large tracts of ground belonging to them have been offered for sale in Sydney and other places", caused notices to be published warning that they had not sold the land (with the exception of land on the Pelorus River, in respect of which the European purchasers published their own warning<sup>21</sup>)

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<sup>18</sup> *The Colonist*, Sydney, 30 November 1839, at 3 (from the *Colonial Gazette*, London, 7 August 1839); *The Sydney Herald*, 4 December 1839, at 2; *The Colonist*, Sydney, 4 December 1839, at 2; *The Australian*, Sydney, 5 December 1839, at 2.

<sup>19</sup> *The Australian*, Sydney, 5 December 1839, at 3; *The Sydney Herald*, 6 December 1839, at 2 & 11 December 1839, at 2.

<sup>20</sup> Advertisements headed "New Zealand" by Mr James Ballingall in, for example, the *Sydney Gazette and New South Wales Advertiser*, 10 October 1839, at 3, *The Colonist*, Sydney, 12 October 1839, at 4 and *The Sydney Herald*, 14 October 1839, at 2.

<sup>21</sup> *Commercial Journal and Advertiser*, Sydney, 25 December 1839, at 3, 1 January 1840, at 1, 4 January 1840, at 1 and 8 January 1840, at 1. See also the New Zealand Land Company's notice of its "purchases" on both sides of the Cook's Strait given in, for example, the *Sydney Monitor and Commercial Advertiser*, Sydney, 25 December 1839, at 2.

and had set up trusts with British trustees to protect it.<sup>22</sup> (As seen in Chapter 6, similar arrangements were entered into in other parts of the country with missionaries at about the same time.) *The Colonist* published an extract from Joel Polack's *New Zealand* (published in London in 1838) about how to deal with Maori for purchase of land.<sup>23</sup> William White, the former Wesleyan missionary at the Hokianga, published anonymously a handbook for intending immigrants to New Zealand, containing information about the geography, harbours, climate, soil and natural resources of the country.<sup>24</sup> It also contained information about Maori and the nature of their property in land, together with advice about the "fair and equitable mode of purchasing land" securely from Maori.<sup>25</sup> White's book was serialised by the *Commercial Journal and Advertiser* and *The Australian*.<sup>26</sup>

<sup>22</sup> *The Colonist*, Sydney, 23 November 1839, at 3; *The Sydney Herald*, 25 December 1839, at 3; *The Australian*, Sydney, 4 January 1839, at 3; *The Colonist*, Sydney, 8 January 1840, at 3.

<sup>23</sup> *The Colonist*, Sydney, 25 September 1839, at 2; JS Polack *New Zealand: Being a Narrative of Travels and Adventures During a Residence in that Country between the Years 1831 and 1837* (Richard Bentley, London, 1838) vol 2, 205-210 & 215. In the extract published by *The Colonist*, Polack made the doubtful claim (see Chapter 3, text accompanying n 9) that "[t]he title deeds I had drawn out, were copied exactly from William Penn's document, with the North American Indians".

<sup>24</sup> [William White] *Important Information Relative to New Zealand, intended to be an answer to all inquiries by those who are interested in the occupancy of that country by British subjects, &c., especially with respect to questions relative to its geography, soil, climate, natural resources, and the validity of titles to lands purchased from the native chiefs by foreigners. Together with an appendix, comprising the latest official documents relating to that interesting country. Written by a gentleman who has been a resident fourteen years at Hokianga* (Thomas Brennand, Sydney, 1839) ["White Important Information"]. The book was advertised for sale as "a guide to the future emigrant". *The Sydney Herald*, 4 December 1839, at 1. See also Chapter 9, n 23.

<sup>25</sup> White wrote that Maori considered land to be "the joint property of the tribe, and held as tenants in common":

The New Zealanders claim for themselves, and recognize in others to whom they may alienate land, a distinct right of property in the soil. Their ideas, laws, and customs on this subject are clear and defined; and as to their rights to which, they are particularly tenacious, whether collectively, as a tribe, or individually, as members of that tribe. The whole of New Zealand is divided by known boundaries by the different tribes, including every small island adjoining the coast. Any encroachment, or trespass upon which, by occupation, cutting timber, or cultivation, by one tribe on the possessions of another, without permission first having been obtained, even for temporary purposes, would be considered an unpardonable offence, and followed by an immediate demand for satisfaction; and if that were denied it would in all probability, occasion war between the parties.

From this it followed that all purchases of land should be made from the tribe, and that Maori should be "let ... [to] decide amongst themselves who are and who are not interested in any portions they may be willing to dispose of, by holding a general meeting on the spot, for the purpose of fairly and freely discussing and canvassing the rights of each". If the mode of

At the end of December 1839, *The Colonist* started a series of five articles under the by-line of “A Scottish Highlander” on the prospects for New Zealand colonisation and the basis on which it ought to be undertaken.<sup>27</sup> The articles seem to have attracted great interest.<sup>28</sup> All but the final article in the series appear to have

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purchasing land (as further described by White) was followed “titles are as good in New Zealand as in any other part of the world” and would stand up to investigation: “as British law is about to be established, and the rights of the natives supported, the future purchaser of land, in New Zealand, if he takes care to secure an equitable title in the way above stated, leaves no reason to apprehend its ever being disputed”. White *Important Information*, above n 24, 52-55.

<sup>26</sup> *Commercial Journal and Advertiser*, Sydney, 7, 21, 25 & 28 December 1839 & 1 January 1840; and *The Australian*, Sydney, 5, 7 & 10 December 1839.

<sup>27</sup> *The Colonist*, Sydney, 21 December 1839 at 2, 25 December 1839 at 2, 28 December 1839 at 2, 4 January 1840 at 2 & 8 January 1840 at 2. The “Scottish Highlander” supported New Zealand becoming a British colony if that could be done “without violating either the rights of Europeans or the natives”. He recommended the plan that Britain purchase “a certain portion, or the whole of the country from the natives, at a fair and reasonable price, reserving for the natives themselves the whole of their present cultivated land, and also a tenth part of the money realized by the re-sale of the land”, which would be put towards “the religious instruction and education of the natives”. The remaining nine-tenths of the proceeds of the land sales of the Crown would be applied to the “importation of reputable emigrants and labourers”. *The Colonist*, Sydney, 25 December 1839, at 2. The “Scottish Highlander” further recommended that, in addition to a Lieutenant-Governor, Executive Council, “and all the usual officers of Justice, &c, &c”, there should be an “Elective Assembly, or House of Representatives, to which a certain number of the most intelligent of the native chiefs would be eligible”:

Many, we know, will ridicule the idea of setting up a “blanketted [sic] chief” as a legislator; but such people are perfectly ignorant of the native character, or the rapid progress they are making towards civilization, and the attainment of knowledge. The New Zealander is from his youth upwards accustomed to the senate and the debating assembly, and will deliberate with astonishing coolness and gravity, on measures of policy and government; his reasoning powers are good, and his eloquence on many occasions would do credit to some of our best forensic pleaders. It may be argued that the measure is novel, and, perhaps dangerous, in as far as it gives too much power to the natives, but we apprehend no danger from the admixture of native and European deputies; on the contrary, we believe it would be attended with the most beneficial results. The preponderance must always remain on the European side, both as regards numbers and influence, while the native is made to feel that he is neither neglected nor despised; but taught to repose confidence and trust in a government which administers justice with an even hand. The experiment is, at all events, worth trying; and would succeed, and tend to do away with many prejudices on both sides, and be the means of amalgamating and uniting more closely the native and emigrant population.

*The Colonist*, Sydney, 28 December 1839, at 2.

<sup>28</sup> *The Colonist*, Sydney, 25 December 1839, at 2: “In consequence of the unexpected demand which was created for our last number by the appearance in our columns of the first article of ‘A Scottish Highlander,’ on the subject of New Zealand, which demand we were unable to supply, we have been induced, at the request of several of our Subscribers and not a few respectable Non-subscribers, to reprint the preliminary Article in our fourth page. By this means, we are now in a condition to supply the demand that has been created; and those who are desirous of obtaining the entire series of articles, which our Correspondent intends to produce on this engrossing subject, may have their wishes gratified by an early application at our office.”

been written before Hobson's arrival. The "Scottish Highlander" was later revealed as Samuel McDonald Martin,<sup>29</sup> who was to take a leading role in Hobson's subsequent dealings in Sydney with owners and prospective owners of land in New Zealand.<sup>30</sup>

In none of this activity was there any indication of doubt about the legitimacy of purchases from Maori if made in accordance with Maori custom and without fraud.<sup>31</sup> A risk that such purchases would not be recognised by any British authority established in New Zealand seems not to have been considered,<sup>32</sup> although the possibility that a Government monopoly on land purchasing would be instituted once British authority was set up may have been identified and could have contributed to the urgency with which land purchases were pursued in late 1839.<sup>33</sup> While Labouchere's Parliamentary statement that "fraudulent or excessive" purchases would not be recognised was published in Sydney in mid-November

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<sup>29</sup> See *The Colonist*, Sydney, 11 January 1840, at 2: "Dr Martin has favoured the British public with valuable information on this subject [the colonisation of New Zealand] through the medium of the Press, in a series of articles, which at our request he threw hurriedly together for publication in our paper."

<sup>30</sup> Samuel McDonald Martin was born probably in the Isle of Skye between 1805 and 1810. He was the son of a doctor, and himself graduated MD from the University of Glasgow in 1835. In 1837 Martin emigrated to New South Wales, where he bought land and engaged in sheepfarming. In June 1839 he visited New Zealand, travelling through the Hokianga, Bay of Islands and Coromandel. With a partner, who stayed behind to complete the purchase when Martin returned to Sydney in late 1839, he purchased land at the Coromandel, where he later jointly owned a sawmill. Martin moved to New Zealand in mid-1840, becoming a magistrate, newspaper editor and, briefly, a member of Fitzroy's Legislative Council. He returned to Britain in 1845 and was appointed a magistrate in British Guiana in 1848, but died within a few months of his arrival there. KA Simpson "Martin, Samuel McDonald (1805-1810?-1848)" *Dictionary of New Zealand Biography*. See also SMD Martin *New Zealand; In a Series of Letters* (Simmonds & Ward, London, 1845) ["Martin *New Zealand*"].

<sup>31</sup> See also *The Colonist*, Sydney, 4 September 1839, at 2: "The existing possessions are not to be interfered with, if they have been transacted *bonâ fide* in the usual manner of contract among the barbarians. We should think that those who have sections of land already secured in that promising country may account them, as so many fortunes to them now, since this enterprise [that of the New Zealand Land Company, with the sanction of the Government] has been set on foot."

<sup>32</sup> Except possibly by *The Sydney Herald*, 4 December 1839, at 2.

<sup>33</sup> *The Colonial Gazette* (London) claimed from a letter it had seen "from the correspondent of a well-known mercantile house in the city, dated Bay of Islands, July 17th [1839]" that "[t]he report of the Lords' Committee of 1838 had found its way to the Bay of Islands and stimulated the prevailing anxiety to effect purchases of land from the natives, whilst facilities for *landsharking* yet remained". Reprinted in the *New Zealand Journal*, London, 8 February 1840, at 2. As noted in Chapter 9, the Lords' Committee had questioned witnesses about the need for restrictions on private purchasing of Maori land.

1839, it does not seem to have caused great alarm. There was general agreement that there would have to be investigation of titles to ensure that fraudulent and unfair purchases did not stand, and that pretensions to vast fiefdoms should be deflated (although Sydney views as to what was “excessive” were almost certainly much more generous than the 2,560 acres subsequently permitted to land claimants under legislation in 1840<sup>34</sup>).<sup>35</sup>

Although Hobson’s arrival in Sydney on 24 December was reported in the newspapers,<sup>36</sup> there was no immediate clarification of his mission to New Zealand, leaving commentators to continue to speculate about it. A correspondent to the *Sydney Monitor*, identified only by the initials “A.N.”, assumed that Hobson was to carry out his factories proposal and expressed regret that the “experiment of the British Government” was not on a “much larger scale”.<sup>37</sup> For this correspondent, it was clear that Maori “rights” were not to be “trample[d] on”: “[i]f the natives think proper to sell their lands, we shall purchase them, otherwise it is no bargain”. “A.N.” understood that “[t]he terms on which it is proposed to treat with the New Zealanders are those which one civilized state observes towards another”. In this, “[t]he New Zealanders have been treated very differently from the aborigines of

<sup>34</sup> See discussion of the New Zealand Land Claims Act 1840 (NSW) in Chapter 16.

<sup>35</sup> See, for example, the view of “A.N.” to the *Sydney Monitor and Commercial Advertiser*, 8 January 1840, at 2: “There has doubtless been much dishonesty practised on the New Zealanders, with regard to their lands; but we trust that every purchase said to have been made from them, will be subjected to a rigorous ordeal, that the just title may be confirmed, and the dishonest one disallowed.” Earlier Samuel Martin, writing as the “Scottish Highlander”, had advocated a “board ... to determine all disputes about claims to land”. If a fair price “according to the then value of land” had been paid for the land, the board would confirm the title. If fair value had not been given, or the land “had been fraudulently come by”, the board would reject the claim and the land would be returned to Maori. As for large purchases of land:

All claims to immense tracts of country, such as that of Baron de Thierry and some of the Sydney *whalers*, we would at once reject. Wherever the claim to land exceeded a certain extent, say ten or twenty thousand acres, there is a *prima facie* presumption that value has not been given, and that the natives were imposed upon.

*The Colonist*, Sydney, 25 December 1839, at 2. Martin wrote that he expected to see “the sudden evaporation of many rum-bottle purchases, and the explosion of not a few gun powder claims, beneath the searching glance of constitutional inquiry”. *The Colonist*, Sydney, 28 December 1839, at 2.

<sup>36</sup> *The Sydney Herald*, 25 December 1839, at 2; *The Colonist*, Sydney, 25 December 1839, at 2; the *Sydney Gazette and New South Wales Advertiser*, 26 December 1839, at 3; *The Australian*, Sydney, 26 December 1839, at 2; the *Australasian Chronicle*, Sydney, 27 December 1839, at 4.

<sup>37</sup> *Sydney Monitor and Commercial Advertiser*, 8 January 1840, at 2.

New South Wales”. The Aborigines, for whom New South Wales was a “hunting ground”, were properly dispossessed according to the law of nations “by those who would turn the soil to a more profitable account by cultivation”.<sup>38</sup> Maori, by contrast, “though far from a civilized people”, had “cultivated the soil, thereby making good their title to the domain, a title which no one, that we hear of, is disposed to dispute”. “A.N.” subscribed to the view that there should be investigation of land purchases, so that “the just title may be confirmed, and the dishonest one disallowed”.

Samuel Martin, in the final article written as the “Scottish Highlander”, while acknowledging that official announcements of Hobson’s mission were yet to be made, inferred from the appointment of Hobson as “Consul” that Britain recognised New Zealand as “an independent country” and “the right of the Natives to their own land, and to the disposal of it to whom, and in what manner, they will”.<sup>39</sup> It followed that Britain “consents and approves of the legal occupation and honest acquisition of that land by British subjects, giving to them in this respect a guarantee of protection and support”. In this, Martin, who was a New Zealand landholder, cannot be treated as disinterested, albeit that no contrary view seems to have had currency in Sydney at the time.<sup>40</sup>

Martin considered that the British Government’s approach to New Zealand represented a change from a former “desire of dominion”.<sup>41</sup>

The day is certainly not far gone, when even England would greedily swallow the bait, despite the consequence. But the schoolmaster is now happily abroad, and has of late thrown a very strong light on international politics—things have been done forty, perhaps ten, years ago with impunity, even applause, which would now be looked upon as infamous and cruel.

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<sup>38</sup> The editor of the *Sydney Monitor* took a somewhat different view: “[A.N.’s] morals on dispossessing the Aborigines of any and every country, are most unjust, unless he had added, that the usurpers of these lands can alone render the act humane and moral, by feeding and clothing each tribe gradually as it is dispossessed of its lands”. Ibid.

<sup>39</sup> *The Colonist*, Sydney, 8 January 1840, at 2.

<sup>40</sup> Except possibly with *The Sydney Herald*: see 4 December 1839 at 2 and 30 December 1839 at 2.

<sup>41</sup> See also the third article of the “Scottish Highlander”, *The Colonist*, Sydney, 28 December 1839, at 2.

Martin thought that Gipps had been given authority to decide the terms of British intervention in New Zealand “as he may see fit according to the exigencies of the case”. In those circumstances he suggested that there was opportunity for those with knowledge of New Zealand to make suggestions to Gipps and Hobson. In particular he proposed that

all the owners of New Zealand property, who are resident in Sydney, ought without delay to hold a meeting, and consult in a quiet way with one another how they could best forward their own interests, as well as those of her Majesty. A deputation from them ought to wait upon the Consul, and freely offer their advice, and every other assistance.

This suggestion was acted on, with a meeting of landowners and other interested persons held on 10 January, followed by a deputation to Hobson on 13 January.

### **Hobson reports to Gipps**

Before receiving the deputation on 13 January, Hobson seems to have kept out of the public eye. Little is known about what he did in this time. He and his family did not move ashore until 27 December.<sup>42</sup> Before then he sent to Gipps a bag of despatches from the Colonial Office, together with the commissions for Gipps as Governor and himself as Lieutenant-Governor and Consul. He also sent Gipps a letter providing the background to his appointment and mission.<sup>43</sup> It is likely that Hobson and his family stayed at Government House with Gipps for the three weeks from 27 December until he left Sydney for New Zealand on HMS *Herald* on 18 January.<sup>44</sup> The two men may have known each other from the time when Gipps was private secretary to Lord Auckland, then First Lord of the Admiralty.<sup>45</sup> There is no record of how Hobson spent his time before 13 January when he met with the deputation of those with interests in New Zealand. Almost certainly he had discussions with Gipps about his instructions. He is likely to have been busy in making arrangements for the trip to New Zealand and for Eliza and the children,

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<sup>42</sup> Scholefield *Captain William Hobson*, above n 2, 79.

<sup>43</sup> Hobson to Gipps, 24 December 1839, ANZ ACHK 16591, G36/1, 1-7.

<sup>44</sup> It was at Government House that Hobson received the deputation of those with interests in New Zealand on 13 January. Martin *New Zealand*, above n 30, 79.

<sup>45</sup> See Chapter 10, text accompanying n 7.

who were to be left behind in Sydney until matters were further advanced in New Zealand.<sup>46</sup> He met with the Bishop of Australia, William Broughton, perhaps to obtain his assistance in securing the support of the Church Missionary Society missionaries for Hobson's negotiations with Maori.<sup>47</sup> Certainly Broughton on 10 January wrote to Henry Williams at the Bay of Islands (in a letter that travelled with Hobson on the *Herald*) to urge co-operation with Hobson's mission.<sup>48</sup> Hobson also seems to have had his portrait painted at this time.<sup>49</sup>

In his 24 December letter to Gipps,<sup>50</sup> Hobson gave an account, from his perspective, of the background to his Instructions (beginning with his first interview with Glenelg in January 1839) and his own views about the Instructions and the task he had been set. Of the January interview with Glenelg, Hobson reported Glenelg's explanation of the "reluctance with which Her Majesty's Ministers interfered with the affairs of New Zealand". "[T]he force of circumstances had left them no alternative":

The acquisition of vast tracts of Land in those Islands by British Subjects, and the settlement there of a considerable number of Persons, amongst whom were many of the most depraved character, and the still further emigration that was in progress from England, under a Society that had been formed for the promotion of that object, and for the purchase and resale of Land, had created a necessity for the interference of Government to avert evils which must result both to the Aborigines and to the Settlers, if unrestrained by necessary Laws and Institutions.

In this recollection, Hobson may have drawn in part upon the explanation given in the 14 August 1839 Instructions. Certainly the language used to describe the interview with Glenelg is reminiscent of that used in the Instructions (although the

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<sup>46</sup> In the event, Eliza and the children joined Hobson in New Zealand in April 1840.

<sup>47</sup> See Broughton to Jowett (CMS), 27 March 1840, CMS CN/O 3: "the conversation which I held with Captain Hobson".

<sup>48</sup> See text accompanying n 114 below.

<sup>49</sup> See above n 4.

<sup>50</sup> See above n 43.

reasons for intervention had not greatly changed in Colonial Office thinking between January and August 1839).<sup>51</sup>

Hobson also recounted to Gipps the plan he had submitted to Glenelg, in response to his invitation, on 21 January 1839.<sup>52</sup> He explained to Gipps that in the plan he had done little more than extend his 1837 factories proposal, in the belief that Glenelg would not countenance more intrusive intervention. Quoting from the plan submitted to Glenelg, the factories proposal was described as “one of expediency, rather than of choice”. Its weaknesses were identified and the suggestion made that the preferable course was for the Government to resolve “at once”:

to extend to that highly gifted Land the blessings of civilization, and liberty, and the protection of English Laws, by assuming the Sovereignty of the whole country and by transplanting to it the Nucleus of a Moral and Industrious population.

This explanation may have suggested to Gipps that Hobson had been more influential in final shape of the Instructions than in fact was the case.

Hobson’s view of his Instructions was that, while they were “generally ... comprehensive and clear”, he would have preferred more explicit responses to his 1 August 1839 queries, especially concerning the forcible suppression of savage practices and warfare:

It is assuming I fear a little too much to suppose that habits so inveterate as Warfare amongst the Native Tribes—and human sacrifices and cannibalism resulting therefrom will yield to persuasion and kindness unless the kindness consists in forbearance to use a power which the natives must know I possess; Now the absence of that power was exactly what I complained of. His Lordship declines supplying me with Military, and it does not appear to me, that the resources of the Young Colony can afford a sufficient body of Police to awe the Natives into obedience, or to support my demands should I be obliged to use force.

In addition to his complaint that the military force provided to him was inadequate, Hobson was displeased that the Admiralty had “peremptorily refused” to give him

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<sup>51</sup> See Chapter 8, text accompanying ns 10-12.

<sup>52</sup> See Chapter 9, text accompanying ns 348-354.

the command of a ship. He was put out that his passage to New Zealand might be in a small brig, “the appearance of which would not produce that impression on the minds of Savages, that was required to add weight or give importance to my negotiations”.<sup>53</sup> He wrote that, given that his “remonstrances” with Normanby over the appointment of suitable “Public Officers” (Judge, Prosecutor, Colonial Secretary and Treasurer) had been “in vain”<sup>54</sup>,

it must therefore be admitted that up to the moment of writing this letter I have an onerous and arduous task before me, with the smallest possible modicum of support that Government can possibly give. I however place my reliance on your Excellency, feeling assured that with your knowledge of the difficulties I shall have to encounter, I shall be assisted not only with the Soundest judgement, but the most efficient [means?].

### **Gipps warns off purchasers of land in New Zealand**

Although Samuel McDonald Martin had proposed in his article of 8 January in *The Colonist* that those with experience of New Zealand should try to influence the direction to be taken by Hobson, the event which perhaps precipitated the eventual interview on 13 January was not known to him at the time he wrote his article. On 6 January (as reported in *The Australian* on 7 January but not discussed in *The Colonist* until 8 January), the clerk of the Legislative Council was sent by Gipps to Hebblewhite & Vickery’s auction rooms to announce, at what was said to be the “first public sale of Land in New Zealand held in this Colony”,<sup>55</sup> that the Governor intended to issue a proclamation concerning the recognition of title to land acquired by British subjects in New Zealand. *The Sydney Herald* report of 8 January, described that the clerk had announced that the proclamation “shortly” to be made was “to the effect that it was questionable whether the Home Government would recognize titles of land granted by the chiefs”. The auction, of land in the

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<sup>53</sup> See Chapter 10, n 80.

<sup>54</sup> See Chapter 10, n 85.

<sup>55</sup> Advertisement for the sale of “About Two Thousand Acres of Land at the Bay of Islands, New Zealand” (calling the attention of “Capitalists, Speculators, or parties engaged in the Oil or Timber Trade” to the property) in: *The Australian*, Sydney, 2 January 1840, at 3; *The Colonist*, Sydney, 4 January 1840, at 3; *The Sydney Gazette and New South Wales Advertiser*, 4 January 1840, at 3; and *The Sydney Herald*, 6 January 1840, at 3. The land offered for sale was evidently European owned. The advertisement gave the boundaries of the property from the “original [Maori] grant”.

Bay of Islands, collapsed and “created a good deal of excitement, both then and afterwards”.<sup>56</sup> The account in *The Australian* carried much the same report but added some colourful detail about the “very proper” annoyance of Messers Hebblewhite and Vickery at this “uncalled-for interference on the part of the government, and their want of courtesy” in communicating “in so very unofficial a manner”. Mr Hebblewhite was reported to have “remonstrated” with the clerk on the “Governor’s presumption in meddling with his trading and mercantile affairs”. It was only out of the “great personal respect” he held for the clerk, that Mr Hebblewhite had not “thrust him out of his rooms”. The paper reported Mr Hebblewhite’s comment that, if the Governor himself had called, “he certainly should, very unceremoniously, have ordered him out”.<sup>57</sup>

The Governor’s actions were discussed by *The Colonist* on 8 January.<sup>58</sup> It claimed to have read *The Australian*’s report “with astonishment”. Apart from the wisdom of the Governor divulging the Government’s “grand political schemes ... in the rooms of an auctioneer”, *The Colonist* denied that there was any right to interfere with a sale of land in New Zealand:

The British Government has already repeatedly pledged itself to acknowledge the independence of the New Zealand Chiefs. Both in Parliament and in despatches from the Secretary of State, their right to alienate their property by sale or gift to Europeans has been recognized.

If the Government’s concern was with “dishonest acquisition” by Europeans, the Governor’s notice was unnecessary because it was “notorious” that such acquisitions were of limited effect: “if any one had a mind to hazard the purchase of land under such circumstances, he would do so of course under all the contingency and risk which the future investigation of his title might involve”. If, however, the “secret intention or contemplated design” was rather

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<sup>56</sup> *The Sydney Herald*, 8 January 1840, at 2.

<sup>57</sup> *The Australian*, Sydney, 7 January 1840, at 2.

<sup>58</sup> *The Colonist*, Sydney, 8 January 1840, at 2.

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to deny the validity of *all* titles to land granted by the New Zealand Chiefs, whether honestly acquired or not, and to claim for the Crown of England the right of primary acquisition, in order that the principle of British law may be established, that the Crown is the fundamental source of all title to territorial property

then it would entail “trampling on the original rights of the sovereign chiefs and taking possession of the territory as a conquered province”. From the circumstance that the warning was unnecessary if intended as notice that fraudulent purchases would not be allowed, *The Colonist* suspected that the Government’s design was indeed to deny the validity of all purchases from Maori.

Although it was recognised that there were advantages to colonisation in proceeding in this way (unlocking “the primary acquisition of waste lands by the Crown”), the British Government could only adopt that means by violating “the pledge by which they have encouraged Europeans to emigrate to New Zealand, and to purchase lands from the Chiefs”. Such a course would hold “in contempt also ... the natural and inalienable rights of the original inheritors of the soil”. It should be denounced as “gross injustice and reckless despotism”:

It may be true, that the British Government will give the natives of New Zealand a higher price for their territory than private speculators have given. And in appropriating the revenues arising from the redisposal of these lands, the British crown may contemplate not only the introduction of a British population into the country, to render that land available, and to develop still further its manifold resources, but it might also have in view the reservation of an ample portion of these resources to secure to the natives the blessings of civilization and religion. Far be it from us to raise needless objections to such a scheme provided it proceeded in all its relations on the principles of equity and justice, and observed a sacred regard to the legitimate and pre-existent rights of individuals.

...

But ... however desirable, the establishment of such a scheme of colonization may be, we can never carry it into effect at the expense of national honour and by the violation of private right, and expect the favour of Providence and the approbation of Heaven.... Let His Excellency by all means, with the aid of competent council, deliberate deeply on this intricate and momentous question and endeavour with wisdom and integrity to devise

some honourable and unexceptionable means of determining the equity and legitimacy of the titles of those who claim the right of pre-emption<sup>59</sup> and present possession over certain portions of the territory of New Zealand. Let the British Government, if they please, issue a Royal Proclamation, to prohibit any private purchases of New Zealand Land in the future. Let them purchase for the Crown as the trustee of the Nation the entire remainder, if they choose, of the land in these islands; and with regard to [which?] by all means let them establish the system of colonization which we have supposed they contemplate.

*The Colonist* endorsed the proposal made by the “Scottish Highlander” in the same edition that a public meeting be held in Sydney of interested parties “to discuss the merits of the very critical question that seems now at issue”.

### **Hobson’s dealings with the landholders**

Following notice in *The Sydney Herald*,<sup>60</sup> the public meeting was held at the Royal Hotel on the afternoon of 10 January, with Samuel Martin in the chair.<sup>61</sup> At the meeting Martin seems to have dampened down some hot-headed ideas about “warlike resistance and republic independence”<sup>62</sup> to secure the adoption of resolutions welcoming British intervention in New Zealand, pledging support for Hobson in “establishing a regular system of Law and Government”, and appointing a deputation of five persons (one of whom was Martin) to wait upon Hobson.

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<sup>59</sup> “Pre-emption” seems to be used here in the sense of a prior purchase of land. See also text accompanying n 72 below.

<sup>60</sup> *The Sydney Herald*, 10 January 1840, at 3: “NOTICE.—All those who are interested in New Zealand, are requested to attend a Meeting to be held at the Royal Hotel, at two o’clock p.m., THIS DAY, 10th January, on matters of great importance.”

<sup>61</sup> See reports of the meeting (and of the resolutions passed at it) in: *The Colonist*, Sydney, 11 January 1840, at 2; *The Sydney Herald*, 13 January 1840, at 1 & 2; and the *Australasian Chronicle*, Sydney, 14 January 1840, at 3. *The Colonist* and *The Sydney Herald* gave contradictory reports of the attendance at the meeting. According to *The Colonist* the meeting had been “very numerous and respectably attended”, whereas *The Sydney Herald* reported that it was “not very numerous and attended” (while conceding that “such persons as were present were proprietors of land at New Zealand, and consequently were particularly interested”).

<sup>62</sup> *The Colonist*, Sydney, 11 January 1840, at 2: “Nothing could be more ridiculous than to indulge in idle bravado about warlike resistance and republican independence, as a means of evading the Sovereign control and legal investigation of British authority over the titles of every British subject in New Zealand”.

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The interview took place at Government House on 13 January. Martin later recorded of Hobson's performance at the interview that

he appeared nervous and embarrassed—evidently most anxious to impress us favourably, but fearful, at the same time, of committing himself. With his answers to the various questions put we were in general satisfied ...<sup>63</sup>

*The Colonist* was the first paper to publish a report of the interview, which it did on 15 January. The publication preceded the deputation's formal reporting back to the public meeting, which occurred later that day. The report seems to have been based on notes compiled by the deputation following the interview with Hobson.<sup>64</sup> *The Colonist* reported that:<sup>65</sup>

Captain Hobson informed the deputation, that he held the Commission of Her Majesty the Queen as her Lieutenant-Governor over the British Colony about to be Established in New Zealand; that the Sovereignty of the British Crown was to be paramount over the Territory; that the titles of European purchasers of land, were to be recognized and confirmed, if these were fairly and justly acquired; but that in all cases of disputed or conflicting claims an investigation, under constitutional authority, would be entered into, for their determination. His Excellency, the Lieutenant-Governor, (as he may now be styled,) hinted that, although the British Government had formerly recognized the independence of the New Zealand Chiefs, they had since proved themselves inadequate to the maintenance of social order in the territory; so that the Establishment of British Laws and authority, was rendered the more necessary and expedient. He likewise intimated as a general principle, that it was the object of Government so to arrange that all titles to land in New Zealand (in the northern island at least) should be held either as derived from or confirmed by the Crown,—that great constitutional source of the rights of British subjects to any land they may possess within the precincts of the Empire. More than this was not competent to His Excellency to reveal, and more than this it was unnecessary for the deputation to inquire into.

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<sup>63</sup> Martin *New Zealand*, above n 30, 79-80.

<sup>64</sup> Martin *New Zealand*, above n 30, 80 ("The Deputation, after leaving Government House, committed to writing, in the presence of one another, the substance of the conversation with Captain Hobson"); the *Australasian Chronicle*, Sydney, 17 January 1840, at 2 ("The deputation having very inconsistently published in the *Colonist*, the account of their interview with Captain Hobson, which should have been reserved for the meeting ...").

<sup>65</sup> *The Colonist*, Sydney, 15 January 1840, at 2.

The report was seen by Hobson who felt it necessary to write to Martin correcting the impression given by the report about the extent of acquisition of sovereignty contemplated:<sup>66</sup>

My Dear Sir,—in a consequence of a report that is published to-day in *The Colonist*, I beg to call your attention to the reply I gave you on Monday when you asked me, “If the sovereignty of the Queen will extend over the whole of New Zealand.”

I think my reply was, “that I could not positively answer that question,” but I added as a matter of conversation, “I hoped it might”.

As the whole must depend upon negotiation, of course I could not speak positively. Pray let this be fairly represented to the meeting.

The deputation reported the results of its interview with Hobson to the public meeting in the afternoon on 15 January. *The Australian* reported the following day that about 100 people had attended and that the report of the deputation had been:<sup>67</sup>

That the Deputation was received by Captain Hobson most courteously. They merely asked him the intention of the Government with regard to New Zealand. Captain Hobson replied that they intended to colonize it all over, from north to south. They then asked if the Government intended to dispose former purchasers of their land. Captain Hobson said decidedly not, but it was the intention of Government to investigate doubtful possessions, which had been acquired from the chiefs by fraudulent means. The Government recognized the New Zealand Company, formed in London, and regarded it favourably, especially as it advanced 75 per cent in sending out suitable persons as colonists. Another question asked was, “whether any persons who had established stores at New Zealand would be disturbed?” The answer was in the negative.<sup>68</sup>

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<sup>66</sup> Hobson to Martin, 15 January 1840, published in *The Colonist*, Sydney, 18 January 1840, at 2.

<sup>67</sup> *The Australian*, Sydney, 16 January 1840, at 2. The *Australasian Chronicle* described it as a “large and respectable Meeting”. *Australasian Chronicle*, Sydney, 17 January 1840, at 2.

<sup>68</sup> Broadly similar reports to *The Australian*’s (of the deputation’s report to the meeting) were subsequently given in other Sydney newspapers. See *The Sydney Herald*, 17 January 1840, at 2; the *Australasian Chronicle*, Sydney, 17 January 1840, at 2-3; the *Commercial Journal and Advertiser*, Sydney, 18 January 1840, at 2; *The Colonist*, Sydney, 18 January 1840, at 2; and *The Australian*, Sydney, 18 January 1840, at 3. The *Sydney Herald*, for example, reported Hobson’s statements about the New Zealand Land Company and the risk to settlers in erecting stores and buildings as follows:

In answer to a question respecting the Company formed in London, and called the New Zealand Company, Captain Hobson said that the Government knows of the formation of the Company, and

Samuel Martin again chaired the meeting. He read to it the letter he had received from Hobson about the extent of acquisition of sovereignty contemplated.<sup>69</sup> This resulted in discussion by the meeting of the divergence between what the deputation maintained that Hobson had told them and what Hobson now claimed to have said. The editor of *The Colonist*, who was present at the meeting, suggested that Hobson was back-peddalling under pressure from the New South Wales administration: “he understood the Colonial Secretary had, after the appearance of his paper of that morning, written a furious letter to Captain Hobson, about betraying the secrets of government”.<sup>70</sup>

As at the earlier meeting, Martin seems again to have calmed tensions. His view was that he and the rest of the deputation “had every reason to be satisfied with the candid and explicit manner in which Captain Hobson had replied to all their enquiries”. The Government “no doubt” had secret plans “which it did not behove them to reveal, and which perhaps we had no right to enquire into”. The meeting could take comfort, however, from “the assurance on the part of Captain Hobson that the Government meant to respect titles of persons who had honestly come by their lands”.<sup>71</sup>

The meeting was moved to adopt resolutions that it “rest[ed] satisfied” with Hobson’s “renewed pledge” that “the rights of pre-emption obtained by British

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that its object is to purchase land from the natives, and sell it at profit, and they have already sold a large quantity of the land that they intend to purchase, and the Government looks with favor upon the Company, because they have undertaken to shew all their accounts, and to expend seventy-five per cent of the produce of the land upon the importation of labourers into New Zealand. Captain Hobson said that he hoped that no alarm exists upon the public mind, for all persons may rest assured that they will receive the same justice that is measured out to the New Zealand Company. In answer to the question of whether parties who are expending money in the erection of stores and formation of establishments in New Zealand, had better stop, he said no, there is nothing to fear.

<sup>69</sup> *The Sydney Herald* reported that Martin had received Hobson’s letter during the meeting. *The Sydney Herald*, 17 January 1840, at 2.

<sup>70</sup> *Australasian Chronicle*, Sydney, 17 January 1840, 2-3 at 2. See also *The Australian*, Sydney, 18 January 1840, at 3; and the *Sydney Monitor and Commercial Advertiser*, 20 January 1840, at 2 (criticising the editor of *The Colonist* for relating “idle rumour” and expressing its own view that the rumour was “incredible” as “we are sure [the Colonial Secretary] would not write on the authority of common gossips”).

<sup>71</sup> *The Colonist*, Sydney, 18 January 1840, at 2. Compare Martin *New Zealand*, above n 30, 80-81.

subjects over land”<sup>72</sup> were “to be recognized and confirmed, so far as these may be consistent with honour and justice”, and expressing the hope “that the decision of disputed rights will be referred to the arbitration of a Court of Equity, and a Jury of impartial and disinterested men”. The meeting further declared its “loyal attachment to the British Crown, and its intention to recognize the authority, and to uphold the obligation of British Law, over British subjects and British property in the British colony about to be established in the territory of New Zealand”. An Address to Hobson in similar terms to the other resolutions was agreed to, and in which confidence was expressed that the establishment of a British Colony in New Zealand would not only be the means by which “the power and commerce of Britain will be extended, and the nucleus of a new Empire ... formed” but would also prove “a most momentous step in the march of Christian civilization”: “that beneath the genial sway of British authority, and the enlightened administration of Your Excellency’s government, the spiritual as well as the temporal interests of the native inhabitants of New Zealand will be cared for and secured”.<sup>73</sup>

On 16 January, Hobson wrote to Gipps regarding his 13 January meeting with the deputation and the reports that were circulating about it. When he wrote, the only reports that had appeared were those in *The Colonist* of 15 January<sup>74</sup> (probably given from the notes compiled by the deputation following the interview) and *The Australian* of 16 January<sup>75</sup> (of the deputation’s report to the public meeting). The letter indicates that Hobson was defensive about his handling of the deputation and anxious to give his own version of events. Such defensiveness perhaps confirms the information that the Colonial Secretary had been unimpressed by Hobson’s unguarded remarks. In such circumstances, whether Hobson’s account of the interview to Gipps was in all particulars accurate and whether in it he may to some

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<sup>72</sup> As to the sense of “pre-emption” here, see above n 59. See also “B.A.C.” to the *Sydney Monitor and Commercial Advertiser*, 24 January 1840, at 2.

<sup>73</sup> The Address was published in *The Australian*, Sydney, 18 January 1840, at 3 and *The Colonist*, Sydney, 18 January 1840, at 2.

<sup>74</sup> See text accompanying n 65 above.

<sup>75</sup> See text accompanying n 67 above.

## Chapter Eleven: Hobson & Gipps

extent have been parroting back to Gipps views that he knew the Governor would find congenial is a matter to be assessed. Hobson wrote:<sup>76</sup>

Sir

Having observed in the public Papers a very [garbled?] statement of my answers to the deputation from a Public meeting who waited on me on the 10 ins<sup>t</sup> [sic<sup>77</sup>] I have the honor to lay before Your Excellency a precis of what passed on that occasion.

The Deputation prefaced their observations by saying that they had been instructed to wait on me in consequence of an announcement that had been made by authority of the Gov<sup>t</sup> at a public Auction respecting the Title to Land in New Zealand.<sup>78</sup>

My reply was that I had understood H.E. The G<sup>r</sup> had deemed it right to make that announcement to the Public lest an admission by Gov<sup>t</sup> of the validity of the Titles to Land so purchased might be inferred but I had to inform the Deputation that I was instructed as early as possible to dispel any apprehension on the part of owners of Property in New Zealand of their being dispossessed of their Lands that had been acquired equitably.

A Question was then asked to this effect[:] “What rule has Gov<sup>t</sup> laid down for the regulation of Titles to Land?[]” I replied that it would be premature to enter into details. That in fact the arrangement of the matter was not complete, but I might state generally that Gov<sup>t</sup> would not acknowledge excessive claims nor Titles to Land that had not been acquired on equitable conditions, and that it must be distinctly understood that no Title will be [deemed?] valid unless founded on a Grant from the Crown.

A Question then followed—what right has the Crown to interfere in the affairs of New Zealand, a free and independent State. That was a subject which I was not prepared to discuss. I said generally “It is the condition on wh[ich] Colonization can be effected and it is the undoubted right of the Sovereign as admitted by the practice of all Nations and of all Ages.[”] A Desultory conversation then followed, in which I informed the Deputation

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<sup>76</sup> Hobson to Gipps, 16 January 1840, ANZ ACHK 16591, G36/1, 10-12.

<sup>77</sup> Hobson was mistaken. The interview with the deputation occurred on 13 January.

<sup>78</sup> It does seem to have been the case that the announcement made on behalf of the Governor at Hebblewhite and Vickery’s auction rooms on 6 January 1840 was the subject of discussion between Hobson and deputation. It was reported in the newspapers that, in answer to a question from the floor at the public meeting, one of the deputation had said that Hobson had stated that the announcement at the auction “had been misunderstood, but he did not say in what way”. *The Sydney Herald*, 17 January 1840, at 2; *The Australian*, Sydney, 18 January 1840, at 3.

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that I personally had nothing to do with the settlement of Land claims. In consequence of the position in which I shall be placed with the future Colonists it was deemed right to relieve me from those duties, but nevertheless I identified myself with the principle laid down by Gov<sup>t</sup> which I could assure the Dep<sup>n</sup> was based on Equity.

One of the Dep<sup>n</sup> then asked me if it was proposed to colonize the whole of New Zealand. I answered that this would be the subject of Negotiation; and that I would not answer for the result; but I said I hoped it might be accomplished.

In one part of the conversation an argument was advanced asserting the rights of the New Zealanders, being a free and independent State, to alienate their Lands. [O]n this subject I remarked to this effect[:] That it is true a formal declaration of Independence has been made by the New Zealand Chiefs: but that in fact the new Zealanders but little understood the nature of that proceeding, and that they never fulfilled its obligation. No confederation had [ever?] been formed to enact Laws nor for any other useful purpose, it was an experiment wh[ich] had failed notwithstanding wh[ich] their independence is still fully acknowledged by the British Gov<sup>t</sup>, as a proof which I am at this moment accredited to them: but they never were in a condition to treat with the Europeans for the sale of their Lands, any more than a Minor w<sup>d</sup> be who knew not the consequences of his own Acts. A very universal misapprehension prevailed as to the boundary of the Independent State of New Zealand, wh[ich] in reality only includes the northern part of the Northern Island.

I have & c

William Hobson

A number of points can be drawn from the various accounts of Hobson's dealings with the deputation. First, there is no suggestion by Hobson that Britain already had sovereignty of part or all of New Zealand (he makes no mention of the authority he had to claim the Southern Islands by discovery under certain conditions), nor did the deputation take him to suggest otherwise. Questioned on the right of Britain to interfere in New Zealand, he seems to acknowledge (by his own account given to Gipps) that it could only follow from assumption of sovereignty. In his remarks both to the deputation and to Gipps, Hobson reveals scepticism about Maori "social order" and "independence". These reservations

were shared in part by the Colonial Office,<sup>79</sup> but they seem to have caused Hobson more doubt about the appropriateness of his mission to treat with Maori for sovereignty. He went out of his way to say that the Declaration of Independence applied only to the northern North Island, and even there was “an experiment wh[ich] had failed”. Despite what may have been private misgivings, Hobson was, however, clear that his instructions required him to treat Maori as independent, their independence “still [being] fully acknowledged by the British Gov<sup>t</sup>”.

Secondly, Hobson revealed his own preconception that British sovereignty would be established over the whole country. His letter to Gipps seems to have been prompted by the realisation that he had revealed too much rather than that he had been misunderstood. Thirdly, in his discussions with the deputation Hobson clearly gave the impression that acquisitions of land from Maori were valid and would be confirmed by Crown grant after a process of investigation to exclude those that were fraudulent or perhaps excessive<sup>80</sup> (he spoke of the “favour” with which the Government regarded the New Zealand Land Company which was then embarked on purchases of land from Maori, and promised that “all persons may rest assured that they will receive the same justice that is measured out to the New Zealand Company”<sup>81</sup>). Hobson does not seem to have suggested to the deputation that there was any doubt about the capacity of Maori to sell land. Any such intimation is likely to have caused consternation and would certainly have been the subject of report to the public meeting and picked up in the press reports. Hobson’s letter to Gipps, written after Gipps had signed but not published his proclamation as to land titles (as discussed below), while purporting to report his discussions with the deputation, was to different effect in asserting that Maori “never were in a condition to treat with the Europeans for the sale of their Lands, any more than a Minor w<sup>d</sup> be who knew not the consequences of his own Acts”. While it is possible

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<sup>79</sup> See Chapter 8, text accompanying n 13.

<sup>80</sup> Hobson does not seem to have explicitly explained that excessive purchases would be disallowed (although see his reply to the public meeting’s Address below) but it was common knowledge in Sydney that this would be the case. It may, however, be that the omission was of a piece with Hobson not wanting to introduce any note of discord between himself and the holders of New Zealand lands.

<sup>81</sup> See above n 68 and accompanying text.

that, by this, Hobson meant no more than was implicit in Labouchere's statement to Parliament that titles would be investigated to ensure that Maori had not been taken advantage of,<sup>82</sup> Hobson's statement seems to deny Maori full property in land, or at least the right to alienate it in accordance with their own custom. Since Gipps was shortly to advance this more absolutist view of Maori property,<sup>83</sup> it is possible, as Donald Loveridge has suggested of the letter generally, that Hobson was reflecting back Gipps's own views which had been discussed between the two men.<sup>84</sup>

Intriguingly, as *The Colonist* reported, Hobson does seem to have allowed that a distinction might be made between sale of land in the North Island and in the Southern Islands. This distinction in treatment between the Northern Island and Southern Islands is consistent with the suggestion made by Hobson in his letter of 15 August 1839 to the Colonial Office (perhaps influenced by Lang as has been suggested) that, if Britain claimed sovereignty by discovery in respect of the Southern Islands, it would have a freer hand in dealing with those who had purchased land there in contrast to the treatment of those who had already acquired land in the "free and independent state" recognised in the North Island. Finally, Hobson's remarks supportive of the New Zealand Land Company are hard to reconcile with the Colonial Office's views at the time. They are consistent with the views he had long-held in favour of colonisation.

The Sydney owners and prospective owners of New Zealand lands and the Sydney press seem to have decided to be satisfied by Hobson's communications with the landholders' deputation, in particular his explanations of how existing British interests in land in New Zealand would be treated. For *The Colonist*:<sup>85</sup>

The fears and suspicions created by the blundering and misconstrued announcement of Mr MacPherson [the clerk of the Legislative Council] at Mr Hebblewhite's Sale, have

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<sup>82</sup> See Chapter 9, text accompanying n 503.

<sup>83</sup> See Chapters 14 and 16.

<sup>84</sup> Donald Loveridge "The New Zealand Land Claims Act of 1840" (Brief of Evidence for the Crown Law Office, Muriwhenua Land Claim, Wai 45, 1993, I6, revised version 2002) 25.

<sup>85</sup> *The Colonist*, Sydney, 15 January 1840, at 2.

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had their specific and satisfactory antidote; and the honour and integrity of the British Government stands once for all pledged to a course of impartial and equitable policy alike towards the European and Native Landholders of New Zealand.

The *Australasian Chronicle* also took from the deputation's interview that

the titles of all claims to hold lands will be duly investigated, and in cases of *bona fide* purchase, confirmed; that all disputed claims will be investigated and equitably settled; but that there is no disposition on the part of the Government to interfere with the possessions of those whose titles are undisputed, or with any private dealings that are not complained of. All titles will of course be made to originate in the crown.<sup>86</sup>

The *Sydney Monitor*, which continued to refer to Hobson as "Lieutenant-Governor of the Factories about to be established in different ports of New Zealand", also expressed confidence that settlers would be able to "go on trading either in tea, sugar, soap or *land*, with as great safety at Hokianga, Bay of Islands, Cook's Straits, or elsewhere, as they do in Sydney".<sup>87</sup>

Nor did the newspapers challenge the propriety of an inquiry into the validity of titles to land. *The Colonist* (which assumed that investigation would be by a "Court of Claims") merely argued that

in the infancy of the settlement, the validity of titles ought not to be too scrupulously tested on the grounds of legal formality, provided that in equity it be proved to the satisfaction of a disinterested and impartial jury, that the titles have been honestly acquired, and that a fair consideration has been given for the land.<sup>88</sup>

Other newspapers, however, maintained that a rigorous investigation of claims to titles to land was required. The *Sydney Gazette* ventured to hope:<sup>89</sup>

that no title will be confirmed where the most satisfactory evidence cannot be produced that fair and equitable consideration was given for the land claimed.

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<sup>86</sup> *Australasian Chronicle*, Sydney, 17 January 1840, at 2.

<sup>87</sup> *Sydney Monitor and Commercial Advertiser*, 20 January 1840, at 2.

<sup>88</sup> *The Colonist*, Sydney, 15 January 1840, at 2.

<sup>89</sup> *Sydney Gazette and New South Wales Advertiser*, 16 January 1840, at 2.

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A contemporary of yesterday [*The Colonist*, 15 January 1840] expresses a hope that too scrupulous an inquest will not be made by the Government. We, on the other hand, say the inquest cannot be too scrupulous; let the natives of New Zealand be at once confirmed in the justice of our future intentions towards them, let them see that we are determined to protect their individual interests by the most equitable laws and regulations, let us inspire them with confidence, and the sovereignty of the law will be cheerfully acknowledged. Rum, gunpowder, and firelocks, have, we believe, been more frequently paid for land, than pounds, shillings, and pence, or than articles of real utility, and when this description of barter can be clearly proved, we would not confirm the title to land so purchased beyond the quantity actually brought into cultivation.<sup>90</sup>

The *Australasian Chronicle* “earnestly hope[d]” that the colony would be established “upon principles worthy of the British Government”—“[t]hat while the claims of those holding land by purchase are recognized, the just rights of the natives may be firmly upheld”. Where European and Maori had a competing claim to land and “the claim of the latter leaves any doubt in the mind of the judges respecting the injustice of the purchase”, its opinion was that “the original right of the native should always hold good”. Unlike the *Sydney Gazette*, however, it did not agree that Europeans claims to land should be disallowed where payment had been made in merchandise rather than in money, or that the rights of purchasers should be judged by the “*present value of land in New Zealand*”.<sup>91</sup>

### To New Zealand

The final arrangements for Hobson’s departure for New Zealand were being made while the attention of the Sydney public and press was engaged with the

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<sup>90</sup> The *Sydney Gazette* also advocated the establishment by the Government of a minimum price per acre of uncultivated lands, with pre-existing purchasers of land in New Zealand given the right to pay the difference between the price paid to Maori for the land in the first place and the Government’s minimum price in order to retain their interest. Ibid. In a later article, the *Sydney Gazette* suggested that “some fixed rate as to value”, of the lands purchased from Maori, be laid down “and every claim to *title* ... tested by that rule”. *Sydney Gazette and New South Wales Advertiser*, 20 January 1840, at 2.

<sup>91</sup> *Australasian Chronicle*, Sydney, 17 January 1840, at 2: “At the time these purchases were made, the land was of little or no value to the holders, and in all probability, but for these purchases and the present attempt to colonize the country, in consequence, the land would have continued valueless. On the other hand, the purchasers had no guarantee at the time of the purchase that any other law would ever reign in New Zealand than the law of *might*, and consequently had no security that this property would ever become of great value.”

announcement on behalf of the Governor at Hebblewhite and Vickery's auction rooms and with Hobson's interactions with the landholders' deputation. Instructions were given to Captain Nias of HMS *Herald* to convey Hobson and his party to New Zealand and to assist him with his mission.<sup>92</sup> Appointments were made to government offices in New Zealand:<sup>93</sup> George Cooper as collector of customs, Felton Mathew as acting surveyor-general, Willoughby Shortland as police magistrate, James Freeman as second-class clerk, and Samuel Grimstone as third-class clerk.<sup>94</sup> Four police officers were also made part of the *Herald's* company, it seems with the idea that more were to follow.<sup>95</sup> It is generally agreed

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<sup>92</sup> See Henry Comber *Tour of Duty: Midshipman Comber's Journal Aboard HMS Herald on the East Indies Station—Australia, New Zealand & China, 1838–42*, ed. by W David McIntyre & Marcia McIntyre (Macmillan Brown Centre for Pacific Studies, University of Canterbury, Christchurch, 1999) 110 (13 January 1840).

<sup>93</sup> Gipps to Russell, 9 February 1840, GBPP 1840 (560) XXXIII.575 at 4. The appointments of George Cooper and Felton Mathew had been made by 8 January 1840. See *The Sydney Herald*, 8 January 1840, at 2.

<sup>94</sup> Grimstone in the event did not sail with Hobson but arrived in New Zealand in March 1840 (Gipps's letter of 9 February 1840 to Russell is incorrect in this respect). See Phil Parkinson "“Preserved in the Archives of the Colony”: The English Drafts of the Treaty of Waitangi" (2004) 11 *Révue Juridique Polynésienne/New Zealand Association for Comparative Law*, Special Monograph at 14. George Cooper had been born in County Kildare, Ireland, in 1794. He was employed in the Customs Department in Ireland before appointment as comptroller of customs at Sydney in 1836. JH Walsh "George Cooper" (1927) 11 *The Victorian Historical Magazine* 178–182. Felton Mathew had been employed as a government surveyor in New South Wales in 1829, becoming town surveyor for Sydney in 1835. Hilary Reid "Mathew, Sarah Louise" *Dictionary of New Zealand Biography*; Scholefield *Captain William Hobson*, above n 2, 80 & 166–167 n 3. As to Willoughby Shortland, see above n 2.

<sup>95</sup> Gipps later wrote that Hobson had been accompanied to New Zealand by "a sergeant and four troopers of the mounted police". Gipps to Russell, 9 February 1840, GBPP 1840 (560) XXXIII.575 at 4. The *Herald's* log appears to name a sergeant, a corporal and two "privates of police". HMS *Herald* Logbook, 18 January 1840, ATL Micro-MS-Coll-05-5749. A report in *The Colonist* in February referred to Hobson being rowed ashore at Kororareka on 30 January "with the four policemen stuck up in the bow for a figure head". *The Colonist*, Sydney, 22 February 1840, at 2. It may be that the "mounted police" referred to by Gipps were prevented by Captain Nias of the *Herald* from taking their horses to New Zealand (the *Sydney Gazette and New South Wales Advertiser*, 18 January 1840, at 2 reported that Nias had stopped Hobson from taking with him "a single saddle horse"). It seems that the horses may have come later, with the further detachment of mounted police. See letter of 22 January 1840 from the Colonial Secretary to the Commandant of Mounted Police, published in *The Australasian Chronicle*, Sydney, 28 January 1840, at 2. It seems that Major Bunbury was referring to this reinforcement when he later wrote: "I cannot conceive what occasioned Captain Hobson to send for the body of mounted police from Sydney, which had preceded us. We found the horses nearly starved.... They were about as much required as a body of horse-marines. Even when they were removed to the Thames and Auckland, I never saw them more usefully employed than in driving from the bush Mrs Hobson's cows, when these strayed too far away". [Thomas Bunbury] *Reminiscences of a Veteran: Being Personal and Military*

that the officials available to Hobson were not particularly competent.<sup>96</sup> It appears that Gipps intended to make further appointments (as, for example, a judge, prosecutor and colonial secretary), and indeed that he may have done so, possibly even in time for some to have sailed with Hobson, had he not encountered difficulty in finding candidates willing to accept appointment to New Zealand.<sup>97</sup>

Cooper, Mathew and Shortland were sworn in as magistrates by Justice John Walpole Willis of the New South Wales Supreme Court, who reportedly said at the ceremony that “he knew nothing about New Zealand; and could only swear them in as magistrates of New South Wales and its dependencies, leaving it to them to

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*Adventures in Portugal, Spain, France, Malta, New South Wales, Norfolk Island, New Zealand, Andaman Islands, and India* (Charles J Skeet, London, 1861) vol 3, 57.

<sup>96</sup> Samuel Martin was later to write of the officers who sailed with Hobson in the *Herald* that they had been “selected for their known incompetency by Sir George Gipps”: “they are evidently sent to New Zealand because Sir Geo Gipps had no use for their services here, and was consequently anxious to get rid of them”. Martin *New Zealand*, above n 30, 81. While it may be going too far to suggest, as Martin does, that Gipps contrived to give Hobson incompetent subordinates (see Mark Francis’s view that “Gipps, who was short of competent officials, appointed to New Zealand the most competent he could spare”), the general picture given by historians that these were second-rate administrators bent on feathering their own nests may still hold. See Chapter 1, n 57; Peter Adams *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland University Press, Auckland, 1977) 158 (“Gipps provided him with a threadbare establishment of second-rate New South Wales civil servants”); and Scholefield *Captain William Hobson*, above n 2, 161, 166-167 & 186-187. Compare Mark Francis “Writings on Colonial New Zealand: Nationalism and Intentionality” in Andrew Sharp & Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past—A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 165-188 at 184.

<sup>97</sup> See Hobson to Gipps, 13 January 1840, ANZ ACHK 16591, G36/1, 8-9 identifying the government offices that, in Hobson’s view, were “essential for the discharge of the Public duties on the early formation of a Colony in New Zealand”: Judge, Crown Prosecutor, Colonial Secretary, Treasurer, Collector of Customs, Protector of Aborigines, Chief Magistrate and Superintendent of Police (one person), Inspector of Police, four Police Sergeants, Surveyor-General, Assistant Surveyor, Colonial Surgeon, and ten clerks. *The Colonist* reported that Francis Fisher (a former New South Wales Crown Solicitor) had accepted appointment as judge and William Hustler (a barrister) as “Queen’s Advocate ... with the same powers as the Attorney-General here”. *The Colonist*, Sydney, 15 January 1840, at 2. In its next issue, however, *The Colonist* reported that Fisher had turned down the judgeship and that it had been offered to Hustler. *The Colonist*, Sydney, 18 January 1840, at 2. In the event, no superior court judge was appointed by Gipps, although Fisher was appointed to the Land Claims Commission and also later acted as Attorney-General. *The Australian* reported on 14 January that the office of Colonial Secretary had not been filled up. It had been “offered to several gentlemen” but declined by all of them. It was the view of *The Australian* that the salaries attached to the New Zealand offices were too small to attract good candidates. *The Australian*, Sydney, 14 January 1840, at 2.

decide upon their own responsibility, whether that was sufficient to authorize them to act in New Zealand”.<sup>98</sup>

Hobson was given a letter for Busby terminating his office and instructing him to transfer his records to Hobson.<sup>99</sup> Orders were also given to the New South Wales colonial treasurer and auditor-general to allow advances on the land fund of the colony for payment of the expenses of the new administration in New Zealand, a direction said to have been authorised by the British Government “in directing the establishment of a settled form of Civil Government over British subjects in New Zealand”.<sup>100</sup>

As part of the final arrangements, at a meeting of his Executive Council on 14 January, Gipps administered to Hobson the “prescribed oaths” of office as Lieutenant-Governor “in and over that part of Her Majesty’s territory” which “is or may be acquired in sovereignty by Her Majesty, Her heirs and successors, within that group of islands ... commonly called New Zealand”.<sup>101</sup> Gipps also executed, but did not immediately publish, three proclamations relating to New Zealand. The first declared, in accordance with the 15 June 1839 letters patent,<sup>102</sup> the boundaries of New South Wales extended to include “any territory which is or may be acquired in sovereignty” in New Zealand (and proclaimed Gipps Governor-in-chief of the same).<sup>103</sup> The second declared, in accordance with Hobson’s 30 July 1839 Commission appointing him Lieutenant-Governor of the “territory which is or may be acquired in sovereignty” in New Zealand, that Gipps had “this day administered the prescribed oaths to the said William Hobson, esq., as Lieutenant-governor of

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<sup>98</sup> *The New Zealand Journal*, London, 20 June 1840, at 141 (from the *Colonial Times* of Hobart). Compare reports in the *Commercial Journal and Advertiser*, Sydney, 25 January 1840, at 2 and the *Sydney Monitor and Commercial Advertiser*, 27 January 1840, at 2.

<sup>99</sup> Thomson (Colonial Secretary NSW) to Busby, 15 January 1840, SRNSW NRS 939, 4/3527 (also ANZ Micro-Z 2711 & UoA Microfilm 09-006 Reel 5).

<sup>100</sup> Minute dated 15 January 1840 (approved by Gipps on 16 January), SRNSW NRS 905, 4/2501 (also ANZ Micro-Z 2712 & UoA Microfilm 09-006 Reel 6). The direction drew on Normanby’s Instructions to Hobson in the language used. See Chapter 8, text accompanying n 12.

<sup>101</sup> See below ns 104 & 126 and accompanying text.

<sup>102</sup> For the 15 June 1839 letters patent, see Chapter 9, n 499 and accompanying text.

<sup>103</sup> See copy enclosed in Gipps to Russell, 9 February 1840, GBPP 1840 (560) XXXIII.575, 1-3 at 2.

such parts of the said territory as is or may be acquired in sovereignty as aforesaid” and called upon “all British subjects to be aiding and assisting the said William Hobson, esq., in the execution of his said office”.<sup>104</sup>

The third proclamation concerned land titles. Gipps later described it as having been issued “in order to put an end, as far as possible, to the speculations in New Zealand lands which were then being openly carried on in Sydney”.<sup>105</sup> The land titles proclamation declared “for the information and guidance of all parties interested”, pursuant to “instructions under the hand of the Most noble the Marquis of Normanby ... bearing date the 14th day of August 1839”, that it was the Queen’s command,

that it shall be announced to all Her Majesty’s subjects in New Zealand, that Her Majesty will not acknowledge as valid any title to land which either has been or shall be hereafter acquired in that country, which is not either derived from or confirmed by a grant to be made in Her Majesty’s name and on Her behalf, but that care shall be taken at the same time to dispel any apprehension that it is intended to dispossess the owners of any land acquired on equitable conditions, and not in extent or otherwise prejudicial to the present or prospective interests of the community, to be investigated and reported on by commissioners to be appointed by me, with such powers as may be conferred upon them by an Act of the Governor and Council of New South Wales.

The proclamation further declared (without reference this time to any instruction or other authority) that:<sup>106</sup>

[A]ll purchases of land in any part of New Zealand which may be made by any of Her Majesty’s subjects from any of the native chiefs or tribes of these islands, after the date hereof, will be considered as absolutely null and void, and neither confirmed nor in any way recognised by Her Majesty.

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<sup>104</sup> See copy enclosed in Gipps to Russell, 9 February 1840, GBPP 1840 (560) XXXIII.575, 1-3 at 2-3.

<sup>105</sup> Gipps to Russell, 9 February 1840, GBPP 1840 (560) XXXIII.575 at 1-3 at 1. This was the despatch in which Gipps reported the action he had taken in respect of the Hebblewhite & Vickery auction of New Zealand lands.

<sup>106</sup> See copy enclosed in Gipps to Russell, 9 February 1840, GBPP 1840 (560) XXXIII.575, 1-3 at 3.

Gipps gave copies of these proclamations to Hobson on 15 January when issuing him with further instructions.<sup>107</sup> He also provided Hobson with the 15 June 1839 Commission extending the limits of the Government of New South Wales to include, as Gipps put it in his covering letter, “any territory of which the sovereignty has been, or may be, acquired by Her Majesty in New Zealand”, which Hobson was to publish in New Zealand and return to Sydney.<sup>108</sup> Gipps further provided Hobson with two proclamations, prepared with the advice of Gipps’s Executive Council, “with a view to their being issued by yourself, with such alterations as circumstances may lead you to deem necessary on your arrival in New Zealand”. The second of the two proclamations, that dealing with land titles, was “a substitute for the one which it was the intention of the Marquess of Normanby to supply to you, with his Lordship’s letter of the 15th August 1839, but which was by some accident omitted”.<sup>109</sup> (These proclamations, issued by Hobson at Christ Church at Kororareka on 30 January 1840, are described below.<sup>110</sup>)

On 17 January, Hobson was formally presented with the loyal Address produced by the 15 January public meeting.<sup>111</sup> To it, he gave a written response expressing his gratitude and confirming, “in order to leave no doubt as to the true import and meaning of the verbal communication which passed between myself and the Gentlemen who visited me on Monday last”, that he was directed by his Instructions

to dispel from the public mind any apprehension that persons will be dispossessed of Lands, acquired on equitable terms from the natives, which are not in point of extent, or otherwise, prejudicial to the present or prospective interest of the community.<sup>112</sup>

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<sup>107</sup> Gipps to Hobson, 15 January 1840, GBPP 1840 (560) XXXIII.575, 4-5. These additional instructions concerned the relation in which Hobson, as Lieutenant-Governor, was to stand towards Gipps, as Governor. They do not bear on the meaning of the Treaty of Waitangi.

<sup>108</sup> Ibid 4. Gipps also returned Hobson’s own Commission as Lieutenant-Governor.

<sup>109</sup> Ibid 5. See Chapter 8, text accompanying n 66.

<sup>110</sup> See text accompanying ns 125-129 below.

<sup>111</sup> See text accompanying n 73 above.

<sup>112</sup> Hobson’s reply was published in *The Australian*, Sydney, 18 January 1840, at 3 and *The Colonist*, Sydney, 18 January 1840, at 2. See Martin *New Zealand*, above n 30, 81: “Having been furnished with a copy of it [the Address] before the day of presentation, he was prepared with a written answer, from which it would appear that he was highly flattered with the

Hobson's reply on this point was in the terms of Gipps's, as yet unpublished, land titles proclamation.

Hobson and his officers left Sydney on HMS *Herald* on 18 January.<sup>113</sup> The ship also carried the letter from Bishop Broughton to Henry Williams.<sup>114</sup> Broughton's letter, which was later described by Williams (who was grateful to receive advice having had "no communication from the society [the Church Missionary Society in London] at this important crisis") as "long and kind and judicious",<sup>115</sup> seems to have been written in the knowledge of the contents of Normanby's Instructions to Hobson.<sup>116</sup> Whether or not Broughton viewed the Instructions themselves or simply was informed about them by Hobson or Gipps is not clear. Certainly, Broughton's letter indicates a surer grasp of what was in view than the Sydney speculation about Hobson's mission.<sup>117</sup> Broughton, as a member of Gipps's Legislative Council, could obviously be trusted with confidential information, but is unlikely to have allowed himself to be used unless he was independently supportive of the proposal for British intervention in New Zealand and convinced of the genuineness of the intentions with which it was to be undertaken. Broughton's letter is interesting in its author's understanding of the Instructions, either as read by him or as explained to him by Hobson or Gipps.

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compliment paid to him." See also the letter from a correspondent (possibly Samuel McDonald Martin) to *The Colonist*, Sydney, 22 January 1840, at 2: "we also acknowledge with pleasure ... the honest promise, and honourable assurance which he [Hobson] has given on their [the Government's] part, that they will respect the rights of every individual connected with New Zealand, and administer justice, with that impartiality, honour and integrity, which become such a nation as England."

<sup>113</sup> HMS *Herald* Logbook, 18 January 1840, ATL Micro-MS-Coll-05-5749; HMS *Herald* Remark Book (P. Bean, Master), 18 January 1840, ATL Micro-MS-Coll-20-2437.

<sup>114</sup> Broughton to Henry Williams, 10 January 1840, AML MS 91/75, Box 1, Folder 4 (typescript).

<sup>115</sup> Henry Williams *The Early Journals of Henry Williams, Senior Missionary in New Zealand of the Church Missionary Society, 1826–40*, ed. by Lawrence Rogers (Pegasus Press, Christchurch, 1961) 477 (30 January 1840).

<sup>116</sup> The letter does not acknowledge that Broughton had had more information than was in the public domain.

<sup>117</sup> Donald Loveridge "'The Knot of a Thousand Difficulties': Britain and New Zealand, 1769–1840" (Brief of Evidence for the Crown Law Office, Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 17 December 2009, A18) 186 n 519: "It should be noted that Broughton was a member of the Legislative Council of New South Wales, and parts of his letter suggest that he had seen Normanby's instructions to Hobson and Gipps. Certainly he had received a thorough briefing on the Government's plans and intentions."

Broughton wrote to urge missionary co-operation with Hobson and to offer advice on their land purchases as likely Bishop of New Zealand should the country be acquired in sovereignty by Britain and the territory come within the Diocese of Australia. Broughton wrote that Hobson was expected to exercise “more ample powers than were conferred upon the British Resident”. Enough was known “from the published statements” to make it probable that Hobson was to endeavour “to obtain from the Chiefs a voluntary recognition of Her Majesty’s Sovereignty over the territory”. This course Broughton regarded as beneficial to Maori:

[N]o one I think can have had an acquaintance with New Zealand, even so short and limited as mine has been,<sup>118</sup> without being made sensible of the utter inadequacy of the present mode of government, if the native rule can in any sense be called such, to provide for the internal peace of the country, to develop its latent resources, or to maintain duly its relations with strangers. The expedience of establishing some determinate and central authority is, I believe, almost universally admitted by the chiefs themselves: and their attention has been as naturally turned to England as the power under whose supremacy they may most surely expect to enjoy that protection of their persons and properties which they appear sensible cannot be afforded by any authority existing among themselves. In the desire to have Her Majesty’s Sovereignty universally recognized I think the Missionaries must heartily concur; both from a sense of the security which it must afford to them in carrying on the great work of evangelizing the natives, and from a desire that the latter, together with the spiritual blessings of the Gospel, should enjoy that civil peace and security which accompanies the regular administration of just and impartial laws under our national form of government. The actual Sovereignty of New Zealand must be at present assumed to reside in the Chiefs, by whom it seems to be exercised within the limits of their respective territories. These rights I have reason to suppose are so distinctly recognized by the British Government as to forbid the possibility of any design or attempts to set them aside, or to assume any powers for the Crown without the free consent of the chiefs. The course to be pursued I should therefore rather expect will be in the first instance to make application to them to surrender to Her Majesty their existing rights of Sovereignty, and to acknowledge her and her successors as the supreme and lawful rulers of the country. In promoting to the utmost of our power the accomplishment of such a purpose we should be, I think, befriending the chiefs themselves and the natives generally in the most unquestionable manner; they being

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<sup>118</sup> Broughton had visited New Zealand to inspect the Church Missionary Society mission in December 1838 and January 1839.

## Chapter Eleven: Hobson & Gipps

required only to surrender a precarious, and in their circumstances a fruitless independence, for the solid and substantial advantages of protection in persons and properties which will be afforded them by British power and justice.

While Broughton thought that the missionary endeavours might succeed without “regular government”, he thought that “affairs have come to pass, that we have no longer the option of retaining them, even if we wished it, in their now existing condition”. Colonisation was “in rapid progress” and British laws and government “and none else” established with the “free consent of [New Zealand’s] present chiefs and people” was the best outcome. He therefore strongly recommended that the missionaries use their influence to induce the chiefs

to make the desired surrender of Sovereignty to Her Majesty, by explaining to them clearly and with good faith, the permanent advantage which their country and all its inhabitants must derive from thus coming under the direct protection of a power whose good will and kind disposition towards them, they have had during so many years the opportunity of experiencing, and may as confidently rely on for the time to come.

Broughton expressed confidence that the chiefs would discern “their own interest and advantage in being brought under British rule, as shall lead them to merge their own authority in that of our gracious Queen”. If so, it would be proper for the missionaries also “to explain to them fully the nature and obligation of an Oath, which they may be required to take in testimony of their allegiance”.

Broughton was aware of the criticisms made of missionary dealings in land. He advised Henry Williams that a consequence of “establishing the British dominion” would be “the settlement of titles to land according to the principles of law and equity”:

This proceeding will necessarily lead to a judicial investigation of the claims of occupants of land who have purchased or professed to purchase from the chiefs. Although it is not to be doubted that the strictest good faith will be observed towards all parties interested; yet it seems equally clear that while the titles of all bona fide and fair purchasers will be upheld and confirmed, others of a contrary description, or in which any fraud is manifested, will have a very severe judgment to undergo. According to the principles of strict justice at least, I do not see how it can be otherwise; nor how the

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natives could ever be brought to place much confidence in the uprightness of our intentions, unless the powers, which, with their consent, our government is to assume among them be in the first instance exercised in the investigation of dealings and transactions between them and Europeans, wherein undue advantage has been taken by the latter.

He urged full co-operation with investigation into missionary purchases, which he anticipated would be “according to a regular judicial form”, and asked the missionaries to prepare their cases “to the minutest point” and not to “maintain a claim to any property which might be held either to be excessive in quantity, or for which a fair and just consideration had not been given”.

The *Herald* arrived in the Bay of Islands on 29 January.<sup>119</sup> As has been described in Chapter 1, Busby immediately went on board and planning for a meeting of chiefs to propose a treaty began.<sup>120</sup> On 30 January, Hobson and his officials went ashore at Kororareka to address the British settlers, who had been invited to meet him at Christ Church.<sup>121</sup> Efforts were made to make Hobson’s arrival impressive. A correspondent to *The Colonist* described how “about two o’clock”,

Captain Hobson and suite, with the four policemen stuck up in the bow for a figure head, put off in the cutter under a salute of eleven guns, and were landed on the beach to astonish the natives in the best manner they could.<sup>122</sup>

According to the report in *The Colonist*, about 150 Europeans were present at Christ Church when James Freeman, Hobson’s secretary, read, first, the 15 June 1839 Commission extending the limits of the colony of New South Wales (to include “any territory which is or may be acquired in sovereignty by Her Majesty, Her Heirs or Successors, within that group of Islands in the Pacific Ocean, commonly called New Zealand”) and secondly, Hobson’s own Commission of 30 July 1839 as Lieutenant-Governor.<sup>123</sup> Following these announcements, first Busby

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<sup>119</sup> See Chapter 1, n 9.

<sup>120</sup> See Chapter 1, ns 11-14 and accompanying text.

<sup>121</sup> Hobson to Gipps, 4 February 1840, GBPP 1840 (560) XXXIII.575, 7-9 at 7.

<sup>122</sup> *The Colonist*, Sydney, 22 February 1840, at 2.

<sup>123</sup> For these Commissions, see Chapter 9, ns 499 & 509 and accompanying text. Hobson later described his Commission (in terms slightly different from those used in the Commission

and then thirty-nine settlers and one chief subscribed to a document witnessing the reading of the Commissions.<sup>124</sup> Freeman then read out the two proclamations which Gipps had provided to Hobson.<sup>125</sup>

The first proclamation announced that “measures shall be taken for the establishment of a settled form of civil government over those of Her Majesty’s subjects who are already settled in New Zealand, or who may hereafter resort hither”. It referred to the 15 June 1839 and 30 July 1839 Commissions and to Hobson’s swearing in as Lieutenant-Governor by Gipps on 14 January 1840. As he had published the Commissions in New Zealand and “this day entered on the duties of my said office”, Hobson called upon “all Her Majesty’s subjects to be aiding and assisting me in the execution thereof”.<sup>126</sup> The second proclamation was that concerning titles to land, and was in substantially the same terms as Gipps’s 14 January proclamation in Sydney,<sup>127</sup> with the addition of the explanation that the Queen had “tak[en] into consideration the present as well as future interests of Her said subjects, and also the interests and rights of the chiefs and native tribes of the said islands”.<sup>128</sup> Both proclamations were issued by Hobson as “Lieutenant-governor of the British Settlements in progress in New Zealand”, picking up the phrase used by Normanby in his letter to Gipps of 15 August 1839.<sup>129</sup>

*The Colonist* reported that Hobson and Busby had spoken briefly. Hobson had expressed concern about learning on his arrival “that the natives have been deceived, inasmuch as they had been told, that he came out there to take their land

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itself) as giving him authority over “such part of the colony [of New South Wales] as may be acquired in sovereignty in New Zealand”. Hobson to Gipps, 4 February 1840, GBPP 1840 (560) XXXIII.575, 7-9 at 7.

<sup>124</sup> See copy enclosed in Hobson to Gipps, 4 February 1840, GBPP 1840 (560) XXXIII.575, 7-9 at 7.

<sup>125</sup> The proclamations in the form provided by Gipps have not survived, so it is not possible to know whether Hobson had made any changes to them.

<sup>126</sup> See copy enclosed in Hobson to Gipps, 4 February 1840, GBPP 1840 (560) XXXIII.575, 7-9 at 8.

<sup>127</sup> For which see text accompanying n 106 above.

<sup>128</sup> See copy enclosed in Hobson to Gipps, 4 February 1840, GBPP 1840 (560) XXXIII.575, 7-9 at 8-9. In declaring that purchases of land in New Zealand from Maori “after the date of these presents” would be considered “absolutely null and void”, the land titles proclamation introduced a different cut off date for purchases than Gipps’s 14 January 1840 proclamation.

<sup>129</sup> See Chapter 9, text accompanying n 514.

from them, which was not the fact". He had asked the "peaceably disposed inhabitants" to "disabuse" Maori of this. It appears from *The Colonist* report that the rumour may have been a product of settler agitation for confirmation of their own land purchases. Hobson was reported as referring to questions of land being "of great importance to the future welfare of the colony, as it appeared that all hands were mouths open for litigation, and a settlement of claims forthwith". Busby was reported as having urged the settlers "not [to] press any claims immediately upon the Governor, as it might tend to embarrass him very much at the outset". He expressed confidence that "every thing would be settled in the most amicable manner". *The Colonist* reported of the proceedings at Christ Church that the settlers were "highly pleased that they are now placed under regular Government, and with the expectation of having at all events some law amongst them, even if they do not get justice".<sup>130</sup>

Many years later, Busby was to write that the reading of the land titles proclamation had "occasioned no little dismay among the purchasers of Land".<sup>131</sup>

It was debated amongst them whether it would not be prudent to advise the chiefs to refuse the cession of Sovereignty. And the most respectable of their number came to the late Resident, who had himself purchased land to a considerable extent, to consult him upon the subject. His advice was that the purchasers of land should rely upon the uprightness of the British Government which in his opinion they might safely do; but that in any circumstance it would be madness in them to oppose its intentions. The party accordingly expressed his intentions to "bring over his chief" to the meeting, and to give that advice to the other Landholders.

Busby was also, in 1844 or 1845, to express some criticism of Hobson's actions in reading the Commissions and proclamations "without waiting for the issue of the Treaty" and thereby "unfortunately, taking it for granted that the Chiefs would as a matter of course cede their rights of Sovereignty to the Queen". Busby wrote that Hobson's actions were taken "with the view of putting a stop to the acquisition of

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<sup>130</sup> *The Colonist*, Sydney, 22 February 1840, at 2.

<sup>131</sup> James Busby "Occupation of New Zealand, 1833-1844" (c. 1865), AML MS 46, Box 6, Volume 1 (typescript) ["Busby 'Occupation of New Zealand'"], 86-87.

Land which was going on with great activity”.<sup>132</sup> In 1865, Busby made similar comments about Hobson’s actions. On that occasion, he wrote that Hobson had first thought to read the Commissions and proclamations at Waitangi, on the land forfeited by Rete as compensation for his robbery of the Residency in 1834 since “[t]his was the only spot in New Zealand of which it could be said in any sense that it was under the Sovereignty of the Queen”. Busby suggested that he had dissuaded Hobson from this course because it would be impossible to assemble the settlers at Waitangi. In 1865, Busby expressed the view also that the land forfeited by Rete could not be treated as ceded in sovereignty. He criticised Hobson’s assumption of office as Lieutenant-Governor as premature, “as little consistent with good faith, towards the natives” and inconsistent with British Government’s insistence that any authority beyond that attaching to a Consul was dependent on the prior cession of sovereignty by Maori.<sup>133</sup>

As has been described,<sup>134</sup> after the reading of the Commissions and proclamations, the invitations to Waitangi were sent to the chiefs of the Confederation of United Tribes and the drafting of the Treaty was continued by Busby after Hobson became ill. On 3 February, the day on which Busby provided Hobson with his draft, Hobson received a congratulatory address from 45 inhabitants of Kororareka.<sup>135</sup> In response, Hobson thanked the residents and referred to how Queen Victoria “ever ready to promote the best interests of Her subjects, has taken measures for extending to this most highly-gifted land the protecting influence of British laws and British institutions”.<sup>136</sup> On 3 or 4 February, Hobson made changes to Busby’s draft and added a preamble. At 4 pm on 4 February, the draft was given to Henry Williams to translate into Maori for the meeting with the chiefs on 5 February, which by then had been extended to independent chiefs not of the Confederation.

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<sup>132</sup> James Busby “The British Government in New Zealand” (1844 or 1845), AML MS 46, Box 2, Folder 7 (holograph), 145-146.

<sup>133</sup> Busby “Occupation of New Zealand”, above n 131, 85.

<sup>134</sup> See Chapter 1.

<sup>135</sup> See copy of the Address enclosed in Hobson to Gipps, 3 February 1840, GBPP 1840 (560) XXXIII.575, 6-7 at 6.

<sup>136</sup> See copy of the reply enclosed in Hobson to Gipps, 3 February 1840, GBPP 1840 (560) XXXIII.575, 6-7.

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Apart from last minute review of the translation by Busby, and perhaps some consequential adjustments to the English text, the stage was set for treaty-making.

## CHAPTER TWELVE

### SIGNING THE TREATY

The first signing of the Treaty took place at Waitangi on 6 February when perhaps 43 chiefs signed their names or put their moko or marks to the agreement. Over the next seven months, at some 50 gatherings, 500 more signatures were obtained from Kaitaia in the far north to Ruapuke Island in Foveaux Strait. Some of the meetings at which the Treaty was signed involved a few individuals only; others were large events at which many signatures were obtained. They included the gatherings at Waitangi (5–6 February), Mangungu in the Hokianga (12 February), Waikato Heads (late March), Kaitaia (28 April), Port Nicholson (29 April) and Turanga/Gisborne (5 May).<sup>1</sup>

It seems that, in February 1840, Hobson intended to take the Waitangi treaty sheet around the country personally for signature, as he did at Waimate on 10 February and Mangungu on 12 February.<sup>2</sup> He sailed from the Bay of Islands on 21 February on HMS *Herald* but got no further than the Waitemata where on 1 March he suffered a stroke which left him partially paralysed and impaired in speech.<sup>3</sup> Although a meeting at the Waitemata, arranged by Henry Williams, proceeded in Hobson's absence on 4 March and 16 signatures were obtained, Hobson was then

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<sup>1</sup> See "Map 1: Locations of Treaty Signings" in Claudia Orange *The Treaty of Waitangi* (2nd ed, Bridget Williams Books, Wellington, 2011) 70-71, which gives the dates and places of the signings and the approximate number of signatures obtained at each location. Orange discusses the differences between the nine treaty sheets that were signed around the country and the difficulty in reading some of these. The Waitangi treaty sheet is said to be "the most confusing of all": "there are many uncertainties regarding names, dates of signings and numbers signing at different locations". Ibid 272.

<sup>2</sup> See, for example, Journal of Felton Mathew, APL NZMS 88 (manuscript) & ATL MS-1620 (typescript) ["Mathew's Journal"], 24 January, 4 & 22 February 1840 (pp 8, 32 & 64 of the typescript; note that the typescript page numbers given here are those in hand in the top right-hand page corners); Henry Williams to Dandeson Coates, 13 February 1840, CMS CN/M vol 11, 706-708 at 706 ("I am about to accompany the Governor to Cook's Strait for the purpose of seeing the Chiefs of that part of the country"); and Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987) ["Orange *The Treaty of Waitangi*"] 66.

<sup>3</sup> Mathew's Journal, above n 2, 22 February & 1 March 1840 (pp 64 & 74 of the typescript); Orange *The Treaty of Waitangi*, above n 2, 67.

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obliged to return to the Bay of Islands to convalesce.<sup>4</sup> He was not well enough to resume collecting adherences to the Treaty and the remaining work was delegated to officials, missionaries and, in one case, to a former army officer present in New Zealand, Captain William Symonds. They were given copies of the Treaty for signature, so that the Treaty, after all signatures had been collected, comprised nine separate sheets. In all but one case, the Treaty sheet signed contained the Maori text only. The sheet signed at the Waikato Heads (late March) and Manukau (26 April) by 39 chiefs was an English text.<sup>5</sup>

### The documentary record

There are few reports of the proceedings at the Treaty signings. For many signings there is no record at all beyond what can be gleaned from the Treaty sheets. The best documented meetings were those in the north where the sources include the official reports by Hobson (Waitangi and Mangungu) and Willoughby Shortland (Kaitaia), the account of the proceedings at Waitangi prepared by William Colenso for the Church Missionary Society, and diary and journal records kept by Felton Mathew (Waitangi), the Reverend Richard Taylor (Mangungu and Kaitaia) and, the recently-arrived colonial surgeon, John Johnson (Kaitaia).<sup>6</sup> Even Colenso's account,<sup>7</sup> which is the fullest, and was later checked by Busby, is too short to be

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<sup>4</sup> Mathew's Journal, above n 2, 4 March 1840 (p 77 of the typescript); Orange *The Treaty of Waitangi*, above n 2, 68.

<sup>5</sup> Orange *The Treaty of Waitangi*, above n 2, ch 4 and 259-260.

<sup>6</sup> Hobson to Gipps, 5-6 February 1840, GBPP 1840 (560) XXXIII.575 at 9-11; Hobson to Gipps, 17 February 1840, GBPP 1841 (311) XVII.493 at 10-12; Shortland to Hobson, 6 May 1840, GBPP 1841 (311) XVII.493 at 58-59; William Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi, New Zealand, February 5 and 6, 1840* (George Didsbury, Government Printer, Wellington, 1890) ["Colenso *Authentic and Genuine History*"]; Diary of Felton Mathew, MNZA X112 (manuscript & typescript) ["Mathew's Diary"], 5 February 1840 (pp 5-14 of the typescript); Mathew's Journal, above n 2, 5 & 6 February 1840 (pp 32-41 of the typescript); "Notes of the Meeting at Hokianga Feb. 12, 1840" in Journal of Richard Taylor, ATL qMS-1986 (typescript), 361-366 ["Taylor 'Notes of the Meeting at Hokianga'"]; Journal of Richard Taylor, ATL qMS-1985 & qMS-1986 (typescript) ["Taylor's Journal"], 28 April 1840, 196-202; Journal of John Johnson, APL NZMS 27 (manuscript & typescript) ["Johnson's Journal"], 28 April 1840 (pp 19-23 of the typescript).

<sup>7</sup> For a meticulous examination of the relationship between Colenso's 1890 published account and his manuscript "Memoranda of the arrival of Lieut Govr Hobson in New Zealand" (held in the Alexander Turnbull Library), see Judi Ward "Fact or Fiction? William Colenso's *Authentic & Genuine History of the Signing of the Treaty of Waitangi* (MA thesis, Massey University, 2011) ["Ward 'Fact or Fiction?'"].

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accepted as a complete record of the full discussions that occurred on 5 and 6 February at Waitangi.<sup>8</sup>

The written record of Treaty signings outside the north is even less satisfactory, apart from reports made by Major Thomas Bunbury to Hobson.<sup>9</sup> Bunbury had arrived in the Bay of Islands on 16 April with a company of the 80th Regiment which had been sent by Gipps at the direction of Lord John Russell, Normanby's successor as Secretary of State for the Colonies.<sup>10</sup> Gipps, who had received word of Hobson's stroke at the end of March, had instructed Bunbury to take charge of the administration should that be necessary.<sup>11</sup> On Bunbury's arrival in New Zealand, Hobson was sufficiently recovered to make that course unnecessary. But Hobson was pleased to be able to delegate to Bunbury the task of taking the Treaty to the South Island in HMS *Herald*, stopping to collect signatures around the coast of the North Island on his trip, with special direction to obtain the signature of Te Rauparaha because of his authority over the southern regions of the North Island.<sup>12</sup> In his mission, Bunbury had the assistance as interpreter of Edward Williams.

Before Bunbury's arrival, treaty sheets for signature had been dispatched to Captain Symonds<sup>13</sup> (who had been part of Hobson's aborted mission south and had

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<sup>8</sup> For a comparison of Colenso's *Authentic and Genuine History* with other eye-witness reports, see Ward "Fact or Fiction?", above n 7. See also Peter Low "Pompallier and the Treaty: A New Discussion" (1990) 24:2 *New Zealand Journal of History* 190-199 at 191-192 & 197.

<sup>9</sup> Bunbury to Hobson, 6 & 15 May & 28 June 1840, GBPP 1841 (311) XVII.493 at 100, 103-104 & 105-112.

<sup>10</sup> See Chapter 13, n 3 and accompanying text.

<sup>11</sup> [Thomas Bunbury] *Reminiscences of a Veteran: Being Personal and Military Adventures in Portugal, Spain, France, Malta, New South Wales, Norfolk Island, New Zealand, Andaman Islands, and India* (Charles J Skeet, London, 1861) ["Bunbury *Reminiscences of a Veteran*"] vol 3, 44-46.

<sup>12</sup> Hobson to Bunbury, 25 April 1840, GBPP 1841 (311) XVII.493 at 17-18; Bunbury *Reminiscences of a Veteran*, above n 11, 51. Hobson was anxious to avoid a further trip in the company of Captain Nias of the *Herald* with whom he had quarreled badly, a possible factor in his stroke.

<sup>13</sup> This copy of the Treaty was sent under Willoughby Shortland's signature as "Colonial Secretary" on 13 March. The other treaty sheets were evidently prepared after 13 March, when Hobson had recovered sufficiently to put his shaky signature to them. Orange *The Treaty of Waitangi*, above n 2, 68-69. One reason that Shortland took charge of organising further treaty signatures during Hobson's convalescence was that George Cooper, who was first in rank of Hobson's officials, had resigned office and returned to Sydney from the Bay of Islands on HMS *Herald* on 12 March (where he was promptly reprimanded by Gipps and sent back to New Zealand). See Mathew's Journal, above n 2, 11 & 12 March 1840 (at pp 87 & 89 of the

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remained behind in the Waitemata-Manukau region when the *Herald* returned to the Bay of Islands<sup>14</sup>), and to the Church Missionary Society missionaries, the Reverend Robert Maunsell (Waikato Heads) and the Reverend Alfred Brown (Tauranga).<sup>15</sup> After obtaining very few signatures at Manukau,<sup>16</sup> Symonds sent his treaty sheet to the Wesleyan missionary, the Reverend John Whiteley, at Kawhia, who obtained signatures from chiefs from as far afield as Mokau over a period of some six months.<sup>17</sup> Maunsell obtained 32 signatures at the Waikato Heads on a sheet containing the Treaty in English. It is not clear why Maunsell was sent a text in English (he appears to be the only one to have received a sheet in English). He later obtained signatures of five Waikato chiefs on a printed copy of the Treaty in Maori (one of 200 produced by Colenso at the mission press at Paihia on 17 February<sup>18</sup>), which may have been sent to him with the English treaty sheet for explanatory purposes.<sup>19</sup> The English sheet signed at the Waikato Heads was later given by Maunsell to Captain Symonds, who obtained additional signatures on it at Manukau before returning it to Shortland.<sup>20</sup> Brown, together with other members of the Church Missionary Society at Tauranga, collected signatures in April and May.<sup>21</sup>

When Bunbury called in to Tauranga on his way south, he authorised the missionaries to make two copies of the Treaty (“copying” Hobson’s signature).

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typescript); Gipps to Hobson, 8 May 1840, ATL qMS-0843; and Phil Parkinson “‘Preserved in the Archives of the Colony’: The English Drafts of the Treaty of Waitangi” (2004) 11 *Révue Juridique Polynésienne/New Zealand Association for Comparative Law*, Special Monograph at 11.

<sup>14</sup> Orange *The Treaty of Waitangi*, above n 2, 68; Mathew’s Journal, above n 2, 4 March 1840 (p 77 of the typescript).

<sup>15</sup> Hobson to Bunbury, 25 April 1840, GBPP 1841 (311) XVII.493, 17-18 at 17.

<sup>16</sup> Symonds had the assistance of James Hamlin, a Church Missionary Society catechist at the Manukau Harbour. Orange *The Treaty of Waitangi*, above n 2, 68.

<sup>17</sup> Symonds to Whiteley, 8 April 1840, GBPP 1841 (311) XVII.493 at 102; Orange *The Treaty of Waitangi*, above n 2, 70.

<sup>18</sup> See *BiM* 83.

<sup>19</sup> The date on which the signatures were obtained is not recorded on the printed sheet. As a result, it is not possible to infer with any confidence that it was provided to Maunsell with the English text sheet.

<sup>20</sup> Orange *The Treaty of Waitangi*, above n 2, 70; Symonds to Shortland, 12 May 1840, GBPP 1841 (311) XVII.493 at 101-102.

<sup>21</sup> Orange *The Treaty of Waitangi*, above n 2, 70-71. Brown may in fact have been sent two copies of the Treaty, one of which (now in the archives of the Catholic Diocese of Auckland) remained unsigned.

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The first was sent into the interior for signature by Tuwharetoa and Arawa (a project that was unsuccessful). The second was given to a trader, James Fedarb (a former Church Missionary Society worker), to take down the East Coast from Tauranga and was signed by chiefs at Whakatane, Opotiki, Torere and Te Kaha.<sup>22</sup> At the same time, Henry Williams was sent by the schooner *Ariel* to collect signatures in the Cook's Strait area and north to Whanganui. On his way he stopped at Turanga to leave a further copy for signing with his brother, the Reverend William Williams. In all, Henry Williams collected 132 signatures on his treaty sheet.<sup>23</sup> Forty-one signatures were obtained by William Williams on his copy from Turanga north to Waiapu.<sup>24</sup>

Such reports and private accounts as there are by Symonds, Fedarb and the missionaries do not detail the speeches given by British or Maori at the Treaty signings south of the Bay of Islands.<sup>25</sup> Bunbury's reports are better but variable and incomplete as a record of what was said.<sup>26</sup>

It seems likely that the larger meetings would have followed the format established by Hobson at Waitangi and Mangungu and followed later by Shortland at

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<sup>22</sup> Ibid 76-77.

<sup>23</sup> Ibid 72-73.

<sup>24</sup> Ibid 71-72. Orange says that by chance Williams obtained the signatures of one Wairoa chief and one Ahuriri chief from south of Turanga at two of these meetings.

<sup>25</sup> Symonds to Shortland, 12 May 1840, GBPP 1841 (311) XVII.493 at 101-102; Papers of William Cornwallis Symonds, ATL Micro-MS-0728; Diary of James Williamson Fedarb, 1839-1852, APL NZMS 375 (manuscript & typescript) & ATL MS-Papers-7910-2 (typescript); Colenso to Hobson, 27 June 1840, GBPP 1841 (311) XVII.493 at 105 (returning Fedarb's treaty sheet); Maunsell to Shortland?, 14 April 1840, GBPP 1841 (311) XVII.493 at 99; Journal of Alfred Nesbit Brown, 1835-1850, UoA MSS & Archives A-179; James Stack to Shortland, 23 May 1840, GBPP 1841 (311) XVII.493 at 104; Henry Williams to Hobson, 11 June 1840, GBPP 1841 (311) XVII.493 at 105; William Williams to Shortland, 8 May 1840, GBPP 1841 (311) XVII.493 at 101; William Williams & Jane Williams *The Turanga Journals 1840-1850: Letters and Journals of William and Jane Williams, Missionaries to Poverty Bay*, ed. by Frances Porter (Victoria University Press, Wellington, 1974) ["Williams Turanga Journals"]; Edward Williams "Journal of a voyage to the Northern and Southern Islands of New Zealand in HMS *Herald*, 1840", ATL MS-2407.

<sup>26</sup> See above n 9. Bunbury held meetings at Coromandel (4 May), Mercury Bay (7 May), Tauranga (12 May), Akaroa (30 May), Ruapuke Island (10 June), Otago (12 June), Cloudy Bay (17 June), Mana (19 June) and Hawke's Bay (24 June). At these gatherings Bunbury collected few signatures, some 27 in total.

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Kaitaia.<sup>27</sup> Hobson's instructions to Henry Williams (later said by Hobson to be "in substance" the same as those given to others entrusted with the task) were to obtain signatures to the Treaty from the chiefs by "first explaining to them its principle and object, which they must clearly understand before you permit them to sign".<sup>28</sup> Similarly, Hobson explained in a letter to Bunbury "the mode" he had followed ("in accordance with the native custom") which included explaining the purpose of the Treaty, reading it, "explaining such parts of it as might not be very intelligible to their untutored minds", and inviting the chiefs "to offer any observations, or remarks, or to ask explanation of any part they did not clearly understand". This procedure, Hobson explained, was one which enabled him to be satisfied that "I had complied with the spirit of my instructions".<sup>29</sup>

It seems likely this format was followed elsewhere.<sup>30</sup> If so, the major variation when the conduct of the proceedings was left to a missionary may have been in dispensing with translation,<sup>31</sup> since in that event the explanations of the Treaty and its purpose would have been given directly in Maori. It seems from Bunbury's reports that at smaller gatherings there may have been more discussion between the British and Maori than occurred at larger gatherings, where the debates were conducted principally between the chiefs with further British contribution only where response was called for. There is, however, effectively no record of the discussions in the smaller meetings. Because the British statements at the larger gatherings were mainly in the formal opening up of the discussion and they are more extensively recorded than the subsequent discussion (conducted largely as a

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<sup>27</sup> As to the format adopted at the meetings at Waitangi, Mangungu and Kaitaia, see the sources referred to in n 6 above.

<sup>28</sup> Hobson to Henry Williams, 23 March 1840 (annotated copy enclosed in Hobson to Secretary of State for the Colonies, 25 May 1840), GBPP 1841 (311) XVII.493 at 17.

<sup>29</sup> Hobson to Bunbury, 29 April 1840, reproduced in Bunbury *Reminiscences of a Veteran*, above n 11, 60-65 at 63-64.

<sup>30</sup> This was certainly the format adopted by Bunbury at Tauranga. See Orange *The Treaty of Waitangi*, above n 2, 74. And see also the format of the meeting held at Manukau on 20 March described by Captain William Symonds in his report to Shortland. Symonds to Shortland, 12 May 1840, GBPP 1841 (311) XVII.493, 101-102 at 101.

<sup>31</sup> Undertaken at Waitangi by Henry Williams, at Mangungu by John Hobbs, and at Kaitaia by William Puckey. Some missionary translators may have taken the opportunity to make their own remarks, as Henry Williams seems to have done at Waitangi. See Chapter 19, text accompanying ns 36 & 42-44.

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debate between the chiefs), it seems safe to conclude that the British contribution is more fully captured in the records than the Maori contribution.

For the purpose of this thesis, the significance of the point is that the record, although unsatisfactory and incomplete in many respects, is likely to capture the essential messages given by the British. Sufficient detail is recorded in respect of the northern meetings to give some confidence about the accuracy of the reports of what was said on those occasions. Since the format adopted for the subsequent gatherings was patterned on the northern meetings, there is reason to believe that consistency in approach was followed, leaving the Treaty text as the focus.

This chapter therefore examines the record of British explanations and understanding of the Treaty during the seven months in which signatures were collected. Its purposes are two-fold. First, it provides a check for conclusions reached as to the meaning of the English draft of the Treaty derived from the sources reviewed in Chapters 3-11 (the context provided by British imperial practice to 1840, the development of Colonial Office policy towards New Zealand in the years 1837–39, and the perspectives of the framers of the Treaty). Such check is necessary because if there are any near-contemporary inconsistencies in understanding of the Treaty and its effect they must be confronted. Secondly, the immediate explanations about Treaty meaning are the best evidence of original understanding in the absence of any reason to doubt them.

It is necessary to allow the possibility that British understandings may have shifted during the seven-month period of Treaty debates, with its focus on the Maori text and Maori aspirations for the Treaty. It is possible, too, that views may have developed as early British administration of New Zealand had to confront putting the Treaty into practice even before the signings were completed. In the examination of the written record drawn on in this chapter, however, what is striking is the absence of inconsistency in British explanations and understandings of the Treaty in this period even as thinking was tested by Maori questioning in the debates. Nor does it seem that the practicalities of administration led to any altered

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views about the Treaty, although it must be acknowledged that the extent to which practical issues relating to Maori arose in administration in 1840 is outside the scope of this work. Because New Zealand circumstances may well have changed quickly after 1840, this chapter does not draw on post-1840 records, including the recollections of Henry Williams and James Busby about the Treaty, for which more context is necessary, and which are discussed in Chapters 16-19.

Because the focus of this thesis is British understandings of the Treaty, the chapter does not deal with Maori understandings as such. To the extent that the reported views of Maori were adopted or commented on, however, they are relevant to the understandings of the British witnesses. It is also outside the purpose of this thesis to deal with the controversies about the adequacy of British explanations and the methods used in obtaining Maori adherence to the Treaty. Nor is it within the scope of the chapter to examine the legitimacy of Hobson's proclamations of sovereignty on 21 May 1840, while signatures were still being collected.

Because the purpose of the chapter is to check for inconsistency in British understandings of the Treaty and to identify the immediate explanations given of it, it is not necessary to provide a narrative of the Treaty signings. That task has, in any event, been superbly accomplished by Claudia Orange.<sup>32</sup> Instead, the chapter identifies material in the record relevant to the themes of the thesis, collected as relevant to the questions about Treaty meaning identified at the close of Chapter 2.

### **The reasons for British intervention**

The reasons for British intervention were explained as being the establishment of government to "restrain" British subjects and thereby "protect" Maori from their lawlessness.<sup>33</sup> The language of "protection" and "guardianship" was prominent in

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<sup>32</sup> Orange *The Treaty of Waitangi*, above n 2, chs 3-4.

<sup>33</sup> Hobson, as recorded by Colenso, explained to the chiefs at Waitangi:

The people of Great Britain are, thank God! free; and, so long as they do not transgress the laws, they can go where they please, and their sovereign has no power to restrain them. You have sold them lands here and encouraged them to come here. Her Majesty, always ready to protect her subjects, is also always ready to restrain them.

Her Majesty the Queen asks you to sign this treaty, and so give her the power which shall enable her to restrain them.

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the speeches at the Treaty signings, in contemporary correspondence with chiefs, and in private journal entries.<sup>34</sup> The negative impacts of European settlement on Maori were referred to at the Treaty discussions, with some discussion also about

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Felton Mathew wrote that Hobson had “set forth briefly but emphatically, and with strong feeling, the object and intention of the Queen of England in sending him hither to assume the Government of these Islands”:

He pointed out to them the advantage they would derive from this intercourse with the English, and the necessity which existed for the Government to interfere for their protection on account of the number of white people who had already taken up their abode in this country.

At Mangungu, when, according to Hobson’s later report, the settler Frederick Manning acknowledged to the meeting having counseled chiefs not to sign the Treaty (“admitting, at the same time, that the laws of England were requisite to restrain and protect British subjects, but to British subjects alone should they be applicable”), Hobson told the chiefs that Manning had given his advice “in utter ignorance of th[e] most important fact” that “English laws could only be exercised on English soil”. Hobson reported that he warned the chiefs that

if you listen to such counsel, and oppose me, you will be stripped of all your land by a worthless class of British subjects, who consult no interest but their own, and who care not how much they trample on your rights. I am sent here to control such people, and I ask from you the authority to do so.

At Kaitaia, Shortland is recorded by Johnson as having told the chiefs that the British Government

had sent them a Governor to introduce the blessings of a regular Government and British Laws and Institutions—and to protect them from white men who had latterly come in such numbers to their shores, many of whom being lawless men might injure them . . . .

In his 29 April 1840 instructions to Bunbury, Hobson wrote of his speeches at the Treaty signings up to that date that he had “explained in the fullest manner the reason why Her Majesty had resolved, with their consent, to introduce civil institutions into this land”: “I showed that the unauthorized settlement of British subjects here had rendered such a measure very essential for their benefit”. Colenso *Authentic and Genuine History*, above n 6, 16 (identical to the transcript of Hobson’s speech in Colenso’s Notebook, Brett Library; and substantially the same as the version given in Captain Robertson’s report of the Waitangi proceedings, *The Sydney Herald*, 21 February 1840, at 2); Mathew’s Diary, above n 6, 5 February 1840 (p 7 of the typescript); Hobson to Gipps, 17 February 1840, GBPP 1841 (311) XVII.493, 10-12 at 11; Johnson’s Journal, above n 6, 28 April 1840 (p 20 of the typescript); Hobson to Bunbury, 29 April 1840, reproduced in Bunbury *Reminiscences of a Veteran*, above n 11, 60-65 at 63.

<sup>34</sup> See, for example, Mathew’s Journal, above n 2, 6 February 1840 (p 36 of the typescript) (“[Hobson stated] that he had been sent among them by the Queen to protect & defend them, and to place them under the paternal sway of Gt Britain—and a great deal more such fustian”); Hobson to Gipps, 17 February 1840 (Mangungu), GBPP 1841 (311) XVII.493, 10-12 at 11 (“I entered into a full explanation to the chiefs of the views and motives of Her Majesty in proposing to extend to New Zealand her powerful protection”); English language draft (?) of letter from Shortland to Te Tirarau, c. April 1840, ATL fMS-Papers-2227-06 (inviting Te Tirarau to Okiato/Russell to “hear the articles of the Book which has been assented to & signed by the chiefs of here, of Hokianga, of where, of where; that is, their assenting to Victoria, Queen of England as a guardian for them”) (a Maori language holograph transcript and a typescript of the English draft are at ATL MS-Papers-2493); Symonds to Whiteley, 8 April 1840, GBPP 1841 (311) XVII.493 at 102 (“let all the principal chiefs sign who may wish to give over their country to British protection”); and letter from Hobson to the chiefs of New Zealand, 8 September 1840, GBPP 1841 (311) XVII.493 at 115-116 (“let me say unto you my former speech to the tribes of New Zealand I again speak unto you. ‘I the Governor will protect and direct you.’—Yes, I will indeed be to you a guardian.”).

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Maori inability to protect themselves.<sup>35</sup> The fact that Maori had previously asked for such British protection was stressed.<sup>36</sup> The establishment of Government was also acknowledged to be for the benefit of British subjects<sup>37</sup> but the emphasis in the explanations for British intervention was clearly on the desirability for Maori of bringing the British population under control and on the fact that the government to be established would have Maori interests at heart.<sup>38</sup> Hobson and his officials

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<sup>35</sup> See, for example, Bunbury's report of an exchange he had with a chief at the meeting at Tauranga (12 May):

[The chief] observed, if your nation is so fond of peace, why had we introduced into his country fire-arms and gunpowder? He was in reply, told, that the effects of this trade had been much deplored by the Queen's Government, who were anxious to mitigate its consequences which could only be effected by giving the Queen the necessary powers, and for which purpose they were required to sign the treaty, which had been before explained to them. He next inquired whether my Queen governed all the white nations; I replied, not all; but that she was Queen of the most powerful of all the nations. She had, however, acknowledged the New Zealanders to be an independent nation some years ago; but that treaty [the 1835 Declaration of Independence] had proved abortive, in consequence of the wars of their tribes amongst themselves, and their want of union; and to themselves alone, therefore, were to be attached the evils they had endured. She did not seek the authority of white men, of whatever nation, to govern them; she sought that authority from themselves alone; as a spontaneous gift, vesting her with power for their own good, and to avert the evils which she foresaw were accumulating around them, by the increasing influx of white men, subject otherwise to no law or control.

Bunbury to Hobson, 15 May 1840, GBPP 1841 (311) XVII.493, 103-104 at 103.

<sup>36</sup> See, for example, Hobson's speech at Waitangi as recorded in Colenso *Authentic and Genuine History*, above n 6, 17 ("You yourselves have often asked the King of England to extend his protection unto you. Her Majesty now offers you that protection in this treaty"); Hobson's speech at Mangungu as recorded in Taylor "Notes of the Meeting at Hokianga", above n 6 (p 361 of the typescript) ("He then addressed the natives explaining the intentions of Her Majesty reminding them that they had often applied to the British Gov<sup>t</sup> for assistance and that Queen Victoria had now sent it to them"); and Shortland's speech at Kaitaia as recorded in Johnson's Journal, above n 6 (p 20 of the typescript) ("He said that our Government had often been solicited by the Chiefs of New Zealand to send them a Governor, that she had at length consented to their wishes").

<sup>37</sup> See, for example, Hobson's speech at Waitangi as recorded in Colenso *Authentic and Genuine History*, above n 6, 16 ("Her Majesty Victoria, Queen of Great Britain and Ireland, wishing to do good to the chiefs and people of New Zealand, and for the welfare of her subjects living among you, has sent me to this place as Governor"); and Hobson's speech at Mangungu as recorded in Taylor "Notes of the Meeting at Hokianga", above n 6 (p 361 of the typescript) ("The Lieut Gov<sup>t</sup> opened the meeting with an address to the Europeans pointing out to them the advantage which would be derived from a settled form of Gov<sup>t</sup> being established amongst them").

<sup>38</sup> See, for example, Hobson's speech at Waitangi as recorded in Colenso *Authentic and Genuine History*, above n 6, 16 ("Her Majesty Victoria, Queen of Great Britain and Ireland, wishing to do good to the chiefs and people of New Zealand, and for the welfare of her subjects living among you, has sent me to this place as Governor") & 17 ("I will give you time to consider of the proposal I shall now offer you. What I wish you to do is expressly for your own good, as you will soon see by the treaty"); Hobson's (or Henry Williams's) further statement at Waitangi recorded in Colenso's Notebook, Brett Library, but not reproduced in *Authentic and Genuine History* (on which see Ward "Fact or Fiction?", above n 7, 35-36 & 38): "One thing I'd ask—Do you think it better for yr Country to be ruled by the Q who has no other Int. but yrs or those persons who come here with no other desire but to purchase lands for yourselves

appear to have held a low opinion of the existing European population of New Zealand at this time.<sup>39</sup>

### Why a Treaty?

It was explained to Maori that the British Crown could exercise no “civil powers” in New Zealand unless by the consent of Maori.<sup>40</sup> Although some private opinions may have been that the course of seeking Maori consent through a treaty was misguided,<sup>41</sup> none of the British participants, either privately or publicly, doubted that consent was an essential precondition required by the British Government in order for a colony to be established. Nor is there any questioning of the efficacy of the Treaty in effecting a transfer of sovereignty.<sup>42</sup>

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[sic]?”). See also the views of Rev Richard Davis and “C.B.”, a correspondent to *The Australian*, quoted below at n 108 and accompanying text.

<sup>39</sup> See Hobson to Normanby, 20 February 1840, GBPP 1841 (311) XVII.493 at 12-13; Mathew’s Journal, above n 2, 16 February 1840 (p 59 of the typescript) (“a most vicious European population”); Johnson’s Journal, above n 6, 17 March 1840 (p 1 of the typescript).

<sup>40</sup> According to Colenso’s account, Hobson told the chiefs at Waitangi:

Her Majesty Victoria ... has sent me to this place as Governor.

But, as the law of England gives no civil powers to Her Majesty out of her dominions, her efforts to do you good will be futile unless you consent.

...

The people of Great Britain are, thank God! free; and, so long as they do not transgress the laws, they can go where they please, and their sovereign has not power to restrain them. ...

Her Majesty the Queen asks you to sign this treaty, and so give her that power which shall enable her to restrain them.

Colenso *Authentic and Genuine History*, above n 6, 16. Mathew recorded that Hobson had “set forth briefly but emphatically, and with strong feeling, the object and intention of the Queen of England in sending him hither to assume the Government of these Islands, provided the native chiefs and tribes gave their consent thereto”. Mathew’s Diary, above n 6, 5 February 1840 (p 7 of the typescript). At Mangungu on 12 February, Hobson told the chiefs that “in order to enable him to render that assistance [that they had often asked for] it was necessary for them to enter into a treaty with Great Britain without which he could not bestow on them the benefit of English laws and Institutions”. Taylor “Notes of the Meeting at Hokianga”, above n 6 (p 361 of the typescript). At the meeting at Tauranga on 12 May 1840, Bunbury told Maori that the effects of the trade in munitions was “much deplored by the Queen’s Government, who were anxious to mitigate its consequences, by substituting justice and a regular form of government in their country, and which could only be effected by giving the Queen the necessary powers, and for which purpose they were required to sign the treaty”. Bunbury to Hobson, 15 May 1840, GBPP 1841 (311) XVII.493, 103-104 at 103.

<sup>41</sup> See the views of Felton Mathew discussed in the text accompanying ns 60-62 below. See also Hobson to Bunbury, 29 April 1840, reproduced in Bunbury *Reminiscences of a Veteran*, above n 11, 60-65.

<sup>42</sup> See Mathew’s Journal, above n 2, 5 February 1840 (p 32 of the typescript) (“This is an important day, big with the fate of ‘Hobson and New Zealand’. On the success of our negotiations with the Chiefs today, must depend our future operations. I trust it will be

### What was the “sovereignty” obtained?

In public statements and in private communications, those engaged in obtaining Treaty signatures in 1840 were clear that Hobson had been sent to be a Governor for Maori as well as Europeans and that the British institutions would be set up in the country.<sup>43</sup> None expressed doubt that Maori would, by the Treaty, become subjects of the Queen and Maunsell said so explicitly.<sup>44</sup> Bunbury referred to the Treaty as a “Treaty of Allegiance with the Native Chiefs”, and Shortland writing to Hobson about the Kaitaia meeting reported, without demurring, that it had been the “earnest wish” of the chiefs “to become subjects of Her Majesty”.<sup>45</sup>

It seems, however, also to have been accepted that the Treaty provided a special status for Maori distinct from that of other British subjects. This may be thought implicit in emphasis that the Treaty would enable the new government to control settlers for the protection of Maori. There is no corresponding suggestion that British intervention was for the purpose of regulating Maori society although it was expected that Maori society would change beneficially under British sovereignty.

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auspicious”) & 6 February 1840 (p 40 of the typescript) (“I should have said that the object of the Treaty is to cede voluntarily to the Queen the Sovereignty of New Zealand—a measure which was rendered necessary by the British Gov<sup>t</sup> having some years ago formally recognised the independence of the country”); and Hobson to Bunbury, 29 April 1840, reproduced in Bunbury *Reminiscences of a Veteran*, above n 11, 60-65 at 62 (“I was appointed last year first to treat with the native chiefs for the sovereignty, and then to assume the Government”) & 63 (“[at Waitangi and Mangungu] I explained in the fullest manner the reason why Her Majesty had resolved, with their consent, to introduce civil institutions into this land”).

<sup>43</sup> See, for example, Colenso’s English translation of Busby’s draft circular letter in Maori inviting the chiefs to meet Hobson at Waitangi, c. 30 January 1840, ATL f-76-048 (“to see the Chief of the Queen lately arr<sup>d</sup> here by the Ship/Man-o-War to become a Gov<sup>t</sup> for us”); Hobson’s speeches at Waitangi and Mangungu as quoted above at ns 33, 38 & 40; Shortland’s speech at Kaitaia as quoted above at n 33; Bunbury’s remarks at Tauranga as quoted above at n 35 (final sentence); Hobson to Bunbury, 25 April 1840, GBPP 1841 (311) XVII.493 at 17-18 (“expound to them [Maori] the principles on which Her Majesty proposes to extend to this country the advantages of a settled form of civil government”); Davis to Coleman, 13 February 1840, reproduced in Richard Davis *A Memoir of the Rev. Richard Davis, for Thirty-Nine Years a Missionary in New Zealand*, comp. by John Coleman (James Nisbet & Co, London, 1865) [“Davis A Memoir”] 248-252 at 250-251 (“I tremble much for the natives. Much is to be apprehended. They will require all our care. They are oxen unaccustomed to the yoke”).

<sup>44</sup> Maunsell to Coates, 30 March 1840, CMS CN/M vol 12, 307-311 at 309: “They are now subjects of the Queen”.

<sup>45</sup> Bunbury to Nias, 17 June 1840, ATL qMS-1603; Shortland to Hobson, 6 May 1840, GBPP 1841 (311) XVII.493, 58-59 at 58.

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The distinct status for Maori under the Treaty is suggested by the language of “protection” and “guardianship”,<sup>46</sup> and in statements about ensuring Maori would not be “degraded” in status (statements made particularly to the chiefs) and preserving “most fully” their “rights” and “privileges” (a reference that was distinct from the “rights and privileges” of British subjects extended to them by article 3).<sup>47</sup> These assurances were additional to the guarantees of security in their property. Similarly, statements were made that Maori customs would be protected.<sup>48</sup> These expressions can be contrasted with the references to settlers who were to be secured the benefits of “peace and civil government”.<sup>49</sup>

A special status for Maori was not seen to be inconsistent with a government that would apply to them and settlers. Nor was it apparently seen to be inconsistent with their new status as British subjects. So, for example, Midshipman Henry Comber of HMS *Herald* recorded in his journal of proceedings at Waitangi on 5 February:<sup>50</sup>

The Lieut. Governor opened the meeting by reading a declaration in the name of HM Victoria. Stating that it was our wish to protect and aid the New Zealanders and if they were willing to grant them all the privileges of British Subjects provided they agreed to the terms of a treaty which he afterwards read to them, the sum of which was, “That they should acknowledge HM the Queen of England as their liege Sovereign. . . .”

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<sup>46</sup> See above n 34.

<sup>47</sup> See, for example, Hobson’s retort to Frederick Manning at Mangungu, above n 33: the implication is that the establishment of British authority in New Zealand would ensure that chiefly “rights” were protected; circular letter of Hobson to the chiefs, 27 April 1840, quoted in full in the text accompanying n 69 below (saying that the statement of “evil disposed Pakeha” that “you will be generally degraded” was “false”); Hobson to Bunbury, 29 April 1840, reproduced in Bunbury *Reminiscences of a Veteran*, above n 11, 60-65 at 63-64 (explaining that at Waitangi and Mangungu he had offered “a solemn pledge that the most perfect good faith would be kept by Her Majesty’s government, that their property, their rights, and privileges should be most fully preserved”).

<sup>48</sup> See below ns 69-75 and accompanying text.

<sup>49</sup> Hobson to Gipps, 17 February 1840, GBPP 1841 (311) XVII.493, 10-12 at 11 (writing of his exchange with Manning at Mangungu: “I asked his motive for endeavouring to defeat the benevolent object of Her Majesty, whose desire it is to secure to these people their just rights, and to the European settlers peace and civil government”).

<sup>50</sup> Henry Comber *Tour of Duty: Midshipman Comber’s Journal Aboard HMS Herald on the East Indies Station—Australia, New Zealand & China, 1838–42*, ed. by W David McIntyre & Marcia McIntyre (Macmillan Brown Centre for Pacific Studies, University of Canterbury, Christchurch, 1999) [“Comber Journal”] 116-117 (5 February 1840).

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His Excellency then discoursed with them at some length concerning the advantages they would receive, etc. After which he requested any of the Chiefs who had any question to ask, or any objection to make to come forward. Then came the fun. Each Chief, 37 there were, rose in his turn and stated his objections, which occupied several hours. The principal objection was they thought they would be made slaves or otherwise degraded from their privileges and freedom. It took some time to convince them to the contrary ....

Similarly, a correspondent to *The Australian* newspaper, present at the Treaty signing at Waitangi, explained its “substance” as:<sup>51</sup>

That the natives should yield up to the Queen of England the sovereignty of the country, and should, in return, enjoy all the rights and privileges of British subjects; ... that the native chiefs should retain such portion of the authority exercised by them over their tribes as might be considered proper or necessary by His Excellency the Governor.

The Catholic missionary Father Louis-Catherin Servant described Hobson’s proposal to the chiefs as that, in exchange for their recognition of “his authority” (which “he gives them to understand ... is to maintain good order, and protect their respective interests”), “all the chiefs will preserve their powers and their possessions”.<sup>52</sup>

At Hawke’s Bay, the chief Te Hapuku expressed his concern to Major Bunbury about the loss of chiefly authority by means of “a sort of diagram on a piece of board, placing the Queen by herself over the chiefs as these were over their tribes”. Bunbury told Te Hapuku that “it was literally as he described it, but not for an evil purpose as they supposed, but to enable her to enforce the execution of justice and good government equally amongst her subjects”. He told Te Hapuku that:<sup>53</sup>

It was not the object of Her Majesty’s Government to lower the chiefs in the estimation of their tribes, and that his signature being now attached to the treaty could only tend to

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<sup>51</sup> “C.B.” to the editor of *The Australian*, Sydney, 19 March 1840, at 3. It should be noted that “C.B.” is the only witness to the Treaty signings to suggest that chiefly authority could be limited by the Governor.

<sup>52</sup> Servant to Colin, 5 March 1840, translated in Philip Turner “The Politics of Neutrality: The Catholic Mission and the Maori, 1838–1870” (MA thesis, The University of Auckland, 1986) 88.

<sup>53</sup> Bunbury to Hobson, 28 June 1840, GBPP 1841 (311) XVII.493, 105-112 at 110-111.

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increase his consequence by acknowledging his title; he might, therefore, sign or otherwise as he thought best for his own interest and those of his tribe.<sup>54</sup>

Hobson, in reporting the suggestion in speeches at Waitangi that chiefly dignity would be diminished by the Treaty (a suggestion he put down to the influence of Catholic missionaries and disaffected settlers), wrote that it had been rightly answered by Nene's confidence that the Governor would be a "father" to Maori and would protect their customs.<sup>55</sup>

John Johnson, the colonial surgeon, in his journal cited Nopera Panakareao's speech at Kaitaia as "replete with good sense and good feeling" and "that of a man of reflection". Of Nopera's imagery that "the shadow of the Land goes to the Queen, [but] the substance remains to us", Johnson wrote that "nothing could be more beautiful or expressive" than the "elegant figure by which he expressed the word Sovereignty".<sup>56</sup>

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<sup>54</sup> Although Bunbury reported that a non-signing chief at Coromandel had said that "he could for himself, see no necessity in placing himself under the dominion of any prince or queen, who might govern the white men if she pleased, as he was desirous of continuing to govern his own tribe", Bunbury considered the speech to have been "tutored by some Europeans". Accordingly, the report is not evidence that Bunbury considered the chief to have accurately understood the effect of the British proposals. Bunbury to Hobson, 6 May 1840, GBPP 1841 (311) XVII.493 at 100.

<sup>55</sup> Hobson to Gipps, 5-6 February 1840, GBPP 1840 (560) XXXIII.575 at 9-10.

<sup>56</sup> Johnson's Journal, above n 6, 28 April 1840 (p 22 of the typescript). Whether Nopera was referring to sovereignty in this imagery may be controversial. Robert Vernon Smith, the Parliamentary Under-Secretary for the Colonies, on reading the speech in early April 1841, seems to have thought, more prosaically, that it related to control and alienation of land rather than sovereignty (and said in that connection that "I fear they will discover that the subjects of Queen Victoria have something more than the shadow"). (Stephen, for his part, commended Nopera's speech, writing that he thought there was "great merit in the New Zealand style of Public Speaking". Lord John Russell said of the speech, "the Welshman is a very good metaphor for a New Zealander".) Colonial Office minutes at CO 209/7, 258b. The point being made here, however, is that Johnson certainly considered "the shadow of the Land" an apt metaphor for sovereignty. Nopera's speech on 28 April followed discussions he had had about the meaning of sovereignty (kawanatanga?) with Rev William Puckey and others the preceding evening. Johnson's Journal, above n 6, 27 April 1840 (p 19 of the typescript) ("Noble called upon us in the evening to question Mr Puckey as to the nature of the Treaty he was to sign and particularly as to the meaning of the word Sovereignty, this was endeavoured to be made intelligible to him") & 28 April 1840 (p 22 of the typescript) ("the elegant figure by which he expressed the word Sovereignty showed that he had ponder'd deeply on his conversation of the previous evening").

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Felton Mathew recorded that Hobson at Waitangi on 5 February

caused to be read to [Maori] a treaty which had been prepared, by which the native chiefs agreed to cede the sovereignty of their country to the Queen of England, throwing themselves on her protection but retaining full power over their own people—remaining perfectly independent, and only resigning to the Queen such portion of their country as they might think proper on receiving fair and equitable consideration for the same.<sup>57</sup>

Later, in his diary following the signing of the Treaty, he commented on his impression of the chiefs and what the future might hold for Maori:<sup>58</sup>

During the whole ceremony with the chiefs, nothing was more remarkable than the very apt and pertinent questions which they asked on the subject of the treaty, and the stipulations they made for the preservation of their liberty and perfect independence. They are certainly a most intelligent race and appear susceptible to a very high degree of civilization. They are but little if at all more barbarous than the Britons at the period of the Norman Conquest, and perhaps may in after centuries become an enlightened and powerful a nation as we are ourselves, unless, as has been almost invariably the result of colonisation by Europeans in all parts of the world, they should gradually disappear from the face of the earth.<sup>59</sup>

In two other entries, one in his diary and one in his journal, Felton Mathew was critical of the British approach in the Treaty, describing Hobson's explanation of the Queen's concern to protect Maori as "fustian"<sup>60</sup> and expressing the view that the colony should have been established by right of discovery rather than by adopting "the folly of treating with a parcel of beastly barbarians as if they were civilized and enlightened beings".<sup>61</sup> This personal view, however, proceeded on the

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<sup>57</sup> Mathew's Diary, above n 6, 5 February 1840 (pp 7-8 of the typescript).

<sup>58</sup> Mathew's Diary, above n 6, c. 7 February 1840 (p 14 of the typescript).

<sup>59</sup> In his journal (written for his wife), Mathew wrote: "I cannot tell you half that was said; but you would have been surprised to hear the apt and pertinent questions they proposed, and the bold & manly way in which they stipulated for the preservation of their liberties" and "They certainly are a fine & extraordinary race of men—far more intelligent I suspect than the ancient Briton when their country was invaded by the Romans—God knows but they may make as powerful a people as we now are." Mathew's Journal, above n 2, 6 February 1840 (pp 37 & 40 of the typescript).

<sup>60</sup> Ibid (p 36 of the typescript). "Fustian" here is used in the sense of excessively lofty language.

<sup>61</sup> Mathew's Diary, above n 6, 6 April 1840 (p 21 of the typescript).

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basis that the British had undoubtedly dealt with Maori as a “free and independent” people.<sup>62</sup>

Despite the view that Maori were to be protected in their existing “rights” and “privileges”, how colonial government was to apply to them in practice was not clearly explained in the debates, possibly because British officials did not have a clear idea of this themselves. The only comment on this point was made by Robert Maunsell, who observed of the English text of the Treaty:<sup>63</sup>

It is stated in the preamble that one of the chief objects of the present Governor will be to establish “a settled form of civil government”; while it is not stated that the concurrence of the chiefs will be required, beyond the preliminary act of assenting to the Sovereign power of the Queen; neither, also, are those rights defined which it is stated Her Majesty is anxious to protect for the Native chiefs.

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<sup>62</sup> Ibid (pp 21-22 of the typescript). Mathew was later to write (in a revised diary entry for 5 February 1840 probably written in December 1842) that it had not been “consistent with the dignity of the British nation to send a Captain of the Navy, accompanied by three officers only, sneaking to New Zealand in a small frigate (which was not even placed under his orders) to ask a few barbarians if they would allow the establishment of British authority among them”. He considered that the country should have been taken possession of by right of Cook’s discovery (“a right which no one could have controverted”), with “an adequate force ... sent down in order to awe the natives”, and the administration “established on such a scale as would have given it due weight and authority”. “As actually established, however, the Government was a wretched mockery, existing merely by sufferance—without the power of carrying out a single measure or enforcing a single regulation, contemned and despised by all.” Mathew considered that New Zealand had been acquired “in conformity with one of the popular fallacies—one of the specious humbugs of the day. The atrocities which have been committed in every British Colony on the unfortunate aboriginal inhabitants had awakened the attention of the British public and had been subject of comment and censure in both Houses of Parliament. This, in itself, a very proper and laudable feeling, if properly directed would lead to most beneficial results, but Englishmen have a constant tendency to fly to extremes, and from being utterly reckless of the lives and interests of the aborigines in their colonies, from hunting them down like dogs, poisoning them like rats, and committing every conceivable outrage on their persons and properties, they fall into the opposite error of embargoing the Government, paralysing its energies, endangering the lives and property of their own people, sacrificing their interests, and retarding the progress of the Colony, from their extreme delicacy in the treatment of a set of people who, after all, are simply savages—and very indifferent savages too.” Mathew’s Diary, above n 6, “5 February 1840” (pp 24-26 of the typescript). See, similarly, Bunbury *Reminiscences of a Veteran* (1861), above n 11, 91: “It was not the least of their errors that [the British Government] did not continue the governorship of New Zealand subordinate to that of New South Wales, a few months longer. Sir George Gipps was a practical man. He would have allowed Exeter Hall twaddle to speak, but not to act or intermeddle with the affairs of Local Government, much less to hamper it.”

<sup>63</sup> Maunsell to Coates, 30 March 1840, CMS CN/M vol 12, 307-311 at 309.

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An indication of how the relationship of the Crown and Maori under the Treaty was seen by settlers in New Zealand who did not participate in the Treaty signings is perhaps illustrated by a 25 April 1840 report in *The New Zealand Gazette*. That New Zealand Land Company newspaper had recently relocated from London to Port Nicholson. The *Gazette* republished reports from *The Sydney Herald* and the *Hobart Town Courier* of Hobson's proceedings in New Zealand down to 8 February. They were introduced by the *Gazette* in comments which acknowledged the Treaty's novelty and described the arrangements entered into as a "union" and "confederation".<sup>64</sup>

The great interest which now attaches to the union of New Zealand with the British Empire, induces us to believe that the following details will be acceptable to our readers. In one point of view—namely, as a record of the first formation of a union between a civilized and a savage state by treaty, it deserves to be preserved. Whatever may be the issue of the proposed confederation, after ages will derive instruction from perusing the account of the initiative measure towards the accomplishment of an object altogether novel.

### English law and Maori custom

While statements such as those already referred to by Father Servant, Major Bunbury and Felton Mathew indicate some awareness that a dynamic was being set up between British order and Maori social organisation, other contemporary comment was less nuanced.<sup>65</sup> At face value, it seems to suggest that British

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<sup>64</sup> *The New Zealand Gazette*, Wellington, 25 April 1840, at 3.

<sup>65</sup> See, for example, the *Commercial Journal and Advertiser*, Sydney, 22 February 1840, at 2 ("On the 5th instant, the Governor ... met the Chiefs for the purpose of explaining the objects of Her Majesty, in sending out himself and others to form a civilized Government among them—which was to protect alike the native and the emigrant"); Journal of Rev John Hobbs (WMS), ATL Micro-MS-0612-11 (microfilm copy of manuscript) & AML MS144 Box 1 Vol 5 (typescript), 28 March 1840 (pp 577-578 of the typescript) ("a new Era has commenced in New Zealand .... [A] Lieutenant Governor, Secretary, Land Surveyor & Superintendent of Police has [sic] already arrived to commence the establishment of British Law. I believe the whole of the Chiefs of what is called the Confederation have now signed a treaty ... ceding to her Brittanic Majesty the complete sovereignty of their country, which treaty pledges the Queen to support the native chiefs thus signing in the possession of their own lands and promises them all the rights and privileges of British subjects. ... I am inclined to think that the extension of British Law to this country will in the end be a blessing to the Natives who were always destroying one another"); Maunsell to Coates, 30 March 1840, CMS CN/M vol 12, 307-311 at 309 ("They are now subjects of the Queen & an injudicious law if forced upon

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government and law were to apply equally to Europeans and Maori. It does not, for example, say anything about the protection of Maori custom (although equally it does not suggest it was abrogated either). Most of these references are passing comments about the Treaty. More significantly, Colenso, in February 1840, suggested that under the Treaty the chiefs had lost the power of life and death over their slaves. He considered that this was one of the matters not properly explained to the chiefs at Waitangi.<sup>66</sup>

The question of preservation of custom was raised on a number of occasions reflecting Maori concern on that score. At Waitangi itself, in promising protection of the different religious faiths, a promise was given to protect “me te ritenga Maori hoki” (translated by Colenso as “Maori custom, or usage”).<sup>67</sup> It is doubtful whether this assurance extended beyond protecting (non-Christian) Maori religious belief,<sup>68</sup> but in subsequent dealings the promise was explicitly extended to custom

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them in their present state may result in their ruin. ‘Summum jus, est summi injurie’ [extreme right is extreme injury] is a maxim nowhere more true than in this land; & I cannot therefore but hope that Government will ever have an experienced monitor near them to point out measures most advisable and to urge them to provide men that will exercise a temperate upright & judicious authority; in a word to [give?] to them the advice given the Great Jewish lawyer [Moses] to provide ‘able men, such as fear God, men of truth & hating covetousness’ [Exodus 18:21]”); Journal of Rev Charles Baker (CMS), ATL qMS-0110 (typescript), 5 February 1840 (p 9) (“The object of the meeting was that the Governor might propose a Treaty to secure the Queen of England sovereignty & to the introduction of British law”). In addition, there are statements made by Hobson and Bunbury which suggest equal treatment of Maori and Europeans: see letter of Hobson to the Chiefs of New Zealand, 8 September 1840, GBPP 1841 (311) XVII.493, 115-116 at 116 (“The good Government of our Queen shall protect and direct us, in the wrongs or misunderstandings of the native people, as also of the white people”); Bunbury to Hobson, 28 June 1840, GBPP 1831 (311) XVII.493, 105-112 at 110 (“[The Queen’s position above the chiefs was] not for an evil purpose as they supposed, but to enable her to enforce the execution of justice and good government equally amongst her subjects”). But these statements exist alongside others assuring the chiefs that they will retain their customs and authority: see, for example, text accompanying n 53 above and ns 74-75 below.

<sup>66</sup> Colenso to Secretaries of the Church Missionary Society, 24 January 1840, CMS CN/M vol 12, 708-719 at 715-716.

<sup>67</sup> Colenso *Authentic and Genuine History*, above n 6, 31-32.

<sup>68</sup> Compare *ibid* to Journal of Rev Richard Davis (January 1840-January 1841), CMS CN/M vol 12, 583 (6 February 1840); Davis to Coleman, 5 February 1840, with addendum dated 8 February 1840, reproduced in Davis *A Memoir*, above n 43, 246-248 at 247; and Henry Williams “Early Recollections” in Hugh Carleton *The Life of Henry Williams, Archdeacon of Waimate* (vol 2, Wilsons & Horton, Auckland, 1877) 14-15.

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more generally. For example, Hobson sent a circular letter to the chiefs on 27 April 1840 to counter suggestions being made that their customs were under threat:<sup>69</sup>

Friend,

The Governor has heard that a certain evil-disposed and otherwise mischievous Pakeha in your midst has been stirring you up so that your hearts may be turned against the sovereignty of the Queen, this evil disposed Pakeha stating that: “Your lands will be wrested from you; that your original customs will be trampled down and abolished, and that you will be generally degraded.” Now, these allegations are not only bad, but they are the false statements of evil-disposed persons. Do not hearken to their bad statements. What the Governor tells you all is perfectly true, so hearken unto him.

I, the Governor, declare: That the statements made to you by these evil-disposed persons are absolutely false. I now repeat to you that which I have already assured the chiefs at the meetings held at Waitangi and Hokianga, namely: That the Governor will ever strive to assure unto you the customs and all the possessions belonging to the Maori. The Governor will also do his utmost towards the maintenance of peace and good will and industry in this country. Please publish this letter to your tribe.

From your friend,

The Governor.

This does not seem simply to have been a tactic to counter Maori agitation.<sup>70</sup> In his report to Gipps about the Waitangi signing, Hobson wrote with approval of Nene’s speech, which had specifically adverted to the essentiality of Hobson “preserv[ing] our customs”.<sup>71</sup> Shortland, in speaking to Maori at Kaitaia, assured them that they would have the protection both of English law and their own “native laws”. He said that the Queen

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<sup>69</sup> Circular letter of Hobson to the chiefs, 27 April 1840 (see *BiM* 81), as translated by T Lindsay Buick *The Treaty of Waitangi: How New Zealand Became a British Colony* (3rd ed, Thomas Avery & Sons Ltd, New Plymouth, 1936) 191.

<sup>70</sup> Rumours of a “projected conspiracy” among northern Maori tribes to attack the Government were received at about this time. See Johnson’s Journal, above n 6, 6, 10 & 28 April 1840 (pp 12, 13 & 23 of the typescript).

<sup>71</sup> Hobson to Gipps, 5-6 February 1840, GBPP 1840 (560) XXXIII.575, 9-11 at 10.

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had sent them a Governor to introduce the blessings of a regular Government and British Laws and Institutions—and to protect them from white men who had latterly come in such numbers to their shores, many of whom being lawless men might injure them—that the Queen would not interfere with their native laws nor customs but would appoint gentlemen to protect them ...<sup>72</sup>

When at Tauranga on 12 May Bunbury was asked if the Governor would send soldiers to keep the peace should a tribe wish to abstain from war, he answered that the Governor would prefer to “mediate” between the tribes and, if asked to do so, would “no doubt” comply with “the custom of their country ... by ... insisting on compensation being made to the party injured, by the party offending”.<sup>73</sup> Such an approach may be thought consistent both with maintenance of Maori custom and the special status of Maori in the new order.

Similarly, at Hawke’s Bay, Bunbury agreed with Te Hapuku that the Queen was “over the chiefs as they were over their tribes” and explained that this was to “enable her to enforce the execution of justice and good government equally amongst her subjects”. The effect, however, was explained by Bunbury as being:<sup>74</sup>

[T]he tribes must no longer go to war with each other, but subject their differences to her arbitration; strangers and foreigners must no longer be plundered and oppressed by the natives or their chiefs, nor them injured or insulted by white men.

Bunbury also mentioned in a report that one chief had expressed approval when it was explained to him that the government would be “even-handed” and “equal” in dealing with “evil-doers” whether they were Maori or European. He then immediately went on to discuss the Maori custom of dividing up the effects of deceased persons to the exclusion of the widow and heirs. While expressing confidence that, “in cases of white men”, once it was explained that this was not

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<sup>72</sup> Shortland’s speech at Kaitaia as recorded in Johnson’s Journal, above n 6, 28 April 1840 (p 20 of the typescript).

<sup>73</sup> Bunbury to Hobson, 15 May 1840, GBPP 1841 (311) XVII.493, 103-104 at 103.

<sup>74</sup> Bunbury to Hobson, 28 June 1840, GBPP 1841 (311) XVII.493, 105-112 at 110.

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the custom of the British, “these domiciliary visit[s]” would end, Bunbury did not suggest that the custom would be displaced as between Maori.<sup>75</sup>

The interface between custom and chiefly authority, on the one hand, and English law and legal institutions, on the other, remained to be developed. Hobson and Bunbury both referred to the precedent provided by India. Separately, they suggested that English law and legal institutions would have to be modified in application to Maori, in part to recognise their level of social development and customs. This could be indicative of a view that, without such modification (which Hobson asked Gipps to refer to his law officers for possible legislation), English law and any courts established for the colony would supplant Maori custom and its enforcement. There is, however, no explicit consideration of this point. It is inconsistent with the assurances given in 1840 to Maori about the protection of their custom and chiefly authority. It may be that the immediate focus of Hobson and Bunbury was to put in place institutions which could deal with serious criminal offending and disputes about land which could otherwise compromise peace and good government. If so, they may have envisaged a continuing role for custom in inter-se Maori disputes.

Hobson, in May 1840, proposed to Gipps “modification of the Criminal Law as regards the Aborigines of New Zealand”:<sup>76</sup>

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<sup>75</sup> Ibid 109.

<sup>76</sup> Hobson to Gipps, 7 May 1840, SRNSW NRS 905, 4/2540 (also ANZ Micro-Z 2713 & UoA Microfilm 09-006 Reel 7). Hobson’s letter was not answered until late December 1840 when Gipps made the following reply:

Sir,

Your despatch of the 7th May last, No 35, was referred on the 12th June to the Attorney General. It has this day been returned to me with the following opinion:—

“The suggestions of the Lieutenant Governor of New Zealand embrace so difficult a subject that I fear it could not be matured sufficiently to be brought before the Legislative Council at least until the land question (which now immediately presses) be disposed of. At present I do not think it would be consistent with Her Majesty’s Instructions to the Governor to introduce a Bill of so unusual a nature as that suggested. It would be a proper subject to submit to the Home Government for consideration, but the necessity for the proposed law should be shown by reference to the habits and feelings of the natives and the general circumstances of New Zealand which are not well understood.”

I regret that so much delay should have occurred in furnishing his opinion, and can only hope that no inconvenience may have arisen therefrom.

I have &c

George Gipps

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Whereas it would be inexpedient to carry into effect against the Aborigines of New Zealand the penalties attached to the Commission of Robbery and similar offences by the Criminal Laws of England especially when those offences are committed entirely amongst themselves, to subject them to the Jurisdiction of English Courts of Law except in cases involving points of Real Property and of murder, inasmuch as in the first place they have not attained a sufficient degree of civilization to understand the Justice of their application as it regards them and in the second place their want of the knowledge of the English Language the difference of their customs and usages which would tend to impede the progress of Justice and interfere with the [??] of Courts. It is therefore proposed that in order to remedy these Evils that

The different Protectors of Aborigines<sup>77</sup> be empowered to hold Native Courts in their respective Districts for the trial of all offences committed by the Native population amongst themselves which do not amount to Felony, except in cases which involve the rights of property such case to be tried by the Court of Claims or the Supreme Court.

That in all cases of Felony except murder (such cases to be reserved for the proper Criminal Courts) two magistrates to be associated with the different Protectors of Aborigines with power to decide summarily.

All decisions in such Native Courts to be given according to the common and Statute law of England. Transportation and Imprisonment for long periods be abolished and either a Scale of Fines or imprisonment for short periods at the option of the Protectors and Magistrates be substituted.

Such Scale of Fines to accord as much as circumstances will allow with the Laws and Customs of the Aborigines.

In all cases where the Aborigines are not Believers in the Christian Faith a Simple declaration be substituted in the place of Oaths.

All cases occurring either between the Aborigines and Europeans or Europeans and Aborigines, be submitted to the Jurisdiction of the usual Courts modelling however the proceedings and penalties as far as regards the Aborigines on the same system adopted in the Native Courts of the Protectors.

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Gipps to Hobson, 22 December 1840, SRNSW NRS 4530, 4/1651 (also ANZ Micro-Z 2710 & UoA Microfilm 09-006 Reel 4). I am grateful to Shaunnagh Dorsett for drawing my attention to Gipps's letter.

<sup>77</sup> The appointment of the missionary, George Clarke, as Chief Protector of Aborigines in May 1840, was followed in subsequent months by the appointment of sub-protectors.

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The Protectors and Sub-Protectors to act in all cases before the Courts as Counsel for the Aborigines.

That the Jurisdiction of the Protectors as regards the Aborigines be summary and without appeal and neither Counsel or Solicitors be allowed to plead in them.

That Establishment of Native Courts is not without precedent inasmuch as Courts of a similar nature exist throughout India [the words “have been in existence for many years” are crossed out].

Bunbury recommended “judiciary circuits” by a naval officer acting as magistrate, which would “be a check on the natives” but with “powers to apprehend also our more obstreperous countrymen” to convey them to town for trial. He suggested that Maori needed to be prepared gradually for English law and institutions.<sup>78</sup>

Viewing the peculiar habits and customs of the natives of New Zealand, and the circumstances under which we have obtained the sovereignty of these islands, it is worthy of consideration whether, as in India, some trifling degree of deference might not be paid to their present state and condition, in order gradually to prepare and make them comprehend the complex and expensive forms of our civil institutions, and criminal laws.

While Hobson and Bunbury clearly realised that matters would have to develop, there is no suggestion in their reports that English law could be applied to Maori in the same way as to settlers. An evolving dynamic of English law and Maori custom does not seem to have troubled British participants in 1840 or to have been regarded by them as inconsistent with the Queen’s sovereignty.

### “One people”?

At the Treaty signing at Waitangi, Hobson is famously reported to have shaken the hands of the chiefs who signed with the words “He iwi tahi tatou”. Colenso translates this as “We are [now] one people”, and says that it “greatly pleased” the chiefs.<sup>79</sup> Mathew recorded that all the officials present spoke the words, which he

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<sup>78</sup> Bunbury to Hobson, 28 June 1840, GBPP 1841 (311) XVII.493, 105-112 at 111.

<sup>79</sup> Colenso *Authentic and Genuine History*, above n 6, 35.

translates as “Now we are brethren and countrymen”.<sup>80</sup> It seems unlikely that these words were intended to convey that the Treaty submerged Maori identity or distinctiveness in the new polity and society. Such sense would be at odds with the explanations and understandings of Hobson, Mathew and others expressed at the time as discussed above. It would also be unlikely that the chiefs would greet with approval a sentiment at odds with expressed concerns about maintenance of their own authority. Mathew’s translation resonates with the anti-slavery movement’s cry “We are all brethren”.<sup>81</sup> So understood, it may have emphasised common humanity and the spirit in which the Treaty was undertaken. Certainly there is nothing in the Treaty speeches and contemporary commentary to indicate that British participants looked to assimilation of Maori to British society as an inevitable consequence of the Treaty. As indicated, Mathew, for example, thought that Maori could develop “in after centuries” to “become an enlightened and powerful a nation as we are ourselves”.<sup>82</sup> And Henry Williams wrote in June 1840 that it was essential, if Maori were not to “become extinct”, that “a broad line of separation [be] preserved between the Europeans and the Natives”.<sup>83</sup>

### Maori property in land

Given the terms of article 2 of the Treaty and the way in which the Treaty purpose was explained, it is perhaps not surprising that the contemporary written record shows that there was little said about Maori property in land beyond the assurance that Maori lands were secured to them.<sup>84</sup> Certainly nothing in what was said

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<sup>80</sup> Mathew’s Diary, above n 6, 5 February 1840 (p 12 of the typescript).

<sup>81</sup> See Chapter 3, text accompanying n 182.

<sup>82</sup> See above ns 58-59 and accompanying text.

<sup>83</sup> Report of Henry Williams, 30 June 1840, CMS CN/M vol 12, 394-397 at 397.

<sup>84</sup> See, for example, Busby’s preliminary remarks at Waitangi recorded in Colenso *Authentic and Genuine History*, above n 6, 17 (“Mr Busby addressed the Natives to the effect that the Governor was not come to take away their land, but to secure them in the possession of what they had not sold”); Hobson to Bunbury, 29 April 1840, reproduced in Bunbury *Reminiscences of a Veteran*, above n 11, 60-65 at 63-64 (“I offered [at Waitangi and Mangungu] a solemn pledge that the most perfect good faith would be kept by Her Majesty’s government, and their property, their rights, and privileges should be most fully preserved”); Bunbury to Hobson, 28 June 1840, GBPP 1841 (311) XVII.493, 105-112 at 107, discussing the endorsement he made on a document in English presented to him by the chief Tuhawaiki at Ruapuke Island (the document declared that the Island was the property of Tuhawaiki and his tribe and of the various individuals to whom Tuhawaiki had allotted portions, and Bunbury

publicly or in private communications or journals indicates that the British participating questioned whether Maori had property in land and the word “property” was used of land in the discussions.<sup>85</sup> None of the doubts expressed in Sydney before February 1840 and beyond that date (discussed in Chapters 11, 14 and 16) as to the nature of Maori interests in land and their ability to alienate it (or of settlers to receive it) intruded at all on the Treaty discussions. If Hobson or other officials held any such doubts they did not say so. Crown pre-emption was treated by the British as something requiring Maori consent in the Treaty. Necessarily implicit was the recognition that, without such agreed restraint, Maori could alienate land to whomever they chose. In the discussions, existing European purchases of Maori land prior to the Treaty were (where transacted without fraud upon Maori and in accordance with custom) treated as effective transfers of property.<sup>86</sup> If the English law doctrine of tenures was thought to affect Maori property in land, there was no mention of it in either the public statements or privately recorded comment.<sup>87</sup>

### **The status of unoccupied and uncultivated land**

There is no suggestion in the record of Treaty discussions and comments upon them that Maori interests in land did not extend to unoccupied and uncultivated

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wrote on the back of it: “I have seen this paper but am not prepared to give an opinion or any information on the purport of it. The treaty guarantees the full and exclusive possession of their lands and other properties to the natives”).

<sup>85</sup> See above n 84. See also Davis to Coleman, 5 February 1840, with addendum dated 8 February 1840, reproduced in Davis *A Memoir*, above n 43, 246-248 at 247-248 (“The treaty preserves to the Maoris all their land possessions, with the privilege of selling or not selling their land, with this proviso, that if they sell, they must sell to Government—a necessary restriction, to guard the natives from imposition”); “C.B.” to *The Australian*, Sydney, 19 March 1840, at 3 (the “substance of the treaty” was that Maori “should be confirmed in the possession of all the lands now held by them”); and Mathew’s Journal, above n 2, 16 February 1840 (p 59 of the typescript) (reference to “native proprietors”).

<sup>86</sup> See, for example, the speeches of James Busby and Henry Williams at Waitangi in defence of their land purchases as recorded in Colenso *Authentic and Genuine History*, above n 6, 20-21; and Hobson to Normanby, 20 February 1840, GBPP 1841 (311) XVII.493, 12-13.

<sup>87</sup> Bunbury reported that Edward Williams and Captain Stewart (the pilot engaged on the *Herald*’s southern voyage) were “surprised at the very clear manner” in which one chief explained article 2 to another, suggesting that they did not understand Maori interests in land to be in the nature of “rights of occupancy” only (with the ultimate ownership of land being in the Crown) since it is highly unlikely that the chief would have explained land interests in this way. Bunbury to Hobson, 28 June 1840, GBPP 1841 (311) XVII.493, 105-112 at 108.

lands. Many of the British participants to the Treaty were purchasers of such lands. Those who were not were well aware that others had purchased unoccupied lands. All knew that the concerns about loss of land expressed by chiefs at the Treaty signings, particularly in the north, were made in relation to lands generally and were not limited to those occupied and under cultivation. Statements such as that of Busby at Waitangi that “the Governor was not come to take away their land, but to secure them in the possession of what they had not sold” did not differentiate between lands occupied and not occupied and could not have been intended or understood to be so limited.<sup>88</sup>

### **The Crown’s right of pre-emption**

There have been suggestions that the Crown’s right of pre-emption may have been understood as a right of first offer only, leaving Maori free to sell land to others if it was not acquired by the Crown.<sup>89</sup> There is, however, no support for this in the contemporary record. In both their public statements and private comments, British participants in the Treaty debates exhibited a clear understanding that the right of pre-emption secured to the Crown by article 2 was a monopoly right of purchase of Maori lands.<sup>90</sup>

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<sup>88</sup> Colenso *Authentic and Genuine History*, above n 6, 17. See also Comber *Journal*, above n 50, 117 (“[The Treaty provided that] they should submit to her the rights of pre-emption of any land which they should be desirous of parting with”); and Mathew’s *Diary*, above n 6, 5 February 1840 (pp 7-8 of the typescript) (“... only resigning to the Queen such portion of their country as they might think proper on receiving a fair and equitable consideration for the same”).

<sup>89</sup> See Chapter 2, text accompanying ns 385-402.

<sup>90</sup> See, for example, Davis to Coleman, 5 February 1840, with addendum dated 8 February 1840 (see above n 85); Davis to Secretary of the Church Missionary Society, 8 February 1840, CMS CN/M vol 12, 15-18 at 16 (“the natives are no longer allowed to sell their lands to private individuals but to Government”); Colenso to Secretaries of the Church Missionary Society, 24 January 1840, CMS CN/M vol 11, 708-719 at 715 (“As to their being aware that by their signing the Treaty they have restrained themselves from selling their land to whomsoever they will, I cannot for a moment suppose that they can know it”); and Mathew’s *Diary*, above n 6, 6 April 1840 (pp 21-22 of the typescript) (“England ... offers them a ‘Treaty’ forsooth, in which precious document she tells them ‘You are perfectly free and at liberty to do what you like with your own, and we have no intention of taking it from you, but if you wish to sell we will buy’. In the same breath, however, she tells them that the right of pre-emption (blessings on their learning) is vested in the Queen, and therefore though they are quite free and independent of course, yet that they must not sell their land to anybody but her little Majesty”). However, Henry Comber seems to have thought that Maori could sell land to settlers with the sanction of

## Chapter Twelve: Signing the Treaty

The reasons why the Crown sought the right of pre-emption were explained to Maori as being for their benefit. It was to prevent their being cheated or imposed upon by “worthless” Europeans and from imprudently selling lands against their long-term interests. It was also explained that the Crown was anxious to ensure that their interests were advanced in any land sales, by receipt of proper value and the establishment of orderly and productive European settlements.<sup>91</sup> Although later, as is discussed in Chapter 18, there were suggestions that Maori had been told only half the story (with the benefits obtained by the Crown by pre-emption—effectively ability to finance and direct settlement—not properly explained), this may be a perspective reached with hindsight.<sup>92</sup> At the time, there is no indication that the officials appreciated that immigration pressures would set up a conflict between the protective and settlement purposes of pre-emption. Certainly the

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the government: “[the Treaty provided that] they should submit to her [the Queen] the rights of pre-emption of any land which they should be desirous of parting with. That they should not at any time dispose of any land to private individuals without the Sanction of HM Government.” *Comber Journal*, above n 50, 117.

<sup>91</sup> See Hobson’s riposte to Manning at Mangungu as quoted in Hobson to Gipps, 17 February 1840, GBPP 1841 (311) XVII.493, 10-12 at 11 (“if you listen to such counsel, and oppose me, you will be stripped of all your land by a worthless class of British subjects, who consult no interest but their own, and who care not how much they trample on your rights”); speech of Hobson to chiefs as recorded in Johnson’s *Journal*, above n 6, 7 April 1840 (p 12 of the typescript) (“He told them that he was commanded by the Queen to prevent them from selling all their lands to white men, instead of coming to take them away that the Queen would only buy such Lands from them as they did not require and that they would see that what he said was true”); Bunbury’s report of the Treaty signing at Coromandel (4 May 1840) in Bunbury to Hobson, 6 May 1840, GBPP 1841 (311) XVII.493 at 100 (“Mr [Edward] Williams explained the treaty; its object in consequence of the influx of strangers; and that the claim of pre-emption on the part of Her Majesty was intended to check their imprudently selling their lands without sufficiently benefiting themselves, or obtaining a fair equivalent”); Bunbury’s report of the meeting at Tauranga (12 May 1840) in Bunbury to Hobson, 15 May 1840, GBPP 1841 (311) XVII.493, 103-104 at 103 (“On my speaking of the sale of lands, and of the right of pre-emption claimed by the Queen and intended equally for their benefit, and to encourage industrious white men to settle amongst them, to teach them arts, and how to manufacture those articles which were so much sought after and admired by them, rather than by leaving the sale of large tracts of lands to themselves, they might pass into the hands of white men, who would never come amongst them, but to hamper by their speculations the industrious. The Queen, therefore, knew the object of these men, many of whom, I had no doubt, had counseled them not to sign the treaty; but she would, nevertheless, increasingly exert herself, to mitigate the evils they sought to inflict on this country, by purchasing their lands herself at a just valuation”); and Shortland’s speech at Kaitia as recorded in Johnson’s *Journal*, above n 6, 28 April 1840 (p 20 of the typescript) (“the Queen ... would appoint gentlemen to protect them and prevent them from being cheated in the sale of their Lands—that Her Majesty was ready to purchase such as they did not require for their own use, to dispose of again to her subjects who she would take care were respectable men who would not injure them”).

<sup>92</sup> See Chapter 18, text accompanying ns 20 & 46.

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missionaries, who had a long-standing concern about alienation of Maori land, regarded the purpose of pre-emption at this time as being protective of Maori retention of land.<sup>93</sup>

### Conclusion

The account of the making of the Treaty given in this chapter indicates that the various contemporary British explanations and understandings of the Treaty were substantially consistent with each other. Claudia Orange's major history of the Treaty does not suggest otherwise. In particular, she finds that Maori were promised "a degree of ... independence under British sovereignty" and that the Treaty was explained to them as necessary "in order to establish effective law and order—primarily for controlling Europeans"<sup>94</sup>:

Maori authority might have to be shared, but Hobson would merely be more effective than Busby, and British jurisdiction would apply mainly to controlling troublesome Pakeha; Maori authority might even be enhanced.<sup>95</sup>

...

... Maori and Pakeha would share authority. The intervention of Britain would still be limited. At Kaitaia at least, the chiefs were assured that Maori customs and law would not be interfered with, and Maori were encouraged to believe that their rangatiratanga would be enhanced. While they might have reasoned, as Heke did, that they could not be certain of the effect of the treaty,<sup>96</sup> they might reasonably have believed that they were

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<sup>93</sup> See, for example, Davis to Coleman, 5 February 1840, with addendum dated 8 February 1840, (see above n 85); Davis to Secretary of the Church Missionary Society, 8 February 1840, CMS CN/M vol 12, 15-18 at 16 ("For a long time I had seen that nothing but ceding the sovereignty of the country could possibly, according to human probability, preserve the people. The inundation of emigrants & the manner in which land had been purchased, were indicative of destruction of the Native Tribes. Under such circumstances the only chance which appeared for them was that we should buy some tracts of country on which they may live... . Now we are delivered from cases of that nature, as the natives are no longer allowed to sell their lands to private individuals but to Government. This is a very judicious arrangement. Had this step not been taken much difficulty would have still arisen, as the calls for land would have increased with the number of emigrants").

<sup>94</sup> Orange *The Treaty of Waitangi*, above n 2, 33.

<sup>95</sup> Ibid 56.

<sup>96</sup> See Hone Heke's speech at Waitangi as recorded by Colenso in his *Authentic and Genuine History*, above n 6, 26: "[W]e the Natives are children—yes, mere children. Yes; it is not for us, but for you, our fathers—you missionaries—it is for you to say, to decide, what it shall be.

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ceding only limited rights to Britain—perhaps a relinquishment of responsibility over external affairs—and that Maori control over tribal matters would remain.<sup>97</sup>

Orange takes the view, however, that these explanations, “presented in a manner calculated to secure Maori agreement”, were consciously misleading in emphasising the “benefits to be gained from the treaty ... rather than the restrictions that would inevitably flow”. The transfer of power to the Crown was “played down”<sup>98</sup>:

Couched in terms designed to convince chiefs to sign, explanations skirted the problem of sovereignty cognisable at international law and presented an ideal picture of the workings of sovereignty within New Zealand.<sup>99</sup>

...

Essentially, success depended on the degree to which Maori could be persuaded that they would benefit from signing the treaty. Inevitably, this required a continuation of explanations that stressed the advantages of British intrusion and minimised the effects on Maori independence. The pattern established at Waitangi would be repeated around the country.<sup>100</sup>

...

... Nopera had failed to grasp the transfer of power and authority implied in the treaty.<sup>101</sup>

...

Certainly there was a desire to deal more fairly with the Maori, to improve on the record of British settlement, but tact, flattery, guile, bluff and a dash of subterfuge were all part of the diplomatic equipment.<sup>102</sup>

In these views, Orange assumes that the acquisition of sovereignty was incompatible with Treaty guarantee of rangatiratanga and the assurances given at

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It is for you to choose. For we are only Natives. Who and what are we? Children—yes, children solely. We do not know: do you then choose for us.”

<sup>97</sup> Ibid 89.

<sup>98</sup> Ibid 33.

<sup>99</sup> Ibid 56.

<sup>100</sup> Ibid 60.

<sup>101</sup> Ibid 82.

<sup>102</sup> Ibid 91.

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the Treaty signings of protection of chiefly standing and custom. The assumption is questioned in Chapter 20, in part drawing upon the context of the Treaty signings described here. For the purposes of this chapter, however, it is sufficient to note in conclusion that there is no evidence in the contemporary record, including private communications and diaries, to suggest any conscious misrepresentation of the Treaty effect to Maori, let alone any concerted plan among officials and missionaries to that end. The officials, for their part, professed “good faith” in everything they did;<sup>103</sup> and it is almost inconceivable that the missionaries would have allowed themselves to be used to obtain the Treaty if they had not believed it was in the best interests of Maori (as they saw them) and that Hobson and the British Government were genuine in the assurances they gave. The missionaries did not see British intervention as an outcome which in itself would assure the future for Maori. They expected to have to maintain vigilance on behalf of Maori in the times ahead.<sup>104</sup> Some were only reluctantly co-opted into providing

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<sup>103</sup> Hobson told Gipps that he had “assured” the chiefs assembled at Waitangi “in the most fervent manner that they might rely implicitly on the good faith of Her Majesty’s Government in the transaction”. Hobson to Gipps, 5-6 February 1840, GBPP 1840 (560) XXXIII.575, 9-11 at 9. To Bunbury, Hobson explained that at Waitangi and Mangungu he had “offered a solemn pledge that the most perfect good faith would be kept by Her Majesty’s Government”. Hobson to Bunbury, 29 April 1840, reproduced in Bunbury *Reminiscences of a Veteran*, above n 11, 60-65 at 63.

<sup>104</sup> See Davis to Coleman, 13 February 1840, reproduced in Davis *A Memoir*, above n 43, 248-252 at 250-251 (“I tremble much for the natives. Much is to be apprehended. They will require all our care. They are children in every sense of the word. They are oxen unaccustomed to the yoke”); Davis to Secretary of the Church Missionary Society, 8 February 1840, CMS CN/M vol 12, 15-18 at 17 (“But while I would rejoice in the apparent deliverance which has thus been effected for the natives, I cannot but look forward with trembling to our future prospects. A change will take place in the country & the natives will be exposed to many temptations to which they have been hitherto strangers. Never was there a time when Missionaries were more loudly called upon to act with the utmost vigilance & discretion”); Journal of Rev Samuel Ironside (WMS), ATL MS-Papers-3817-1 (photocopy) [“Ironside’s Journal”], 1 February 1840 (“Heard today that Captain Hobson ... had arrived .... O that this may be for the benefit of the New Zealanders in soul & body”); Journal of Rev James Buller (WMS), ATL qMS-0300, 2 February (“The steps which may now be anticipated on the part of the British Gov<sup>t</sup> will [materially?] alter the state of things in this country. May the Lord preside & overrule in all things”); James Kemp to Secretary of the Church Missionary Society, 11 February 1840, CMS CN/M vol 12, 101-104 at 102 (“What the event of these things will be we must leave in the hands of Him who is too wise to err & to good to be unkind. The number of Europeans who have come & are continually coming to this land is considered by all as evidently pointing out & calling loudly on the British Government that British laws should be established in New Zealand; & I think it is generally considered that between the two evils the least is chosen & not a better step could under existing circumstances be adopted than what is now in progress”); and report of Henry Williams, 30 June 1840, CMS CN/M vol 12, 394-397

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assistance to Hobson and gave the work less priority than their spiritual ministry which was then much in demand (again suggesting that they were not adherents to any hidden agenda).<sup>105</sup> They had come to their own judgement about whether to support the Treaty (for example, through the explanation of British motives passed on by Bishop Broughton<sup>106</sup> and through their assessment and questioning of

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at 397 (“We feel the present is a season which demands every exercise of faith and patience. The Mission assailed on every side with grievous, malicious and unfounded charges and the country threatened with invasion on all sides by men seeking their own advancement at the expense of the Aborigines”).

<sup>105</sup> See, for example, William Williams to Shortland, 8 May 1840, GBPP 1841 (311) XVII.493 at 101 (“I am happy to inform you that the leading men in this bay [Poverty Bay] have signed the treaty, and there is no doubt but all the rest will follow their example. In about a week I expect to proceed to the East Cape, but it will be the latter end of July or August before I shall again see the natives of Wairoa, which is to the south of Table Cape”); Williams *Turanga Journals*, above n 25, 96-98, 102-107 & 107-108; Rev James Stack (WMS) to Shortland, 23 May 1840, GBPP 1841 (311) XVII.493 at 104 (“Either Rev. A.N. Brown or myself should feel most happy by personal visitation amongst all the tribes in the Bay of Plenty to forward the views of Her Majesty’s Government were it just now practicable; but unfortunately it is not; Mr B. being on a missionary visit in an opposite direction, of necessity one of us must remain at home to take charge of the station”); Maunsell to Shortland?, 14 April 1840, GBPP 1841 (311) XVII.493 at 99 (“In forwarding the accompanying document [the Treaty], I would beg to observe, in reference to ourselves, that cordially as we desire to co-operate with Governor Hobson in all measures consistent with our principles, we cannot but state, that we feel strongly the responsibility in the eyes of the natives, by the steps we are now adopting./ I would beg therefore with all deference to add, that having put ourselves thus prominently forward in obtaining an acknowledgment of the sovereign power of The Queen on the part of the natives, so we trust, that that acknowledgment will never be made, even apparently, the basis of any measure that may hereafter result in their prejudice./ The steps we have taken have been taken in full dependence on the well-known lenity and honour of the British Government, and we rest assured, that we shall never hereafter find ourselves to have been in these particulars mistaken”). John Wilson, a Church Missionary Society catechist, refused to assist Hobson. Orange *The Treaty of Waitangi*, above n 2. Wilson wrote to Rev Alfred Nesbitt Brown that “You will of course exercise your own judgement as to how far you become a *servant* of the government in getting names to the Treaty—as for myself I intend having nothing to do with the matter, as I fear we shall find theory and practice (when they begin to work) two different things ... . Let not the glitter of a Government influence us. Let us remember *what we are!* what we are called to ... . The times are becoming trying & it will soon appear what we are made of”. Wilson to Brown, 24 April 1840, quoted in Williams *Turanga Journals*, above n 25, 157. As to the success of the Christian missions at this time, see Henry Williams to Dandeson Coates, 13 February 1840, CMS CN/M vol 11, 706-708 at 706; report of Henry Williams, 30 June 1840, CMS CN/M vol 12, 394-397; Henry Williams to Rev Edward Marsh, 14 April & 28 November 1840, quoted in Hugh Carleton *The Life of Henry Williams, Archdeacon of Waimate* (vol 2, Wilsons & Horton, Auckland, 1877) 24-25 & 26-27; Davis to Coleman, 5 February 1840, with addendum dated 8 February 1840, reproduced in Davis *A Memoir*, above n 43, 246-248; Rev James Buller to Secretary of the Wesleyan Missionary Society, 11 February 1840, reproduced in Journal of James Buller (1838–1844), ATL qMS-0300.

<sup>106</sup> See Chapter 11, text accompanying n 114.

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Hobson himself).<sup>107</sup> Richard Davis of Waimate may have voiced the views of other missionaries too when he wrote to the Church Missionary Society that:<sup>108</sup>

Never was a savage nation placed under circumstances so favourable.... Never was I so proud as now of being an Englishman.

### Postscript

In the Colonial Office, news of the proceedings at Waitangi was received on 9 July 1840. James Stephen wrote on that day to Robert Smith, the Parliamentary Under-Secretary for the Colonies, that the despatch

seems to me to prove, if proof were wanting, how much wiser was the course taken of negotiating for a Cession of the Sovereignty, than would have been the course of relying on the proceedings of Captain Cook, or the language of Vattel, in opposition to our own Statute Book.

In response to Smith's suggestion that the despatch should be "presented to Parliament forthwith", Lord John Russell, the Secretary of State, replied:<sup>109</sup>

The English & Natives both rely on our good faith. Approve Capt. Hobson's conduct. Have these despatches printed for the Committee on N.Z.

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<sup>107</sup> See Journal of Rev Richard Davis, 15 February 1840, CMS CN/M vol 12, 582 ("Accompanied the Governor to the Bay. Was rather satisfied with my conversation with him as to the views of Government respecting the Natives. They appear to be honourable & His Excellency appears to desire to carry them into effect"); and Ironside's Journal, above n 104, 10 February 1840 ("The Governor's proposal was to me very fair, & calculated to benefit the natives, so I gave it my sanction").

<sup>108</sup> Davis to Secretary of the Church Missionary Society, 8 February 1840, CMS CN/M vol 12, 15-18 at 16. See, similarly, "CB" to the editor of *The Australian*, Sydney, 19 March 1840, at 3: "The terms of this treaty are certainly very favourable to them, and such as I should imagine had never before been granted to any nation of savages."

<sup>109</sup> Colonial Office minutes, 9 & 10 July 1840, CO 209/6, 33b.



## CHAPTER THIRTEEN

### WAITING FOR THE TREATY—LONDON

Stephen's reaction on receiving news of the Treaty that treating with Maori for sovereignty was "much wiser" than reliance on Captain Cook's discovery or "the language of Vattel" (the first of which had not featured greatly and the second not at all in the considerations which led to Hobson's dispatch) points to the fact that discussion about New Zealand had continued in London between Hobson's departure in late August 1839 and news of his success at Waitangi on 9 July 1840. It was a time of change at the Colonial Office and a time when the New Zealand Land Company was repositioning itself.

In the Colonial Office, Normanby was succeeded by Lord John Russell and Labouchere was replaced by Robert Vernon Smith.<sup>1</sup> In Russell, the Colonial Office obtained perhaps the most able Secretary of State for the Colonies of the mid-nineteenth century. Stephen was to say of him that he was "one of the very few men in the World, who in the exercise of great political power, is filling the precise function for which nature designed, and education qualified him".<sup>2</sup> Certainly any reading of the Colonial Office records relating to New Zealand leaves no doubt about his intelligence, capacity and leadership. He was a moderniser, a man of the future (and future Prime Minister), more clear-headed than Glenelg but without his humanitarian agenda. He was also decisive; one of his first actions in relation to New Zealand was to direct Gipps to give Hobson the military support he had been requesting.<sup>3</sup> Smith, the new Parliamentary Under-Secretary, was considerably less

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<sup>1</sup> In 1859, on being created Baron Lyveden, Smith obtained royal licence to change his surname to Vernon (his mother's maiden name). He is generally referred to in New Zealand histories as "Vernon Smith" but at the time he was Under-Secretary of State for the Colonies, Vernon was simply his middle name.

<sup>2</sup> Quoted in John Prest "Russell, John [*formerly* Lord John Russell], first Earl Russell (1792–1878)" *Oxford Dictionary of National Biography*.

<sup>3</sup> Russell to Gipps, 26 September 1839, GBPP 1840 [238] XXXIII.587 at 49. Russell seems to have been alerted to the precariousness of Hobson's position by reports about the New Zealand Land Company's "articles of association" for its emigrants which envisaged a

able than Russell, although he came with the experience of having been Secretary to the Board of Control for India from 1835–39.<sup>4</sup> His written interventions on New Zealand matters, as contained in the Colonial Office records, were often unhelpful or confusing but were generally tidied up by Stephen or Russell.

Although the New Zealand Land Company may have thought that the changes in political leadership at the Colonial Office might obtain for it a more sympathetic hearing, those hopes soon faded as it became clear that the new ministers were as distrustful of its methods as their predecessors.<sup>5</sup> As is discussed in this chapter, when the New Zealand Land Company realised that it was making no impression upon Russell, it sought to undermine the Colonial Office by criticising its New Zealand policy to the Foreign Office. When that failed and it was clear that the

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capacity to make and enforce rules relating to the government of its settlements, a development the Colonial Office looked upon as potentially treasonable. See articles of association of New Zealand Land Company settlers, 14 September 1839, GBPP 1840 [238] XXXIII.587 at 59-60; extract from the *Morning Chronicle*, 16 September 1839, GBPP 1840 [238] XXXIII.587 at 51-52; Stephen to Russell, 16 September 1839 & Russell minute, 19 September 1839, CO 209/4, 571a-572a; Stephen to Young, 19 September 1839, GBPP 1840 [238] XXXIII.587 at 50-51; and the sequel to this correspondence at GBPP 1840 [238] XXXIII.587 at 52-63 & CO 209/4, 568a-b, 577a-603a, 617a-642a. In December 1839, Russell reiterated his instructions to Gipps to send troops to Hobson “when you have received intelligence that Captain Hobson has obtained a grant or cession of territory from the North Island, or that he has established the Queen’s authority in the Southern Island” (also expressed as “when [Hobson] shall have assumed the title of Lieutenant-Governor of New Zealand”). This seems to have been prompted by Russell becoming aware of the numbers of emigrants going out with the Company, which seems to have come as a surprise to the Colonial Office. Russell to Gipps, 4 December 1839, GBPP 1840 [238] XXXIII.587 at 49-50. The success of the recruitment of emigrants may even have taken the Company by surprise. See *The New Zealand Journal*, London, 8 February 1840, at 9-10 (“The disposition to promote the colonization of New Zealand is really something extraordinary”); and the *Glasgow Chronicle* as reproduced in *The Sydney Herald*, 16 October 1839, at 2 and the *Sydney Gazette and New South Wales Advertiser*, 19 October 1839, at 2-3. On receipt of Russell’s September 1839 despatch, Gipps arranged for a company of the 80th Regiment, under the command of Major Thomas Bunbury, to go to New Zealand in the *Buffalo* (which left Sydney on 5 April 1840). See notations by Gipps on Russell to Gipps, 26 September 1839, SRNSW NRS 909, 4/1017 (also ANZ Micro-Z 2714 & UoA Microfilm 09-006 Reel 8); and Gipps to Russell, 5 April 1840, GBPP 1841 (311) XVII.493 at 14-15.

<sup>4</sup> WR Williams “Vernon, Robert, the first Baron Lyveden (1800–1873)”, rev. HCG Matthew, *Oxford Dictionary of National Biography*.

<sup>5</sup> See, for example, the correspondence regarding the Company’s “articles of association” for its emigrants referred to at n 3 above. Stephen considered that a letter of the Company in early March 1840 had been “plainly written in order to allure Lord John Russell into a correspondence with this Body on the affairs of New Zealand, and thus to draw from his Lordship indirectly that recognition which has so often been refused of this Company as a Body lawfully constituted for lawful and good ends”. Stephen minute, 6 March 1839, CO 209/8, 220b.

Government supported the Colonial Office, the Company moved to put pressure on the Government through Parliament. The arguments it advanced developed during the period to draw on the American legal authorities which had been brought to notice by the Reverend Lang. Two days before news of the Treaty was received in Downing Street, the Company succeeded, over initial ministerial opposition, in obtaining the appointment of a Parliamentary Select Committee to inquire into the policy being followed. While the positions put forward by the Company were readily rejected by the Government (in responses which are themselves of significance as indicating its intentions in and understandings of the Treaty), they proved extremely influential in shaping perceptions of the meaning of the Treaty and introduced the framework of a new debate about sovereignty and property which had not existed at the time Hobson was dispatched and which was to cast a long shadow. This chapter therefore explains how the ideas in this new debate were first expressed and the immediate reaction of the Colonial Office to them. Chapters 15 and 17 describes their further development and influence.

### **In the interim**

It would be wrong, however, to leave the impression that the only New Zealand business with which the Colonial Office was engaged while it waited to hear from Hobson was that generated by the New Zealand Land Company. During the period the Colonial Office continued to receive reports from New Zealand about the extent of European lawlessness and land purchases, which almost certainly would have confirmed it in the view that Hobson's mission was necessary.<sup>6</sup> Through the

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<sup>6</sup> See, for example, Coates to Stephen, 10 March 1840, CO 209/8, 145a-147b (includes Colonial Office minutes at 146b), enclosing an extract of a letter from Rev George Clarke to Coates, 23 August 1839 (see discussion of this letter at Chapter 6, text accompanying ns 464-468); Coates to Stephen, 11 June 1840, CO 209/8, 163a-165b (includes Stephen's note to Smith at 165b that "the Enclosure deserves reading"), enclosing an extract of a letter from Rev Richard Davis to Coates, 18 November 1839 (see discussion of this letter at Chapter 6, text accompanying n 471). In this period also, the Colonial Office received a complaint from the Wesleyan Missionary Society that the New Zealand Land Company had purported to have purchased land at Port Nicholson which it knew was already claimed as property of the Society. See Beecham to Russell, 29 June 1840, CO 209/8, 403a-410b. For Colonial Office minutes, its reply to the Wesleyan Missionary Society, and its consequential instructions to

Church Missionary Society in London, the Colonial Office received reports of the increasing pace of Maori conversion to Christianity and missionary justifications of their land purchases (criticism of which had put the Society somewhat on the back foot vis-à-vis the Company), including explanations that some were on trust for Maori to protect them from European land-sharking (a practice which the Society, in a change of heart, now endorsed).<sup>7</sup> During the 10 months it took for word of the Treaty to be received in London, the Colonial Office also continued to field enquiries from would-be emigrants and those seeking appointment to official positions in the New Zealand administration. Its responses are a window into the attitudes held by the Colonial Office.

In response to queries about emigration and offices, the Colonial Office maintained the approach it had taken before Hobson's departure.<sup>8</sup> It emphasised that no British colony had yet been established in New Zealand and "for the present, it is impossible to ascertain whether any such Colony will ever be founded".<sup>9</sup> "[N]o Company or Body of persons in this Country has received from HM Government any sanction for establishing Settlements there".<sup>10</sup> Until it was known "whether the Native Chiefs in whom the Sovereignty of New Zealand resides will concur in the arrangements which Captain Hobson, in the character of British Consul, has been authorised to propose to them" for "part of" the Islands of New Zealand, no

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Hobson and Gipps, see CO 209/8, 412b-416b. See also Beecham to Ward (New Zealand Land Company), 18 July 1840, GBPP 1840 (582) VII.447 at 155-158.

<sup>7</sup> See, for example, the Earl of Chichester to Russell, 27 December 1839, CO 209/5, 155a-160b; "Statement of the Committee of the Church Missionary Society, relative to the New-Zealand Mission", 29 November 1839, GBPP 1840 (582) VII.447 at 165-173 (and sent to Stephen by Coates on 9 January 1840; see CO 209/8, 142a-144b); "Further Statement of the Committee of the Church Missionary Society relative to the New-Zealand Mission", 31 March 1840, GBPP 1840 (582) VII.447 at 173-181; and Coates to Smith, 14 May 1840, CO 209/8, 157a-162b (enclosing the Committee's 31 March "Further Statement" and another copy of its 29 November "Statement").

<sup>8</sup> See Chapter 9, text accompanying ns 516-528.

<sup>9</sup> Colonial Office to M Pepper, 30 October 1839, CO 209/5, 328a.

<sup>10</sup> Stephen to W Sharpe, 7 September 1839, CO 209/5, 355a-b (also GBPP 1840 [238] XXXIII.587 at 49). A copy of the Treasury Minute of 19 July 1839 as tabled in Parliament was enclosed as "best explain[ing] the state of the question".

appointments could be made.<sup>11</sup> Even the appointment of a Bishop for New Zealand was deferred.<sup>12</sup>

In relation to enquiries about how land purchases in New Zealand were to be treated, the Colonial Office declined to give any undertaking about the confirmation of titles to land derived through the New Zealand Land Company should a colony be established.<sup>13</sup> In relation to lands purchased by private individuals “hereafter” from the chiefs, the standard response was that the Government did not intend to recognise such titles.<sup>14</sup> In one response, where Stephen’s draft had suggested that the Government would treat future purchases as invalid, Russell altered the reply to say that it was “not the intention of HM Government to sanction any title which may thereby be acquired, and such Emigrants must act entirely at their own risk”.<sup>15</sup> In response to a query about the security of title of purchasers of land from Europeans who had already acquired it from Maori, the answer was returned that the Government “cannot undertake to give any assurance that in the event of such a Colony being founded the local Gov<sup>t</sup> would recognize any title to Land acquired by purchase from the Native Chiefs”.<sup>16</sup> In response to a query as to whether the Crown would sell land to settlers, the response was made that, in the event of a colony being established, “all Lands which may be acquired by the Government there will be progressively put up to

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<sup>11</sup> Colonial Office to John Crawford, 5 October 1839, CO 209/4, 657a-658a; Russell to the Earl of Sefton, 18 November 1839, CO 209/5, 363a-b. See also, for example, Colonial Office to E Ombler, 4 October 1839, CO 209/5, 316a-b; and Smith to John Thompson, 4 March 1840, GBPP 1840 [238] XXXIII.587 at 65.

<sup>12</sup> Colonial Office to Coates, 15 January 1840, CO 209/5, 161a-162a; Colonial Office to the Earl of Chichester, 15 January 1840, CO 209/5, 162b-163a. See also Russell to the Archbishop of Canterbury, 6 July 1840, CO 209/7, 302a-303b.

<sup>13</sup> See, for example, Colonial Office to James Greenwood, 16 September 1839, CO 209/5, 232a-b; Smith to J Wood Beilby, 18 January 1840, GBPP 1840 [238] XXXIII.587 at 64; Colonial Office to J Rook, 7 July 1840, CO 209/7, 480a-b at 480b; Colonial Office to G Webster, 7 July 1840, CO 209/7, 500a-501a at 500a-b.

<sup>14</sup> See, for example, Colonial Office to John Dent, 16 October 1839, CO 209/5, 206a-207b at 206b (“HM Gov<sup>t</sup> will not recognize any Titles to Lands, hereafter to be acquired by purchase from the Native Chiefs, effected by private Individuals”) & 207b (“Lord John Russell is not aware that it is practicable to make, at preset, any purchases of Land in N Zealand on a safe Title”). See also text accompanying n 20 below.

<sup>15</sup> Stephen minute, 9 September 1839, CO 209/5, 234b; Colonial Office to James Greenwood, 16 September 1839, CO 209/5, 232a-b at 232b.

<sup>16</sup> Colonial Office to John Wilkinson, 30 October 1839, CO 209/5, 393a-394a at 393b-394a (replying to Wilkinson to Russell, 21 October 1839, CO 209/5, 391a-392a).

sale”.<sup>17</sup> In other correspondence it was explained that “the Crown of England has not at present any Claim to any land in N Zealand”.<sup>18</sup>

In a prospectus sent by the Scots New Zealand Land Company to the Colonial Office seeking support in October 1839, a number of arguments that prefigured later debates in England and New Zealand and that were derived from philosophical theory and abstract doctrine were put forward.<sup>19</sup> The prospectus took the view that Maori did not possess sovereignty, which the prospectus treated as “evidently founded on the *utility* of government power, and of national responsibility”, because they were “incapable of combining and forming any thing like a responsible government” able “to treat with other governments”, “to obey international law”, or “to put down pirates and freebooters within the territory of the state”. Britain could assume the right of sovereignty on the basis of Cook’s discovery. As to property in land, the pamphlet pressed the view that it was of two types, “*National* and *Individual*”, both “founded on *Utility*, that is, the advantage of mankind”. Because Maori did not have any “*government right* to the New Zealand territory” and had “only *individual right* to those parts which they cultivate or derive some benefit from by occupancy”, a Maori had “no *right* to the unappropriated wilderness of New Zealand more than any other person who may be standing beside him in that wilderness”. Maori had rights of property, therefore, only to “small portions” of the country. Nevertheless, since the prospectus acknowledged that Maori had somehow a “sense of *right* to these unappropriated territories”, the prospectus considered that it was expedient to “purchase their good will to the occupancy of these,—that is, their forbearance from molesting the occupiers”. It acknowledged that to take possession without such purchase “might lead to the sacrifice of life” and that “it is even cheaper to hire their forbearance than to compel it by force”.

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<sup>17</sup> Colonial Office to Thomas Sandeman, 28 September 1839, CO 209/5, 358a-b at 358b.

<sup>18</sup> Colonial Office to John Dent, 16 October 1839, CO 209/5, 206a-207b at 206b.

<sup>19</sup> Patrick Matthew (Chairman) to Russell, 9 October 1839, CO 209/4, 659a-662b, enclosing the prospectus of the Scots New Zealand Land Company (at CO 209/4, 670a-689b). See section headed “Land Property Right” at pp 21-23 of the prospectus (CO 209/4, 681a-682a).

To the letter of the Scots New Zealand Land Company, the Colonial Office returned its standard response that, until the outcome of Hobson's mission was known, the establishment of a colony remained uncertain, but that lands "hereafter" purchased from the chiefs would not be recognised by the government of the colony "if ultimately founded".<sup>20</sup>

In view of latter debates, what is striking about these Colonial Office responses is that they proceeded on the bases that sovereignty must be treated for and that its acquisition would not be anticipated by the Government. That sovereignty might be acquired over part only of the country was seen as a possible outcome. In the responses about land, there was no assertion that purchases from Maori were invalid. In relation to future purchases, the standard answer was rather that the Government did not intend to recognise them, and that would-be purchasers acted at their own risk. In respect of past purchases, there is little to go on. The one letter which deals with derivative purchases from Europeans simply declines to give any assurance that such titles would be recognised, consistently with the instructions to Hobson and Gipps that pre-existing purchases would have to be the subject of inquiry. There was no assertion of lack of capacity of British subjects to acquire land in New Zealand before the establishment of a colony as might have been expected if that was the understanding of the Colonial Office.<sup>21</sup> It was not suggested that acquisition of sovereignty would itself give the Crown disposable land, even un-owned "waste lands", to pass to settlers. Rather it was suggested that the local government would have to acquire lands for on-sale.

### **New Zealand Land Company repositioning**

While news from Hobson in New Zealand was awaited, the New Zealand Land Company repositioned itself in response to the basis on which Hobson had been

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<sup>20</sup> Colonial Office to Patrick Matthew, 21 October 1839, CO 209/4, 665a-666a at 665b.

<sup>21</sup> Robert Smith did suggest that the opinion of the law officers be taken on whether, among other things, British subjects could "acquire lands save for the Queen", but the matter does not seem to have been pursued and it is not a question that seems to have occurred to Stephen or Russell before 1840. See Smith's query, c. 30 October 1839, CO 209/4, 595a.

dispatched to treat for sovereignty. It may be that it appreciated that one outcome of Hobson's mission might be that sovereignty would be acquired over part only of New Zealand, possibly leaving some or all of their land purchases outside the colony. Whatever the reason, it moved increasingly towards advocating the view that it was unnecessary to negotiate with Maori for sovereignty because British sovereignty had already been established by right of discovery.

This was a change of position, although one that had been developing for some time. Initially, as has been seen in Chapter 9, the New Zealand Association in 1837 took the view that Maori were independent and that a cession of sovereignty would have to be negotiated with them if settlement were to take place. By Cook's discovery, Britain had secured the right to colonise New Zealand to the exclusion of all other civilised nations, but had not by that circumstance displaced Maori sovereignty.<sup>22</sup> During the course of 1838–39, the Association moved away from its initial position, questioning whether Maori in fact had sovereignty but, pragmatically, recognising that the Government and Parliament were committed to acknowledging Maori sovereignty. This was, for example, the approach taken by the Association's witnesses to the House of Lords Select Committee in May 1838.<sup>23</sup>

By August 1839, however, Edward Gibbon Wakefield in the inaugural issue of *The New Zealand Gazette* (published by the New Zealand Land Company) was deriding Hobson's mission: "Hobson ... is to treat with the native chiefs for a cession of the sovereignty,—a thing for which their language did not afford a word until the Missionaries coined one for the occasion".<sup>24</sup> On 2 October, *The Colonial Gazette* published an extensive attack, which may also have been written by Wakefield, on the portion of Hobson's instructions relating to the treatment of land

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<sup>22</sup> See Chapter 9, text accompanying ns 5 (Wakefield *A Statement*), 27 (Wakefield & Ward *The British Colonization of New Zealand*), 46-49 ("Abstract of an Act") & 72 (Wakefield *Mr Dandeson Coates*).

<sup>23</sup> See Chapter 9, text accompanying ns 210-214 (Hinds & Baring). But see John Ward *Information Relative to New Zealand, Compiled for the Use of Colonists* (2nd ed, London, [January] 1840) viii.

<sup>24</sup> *The New Zealand Gazette*, London, 21 August 1839, 4-6 at 6 (also quoted in *The Colonial Gazette*, London, 28 August 1839, at 627).

which had just been published in *The Globe* (in a leak which the *Gazette* article attributed to the Government but which may well have been through the Company itself).<sup>25</sup> The *Gazette* article took the line that what was praiseworthy about the system of land sales envisaged by the Instructions were the principles behind it which had been developed by Wakefield “some ten years ago”. They were, however, wholly deficient in terms of the “practical part”, and did not address the extent of land purchases which had taken place in New Zealand in recent times. Although the “main purpose” of the Instructions was identified as “to put an end to the practice of *land-sharking*”, the article maintained that it would have the exact opposite effect. It interpreted the instruction to Hobson to announce by proclamation that the Crown would “not acknowledge as valid any title to land which either has been or shall hereafter be acquired from the natives in that country, which is not either derived from or confirmed by a grant to be made in her Majesty’s name and on her behalf” as an incitement to land-sharking because it held out the “promise” of a Crown grant to such land subject only to “examination by a Commission” (the writer envisaged that the Commission was likely to be comprised itself of land-sharks from New South Wales). In this interpretation, the writer concentrated on the passage in the Instructions altered from Stephen’s draft by Labouchere.<sup>26</sup> Ironically, the same passage was to lead Gipps in July 1840 to the contrary conclusion, that past and future purchases from Maori were invalid until confirmed by Crown grant as a matter of sovereign grace, rather than right, following investigation.<sup>27</sup> Pertinently, putting its finger on a weakness in Labouchere’s expression, the *Gazette* asked rhetorically, “How a title to land already ‘acquired’ is to be ‘derived from’ a future grant by the Crown, it is not easy to perceive”. This statement seems to presuppose that acquisition of land from Maori was not itself invalid in the absence of a Crown grant.

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<sup>25</sup> *The Colonial Gazette*, London, 2 October 1839, at 706; Robert Smith (7 July 1840) 55 GBPD HC c 541: “it was the Land Company that was responsible for the publication”.

<sup>26</sup> See Chapter 8, text accompanying ns 47-49.

<sup>27</sup> See Chapter 16, text accompanying ns 143-145.

The writer took the view, in apparent reliance on the Treasury Minute of 19 July 1839 (referred to in Chapter 9<sup>28</sup>), that the focus of acquisition of sovereignty was the land already obtained by British subjects from Maori. This he regarded as a tacit injunction to “*Shark* away gentlemen”. The article concluded “upon the whole the affair is a complete mess”:

All this was long since foretold by persons well-acquainted with the subject. The suggestions of the New Zealand Association of 1837, on which the instructions of Captain Hobson are founded, might have been suitable to the then state of things, but are wholly inapplicable now. Since Lord Howick’s crotchetyness prevented the passing of a law for the regular Colonization of New Zealand, the mischiefs of irregular colonization have been proceeding apace. They are now all but incurable. The Colonial Office will not cure them except by retracing its steps and starting afresh from the safe point of *British sovereignty established by Cook in 1769, and formally asserted by the Crown of England in 1814*. This would cut the knot of a thousand difficulties. This, too, is the most legitimate mode of proceeding, the one least open, or rather the only one not at all open to question. Finally, this is the only way of averting fresh difficulties of a most serious kind *which are growing in Paris*. By acknowledging as to all New Zealand the mock sovereignty of the native savages, which Lord Howick set up in 1831 as to a little bit of one of the islands only, the Government provides a great store of confusion and trouble for its subjects and itself; and it also *invites* foreigners to colonize on land which had better be covered by the waters than possessed by any nation but the English.

It is not clear that the writer had in mind the approach suggested by Lang in *New Zealand in 1839*, a pamphlet that had already been discussed in the columns of *The Colonial Gazette*.<sup>29</sup> How the “knot of a thousand difficulties” would be “cut” by basing sovereignty on discovery is not further explained. But it had been put forward as a solution to land-sharking by Lang (because it would allow land acquisitions to be treated as invalid as infringing the Crown’s right of pre-emption which, on his theory, arose as an incident of the acquisition of sovereignty by discovery).<sup>30</sup>

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<sup>28</sup> See Chapter 9, text accompanying ns 495-498.

<sup>29</sup> See *The Colonial Gazette*, London, 28 August 1839, at 627.

<sup>30</sup> See Chapter 10, text accompanying ns 134-145.

By November 1839, the New Zealand Land Company was no longer content to express its views through the press. In the correspondence with the Colonial Office on 7 November it asserted that, while Hobson's expedition might seem "to imply a doubt whether those islands constitute at present a dependency of the British Crown", there was "the most irrefragable evidence that the sovereignty of Great Britain had long been asserted and acted on in these islands".<sup>31</sup> On the same day, the Company wrote directly to Lord Palmerston, the Foreign Secretary, complaining about the Colonial Office's refusal to communicate with the Company and drawing to his attention the implications of the actions being taken by the Colonial Office in relation to the sovereignty of New Zealand. This letter was an apparent attempt to enlist the support of the Foreign Office against the Colonial Office<sup>32</sup> by pointing out that, in acting as though the consent of Maori chiefs to a transfer of sovereignty was necessary, the Colonial Office was playing into the hands of the French Government, which was denying British sovereignty over New Zealand and asserting the right to plant its own settlements there. The letter maintained that "the law of nations" recognised that in a country "of which the inhabitants are so barbarous as to be ignorant of the meaning of the word sovereignty, and therefore incapable of ceding sovereign rights", the only way of acquiring sovereignty was by taking possession as Cook had done in 1769.<sup>33</sup>

This attempt to undermine the Colonial Office was not successful. The Foreign Office referred the Company's letter to the Colonial Office for its advice.<sup>34</sup> Stephen's memorandum to Russell said of the Company's letter that "they are either being ill informed as to the facts, or very ill-disposed to make a fair statement of them".<sup>35</sup> It set out the basis upon which he considered "the proofs are, as it seems to me, overwhelming and superabundant" that "Great Britain has

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<sup>31</sup> Young to Russell, 7 November 1839, GBPP 1840 [238] XXXIII.587, 55-58 at 56.

<sup>32</sup> See Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) ["Hickford *Lords of the Land*"] 103: "Tactically, it pursued this issue not with a recalcitrant or obstructive Colonial Office but with Palmerston's Foreign Office".

<sup>33</sup> Somes to Russell, 7 November 1839, GBPP 1840 [238] XXXIII.587, 66-68 at 66.

<sup>34</sup> Backhouse to Stephen, 15 November 1839, GBPP 1840 [238] XXXIII.587 at 65.

<sup>35</sup> Memorandum of Stephen to Russell, 18 November 1839, CO 209/5, 51a-53b at 51a.

recognized New Zealand as a Foreign and Independent State”.<sup>36</sup> Russell, after discussing the matter with Palmerston, advised Stephen that the matter was to be referred to the Cabinet and asked him to prepare a background paper for that purpose.<sup>37</sup> The resulting paper, prepared in the Colonial Office and edited by Stephen, was eventually published in the Parliamentary Papers on 8 April 1840.<sup>38</sup> The paper appears to have gone to Cabinet.<sup>39</sup> Although no record of the outcome survives, it led to no change in Colonial Office approach to sovereignty, suggesting it was accepted by Cabinet.

By April 1840 when the paper produced for Cabinet was made public, the Company arguments were becoming more sophisticated. A key development was close attention to American case-law concerning Native American sovereignty and property. The usefulness of this material may first have come to notice through the writings of Lang, whose pamphlet was reviewed in *The New Zealand Journal* of 22 February.<sup>40</sup> Its use was, however, taken to new heights by Henry Chapman, a journalist, lawyer and radical pamphleteer, who had spent time in the Canadian colonies and, in February 1840 with the encouragement of Edward Gibbon Wakefield, became proprietor-editor of *The New Zealand Journal*.<sup>41</sup> Chapman was later to become New Zealand’s second Supreme Court judge and wrote the lead judgment in the important case of *R v Symonds* (1847), discussed in Chapter 18, which drew on the American case-law.

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<sup>36</sup> Ibid 53b.

<sup>37</sup> Russell minute, 19 November 1839, CO 209/5, 53b.

<sup>38</sup> “Papers Relative to New Zealand, Printed Solely for the Use of the Cabinet”, FO 58/2, 8a-21b at 21a-b; “Memorandum”, GBPP 1840 [238] XXXIII.587 at 68-69; “Memorandum, Colonial Department”, 21 November 1839, CO 209/4, 332a-338b, CO 209/5, 68a-72b & CO 209/4, 340a-341b; Memorandum as revised by Stephen, CO 209/5, 64a-72a.

<sup>39</sup> See “Papers Relative to New Zealand, Printed Solely for the Use of the Cabinet”, FO 58/2, 8a-21b at 21a-b; and minute of Stephen to Smith, 12 March 1839, CO 209/8, 68b (“the Foreign Office letter of 15 November was not answered because the question became the subject of Cabinet discussion and the Papers were printed for the use of the Cabinet.... At pages 27-8 of that Paper [ie FO 58/2, 21a-b] you will see what is the answer to the Foreign Office letter.... Lord Russell might send to Lord Palmerston officially a copy of the printed paper as containing all the Information which it appears to Lord John Russell necessary or practicable to afford in answer to the letter of 15 November”).

<sup>40</sup> *The New Zealand Journal*, London, 22 February 1840, at 19-21.

<sup>41</sup> DG Edwards “Chapman, Henry Samuel (1803–1881)” *Dictionary of New Zealand Biography*.

In an unattributed article in *The New Zealand Journal* of 4 April 1840, but which is known to have been written by him,<sup>42</sup> Chapman urged that the danger of French pretensions to New Zealand should be directly countered by Britain maintaining its existing sovereignty over New Zealand.<sup>43</sup> That was in accordance with the “customary law of nations” observed by all European powers including France which had been relied upon by the United States Supreme Court in deciding cases between its States and Indian nations, each being “distinct and independent sovereignties”. Chapman, who cited and followed John Austin’s austere view that there was no “international law” binding sovereign nations, took the view that the United States Supreme Court was the only legal tribunal in existence whose jurisprudence came close to pronouncing on “international law” because of its jurisdiction to adjudicate disputes between States and between States and Indian nations. As a result, its views on “the customary law of nations” were of particular interest.

In the article, Chapman described the decisions of the United States Supreme Court in *Johnson v M’Intosh*, *Cherokee Nation v State of Georgia*, and *Worcester v State of Georgia*. Accurately, he takes from these cases the propositions that discovery conferred sovereignty as against other European nations but did not affect the rights of the native inhabitants beyond conferring on the discovering power the exclusive right of purchasing native lands. From this he argued that subsequent British acknowledgment of Maori sovereignty was irrelevant. It was open to the British Government to adopt whatever relations it considered appropriate with the chiefs but its sovereign rights against other nations remained and should be maintained.

Chapman’s focus was on British sovereignty and in particular its assertion against other powers. He did not greatly elaborate upon the rights remaining with native populations. He indicated that they are “distinct political societ[ies], capable of

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<sup>42</sup> See Hickford *Lords of the Land*, above n 32, 49.

<sup>43</sup> “The English, the French, and the New Zealanders” in *The New Zealand Journal*, London, 4 April 1840, at 49-50.

managing their own affairs and governing themselves” and “maintaining the relations of peace and war” but also wrote that:

It must be clear, that the rights reserved to the native tribes could only be of a modified character, but whether those rights were abridged or extensive—whether they were confined to a mere right of occupation, or amounted to something deserving the name of sovereignty, was a question which did not affect the relation between the discovering nation and other civilised powers.

Shortly after Chapman’s piece appeared, the publication of Stephen’s paper for the Cabinet on the question of sovereignty elicited a more antagonist response in *The New Zealand Journal* of 18 April 1840. The article is marked by such virulent invective directed against Stephen as to suggest that its unnamed author was Wakefield.<sup>44</sup> The end of this torrent of abuse (the “monstrous, ... immoral doctrine ... could only have had its birth-place in the breast of a fiend”; it was “a fiction, a mere quibble, ... invented to stop sound colonization, and, at the same time, to perpetuate the reign of fraud, rapine, and bloodshed in New Zealand”; it should be “treated as so much waste paper—as a mere piece of official insolence ... calculated only to heap disgrace upon its author”) was, consistently with Chapman’s argument, that the existing British right of sovereignty against all European powers was “unimpaired by our recognition of the native tribes” and must be asserted “including a right of pre-emption, against all civilized powers”. While Penn’s principle towards native populations should “be strictly adhered to”, “the national honour” should not be “wrecked”.

### **Petitioning Parliament**

By this stage, the Company appears to have given up any hope of persuading the Government to accept its views and had moved to bring the matter to the attention of Parliament. It had organised a meeting at the Guildhall on the basis of a “requisition” to the Lord Mayor by 114 merchants, bankers, shipowners and

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<sup>44</sup> “Mr Stephen and the Sovereignty of New Zealand”, *The New Zealand Journal*, London, 18 April 1840, at 61-62. See also the attacks on Stephen in *The Colonial Gazette*, London, 5 & 12 February and 22 April 1840 (reprinted in *The New Zealand Journal*, London, 22 February and 2 May 1840).

inhabitants of the City of London for a public meeting to petition the Crown and Parliament for the systematic colonisation of New Zealand. The meeting, which professed not to be aligned with the Company but included a number of Company members and supporters including Wakefield and Chapman, was held on 15 April 1840 and was attended by a crowd estimated by *The Times* at 400 but by *The New Zealand Journal* at more than 2,500.<sup>45</sup> The meeting adopted a petition to the House of Commons asking it to take measures calculated to “preserve these valuable islands to Her Majesty’s dominions”, to establish law “throughout” the country, and to set up a “lawful system of colonization” under a “distinct and sufficient” local administration. In its preamble to these requests, the petition rehearsed the arguments made by Chapman and Wakefield that the pre-existing sovereignty obtained with discovery should not be abandoned. The reference to establishment of law “throughout” the country indicated concern with the prospect that Hobson would achieve only a partial cession of sovereignty. A “lawful system of colonization” addressed alarm that unless an orderly Crown-controlled system of passing land to emigrants was adopted (not entailing land purchases from “the barbarous natives of the country”, “a practice which is forbidden by every other civilized government having relations with savages”) there would be not only “great uncertainty and endless litigation with respect to titles of land” but also “the adoption of any judicious system in the disposal of waste land, by competent authority, for the purposes of colonization” would be rendered impossible. Such system would also have the advantage for Maori that it would enable “general and systematic reserves of land for their use” to be made. The reference to measures for a “distinct and sufficient” administration in New Zealand met concerns that administration from New South Wales would be too remote.<sup>46</sup>

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<sup>45</sup> *The Times*, London, 16 April 1840, at 5; *The New Zealand Journal*, London, 18 April 1840, at 64-68.

<sup>46</sup> “Petition of Merchants, Bankers, and Shipowners of London”, GBPP 1840 (582) VII.447 at 135-137. Compare to Resolutions of a meeting of the Aborigines’ Protection Society, 15 April 1840. The resolutions included: “That the right to the lands of New Zealand is originally and indefeasibly in the natives, the possessors and natural lords of the soil *ab origine*, holding their charter directly from the Sovereign Ruler of the universe”; and “That colonization can only be rightly conducted on the principle of direct purchase and fair remuneration”. According to the report of *The New Zealand Journal*, there seems to have been some difference of opinion

The petition was presented to the House of Commons on 22 May.<sup>47</sup> Nothing happened immediately. It was not until late June or early July that Lord Eliot gave notice of motion for the appointment of a Select Committee to inquire into the matters raised in the petition.<sup>48</sup> Debate on the motion was held on 7 July, two days before the Colonial Office received Hobson's report of the signing of the Treaty at Waitangi. Before these events, however, some news from Sydney and the Bay of Islands had been received by the London papers and added to the background to the 7 July debate.

*The New Zealand Journal* on 20 June published Gipps's proclamations and reports from the Sydney newspapers about a number of events relating to New Zealand such as Gipps's intervention to stop the auction of New Zealand lands (which it published under the heading "Pre-emptive right of the Crown asserted"), Hobson's meeting with the deputation of New Zealand landholders, and a meeting Gipps had on 31 January 1840 with visiting Ngai Tahu chiefs (which is discussed in the next chapter).<sup>49</sup>

In its editorial commentary on these matters, *The New Zealand Journal* represented Gipps's proclamations as evidence of British assertion of sovereignty by right of discovery.<sup>50</sup> This was said by the paper to be "undoubtedly as it should be". Although such sovereignty "need not interfere, in any way, with the independence of the chiefs", the editorial commented that Gipps, in the meeting with the Ngai

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within the Society about the justice of appropriating Maori land. For example, Standish Motte (then also acting chairman of the New Zealand Land Company) contended that "taking a portion of land (now really waste land)" from Maori was justified if, through the introduction of "British capital and industry", Maori were "benefited in a worldly sense, and opportunity was furnished for far greater benefit". A Mr Moore, on the other hand, "protested against the principle of leaving the New Zealanders only as much land as would support them", asking:

Was it doing as we would be done by? We had no right to take as much land as we could stand upon, except by fair and open treaty. How should we like to have England colonized by a stronger people, upon the principle of leaving us only so much land as was needful to support us?

*The New Zealand Journal*, London, 2 May 1840, at 75-76

<sup>47</sup> GBPP 1840 (582) VII.447 at iii.

<sup>48</sup> See *The New Zealand Journal*, London, 4 July 1840, at 154: "Lord Eliot has given notice that on Tuesday next he will call the attention of the House to the state of New Zealand, and to the prayer of the petition adopted at the meeting held in the Guildhall, on the 15th of April last".

<sup>49</sup> *The New Zealand Journal*, London, 20 June 1840, at 140-141.

<sup>50</sup> "Recognition of New Zealand as a British Colony", *The New Zealand Journal*, London, 20 June 1840, at 137.

Tahu chiefs, “seems to have gone a point further than necessary and denied their independence except that of such as entered into the ‘confederation’”. The effect of British sovereignty was simply “to assert a pre-emptive right of dealing with the natives, as against all subjects of this realm, and an exclusive right of sovereignty against all civilized powers”. The journal commented, whether disingenuously or not is impossible to say, “[w]hy Lord John Russell did not plainly state that this was intended, we are at a loss to comprehend”.

From Gipps’s land titles proclamation, *The New Zealand Journal* took the view that “land-sharking” would be brought to an end: “the Crown asserts a paramount title, and no subject can acquire lands except by grant from the Crown”. It also expressed the view that the proclamation made it clear that “existing titles will be respected, except in cases of obvious injustice, where the natives have been cheated out of their land for a mere nominal consideration, under the sham forms of bargain and sale”. The understanding expressed by the editorial writer was that, whereas “every person who acquires land in the country occupied by barbarous tribes, acquires at the same time a portion of sovereignty therewith”, the matter was transformed with assertion of British sovereignty:

Let it be remembered that we have no purely *allodial* tenures. The theory is, that all our lands are held under the Crown, so that if a subject make a purchase, before prohibition of course, of a native chief, the purchaser becomes tenant in fee under the Crown. This is now the case with every British land-owner in New Zealand.

On 4 July, *The New Zealand Journal* carried reports from four Sydney newspapers about Hobson’s proceedings in New Zealand including his proclamations and the signing of the Treaty.<sup>51</sup> The Colonial Office did not receive official word of the Treaty until 9 July, two days after the debate on Lord Eliot’s motion for a Select Committee.<sup>52</sup>

The Government’s initial inclination was to oppose the motion as leading to an enquiry that would be largely pointless both because it was likely to be overtaken

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<sup>51</sup> *The New Zealand Journal*, London, 4 July 1840, at 154-155.

<sup>52</sup> See Chapter 12, n 109; and 55 GBPD HC cc 523-545 (7 July 1840).

by events in New Zealand and because the conduct of policy in this area was, as the House of Lords Committee of 1838 had accepted, properly a matter for the Crown.<sup>53</sup> In the event, however, Russell, perhaps sensing that the motion would be carried, indicated that he would not oppose it and it was agreed to.<sup>54</sup>

Eliot spoke in support of the motion.<sup>55</sup> He maintained that New Zealand was a British possession through Cook's discovery.<sup>56</sup> He invoked the statement of principle in Kent's *Commentaries* that discovery conferred sovereignty against other European powers, leaving it to the discoverer to regulate the relations between it and the native population.<sup>57</sup> From Kent's *Commentaries*, Eliot also cited *Worcester* in support of the view that, although discovery conferred "the exclusive right to purchase", it did not deny the rights of the native occupiers to sell.<sup>58</sup> While he cited Vattel for the view that not much value was to be placed on "the territorial rights of erratic races of people, who sparsely inhabited immense regions and allowed them to remain a wilderness", contrary to the obligation on mankind to cultivate the soil, he also allowed that Vattel had "extolled the moderation of William Penn" and that the United States Government for its part had "never insisted on any other claim to the Indian lands than the right of pre-emption".<sup>59</sup> Eliot also referred to correspondence from Russell<sup>60</sup> which indicated, he said, that "the law did not recognize as valid even the title to lands already acquired by the subjects of Her Majesty". Eliot expressed himself as being "at a loss to guess, if the islands of New Zealand were independent states, what authority the noble Lord could have to say that acquisitions of individuals resident there were not legal and binding in that country".<sup>61</sup> In addition, he said of Hobson's land titles proclamation that "it was a very doubtful point whether these commissioners would have any

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<sup>53</sup> Lord John Russell (7 July 1840) 55 GBPD HC cc 531-532.

<sup>54</sup> Lord John Russell (7 July 1840) 55 GBPD HC c 545.

<sup>55</sup> Lord Eliot (7 July 1840) 55 GBPD HC cc 523-531.

<sup>56</sup> Ibid 525.

<sup>57</sup> Ibid 527-528.

<sup>58</sup> Ibid 528.

<sup>59</sup> Ibid.

<sup>60</sup> This was probably a reference to the correspondence (considered above) published in the Parliamentary Papers in April 1840. See GBPP 1840 [238] XXXIII.587.

<sup>61</sup> Lord Eliot (7 July 1840) 55 GBPD HC cc 523-531 at 529.

right to make an award and whether appeals might not be made to the Privy Council so as to try this question”.<sup>62</sup>

Before Russell withdrew his opposition to the motion, he spoke against it.<sup>63</sup> In the course of his speech, he declined to engage with Eliot on “arguments as to the right of the claim of sovereignty in places discovered by civilized nations, where wild tribes only were the inhabitants”. Russell said he “did not dispute the principles of the passage quoted by the noble Lord from Vattel” (although it may be that Russell was in fact referring to the passage quoted by Eliot from Kent since he goes on to discuss the “right [which] might accrue to the first discoverer”<sup>64</sup>). He expressed confidence that the conduct of the British Government had been “in entire accordance with the principle so laid down”. If, however, the right obtained by discovery had not been exercised for many years and “solemn declarations” had since been made “apparently relinquishing, at all events, not confirming, that right”, it “certainly was necessary” to find “some new title to the possession of any such sovereignty”.<sup>65</sup> That was the case in New Zealand, for reasons that Russell explained. New Zealand had been “reckoned a foreign dominion”. For that reason, Hobson as consul was to proceed “in the manner that Vattel declared to be so laudable, and in perfect conformity with the law of nations—namely, if he could, to make an agreement with the natives to purchase their land and territory, and then establish the authority of this country there”.<sup>66</sup>

In response to Eliot’s questioning of the basis for not recognising existing titles to land, Russell expressed the view that there would be little difficulty in inquiring into whether the lands had been “fairly purchased”. Russell accepted that “undoubtedly the Crown had, with respect to all its colonies, the general and

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<sup>62</sup> Ibid 530.

<sup>63</sup> Lord John Russell (7 July 1840) 55 GBPD HC cc 531-538.

<sup>64</sup> Certainly there is nothing in the development of Russell’s response to indicate that he agreed with Vattel’s views about the “territorial rights of erratic races” since what follows immediately from the expression of agreement is confined to the acquisition and maintenance of sovereignty by right of discovery and Russell later refers to the need to purchase land.

<sup>65</sup> Lord John Russell (7 July 1840) 55 GBPD HC cc 531-538 at 532.

<sup>66</sup> Ibid 534.

original right in the land”.<sup>67</sup> Application of such doctrine, however, to pre-existing purchases of land would have led to Hobson’s authority being immediately resisted. Investigation of title, to ascertain whether the land had been “fairly purchased”, was the only practical course to be followed for such pre-colonial purchases.<sup>68</sup> Where purchases had not been “very unfair or fraudulent”, “the title to those lands ought to be maintained”.<sup>69</sup>

Other speeches in the debate contain little of interest for present purposes. The exception is Russell’s response to a question as to whether Hobson was authorised to negotiate for the sovereignty of the whole of New Zealand or whether his negotiations “were to be restricted to those parts of the islands where he found Englishmen located”.<sup>70</sup> Russell answered that Hobson’s duties were “in the first place, to endeavour to acquire the sovereignty of those lands in which any of her Majesty’s subjects were located”. He was authorised to accept, however, the sovereignty of the whole country “if he should find, in the course of his negotiations with the chiefs, that they were desirous of placing the whole sovereignty of their country in the hands of the Crown of England”. This was, however, “a subject very much left to the discretion of Captain Hobson, and it was impossible to give any definite answer upon the subject, until some report had been received from him”.<sup>71</sup>

This is where matters stood in London immediately before word of the Treaty was received. The Select Committee set up following the success of Eliot’s motion

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<sup>67</sup> The basis on which Russell considered that the Crown had a “general and original right in the land” in existing colonies is not explained. It may well be a reference to the doctrine by which all land is ultimately held of the Crown. It is clear, however, that he is not referring to the ability of British subjects to acquire land in foreign countries. In context, he is referring only to treatment of purchases made before the acquisition of sovereignty and explaining that the policy adopted in relation to New Zealand was not to make all such purchases invalid, in exercise of sovereign authority when acquired (since that course would have led to Hobson’s authority being immediately resisted). Instead, the policy adopted as an act of state was that, after acquiring sovereignty, the British Crown would maintain such titles (through confirmation by Crown grant—in conformity with the theory of tenure held of the Crown) provided that they were found, on investigation, to have been fairly obtained.

<sup>68</sup> Ibid 535.

<sup>69</sup> Ibid 536-537.

<sup>70</sup> Viscount Sandon (7 July 1840) 55 GBPD HC c 544.

<sup>71</sup> Lord John Russell (7 July 1840) 55 GBPD HC c 545.

### Chapter Thirteen: Waiting for the Treaty—London

therefore came to consider, not the options for intervention available to the Colonial Office, but whether the course followed by it had been appropriate, especially in relation to matters of sovereignty and property. Its proceedings, in which the American legal analogies again featured, are described in Chapter 15. That chapter, together with Chapters 16-18, indicate how, from a comparatively late and tentative start—starting with Lang, developing with Chapman and Wakefield, and cropping up in the House of Commons debate and the Select Committee inquiry—matters of doctrine concerning the nature of sovereignty and native property interests in land came to over-shadow the Treaty.



## CHAPTER FOURTEEN

### WAITING FOR THE TREATY—SYDNEY

No news from New Zealand was received by Gipps until 18 February. On that date he received despatches from Hobson which confirmed the reading of the Commissions and proclamations at Kororareka on 30 January and which described the debates and signing of the Treaty at Waitangi. A copy of the Treaty in English was enclosed.<sup>1</sup>

News of the Treaty was not reported in the press in Sydney until 20 February. On that date *The Australian* reported:<sup>2</sup>

By the *Samuel Winter*, from New Zealand, we learn that the New Zealanders at and in the vicinity of the Bay of Islands recognized the person of His Excellency Governor Hobson as the representative of Her Majesty the Queen, and declared their allegiance to her Sovereignty. Now, to all intents and purposes, New Zealand may be viewed as a British Colony.

*The Sydney Herald* of 21 February carried a long report from Captain Robertson of the *Samuel Winter* (which vessel had brought Hobson's confidential despatches to Gipps to Sydney from the Bay of Islands) that discussed both Hobson's 30 January proclamations and the treaty debate and signing at Waitangi on 5 and 6 February.<sup>3</sup> The report provided the texts of Hobson's proclamations but not the Maori or English texts of the Treaty which Hobson had not yet published in New Zealand.<sup>4</sup> Other newspapers picked up Captain Robertson's report as given in *The Sydney Herald* and published Hobson's proclamations.<sup>5</sup> Another account was given by *The*

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<sup>1</sup> Hobson to Gipps, 3 February 1840, 4 February 1840, and 5 & 6 February 1840, GBPP 1840 (560) XXXIII.575, 6-11.

<sup>2</sup> *The Australian*, Sydney, 20 February 1840, at 2.

<sup>3</sup> *The Sydney Herald*, 21 February 1840, at 2.

<sup>4</sup> Robertson's report of the proceedings at Waitangi is substantially the same as Colenso's account.

<sup>5</sup> *Sydney Gazette and New South Wales Advertiser*, 22 February 1840, at 3 (proclamations only); *The Australian*, Sydney, 22 February 1840, at 2 (land titles proclamation only); the *Commercial Journal and Advertiser*, Sydney, 22 February 1840, at 2; the *Australasian Chronicle*, Sydney, 25 February 1840, at 4 (Captain Robertson's report for 5-6 February only);

*Colonist* on 22 February, in which it was reported that the chiefs had at first refused to sign the treaty (“saying, ‘that they had never been robbed by any one, and that they would still retain the right to sell their land to whom they pleased’”) until, as *The Colonist*’s correspondent put it, “His Excellency sent them a quantity of tobacco and blankets, which pleased them very much, and yesterday (6th instant), all except two signed the required documents”.<sup>6</sup> From the same or another source, it was further reported that Hobson had informed settlers that “any purchases of land fairly made heretofore, will not be interfered with, but that henceforth no purchases from the natives will be valid”. *The Colonist* also carried a report from a correspondent at the Bay of Islands dated 1 February to which was appended Hobson’s 30 January proclamations.<sup>7</sup>

### Continuing controversy

During the period between Hobson’s departure from Sydney and receipt of news of the treaty signed at Waitangi, the terms of British intervention in New Zealand continued to be debated in the Sydney newspapers. *The Colonist* on 22 January noted that:<sup>8</sup>

[t]here is no subject which at present occupies the public mind, of such extensive interest and immediate importance, as the one on which we are about to offer a few observations: to wit, the subject of New Zealand Colonization.

The newspaper identified as a question “still at issue” (because of the Government’s determination “to exercise the most cautious policy and delicate discretion on their first setting out”) “the extent to which the jurisdiction of British authority can be competently exercised, and to which the territorial sovereignty of

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and the *Sydney Monitor and Commercial Advertiser*, 26 February 1840, at 4 (Captain Robertson’s report for 3-8 February only).

<sup>6</sup> *The Colonist*, Sydney, 22 February 1840, at 2. Extracts from this report were given in *The Australasian Chronicle*, Sydney, 25 February 1840, at 4; and the *Sydney Monitor and Commercial Advertiser*, 4 March 1840, at 2.

<sup>7</sup> *The Colonist*’s correspondent described the land titles proclamation as stating “that the Government would not acknowledge any purchase of land prior to this date unless a good claim and title could be proved before a Court, which was about to be established, and that from and after this date all land must be purchased at public auction from the Government, who will purchase the land from the natives”. Ibid.

<sup>8</sup> *The Colonist*, Sydney, 22 January 1840, at 2.

the British Crown can justly and warrantably be established and recognised in New Zealand”. It took aim at the view of “certain parties” that this question “involves no difficulty at all”, there being

no reason why Her Britannic Majesty should not take possession of these islands by right of prior discovery, and sustain her absolute sovereignty over the entire territory, as she has done in colonizing Australia, by the conscious power she possesses to defend her empire against hostile interference.

*The Colonist* objected that it would infringe Maori rights for the British Government to proceed in this way. In its response it anticipated the rejoinder that those who advocated Britain advancing an immediate claim to sovereignty by reason of a “right of prior discovery” might make that Maori had mere rights of use over land and did not own them, and answered it in two ways: first, by adopting the view that even usufructuary interests were rights to be recognised by the colonising power and their extinguishment bargained for; and secondly, by denying that Maori interests in land were in this category: their sovereignty and their proprietorship of lands had been recognised by the British Government:

When we remind them [the “certain parties” who advocated taking possession of New Zealand by “right of prior discovery”] of the injustice which such a measure would inflict on the aborigines, in robbing them by unhallowed violence of their natural possessions, they contend that savage tribes have no absolute and permanent right to the soil they inhabit, but enjoy it merely as a usufruct by the dispensation of nature, which right must in a great measure be abated, if not altogether superseded, to make way for the institutions and improvements of civilized life. But granted this reasoning be correct, we cannot deprive the aborigines even of this usufruct which nature has given them over the soil, without violating a principle of justice; and in colonizing their territory we are bound as a nation, as well as in our individual capacity, to regard this right, and to deal equitably with the natives of the soil, when we seek from them the surrender of their interest in the lands which they and their forefathers have occupied from time immemorial, and by the occupation of which they derived their subsistence.

The rights of proprietorship, however, which naturally belong to the aborigines of New Zealand have been recognized by the British government, and their right, therefore, to alienate their lands is likewise unquestionable. The independence of New Zealand as a

## Chapter Fourteen: Waiting for the Treaty—Sydney

nation has been recognised . . . . If her Britannic Majesty, therefore, were now to assert an absolute sovereignty over that territory, she would . . . be trampling on the rights of the natives . . . .

*The Colonist* further took the view that, unless the Government could “negotiate on fair and honourable terms for the cession or purchase of territory” and persuade Maori “to become British subjects”,<sup>9</sup> British “jurisdiction” (that is, “laws and authority”) should “only be competent over the persons and property of her own subjects”:

To this no Power, whether civilized or barbarian, can object, and more than this Britain need not desire. Let her establish and carry out her own self-creating and enlarging system of colonization, and in a few years the persons and property of her subjects will invest her with paramount sovereignty of all New Zealand. This, we conceive, is what Captain Hobson meant when he said in his letter, published in our last, that he hoped the sovereignty of the Queen of England might extend over the whole of New Zealand, although he could not positively answer that it would, “as the whole must depend on negotiation”.

Three developments helped to maintain interest in Sydney in New Zealand affairs in the month before reports of the signing of the Treaty were received: first, publication of the fourth letter from Lang’s *New Zealand in 1839* (with its argument that the Crown should maintain “inviolable” its “right of pre-emption”); secondly, publication of Gipps’s 14 January proclamations; thirdly, publication of the section of Normanby’s Instructions to Hobson concerning land policy.

Lang’s *New Zealand in 1839*, which had been published in London in July 1839, seems not to have been available for sale to the public in Sydney until about the beginning of February 1840.<sup>10</sup> English newspaper reviews of the book had been published in Sydney papers from as early as November 1839, however they either did not draw attention to or managed to obscure Lang’s argument about the

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<sup>9</sup> In the event that it was able to achieve these things “then indeed a case will arise in which Great Britain would be perfectly justified in declaring her absolute sovereignty over New Zealand as part and parcel of her Empire, and in maintaining it even at the peril of a war”. Ibid.

<sup>10</sup> See advertisement in the *Commercial Journal and Advertiser*, Sydney, 1 February 1840, at 1.

invalidity of existing British purchases of land in New Zealand by reason of the British Crown's prior right of pre-emption.<sup>11</sup>

The first Sydney newspaper to obtain a copy of Lang's book seems to have been *The Australian*, which told its readers on 21 December 1839 that, although it had "not yet perused it with sufficient attention as to be prepared to offer any opinion thereupon", "it breathes a bitter and unrelenting and antagonistic spirit, which is quite in consonance with the tone of Dr Lang's character".<sup>12</sup> It acknowledged that it was "in many parts, a powerfully written work" and that it had "certainly created a sensation at home", and promised its readers it would "not fail briefly to notice the doctor's pamphlet" at some later time.

In the event, *The Australian* did more than briefly notice Lang's pamphlet. It published abridged versions of each of Lang's four letters across four issues of its paper, making extensive quotation from the text. "Letter I" on the character of the European population of New Zealand was reviewed on 2 January 1840; "Letter II" on the religious missions to New Zealand on 4 January; "Letter III" on the prospects for New Zealand colonisation on 16 January; and "Letter IV" on the principles upon which a British colony ought to be established on 18 January.<sup>13</sup> By the time it was finished, *The Australian* had come to the opinion that the pamphlet was "by many degrees the most philosophical, the more forcible, the clearest, and the most comprehensive statement upon this important subject [New Zealand]

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<sup>11</sup> See the review by the *The Spectator* reproduced in *The Australian*, Sydney, 16 November 1839, at 3 and in the *Sydney Gazette and New South Wales Advertiser*, 23 November 1839, at 3; and the review by *The Colonial Gazette* reproduced in *The Colonist*, Sydney, 4 January 1840, at 4. Although *The Spectator* review quoted Lang's recommendation that the New Zealand Land Company should "surrender ... their native titles to Her Majesty's Government" by way of "lend[ing] their influence and support towards the maintenance of Her Majesty's undoubted right of preemption in all cases, both past and future", the review as a whole obscured that Lang denied the validity of British subjects' purchases of land in New Zealand (so, for example, it is said that the New Zealand Association's 1838 Bill "embodied the precise plan now recommended by Lang", including that purchases should be investigated to separate fraudulent from "bona fide titles"). *The Colonial Gazette* review republished in *The Colonist* on 4 January 1840 discussed only Lang's views about the Christian missions to New Zealand and the prospects of New Zealand colonisation.

<sup>12</sup> *The Australian*, Sydney, 21 December 1839, at 2.

<sup>13</sup> *The Australian*, Sydney, 2 January 1840 at 2, 4 January 1840 at 2, 16 January 1840 at 2 & 18 January 1840 at 3.

which we have, up to this moment, perused”, and it commended Lang’s views in his fourth letter as to the principles upon which a British colony ought to be established as “framed upon rules of sound discretion and great good sense”.<sup>14</sup>

On the same day that *The Australian* published the fourth of Lang’s “letters”, *The Colonist* republished a review of Lang’s pamphlet in *The Scotsman* from which Lang’s advocacy of disallowance of past and future private purchases of land from Maori as “an infringement of her Majesty’s undoubted right of pre-emption” was to be seen.<sup>15</sup> Thus it was that on the very day that Hobson sailed for New Zealand, the Sydney public was alerted, by both *The Australian* and *The Colonist*, to Lang’s contention that purchases of land in New Zealand were invalid as against the British Crown. It is fascinating to consider how different Hobson’s interactions with the deputation from the public meeting of New Zealand landholders and other interested parties might have been if it had been appreciated then that Lang’s recommendations were a possible course the British Government might take in New Zealand.

It did not take long for a reply to be made in the Sydney newspapers to Lang’s case about the treatment of private claims to title to land in New Zealand. Ironically, the reply appeared in Lang’s own newspaper, *The Colonist*.<sup>16</sup> (It is to be recalled that Lang was overseas in January 1840 and did not return to Sydney until March 1841.) The reply was from an unidentified correspondent; however, the style of the letter, the positions adopted, and the statement by the writer that he was “disposed and encouraged to continue [his] remarks”, suggest that the correspondent was Samuel McDonald Martin. Martin (assuming it was him) wrote that, while he “would not devote one moment” to consideration of the “unjust and extravagant schemes” for British Government colonisation of New Zealand “of foolish and envious people, who would suggest that other men, though they may have honestly come by their property, should still be deprived of it”, the matter was different with Lang:

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<sup>14</sup> *The Australian*, Sydney, 18 January 1840, at 3.

<sup>15</sup> *The Colonist*, Sydney, 18 January 1840, at 4.

<sup>16</sup> *The Colonist*, Sydney, 22 January 1840, at 2.

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[W]hen we find such a man as Dr Lang,—a person whose talents and reasoning powers we hold in the highest estimation, whose integrity of purpose we should be the last to call into question, and one too who is equally distinguished in the field of polemic controversy and colonial policy,—when we find such a man, we say, arguing for this wholesale spoliation of New Zealand landholders, such speculations assume an air of importance which they would not otherwise possess.

Martin examined Lang's claim that the British Crown had a right of pre-emption of New Zealand lands which preceded the right of British subjects to buy lands there:

The Doctor sets out in the defence and justification of his proposed plan for doing away with the honest and just claims of New Zealand proprietors by drawing two lines, which he calls parallel, but the parallelism of which we deny at the outset, and by proving that no such parallelism exists we shall, it must be allowed, both logically and morally overthrow any inferences which he may have deduced from these premises. To speak plainly, Dr. Lang's argument against the acknowledgement of the titles of landholders in New Zealand, and in favour of England's appropriating the whole island to herself, is founded upon the fact that she has already acted in a similar manner towards the first settlers in Port Phillip. Though we almost doubt if the Doctor himself would stand up for the honesty of even this proceeding, or defend England in her assumption of sovereignty over the natives of Australia. However, we have at present nothing to do with the justice or injustice of that proceeding. We will allow the Doctor the full benefit of his argument, and grant that England was right in what she had thus done. But still we maintain the lines are not parallel—because, in the first place, England had for many years before the occupation of Port Phillip by the Van Diemen's Land settlers, asserted her right to, and sovereignty over, the whole continent of Australia, and not only had she done so, but had actually founded a flourishing colony within a few hundred miles distance of the country thus claimed. Moreover her right to and sovereignty over the whole continent had been acknowledged by all the civilized powers; at all events her pretensions were never disputed. In the second place, the settlers at Port Phillip had acted in the face of these declarations of sovereignty over the country on the part of England, and with all this information before their eyes, they had entered the field as the rivals of their country, and had made a purchase of land from the natives, whose right to the soil was never for a moment taken into consideration, or at any time acknowledged by Great Britain. But the condition of New Zealand is far different. Britain has never, that we are aware of, preferred the slightest claim to any land there, or made the least effort to secure it as a dependency. On the contrary, it is worthy of remark, that she was the first civilized power to acknowledge their independence, both by the appointment of a British Consul

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or Resident to their country, as well as by sending to them by one of the captains in the British Navy a national flag, which is to this day recognized in all our ports as that of New Zealand. As a further and stronger proof of the acknowledgement of New Zealand's independence, does not Great Britain even to the present hour deny a British register to all ships built in New Zealand? thereby declaring at once that she regards it, to all intents and purposes, in the light of a foreign country. That being the case, was it not fair and right on the part of British subjects to acquire lands and possessions in New Zealand, as well as they would in any other foreign country? Did England ever whisper that the deed was wrong? Did she not buy from them the oil and the whalebone, the potatoes, the maize, and the pork, without ever calling into question their right to the same or to the soil which produced them? Where then, we would ask, is the parallel? and what is there in the circumstances of the one to warrant the adoption of the same plan, that was acted upon in regard to the other?

Martin also responded to “one other equally unjust and fallacious argument in favour of the appropriation system”, that the British Crown was “the only legitimate source whence titles to the possession of land and property can come to the subject”:<sup>17</sup>

Even granting the full force of this argument, we maintain it can only affect the subject while he remains at home. When he leaves his country, whether for his own, or his country's good, it must cease to affect him. In a foreign country, even though a subject of Great Britain, he may become the possessor of land without asking or receiving a title from England, provided there is no law in the country to which he has gone, to forbid his so doing. The title must come from the Government of the country where he resides, and not from that which he has left. And it remains altogether with that country to determine and decide upon his term of naturalization. In the free and independent state of New Zealand, a man is admitted to all the rights and privileges of a citizen whenever he lands upon her shores. In America it requires some years,—in England, many years to become a citizen, every country determining in this matter as it likes. But that England should prosecute and persecute her subjects in a foreign country, merely because they have gone there to better their circumstances, and to obtain those comforts which she denied them herself, is so monstrously absurd, that we can compare it to nothing else but the conduct of a foolish mother, who after refusing nourishment to her starving child, cruelly chastises it for receiving from another the food which she herself had denied it.

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<sup>17</sup> Martin wrote that this argument had “frequently been brought forward with a good deal of pompous pride and consciousness of superior force and ingenuity”.

The second development that maintained interest in Sydney in mid-January to mid-February 1840 in British plans towards New Zealand was the publication of Gipps's three 14 January proclamations. The proclamations were gazetted on 18 January,<sup>18</sup> having been held back from publication by Gipps until after Hobson had sailed.<sup>19</sup> Gipps's motive for withholding the proclamations from publication until Hobson had sailed was most likely to ensure that news of the Government's plans did not precede Hobson to New Zealand and cause difficulties for him there (as, for instance, if settlers disaffected by the land titles proclamation were to counsel Maori not to cede sovereignty). The delay in publication may also have been intended to protect Hobson from harassment in Sydney since it may have been anticipated that the land titles proclamation in particular would prove controversial.

It seems to have taken the Sydney newspapers a few days to notice that a supplement to the regular Government Gazette had been published containing the New Zealand proclamations. From 22 January they began to reprint them in their own pages.<sup>20</sup> The newspapers seem to have mostly regarded as "mere matters of form"<sup>21</sup> the proclamations extending the boundaries of New South Wales to include "any territory which is or may be acquired in sovereignty" in New Zealand and announcing Hobson's assumption of office as Lieutenant-Governor of that territory. Only *The Colonist* scrutinized the proclamations for what they revealed about "the question of sovereignty". It interpreted them as "asserting [the Queen's] dominion over such parts only of the New Zealand Islands as are at present in

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<sup>18</sup> *Supplement to the New South Wales Government Gazette of Wednesday, January 15, 1840*, Sydney, 18 January 1840.

<sup>19</sup> See Gipps to Hobson, 15 January 1840, GBPP 1840 (560) XXXIII.575 at 4: "I have the honour also to enclose to you herewith copies of three proclamations respecting New Zealand, which it is my intention to issue in Sydney as soon as possible after you shall have left it". If Gipps had not wanted to withhold the proclamations from publication, they could have been included in the Government Gazette of 15 January.

<sup>20</sup> *The Sydney Herald*, 22 January 1840, at 2; the *Sydney Gazette and New South Wales Advertiser*, 23 January 1840, at 2; *The Australian*, Sydney, 23 January 1840, at 3; the *Australasian Chronicle*, Sydney, 24 January 1840, at 4; the *Sydney Monitor and Commercial Advertiser*, 24 January 1840, at 2 (land titles proclamation only); *The Colonist*, Sydney, 25 January 1840, at 2; *Commercial Journal and Advertiser*, Sydney, 25 January 1840, at 2.

<sup>21</sup> *The Australian*, Sydney, 23 January 1840, at 2.

possession of her subjects, and such also as may hereafter be acquired by herself in purchase or negotiation from the natives”.<sup>22</sup>

“[B]y far the most important” of the three proclamations, and of “great interest” to the newspapers, was that concerning land titles.<sup>23</sup> Although no newspaper interpreted it as denying (in the manner of Lang) the validity of British titles to land in New Zealand where purchases were not fraudulent or excessive,<sup>24</sup> there was some difference of opinion between the newspapers as to whether the proclamation was justified. *The Australian* saw it as affirming Labouchere’s Parliamentary statement and as laying down a rule that was “consonant with sound policy, for it is calculated to protect the reputable settler, and to put to the rout the swarm of unprincipled adventurers who have, up to this moment, preyed upon the credulity of the Native Chiefs”.<sup>25</sup> The *Sydney Monitor*, too, considered that the proclamation embodied a “sensible and just view of titles to land in New Zealand”.<sup>26</sup>

*The Colonist*, however, objected to the proclamation on three grounds: first, the prohibition on future purchases infringed “one of the standard maxims of the British Constitution, and one too of the fundamental principles of British law” that there should not be retrospective legislative interference with individual rights (at

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<sup>22</sup> *The Colonist*, Sydney, 29 January 1840, at 2. *The Colonist* interpreted the proclamations, consistently with the view it had previously given of the plans of the British Government, as that “Her Majesty’s sovereignty will extend only over the persons and property of British subjects” except to the extent that Maori were “induced to recognize the paramount sovereignty, and place themselves under the protection, of the British Crown”.

<sup>23</sup> *The Sydney Herald*, 22 January 1840, at 2.

<sup>24</sup> But see SMD Martin *New Zealand; In a Series of Letters* (Simmonds & Ward, London, 1845), Letter IV (25 January 1840), especially 82-83: “The third proclamation, ... is regarded with much suspicion, if not fear ...”; “I must confess, from what I know of the character of Sir George Gipps, the disposition of the Council of New South Wales towards New Zealand, and the reports of the intentions of both parties which are now in circulation here, that I strongly fear the proprietors of lands in New Zealand will not be permitted, without a struggle, to retain their possessions in that country”.

<sup>25</sup> *The Australian*, Sydney, 23 January 1840, at 2. See also *The Australian*, Sydney, 1 February 1840, at 1: “We foresee ... much litigation arising from the claims to tracts of land purchased from the several chiefs. It cannot be disputed by any person, at all conversant with the subject, that large portions of land have been obtained for *purely nominal considerations*. Purchases, indeed, of such a nature as to render it quite impossible for the British Government, upon the principle set forth in the late proclamation, to recognize them”.

<sup>26</sup> *Sydney Monitor and Commercial Advertiser*, 24 January 1840, at 2.

least not without an award of adequate compensation) since it would catch purchases made in New Zealand between 14 January and Hobson's arrival there;<sup>27</sup> secondly, the proviso that land acquired on equitable conditions would be confirmed so long as not "in extent or otherwise prejudicial to the present or prospective interests of the community" was a "very indefinite and extraordinary reservation" for which there was no precedent in the "British Constitution or ... Statute Book of England": if the purchase was fair what further basis for interference could there be?<sup>28</sup>; thirdly, the proclamation made "no mention ... of the tribunal by which such [land] claims are to be finally determined" (after being investigated and reported on by the Commissioners) but if it were to be the case that that function was to fall on the Governor and Council (possibly without even a right of appeal to "that constitutional palladium of personal rights, a Jury of impartial and disinterested men, under the administration of the Judges of the Supreme Court of the territory") the result would be "monstrously anomalous, ... unconstitutional and dangerous" as "the Government and Commissioners will have it in their power to set the existing laws of the Empire aside in questions respecting property in New Zealand, and substitute in their stead some arbitrary rule or criterion of their own imagining".<sup>29</sup>

The third development that maintained interest in British plans towards New Zealand was the publication of the section of Normanby's Instructions to Hobson concerning land policy in Sydney newspapers in late January 1840.<sup>30</sup> The extract from the Instructions was republished from *The Colonial Gazette* (London),<sup>31</sup> and two of the Sydney newspapers also reproduced the London newspaper's assessment of land policy in the Instructions (which has been discussed in Chapter

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<sup>27</sup> "If this clause of the Proclamation be literally and rigidly acted upon, we shall have no hesitation in characterizing the enforcement of it as a piece of unreasonable and arbitrary despotism. Why! Nicholas of Russia, the archest and most absolute tyrant in the world, could not issue a ukase more unreasonable and despotic than this!"

<sup>28</sup> "The necessity of an *Immigration Fund* will not justify the act, and that is the only principle that we can imagine might be pleaded in justification of so anomalous a proceeding".

<sup>29</sup> *The Colonist*, Sydney, 29 January 1840, at 2.

<sup>30</sup> See Chapter 13, text accompanying n 25.

<sup>31</sup> Supplement to *The Sydney Herald*, 27 January 1840, at 2; *The Australasian Chronicle*, Sydney, 28 January 1840, at 4; the *Sydney Monitor and Commercial Advertiser*, 29 January 1840, at 2; the *Commercial Journal and Advertiser*, Sydney, 5 February 1840, at 2.

13).<sup>32</sup> One of these papers was *The Sydney Herald* which commended *The Colonial Gazette* article to its readers' "especial attention" as "[g]enerally speaking, ... contain[ing] much truth".

It was with the information provided by *The Colonial Gazette* (and with knowledge now also of Gipps's proclamation and Lang's views) that *The Sydney Herald* on 19 February asked "In whom lies the fee-simple of the New Zealand Isles?"<sup>33</sup> It considered that the British Government had supplied the answer to this question:

The discussion of the question as an abstract proposition might have afforded a profitable exercise to our pen, had it not been practically answered by the British Government, who have conceded the sovereignty of the soil in its rightful lords, the aboriginal Chiefs.

*The Sydney Herald* then proceeded to consider how the British Crown was to acquire sovereignty and property in New Zealand and to establish a system of Crown land sales:

Having conceded the point, that the property of the soil is vested in the native Chiefs, and having at the same time determined on colonizing the islands with British emigrants, Ministers had next to consider by what means the Crown could acquire a territorial

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<sup>32</sup> *Sydney Gazette and New South Wales Advertiser*, 25 January 1840, at 2; Supplement to *The Sydney Herald*, 27 January 1840, at 1-2.

<sup>33</sup> See also the *Sydney Gazette and New South Wales Advertiser*, 20 February 1840, at 2: "Various opinions and speculations are afloat respecting the settlement of land-titles in New Zealand. Her Majesty will, in the first place, obtain the sovereignty by purchase, or by cession from the Aboriginal chiefs. Then comes the questions, by what rule of *Ex post facto* law are the claims of parties to be determined who have purchased lands from the native chiefs long prior to Her Majesty the Queen of England's having obtained the sovereignty of New Zealand.... The ambiguity of style in which the official reply has been given to the question [by Hobson to the deputation of landholders], gives no clew by which we might arrive at anything bordering on a correct conclusion.... We deem it quite requisite to institute an inquisition into the merits of each particular claimant's case; and we would most unquestionably refuse to recognise the claims of those who pretend to the possession of tracts of country, greater in extent than some English counties, harbour and river frontage for factories, eligible sites for towns, &c. With the above reservations, we would advocate the propriety of submitting every disputed case to the decision of an impartial special jury, who should have to determine whether fair and equitable consideration has been given for the land claimed, making due allowance for the risk run by those who left the practicability of retaining their purchases to future events." See also the *Australasian Chronicle*'s response to the letter of a correspondent criticising the land purchasing of Church Missionary Society missionaries: "We have no doubt Captain Hobson will take charge of the lordly acres so unjustly acquired by these wolves in sheep's clothing, and reduce their possessions to the apostolic standard". *Australasian Chronicle*, Sydney, 21 February 1840, at 2.

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seignorage<sup>34</sup> analogous to that held in Colonies won by conquest or by arbitrary seizure. The moral sense of the age would not tolerate that the admitted right of the Chiefs should be wrested from them by violence—that their lands should be seized at the point of the bayonet and the mouth of the cannon, and that Queen Victoria should become the feudal lady of New Zealand, by the summary process which made the Norman Duke the feudal lord of England. No—this wholesale spoliation, this national ruffianism, would not have been endured by a people imbued with the mild spirit of commerce, of science, and of religion; and so Ministers had no alternative but to follow the plain track of equitable negotiation, and to effect a transfer of the seigniory from the Chiefs to the Queen of England by means of *honest bargaining*.

Their plan is, to *buy out* the natural lords—to induce them, for an adequate consideration to hand over their sovereignty, and quietly to place their territories beneath the British flag. By what *means* they intended to drive this gigantic bargain, whether by fair words or by hard cash, remains to be seen; but it is at all events noticed that the Queen must neither rob nor cheat, but must deal with the Chiefs as her subjects deal with each other.

This point gained, the Crown will proceed to sell and convey the lands of New Zealand as the Crown Lands are sold and conveyed in the Australian Colonies; and the proceeds will doubtless be applied in the same way also; that is, partly in the assistance of emigration, and partly in the gratification of “my lords of the Treasury”.

*The Sydney Herald* considered that “[s]o far, then, the project is unobjectionable—nay, it is laudable”. But “now comes the critical question—*How will the Crown deal with lands already alienated?*” *The Sydney Herald* predicted from the “oblique” way in which the British Government had recognised Maori sovereignty that “British holders of New Zealand estates [should] tremble for their titles”: “there will soon be a terrific smash among the New Zealand titles”. Their “day of ordeal” was approaching in which they would be forced “to pass seven times through the fire of a sordid investigation”. The investigation of titles was “sordid” because it involved sacrificing private property rights for reasons of “public expediency”, namely the “augmentation of state revenue”.

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<sup>34</sup> In England, “seignory” is the lordship exercised by a superior feudal landlord. However, *The Sydney Herald* seems to use it to refer to the ownership of land.

*The Sydney Herald* did not interpret Gipps's proclamation as denying British rights in land through purchase from Maori. Rather, it would seem, it objected to interference with private rights on the grounds of acquisition on unfair terms or prejudice to present or future interests of the community (whether due to the size of the purchase or for any other reason). It stated:<sup>35</sup>

What the Chiefs have actually sold and conveyed, they cannot sell and convey over again. And yet Sir George Gipps tells us in one of his late Proclamations, that "Her Majesty will not acknowledge as valid any title to land which either *has* been or shall be acquired in that country, which *is* not either derived from or confirmed by a grant to be made in Her Majesty's name, and on her behalf." This is wretched grammar, for it says what it does not and cannot mean. Literally interpreted, it would proclaim that all lands now held in that country by British subjects otherwise than by Royal grant, will not be recognised as held under a valid title; whereas it is evident the Governor intended to say, that the titles will not be recognised *until* they shall have been so confirmed.—But the Proclamation proceeds—"Care shall be taken at the same time to dispel any apprehension that it is intended to dispossess the owners of any land acquired on equitable conditions, and *not, in extent or otherwise, prejudicial to the present or prospective interests of the community* [...]"

Now, it is assumed, that if the Crown (through its Commissioners) be dissatisfied with the "*conditions*" upon which land has been acquired, or shall be of opinion that, "in extent or *otherwise*," it is "prejudicial to the present or *prospective* interests of the community," the title may be declared invalid, the solemn enfeeoffments<sup>36</sup> of the Sovereign Chiefs be set aside, and the land (we infer) be seized upon in the Queen's name.

Our comments upon this very questionable doctrine, we must reserve for another article.

As will be seen in Chapter 16, debate about Government policy in relation to the acquisition of sovereignty and the recognition of Maori and European property in land did not end in Sydney with news of the Treaty. It was kept alive, first, by continuing uncertainty about Government intentions in respect of pre-proclamation European titles to land in New Zealand and, later, by the controversy created by the

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<sup>35</sup> *The Sydney Herald*, 19 February 1840, at 2.

<sup>36</sup> An "enfeoffment" is the deed by which a person is put in possession of the fee-simple of lands.

terms of the land claims legislation introduced into the New South Wales Legislative Council by Gipps in May 1840. The ongoing debate about Crown, Maori and settler rights of sovereignty and property in the period after the signing of the Treaty of Waitangi, so far as it illuminates thinking in the Treaty, is further considered in Chapter 16. Meanwhile it is necessary to consider actions by Gipps in the period between when Hobson departed from Sydney and when Gipps received news of the Treaty which were largely out of public view and which may provide clues as to his thinking on those topics that go to questions about the meaning of the Treaty.

### **The Governor**

Gipps had been born in Kent in 1790, the son of a clergyman. After education at King's School, Canterbury (where William Broughton, later Bishop of Australia, was a school-fellow), Gipps attended the Royal Military Academy at Woolwich, before joining the Royal Engineers. After service in the Peninsula Wars, Flanders, and at Chatham Dock (the headquarters of the Royal Engineers), Gipps became commander of the Engineers in the colonies of Essequibo-Demerara and Berbice, with the task acquiring wood for the navy, entailing the building of wharves, roads and sawmills, with labour provided by 800 mainly government-owned slaves. Gipps owned a slave, and had a child by the slave of another, arranging for both to be freed when he left the colony in 1829. While in the colony, Gipps came to the attention of the Colonial Office for proposals he made for freeing some of the government slaves, although the proposals were ultimately overtaken in the wider emancipation measures of the 1830s.<sup>37</sup>

After returning to England in 1830, where he was soon married, Gipps was appointed in 1831 to a commission to inquire into Irish electoral boundaries. After

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<sup>37</sup> Unless otherwise indicated, the biographical information given here about Gipps comes from the following sources: Samuel McCulloch "Gipps, George (1791–1847)" *Australian Dictionary of Biography* (Melbourne University Press, 1966) vol 1, 446–453 ["McCulloch 'George Gipps'"]; Alan Frost "Gipps, George (1791–1847)" *Oxford Dictionary of National Biography* ["Frost 'George Gipps'"]; John Gipps *Every Inch a Governor: Sir George Gipps, Governor of New South Wales 1838–1846* (Hobson's Bay Publishing, Port Melbourne, Victoria, 1996).

a final posting as a military engineer, in 1834 he secured the position as private secretary to Lord Auckland, First Lord of the Admiralty. Through the support of Lord Auckland, Gipps was appointed in mid-1835 as one of three commissioners in an inquiry into French grievances in Lower Canada. The grievances which led to the inquiry included demands that the Executive be responsible to the Legislative Assembly and that the Legislative Council be elected. The management of Crown land and land revenues were related grievances. The other commissioners were the Earl of Gosford, who chaired the Commission and was also appointed Governor, and Sir Charles Grey, a former judge of the Supreme Court of Calcutta. Gipps was knighted before leaving for Canada.

While the Gosford Commission, which had been set an impossible task, did not settle the problems of Lower Canada (which eventually were to lead to rebellion), Gipps emerged from the experience with an enhanced reputation. He demonstrated political skills and a good grasp of colonial administration, and his ideas were well received by the Government. He had a reputation for being just in his dealings towards the French Canadians. It was necessary for the Commission to consider the respective merits of French and English systems of land tenure. In its final report, while taking a balanced view, the Commission favoured systems which would ensure that land found its way to best use. It favoured the right of the Crown to dispose all ungranted lands on the basis that

in any new discovered or newly occupied country the land belongs to the Government of the nation taking possession of it, and that settlers in it, so long as they retain the character only of emigrants from the mother country, can claim no more than what has been granted to them as individuals.<sup>38</sup>

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<sup>38</sup> *Reports of the Commissioners Appointed to Inquire into the Grievances Complained of in Lower Canada* (General Report, Section 3: The Wild Lands and King's Domain), GBPP 1837 (50) XXIV.1 at 20. Mark Francis says that the task of writing the reports "fell mostly upon Gipps". Mark Francis *Governors and Settlers: Images of Authority in the British Colonies, 1820–60* (Canterbury University Press, Christchurch, 1992) ["Francis *Governors and Settlers*"] 160.

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The experience on the Gosford Commission is said to have shaped Gipps's views on colonial government before he arrived in New South Wales.<sup>39</sup>

After the Commission had despatched its final report in 1837, Gipps spent two months travelling in the United States, finding much to admire. He arrived back in England with his family in mid-1837 to find that he had been appointed a Major. Shortly afterwards, he was appointed as Governor of New South Wales following the resignation of Sir Richard Bourke. Gipps and his family left England in October 1837, arriving in Sydney in February 1838 as effectively the first civil governor of New South Wales.<sup>40</sup>

New South Wales was a colony experiencing rapid change. The rapid expansion of pastoralism and the growth of free immigration<sup>41</sup> through the 1830s led to pressures for representative government, religious toleration, and public education. Demand for land led the European population into increasing conflict with Aborigines. Gipps became unpopular when he brought to justice stockmen responsible for the Myall Creek massacre of June 1838 (in this, Gipps had no option: it was Colonial Office policy that Aborigines were to be protected and treated as subjects). Gipps passed legislation to admit the evidence of Aborigines in court (although the legislation was subsequently disallowed on the advice of the Law Officers in London). He prepared a proclamation on Aboriginal policy shortly after his arrival, based on a despatch by Glenelg to Bourke following the report of the Aborigines Committee, but was soon obliged to water down his initial intentions.<sup>42</sup> Indeed, he seems rapidly to have become pessimistic about the protection of Aborigines and attempts to civilise them. He became disillusioned about the utility of the system of Protectors of Aborigines and reluctant to resource them. Gipps's strong support for settlement and land utilisation was inimical to

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<sup>39</sup> Ibid 157 & 164.

<sup>40</sup> His rank as Major did not qualify him to command the military and naval forces in Australia.

<sup>41</sup> The population of New South Wales doubled between 1838 and 1846.

<sup>42</sup> AGL Shaw "British Policy Towards the Australian Aborigines, 1830–1850" (1992) 25:99 *Australian Historical Studies* 265-285 at 273-274.

protective measures for Aborigines and their use of land (their ownership of land was denied).<sup>43</sup>

By December 1839 when Hobson arrived in Sydney, Gipps, then 49 years old, was an experienced and accomplished administrator. His style is said to have been marked by “quiet dignity and steady application of principle”.<sup>44</sup> He seems to have maintained in Australia the view he had developed in Canada that Crown management of land and land revenues was key to the success of colonisation.<sup>45</sup> He had good command of detail as well as general principle. He was intelligent and had a reputation for hard work. He was confident in his own views and was not someone to seek advice from others.

Gipps was therefore, by temperament and experience, someone who was likely to have had views on Hobson’s mission and a sense of his own responsibility as Governor. He is known to have been careful in his dealings with the Colonial Office and concerned about its opinion of his work.<sup>46</sup> It is difficult, however, to gauge Gipps’s thinking about New Zealand from what is known about the period during which Hobson was in Sydney. He is not known to have any direct dealings with the New Zealand landowners in Sydney. It is hard to know what to read into his intervention in the New Zealand land auction, and other actions such as the proclamation on land titles, which may have been prompted by caution to ensure that Colonial Office instructions were able to be carried out. They do not in themselves indicate an independent line on questions of sovereignty and property.

### **An unsigned treaty**

Before news of the Treaty’s signing had arrived in Sydney, however, it is possible to see in Gipps’s further actions in relation to New Zealand a stamp of his own. That is not to suggest any conscious departure from Normanby’s Instructions. If Gipps did gloss the Instructions, as will be argued in respect of some of his post-

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<sup>43</sup> Ibid 274-276.

<sup>44</sup> Frost “George Gipps”, above n 37.

<sup>45</sup> McCulloch “George Gipps”, above n 37.

<sup>46</sup> Francis *Governors and Settlers*, above n 38, 167.

Treaty actions, it may have been in response to unforeseen practical problems, particularly with the scale of European pre-Treaty land purchases.

In late January 1840, it was reported in Sydney newspapers that a number of Maori chiefs had been brought to Sydney for the purpose of concluding sales of large areas of New Zealand land. Correspondents to the papers expressed concern that these proceedings were inconsistent with Gipps's proclamation and were being obtained by unscrupulous means.<sup>47</sup> Most of these chiefs (perhaps eight) appear to have been Ngai Tahu, who may have been attempting to raise money to finance their war with Te Rauparaha, or were attempting to gain Gipps's protection against Te Rauparaha, including by preventing his rumoured sale to the New Zealand Land Company of Ngai Tahu lands.<sup>48</sup> Some North Island chiefs were also in Sydney at the time, although their purpose for being there is not clear.<sup>49</sup>

According to a report in *The Colonist*, Gipps met with five of the Ngai Tahu chiefs, led by the chiefs Tuhawaiki and Karetai, on 31 January.<sup>50</sup> The source for the report was said to be "the interpreter" at the meeting. That was quite possibly John Jones, a whaling station owner with a history of land dealings with Ngai Tahu who had brought the chiefs to Sydney.<sup>51</sup> The report is hostile to Gipps and makes out that Gipps behaved rudely towards the chiefs, who had requested the interview. It seems from the report that Gipps formed the view that the chiefs were being

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<sup>47</sup> *The Sydney Herald*, 31 January 1840, at 2 ("By the late arrivals a number of New Zealand Chiefs have come to town and are continually to be seen near a certain Attorney's office, where a large quantity of *Deeds* are preparing for their *Signatures*. Surely this ought not to be allowed, after the Queen's late proclamation"); *The Australian*, Sydney, 1 February 1840, at 2 ("the sinister proceedings of certain individuals who have brought to Sydney some six or seven New Zealand Chiefs, for the purpose of *manufacturing* titles to large tracts of land, of which they have possessed themselves by means that are very far from coming within the description [in the proclamation] of a fair equitable bona fide purchase. We trust we may have been misinformed").

<sup>48</sup> Harry Evison *The Long Dispute: Maori Land Rights and European Colonisation in Southern New Zealand* (Canterbury University Press, Christchurch, 1997) ["Evison *The Long Dispute*"] 88-89; Harry Evison "The Wentworth-Jones Deeds of 15 February 1840" (1995) 28 *The Turnbull Library Record* 43-60 ["Evison 'The Wentworth-Jones Deeds'"] at 44.

<sup>49</sup> Evison *The Long Dispute*, above n 48, 90; Edward Sweetman *The Unsigned New Zealand Treaty* (The Arrow Printery Pty Ltd, Melbourne, 1939) ["Sweetman *The Unsigned New Zealand Treaty*"] 60.

<sup>50</sup> *The Colonist*, Sydney, 1 February 1840, at 2.

<sup>51</sup> Evison *The Long Dispute*, above n 48, 79 & 89.

manipulated in an attempt to gain Gipps's endorsement of land sales already made and which the chiefs said they wished to acknowledge. The reporter described Gipps as seeming "to chuckle at what he thought was a very clever discovery on his part of the aim and policy of the European claimants in bringing forward these native chiefs", and as "rather *too* candid (*rude* to wit)". He "would scarcely hear any one speak but himself" and dropped a number of "morsels of information":

Among other things, His Excellency acknowledged that the Sovereignty and independence of the chiefs, of the *Northern* part of the *Northern* island of New Zealand *had* been recognized by the British Government but that that recognition did not extend to the other parts of the territory. He also remarked with reference to the reduction of claims to land, on the objection of extent, that the purchasers would be fully indemnified for their outlay on the land claimed by them; but that he did not mean to say positively that they would be deprived of their possessions on that consideration. The Government had first to negotiate with the chiefs for the establishment of British Sovereignty, before they would proceed to interfere in such cases, and that then they would be referred to a Board of Committee. His Excellency was understood to hint that British subjects had no right to purchase land of savages, in precedence to their own Government.

The chiefs were said not to have been impressed with their reception by Gipps but at least one correspondent to a Sydney newspaper expressed appreciation that the Governor had not allowed himself to be hoodwinked by the land-sharks.<sup>52</sup>

It seems that a further meeting of chiefs with Gipps was held on 12 February.<sup>53</sup> It included five North Island chiefs as well as Tuhawaiki and another Ngai Tahu chief.<sup>54</sup> Little is known of this meeting. It seems that at it there was discussion about the terms of an agreement on the part of the chiefs to recognise British

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<sup>52</sup> Letter from "No Shark", *Australasian Chronicle*, Sydney, 4 February 1840, at 2. See also letter from "A Pakia Riri", Supplement to *The Sydney Herald*, 7 February 1840, at 1. The second letter discusses the most recent import from New Zealand, "Five New Zealand Chiefs" come to "teach us the arts and manufactures ... not ... [of] New Zealand flax, but of Deeds for the conveyance of New Zealand land, that does not even belong to them".

<sup>53</sup> Gipps to Russell, 16 August 1840 (no 2), GBPP 1841 (311) XVII.493 at 63: "they all promised to attend on the next day but one [14 February] to sign the paper which was to be prepared for them".

<sup>54</sup> See list of attending and non-attending chiefs (and of the districts claimed by them) attached to the draft of the "Memorandum of an agreement", SLNSW DL N Ar/3 (also ANZ Micro-Z 2718 & UoA Microfilm 09-006 Reel 3).

sovereignty over their territories. Gipps was later to explain to Russell that his purpose was to get the chiefs “to sign a declaration of willingness to receive Her Majesty as their sovereign, similar in effect to the declaration which Captain Hobson was then engaged in obtaining from the chiefs of the Northern Island”. The chiefs were

accordingly brought to the Government House, and, through the medium of an interpreter, the nature of the document they were required to sign was fully explained to them in the presence of myself, the colonial secretary, and several persons who claimed to have purchased land in the Middle Island [the South Island] ....<sup>55</sup>

The agreement proposed to the chiefs at the 12 February meeting either had not yet been written or was only in draft.<sup>56</sup> The outcome of the meeting was that the chiefs agreed to return to Government House on 14 February, with the Ngai Tahu chiefs who had not been present on the 12th,<sup>57</sup> to sign the properly drawn up agreement. In the expectation that this would occur, Gipps gave each of the chiefs 10 sovereigns before they departed.

None of the chiefs, however, returned to sign the agreement on 14 February. A message was sent for them, to which an answer was returned by John Jones that he had “been advised not to be instrumental in getting the New Zealand Chiefs (my friends now here) to sign away their rights to the Sovereignty of the Crown, respectively owned by them, until my purchases are confirmed as far as they can be by the Crown”. Jones said that he would “act on the advice”.<sup>58</sup>

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<sup>55</sup> Gipps to Russell, 16 August 1840 (no 2), GBPP 1841 (311) XVII.493 at 63.

<sup>56</sup> The extant draft of the agreement (see below) bears the date 14 February 1839, which suggests that it may not have been drawn up until after the meeting on 12 February, after the chiefs had agreed to return on 14 February. It is possible, however, that there was an even earlier draft that has not survived.

<sup>57</sup> The expectation that the non-attending Ngai Tahu chiefs on 12 February, including Karetai, would return to Government House with the other chiefs on the 14th is to be seen from the fact that the three extant copies of the agreement (see below) include them as parties to it.

<sup>58</sup> Jones to Thomson (Colonial Secretary, New South Wales), 14 February 1840, quoted in Sweetman *The Unsigned New Zealand Treaty*, above n 49, 62. To Jones’s reply, Gipps minuted that “Mr Jones must take the consequences of the part which he has acted in this business” and that “[t]he matter had better lay up for a few days—in the meantime of course, no more presents can be given”. Gipps minutes, quoted in Sweetman *The Unsigned New Zealand Treaty*, above n 49, 62.

Gipps's "Memorandum of an agreement" was never signed.<sup>59</sup> The intended parties to it were Gipps as Governor of New South Wales and its dependencies acting on behalf of Queen Victoria and the five North Island and five South Island chiefs who were named. The agreement, which was not divided into a preamble, articles and subscription in the manner of the English draft of the Treaty of Waitangi, recited that the chiefs had "expressed their willingness and desire" for Queen Victoria to "take them, their tribes and their country under Her Majesty's Royal protection and Government" and that Queen Victoria

viewing the evil consequences which are likely to arise to the welfare of the Native Chiefs and tribes from the settlement amongst them of Her Majesty's subjects unless some settled form of Civil Government be established to protect the Native Chiefs and Tribes in their just rights, and to repress and punish crimes and offences which may be committed by any of Her Majesty's subjects

had been pleased to appoint Hobson as her Lieutenant-Governor "in and over such parts of New Zealand as have been or may be acquired in Sovereignty by Her said Majesty, Her Heirs and Successors" and to empower him "to treat with the Native Chiefs accordingly".

The agreement was said to be a "preliminary engagement", which the chiefs engaged "to ratify and confirm" in the presence of their tribes and Hobson. (Two references to the agreement as a "treaty" were crossed out in the draft of the agreement.) By it, it was agreed that Queen Victoria should

exercise<sup>60</sup> absolute Sovereignty in and over the said Native Chiefs, their tribes and Country in as full and ample a manner as Her said Majesty may exercise her Sovereign

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<sup>59</sup> A draft with corrections and two neat copies of it (one on parchment and one on paper, both with official seals) are extant. The only difference between the two neat copies is that one is dated 14 February 1840 (although the date has been struck-through), whereas the date is left blank in the other. Presumably, the agreement that is dated is the one that was prepared for the chiefs for signing on 14 February, while the undated one is one that was prepared in the event that they (or their sponsors) had a change of heart (see Gipps's minute at n 58 above). SLNSW DL N Ar/3 (also ANZ Micro-Z 2718 & UoA Microfilm 09-006 Reel 3).

<sup>60</sup> The word "exercise" was substituted for the word "assume" in the draft of the agreement. A contemplated reference to Hobson treating with the chiefs for an "acquirement" of sovereignty was reconsidered and different words used.

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authority over any of Her Majesty's dominions and subjects, with all the rights, powers and privileges which appertain to the exercise of Sovereign Authority.

The Queen “engage[d]”

to accept the said Native Chiefs and Tribes as her Majesty's subjects and to grant Her Royal Protection to the said Native Chiefs, their tribes and country in as full and ample a manner as Her Majesty is bound to afford protection to other Her Majesty's subjects and dominions.

The chiefs, for their part, “engage[d]” on behalf of themselves and their tribes

not to sell or otherwise alienate any lands occupied by or belonging to them, to any person whatsoever except to her said Majesty upon such consideration as may be hereafter fixed.

This promise by the chiefs was

upon the express understanding that the Chiefs and Tribes shall retain for their own exclusive use and benefit such parts of their said lands as may be requisite and necessary for their comfortable maintenance and residence; and out of the proceeds of the land which may be purchased from them adequate provision shall be made for their future education and instruction in the truths of Christianity.

Not only was Gipps's agreement not signed but, no doubt adding insult to injury so far as he was concerned, on 15 February, Tuhawaiki, Kareti and six other Ngai Tahu chiefs entered into an agreement with John Jones and William Wentworth, a leading Sydney lawyer and landowner, to “sell” to them the entire South Island (“Middle Island”), as well as Stewart Island and other southern islands, excluding only Ruapuke Island and “such portions ... as [had] already been disposed of” by the chiefs.<sup>61</sup>

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<sup>61</sup> “Indenture” dated 15 February 1840, SLNSW MLMSS 7574 (Wentworth's copy) [published as *The Wentworth Indenture* (The Nag's Head Press, Christchurch, 1979)] & ATL MSO-Papers-4947 (Jones's copy). See Evison “The Wentworth-Jones Deeds”, above n 48, 45-47. Jones and Wentworth were also purchasing on behalf of C Brown, R Campbell and FW Unwin. See *The Sydney Herald*, 6 July 1840, at 4, col 5; and Sweetman *The Unsigned New Zealand Treaty*, above n 49, 65. As to the right of the chiefs to sell the land, see Evison *The Long Dispute*, above n 48, 90-91; and Evison “The Wentworth-Jones Deeds”, above n 48, 46.

While Gipps's treaty was not adopted, some similarities between it and the Freeman draft of the Treaty in English (**Appendix 1**) and the Hobson preamble (**Appendix 4**) may point to discussions between Gipps and Hobson in Sydney in late December 1839 or early January 1840 about the form the treaty should take. It is possible that the discussions were captured in notes drawn on by both Gipps in Sydney and Hobson in New Zealand. No notes survive, so the matter can only be one of conjecture based on the similarities between the texts. Busby's later reference<sup>62</sup> to having received from Cooper and Freeman "some notes ... as the basis of the Treaty" may have been simply a reference to the Freeman draft but could conceivably have included more preliminary material such as may have been brought from Sydney.

Donald Loveridge refers to "marked similarities" between Gipps's treaty and the Freeman draft.<sup>63</sup> It is true that both entailed a cession of sovereignty and the exclusive right of Crown purchase of land, in exchange for "Royal Protection" and the rights of British subjects (although expressed in different terms). Not too much should be read into these similarities because they largely flowed from Normanby's Instructions. Apart from use of the expressions "Royal Protection" and "evil consequences", however, there are no significant coincidences in language. Stronger coincidence in language which might suggest collaboration in Sydney over the terms of the treaty is provided by comparison of Gipps's treaty with the Hobson preamble. There, the coincidences are the use of the phrases "evil consequences", "just Rights" and "settled form of Civil Government". While "settled form of Civil Government" might have been taken independently by each from Normanby's Instructions (in which it appeared<sup>64</sup>) and "just Rights" seems to have been an expression in common currency (as appears from use of it by Busby in 1835,<sup>65</sup> Edward Marsh in 1838,<sup>66</sup> the *Australian Chronicle* in January 1840,<sup>67</sup>

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<sup>62</sup> See Chapter 1, text accompanying n 17.

<sup>63</sup> Donald Loveridge "The 'Littlewood Treaty': An Appraisal of Texts and Interpretations" (2006) Stout Research Centre <[www.victoria.ac.nz/stout-centre/research-units/towru/publications/Littlewood-Treaty.pdf](http://www.victoria.ac.nz/stout-centre/research-units/towru/publications/Littlewood-Treaty.pdf)> at 18.

<sup>64</sup> See Chapter 8, text accompanying n 12.

<sup>65</sup> See Chapter 7, text accompanying n 79.

<sup>66</sup> See Chapter 9, text accompanying n 194.

and its inclusion in a Sierra Leone treaty in 1825<sup>68</sup>), the combination of the three expressions could well be more than coincidence and point to some discussion about the text.

Perhaps more important than the similarities between Gipps's treaty and the English drafts of the Treaty of Waitangi are the differences. These have been discussed by Peter Adams and Judith Binney. Adams does not develop the point but makes the suggestion that the language used by Gipps "showed that he had a restrictive approach to Maori needs and rights" and that his was "a different view of the subject" than was taken in New Zealand.<sup>69</sup> It is the case that Gipps's treaty explicitly makes Maori subjects of the Queen in a way that is less clear in the New Zealand drafts. The Queen's sovereignty is expressed much more powerfully in Gipps's treaty, including in relation to its application "in and over the said Native Chiefs, their tribes and Country". The grant of protection "in as full and ample a manner as Her Majesty is bound to afford protection to other Her Majesty's subjects" suggests that under Gipps's treaty there would be no special protection for Maori. A further difference is that the "right of preemption" in the New Zealand drafts is clearly expressed in the Gipps's treaty (which does not use the term "pre-emption") as an exclusive right of purchase. A final and more significant difference is that in Gipps's treaty there is included promises about reserving land to Maori "for their comfortable maintenance and residence" and applying a portion of the proceeds of land sales to their "future education and instruction in the truths of Christianity". There is no equivalent in the New Zealand texts and, critically, from Busby's first draft on they included the guarantee of "full exclusive and undisturbed possession" of land and other properties.

The differences in Gipps's treaty concerning reserving land and applying the proceeds of land sales in part for Maori benefit may have been Gipps's attempt to fulfil aspects of Normanby's Instruction. Normanby had directed that Maori should

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<sup>67</sup> See Chapter 11, text accompanying n 91.

<sup>68</sup> See Chapter 4, text accompanying n 183.

<sup>69</sup> Peter Adams *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland University Press, Auckland, 1977) 179.

not be allowed to sell land which was “essential, or highly conducive, to their own comfort, safety or subsistence” and that “such pecuniary aid as the local Government may be able to afford” was to be given to support the work of missionaries.<sup>70</sup> It is possible, however, to see in these and other differences between the Sydney treaty and the New Zealand drafts Gipps’s personal views, shaped in part by his experience as a Governor of New South Wales, a colony where aboriginal policy was out of step with most other parts of Empire.

Whatever the explanation, Binney is surely right to conclude from all the differences<sup>71</sup> that the English text, as well as the Maori text, of the Treaty of Waitangi was “shaped at the Bay [of Islands], through the experiences of the older European residents, and most particularly James Busby and the Reverend Henry Williams, who did understand what the Maori relationship to this land was”.<sup>72</sup>

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<sup>70</sup> See Chapter 8, text accompanying ns 32-33.

<sup>71</sup> On which see also Judith Binney “Tuki’s Universe” in Judith Binney *Stories Without End: Essays 1975–2010* (Bridget Williams Books, Wellington, 2010) 45-61 at 59-60; and Brian Easton “Was There a Treaty of Waitangi; and Was it a Social Contract?” (1997) *Archifacts* 21-49 at 24, 30-31 & 34-35.

<sup>72</sup> Judith Binney “The Maori and the Signing of the Treaty of Waitangi” in David Green (ed) *Towards 1990: Seven Leading Historians Examine Significant Aspects of New Zealand History* (GP Books, Wellington, 1989) 20-31 at 25-26.

## CHAPTER FIFTEEN

### THE 1840 HOUSE OF COMMONS SELECT COMMITTEE

This chapter continues the story which was left in London in July 1840 in Chapter 13. Chapter 16 picks up the story left in Sydney in February 1840 in Chapter 14. Both are concerned with the development of thinking about Maori property interests in land and about the nature of Maori sovereignty before 1840. The same themes are continued in Chapters 17, in respect of London in the period 1840–47, and in Chapter 18, in respect of New Zealand in the period 1840–77, after its creation as a colony separate from New South Wales.

The focus in these four chapters is not on the working out on the ground of British administration in New Zealand with respect to Maori—a complex inquiry beyond the scope of this thesis.<sup>1</sup> Chapter 19 points, however, to views expressed after 1840, and as late as the mid-1860s, which indicate that British sovereignty was not seen as inconsistent with Maori self-government and the retention of Maori customary law. Expression of such views, even if they were not generally held by then, suggests that it would be bold to think that they were not views held about the meaning of the Treaty in 1840. Caution is required, particularly given the drift of history and ideas discussed in Chapter 3, in arguing backwards as to the understanding of the framers of the Treaty from opinions, even if mainstream, later expressed about the nature and scope of British sovereignty and the application of English law to Maori.

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<sup>1</sup> Relating the history of British administration to original understandings of the Treaty would be complex and perhaps impossible. It would be necessary to attempt to identify when administration was undertaken in conscious appreciation of a Treaty implication and when it was undertaken in response to emerging pressures on government without any such appreciation. In addition to settler expectations of government, developing Maori expectations (including their understandings of the Treaty, which may not have been static) would have to be unpicked. Events on the ground may have been changing fast and original understandings of the Treaty could have faded or been overlooked in practical administration. There may well much in the post-1840 history that supports the interpretation of the Treaty in English put forward in this thesis.

The complexity in trying to discover original understandings of the relationship in the Treaty between British sovereignty and Maori society from the history of post-1840 government administration does not exist in the same way in the case of insight to be obtained from post-1840 thinking about the nature and extent of Maori interests in land and the nature of the sovereignty possessed by Maori before 1840, the focus of this chapter and Chapters 16-18. That is because it depends upon consideration of a history of ideas which begins before 1840 and is carried on as an evolving intellectual debate, largely outside New Zealand, in which the influences and strands of thought are expressed, allowing its progress to be followed. Following this debate is important to my thesis that the framers of the Treaty dealt with Maori on the basis that they were full owners of their territories, including of their unoccupied and uncultivated lands.

Although different views came to dominate and are still preferred in the New Zealand historiography as described in Chapter 2, the next four chapters attempt to show that they have been wrongly influenced by application of United States case-law (itself not correctly understood) which became influential only after the Treaty was signed. American law was used by Sir George Gipps soon after the Treaty in framing the statute under which pre-1840 European purchases of land were to be investigated (in performance of Normanby's Instructions) and was increasingly invoked in its arguments by the New Zealand Company (as foreshadowed in Chapter 13 and developed in what follows). It came to be adopted into New Zealand law through further land claims legislation and the decision of the Supreme Court in *R v Symonds* in 1847, in which Justice Henry Chapman wrote the principal judgment of the Court. As seen in Chapter 13, Chapman had in 1840 advocated on behalf of the Company for application of the American approach. It is not clear whether in *Symonds* the implications for Maori of the adoption of American law were fully considered (the judgments are ambiguous on the point) and the direct application to Maori did not emerge as an issue until later<sup>2</sup> and by then was largely insignificant set against the transformation of Maori land

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<sup>2</sup> See *Wi Parata v Bishop of Wellington and Attorney-General* (1877) 3 NZ Jur (NS) SC 72.

ownership through the Native Land Court legislation. By about 1846, political changes in London and the ascendancy in Government and in the Colonial Office of those sympathetic to the Company—or at least its criticisms of earlier Colonial Office policies—meant that there would be no reconsideration of the applicability of American precedent from that quarter. Indeed in December 1846, Earl Grey as Secretary of State for the Colonies adopted Company arguments that unoccupied and uncultivated lands were waste lands of the Crown available for disposal.

What is critical for present purposes, however, is that the immediate response of the Colonial Office in the early 1840s was consistently to reject the applicability of American native title to Maori and to maintain that Maori were owners of their lands, including such unoccupied lands as native custom recognised their entitlement to. In this period, too, the Colonial Office continued to reject suggestions that British sovereignty in New Zealand (at any rate, as to the North Island) had been acquired by discovery, and instead insisted that the source of sovereignty was to be found only in the Treaty (a position inconsistent with views expressed by Gipps in justifying his Land Claims Act). For his part, James Busby, throughout a long campaign to secure recognition of his pre-Treaty purchases of land in which he challenged the validity of Gipps's Land Claims Act and the New Zealand ordinances which followed it (and who cannot, therefore, be seen as entirely disinterested), maintained (until a late switch in embittered old age) that Maori ownership of all lands in New Zealand not already sold by them had been secured to them by the Treaty of Waitangi in exchange for their cession of sovereignty.

The arguments about Maori and pre-1840 settler land rights also entailed debate about the origin of the right of pre-emption: whether it arose out of the agreement contained in the Treaty or by operation of law through sovereignty (either under “discovery doctrine” or as an incident of the doctrine of tenures). While the debates in 1840 in London and Sydney (discussed in this chapter and the next) did not directly concern questions of the extent of Maori land interests in New Zealand, in

them can be seen the seeds of the latter “waste lands” arguments advanced by the New Zealand Company from December 1842. Chapter 17 traces that development.

This chapter focuses on the proceedings of the 1840 House of Commons Select Committee on New Zealand, the background to which has been dealt with in Chapter 13.

### **The Select Committee proceedings, July 1840**

The House of Commons Select Committee to inquire into the petition adopted at the Guildhall meeting was set up on 9 July.<sup>3</sup> In addition to Lord Eliot, who had proposed the setting up of the Committee in the House, its members included, at least initially, two New Zealand Land Company directors, Francis Baring and William Hutt. Baring had recently become Chancellor of the Exchequer in the Whig administration. Hutt was discharged from the Committee a few days later, enabling him to give evidence to it. His replacement was Benjamin Hawes, a radical and free-trader, who in 1846 when the Whigs returned to power, was to become Parliamentary Under-Secretary for the Colonies. The current Under-Secretary, Robert Smith, and his predecessor, Henry Labouchere, were also members. Viscount Howick, later as Earl Grey to be Secretary of State for the Colonies, was added to the Committee at the same time as Hawes, almost certainly in order to be able to challenge Edward Gibbon Wakefield’s evidence about the history of the New Zealand Association’s and New Zealand Land Company’s dealings with the Government. The rest of the Committee consisted of a mix of Whigs and Tories. Two of the latter, William Gladstone and George Hope, were later themselves to have ministerial responsibilities for the colonies under Peel’s Tory Government, Gladstone as Secretary of State in 1845–46 and Hope as Under-Secretary from 1841–46.<sup>4</sup>

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<sup>3</sup> GBPP 1840 (582) VII.447 at ii.

<sup>4</sup> The *Oxford Dictionary of National Biography* has entries on most of the members of the Committee, including all of those mentioned above except Hope.

*The Times* was later to describe the Committee as a “packed colonization committee” wrung by the Company and the “heterogeneous elements” supporting it in Parliament from the dying Whig ministry.<sup>5</sup> That may have been unduly harsh. Certainly the draft report prepared by Eliot for adoption by the Committee was rejected,<sup>6</sup> suggesting either some independence from Company influence or that party influence ultimately prevailed.<sup>7</sup> It is true, however, that the proceedings of the Committee were dominated by the Company witnesses, especially Wakefield, who appeared on all but one of the six days of hearing. While Dandeson Coates and the Reverend John Beecham provided a missionary society perspective and there were one or two apparently unaffiliated witnesses (such as Alexander Busby, the brother of James Busby), most of the witnesses were associated with the New Zealand Land Company. In addition to Wakefield and Hutt, they included the Reverend Samuel Hinds (whose advocacy for the New Zealand Association was referred to in Chapter 9) and John Ward, the Company’s secretary (whose own writings in support of the Association’s and Company’s promotions were also referred to in Chapter 9).<sup>8</sup> It is not necessary for present purposes to rehearse the evidence given to the Select Committee.<sup>9</sup> That of principal interest is the evidence of Wakefield.<sup>10</sup>

In his evidence, Wakefield traversed the Government treatment of the Association and Company, giving a one-sided account that may have prompted the addition of Howick to the Committee in order to provide some check.<sup>11</sup> In evidence directed at the Committee’s consideration of whether the Colonial Office had acted appropriately in relation to New Zealand, Wakefield expressed the view that it had been wrong not to assert sovereignty against other nations on the basis of Cook’s

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<sup>5</sup> *The Times*, London, 27 July 1840, at 4.

<sup>6</sup> As is further discussed below.

<sup>7</sup> The latter possibility is suggested by the fact that the four who voted to adopt Eliot’s report were the two directors of the New Zealand Land Company, Baring and Hawes, and two Tories, Hope and Gladstone.

<sup>8</sup> See list of witnesses at GBPP 1840 (582) VII.447 at xii.

<sup>9</sup> The evidence taken by the Committee was later reported to the House of Commons and published with the record of its proceedings. See GBPP 1840 (582) VII.447.

<sup>10</sup> GBPP 1840 (582) VII.447 at 1-25 (13 July), 25-52 (16 July), 53-59 (17 July), 97-111 (22 July) & 112 (24 July).

<sup>11</sup> See *ibid* 97-111 for the exchange between Howick and Wakefield on 22 July.

discovery. Although he maintained that the Association had thought it “expedient”, “in these modern times of milder manners, when oppression is not permitted as it used to be in former days”, to obtain the consent of Maori to the establishment of “a regular British authority with courts of justice in New Zealand”,<sup>12</sup> he also asserted that it was preposterous to suggest that Maori had sovereignty: “there never has been any sovereign power in New Zealand”;<sup>13</sup> “there is no word in their language for sovereign”;<sup>14</sup> “they had not the words because they have not the idea”;<sup>15</sup> “they do not know what sovereignty means, either small or great”;<sup>16</sup> they “have no name for their country; they are so completely dispersed and separate that they have no national name”.<sup>17</sup> He expressed the view that the Congress of United Tribes was a “mockery”.<sup>18</sup> Maori had “nothing like what is called law amongst civilized nations”;<sup>19</sup> “the authority exercised in each tribe was not of the nature of a sovereignty authority”;<sup>20</sup> the exercise by the chiefs of a power of life and death was

very much in the same way in which we see some animals exercising the power of life and death over inferior animals, and over inferior beings of their own class, without any fixed law. ... [It] is not law; it is savage nature.<sup>21</sup>

Wakefield said that the approach taken by the Association and Company “was just that which is adopted by the United States in their dealings with some aboriginal nations of America”. That approach was

to maintain diplomatic relations, having residents among them, receiving their representatives at Washington, and making treaties with them, but at the same time maintaining, as against all foreign powers whatever, the ancient right of discovery and

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<sup>12</sup> Ibid 5.

<sup>13</sup> Ibid 9.

<sup>14</sup> Ibid 9. See also *ibid* 40.

<sup>15</sup> Ibid 41.

<sup>16</sup> Ibid 41.

<sup>17</sup> Ibid 9.

<sup>18</sup> Ibid 8. See also *ibid* 38 & 41.

<sup>19</sup> Ibid 39.

<sup>20</sup> Ibid 41.

<sup>21</sup> Ibid 41.

## Chapter Fifteen: The 1840 House of Commons Select Committee

possession which they derive from their ancestors the English. The association itself put forth that principle from the beginning, and always adhered to it ...<sup>22</sup>

This evidence is not credible. Although the Association had in 1837 “supposed” that, as against other nations, British had acquired rights by reason of discovery, there had been no reference then to the United States approach to dealings with Indian nations.<sup>23</sup> Nor was there any such reference in, for example, the arguments put to the Foreign Office in November 1839,<sup>24</sup> an omission that suggests the American example had not emerged. It seems that the Company did not take it up until Chapman, perhaps prompted by Lang’s publication, drew it to attention in April 1840.<sup>25</sup> Moreover, in 1837 when the Association had referred to rights of discovery as against other nations, the tenor of their approach was very different from Wakefield’s evidence in July 1840. Then, as will be recalled, the Association had acknowledged that the consent of this “intelligent people”, who had “so far advanced beyond the savage state as to recognise property in land” and whose independence had been “virtually, not to say formally acknowledged” by the British Crown, was required for purchase and settlement on their “unoccupied and waste” lands.<sup>26</sup>

Wakefield’s evidence suggested that the Government had only recently denied that it had sovereignty and insisted upon a voluntary cession of sovereignty by Maori, a matter on which he was challenged by Labouchere, and which is inconsistent with the historical record as already described.<sup>27</sup> Wakefield argued that the repudiation of British sovereignty put at risk a successful colonisation of New Zealand because it meant that land-sharks could not be prevented from acquiring the “greater part of the land, if not the whole of the land” before British sovereignty could be re-established.<sup>28</sup> The land titles proclamations issued by Gipps and Hobson exposed the absurdity of the Government’s repudiation of sovereignty. It was inconsistent

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<sup>22</sup> Ibid 5.

<sup>23</sup> See Chapter 9, text accompanying n 5.

<sup>24</sup> See Chapter 13, text accompanying n 33.

<sup>25</sup> See Chapter 13, text accompanying n 43.

<sup>26</sup> See Chapter 9, text accompanying n 5.

<sup>27</sup> GBPP 1840 (582) VII.447 at 4-5, 11-12 & 23.

<sup>28</sup> Ibid 45.

to question “the rights of private property acquired before the proposed cession of the sovereignty”, while at the same time treating New Zealand “as France or Sicily would be, until ceded to the British Crown”. Although Wakefield professed himself to be in favour of prohibiting private purchases of land in New Zealand in order to “coloniz[e] the country properly” (including by enabling the creation of a fund for emigration out of land sales), he pointed out that settlers were likely to claim that such proclamations were invalid in respect of property acquired before cessions of sovereignty were obtained.<sup>29</sup> Although the “supreme Legislature” might provide a remedy by dispossessing settlers by retrospective legislation, “once the whole country shall have been possessed by land-sharks, by those private purchasers from the natives”, there would be huge practical difficulties in effecting such dispossession.<sup>30</sup>

Wakefield explained the Company’s own purchases as having been reluctantly undertaken.<sup>31</sup>

Many members of the company had a strong repugnance to the practice of purchasing land at all from those ignorant savages, who are quite ignorant of the value of what they are parting with; and they only adopted this course because the conduct of the Government precluded them from taking the course which they had in their original plan proposed, that no individuals should be allowed to purchase land from the natives of New Zealand, but that land should be acquired from them only by a responsible officer of Government.

Despite these purchases, the Company—unlike, he presumed, the land-sharks—would “gladly ... throw its lands into any general plan which Parliament might think fit to enact”.<sup>32</sup>

In his evidence to the Committee, Wakefield expanded on the course that should, in his view, have been taken by the Colonial Office but which had instead been abandoned. That was to maintain the claim to sovereignty by right of discovery and

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<sup>29</sup> Ibid 44.

<sup>30</sup> Ibid 44-45.

<sup>31</sup> Ibid 11.

<sup>32</sup> Ibid 45.

to deal with Maori in relation to land on similar principles to those adopted in the United States. The United States Supreme Court had treated United States sovereignty as derived from the original sovereignty (by discovery) of the “Crown of England”. By it, “the land is wholly the property of the United States, and ... no individual can acquire it except through the United States”. Wakefield expressed the opinion that this was “not merely a principle of law in America” but seemed also “to be completely in accordance with policy and with justice to the natives, because it is a barbarous practice to allow individuals to buy land from savages”. He considered that the United States approach had in fact been the course taken by Britain at Port Phillip where “purchases were disallowed as being contrary to law”: “[t]he disallowance in that case was immediate; there never was practically a question raised about it”. The same approach had not been taken in New Zealand because of the influence of missionaries whose purpose was to “preserv[e] a private property in land obtaining by those sharking practices”.<sup>33</sup>

Wakefield asserted that “the right of individual property has never existed in New Zealand naturally”. Maori had been “taught” to exercise it as an “artificial construction by persons who wished themselves to acquire individual property in New Zealand, and who therefore made the natives go through a form of conveyance, using the same words as are used in the conveyance of property here”.<sup>34</sup>

I do not know anything more absurd and ridiculous than one of those deeds by which the natives of New Zealand have been made to convey their land to individuals, containing all the old-fashioned and most cumbrous of our law terms; deeds made by attorneys in New South Wales, sent over ready made, with blanks left for the names of the seller and the buyer, and which have been used by all classes of people, having been first used by the class which possessed the greatest influence over the minds of the natives, that is by the missionaries, when they purchased land, and who, I think, together with the settlers, have taught the natives to exercise a kind of individual right of property. I believe the property in land was a tribe property; and any member of the tribe cultivated a piece here for a little while, and then cultivated another piece.

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<sup>33</sup> Ibid 48.

<sup>34</sup> Ibid 42.

If Britain had maintained its sovereignty, all the present problems would have been prevented.<sup>35</sup>

If the principle of the American law had been asserted, and all this land-sharking had been repudiated, and if Parliament had been applied to for a law to place the whole of the waste lands of New Zealand under a proper authority to dispose of them in a proper manner, so as to provide the country with its own emigration fund, and to carry a body of labour there, then the inconveniences which I have recited would not have occurred. In the present state of disorder which prevails upon that subject, it seems impossible that anything like a beneficial system of colonization, either for New Zealand or the neighbouring colonies, should be adopted; for what prevails now is a system of disorder.

Wakefield clearly thought that the opportunity to adopt the United States and Port Phillip solutions to the problem of existing European purchases of land in New Zealand had passed:<sup>36</sup>

[T]ime has gone by; for in point of fact the Crown has repudiated that paramount sovereign right which would have enabled it to assert the principle mentioned in the question.

Wakefield took the view that the problem could now only be addressed by “Parliament, in its supremacy”,<sup>37</sup> in apparent reference to retrospective legislation to divest acquired property (a solution he indicated—although he was not authorised to say so—that the Company would not oppose if the land could be re-purchased from the Crown on a fair basis).<sup>38</sup> He did not understand that the land claims legislation to be framed in Sydney (in conformity with Normanby’s Instructions to Hobson and the proclamations of Gipps and Hobson) would be other than a mechanism for resolving competing claims, not entailing invalidation of all titles.<sup>39</sup> This view was at odds with the position of the Company represented by William Hutt in his evidence. Hutt indicated that unless the Imperial Parliament legislated for a general scheme of colonisation, the Company would consider

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<sup>35</sup> Ibid 51.

<sup>36</sup> Ibid 48.

<sup>37</sup> Ibid 51.

<sup>38</sup> Ibid 51-52.

<sup>39</sup> Ibid 52.

challenging the validity of any Commission set up to investigate its titles to land in New Zealand. He referred to resolutions of the directors of the Company passed the day he gave evidence that Gipps's proclamation was contrary to international law and repugnant to justice because it interfered with "private rights of property in a country which the Crown itself declares to be a foreign independent sovereign state (and which rights were previously acquired by purchase and cession from chiefs or others having equally valid powers with those through whom the Crown has since acquired sovereign rights)".<sup>40</sup> The resolutions included an indication that, faced with such unlawful interference with private rights, "the settlers on the company's territory, with a view to preventing their own ruin, may be led to induce the chiefs of that part of New Zealand to retain the sovereignty thereof".<sup>41</sup>

Wakefield's view that it was too late to follow the American approach in New Zealand was expressed despite what appears to have been an attempt by George Hope, in sympathetic questioning of Wakefield, to suggest that treating with Maori for sovereignty was not inconsistent with an assertion by the British Crown of an existing right of pre-emption of Maori lands (based on a right of sovereignty by discovery against other nations) by which past and future European purchases from Maori were invalid.<sup>42</sup> Hope was clearly familiar with some of the American case-law and referred to *Cherokee Nations v State of Georgia*, which he took from Kent's *Commentaries*.<sup>43</sup> It was only after Hope initiated a more detailed discussion about American law that Wakefield returned to the Committee with volume eight of Wheaton's Supreme Court reports which included *Johnson v M'Intosh* and which was said by Wakefield to contain "a very full statement of the ancient law

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<sup>40</sup> Ibid 124-125.

<sup>41</sup> Ibid 125.

<sup>42</sup> Ibid 51-52 & 56-57. For other contemporary views that the Government's decision to abandon its claim to sovereignty by discovery had foreclosed the American approach, see letter of "A.B." to Lord John Russell, *The New Zealand Journal*, London, 18 July 1840, at 163; *The New Zealand Journal*, London, 1 August 1840, at 173 ("The treaty of cession, and the commission on titles, are like buckets in a well—both cannot appear on the stage together"); and Henry Chapman "New Zealand" (August 1840) 9:17 *Dublin Review* 189-214 at 207-210.

<sup>43</sup> GBPP 1840 (582) VII.447 at 48.

upon the subject of the exclusive right of the supreme authority to the waste lands of a country inhabited by savage people”.<sup>44</sup>

Notable in the exchanges between Hope and Wakefield is their agreement that the approach of the American cases was that Indian tribes continued as “independent nations” whose “sovereign rights” were affected by European assertion of sovereignty by discovery only in respect of inability to dispose of their lands to Europeans and in their dealings with other foreign nations.<sup>45</sup> They also expressed the view that the opinions of the Supreme Court were unique in being the product of a domestic court with authority to pronounce on aspects of “international law” between “independent nations” (the Indian nations and States, individually and in federation).<sup>46</sup> By the end of the exchanges, there are indications that Wakefield had moved towards Hope’s suggestion that treating with Maori for sovereignty did not preclude assertion of rights of sovereignty, including the right of Crown pre-emption in relation to land.<sup>47</sup> However, the idea did not find its way into Eliot’s draft report which maintained the distinction between the approach required of Hobson by the Colonial Office and American doctrine, as is discussed below.

Of the rest of the evidence to the Select Committee, it is necessary simply to note that witnesses and questioners seem to have accepted that pre-Treaty acquisition of land from Maori was valid except in the case of deception or gross inadequacy of consideration.<sup>48</sup> While there was some questioning directed at whether there were unowned waste lands in New Zealand, the witnesses provided no support for such

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<sup>44</sup> Ibid 53.

<sup>45</sup> Ibid 48-49. Hope noted, for example, that “the State of Georgia had no power to impose upon the Cherokee Indians their penal code, but at the same time that the Cherokee Indians had no power to dispose of their lands except to the State of Georgia”. Ibid 48. See, however, Wakefield’s earlier comment that, by their recent cessions of sovereignty, Maori chiefs had “parted with all their political rights”. Ibid 35. It may be that Wakefield would have preferred to be more selective in his use of American law than Hope.

<sup>46</sup> Ibid 49. These views are similar to those of Henry Chapman and George Gipps: see Chapter 13, text accompanying n 43; and Chapter 16, text accompanying n 130.

<sup>47</sup> Ibid 56-57.

<sup>48</sup> See, for example, ibid 59-70 passim (John Blackett), 84-86 (Dandeson Coates), 94 (Rev John Beecham) & 132 (Alexander Busby).

conjecture and indeed Dandeson Coates asserted that missionary correspondence made it clear that “the whole of the land is the property of one tribe or another”.<sup>49</sup>

The Select Committee heard evidence on six days between 13 and 24 July 1840. On 28 July, Lord Eliot submitted to the Committee a draft report for its consideration.<sup>50</sup> Although the report was not in the event adopted by the Committee, it and the evidence taken by the Committee was published in the Parliamentary Papers, leading *The Times* and perhaps others to conclude that it had been adopted.<sup>51</sup>

Eliot’s own later account gives credit to Wakefield for making “his labour on that occasion ... light”: “he had but little to do except to digest and condense the information that [Wakefield] had afforded him”.<sup>52</sup> Whether the draft report was written by Wakefield (as Donald Loveridge suggests<sup>53</sup>) or whether Eliot was simply referring to the assistance he had obtained from Wakefield’s testimony, it is clear that the report was heavily influenced by Wakefield.

### **Eliot’s draft report**

The draft report professed to be concerned with the present and future rather than the past, saying that it was “comparatively unimportant to know whether the *de jure* sovereignty was already vested in the Crown” since reports of Hobson’s proceedings in New Zealand made it “appear probable that sovereign rights over the whole of the islands will shortly be ceded by the natives to the Queen”.<sup>54</sup> In

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<sup>49</sup> Ibid 85.

<sup>50</sup> Ibid vi-x.

<sup>51</sup> See Donald Loveridge “‘The Knot of a Thousand Difficulties’: Britain and New Zealand, 1769–1840” (Brief of Evidence for the Crown Law Office, Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 17 December 2009, A18) [“Loveridge ‘Knot of a Thousand Difficulties’”] 180 n 510.

<sup>52</sup> Speech of Lord Eliot reported in *The Morning Chronicle*, London, 3 November 1840, 3-4 at 3 (“abridged from the *Devonport Independent*”).

<sup>53</sup> Loveridge “Knot of a Thousand Difficulties”, above n 51, 180 n 509 citing AJ Harrop *England and New Zealand: From Tasman to the Taranaki War* (Methuen & Co Ltd, London, 1926) 87. But compare Loveridge, Harrop and *The Morning Chronicle*.

<sup>54</sup> GBPP 1840 (582) VII.447 at vi.

fact, much of Eliot's report was taken up with criticism of past Colonial Office policy in abandoning the British claim of sovereignty based on discovery.

Because New Zealand had been "treated as an independent foreign state", Britain had "given a sanction to the acquirement of lands by individual purchasers":

The acknowledgement of the independent nationality of the natives has given a sanction to the acquirement of lands by individual purchasers, because, when the right of the natives to sell to all the world was admitted by the British Government, it followed that all persons, whether British subjects or others, had a right to buy without its sanction.

The resulting problems, having "originated before any cession of sovereignty was made", could now be addressed "only by *ex post facto* legislation".<sup>55</sup> Such legislation was necessary to correct three adverse consequences which had resulted from unrestrained land purchasing.

The first was the effect of land purchases upon Maori themselves. "[U]nrestricted colonization" had "sown among the aborigines the seeds of vice and misery" and prevented the establishment of a system to reserve "for the use of the natives" a portion of the land purchased from them. Secondly, it had left a legacy of dispute which it would be very difficult to resolve. The new Government would have to decide whether purchases were valid. Large tracts of land had been acquired "for nominal considerations; a blanket, a hatchet, or a gun". In some cases, there were competing European claims to the same lands or boundary disputes. It would be necessary for Britain to resolve these disputes "according to laws different from its own", a matter of particular difficulty in a country where no surveys had been made and "no law to regulate the possession of property, its descent, or its alienation, is in force".<sup>56</sup>

Whether in that state [New Zealand before the cession of sovereignty] there existed laws, or usages in the nature of laws; by what means property might be legitimately acquired; what dealings were considered fair, and what were held to be fraudulent; whether, in fact, there were any known rules on which the natives acted in their intercourse with

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<sup>55</sup> Ibid vii.

<sup>56</sup> Ibid.

## Chapter Fifteen: The 1840 House of Commons Select Committee

foreigners;—these are questions full of difficulty, which cannot fail to present themselves whenever the validity of purchases made during the past order of things is inquired into.

When a conquering or acquiring state takes upon itself the task of determining rights of property, according to laws different from its own, there must always be some hazard of a failure of justice; but such hazard is immeasurably increased in a case like the present, where it will be necessary to adjudicate upon rights claimed by British subjects in a country whose so-called sovereigns have been savages; where nothing resembling a regular government, or administration of justice, has ever yet been known; and where Englishmen have been residing for years past in a condition of society which can only be described as one of positive anarchy.

A third concern was that the scale of land purchases and the present lack of impediment to further on-sale “on whatever terms they please” meant that “the most approved method of colonization, viz. that of disposing of the whole of the waste lands by sale at a uniform and sufficient price, cannot be carried into effect”.<sup>57,58</sup>

The Government, it is clear, cannot maintain such a price, and thus introduce labour into the colony in quantities proportioned to the extent of land held by private owners, if those owners can undersell the Government without loss to themselves.

The only solution now was legislation. The problems were beyond other remedy: “it is obvious that the Royal commands, issued in the form of proclamations or otherwise, at a time when the Crown neither possessed nor claimed any lawful authority within [New Zealand], could not be enforced, nor have any beneficial effect”.<sup>59</sup>

The report asserted that legislation would have been “uncalled for” and private purchases of land prevented if the Crown had pursued “a different line of policy from the time of ... discovery” and not “lost sight of the principle which was formerly acted upon by this country, and by all other European powers, with regard to their North American possessions”. Citing *Johnson v M’Intosh* and Kent’s

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid vii-viii.

<sup>59</sup> Ibid vii.

*Commentaries*, the report suggested that the consequence was that Britain should have “refused to recognize any titles to land founded on purchases made by private persons from savages”.<sup>60</sup>

This principle has been adopted by the United States, and it has constantly guided their government in its dealings with the various Indian tribes inhabiting the North American Continent, and it has been solemnly declared by the Supreme Court of Judicature in the United States to be a principle of international law. According to this principle, the nation by whose subjects a new country is discovered, acquires thereby a title to its possession as against all foreign powers. That title, when completed by occupation, gives to the discovering nation the sole right to purchase the soil from the natives, to establish settlements within its territory, and to regulate its relation with foreign powers. Upon this principle the governments of Europe, as well as that of the United States, have asserted their right—a right qualified only by the moral obligation of acting with justice to the aborigines—to grant lands to individuals in territories so acquired by them; and upon it the British Government has recently set aside purchases made by individual settlers from the natives in the neighbourhood of Port Phillip.

Despite its criticisms of the approach taken to sovereignty, the draft report proposed that the Committee should “entirely concur” in the approach taken in the land titles proclamations for legislation to appoint commissioners to inquire into titles to land and to declare invalid all titles not confirmed following such investigation by Crown grant.<sup>61</sup> Despite concurrence with the solution proposed, the report raised practical objections about the vagueness of the Instructions to Gipps as to the standards to be applied in investigation. It also claimed that the proposed law was not suitable for enactment by the colonial legislature in New South Wales but rather should “carry with it the weight due to a deliberate act of the Supreme Legislature”. As the legislation would “have the semblance in many cases of invading private rights to property, such legislation ought to be clothed with the highest and most solemn sanction that can be conferred upon it”. The report raised a more general objection to New Zealand being a dependency of New South Wales and to commissioners being appointed from that colony because of

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<sup>60</sup> Ibid.

<sup>61</sup> Ibid viii.

conflicts of interest and “the jealousies which cannot fail to spring up between the two colonies”.<sup>62</sup>

The draft report stated a number of principles which might form the basis of a statute of the Imperial Parliament “for the settlement of the rights of property in New Zealand, and for the future government of that colony”, which it proposed be separated from New South Wales. In particular, it proposed:<sup>63</sup>

That the soil of New Zealand, or of any parts thereof, over which the sovereignty of the Crown shall have been established, should be vested solely in the Crown; and that the titles to land, of settlers, at whatever period acquired, should not be recognized as legal, unless the same shall be confirmed by, or derived from, a grant to be made in Her Majesty’s name. The possessory rights of the natives to their lands should be retained in full; but the Crown should have the exclusive right of pre-emption over all such lands as they may be disposed to alienate.

It is not clear whether “[t]he possessory rights of natives” were intended to be something less than full rights of ownership. The reference to “the soil” of all lands over which the sovereignty of the Crown was established being vested in the Crown, and the earlier preference for the *Johnson v M’Intosh* approach by which the right to grant land was “qualified only by the moral obligation of acting with justice to the aborigines”, gives rise to some suspicion that the draft report was advocating recognition of Maori rights of occupation only.

The principles proposed that the New Zealand Land Company and other parties who had “expended monies in the formation of settlements in New Zealand, and the promotion of emigration thereto from the United Kingdom” should receive compensation either by way of land grants or reimbursement of their expenditure, on the basis that they had “performed, to a limited extent, by anticipation, the same colonizing operations as will henceforth be undertaken by the Government, and consequently that they have been engaged at their own cost in promoting the very

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid ix.

end which the Legislature must be assumed to have now in view”.<sup>64</sup> The report noted that the Company was willing to acquiesce in legislation along the lines it proposed and was willing to advance funds to the Government “by way of loan” to meet the expense of government in New Zealand and to relieve the settlers of New South Wales of the burden.<sup>65</sup>

### **Stephen’s minute on *Johnson v M’Intosh***

The same day that Eliot presented his draft report to the Committee, Stephen wrote a minute to Smith dealing with *Johnson v M’Intosh*.<sup>66</sup> It may be that Smith, who was on the Committee, had provided him with the draft report or it may be that Smith had raised the application of American doctrine because it had been referred to in the evidence before the Committee. What is clear is that Stephen’s immediate response was that *Johnson v M’Intosh* had no application to New Zealand and was unjust. The minute is of such importance as to merit setting out in full.<sup>67</sup>

The case of Johnson and Mackintosh proves that a grant from an Indian Tribe of Lands in the State of Ohio would not [sic] confer on the grantee no valid Title in defezance [sic] of a Title derived under a grant from the United States. It shows that the whole Territory over which those Tribes wandered was to be regarded as the property of the British Crown in right of discovery and of conquest—and that the Indians were mere possessors of the soil on sufferance.

Such is American law. British Law in Canada is far more humane, for there, the Crown purchases of the Indians, before it grants to its own subjects.

Whatever may be the ground occupied by international jurists they never forget the policy and interests of their own Country. Their business is to give to rapacity and injustice, the most decorous [sic] veil that legal ingenuity can weave. Seldon, in the interest of England, maintained the doctrine of what was called Mare clausum. Vattel in

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<sup>64</sup> Ibid.

<sup>65</sup> Ibid x.

<sup>66</sup> As to the date of the minute, see Chapter 2, n 363.

<sup>67</sup> Stephen to Smith, 28 July 1840, CO 209/4, 343a-344a. Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, Oxford, 2004) 134 seems to treat Stephen’s minute as repudiating the idea that British sovereignty was compatible with a “residual sovereignty” in Maori. Stephen’s minute is, however, directed not at how British sovereignty affected Maori government but at questions of property.

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the interest of Holland laid down the principles of open Fisheries. Mr Marshall, great as he was, was still an American, and adjudicated against the rights of the Indians. All such law is good, just as long as there is power to enforce it, and no longer.

Besides what is this to the case of New Zealand? The Dutch, not we, discovered it. Nearly a hundred years ago Captain Cook landed there, and claimed the Sovereignty for King George the II. Nothing has ever been done to maintain and keep alive that claim. The most solemn Acts have been done in repudiation and disavowal of it. Besides the New Zealanders are not wandering Tribes, but bodies of men, till lately, very populous, who have a settled form of Government, and who have divided and appropriated the whole Territory amongst them. They are not huntsmen, but after their rude fashion, Agriculturalists.

The two cases seem to me altogether dissimilar, and the decision of the Supreme Court of the United States, though it may be good American Law, is not the Law we recognize and act upon on the American Continent.

Mark Hickford questions whether the position was as straightforward as Stephen's minute suggests. He points out that the British Crown had often granted land in North America before the Revolution without prior purchase from Indians. He suggests that Stephen either "did not seem to be aware of such subtle historical exceptions" or, if he was, "did not wish to show it", because he was trying to maintain for the Colonial Office maximum flexibility in developing its land policies.<sup>68</sup> However, as has been indicated in Chapter 5, while there were exceptions (particularly in the Canadian maritime provinces), the general pattern in British colonial North America was for the British Crown to acquire lands from Indians on the basis of their ownership of it before grants were made. On this basis, Stephen's minute accurately reflects standard British imperial law and practice in North America, whether or not he knew of the exceptions. As to Hickford's suggestion that Stephen may have consciously glided over the exceptions in order to maintain flexibility, it is difficult to see why the minute should not be taken at face value as a statement of the views held by Stephen as to the nature of Maori

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<sup>68</sup> Mark Hickford "'Decidedly the Most Interesting Savages on the Globe': An Approach to the Intellectual History of Maori Property Rights, 1837-53" (2006) 27:1 *History of Political Thought* (2006) 122-167 at 152 (and see 151-154).

property in land and the rights in land (if any) acquired by the Crown with sovereignty: Stephen was not someone to shrink from confronting inconvenient facts; the *Johnson v M'Intosh* approach which Stephen rejected would seem to have offered more freedom for Crown action than recognition of the necessity of purchase from Maori; if Stephen's objective had been to avoid being locked into any particular position, he would surely have said so rather than saying that *Johnson v M'Intosh* "is not the Law we recognize and act upon on the American Continent".

### **The Committee's rejection of Eliot's draft report**

The Committee voted against the adoption of Eliot's draft report on 30 July by seven votes to four, with Eliot abstaining.<sup>69</sup> Of the four who voted to adopt the report, Baring's and Hawes's support was predictable. It is less clear whether Hope and Gladstone voted out of conviction or because of party. Hope's questioning of Wakefield suggests that he may have been personally attracted to the doctrinal solution offered by the North American case-law (a point not without interest given the fact that he was to hold the position of Under-Secretary for the Colonies from 1841 to 1846). The evidence taken by the Committee was reported to the House on 3 August 1840<sup>70</sup> and was subsequently published with the record of its proceedings, which included Eliot's draft report.

As it transpired, the Committee's report to the House took place one day before, on the other side of the world, the New Zealand Land Claims Act was passed by the Legislative Council of New South Wales. The Act was premised on the same arguments advanced by the New Zealand Land Company to the Select Committee and which had been rejected by both the Committee and by Stephen in his minute on *Johnson v M'Intosh*. It was promoted by Gipps, who was the principal architect of the legislation, as carrying out Normanby's Instructions and as consistent with British imperial law and practice.

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<sup>69</sup> GBPP 1840 (582) VII.447 at x.

<sup>70</sup> *Journals of the House of Commons*, 3 August 1840, vol 95, 597.

CHAPTER SIXTEEN

**THE LAND CLAIMS BILL DEBATE—SYDNEY, 1840**

When news of the Treaty arrived in Sydney, the task for Gipps was to carry out the Marquess of Normanby's Instructions to "appoint a Legislative Commission" to investigate land purchases in New Zealand.<sup>1</sup> Although Gipps was later to remark that the Instructions had not "positively directed" that the Commission be constituted by legislation (a view that seems contrary to the terms of the Instructions in requiring him to proceed "with the advice of the Legislative Council" in appointing a "*Legislative Commission*"),<sup>2</sup> Gipps immediately drew up instructions for the drafting of a Bill on the model of the Act creating the New South Wales Court of Claims.<sup>3</sup>

As has been described in Chapters 11 and 14, the treatment of existing land purchases in New Zealand was a highly charged issue in Sydney in January and February 1840 due to Gipps's intervention to prevent the auctioning of New Zealand lands in Sydney, Hobson's fumbled dealings with the deputation of New Zealand landholders, the disclosure of the land titles proclamation after Hobson had sailed for the Bay of Islands, and the newspaper serialisation of Lang's *New Zealand in 1839* (which unmistakably raised the spectre that the invalidity of all titles, and not only those unjustly acquired, might be a real prospect). It was inevitable, therefore, that the progression of the land claims legislation would be followed closely, especially by the newspapers which had already taken up

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<sup>1</sup> See Chapter 8, text accompanying n 24.

<sup>2</sup> Speech of Sir George Gipps on the second reading of the Land Claims Bill, 9 July 1840, GBPP 1841 (311) XVII.493, 61-78 at 76.

<sup>3</sup> Memorandum of Sir George Gipps, 27 February 1840, SRNSW NRS 909, 4/1017 (also ANZ Micro-Z 2714 & UoA Microfilm 09-006 Reel 8). This memorandum was turned into a letter of instructions to the Attorney-General. See TC Harington (for the Colonial Secretary) to the Attorney-General of New South Wales, 29 February 1840, SLNSW DL N Ar/3, 91a-93b (also ANZ Micro-Z 2718 & UoA Microfilm 09-006 Reel 3). On the Act creating the New South Wales Court of Claims, see Donald Loveridge "The New Zealand Land Claims Act of 1840" (Brief of Evidence for the Crown Law Office, Muriwhenua Land Claim, Wai 45, 1993, I6, revised version 2002) ["Loveridge 'Land Claims Act'"] 40-44.

positions on the controversy. What could not have been anticipated was the heightened level of the final debate.

The Bill was more adverse to the interests of British purchasers than had been generally envisaged in February 1840. In the form introduced into the Legislative Council in late May 1840, it proceeded from the premise that, since the “Uncivilized Tribes, or Aboriginal Inhabitants of New Zealand” lacked the capacity to sell land, all purchases were invalid.<sup>4</sup> Gipps may also have had in mind, and was to develop during the course of the debate about the Bill, justifications based upon legal theories of pre-emption and sovereignty (drawing on the American “discovery doctrine” case-law). He was opposed by William Wentworth and James Busby, as well as sections of the Sydney press. Wentworth’s outrageous purchase of the South Island meant that his arguments were hardly dispassionate, but he was a formidable lawyer and his legal arguments raised the level of the debate. Busby’s arrival in Sydney pitted two contributors to the Treaty against each other within a matter of months of its signing at Waitangi. His arguments that the land claims legislation was inconsistent with the Treaty are significant for the purposes of this thesis, even if his own purchases meant he was not disinterested either.

Those who participated in the debate were conscious that they were participating in something unprecedented which called for consideration of fundamental principles. Gipps himself arranged for his speech in support of the Bill in the Legislative Council to be printed and distributed.<sup>5</sup> One of the members of the Legislative Council considered that a question of “greater importance” could not be brought

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<sup>4</sup> As is discussed below, the recital in the preamble that Maori lacked the capacity to sell land was omitted from the Bill at a late stage of its second reading.

<sup>5</sup> [George Gipps] *Speech of His Excellency Sir George Gipps, In Council, On Thursday, 9<sup>th</sup> July, 1840, on the Second Reading of the Bill for Appointing Commissioners to Enquire into Claims to Grants of Land in New Zealand* (J Tegg & Co, Sydney, 1840); letter from Gipps to unknown recipient (enclosing copies of his speech for distribution) and the reply, both dated 22 August 1840, NSWPA, Manuscript Records of the First Legislative Council (1824–1856), Box 19 (Correspondence), 391.

before the Council and that “[i]t would be thought a question of the first importance in the House of Commons.”<sup>6</sup>

It is surprising that the Land Claims Bill debate has received little attention from historians. The debate raised fundamental questions concerning the basis of British sovereignty, the rights and incidents of the sovereignty obtained, and the nature and treatment of native title to land (whether held by Maori or settlers). Inescapably, these questions implicate the effect and meaning of the Treaty of Waitangi, even if many of those participating in the debate did not frame their arguments by reference to the Treaty. The Treaty was, however, central to Busby’s opposition to the Bill. Gipps defended the Bill on the basis of English law, which he thought was accurately described by the United States Supreme Court in its Indian cases of the 1820s and 1830s. This was a view which, as has been seen, was not shared by James Stephen in his minute on *Johnson v M’Intosh*. Wentworth also made a strong case that Gipps had misstated both English law and American law. That is the conclusion reached in this thesis also. As is discussed in what follows, the Land Claims Bill debate may be seen to throw up two different paths which New Zealand could have taken. Although the path pointed to by Gipps was ultimately the one taken in New Zealand law, and has influenced the view of the Treaty in New Zealand history, it was arguably the wrong path and was by no means the inevitable choice in 1840.

The neglect of the Land Claims Bill debate by historians is not because it had dropped out of sight. The speeches of Busby, Wentworth and Gipps were discussed in some detail by Lindsay Buick in his *The Treaty of Waitangi* (1914).<sup>7</sup> Edward Sweetman reproduced in his *The Unsigned New Zealand Treaty* (1939) not only the speeches of Wentworth and Gipps (and gave summaries of other speeches

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<sup>6</sup> Speech of James Macarthur on the second reading of the Land Claims Bill, 10 July 1840, as reported in *The Colonist*, Sydney, 14 July 1840, at 2.

<sup>7</sup> T Lindsay Buick *The Treaty of Waitangi; or How New Zealand Became a British Colony* (S & W Mackay, Wellington, 1914) 241-254; T Lindsay Buick *The Treaty of Waitangi: How New Zealand Became a British Colony* (3rd ed, Thomas Avery & Sons Ltd, New Plymouth, 1936) [“Buick *The Treaty of Waitangi* (3rd ed, 1936)”] 300-313.

including Busby's) but also Wentworth's further written response to Gipps.<sup>8</sup> Peter Adams and Claudia Orange both cite Sweetman but neither, in their short accounts of the debate, refers to Busby's contribution, and both see the debate as significant only to the "waste lands question", instead of as bearing on the more fundamental questions of sovereignty and native title to land.<sup>9</sup> Although the debate did come to have significance for the "waste lands question" (whether Maori property extended to unoccupied lands), that issue did not arise directly until December 1842 (as is discussed later).<sup>10</sup>

A possible reason for lack of engagement with the arguments developed in the Legislative Council debate and in discussions in the Sydney and New Zealand press it engendered, is a shared view that Gipps was right in law, as New Zealand courts from 1847 seemed to confirm.<sup>11</sup> The two historians who do deal with the Land Claims Bill debate in any depth, Lindsay Buick and Donald Loveridge, treat Gipps as being in the right. Buick, although critical of Gipps's view that Maori did not have individual property in land,<sup>12</sup> regarded his speech as "remarkable for its broad grasp of constitutional history, as well as for its fearless declaration of the attitude adopted by the Crown".<sup>13</sup> Loveridge, in a work of significant scholarship which traces the development of the legislation, takes the view (contrary to that taken in this thesis) that the Bill accurately carried out Normanby's Instructions, including in the positions adopted in respect of Maori sovereignty and rights to sell land.<sup>14</sup> He considers the arguments put forward by the land purchasers to have been "fairly predictable".<sup>15</sup> Other historians may well not have engaged with the

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<sup>8</sup> Edward Sweetman *The Unsigned New Zealand Treaty* (The Arrow Printery Pty Ltd, Melbourne, 1939) ["Sweetman *The Unsigned New Zealand Treaty*"] 71-73 & chs 4-6.

<sup>9</sup> Peter Adams *Fatal Necessity: British Intervention in New Zealand, 1830-1847* (Auckland University Press, Auckland, 1977) 179; Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987) 94-95.

<sup>10</sup> See Chapter 17.

<sup>11</sup> See Chapter 18.

<sup>12</sup> Buick *The Treaty of Waitangi* (3rd ed, 1936), above n 7, 305-307.

<sup>13</sup> Ibid 305.

<sup>14</sup> Loveridge "Land Claims Act", above n 3, 110-114. See also Alan Ward *National Overview* (Waitangi Tribunal Rangahaua Whanui Series, GP Publications, Wellington, 1997) vol 1, 5-6, 15 & 45.

<sup>15</sup> Loveridge "Land Claims Act", above n 3, 76.

arguments of Busby and Wentworth because they were seen to be self-serving arguments put forward by land-sharks.

The Lands Claims Act 1840 declared that all purchases from Maori were invalid. It enacted that “all titles to land in New Zealand which are not, or may not hereafter be, allowed by Her Majesty, are, and shall be, absolutely null and void”.<sup>16</sup> It set up a mechanism by which, as an act of grace rather than right, purchases could be investigated and Crown grants made to the purchasers of lands obtained on “equitable terms” where not “prejudicial to the present or prospective interests” of future settlers.<sup>17</sup> As passed, the Act provided by schedule a table guide to how prices were reasonably to be assessed on a per acre basis.<sup>18</sup> The terms of the Act provided that, once the Commissioners had been satisfied that the purchasers had proved purchase on reasonable terms for all or part of the land, they were to report to the Governor so that a grant could be issued. That was subject to the important proviso that no grant could be recommended which exceeded 2,560 acres or which included land of public utility.<sup>19</sup>

In turning to consider the Legislative Council debate on the Bill, it is important to note that it was amended during the legislative process. This means that the Bill as spoken to by Busby, Wentworth and Gipps was not in the form in which it was passed and printed in the United Kingdom Parliamentary Papers alongside Gipps’s speech.<sup>20</sup> The scheme of invalidity and investigation did not change but features such as the schedule of prices were added and the maximum acreage for grants was

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<sup>16</sup> Land Claims Act 1840 (NSW) 4 Vict No 7 [“Land Claims Act 1840”], preamble (see below n 47 and accompanying text). The long title of the Act is “An Act to empower the Governor of New South Wales to appoint Commissioners with certain powers to examine and report on Claims to Grants of Land in New Zealand”. The short title “Court of Claims Act” is used in the official reprints of statutes. In this thesis I use “Land Claims Act” (or, as the case may be, “Land Claims Bill”) because that is the descriptor most commonly used by historians.

<sup>17</sup> Ibid s 2.

<sup>18</sup> Ibid s 5 & sch D.

<sup>19</sup> Ibid ss 5 & 6.

<sup>20</sup> “New Zealand Land Bill”, GBPP 1841 (311) XVII.493 at 53-57. Loveridge has transcribed the Bill as introduced: see Loveridge “Land Claims Act”, above n 3, 139-143. In the New South Wales Parliamentary Archives there are also printed copies of the Bill as introduced upon which the amendments have either been directly handwritten or attached on separate handwritten sheets. See NSWPA, Manuscript Records of the First Legislative Council (1824–1856), Box 17 (Public Acts).

set (having been left blank in the Bill as introduced). Loveridge provides a careful account of the changes in the Bill during its legislative passage. For present purposes, the only change of importance was the change to the preamble which is discussed below. Unlike the other changes, it went to the principles on which the Bill was framed, which were the focus of the debate.

### **The Bill and its background**

The Bill was introduced by Gipps on 28 May 1840.<sup>21</sup> He had provided in late February 1840 the instructions upon which it was framed<sup>22</sup> and later wrote and added the preamble to the draft.<sup>23</sup> In the Legislative Council debate on the second reading of the Bill, as is further discussed below, Gipps took the line that Maori lacked capacity to sell land and that, in any event, Europeans could not acquire it because the British Crown was already possessed of a right of pre-emption. It is not clear whether these two views were held by Gipps at the time he gave drafting instructions for the Bill. It is possible to read the instructions as inferentially

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<sup>21</sup> *Votes and Proceedings of the Legislative Council, During the Session 1840* (James Tegg, Sydney) ["*Votes and Proceedings*"] 1-4 (28 May). See also text accompanying ns 50-51 below.

<sup>22</sup> See above n 3. The instructions appear to have been supplemented by Gipps, perhaps in oral communication with the draftsman. Certainly there are undated notes in Gipps's handwriting on the same file as the drafting instructions which deal with matters not mentioned in the instructions themselves but which found their way into the Act. They include capping the confirmation of prior purchases at a maximum of 2,560 acres and excluding from all Crown grants areas of community significance such as the foreshore of harbours, bays and roadsteads (in which grants were to be outside 20 chains of high water mark), islands and headlands suitable for defence purposes, and sites suitable for townships (where grants were limited to two acres). Other points covered in the notes either did not find their way into the Bill or were excluded from the Act as passed. They included restrictions on grants abutting rivers and streams, further restrictions on the confirmation of purchases depending on the proportion of lands in cultivation, and the imposition of quit rents (as Normanby's Instructions had directed Gipps to consider). Gipps's undated notes, SRNSW NRS 909, 4/1017 (also ANZ Micro-Z 2714 & UoA Microfilm 09-006 Reel 8; and as transcribed by Loveridge "Land Claims Act", above n 3, 38).

<sup>23</sup> Speech of Sir George Gipps on the second reading of the Land Claims Bill, 9 July 1840, GBPP 1841 (311) XVII.493, 61-78 at 76-77: "I will say that the preamble is, in great part, of my own manufacture; at least it is not taken entirely from the Americans"; "It is to be remarked, however, that this preamble is not absolutely necessary to the Bill; neither is the first enacting clause, which declares all titles acquired from the natives to be null and void ... I framed both the preamble and the Bill as they stand. I thought a declaration, of the nature of that which stands in the preamble, necessary ... to let people know that the law of England does not admit of such practices."

recognising that some property had been validly acquired.<sup>24</sup> The instructions read more as an invocation of an act of state to withhold recognition of title as a matter of policy rather than in application of established legal doctrine. Gipps also gave instructions that a New South Wales statute restraining the unauthorised occupation of Crown lands was to be declared in force in New Zealand “in respect to all Lands for which no Deeds of Grant shall have issued, ... reserving, however, the rights of the Natives”. This may have echoed the *Johnson v M’Intosh* view that aboriginal interests in land were in the nature of rights of use or occupancy only which burdened the Crown’s ownership of the land. Certainly that was the position Gipps was to advance in the debate in the Legislative Council, but it may be that this position developed between February and July, perhaps under influences to be discussed.

Both in the instructions as to the drafting of the Land Claims Bill and, in the same memorandum, in instructions as to the drafting of a Bill to extend New South Wales laws to New Zealand, Gipps treated the area of New Zealand to which both laws were to apply as being confined to those areas acquired by Hobson in sovereignty. There was no suggestion of reliance on Cook’s discovery as giving rise to British sovereignty over the whole country or any rejection of Maori sovereignty except in areas ceded.<sup>25</sup> This is to be contrasted with the views that Gipps later expressed as he came to rely in the debate on the American cases based on “discovery doctrine”. That Gipps’s views altered may also be illustrated by late amendments made to the Extension of New South Wales Laws to New Zealand Bill which dropped reference to the acquisition of sovereignty in New Zealand in

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<sup>24</sup> Under the instructions, Commissioners were to “enquire into and report on the *validity* of claims to Land in New Zealand”, and the legislation was to contain a declaration that Crown grants were required before lands could be held only “within the parts of New Zealand over which Her Majesty’s Sovereignty is established” (appearing to leave open the validity according to local law of purchases outside the areas ceded in sovereignty).

<sup>25</sup> The drafting instructions required the rejection of all purchases “made since the 3rd day of February 1840, the day on which Her Majesty’s Sovereignty was proclaimed at the Bay of Islands”. The date given is perplexing, as is discussed by Loveridge “Land Claims Act”, above n 3, 36-38. It may be a mistaken reference to the 30 January proclamations (in which case it is inconsistent with reliance on the Treaty of Waitangi as the source of British sovereignty unless it refers simply to an assertion of sovereignty over British subjects and/or British-owned lands) or a mistaken reference to the date of the Treaty. But it certainly does not invoke sovereignty by prior discovery.

favour of an assertion of annexation of “Her Majesty’s Dominion in the Islands of New Zealand to the Government of New South Wales”.<sup>26</sup>

Following publication of the 14 January land titles proclamation, the Sydney newspapers continued in February–May 1840 to speculate about its meaning, which was widely regarded as ambiguous, and about the policies Gipps intended to pursue in relation to the existing land purchases in New Zealand.<sup>27</sup> It seems to have been understood that the system adopted would be based on the model of New South Wales Court of Claims, involving investigation of titles by Commissioners guided by “the real justice and good conscience of the case, without regard to legal forms and solemnities”. Initially most newspapers took the line that only those purchases which were not “bona fide” could properly be invalidated. They focused on the proclamation’s apparent requirement for proof of purchase on “equitable conditions” and “not in extent or otherwise prejudicial to the present or prospective interests of the community” rather than on the question of a priori invalidity.<sup>28</sup>

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<sup>26</sup> See Extension of New South Wales Laws to New Zealand Act 1840 (NSW) 3 Vict No 28; and copies of the Bill with handwritten amendments at NSWPA, Manuscript Records of the First Legislative Council (1824–1856), Box 16 (Public Acts); and David Williams “The Pre-History of the English Laws Act 1858: *McLiver v Macky* (1856)” (2010) 41 Victoria University of Wellington Law Review 361–380 at 379. See also Gipps to Hobson, 3 April 1840, CO 209/3, 93a–96a at 95b; and Gipps to Attorney-General, 17 April 1840, SRNSW NRS 909, 4/1017 (also ANZ Micro-Z 2714 & UoA Microfilm 09-006 Reel 8) (“By New Zealand I of course mean the parts only of New Zealand in which Her Majesty’s Sovereignty is established, and which now form a part of this Government, though they did not when the pardons were issued”).

<sup>27</sup> See *Commercial Journal and Advertiser*, Sydney, 29 February 1840, at 2; letter from a correspondent (Samuel McDonald Martin?) to *The Colonist*, Sydney, 29 February 1840, at 4; Supplement to *The Sydney Herald*, 9 March 1840, at 1; *Sydney Gazette and New South Wales Advertiser*, 10 March 1840, at 2; *Australasian Chronicle*, Sydney, 3 April 1840, at 2; *The Colonist*, Sydney, 4 April 1840, at 2; *The Australian*, Sydney, 7 April 1840, at 2; *Sydney Monitor and Commercial Advertiser*, 20 April 1840, at 3; *The Australian*, Sydney, 12 May 1840, at 2; *Sydney Gazette and New South Wales Advertiser*, 14 May 1840, at 2; *The Australian*, Sydney, 16 May 1840, at 2; *Sydney Gazette and New South Wales Advertiser*, 19 May 1840, at 2; *The Colonist*, Sydney, 20 May 1840, at 2; *The Colonist*, Sydney, 23 May 1840, at 2; *The Colonist*, Sydney, 27 May 1840, at 2. Some of these articles are discussed further below. As to the speculations of the newspapers before late February 1840, see Chapter 14, text accompanying ns 8–35.

<sup>28</sup> A correspondent (possibly Samuel McDonald Martin) to *The Colonist* went so far as to write that the proclamation had “given at least one pledge to the owners of land in New Zealand”: it had “acknowledged their right to purchase of the Natives”. *The Colonist*, Sydney, 29 February 1840, at 4.

Before the Bill emerged, however, there seems to have been growing support for the view that wider restriction on the recognition of purchases was appropriate. Importantly too, from late April the argument was being advanced from one corner of the press that purchases were a priori invalid. To some extent the changes in attitude may have reflected growing understanding about what Gipps proposed especially among those newspapers more aligned with him. To some extent it may have reflected the circulation of London newspaper reports of the New Zealand Land Company's criticisms of Colonial Office policy and its adverse impact on the successful colonisation of New Zealand. It may also have been fuelled by growing appreciation of the scale of land-sharking in New Zealand.

As we shall see, newspaper support for a harder line continued to build after the Bill emerged and during its debate, and most newspapers became convinced that Gipps was correct in law that pre-proclamation land purchases from Maori were invalid. Over this period the opposition, which had been more widespread, became largely confined to *The Colonist* of Sydney and the recently-established New Zealand newspapers *The New Zealand Gazette* (ironically a New Zealand Land Company publication) and *The New Zealand Advertiser and Bay of Islands Gazette*. *The Colonist* and *The New Zealand Gazette* were associated with land purchasers. *The New Zealand Advertiser and Bay of Islands Gazette* was edited by Barzillai Quaife, a Congregationalist minister, whose opposition arose out of his concern at the implications of the legislation for Maori property rights.

Something of the flavour of the positions adopted in the press can be gained from a few examples. *The Sydney Herald* in an editorial published on 9 March took the view that "the source of all titles in New Zealand, heretofore subsisting, is in the authority of the Chiefs, to whom the seigniory of their soil has been conceded by the British Government". Proof of purchase depended upon "the customs of the country", "[f]ortunately" modified by Maori adoption in recent years of "the British method of conveying real estate" (by "instrument in writing, of paper or parchment, signed, sealed, and delivered by the Sovereign Chief, and duly attested by subscribing witnesses": "[i]n other words, the fee-simple is conveyed by

regular *Deed of Grant*"). The editorial considered, however, that the terms of the proclamation, in seeming to require proof of purchase on "equitable conditions" and "not in extent or otherwise prejudicial to the present or prospective interests of the community", would introduce complication to the otherwise "straight course" of inquiry of the Commissioners. It expressed the view that the inquiry into the equity of purchases was inconsistent with the acknowledged sovereignty of the chiefs:

If this proviso is not utterly inconsistent with the concessions made by the British Government—if it is not a direct attack on the prerogatives of the admitted sovereignty of the Chiefs—we know not in what other terms to designate it.

It asked why the chiefs were to be treated any differently from the Queen of England in her disposition of Crown lands, pointing out that in New South Wales lands (acquired by "seizure") had been granted on peppercorn rentals. The editorial also questioned "by what rule, by what standard" the equity of the purchases was to be measured. It took the view that the only legitimate inquiry was whether the "transaction was *bona fide*":

If in any case it can be shown that the Chief has been *cheated* out of his land, and induced to execute a deed of grant by *force* or *fraud* of any description whatsoever, by all means let the instrument be declared void, and the land lapse to its rightful owner.

The requirement in the proclamation that confirmation of titles be withheld from purchases prejudicial to community interests was assailed as "licensed plunder" ("unless founded upon the principle of fair compensation").

*The Sydney Herald* deprecated the proclamation as "obscure, indefinite, evasive, binding the Government to do nothing but what they please". It urged parties interested to keep "a vigilant eye upon every future step of the Government" and to be ready

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upon the least appearance of a departure from those just and equitable principles which we have been endeavouring to elucidate, to unite hand and heart in resisting, legally but strenuously, any infringement of their common rights.<sup>29</sup>

It may well have been in response to *The Sydney Herald* editorial, that the *Sydney Gazette* the next day wrote to express disagreement with the claims of vagueness or ambiguity in the proclamation. It considered the “proviso ... respecting *extent* and *position*” was “very essential”:

If an individual claims a title to a vast extent of country, it is for the Government to determine (in our opinion) whether such individual should be allowed to retain so large a possession, or otherwise. If in the opinion of Government the admission of the claimant’s title to so vast a territory, would prejudice the interests of the public generally—the claim should be denied; allowing the claimant to receive from Government compensation regulated by the minimum value [on a standard it urged the Government to fix].

This was not to deny the sovereignty of the chiefs at the time of sale. Rather it recognised that, when the chiefs ceded sovereignty to the British Crown, recognition of purchases was entirely a matter for it in exercise of the sovereignty it had acquired:

The British Constitution does not recognise the rights of a British subject obtained under a foreign power. If an English subject purchases an estate in France, he obtains his title from the French Government; if any dispute arises, it must be decided according to the laws of France. If the New Zealand chiefs cede the sovereignty of their respective territories to the British Crown, the moment they have done so, their right to confer, or even protect titles previously granted, ceases.

What is more, until purchases were confirmed by Crown grant they could have no effect: “If New Zealand is to become a part of the British Empire, all titles to land must be derived from the Crown, otherwise there can be no British Sovereignty”. While the outcome might be harsh to individuals in some circumstances, “individual convenience must give way to general convenience”.<sup>30</sup>

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<sup>29</sup> Supplement to *The Sydney Herald*, 9 March 1840, at 1.

<sup>30</sup> *Sydney Gazette and New South Wales Advertiser*, 10 March 1840, at 2.

These arguments of the *Sydney Gazette* support the proclamation on the basis of Crown's rights upon acquisition of sovereignty to decide whether or not, as an act of state, to recognise purchases. The difference between the *Sydney Gazette* and *The Sydney Herald* comes down to this point. Neither newspaper suggested that purchases made before the acquisition of sovereignty by Britain were invalid either because of lack of capacity by Maori or on the basis of a pre-existing Crown right of pre-emption based on discovery doctrine.

On 23 March, Samuel McDonald Martin chaired a meeting of New Zealand landholders to discuss the creation of an Association to keep under review the development of Government policy. Martin, in addressing the meeting, said that the landholders were left "entirely in the dark as to the intentions of the Government".<sup>31</sup> The meeting formed a committee, of which William Wentworth was a member, to carry forward the setting up of the Association, which formed at further public meeting on 2 April. That meeting, attended according to one report by nearly two hundred people,<sup>32</sup> was clearly an agitated affair. Wentworth now took the chair and delivered a hard-hitting speech. Martin was forced, under criticism from Wentworth, to excuse his earlier actions in moving a vote of thanks to Hobson at the 15 January public meeting<sup>33</sup> (explaining that it was before Gipps had issued his proclamation and was on the basis of Hobson's very different representations to the deputation of landholders). It cannot have helped the mood of the meeting when the editor of *The Colonist* related to the meeting a report that Gipps had referred to New Zealand landholders as "squatters". Wentworth told the meeting that the clear intention of the proclamation was that "the titles to New Zealand possessions would depend entirely on the good will and pleasure of [the] government" which would "confirm titles or not at caprice". He expressed the conviction that Gipps "intended to confirm titles to as little [land] as possible". It was imperative that the landholders should stick together. They had to keep a close eye on the Bill when it emerged and hope to "get as good a bill as possible passed

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<sup>31</sup> Report of meeting of New Zealand landowners in *The Colonist*, Sydney, 25 March 1840, at 2.

<sup>32</sup> *The Sydney Herald*, 6 April 1840, at 2.

<sup>33</sup> See Chapter 11, text accompanying n 73.

for themselves”. They had, however, to be prepared for the eventuality that the Act as passed would be unfavourable. In that case, it would be necessary to decide whether to submit claims for investigation (he himself had no confidence in the process) or to leave it to the Government to initiate eviction which would give the opportunity for the matter to “pass through the hands of a Jury”, after which the legality of the Government position could be tested by bringing “the whole matter before the Queen in Council” (in apparent reference to petition to the Privy Council). He declined to offer advice himself on the validity of titles obtained from Maori, urging that the Association should obtain its own legal opinions. The fact that the Government was proceeding by way of legislation was, however, a matter of “encouragement” because it suggested that “if any law existed already which gave such a right as that which the government claimed, there would be no necessity for a new bill being introduced”.<sup>34</sup> The meeting passed a number of resolutions including one in which it expressed conviction that no law existed that could invalidate purchases and another which recorded their formation under the name “The New Zealand Association”.<sup>35</sup>

By 20 April a different note was being sounded by the *Sydney Monitor and Commercial Advertiser*, possibly picking up on the more recent New Zealand Land Company arguments as developed, for example, in *The Colonial Gazette*’s 2 October 1839 solution to the “knot of thousand difficulties”<sup>36</sup> which was reproduced in the *Sydney Monitor* of 16 March 1840.<sup>37</sup> The *Sydney Monitor* of 20 April attacked the New Zealand landholders whom it thought were justly described as land-sharks. Their “secret” and “unjust” purchases would prevent successful colonisation on the scheme propounded by Wakefield and deny the British people,

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<sup>34</sup> Report of meeting of New Zealand landowners in *The Colonist*, Sydney, 4 April 1840, at 2. Compare the report in the *Australasian Chronicle*, Sydney, 3 April 1840, at 2.

<sup>35</sup> Resolutions of meeting of New Zealand Association published in *The Colonist*, Sydney, 4 April 1840, at 3.

<sup>36</sup> See Chapter 13, text accompanying ns 25-29.

<sup>37</sup> *Sydney Monitor and Commercial Advertiser*, 16 March 1840, at 7 (acknowledging reproduction from the *Sydney Gazette*).

especially the poor, its benefits.<sup>38</sup> The New Zealand position could not be distinguished from that in Port Phillip where comparable land-sharking had met the disapproval of “all men” and been invalidated by the Government without suggestion of it “acting oppressively”. The land had been purchased for “a little tobacco, tea, sugar, ... a few blankets and tomahawks, ... gunpowder, bullets and muskets”. They were the “titles of Cortes and Pizarro”.

The article argued that New Zealand was clearly not an “independent nation” there being “no monarch there, nor any regular formal government”:

It is a nation of small tribes, of numerous tribes, each having its chief, and each independent of the other. It is a series of little colonies, the inhabitants being eternally at war with each other. No bond like that of the South Sea Islands, binds the natives to their King and *his* chiefs. Let a New Zealand chief be taken in war, and he becomes a slave. Let the tribe that captured him ever give him his liberty, yet he is no longer a chief. He will never more be looked on by his tribe, except as a common man.

Although more “energetic and intellectual” than the Aborigines of Australia, Maori were “morally ... as imbecile and unfit for independence as a nation ... as the natives of this colony”.<sup>39</sup>

The article expressed the views that the unoccupied and uncultivated “waste lands” of such people should be available for settlement by “civilized men” “pinched for food and room at home” and that the “true sovereign” of the country was “the sovereign whose enterprising subjects first ploughed the unknown seas, and *discovered* [it]”. If that sovereign refused to colonise the country, another sovereign had the right to do so (“[f]or God made this world to be peopled by man in his *civilised* state”). As for the principles that should be adopted by “civilized men” in respect of the “aborigines of any country they have discovered”, the *Sydney Monitor* took the view that:

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<sup>38</sup> The article concluded by referring to the deceptions of those land-sharks who had drawn the visiting South Island chiefs away from their meeting with Governor Gipps (to sign the agreement he had prepared for them) in order to “dupe” them into selling the Island to them.

<sup>39</sup> The article referred to prostitution of Maori women, their “delight in human blood” and warfare, and cannibalism.

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If the Queen of England take possession of New Zealand as a Sovereign, no man there, no not even the New Zealanders themselves, can hold land, but *by the law of the new Sovereign*.

The new Sovereign is bound indeed, as we have before stated, to confirm to the aborigines, all such lands as they *cultivate*, and actually *depasture*. Of the rest she becomes the *Trustee*, for the benefit alike of the natives and of the British and Irish people, under the authority of her *Parliament*.

The article set out six principles governing the situation. They included the precept that “Queen and Imperial Parliament” held the sovereignty of New Zealand “by the laws of nations: (1) through the right conferred by *discovery*; (2) by *occupation*”. The Queen was the “Guardian of the natives of New Zealand” and “trustee for them as regards their *lands*”, with power to “alienate them for their ultimate benefit, and the interests of the British people”. All previous purchases of land from Maori would be subject to the approval of the Queen and held in the meantime by the purchasers as “sub-trustees of the Queen”. In respect of lands purchased and not occupied, the sales were to be deemed null and void.<sup>40</sup>

A tougher line was also emerging in the columns of the *Sydney Gazette* which on 14 May said that Europeans “upon constitutional principles” had no right to acquire land “in savage countries without the previous consent of the Crown”.<sup>41</sup> This assertion was new and can be contrasted with the views the *Sydney Gazette* had expressed on 10 March.

*The Colonist*, as might have been expected, weighed in in response describing the view that “constitutional principles” prevented the acquisition of property without previous Crown consent as “an arrogant assumption” and a “dogmatical assertion of ... arbitrary opinions”. It denied the existence of such principles and argued that they were inconsistent with the way in which Hobson had been instructed to proceed:

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<sup>40</sup> *Sydney Monitor and Commercial Advertiser*, 20 April 1840, at 3.

<sup>41</sup> *Sydney Gazette and New South Wales Advertiser*, 14 May 1840, at 2.

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[T]he sovereign independence of the Native Chiefs was acknowledged; their right to dispose of the lands, of which they were the natural proprietors, was likewise recognised; and “the right of private individuals” to purchase lands from the Natives was also confirmed. The fact that Her Majesty is now actually negotiating, by means of her representative, with the Natives of New Zealand for the purchase of their land, is the strongest proof that can be given that their right, as proprietors of the soil, to dispose of their own property is acknowledged.

*The Colonist* contended that, if such constitutional principles existed, it was inconceivable that they would have been “overlook[ed] entirely” by the British Government in giving Hobson his instructions. The most it was prepared to allow was that, with acquisition of sovereignty (and because the Crown was the “fundamental source of all title to territorial property within the British Empire”), the British Crown obtained a “constitutional right of pre-emption” which “renders illegal all further purchases of land by private subjects from the natives of that country—and invalidates, thereafter, all titles which are not either derived from or confirmed by the Crown”. It was “dreaming ... extravagantly” to suppose that these principles could be drawn on by “rational or honest inference” to establish “so wide a proposition as, That private individuals can have no right to acquire territorial property in a savage country without the previous consent of the Crown”.<sup>42</sup>

The acknowledgement that the Crown, after acquisition of sovereignty, was the “fundamental source of all title to territorial property”, coupled with the rejection of invalidity of pre-sovereignty purchases, indicates that *The Colonist* must have envisaged that the Crown was obliged to recognise existing purchases if bona fide (while accepting that, without confirmation, such pre-existing purchases could not be maintained).<sup>43</sup> This is made explicit in subsequent editorials in which it is said that the “obvious corollary” of both the validity of the titles “granted by the Native Chiefs” when sovereign and the rights of British subjects to purchase from them

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<sup>42</sup> *The Colonist*, Sydney, 20 May 1840, at 2.

<sup>43</sup> In Chapter 3 I have expressed the view that it is not correct that the Crown could be the only source of title in a British colony or that formal Crown-confirmation of pre-sovereignty purchases was the only way to maintain native titles.

prior to the change in sovereignty was “the OBLIGATION under which the British Government lies ... to RECOGNISE the RIGHTS ... and to grant them, under certain legitimate and reasonable conditions, a Royal CONFIRMATION of their native titles”.<sup>44</sup>

In editorials on 23 and 27 May, *The Colonist* took aim at the *Sydney Monitor*’s editorial of 20 April, rejecting the suggestion that Port Phillip was a precedent for New Zealand (drawing on Samuel Martin’s 22 January response to Lang’s similar argument<sup>45</sup>) and repeating its views that British recognition of Maori sovereignty and property meant that it could not treat past purchases as invalid. Rather the question was “on what grounds ought ... [Crown] recognition [of titles] to rest; and on what terms or conditions ought the Royal confirmation to be granted?”<sup>46</sup>

Although the newspaper editorials between January and late May 1840 had identified the parameters of the options available for dealing with pre-1840 land claims and the arguments in favour of each, the shape of Gipps’s Bill when introduced by him in the Legislative Council on 28 May must have come as a disappointment to the land claimants. His position was closer to the position advocated by the *Sydney Monitor* and *Sydney Gazette* and at the opposite end of the spectrum to *The Colonist*, but also was a much harder-line than the more moderate opinions taken by *The Australian*, the *Australasian Chronicle* and *The Sydney Herald*.

The Bill, in what Gipps was later to call the “first enacting clause”,<sup>47</sup> provided that “all titles to Land in New Zealand which are not, or may not hereafter be, allowed

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<sup>44</sup> *The Colonist*, Sydney, 27 May 1840, at 2. See also *The Colonist*, Sydney, 23 May 1840, at 2 (“it [would be] thenceforth illegal and unconstitutional for any of her subjects ... to maintain their title to those [lands] which they had previously purchased, irrespectively of her special recognition and confirmation”); and *The Australian*, Sydney, 9 June 1840, at 2 (“[it is] legally impossible for a British subject to hold lands in New Zealand except under a title from the Crown”; “[in a British colony] no British subject can hold himself or his acquired landed property independent of the Crown”).

<sup>45</sup> See Chapter 14, text accompanying n 16.

<sup>46</sup> *The Colonist*, Sydney, 23 May 1840, at 2. See also *The Colonist*, Sydney, 27 May 1840, at 2.

<sup>47</sup> Speech of Sir George Gipps on the second reading of the Land Claims Bill, 9 July 1840, GBPP 1841 (311) XVII.493, 61-78 at 77. Confusingly, the Bill and Act purport to start at clause 2, with the first substantive provision being undifferentiated from the preamble.

by Her Majesty, are, and shall be, absolutely null and void”.<sup>48</sup> This position was modified in clause 2. It recited Normanby’s Instructions by which had been declared “Her Majesty’s gracious intention to recognize claims to Lands which may have been obtained on equitable terms ... and which may not be prejudicial to the present or prospective Interests of such of Her Majesty’s Subjects as may resort to, or settle in the said Islands”. It authorised the Governor to appoint Commissioners to report on all claims to grants of land in New Zealand to the Governor who was then empowered (although not obliged) to issue Crown grants. The operative provisions of the Bill were preceded by a preamble, the work of Gipps himself,<sup>49</sup> which contained four recitals. The first recorded that “purchases or pretended purchases” had been made “either mediately or immediately from the Chiefs or other Individuals of the Aboriginal Tribes”. The second recorded that:

[N]either the Chiefs nor other Individuals of uncivilized People, such as inhabit the Islands of New Zealand, have, nor can have, a right so to dispose of the Territory occupied by them, as to convey to Individuals not forming part of their own Tribes, and not being Aboriginal Inhabitants of such Territory, a permanent interest in the Lands, or in any portion of the Lands which are held by them in common, and for the advantage of the said Tribes or Aboriginal Inhabitants.

The third recited that under Normanby’s Instructions it was the Queen’s “will and pleasure not to recognize any titles to Land in New Zealand which do not proceed from, or are not, or shall not be allowed, by Her Majesty”. The last declared that it was “expedient and proper to put beyond doubt the Invalidity of all titles to Land ... founded upon such purchases or pretended purchases ... from the said Uncivilized Tribes, or Aboriginal Inhabitants of New Zealand”. This preamble led into the “first enacting clause” declaring all titles not hereafter allowed by the Queen null and void.

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<sup>48</sup> Copies of “A Bill to empower the Governor of New South Wales to appoint Commissioners to examine and report on Claims to Grants of Land in New Zealand” [“Land Claims Bill 1840”] can be found at CO 201/297, 192a-195a & 198a-201a and at NSWPA, Manuscript Records of the First Legislative Council (1824–1856), Box 17 (Public Acts). Those in the New South Wales Parliamentary Archives include copies with the handwritten amendments to the Bill made between its introduction and enactment.

<sup>49</sup> See above n 23.

### Introduction of the Bill and reaction to it

The Bill was presented by Gipps at the opening of the new session of the Legislative Council. In his speech opening the new session, referring to the land claims based on purchases from Maori, he said:<sup>50</sup>

These claims can have, I believe, no foundation in Law, or the usage of Colonizing Powers; but Her Majesty having been pleased graciously to express Her intention to allow and confirm such of them as may be founded on equitable principles, and not in extent or otherwise prejudicial to the present or prospective interests of Her Subjects in New Zealand, an enquiry into the nature of them by Commissioners ... becomes necessary ... A Bill consequently, on the model of the Act under which claims to Grants of Land are investigated in this Colony, will be immediately submitted to your consideration.

Later, in tabling the Bill for its first reading, Gipps further explained the principles upon which the Bill was based. *The Colonist* reported his speech as follows:<sup>51</sup>

The preamble declares all the titles set forth to be invalid, and if when the measure was discussed these principles should be opposed, he (the Governor) was prepared to support them by the law of England, and according to the decisions of some of the most eminent men that had ever been upon the bench. He laid the Bill before them in full confidence of its legality, for the Secretary of State would not have been so imperative or acted so positively if he had not been fully convinced of the legality of the measure. No British subject was in a position to buy land from the natives of New Zealand. In the Crown only was vested the power to form colonies, and no band of adventurers, however respectable the members of it, had any right or power to do so without permission from Her Majesty, and if they set up a Government without her authority, they would be guilty of something between misdemeanor and high treason ... It was his duty, and the duty of the Council, to maintain the principle that no subject had the right or power to form colonies irrespectively of the Queen. The Government had been forced into the measures which had been taken relative to New Zealand, and unless this principle was acted on, Government might still be dragged in the wake of countless bands of adventurers, who might choose to form colonies in the numerous isles of the Pacific. The question of previous sovereignty had nothing whatever to do with the present question. It mattered

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<sup>50</sup> *Votes and Proceedings*, above n 21, 1. See also *The Colonist*, Sydney, 30 May 1840, at 2.

<sup>51</sup> *The Colonist*, Sydney, 30 May 1840, at 2.

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not whether that sovereignty was acquired yesterday, or in by gone years. The independence of the New Zealand chiefs was never openly acknowledged by England. It was true that it was tacitly allowed, *sub silentio*, and the consequence was, that Captain Hobson had not taken possession of New Zealand as by right of discovery, or of conquest, but had been obliged to negotiate for the sovereignty. The question of independence had nothing at all to do with it. All savages are independent. When he, the Governor, was in Canada, Sir Francis Head negotiated with the tribes for their possessions, but no white settler was allowed to purchase from them for himself.

In the preamble and in the speeches on 28 May, Gipps prefigured arguments he was later to make with more sophistication in the Legislative Council debate on the second reading of the Bill. Even at this time, Gipps seems to have anticipated that it would be necessary for him to defend the Bill against the landholders' claims of right which had been foreshadowed in the press discussion. It seems likely that by 28 May he had received advice (whether or not solicited) from the New South Wales Supreme Court judge, John Walpole Willis.<sup>52</sup> Willis's "Notes on the Acquisition of New Zealand as a Dependency of New South Wales with reference to the lands obtained by British Subjects from the Aborigines" appear to have been written in May 1840 and to have been sent to the Governor at that time.<sup>53</sup> If so, it would explain Gipps's reference, in his speech on the introduction of the Bill, to

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<sup>52</sup> As to the career of the eccentric Willis, who in 1841 became the first resident Supreme Court Judge at Port Phillip (where he gave judgment in the *Bonjon* case discussed in Chapter 3), see John McLaren *Dewigged, Bothered, and Bewildered: British Colonial Judges on Trial, 1800–1900* (Osgoode Society for Canadian Legal History, University of Toronto Press, Toronto, 2011) 74–87 & 170–189; and Janine Rizzetti "Judging Boundaries: Justice Willis, Local Politics and Imperial Justice" (2009) 40:3 *Australian Historical Studies* 362–375. James Stephen was to observe of Willis's career in 1843 that it had been "the most lamentable succession of follies and consequent disasters which could be brought together in the history of any man whom I have either known or read of". Quoted in Rizzetti, *ibid* 375.

<sup>53</sup> John Walpole Willis "Notes on the Acquisition of New Zealand as a Dependency of New South Wales with reference to the lands obtained by British Subjects from the Aborigines" SLNSW A857, 11–68 ["Willis 'Notes on the Acquisition of New Zealand'"]. I am grateful to Janine Rizzetti for overcoming my initial scepticism that Willis was the judge later referred to by Busby as having "implored" him not oppose Gipps's Bill (see text accompanying n 66 below), without which persuasion I would not have discovered these "Notes". For confirmation of Willis's authorship of the note, see Willis to James Mitchell, 9 October 1841, SLNSW A2026, 155–158 at 157; and Willis to Lord Stanley, 8 February 1843, SLNSW A1238/2 at 2295–2296. Willis's assistance to Gipps helps to make sense of his use of Gipps's speech on the second reading of the Land Claims Bill in his judgment in the case of *R v Bonjon* (1841). See Janine Rizzetti "Judge Willis, *Bonjon* and the Recognition of Aboriginal Law" (2011) *Australia & New Zealand Law & History E-Journal*, Refereed Paper No 5, at 15–16.

being “prepared to support [his arguments] ... according to the decisions of some of the most eminent men that had ever been upon the bench”, since Willis’s note drew on United States “discovery doctrine” as described by the notable American jurists Kent and Story in their respective *Commentaries* (descriptions themselves drawn from the case-law of the Marshall Supreme Court). The note is a parade of useless erudition. It cites a large number of further sources including Justinian’s *Institutes* and *Digest*, Tacitus, Vattel,<sup>54</sup> Clark’s *Colonial Law*, Jeremiah Drummond’s *A Defence of the New England Charters*, Watson’s *Annals of Philadelphia*, various United Kingdom Parliamentary papers (among them the reports of the Aborigines Committee and the 1838 Committee on New Zealand), Lang’s *New Zealand in 1839* and William White’s *Important Information Relative to New Zealand*. The extent to which Willis’s note was drawn on by Gipps is discussed below in relation to the speech he gave on the second reading of the New Zealand Land Claims Bill.

The Bill and Gipps’s speeches of 28 May, which were published in the newspapers together with the supporting papers tabled by Gipps (Normanby’s Instructions and enclosures to Gipps),<sup>55</sup> provoked further response. A correspondent to *The Colonist* objected to the statement by Gipps that the purchase of land in New Zealand by British subjects was “treason, or something like it”:

Sir George is correct in stating, that British subjects have no right to assume a sovereignty in any country without the Queen’s permission; but His Excellency is quite mistaken in using this as an argument to show that a fair purchase of land, out of England is treason, high or petty, or yet a misdemeanour.<sup>56</sup>

The same correspondent took issue with the description of Maori as “uncivilized savages”. While that description may have been true some years ago, now there were everywhere in New Zealand to be found “educated Christians”, the

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<sup>54</sup> Invoking some of the same passages relied upon by Lord Eliot in speaking to his motion for the appointment of a Select Committee on 7 July 1840—see Chapter 13.

<sup>55</sup> For example, the Bill was published in the *Australasian Chronicle*, Sydney, 6 June 1840, at 2; *The Australian*, Sydney, 6 June 1840, at 2; and the *Sydney Gazette*, 13 June 1840, at 2. Normanby’s Instructions and enclosures were printed in Supplement to *The Sydney Herald*, 1 June 1840, at 1-2; and *The Colonist*, Sydney, 3 June 1840 at 4 & 6 June 1840 at 4.

<sup>56</sup> See also the similar view expressed by *The Colonist*, Sydney, 17 June 1840, at 2, col 3.

achievement of the very people now described by the Governor as traitors. Nor had the Governor explained why general English law was not adequate to deal with the problem of fraudulent land purchases:

It may be said, the object of the proclamation and intended Commissioners' Courts is to prevent frauds being committed by Lords Durham and others; but if the ordinary laws of England be in force, are they not sufficient to prevent fraud in England? Why not in New Zealand? If a British subject be seized of land to which he has no right, are not the courts open to him that has the right, the real right of complaint; and if it be said the natives are not sufficiently versed in English law to conduct a suit, why not assign them a counsel under the name of protector or attorney-general, or what you will, whose business it would be to manage such suits for them.<sup>57</sup>

Another correspondent to *The Colonist*, "Britannicus", took the view that there was no law prohibiting British subjects from buying and holding lands in independent states, such as New Zealand had been recognised to be by the British Government. As for American "discovery doctrine", while there was "much weight in the reasonings of the late Chief Justice Marshall, of America, on this subject" (which he set out from *Worcester v State of Georgia*), it was inapplicable to New Zealand because Britain, the only nation that could have claimed sovereignty by discovery, had waived any such claim (except possibly in relation to the South Island).<sup>58</sup>

*The Colonist* itself, in an article on 17 June, subjected Gipps's 28 May speeches to a detailed comparison with Normanby's now fully published Instructions, which it said threw "new light upon the formerly dubious intentions of Government". It pointed out that this comparison indicated that Gipps's views about Maori having neither sovereignty nor property in land were not shared by Normanby:

From these extracts it is evident that the Minister of State is very bluntly and broadly contradicted by his malapert and self-sufficient subaltern who governs this colony, and who would set his own crude and by no means scrupulous ideas of prerogative, of international law, and of colonial policy, above the better judgment and express instructions of his superiors ... .

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<sup>57</sup> *The Colonist*, Sydney, 3 June 1840, at 3.

<sup>58</sup> *The Colonist*, Sydney, 13 June 1840, at 4.

The article rehearsed the position already taken by *The Colonist* on the land claims question. It acknowledged that “still the subject is not nearly exhausted”. It reported that the New Zealand Association was apparently intending to petition to be heard by the Legislative Council before the second reading of the Bill and that it was seeking legal representation in presenting its submissions. *The Colonist* commented that there was “here a fine field for an acute and philosophical barrister to display talent upon”.<sup>59</sup>

By the time that this article appeared, the Association had already received two legal opinions from barristers, JB Darvall and William A’Beckett, which were subsequently published in *The Australian* and *The Colonist*. Both barristers took the view that there had been no legal impediment to European purchases of land in New Zealand before the British Crown obtained sovereignty and that treating such purchases as invalid was contrary to English law.<sup>60</sup>

Before the Association petitioned to be heard on the Bill, however, similar petitions were presented by James Busby and by William Wentworth. Busby had arrived in Sydney with his family on 6 April. He had come on business,<sup>61</sup> and perhaps to visit family or to seek a government appointment,<sup>62</sup> only to discover that his New Zealand property interests were threatened by the land claims legislation then in preparation. It was not a good time for Busby. His son James died soon after the family arrived from influenza, which afflicted other members of the family, causing Busby great anxiety.<sup>63</sup> Busby met with Gipps sometime before 16 April, when he sent a letter to William Colenso which referred to the meeting. In it, Busby referred to having a “tough battle to fight with Sir G. Gipps” with whom he

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<sup>59</sup> *The Colonist*, Sydney, 17 June 1840, at 2.

<sup>60</sup> Opinions of JB Darvall and William A’Beckett dated 11 June 1840, published in *The Australian*, Sydney, 20 June 1840, at 3 and *The Colonist*, Sydney, 24 June 1840, at 3.

<sup>61</sup> James Busby *The Rebellions of the Maories Traced to their True Origin. In Two Letters to the Right Honorable Edward Cardwell, Her Majesty’s Principal Secretary of State for the Colonies* (Strangeways & Walden, London, 1865) [“Busby Rebellions of the Maories”] 15: “Soon after the arrival of Captain Hobson, I proceeded to New South Wales, for the purpose of conveying the live stock which I possessed in that colony to the lands I had purchased in New Zealand.”

<sup>62</sup> See Chapter 20, text accompanying n 15.

<sup>63</sup> See Busby to Colenso, 16 April 1840, ATL MS-Papers-10533-2.

had met for “an hour’s discussion of the Land question”.<sup>64</sup> In a letter written to Gilbert Mair on 6 May, Busby gave further details of the meeting, writing that Gipps had said that “he intended to treat us all as squatters and to claim all the land in the Queen’s name”. He reported that Gipps was prepared to “give an equitable consideration to our claims, that is for 10,000 acres he would perhaps as I understand him give us 1,000 and for 100,000 acres perhaps 5,000”. Busby expressed the view that, while such a solution might be a compromise welcomed by “[t]hose who have purchased land in the Southern Island by the million of acres and whose title is not worth a straw”, “it will not do for us”.<sup>65</sup> Busby was much later to say that Gipps had expressed “no little displeasure” when he expressed his disagreement with the approach Gipps was taking. He was also to say that he had been “implored” by a Supreme Court Judge who had advised Gipps in the matter (not named, but almost certainly Willis) not to oppose the legislation.<sup>66</sup> Busby, as might have been expected from his form in such matters, was not to be deterred. To Mair on 6 May, he wrote that the Legislative Council was to meet at the end of the month and that “I shall be at my post”.<sup>67</sup> His petition to be heard on the Bill by the Council<sup>68</sup> was presented by Bishop Broughton on 16 June and was granted. He was advised that he would be heard on 30 June, when the Bill was scheduled for its second reading. Gipps then made it clear that, if anyone else wished to be heard, time would also be made available on 30 June, but that it would be necessary for them to give notice.<sup>69</sup> On 23 June, the Council agreed to hear Wentworth.<sup>70</sup> On 25 June, it acceded to the petition of 153 landholders (almost certainly the members of the New Zealand Association) to be heard through counsel as they had requested.<sup>71</sup>

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<sup>64</sup> Ibid.

<sup>65</sup> Busby to Mair, 6 May 1840, ATL MS-Papers-0227-05 (typescript). See also Busby’s 1865 account of this meeting in *Rebellions of the Maories*, above n 61, 15-17.

<sup>66</sup> Busby *Rebellions of the Maories*, above n 61, 17.

<sup>67</sup> Busby to Mair, 6 May 1840, ATL MS-Papers-0227-05 (typescript).

<sup>68</sup> Petition of James Busby dated 13 June 1840, NSWPA, Manuscript Records of the First Legislative Council (1824–1856), Box 18 (Tabled Papers), 300-301.

<sup>69</sup> See *Votes and Proceedings*, above n 21, 13 (16 June); and *The Colonist*, Sydney, 17 June 1840, at 2.

<sup>70</sup> See *Votes and Proceedings*, above n 21, 17-18 (23 June); and *The Colonist*, Sydney, 24 June 1840, at 2.

<sup>71</sup> See *Votes and Proceedings*, above n 21, 19-20 (25 June); and *The Colonist*, Sydney, 27 June 1840, at 2. The petition of the 153 landholders included the submission that “their rights and

In the event, Darvall and A'Beckett appeared for the 153 landholders. Busby and Wentworth appeared for themselves.

In a last salvo in the press debate before the Council debate ensued, the *Sydney Monitor* published a letter from a correspondent remarking on the “spectacle” of the “land jobbers out of the council, *petitioning* their brother land jobbers in the council”. It warned that if the land-sharks were to prevail, the colony of New South Wales would end up underwriting the inevitable failure of the colony in New Zealand because a revenue there from land sales would be foreclosed.<sup>72</sup>

### **Busby's speech**

Busby's presentation to the Legislative Council was made on 30 June. He had evidently prepared it with care. He wrote to Colenso on 4 July that much of his time in the past fortnight had been taken up “preparing my defence against the bill

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privileges as British Subjects, and individual rights and interests as Land owners in New Zealand will be unjustly and unconstitutionally invaded by the provisions of the said Bill—that the Petitioners were long before, and at the time of making the said Proclamations, and now are, in peaceable and undisputed possession of certain Lands in New Zealand, and have individually expended large sums of money, and much time and labour in the legal and equitable acquisition of the fee simple of such Lands from the Native Chiefs and rightful owners of the Soil, who, for fair and equitable compensation, freely parted with all their right and title to such Lands, to the Petitioners, who in entering upon and concluding such purchases, were advised and verily believed that they were acting in conformity with the laws of Great Britain; that the Territory of New Zealand having been recognized by the British Government, as an independent Foreign State, in amity with Great Britain, the Petitioners have not forfeited their allegiance or right as British Subjects, by residing or purchasing Lands therein; and that the introduction of British Laws, and the recognition by Her Majesty's Government of the full and complete right of the Native Chiefs to alienate their Lands should be a guarantee that no British Subjects holding Land in New Zealand previous to the introduction of British Laws, shall be dispossessed of his property otherwise than by the Verdict of a Jury of his Countrymen, as it is an admission of the validity of the titles of such Landowners; and that no condition can now be annexed to the possession of such Lands save what is founded on Law and the prerogative of the Queen, and that neither the Law, nor the prerogative of the Queen can entitle Her Majesty in her right of universal occupancy, or otherwise, to dispossess any British Subject of Lands lawfully acquired by purchase from the New Zealand Chiefs where the terms of the Contract and the intention of the Parties have been carried into effect; and that it is not competent to Her Majesty or Her Majesty's Representative, by Proclamation to make new Laws or abrogate existing Laws.”

<sup>72</sup> *Sydney Monitor and Commercial Advertiser*, 29 June 1840, at 3.

of spoliation which the Governor brought into the Council”.<sup>73</sup> The speech attacked the whole basis on which the Bill was framed.<sup>74</sup>

It should be noted that Busby was not opposed to investigation of titles to pre-Treaty acquisitions of land. He told the Legislative Council that “no man has a right to object” to investigation to determine whether land had been “equitably acquired” and whether the Maori vendors had “a perfect understanding of the nature and consequences of the transaction”. Busby himself had recommended such a course in his 16 June 1837 despatch and “never failed” to warn British subjects contemplating purchases that “it was impossible the British Government could support their titles to land without a rigid investigation of their justice”. Indeed the British Government owed Maori a duty to investigate titles.<sup>75</sup> Busby’s objection to the legislation was, rather, that it invalidated all titles allowing limited recognition of some only as a matter of grace. He objected, too, to the imposition of a proviso on such recognition that grants must exclude lands of public utility.<sup>76</sup> Busby was less worried about whether the land claims Commissioners would be impartial (although he did question their likely partiality) because he took the view that “the establishment of the British Constitution” would mean that anyone aggrieved by the Commissioners’ determinations would have “the right of trial by Jury”.<sup>77</sup>

Busby’s arguments against the Bill were based on the history of British conduct in New Zealand rather than on legal arguments based on the law of nations. Wentworth was to put forward substantial legal arguments and it appears that there

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<sup>73</sup> Busby to Colenso, 4 July 1840, ATL MS-Papers-10533-2.

<sup>74</sup> A full report of Busby’s submission, including of the Council’s questioning of him, was made in *The Sydney Herald*, 6 July 1840, at 2-3. *The Colonist* gave a summary of the speech (Sydney, 1 July 1840, at 2) and separately reported Busby’s answers to the Council’s questions (Sydney, 4 July 1840, at 4). Another summary of Busby’s address was given in *Votes and Proceedings*, above n 21, 25-26 (30 June).

<sup>75</sup> *The Sydney Herald*, 6 July 1840, at 2, col 4.

<sup>76</sup> *Ibid* 3, col 1.

<sup>77</sup> *Ibid* 2, col 4.

## Chapter Sixteen: The Land Claims Bill Debate

may have been an agreed division of argument between him and Busby. Busby seems to have been averting to this division of labour when he said in his speech:<sup>78</sup>

It would be out of place and presumption in me were I to attempt to argue from the law of nations the title of Her Majesty's subjects to the lands they have equitably acquired in New Zealand: I will leave that to those who have had better opportunities for investigating the question.

Busby made it clear that his arguments were stand-alone ones not dependent on the success of Wentworth's legal arguments:

[F]or ought I know, the precedents of savages may be brought forward to prove to be right [the actions now taken in the Queen's name to deprive British subjects of their property].

Nevertheless he expressed the confidence not only that such precedents would, "without hesitation", be "pronounce[d] to be wrong" by "the unsophisticated mind of man, whether civilized or savage",<sup>79</sup> but also, from all he had learnt, that the law of nations was in favour of the land claimants.<sup>80</sup>

Busby's position was that the Bill "assumes a power which could not be legally or constitutionally assumed by any Colonial Legislature",<sup>81</sup> namely in purporting to disturb titles based on bona fide purchases from "the real and rightful owners of the Lands"<sup>82</sup> over whom Britain at the time "neither had nor professed to have any dominion or jurisdiction".<sup>83</sup> In addition, to this assertion of institutional incompetence, Busby maintained that even if there were power to invalidate bona fide purchases and the principles on which such power was invoked were established, it would still be a terrible injustice to do so. It would be unjust not only to the purchaser but also to those who claimed from him in turn. In the case of Busby's lands that included not only settlers who had purchased sections in his

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<sup>78</sup> Ibid 2, col 5.

<sup>79</sup> Ibid 2, col 3.

<sup>80</sup> Ibid 2, col 5.

<sup>81</sup> Ibid 2, col 2.

<sup>82</sup> Ibid 2, col 4.

<sup>83</sup> Ibid 2, col 5.

“Victoria” subdivision, but also Maori to whom he had re-granted rights of occupancy in accordance with the original purchase deeds. It was also unjust in appearance to the original Maori owners when the Crown proposed to keep land held to have been validly purchased in excess of the maximum grant allowed by the Bill:<sup>84</sup> “[no] casuistry [will] make it appear to the unsophisticated mind of these New Zealanders that they and I have not been despoiled of one just right by the hand of power”. More generally, seeing the Queen’s “natural born subjects” deprived of their “rightful property” in this way, would undermine Maori confidence in the Treaty guarantee of their property to them.<sup>85</sup>

Busby developed his argument along three lines, attacking the underlying principles upon which the Bill was based. First, he pointed to the history of British Government dealings with New Zealand and the way in which settlers, including Busby himself, had conducted themselves in New Zealand to the knowledge of, and without any disapproval being expressed by, the Government. Secondly, he emphasised the inconsistency of the Bill with Normanby’s Instructions. Thirdly, he argued that the Treaty of Waitangi, upon which British rights of sovereignty rested, was also inconsistent with the Bill.

In relation to the first argument, Busby argued that the “point that the question must be decided [upon]” was whether Britain, as the “discovering power”, had “assumed or declared” its dominion. The answer to this, he said, was clear:<sup>86</sup>

Up to the day when Captain Hobson proclaimed the Queen’s Sovereignty over the Territories ceded in Sovereignty to Her Majesty by the aboriginal chiefs, they continued independent of all foreign control in regard to any of their internal transactions,—subject to a moral influence they unquestionably were, and accountable to other nations for their treatment of the foreigners to whom they had given a domicile in their country.

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<sup>84</sup> Busby seems to have been the only speaker in the Land Claims Bill debate to take see the full implications of what was to become the “surplus lands” question.

<sup>85</sup> *The Sydney Herald*, 6 July 1840, at 2, col 3.

<sup>86</sup> *Ibid* 2, col 5.

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Before the Treaty had been entered into, the British Government had acknowledged Maori independence, both by recognition of the 1834 flag and by acceptance of the 1835 Declaration of Independence.<sup>87</sup>

Here then are two national transactions, declaring and recognizing the independence of New Zealand. When these are duly considered, I think it will be found impossible to evade their force, or to explain them as only partial or doubtful acknowledgments.

In questioning at the end of Busby's presentation, Gipps sought to undermine reliance on the 1834 flag and the 1835 Declaration of Independence, by pointing out that Busby himself had been deeply implicated in both. He also suggested that the recognition of the flag was more an exercise of British sovereignty (in "giving a flag") than a recognition of power of government in Maori.<sup>88</sup> In relation to the Declaration of Independence, Gipps suggested that Glenelg's reply did not amount to an acknowledgment of Maori independence.<sup>89</sup> Busby's response was that conferring a flag might be an exercise of sovereignty but only if the conferring power had "reserved to itself a superiority as in the case of the Ionian Islands". But that was not the case in New Zealand.<sup>90</sup> Moreover, the flag had been saluted with 21 guns by a British naval ship, "which I believe is never done but to an independent flag, and which I look upon as a national act".<sup>91</sup> In relation to the Glenelg's reply to the Declaration of Independence, Busby maintained that it was "certainly a virtual admission of their independence". He considered that "there are cases and circumstances in which the absence of abnegation have the effect of a recognition" and that this was "one of them".<sup>92</sup> It is clear from other questioning that members of the Council were sceptical about the significance of the Confederation of United Tribes. Busby was asked what practical effect it had had, upon which he was unable to refer to anything of substance.<sup>93</sup> In this connection,

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<sup>87</sup> Ibid 2, cols 5-6.

<sup>88</sup> Ibid 3, col 2.

<sup>89</sup> Ibid 3, cols 2-3.

<sup>90</sup> Ibid 3, col 2.

<sup>91</sup> Ibid 3, col 3.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid 3, cols 3-4.

Bishop Broughton asked him whether there was a word in Maori for “independence”, to which Busby replied:<sup>94</sup>

I cannot say there is any word that has exactly that signification, unless rangatiratanga, but that they understand the meaning of it in all its extent from the infant to the oldest, I can bear testimony.

With regard to questions of property, Busby took the view that the ability of Maori to alienate land and consequently the ability of British purchasers to obtain valid title followed from Maori sovereignty before the Treaty. Unless there was a rule of English law which prevented British subjects from acquiring property in foreign countries, their titles “would seem to be unquestionable”.<sup>95</sup> In addition, Britain had acted as if such purchases were valid. If “the right of interference” had existed, the Government would have acted on it. Bourke, though well aware of the New Zealand purchases through Busby’s despatches (also printed in the United Kingdom Parliamentary Papers) and prepared to act immediately to invalidate like purchases at Port Phillip, had taken no action.<sup>96</sup>

As to Busby’s second argument that the Bill was inconsistent with Normanby’s Instructions, he argued that a “more express avowal of the independence of the Chiefs and the people of New Zealand [could not] be framed”. He drew attention to the references to Maori “title to the soil, and to the sovereignty [being] indisputable, and ... solemnly recognised by the British Government”. He referred to the Government’s disclaimer of “every pretension to seize on the Islands of New Zealand ... unless the free and intelligent consent of the natives ... be first obtained”. He invoked the 19 July 1839 Treasury Minute also referring to the “indispensible preliminary” for the establishment of a colony being a cession of

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<sup>94</sup> Ibid 3, col 2.

<sup>95</sup> Ibid 2, col 5.

<sup>96</sup> Ibid. See also Busby to JC Colquhoun, 10 January 1848, AML MS 46, Box 2, Folder 4: “The question never arose whether the right to sell those lands belonged to the Aborigines. No one ever doubted that the New Zealanders were as much entitled to sell their landed property as the proprietors of Land in any other country ... .”

sovereignty “obtained by amicable negotiation with, and free concurrence of, the Native Chiefs”.<sup>97</sup>

Busby’s third argument was that the Bill was “inconsistent ... with the faith of a treaty” entered into with Maori. It was the Treaty “alone” upon which “the right of the Council to interfere in the affairs of New Zealand is founded”.<sup>98</sup> The Treaty was a “sacred engagement entered into ... to preserve to [Maori] the property in their land”.<sup>99</sup> Busby provided his own translation of the Maori text of the Treaty, translating article 2 as confirming and guaranteeing

to the chiefs, the tribes, and to each man, and all the men of New Zealand, the entire and exclusive property in their lands, their dwellings, and in all their possessions of whatsoever kind.<sup>100</sup>

Busby described this rendition of article 2 as “as literal a translation as may be”. He asked how the preamble of the Bill, stating “that the chiefs and people have not, nor cannot have, the right to dispose of their lands as they please”, could be reconciled with article 2. To avoid any suggestion that the cession of sovereignty in article 1 carried with it “a right or title to the soil”, article 2 had “expressly saved” that right and title and “confirmed and guaranteed [it] in the fullest sense which language could convey”.<sup>101</sup>

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<sup>97</sup> *The Sydney Herald*, 6 July 1840, at 2, col 6. Busby also analysed the portion of Normanby’s Instructions relating to land issues. See *ibid* 2, cols 6-7. He argued that they supported his views of Maori property and the validity of settler purchases, although it is interesting to note that he had some difficulty in explaining the additions to the Instructions made by Labouchere (while of course he did not know that they were additions).

<sup>98</sup> *Ibid* 2, col 2.

<sup>99</sup> *Ibid* 2, col 3.

<sup>100</sup> *Ibid* 2, col 7. Busby may have given an English translation of the Maori text of the Treaty because, the English text not yet having been published, he may have felt it inappropriate to draw on his own knowledge of it (at the outset of his speech he had indicated that he would refer only to the published official documents and did not intend to refer to “information I have acquired in my official capacity as Her Majesty’s late Resident in New Zealand”) or it may be that, consistently with a view that he was to express in 1859, he treated the Maori text of the Treaty as authoritative (see Chapter 1, text accompanying n 19).

<sup>101</sup> *Ibid*.

In addition, unless Maori had the right to dispose of lands as they wished, it would have been unnecessary for the Crown's right of pre-emption to have been negotiated for in the Treaty:<sup>102</sup>

The perfect power to dispose of their land as they pleased previous to the date of this treaty, is an inference from this clause, the force of which cannot be evaded—the proof of that position is in fact perfect from either clause [in reference to the two clauses of article 2]; but from both together and in connexion with each other it appears to me to be irresistible.

Busby accepted that investigation of titles and confirmation by Crown grant was “a necessary and indispensable preliminary to the establishment of the rights of property under the British Constitution, and the administration of laws that affect it”. He regarded the “maxim of law which derives all titles to Land from the Crown *in capite* [in chief]” (in reference to the doctrine of tenures) as a fiction of law (“the sovereign was [n]ever in possession of the Lands which are said to be held from the Crown”) adopted because “the public good required such a record of the property in Land as was indispensable to the administration of justice; and to this extent was the power of interference considered as a sovereign prerogative inherent in the kingly office”.<sup>103</sup>

### Wentworth's speech

Wentworth followed Busby. His submission was also lengthy and it was necessary for him to complete it on 1 July.<sup>104</sup> Wentworth argued that the Bill was unconstitutional in depriving, without trial by jury, British subjects of their property without compensation.<sup>105</sup> British subjects were able to purchase land in any foreign country, he said.<sup>106</sup> He maintained that the United States law on which

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<sup>102</sup> Ibid. See also *ibid* 2, col 4: “the Queen's right of pre-emption, acquired by Treaty”.

<sup>103</sup> *Ibid* 2, col 4.

<sup>104</sup> Full reports of Wentworth's submission were given in *The Colonist*, Sydney, 4 July 1840, at 4 (30 June) & 2-3 (1 July); *The Sydney Herald*, 6 July 1840, at 3-4; and *Votes and Proceedings*, above n 21, 26-27 (30 June) & 29-30 (1 July).

<sup>105</sup> *The Colonist*, Sydney, 4 July 1840, at 2, col 6.

<sup>106</sup> See, for example, *ibid* 2, col 4: “The right to buy land in foreign states did not depend on the laws of England, but on the laws of the country where land was to be sold, the *lex loci*. The laws of England could not prevent a British subject from purchasing lands in France, if the

the Bill appeared to be framed was not declaratory of English law or the law of nations.<sup>107</sup> Expressing views similar to those James Stephen was to take in his minute on *Johnson v M'Intosh* one month later, Wentworth argued that the view that Maori did not have property in their lands was inconsistent with the approach followed by the British Government in North America with respect to the property rights of Indians. There, the “absolute and unlimited right of the natives to the soil” had been recognised and acted upon in purchases both by individuals and by the Government.<sup>108</sup> Since Maori were more civilised than the North American Indians, their property rights could be no less extensive.<sup>109</sup> The history of private land purchases from Indians in North America also contradicted the assumption that individual British subjects could not purchase such lands because of the Crown’s exclusive right of purchase.<sup>110</sup>

Like Busby, Wentworth distinguished the invalid Port Phillip purchases.<sup>111</sup> He emphasised that in North America pre-emption had not been treated as a matter of legal doctrine but as something that had to be provided for by legislation. Such legislation had never been retrospective and earlier purchases were treated as

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laws of France allowed those lands to be sold, and Englishmen to buy them. It must depend altogether upon the natives who possess the land. Nothing was clearer than this proposition. Neither England or any other country would allow the laws of another country to interfere with them, and by the *lex loci* only could these rights be tested.” Wentworth was alive to the distinction between purchases of land and the formation of colonies by British subjects. Only the first was directly relevant to the land claims debate, as Wentworth recognised. Nevertheless, he went on to defend also the ability of British subjects to govern themselves in territories outside the British dominions, an unnecessary excursion which may have been tactically unwise because it allowed Gipps to continue to conflate the two in responding to Wentworth with the ammunition of the New Zealand Land Company’s own legal opinions that its articles of association for the Port Nicholson settlers were contrary to law. See *ibid* 4, cols 5-6; and speech of Sir George Gipps on the second reading of the Land Claims Bill, 9 July 1840, GBPP 1841 (311) XVII.493, 61-78 at 72-74.

<sup>107</sup> *The Colonist*, Sydney, 4 July 1840, at 4, col 3. For this reason also, Wentworth said the land titles proclamations were a nullity since they were not in accordance with existing law (for which he cited Blackstone). Wentworth also pointed out that the proclamations, by referring to “confirmation” of purchases, suggested that the titles had some validity, a position to be contrasted with that taken in the Bill. *Ibid* 4, col 2.

<sup>108</sup> *Ibid* 4, col 3.

<sup>109</sup> *Ibid* 4, col 4.

<sup>110</sup> *Ibid* 4, col 3 (drawing on Abraham Holmes’s *Annals of America*).

<sup>111</sup> *Ibid* 3, col 1: “that land was within the limits of the commission of the Crown, since the time of the very first Governor of the colony. The right of the Crown to that land had been asserted and never disputed; and no land had ever been bought before from the aboriginal natives of the colony.”

valid.<sup>112</sup> Nor was it correct that English courts could only recognise titles granted by the Crown. Wentworth, in answer to a question from Gipps, said that he expected that, in America, such claims had been vindicated even against subsequent Crown grants but that the record of such actions would be found in local American courts rather than in Westminster Hall. This position elicited a somewhat inconclusive debate about whether the New Zealand land claimants could be dispossessed without legal process by the Crown and whether the purchasers themselves could go to court to evict interlopers.<sup>113</sup> Like Busby, Wentworth also contended that the Bill was inconsistent with Normanby's Instructions.<sup>114</sup>

Much more could be written about Wentworth's speech, which in many respects is well reasoned and constructed. It has been necessary to give more attention to Busby's speech because his arguments were grounded on the Treaty and because of his significance as a framer of the Treaty. Wentworth was also clearly an accomplished advocate and handled the hostile reception he received from Gipps and other members of the Council as well as might be expected, only occasionally over-reaching in argument. It is clear from the questioning that his audience was never going to be convinced by Wentworth. His own land purchases were the subject of close and pointed questioning<sup>115</sup> and Gipps was clearly still smarting from having been out-manoeuvred over his attempts to conclude a Treaty with the South Island chiefs in January (for which he clearly blamed Wentworth).<sup>116</sup>

For the 153 landholders, submissions were made by A'Beckett and Darvall, also on 1 July. A'Beckett, too, distinguished American law and pointed to the different

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<sup>112</sup> Ibid 4, cols 4-5.

<sup>113</sup> Ibid 4, cols 3-4 & at 2, col 7 to 3, col 1.

<sup>114</sup> See *ibid* 4, col 2 & 1, col 7.

<sup>115</sup> See *ibid* 3, cols 1-3. Busby, too, had been questioned about his purchases.

<sup>116</sup> See *ibid* 3, cols 1-2. See also Gipps to Russell, 16 August 1840 (No. 2 Separate), GBPP 1841 (311) XVII.493 at 63. Gipps kept up the attack on Wentworth in his 9 July 1840 speech on the Bill. His remarks, speaking of "corruption" and "jobbery" and comparing Wentworth to Cortés and Pizzaro, claimed the moral high ground in the argument. Gipps declined to assist Wentworth in "making to him a grant of twenty millions of acres, at the rate of 100 acres for a farthing!"

circumstances of Maori from the North American Indians.<sup>117</sup> Like Wentworth, he maintained that there was no law prohibiting British subjects from purchasing lands in a foreign country. The validity of such purchases turned on Maori custom.<sup>118</sup> Nor did Normanby's Instructions justify the Bill, which was "an assumption of the rights of the British Parliament, and a taking of the law out of the hands of the proper judicial authorities".<sup>119</sup> He went as far as to submit that not even the Imperial Parliament could enact a law to divest a British subject of his property except by a jury of his peers and with compensation, without which such a Bill was "repugnant to the principles of British liberty".<sup>120</sup> Darvall, in a supporting submission, contended that there was "not a single precedent to warrant such a proceeding" and that "discovery doctrine" was irrelevant to New Zealand circumstances.<sup>121</sup>

Following the presentations by the petitioners, the second reading of the Bill was deferred until 9 July. In the meantime, Busby wrote on 4 July to William Colenso referring to the proceedings in the Legislative Council and promising to send Colenso a report of his arguments in *The Sydney Herald* when published. Busby wrote that it was "impossible to say" what decision the Council would come to. While "Wentworth and his party", whose title was not "worth a straw", would no doubt be happy to "give up 12 or 14 Million Acres on getting their title to 1 Million confirmed", he hoped that people like himself with "good and equitable titles" would join him in "standing upon our right" and "not allow themselves to be drawn into a compromise which is I think the object of the Govt". Busby mentioned that he had received letters from John Flatt, Gilbert Mair and James Clendon and commented that he could "fancy the astonishment of them all when they read the provisions of the bill".<sup>122</sup>

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<sup>117</sup> *The Sydney Herald*, 6 July 1840, at 4, col 5. A'Beckett's submission was also recorded in *Votes and Proceedings*, above n 21, 30-32 (1 July).

<sup>118</sup> *The Sydney Herald*, 6 July 1840, at 4, col 6.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid* 4, col 7.

<sup>122</sup> Busby to Colenso, 4 July 1840, ATL MS-Papers-10533-2.

## Gipps's speech

On 9 July Gipps spoke in support of the second reading of the Bill.<sup>123</sup> He defended the Bill by reference to three principles upon which he said it was framed, and which “until I heard them here controverted, I thought were fully admitted, and indeed received, as political axioms”.<sup>124</sup> The first was that Maori could not grant land because they had no individual property in land. The reasons he gave were that Maori were “uncivilized”, lacking settled government and law, and had not “subjugated the ground to their own uses, by the cultivation of it”. Their interest was “but a qualified dominion ... or a right of occupancy only”.<sup>125</sup> The second

<sup>123</sup> Gipps's speech was reported in *The Colonist*, Sydney, 11 July 1840, at 4 & 2; *The Sydney Herald*, 13 July 1840, at 2-3; and *Votes and Proceedings*, above n 21, 35-41 (9 July). It was also published as *Speech of His Excellency Sir George Gipps, In Council, On Thursday, 9<sup>th</sup> July, 1840, on the Second Reading of the Bill for Appointing Commissioners to Enquire into Claims to Grants of Land in New Zealand* (J Tegg, Sydney, 1840) (see the copy at CO 209/6, 270a-284b), from which, ultimately, it was printed in the Parliamentary Papers at GBPP 1841 (311) XVII.493, 63-78. Of the differences between the *Sydney Herald* and published versions of the speech, Loveridge “Land Claims Act”, above n 3, 75-76 & n 143 explains that the printed version differs “in some respects” from the *Sydney Herald* report but that “most of the alterations relate to the order of presentation: the substance of the address is very similar in both versions”, with “the only *significant* difference between the two versions appear[ing] to be that the printed one does not reproduce certain disparaging remarks about Wentworth which Gipps apparently made off the cuff during the address”. Although no close comparison of the newspaper reports and speech published by Gipps is undertaken here, Loveridge seems largely correct in this assessment, although two additional differences should be mentioned. The newspapers reports appear to have missed a reference to Robertson's *History of America* which is contained in the official publication of the speech and is also to be found in the publication *Votes and Proceedings of the Legislative Council*. Both the newspapers and *Votes and Proceedings* contain no reference to a foreshadowed amendment to the preamble, unlike the published speech, for the very good reason that it was a subsequent addition made by Gipps, as is explained below.

<sup>124</sup> GBPP 1841 (311) XVII.493, 63-78 at 63. On this basis, Gipps said that Wentworth was wrong that the land titles proclamations were a nullity because not in accordance with existing law (see above n 107): “The proclamations which I issued were intended only as notices or warnings to the public of what the law was ... . The right of the Crown to disallow claims to land in New Zealand would have been as absolute as it is, even if no proclamations, either by myself or Lieutenant-governor Hobson, had been issued ... . The object of the proclamations was simply to give notice of Her Majesty's intention to enforce the right of Her prerogative, for the benefit of Her subjects—to enforce, in a modified way, that prerogative which, though Her Majesty holds it only for the benefit of Her subjects, is anterior to any statutory enactment of the realm.” Similarly, Gipps said that it was wrong to suggest that the Bill would dispossess individuals of their freehold property without due process of law: “What I say is, that Mr. Wentworth has not, neither can he have, nor can any one else have, any freehold in New Zealand, or *liberum tenementum*, as he called it, nor any *tenementum* at all, except what he may derive under this Bill from the Crown.” Ibid 65. See also ibid 77: “... it is not a Bill to destroy titles, but rather to bestow titles ... .”

<sup>125</sup> Ibid 63-64.

principle invoked was that European purchasers could not buy land because the exclusive right of “extinguishing the native title” (“the right of pre-emption of the soil”) was held by the Crown and could not “be enjoyed by individuals without consent of their government”.<sup>126</sup> The third principle, which emerged as an alternative argument to the second, was that settlers could not form colonies except with the consent of the Crown. Where they did, they could be ousted from their settlements by the Crown.<sup>127</sup> Implicit in Gipps’s arguments was a fourth principle, not identified as such, which was that only the Crown could give title recognisable in law.

The first two principles, Gipps said, were supported by American law, which he claimed to represent English law (as well as to be “founded both on the law and the practice of nations”).<sup>128</sup> His view of American law was derived from the 1836 edition of Kent’s *Commentaries on American Law* and the 1833 first edition of Story’s *Commentaries on the Constitution of the United States* with little further discussion than selected quotations from those sources.<sup>129</sup> Gipps drew more heavily from Story than Kent. Most of the passages quoted by him from Story were themselves quotations from the judgment of Chief Justice Marshall in *Johnson v M’Intosh*. Gipps expressed the view that the United States Supreme Court was “a court of the highest judicature that exists in the whole world” because it adjudicated between sovereign states and upon the law of nations.<sup>130</sup> Kent and Story he described as “the most eminent writers on American law, and who may reasonably be supposed to know where they got their laws from, as well as, or better than, Mr. Wentworth, or any lawyer of New South Wales”.<sup>131</sup> The passages Gipps relied on from Kent and Story supported the position that discovery gave the discovering nation absolute and exclusive title to the soil, subject to an Indian right

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<sup>126</sup> Ibid 64.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> See ibid 65-68; James Kent *Commentaries on American Law* (3rd ed, EB Clayton, James van Norden, New York, 1836) [“Kent *Commentaries*”]; Joseph Story *Commentaries on the Constitution of the United States* (Hilliard, Gray, and Company, Boston, 1833).

<sup>130</sup> GBPP 1841 (311) XVII.493, 63-78 at 65-66.

<sup>131</sup> Ibid 65.

of occupancy, and the right to extinguish that right of occupancy. In claiming that American law in this was also English law, Gipps used the opinions obtained in the case of the Port Phillip purchases, which had come to the same conclusion.<sup>132</sup>

The approach also necessarily drew Gipps into arguing that British sovereignty in New Zealand rested on Cook's discovery and that Normanby's Instructions relating both to sovereignty and to Maori property rights were not inconsistent with these views.<sup>133</sup> Indeed he went so far as to say of the descriptions of American law by Story and Kent that:<sup>134</sup>

It really seems to me, gentlemen, that Lord Normanby must have had these passages under his eye when he wrote his instructions; so exactly do they tally with his Lordship's description of the qualified dominion or sovereignty enjoyed by the chiefs over the territory of New Zealand, and of the protection which it is our duty, in settling in that country, to afford to them.<sup>135</sup>

Although Normanby had referred to the sovereignty and ownership of the soil being in the chiefs, Gipps emphasised his qualification "so far at least as it is possible to make that acknowledgment in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert".<sup>136</sup> Normanby's Instructions, Gipps said, had gone "further in acknowledging the independence of the New Zealanders than the facts of the case require, or than they will even

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<sup>132</sup> Ibid 68-71. See Chapter 5, text accompanying n 66.

<sup>133</sup> Ibid 74-76. Compare Gipps to Hobson, 25 January 1840, CO 209/6, 30a-31a at 30a ("until some portion of territory shall be acquired in sovereignty by the Queen"; "after such sovereignty shall have been established").

<sup>134</sup> GBPP 1841 (311) XVII.493, 63-78 at 68.

<sup>135</sup> In Chapter 19 (text accompanying ns 57-62) the extent to which Gipps may have adopted, in relation to Maori, the American view as to the dependent sovereignty retained by Indian tribes is discussed.

<sup>136</sup> GBPP 1841 (311) XVII.493, 63-78 at 74: "This, gentlemen, seems to me to meet the whole case, and to reduce their right of sovereignty, in the estimation of Lord Normanby, nearly to what the sovereign rights of uncivilized tribes are described to be in the pages which I have quoted to you from Kent and Story."

support”: “The independence of New Zealand has never been formally acknowledged; it has, at best, been tacitly acknowledged.”<sup>137</sup>

Except for referring to the confederated chiefs’ recent “acknowledgment” to Hobson of the Queen’s sovereignty,<sup>138</sup> Gipps did not discuss the Treaty of Waitangi or engage with the arguments advanced by Busby from the terms of article 2. Gipps contended that New Zealand had been included in the Commission given to Governor Phillip “and every one of my predecessors, down to the time of Sir Thomas Brisbane, when, in consequence of Van Diemen’s Land being separated from New South Wales, new boundaries were assigned to the Government, and New Zealand, probably by accident, was omitted”:<sup>139</sup>

But even since those days, if not an absolute dependency of New South Wales, it has stood to it in the position of an inferior, and bound to it by the relations which grow out of neighbourhood.

In this, Gipps seems to have had in mind the suggestion in the Aborigines Committee report that purchases of land from aborigines by British nationals in territories adjacent to British colonies should be treated as illegal and void.<sup>140</sup> Later

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<sup>137</sup> Ibid 74-75. In Gipps’s view, the 1834 flag was one conferred by Britain on the chiefs and the Declaration of Independence of 1835 had not been endorsed by Britain: “the flag ... [was] granted to them rather than acknowledged. Various flags were sent to them, out of which they were permitted to choose, and they probably chose that which had the gaudiest colours”; “[t]he answer of Lord Glenelg to the declaration of independence contained not one word in recognition of it”.

<sup>138</sup> Ibid 75: “But supposing the declaration [of independence] to have been a genuine and a valid one, the only effect of it would have been to prevent Captain Hobson from taking possession of the island in which it was made, by virtue of the right derived from the discovery of it by Captain Cook, and to make him have recourse to negotiation with the natives. And as this is the very course which Captain Hobson did pursue, and as Her Majesty’s Sovereignty has now been acknowledged by the very chiefs who signed the declaration of independence, it follows, that all things are now returned to the state in which they would have been if no declaration of independence had ever been made. The utmost effect of it has been to render a negotiation with the chiefs necessary in the Northern Island, whereas the Middle and Southern Islands have been taken possession of without negotiation, by virtue of the right of discovery. But, again, I say that New Zealand never has been, in point of fact, independent ... .”

<sup>139</sup> Ibid. As seen in Chapter 6, Gipps’s view that New Zealand fell within the commissions of the Governors of New South Wales is highly debatable: the latitudes specified always excluded the bottom of the South Island; it was a considerable stretch to include New Zealand within the islands “adjacent” to New South Wales; and indeed only Governor Macquarie seems to have acted on the basis of any such jurisdiction (in appointing justices of the peace for New Zealand).

<sup>140</sup> See Chapter 5, text accompanying n 87.

in his speech, Gipps quoted this passage from the Committee's report and said that, although New Zealand was "perhaps not immediately in contiguity with New South Wales", it "has certainly relations with it, growing out of neighbourhood, and therefore comes within the recommendation of the Committee".<sup>141</sup> Gipps also referred to Governor Macquarie's appointment of the Reverend John Butler as a justice of the peace for New Zealand in 1819.<sup>142</sup>

Gipps also asserted that Normanby's Instructions treated titles to land acquired from Maori by Europeans as invalid. Normanby, he said, had a "firm reliance on the principle that Englishmen are incapable to take land under such a conveyance as those chiefs could make to them".<sup>143</sup> These remarks by Gipps did not, however, involve any description or analysis of those sections of the Instructions dealing with the right of pre-emption Hobson was to negotiate from Maori, the land titles proclamation Hobson was to issue on arrival in New Zealand, or the land claims investigation legislation Gipps and his Legislative Council were to pass. As has been seen, these sections of the Instructions are difficult to reconcile with Gipps's black and white view that pre-1840 purchases from Maori were to be treated as invalid, rather than the basis for a "confirmatory grant" by the Crown after investigation of the fairness and lawfulness of the original acquisitions.<sup>144</sup> It is the case, however, that the clear scheme of the Instructions as drafted by Stephen (which would have made Gipps's view even more difficult to maintain) was obscured by Labouchere's amendments.<sup>145</sup> The amendments may have encouraged Gipps in the approach he took in both the Bill and the earlier land titles proclamations.

It should be noted that the American law cited by Gipps did not support his first principle, which assumed Maori did not have property in land and could not sell it. Indeed, some of the passages might be thought to contradict that point of view. Despite this lack of support, Gipps continued to assert this position, in part by

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<sup>141</sup> GBPP 1841 (311) XVII.493, 63-78 at 77.

<sup>142</sup> Ibid 75. See Chapter 6, text accompanying n 55.

<sup>143</sup> Ibid 74.

<sup>144</sup> See Chapter 8, text accompanying ns 24-26.

<sup>145</sup> See Chapter 8, text accompanying ns 47-49.

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reference to William Robertson's *History of America* which maintained that the idea of property was "unknown, or incompletely conceived" by the Indians.<sup>146</sup> Gipps argued that it was not sovereignty which "confers on any people the right of so disposing of the soil they occupy, as to give to individuals not of their own tribes a property in it". Instead the preconditions of the power to dispose of land were:<sup>147</sup>

civilization ... and the establishment of government capable at once of protecting the rights of individuals, and of entering into relations with foreign powers; above all, it is the establishment of law, of which property is justly said to be the creature. Independence without civilization could no more give to the New Zealanders the right to dispose of their soil to strangers, than it could take the tattoo marks off their faces, or give them garments wherewith to cover their nakedness.

If the mere declaration of independence by the New Zealanders could have given to Englishmen the right to dispossess them by pretended purchases of their lands, then would the person who prepared and concocted that declaration of independence have been the most insidious enemy that the New Zealanders ever had; and better would it have been for the New Zealanders themselves, and better for the honour of England, that they had barbequed him, as we are told they do their hogs, and eaten him up outright. But it is not so, and Mr. Busby stands acquitted of any such insidious design; his declaration of independence (for it was his) was indeed, I think, a silly as well as an unauthorized act, but it was no more; it was, in fact, only, as I have said before, a paper pellet fired off at the Baron de Thierry.

Gipps's third principle, that settlers could not form colonies, was put forward in reliance on an opinion obtained in London for the New Zealand Land Company that the articles of association that its settlers had signed up to and which governed its settlement at Port Nicholson were illegal.<sup>148</sup> The argument that only Crown titles could be recognised in law, was in part supported by some passages in Kent's

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<sup>146</sup> GBPP 1841 (311) XVII.493, 63-78 at 76.

<sup>147</sup> Ibid 75.

<sup>148</sup> Ibid 72-74. See above n 106 and Chapter 13, n 3.

*Commentaries* (although Gipps did not rely on Kent for this)<sup>149</sup> but was otherwise an unsubstantiated assertion by Gipps.<sup>150</sup>

In his speech, Gipps seems to have drawn selectively on Justice John Walpole Willis's rather incoherent note discussed earlier.<sup>151</sup> He certainly passed over material in it inconvenient to his argument (an inconvenience to which Willis himself seems often to have been oblivious). What Gipps does seem to have taken from Willis was the possible application to New Zealand of Kent's and Story's explanations of the American doctrine of pre-emption applied to the Indians of North America. Willis took the view that New Zealand was already British by discovery (although he is contradictory in parts). He also considered relevant to the land rights that settlers might have, the principles that no colony could be settled except by the Crown and that courts of justice could recognise no titles except those granted by the Crown. Gipps expressed the same views in his 9 July speech. It is hard to know whether the views were prompted by reading Willis's note or had already been arrived at by Gipps. It seems clear a lot of Gipps's own work went into the speech. He undertook his own reading of the texts cited by Willis and other texts. There are in existence two notes in his writing to the clerk of the

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<sup>149</sup> Gipps quoted Kent *Commentaries*, above n 129, Lecture 51, §1 ("It is a fundamental principle in the English law, derived from the maxims of the feudal tenures, that the king was the original proprietor of all the land in the kingdom, and the true and only source of title. In this country we have adopted the same principle, and applied it to our republican governments; and it is a settled and fundamental doctrine with us, that all valid individual title to land within the United States, is derived from the grant of our own local governments, or from that of the United States, or from the crown, or royal chartered governments established here prior to the revolution"; "In the elaborately discussed case of *De Armas v Mayor, &c.*, of New Orleans, 5 *Miller's Louis Rep.* 132, it was admitted to have been uniformly the practice of all the European nations having constitutional establishments and dominion in America, to consider the unappropriated lands occupied by savage tribes, and obtained from them by conquest or purchase, to be crown lands, and capable of valid alienation, by sale or gift, by the sovereign, and by him only. No valid title could be acquired without letters patent from the King") & §3 ("... a government grant was the only lawful source of title admitted in the courts of justice"). GBPP 1841 (311) XVII.493, 63-78 at 67-68.

<sup>150</sup> See *ibid* 65 ("I need not say, gentlemen, that without a grant from the Crown, he [Wentworth] cannot have a title on which he could stand for one moment in a court of justice; and that no English judge or jury would recognize a claim to land in New Zealand that is not founded on a grant from the Crown"), 74 ("Englishmen ... can obtain no titles to lands in colonies but from the Crown") & 77 ("[The Queen's] power to disallow these titles is vested in her by virtue of her prerogative, and of that principle of English law which derives all landed property from the gift of the Crown").

<sup>151</sup> See above n 53 and accompanying text.

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Legislative Council relating to his researches. The first, dated 6 July, asks the clerk to:<sup>152</sup>

[S]ee whether you can find in the Council Chamber Marshall's *History of America*. It is an ordinary Octavo Vol. bound in calf.

The second, dated 10 July, asks the clerk to:<sup>153</sup>

Let me have Storey's [sic] and Kent's Books, which were I think left by me on the Table in the Council Chamber.

The clerk's note on the second letter records that he "sent the above 2 vol. Sent also Clarke's [sic] *Colonial Law* 1 vol. Holmes Annals 1 vol. 4 volumes in all". Gipps also made his own selection of passages from Kent and Story and he made no use of most of Willis's other sources (most of which were either irrelevant or unhelpful).<sup>154</sup> The argument that he ultimately made was better constructed and more convincing than the argument contained in Willis's note.

### Other speeches

The Legislative Council considered the clauses of the Bill over a period of five sitting days before the second reading of the Bill was completed on 21 July.<sup>155</sup> Some members of the Council made substantive speeches on the Bill, notably the Chief Justice, James Dowling, the Attorney-General, John Plunkett, and Bishop Broughton. Members of the Council who spoke or contributed to the debates on the clauses were broadly supportive of the premises on which Gipps had proceeded.<sup>156</sup>

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<sup>152</sup> NSWPA, Manuscript Records of the First Legislative Council (1824–1856), Box 19 (Correspondence), 448.

<sup>153</sup> Ibid 419.

<sup>154</sup> The principal exception is that, as Willis had done, Gipps cited the Aborigines Committee Report for the view that New Zealand was bound to New South Wales "by the relations which grow out of neighbourhood". See Willis "Notes on the Acquisition of New Zealand", above n 53, 46–47.

<sup>155</sup> Loveridge "Land Claims Act", above n 3, 105.

<sup>156</sup> The Chief Justice, for example, was strongly of the views that the Crown had an exclusive right of pre-emption in New Zealand by discovery and that it could be the only source of title to land. He also advanced the argument that, even if there was no legal impediment to the purchases of land from Maori, nevertheless the sovereign power was rightly used to protect Maori from unfair and excessive purchases. Gipps had not argued that the legislation could be

The only significant exception was in relation to the principle, stated in the preamble and relied upon by Gipps in his 9 July speech, that Maori lacked the capacity to own and alienate land. That position became untenable when, first, the Chief Justice did not adopt it (and his use of Kent's *Commentaries* indicated that it was not consistent with American law) and, secondly, the Bishop spoke directly against the view.

Although Chief Justice Dowling did not explicitly contradict Gipps, his speech indicated that the United States Supreme Court cases were inconsistent with the proposition ascribed to them by Gipps that the Indian tribes had no property in land that they could alienate. Dowling's use of Kent's *Commentaries* showed that Gipps had been selective in his own use of the material. Gipps had drawn more heavily on Story (whose *Commentaries* concentrated on *Johnson v M'Intosh*) rather than Kent (who had described all the Supreme Court's Indian cases). For his part, Dowling quoted Kent's descriptions of *Fletcher v Peck* and *Worcester v State of Georgia* (discussed in Chapter 5).<sup>157</sup> Dowling's view on Maori capacity to own and sell land was very different from the Governor's. He considered that "[t]he ostensible and real object in asserting the Sovereignty of the Crown" was to maintain the principle that Maori had "in themselves as an independent nation the inherent right to the soil, and the power of alienation" and "to protect the aborigines against improvident alienations which might be destructive to their welfare".<sup>158</sup>

Bishop Broughton was more direct.<sup>159</sup> He was not prepared to assent to the preamble of the Bill in its current form, with its denial of Maori capacity to alienate land. As *The Sydney Herald* reported, he questioned the precedents relied upon by Gipps:<sup>160</sup>

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justified as an act of state on this basis. Speech of Chief Justice James Dowling, 9 July 1840, as reported in *The Sydney Herald*, 13 July 1840, at 3, cols 2-5.

<sup>157</sup> Ibid cols 3-4.

<sup>158</sup> Ibid col 2.

<sup>159</sup> Speech of Bishop Broughton, 9 July 1840, as reported in *The Sydney Herald*, 13 July 1840, at 3, cols 5-7.

<sup>160</sup> Ibid col 6.

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The case of Port Phillip was evidently different, for there the actual sovereignty was claimed; and, with great diffidence, he would submit, that all the cases quoted proceeded upon the assumption, that the countries were not only discovered but actually possessed, and that, thereby, the possessing power had paramount authority. He felt great difficulty in affirming, with regard to the Northern Island, which, up to the cession to Captain Hobson, was not within the sovereignty of Great Britain, that a people so situated neither have nor could have any right to dispose of the soil of the country to individuals.<sup>161</sup> Why should the Council embarrass itself with the question of what a savage can or cannot do? He was not prepared to say, as an abstract universal axiom, that no savage can dispose of land—that a citizen of Timbuctoo could not dispose of land to a resident in Abyssinia, or that a gentleman residing in Ireland could not take property from an Esquimaux. ... If the preamble said, that British subjects could not purchase land from people situated as the New Zealanders are, nothing could shake it. An appeal to common sense would shew it.

Following the speeches of the Chief Justice and the Bishop, Gipps indicated that the preamble would be amended, and claimed that in fact the Attorney-General had already, “before the discussion was commenced”, prepared a replacement.<sup>162</sup> Gipps included an explanation of the amendment in the published version of his speech, as if the amendment had been flagged and explained at the time he delivered it (and not after the speeches of Dowling and Broughton). The explanation in the published speech was that “the Attorney-general’s amendment ... will set forth the incapacity of Englishmen to take lands ... rather than the inability of the natives to grant them”.<sup>163</sup> The amended preamble was substituted on 15 July.<sup>164</sup> It omitted the reference to Maori incapacity to sell land (the second recital in the preamble, described above) and recited:<sup>165</sup>

[W]hereas no such Individual or Individuals can acquire a Legal title to, or permanent interest in, any such Tracts or Portions of Land, by virtue of any gift, purchase, or conveyance by or from the Chiefs or other Individuals of such Aboriginal Tribes as aforesaid ... .

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<sup>161</sup> Broughton considered the case was different in respect of the South Island, “for there the British claim as discoverers—that is, as effectual discoverers”. Ibid.

<sup>162</sup> *The Sydney Herald*, 13 July 1840, at 3, col 7.

<sup>163</sup> GBPP 1841 (311) XVII.493, 61-78 at 77.

<sup>164</sup> Loveridge “Land Claims Act”, above n 3, 100.

<sup>165</sup> Land Claims Bill 1840, above n 48, preamble. See also Land Claims Act 1840, above n 16, preamble.

Since Donald Loveridge has provided an excellent account of the speeches, debates and amendments to the Bill before its second reading concluded on 21 July,<sup>166</sup> and since, apart from the discussion of the principles in the preamble, they do not bear greatly on the themes of this thesis, further discussion here is unnecessary. The remaining history of the Bill was uneventful. It received its third reading without further discussion on 4 August.<sup>167</sup>

### Aftermath

Before the Bill had its third reading, Busby had clearly seen the writing on the wall. To Colenso, he wrote on 25 July that he could “conceive of the dismay of those who like myself thought themselves possessed of large estates”:<sup>168</sup>

I fear little chance of my ever getting an acre at Wangarei. You will see, no doubt, by the papers that the maximum extent to be allowed to any one is 2560 acres unless the Governor and Executive Council choose to consider it a special case. ... But what will be said of the crying injustice of resuming land which may be suitable for a Township on giving from 5 to 30 acres for one elsewhere. “Our own Waitangi” is no longer ours—for there can be no doubt this clause was aimed at it.

He reported, with perhaps pardonable indignation, Gipps’s 9 July remark that for “concocting” the Declaration of Independence he deserved to have been barbequed and eaten by Maori.

To Gilbert Mair the same day he reported the “unfortunate result of the measures before the Govt”: “[i]t seems beyond a doubt that in law our titles are of no validity and the maximum that any one is to get is fixed at 2,560 acres”.<sup>169</sup>

Busby was present in the Legislative Council chamber on 4 August when the Act was passed. He wrote to Mair the following day that they were now “entirely at the mercy of the Govt”.<sup>170</sup>

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<sup>166</sup> Loveridge “Land Claims Act”, above n 3, 88-106.

<sup>167</sup> *Votes and Proceedings*, above n 21, 57 (4 August).

<sup>168</sup> Busby to Colenso, 25 July 1840, ATL MS-Papers-10533-2.

<sup>169</sup> Busby to Mair, 25 July 1840, ATL MS-Papers-0227-05 (typescript).

## Chapter Sixteen: The Land Claims Bill Debate

The coverage of the Land Claims Bill debates in the local Sydney press had been extensive.<sup>171</sup> It seems to have been appreciated on all sides that the issues being debated were unique and momentous.<sup>172</sup> Despite the excitement generated, however, by the time the legislation was enacted, judging by the newspapers, public mood seems to have hardened against the land claimants' position.<sup>173</sup> This

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<sup>170</sup> Busby to Mair, 5 August 1840, ATL MS-Papers-0227-05 (typescript).

<sup>171</sup> For example, *The Sydney Herald's* 6 July 1840 report of the proceedings in the Legislative Council on 30 June and 1 July ran to three full pages, with a further two and a half pages on 13 July devoted to coverage of the proceedings on 9 and 10 July. *The Colonist's* reports of 1, 4 and 11 July were hardly less extensive. There seems to have been no precedent for this coverage in the Sydney press so far as I can tell from my research of these newspapers in the 1839-1840 period. In giving its report on 11 July, *The Colonist* (at 2) indicated as much in advising its readers that:

The importance and extent of our Legislative Council Report compels us to leave out of this day's publication not only our leading article, but the greater part, if not the whole, of our local matter. We should be sorry to mutilate the speeches in defence of the New Zealand Bill, as we gave a full report of the argument against it. In our next we shall complete our report of this momentous debate, accompanying it with a review of the merits of the question as it now stands.

All *The Colonist's* reports of the Legislative Council proceedings on the Land Claims Bill from 30 June–21 July 1840 were subsequently published together as the *New Zealand Question* (John Johnstone, Edinburgh, c. 1840) and ran to 79 pages.

<sup>172</sup> See speech of James Macarthur on the second reading of the Land Claims Bill, 10 July 1840, as quoted in the text accompanying n 6 above; *The Colonist*, Sydney, 11 July 1840, at 2, as quoted at n 171 above; speech of Sir George Gipps on the second reading of the Land Claims Bill, 9 July 1840, GBPP 1841 (311) XVII.493, 63-78 at 63 ("the subject is one of great notoriety, as well as general interest"); speech of Sir John Jamison on the second reading of the Land Claims Bill, 9 July 1840, reported in *The Sydney Herald*, 13 July 1840, at 3 ("as it was a very difficult question, he should like to hear the opinion of the Chief Justice and Attorney General upon the point"); speech of Bishop Broughton on the second reading of the Land Claims Bill, 9 July 1840, reported in *The Sydney Herald*, 13 July 1840, at 3 ("the question is one of as much importance and required as great delicacy in the management of it as any question that was ever deliberated upon by any Legislative Assembly in the world"); speech of Attorney-General John Plunkett on the second reading of the Land Claims Bill, 10 July 1840, reported in *The Sydney Herald*, 13 July 1840, 3-4 at 3 ("[His Excellency's speech] contained more law and more information upon principles generally applicable to colonization than any document extant. Such questions seldom arise, and therefore it is not surprising to find that even gentlemen belonging to the law and well versed in legal matters, make mistakes upon it").

<sup>173</sup> The newspapers that had occupied the center-ground on the issue before the Legislative Council debates now swung in behind the Governor and his Act. See, for example, the *Australasian Chronicle*, Sydney, 11 July 1840, at 2-3; *The Australian*, Sydney, 14 July 1840, at 1; and *The Sydney Herald*, 20 July 1840, at 4. The opinion of the *Australasian Chronicle* was that:

The Governor's speech was able and luminous, and we think perfectly conclusive as to the right of pre-emption contended for on the part of the crown, and consequently that of the government to disallow all such titles to land as are inequitably acquired, or are, from extent or otherwise, prejudicial to the prospective interests of the new colony. Indeed, considering it is in a great measure a question of law, his Excellency showed an astonishing degree of ability and research in grappling with the arguments of the learned gentlemen who pleaded the cause of the claimants of land in New Zealand; and, notwithstanding we were struck with the force of the precedents drawn by Mr. Wentworth from the history of American colonisation, and with the arguments founded thereon, we must confess that, after weighing both sides, it is our opinion that the nature of the

was probably a combination of adverse reaction to the land claimants as the extent of the claims of Busby and especially Wentworth became known, and because doubts were quietened by the support of the Council, including the Chief Justice and Attorney-General, for Gipps's position. News had also arrived of Hobson's 21 May proclamations of sovereignty.<sup>174</sup> Altogether there may have been a sense that events had moved on. Certainly the press reports died down quickly after the second reading of the Bill. In Sydney, only *The Colonist* and Wentworth were left to rail against it (although further opposition was to arise in New Zealand when news of the Bill arrived).

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royal prerogative, the law of nations, and the justice and expediency of the question, are entirely in favour of the government. From the opinions expressed by the Chief Justice, the Attorney-General, and Dr. Broughton, we may conclude that such will be the decision of the council, and that in fact the titles at present held as grants of land by purchase from New Zealanders are to be looked upon as null and void. And certainly, when individuals are to be found who blush not to set up claims to many millions of acres of land, purchased at the rate of one farthing per hundred acres, no honest man could wish that the law were other than it is, or that it were so defective as to permit that any such monstrous claims should be recognised.

*The Australian*, too, considered that Wentworth had been "ably (and so far as we can perceive, successfully) combated by his Excellency in [his] elaborate speech". It took the view, however, that regardless of who had "constitutional law" on their side, the question was answered by "practical" considerations:

If ... we were to advocate Mr Wentworth's views, we should proclaim that we preferred discord to unity, that we considered Chaos as better than order, and that we were of opinion that two suns could shine in the same heaven. ... [E]ven granting the validity of Mr Wentworth's claims, it is quite certain that we behold in that gentleman's case the most gigantic monopoly that perhaps was ever ventured to be established. That any man could stand before the Governor in council, and say that he asserted a *right* to land purchased from certain ignorant aborigines, at the rate (as his Excellency's calculation has it) of FOUR HUNDRED ACRES FOR ONE PENNY, is an instance of almost incredible "sang froid", and really is a matter of some admiration. ... If the Whig and Tory jobs which are thickly spread over the whole of the last century could be concentrated into one rank and odorous abomination; if the dark and dirty doings of successive governments since the days of North, or even of Walpole, could be chronicled in parallel and adjacent columns for the indignant denunciation of posterity; if we could comprehend at one glance the length and breadth of the accumulated rottenness of bygone boroughs, corporations, and companies in England, we could scarcely lay our finger upon a case so monstrous as that defended in broad day-light by Mr Wentworth, before the Representative of his Sovereign, in Council formally assembled.

Likewise *The Sydney Herald* wrote that "[t]he disclosures made before the Council, by persons claiming land at New Zealand, puts it out of the power of the Public Press to take their part." The public had "sympathised in ignorance" with the purchases in the belief that "*bona fide* purchases had been made to the amount of a few thousand acres" not to the millions of acres now claimed. More predictable opinion, given their earlier positions on the land claims question, was given by the *Sydney Gazette and New South Wales Advertiser*, 7 July 1840 at 2 & 11 July 1840 at 2; the *Sydney Monitor and Commercial Advertiser*, 13 July 1840 at 2; and *The Colonist*, Sydney, 25 July 1840 at 2 & 4 August 1840 at 2. *The Colonist* articles are discussed further below.

<sup>174</sup> See Loveridge "Land Claims Act", above n 3, 80-81: "[The announcement by Gipps of receipt of Hobson's proclamations] changed the whole complexion of the land claims debate at a single stroke."

Even James Busby and Samuel Martin seem, for the moment, to have given up the fight. Busby tried to negotiate a settlement of his claims directly with Gipps but was unsuccessful.<sup>175</sup> He then petitioned the Governor and Legislative Council for special treatment, again unsuccessfully.<sup>176</sup> Later that year, Busby acquiesced to application of the Land Claims Act and submitted for investigation all his purchases except Ngunguru (which was referred separately by Busby and his partners in January 1841<sup>177</sup>).<sup>178</sup> Samuel Martin had already left to take up settlement on his land in New Zealand at the time of the Land Claims Bill debate. From New Zealand, he wrote to *The Colonist* to say that, in view of what he had seen of the extent of land-sharking and competing claims, he had come around to the view that the Government of New South Wales should recognise in the land claimants only a pre-emptive right to re-purchase lands at a fixed minimum price (which he thought would burn off three-quarters of the claimants).<sup>179</sup> Despite this early indication (made without knowledge of the terms of the legislation), Martin, as with Busby, later continued to criticise the New South Wales and New Zealand land claims legislation and was active in organising opposition to it.<sup>180</sup> In the meantime, however, *The Colonist* and Wentworth kept up the fight.

### Further arguments

In its editorials of 25 July and 4 August 1840, *The Colonist* drew on Calvin Colton's 1833 arguments in favour of the rights of the North American Indians, which it used to counter Gipps's arguments drawing on American law.<sup>181</sup> The

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<sup>175</sup> Busby to Gipps, 12 & 17 July 1840, ANZ ACGO 8347 IA15 1/5e.

<sup>176</sup> Petition of James Busby to the Governor and Legislative Council of New South Wales, 22 August 1840, SLNSW DL N Ar/1, 494-498. In the petition, Busby accepted that the cession of sovereignty had "rendered invalid" his legal title to lands, while leaving them "still good in equity".

<sup>177</sup> Busby, Mair & Lewington to Colonial Secretary (NSW), 7 January 1841, ANZ ACGO 8347 IA15 1/5f.

<sup>178</sup> Busby to Colonial Secretary (NSW), 22 August 1840, Colonial Secretary (NSW) to Busby, 26 October 1840 & Busby to Colonial Secretary (NSW), 29 October 1840, ANZ ACGO 8347 IA15 1/5e.

<sup>179</sup> *The Colonist*, Sydney, 18 July 1840, at 4.

<sup>180</sup> See text accompanying n 226 below; and Chapter 18.

<sup>181</sup> Calvin Colton *Tour of the American Lakes, and Among the Indians of the North-West Territory, in 1830: Disclosing the Character and Prospects of the Indian Race* (Vol 2,

editorial of 25 July concerned the “right of discovery” by which Hobson had claimed the South Island. It argued that, whatever the position in the earlier history of European colonisation, “a more enlightened policy, founded on Christian principle and the rights of man” was that, by discovery, the discovering nation obtained territory against other foreign powers but “no *bona fide* and absolute right to the appropriation of the soil irrespectively of the consent and natural sovereignty of the aboriginal inhabitants or native proprietors”. In support of this argument, *The Colonist* provided its readers with a long extract from Colton’s book,<sup>182</sup> a work it said had been “instrumental in effecting a conscientious revolution in the views of the Christian public, both of England and America, respecting the rights of Aboriginal tribes”.<sup>183</sup> Colton’s was a stinging attack on the morality and “absurd pretensions” of “discovery doctrine” and its justification by writers such as Vattel. The doctrine “confounded right, by introducing, a new and monstrous code of political and social morality”. All those supporting the doctrine could fall back on was that it was the “design of Providence!”:<sup>184</sup>

But to *invade* the territories of barbarous nations, under the pretence, that it was the design of Providence, that they should be otherwise appropriated, is a claim, for which we know not how to express our contempt and abhorrence. It is not simply sanctifying crime by throwing over it the garb of religion, but it is seizing the Creator’s hand, and demanding of him to ratify and seal the violence!

The *Sydney Gazette* provided a counter-blast to this editorial in which it attacked Colton as “a dissenter in religion—a republican in politics”. It also accused *The Colonist* of hypocrisy in invoking Colton:

The ridiculous cry of invading the rights of a free sovereign people comes with admirable grace, we must confess, from those who, by chicanery and fraud, would deprive seven eighths of the aboriginal natives of the finest portion of their native soil for no consideration.

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Frederick Westley & AH Davis, London, 1833) [*Colton Tour of the American Lakes*]. See Chapter 5, text accompanying ns 281-283.

<sup>182</sup> Colton *Tour of the American Lakes*, above n 181, 33 (“The arrogance ...”) to 45 (“... tribes of the aboriginal Americans.”).

<sup>183</sup> *The Colonist*, Sydney, 25 July 1840, at 2.

<sup>184</sup> Colton *Tour of the American Lakes*, above n 181, 43 & 40.

The Government had not departed from the “recognised law of nations, in claiming the entire and full sovereignty of New Zealand”. Nor had it “trampled upon” Maori rights “to the soil they inhabit and employ for their maintenance and support”. They were not deprived of their interest in cultivated lands and fisheries but had “wisely” been denied the right to “alienate lands to which they have no other right than that which is common to all”.<sup>185</sup> What was more, the attempt by “parties interested in this question” to claim “sovereign rights” for the chiefs and that “their territorial dominions are freehold estates” was “absurd”.<sup>186</sup>

In its reply of 4 August, *The Colonist* deprecated the prejudice shown in the ad hominem attack on Colton. It now focused on “legal precedents and judicial authorities of the very highest description to sustain and corroborate” Colton’s views. These were the judgments of Marshall and McLean in *Worcester v The State of Georgia* and correspondence between Chancellor Kent and Judge Clayton of Georgia about Cherokee land rights. This material was itself taken from appendices to Colton’s book.<sup>187</sup> Their importance seems to have been overlooked not only by *The Colonist* in its earlier, 25 July, editorial but also by it and others who opposed Gipps’s use of American law in the Land Claims Bill debate, which had concentrated on *Johnson v M’Intosh* and been selective in use of the commentaries of Kent and Story. This raised, for the first time, questions about whether the Governor had accurately represented American law.

*The Colonist* quoted from Marshall’s historical review in *Worcester*. It put in capital letters Marshall’s statement that discovery “gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell”. It cited Marshall’s view that the early royal charters were “considered as blank paper, so far as the rights of the natives were concerned”. It drew on the explanations of both Marshall and McLean that the Indian nations were distinct political communities able to enter into treaties with the United States and asserted

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<sup>185</sup> The *Sydney Gazette* took the view that Maori were not deprived of their “hunting grounds” because “in New Zealand nature gave them nothing to hunt”.

<sup>186</sup> *Sydney Gazette and New South Wales Advertiser*, 1 August 1840, at 2.

<sup>187</sup> Colton *Tour of the American Lakes*, above n 181, 259-341.

that the situation in New Zealand with Maori was “precisely analogous”. The argument “on which the recognition of the national independence and sovereignty of the New Zealand Chiefs is now disposed of by Sir George Gipps” was the same argument that Georgia had urged vainly on the United States Supreme Court (“that the treaties entered into with the Indians could not be considered as obligatory on the United States, for a want of power in the Indians to enter into them”).

*The Colonist* described Kent as “the American Blackstone”. His letter to Clayton was quoted to prove *The Colonist*’s “fundamental position ... that the Aborigines of New Zealand have a natural right of property in the soil of their country; that that right is not merely an *inchoate* right (as Sir George Gipps alleges), but a *perfect* and *absolute* right, such as they could justly maintain in equity, and defend from violation, if they had the power ...”.<sup>188</sup> On the basis of *Worcester* and Kent, *The Colonist* claimed that “the argument of Dr Colton with respect to the right of discovery on the one hand, and the rights of the native occupants and proprietors of the soil, on the other, is fully and decidedly borne out and confirmed”.<sup>189</sup>

It is not known whether Wentworth contributed to *The Colonist*’s 4 August analysis of the American materials reproduced in Colson’s book. But he certainly carried on this line of attack on Gipps. Wentworth wrote a response to Gipps’s now

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<sup>188</sup> Kent had written to Clayton:

I am most entirely persuaded, that the Cherokee title to the sole use and undisturbed enjoyment of their mines, is as entire and perfect as to any part of their lands, or as to any use of them whatever. The *occupancy* in perpetuity to them and their posterity, belongs to them of right, and the State of Georgia has no other right in respect to the Indian *property* in their lands, than the *right of pre-emption by fair purchase*.

No other interest in the lands, as property, belongs to the State, and to take possession of the mines by force, is substituting violence for law and the obligations of treaty contract. It appears to be altogether without any foundation, to apply the common law doctrine of *waste* to the case, and I cannot but think that the Legislature of Georgia would not have passed the statute, if they had duly considered that the Indian lands have never been claimed, or the occupancy of them, in the most free and absolute manner by the Indians, questioned, either by the royal Governments before the American Revolution, or by the Union, or by any State since, except in open wars, or except the claim was founded upon fair purchase from the Indians themselves. The proceeding of Georgia in this case is an anomaly, and I think it hurts the credit of free and popular governments, and the moral character of our country, and is in direct violation of the constitutional authority of the United States, as manifested by treaties and by statute.

Kent to Clayton, 13 October 1831, reproduced in Colton *Tour of the American Lakes*, above n 181, 338-341 at 339-341.

<sup>189</sup> *The Colonist*, Sydney, 4 August 1840, at 2.

published speech on the second reading of the Bill. It was carried by *The Colonist* between 12 November and 29 December 1840.<sup>190</sup> The article seems to have been written by Wentworth sometime after the Act had been passed, perhaps close to the date of publication of the first instalment in *The Colonist* on 12 November.

Wentworth's ill-feeling towards Gipps is pronounced. He asserted that Gipps's speech, as published, was not as he had delivered it but "as he now wishes that he had delivered it"<sup>191</sup>:

It will be in the recollection of those of my readers who were present in the Legislative Council during the delivery of this speech, that the Governor, besides comparing my quotation from VATTEL to the DEVIL quoting Scripture, and pointedly directing to me other insulting language, as well as demeanour, was pleased to crown his complimentary effusion, by threatening me with a prosecution for conspiracy.

Such behaviour was perhaps only to be expected of one elevated from "inferior rank in the army" to "giddy eminence".<sup>192</sup>

Wentworth responded to the arguments put forward by Gipps following the same order. First, Wentworth denied that a Crown grant was necessary before any title in land could be recognised in English law. It was a fiction that all lands were held of the Crown. Such fiction did not mean that in conquered or ceded countries, such as India, the Cape Colony, and Mauritius, title to property was "actually and literally" derived from Crown grants. Rather, the pre-conquest titles continued, and the

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<sup>190</sup> "Mr Wentworth's Reply to the Governor's Speech on the New Zealand Bill, as Published by Authority", *The Colonist*, Sydney, 12 November 1840 at 2, 1 December 1840 at 2-3 & 29 December 1840 at 2. Wentworth's reply may have been separately published as well. Sweetman *The Unsigned New Zealand Treaty*, above n 8, 133-171 reproduces a text which omits part of the material published in *The Colonist* (some of that from 1 December and all of that from 29 December 1840), suggesting he may have obtained it from another source. *The Colonist* available to me through the National Library of Australia "Trove" website is missing that part of Wentworth's reply reproduced by Sweetman at page 140 ("Having now followed the Governor ...") to page 159 ("or the *liberum tenementum*, as lawyers term it, in the purchasers.") (possibly a missing page 4 of the 19 November issue). The final, 29 December 1840, instalment also finishes "To be Continued". Since that was the penultimate issue of *The Colonist* according to "Trove", it may be that there is a complete text undiscovered or it may be, if the articles were written for publication in *The Colonist*, that there was no continuation.

<sup>191</sup> *The Colonist*, Sydney, 12 November 1840, at 2, col 1; Sweetman *The Unsigned New Zealand Treaty*, above n 8, 133.

<sup>192</sup> *The Colonist*, Sydney, 12 November 1840, at 2, col 2; Sweetman *The Unsigned New Zealand Treaty*, above n 8, 134-135.

fiction was fulfilled by substitution of the British Crown for the former sovereign power. The property rights of the New Zealand landholders in the North Island continued on this basis following cession of sovereignty by the chiefs.<sup>193</sup>

Wentworth then addressed in sequence the three “political axioms” propounded by Gipps in his speech: that Maori could not grant land because they had no individual property in land; that Europeans could not buy land because of the Crown’s right of pre-emption; that settlers could not form colonies except with the consent of the Crown.<sup>194</sup>

Wentworth suggested that Gipps had given three reasons for the first “political axiom”: Maori, being uncivilised, had only rights of occupancy in land; without a settled form of government and cultivation of land, they could not alienate land outside the tribe; land was held by the tribe, not by individuals.<sup>195</sup> Wentworth said in response to the first reason that, while it had become the position in America, that was the result of war and policies acted upon since the founding of the colonies and which it was now too late for any courts to controvert, rather than being an a priori rule of law. Wentworth substantiated this conclusion by reference to Story’s *Commentaries*, Marshall’s judgment in *Worcester*, Vattel, and Colton.<sup>196</sup> “[A]s an abstract principle applicable to the condition of all uncivilised people, it is not sustainable”;<sup>197</sup> “it is even refuted and scouted by the American law authorities to whom he has referred as his polar guides”.<sup>198</sup>

In response to the second argument, Wentworth denied on the basis of the same authorities that, the ability to alienate to land to foreigners depended on government and cultivation.<sup>199</sup> In any event, Maori were “an agricultural people ...

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<sup>193</sup> *The Colonist*, Sydney, 12 November 1840, at 2, col 5; Sweetman *The Unsigned New Zealand Treaty*, above n 8, 139-140.

<sup>194</sup> Sweetman *The Unsigned New Zealand Treaty*, above n 8, 140.

<sup>195</sup> Ibid 140-141.

<sup>196</sup> Ibid 141-147.

<sup>197</sup> Ibid 145.

<sup>198</sup> Ibid 147.

<sup>199</sup> Ibid 147-150.

and ... have been so ever since the potato, the pig, the tarra, and coomera, were introduced by Captain Cook and other navigators”.<sup>200</sup>

[I]t is only necessary to refer to the Custom House entries at Sydney to prove that hundreds of tons of potatoes and pork, and thousands of tons of maize are annually exported from New Zealand to this colony, to say nothing of the immense supplies of these and other articles, the produce of the soil, which are furnished by the New Zealanders to many hundreds of whaling and other vessels that annually visit their ports for supplies and refreshment. If the absolute right of a people, therefore, to the soil of their country is to be determined by this test, the New Zealander’s right certainly does not rest on a narrower foundation than the right of any British subject in this colony. It rests, indeed, on a much broader, for we are essentially a pastoral people; they essentially an agricultural. We scarcely cultivate an acre out of every hundred thousand which we occupy with our flocks and herds. They have nothing, at least scarcely anything, but the forced products of the soil to maintain them.

In response to the third reason why Maori were incapable of selling land (that their interests in land were held in common and therefore could not be alienated), Wentworth pointed out that Busby and “other competent witnesses” claimed that individual property was not unknown, although “tenancies in common are perhaps more usual”. Moreover, even in the case of commonly held property, there was no impediment to alienation: it simply meant that “instead of purchasing from one, you must purchase, as most European purchasers have done, from all”. Tenancies in common were “not peculiar to savages”; they belonged “equally to our law and to the laws of all civilised nations”.<sup>201</sup> Indeed, tenants in common were able to sever and convert communally-owned property to individual property (including by sale to a stranger) under English law (and if “[w]ith us ... why not with the New Zealanders?”).<sup>202</sup>

As to Gipps’s second “political axiom” (that Europeans could not purchase because of a Crown right of pre-emption), Wentworth denied such right could have

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<sup>200</sup> Ibid 148-149.

<sup>201</sup> Ibid 150.

<sup>202</sup> Ibid 150-151.

arisen in New Zealand until British sovereignty was established in 1840.<sup>203</sup> More importantly, he denied that any such right of pre-emption existed at common law.<sup>204</sup> The American right of pre-emption, as he showed by review of the legislation of the colonies and of the United States, was “the mere creature of municipal regulation—not coeval even with the first establishment of British authority on that continent—but introduced gradually, and only after a considerable lapse of time”.<sup>205</sup> It was necessitated “in order to do away with the universal practice then prevalent of purchasing from the natives by individuals and companies”.<sup>206</sup> The right of pre-emption was not derived from any prerogative of the Crown and, accordingly, “no such right, on the part of the Crown of England, existed in New Zealand”. Such a right could be obtained by legislation if within the competency of the local legislature (which Wentworth doubted had been achieved with the Land Claims Act), but could not have existed before such legislation was enacted “except in as far as that right may have been duly obtained by cession from the natives”.<sup>207</sup>

As to the third “political axiom” (that British subjects could not form colonies without consent of the Crown), although Wentworth tackled this proposition head-on,<sup>208</sup> he also made the short response that:<sup>209</sup>

I must protest against the inference that my assertion or denial of the general principle, as regards British subjects, has anything to do with the rights of the New Zealand landholders. For, whether British subjects have a right to purchase land in New Zealand, irrespective of the authority of the Crown, is one proposition; whether they have a right to found colonies there, irrespective of such authority is another. The one proposition is totally independent of the other.

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<sup>203</sup> Ibid 151.

<sup>204</sup> Ibid 152-159.

<sup>205</sup> Ibid 158-159.

<sup>206</sup> Ibid 158.

<sup>207</sup> Ibid 159.

<sup>208</sup> See *ibid* 159-164; *The Colonist*, Sydney, 1 December 1840, at 2, cols 1-3.

<sup>209</sup> Sweetman *The Unsigned New Zealand Treaty*, above n 8, 160; *The Colonist*, Sydney, 1 December 1840, at 2, cols 1-2.

Additional points made by Wentworth included that the British Government (as was demonstrated “beyond the possibility of doubt” by Stephen’s November 1839 memorandum on sovereignty,<sup>210</sup> it seems received in Sydney in late October 1840<sup>211</sup>) had treated New Zealand as independent and that, in respect of the North Island, “the sovereignty, and right of pre-emption, have been obtained by cession” (and only in respect of Maori who had signed the Treaty). The consequence was:<sup>212</sup>

Now the rule of law applicable to all such treaties, as laid down by Lord Mansfield and the other judges, in the case of *Campbell v. Hall*, is “that they are sacred, and inviolable, according to their true intent, and meaning”; and that the natives comprised within the territorial limits of the ceded sovereignty “being once received under the Queen’s protection become subjects, and are to be universally considered in that light, not as enemies, or aliens”. Hence the chiefs, and other inhabitants, of the northern island—parties to the treaty, having thus become subjects of the Crown, and being recognized in it, as possessing “the entire and exclusive property in their lands”, it follows that their title, and that of their derivatives, “is sacred and inviolable”, and cannot, according to the course of the British constitution, be impeached, except before a competent Court of judicature . . . .

### **New Zealand reaction**

News of the Land Claims Bill and debate reached New Zealand through the Sydney newspaper reports. At Port Nicholson (Wellington) it provoked outrage from the *New Zealand Gazette*, the local mouthpiece of the New Zealand Land Company. The *Gazette* was owned and edited by Samuel Revans, a man of radical views who had earlier been the business partner of Henry Chapman (later the first puisne judge appointed to the Supreme Court of New Zealand) in the *Daily Advertiser*, a pro-French, English-language newspaper in Montreal.<sup>213</sup> Revans was almost certainly unaware of the shifts in position of the New Zealand Land Company in London, which was now taking the position that New Zealand had

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<sup>210</sup> Sweetman *The Unsigned New Zealand Treaty*, above n 8, 168; *The Colonist*, Sydney, 1 December 1840, at 2, col 5.

<sup>211</sup> See *The Sydney Herald*, 20 October 1840, at 2.

<sup>212</sup> *The Colonist*, Sydney, 1 December 1840, at 3, col 1.

<sup>213</sup> Kathleen Coleridge “Revans, Samuel (1807/8-1888)” *Dictionary of New Zealand Biography*; Peter Spiller *The Chapman Legal Family* (Victoria University Press, Wellington, 1992) 21.

become a British possession by discovery and that the Colonial Office had erred in not applying the *Johnson v M'Intosh* approach to invalidating land purchases.<sup>214</sup> He took the opposite tack.

In an editorial of 18 July 1840, Revans responded to Gipps's speech<sup>215</sup> at the opening of the new Legislative Council session on 28 May—the Bill was still not to hand in New Zealand. Revans identified that Gipps had made two arguments: that Maori had no right to sell land and that British subjects had no right to found colonies without Crown permission. The first argument Revans said was “quite inconceivable”:

Up to a very few days ago, the Sovereignty of these Islands resided not in the English Crown, but in the native chiefs. The existence of this Sovereignty has been recognized in various ways; and in none more emphatically than in the recent proclamations by Sir George Gipps and Captain Hobson, and the dispatches upon which these proclamations were founded. But to allow to these chiefs the right of Sovereignty, and deny them the right of selling their land; to recognize them as sufficiently advanced for the exercise of the higher right, and at the same time to declare them too barbarous for the exercise of the lower; to concede to them the prerogative of framing and administering laws, and withhold from them that power of disposing of property, which is the common possession of the meanest freeman in any known community; is a proceeding so inconsistent, that we can hardly imagine any individual, especially Sir George Gipps, giving it the sanction of his authority. ...

Waiving, however, the question of Sovereignty, we venture to affirm that there is no legal or constitutional authority for the assertion that natives circumstanced as are the New Zealanders, have no right to sell their land. In Canada, the sole right of acquiring land from the Indians has been vested in the Crown by an act of the provincial legislature, as in the United States it is vested in the Government by act of Congress. Before these acts, the right of the Indians to sell, and of British subjects to purchase land, was uniformly recognized throughout every part of the vast territories of the English Crown in North America; and some of the largest estates in the United States and in Canada are now held under Indian titles. Nor can a single instance be produced where the Crown has interfered to divest a subject of land thus acquired, unless in cases where the

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<sup>214</sup> See Chapter 15.

<sup>215</sup> Published in the *New Zealand Gazette*, Wellington, 11 July 1840, at 2.

## Chapter Sixteen: The Land Claims Bill Debate

acquisition has been made in breach, not of a dispatch or a proclamation, but of a positive enactment. We are aware that by a fiction of English law, all land within the British dominions is supposed to be vested in the English Sovereign, but only as lord or lady paramount; nor can the Crown on this ground interfere in any manner with the private rights of a single individual.

Gipps's second argument was dismissed as beside the point. The allegiance of British subjects to the British Crown was not violated by their acquisition of lands in foreign countries. Nor was it a breach of their allegiance to submit to the laws of the state within which they had settled. There they could exercise "any right of citizenship which the rulers of the State ... may deem it prudent to award to them".

In these views, Revans showed himself to be closer to the views of James Stephen and William Wentworth than the opinions of George Gipps and the New Zealand Land Company in London. Despite his rejection of Gipps's "reasoning", however, Revans supported the ends of the legislation. It was "expedient that some measures should be taken to check the acquisition of large tracts of land by private individuals, and to render available for the purpose of emigration and settlement the tracts which have been already acquired". Revans, it seems, expected that the land claims commission would be "as liberal in practice as it is arbitrary in constitution". If disappointed in this expectation, he had "at least the consolation of knowing ... [that] any one aggrieved by [the commissioners'] decision, has an easy and certain remedy by an appeal to the English Courts".<sup>216</sup>

When the Bill was received, it was published by the *Gazette* and attacked in an editorial of 8 August 1840. The Bill was "so opposed to our previous conceptions of its nature,—so repugnant to reason and to justice,—and so important to all landholders in these islands,—that we are compelled to call the attention of our readers to its provisions". The *Gazette* regarded the Bill as inconsistent with

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<sup>216</sup> *New Zealand Gazette*, Wellington, 18 July 1840, at 2. The editorial was criticised by the *Sydney Gazette and New South Wales Advertiser*, 8 October 1840, at 2.

Hobson's land titles proclamation of 30 January 1840 and conjectured that it would be "as much a surprise to him as to ourselves".<sup>217</sup>

In the Far North, where the question of the legal status of pre-Treaty land purchases is likely to have been one of particular anxiety to a large number of old settlers and more recent immigrants and land speculators, the local newspaper, the *New Zealand Advertiser and Bay of Islands Gazette*, was a little slow on the topic. When it did find its voice, however (perhaps goaded into paying closer attention by correspondence criticising its silence<sup>218</sup>), it became a powerful advocate against the legislation which it saw as being dangerous for Maori interests in the long run.

The *New Zealand Advertiser and Bay of Islands Gazette* was a short-lived publication (June-December 1840) produced by the Congregational minister, Barzillai Quaife. Quaife, born in Kent in 1798, had emigrated to South Australia in 1839, where he had briefly worked for the *Southern Australian* newspaper, before being persuaded to start a newspaper in New Zealand. He did not arrive in the Bay of Islands until May 1840 and published the first issue of the *Advertiser* (New Zealand's second newspaper only) on 15 June. The newspaper took an independent and anti-Government line which was strongly supportive of Maori interests. It ran foul of the Government and in particular Willoughby Shortland, the Colonial Secretary, who in December 1840 invoked a New South Wales ordinance to require Quaife to put up a substantial sum in surety for payment of a fine should he publish "expressions tending to bring the Government into hatred or contempt". The paper closed, although Quaife subsequently, in February 1842, launched the *Bay of Islands Observer*, which continued to support the interests of Maori and the old land claimants.<sup>219</sup>

In Quaife's first editorial on the subject of the Bill (30 July), he rejected the suggestion that there was any basis in English law to dispossess "English holders

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<sup>217</sup> *New Zealand Gazette*, Wellington, 8 August 1840, at 2. See also *New Zealand Gazette*, Wellington, 15 August 1840, at 2.

<sup>218</sup> See letter to the editor from "An Intending Settler", *New Zealand Advertiser and Bay of Islands Gazette*, Kororareka, 16 July 1840, at 3.

<sup>219</sup> Peter Kennett "Quaife, Barzillai (1798-1873)" *Dictionary of New Zealand Biography*.

of landed property in a Foreign state, when that state becomes part of the British Empire". Any such dispossession could only be achieved by an Act of the Imperial Parliament. A Court of Claims to inquire to the validity of purchases, however, was a "perfectly legitimate thing".<sup>220</sup>

In an issue of 6 August, after Gipps's speech had become available, Quaife referred to Wentworth and Gipps as "giants in legal argument". Wentworth's opinion was tainted because it was employed "in protection of his own interests" to "twenty millions of acres". But the issues were ones that should be determined on "*principle* only". The question whether Maori had "a proprietary right in the soil" was one of "vast consequence" quite independent of its "connexion with European rights". The debate in the Legislative Council had confused the right to form colonies and the right to purchase lands. The claim of discovery was rebutted by Hobson's proclamation of sovereignty over the North Island by cession. There was indeed no "equitable foundation" for the claim of sovereignty by discovery. The idea that Maori did not have property in land in the absence of cultivation was surprising "in this day of enlightenment". It raised the objection, "who is to decide in what cases the Natives have so cultivated as to secure their title? and what is it which constitutes cultivation?" What was more, Maori had cultivated land "for years back, to an extent, sufficient not only for their personal maintenance, but even for the purposes of commerce". "On the whole", Gipps's argument was "utterly incompatible with the natural rights of man" and had not been authorised by Normanby's Instructions to Hobson.<sup>221</sup>

In a further article of 13 August, Quaife developed his point about Normanby's Instructions. He said that Gipps had proceeded on the "very reverse" principles of Normanby and Queen Victoria. "Nothing can be more certain" than that Normanby's Instructions had recognised "without any qualifications whatever" the "original right of the natives both to territory and soil". Although the immediate

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<sup>220</sup> *New Zealand Advertiser and Bay of Islands Gazette*, Kororareka, 30 July 1840, at 2.

<sup>221</sup> *New Zealand Advertiser and Bay of Islands Gazette*, Kororareka, 6 August 1840, at 2.

legislation might not work against Maori, the principles it was framed on created “no small danger” regarding their “future fates”:

[W]hen a public functionary, so exalted as the Governor of one of Great Britain’s most important Colonies, lays it down as an axiom which must not be questioned that the natives have no independent right over their own property, and that the Queen of England holds that right which the natives have not, in spite of her most solemn and indubitable renunciation of it, we own we see no end—looking at the Cape as an example—of the catalogue of miseries which may be entailed on this inoffensive people. We hope His Excellency [Hobson] will never consent to become the instrument of such a doctrine; and we hope there is virtue enough in the present Ministry to check the mischief. If not, we are sure there is energy enough in the public mind at home to make itself heard and feared.

New Zealand had been “brought under the British crown for the *professed* purpose of protecting the aborigines from injury”. It was important that that purpose should not be defeated by legislation “impugning their right altogether”.

Quaife accepted that the Crown was not “legally bound” to recognise land purchases, leaving the purchasers to continue to hold their interests “by the laws and usages under which they are made” (and bearing any risk of insecurity of title unless the Crown chose to set up a system to arbitrate disputes). But it was different to assert a power legally to invalidate purchases. Quaife considered that nothing short of a law passed for that purpose by the Imperial Parliament could give the Crown such power. What the Crown could do was to suspend titles pending investigation of the validity of the purchases. If the purchase was shown to be invalid, the Crown “must restore the property to the former possessor”. If it were valid, it “must be adjudged to him who holds it”. What the Crown could not do, “without purchase”, was to take the land itself “without the full consent of the owner, whether he be Native or European”.<sup>222</sup>

In a further editorial of 3 September, the *Advertiser* was pleased to note that the preamble to the Act as passed had removed “absurd and most objectionable

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<sup>222</sup> *New Zealand Advertiser and Bay of Islands Gazette*, Kororareka, 13 August 1840, at 2.

doctrine” by dropping the assertion that Maori were not capable of owning land.<sup>223</sup> In a 1 October editorial, however, Quaife urged settlers to send a memorial to London objecting to the infringement of Maori interests which Normanby’s Instructions had sought to protect. Although the express denial of Maori property had been removed “from the face of the Bill”, it remained clear that “the whole of the Bill rests on the assumption that the Aborigines had no independent, uncontrollable right”. The choice for British Ministers was either to adhere to the Instructions by “cancelling the Act” or to allow the process of “extermination” of Maori as had happened “in almost every former case of Colonization”.<sup>224</sup>

By 8 October, Quaife’s indignation was unrestrained: “The more we think of [the Act] the more it appears in our eyes irreconcilable with right”. A review of Normanby’s Instructions showed that “the object of Colonization of this country was ... the protection of Native Rights from violation”. Such purpose was “corroborated by the reluctance expressed by the Ministers to establish a British Colony here”. It was “most unaccountably strange” that Maori independence (both as sovereigns and in respect of their property and “perfect right to *choose* their purchasers”) “should ever have been called in question”. Gipps’s arguments “failed most completely in reference to the points which were fundamental”. Although it was not necessary to support such “absurd” land claims as those of Wentworth, “a law might easily have been passed which would set such claims aside, without overthrowing all the rights of property in the country”.<sup>225</sup> The *Advertiser* lent its weight to a “memorial and protest” of New Zealand landholders agreed to at a meeting at Coromandel Harbour on 3 September 1840 (in which Samuel McDonald Martin seems to have played a leading role).<sup>226</sup>

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<sup>223</sup> *New Zealand Advertiser and Bay of Islands Gazette*, Kororareka, 3 September 1840, at 2.

<sup>224</sup> *New Zealand Advertiser and Bay of Islands Gazette*, Kororareka, 1 October 1840, at 2.

<sup>225</sup> *New Zealand Advertiser and Bay of Islands Gazette*, Kororareka, 8 October 1840, at 3.

<sup>226</sup> Memorial and Protest of New Zealand landholders, merchants and others, Coromandel Harbour, 3 September 1840, published in: *The Sydney Herald*, 25 November 1840, at 2; and SMD Martin *New Zealand; In a Series of Letters* (Simmonds & Ward, London, 1845) 110-112.

By this time, James Stephen's November 1839 memorandum on sovereignty ("the proofs are ... overwhelming and superabundant ... [that] Great Britain has recognized New Zealand as a Foreign State") had been received in Sydney. Of this, Busby wrote to Gilbert Mair that "[o]ur last news from England shews that the Secretary of State does not agree with Sir Geo. Gipps as to New Zealand being an independent country or not. I am in great hopes that this will turn the question much in our favour, but it is still doubtful".<sup>227</sup> *The Sydney Herald*, too, considered it "singular" that Gipps and Russell should take "such extremely different views of the question of independence or non-independence of New Zealand".<sup>228</sup>

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<sup>227</sup> Busby to Mair, 24 October 1840, ATL MS-Papers-0227-05 (typescript).

<sup>228</sup> *The Sydney Herald*, 20 October 1840, at 2. See also *The Colonist*, Sydney, 5 November 1840, at 2: "our readers will perceive the very obvious and wide discrepancy that exists between the positive declarations of Lord John Russell, as to the entire and unqualified independence of New Zealand as a Foreign State, and the views of Sir George Gipps on that subject."

## CHAPTER SEVENTEEN

### LONDON, 1840–47

As has been seen, while James Stephen was rejecting the approach taken in *Johnson v M'Intosh* as inconsistent with British colonial practice, in Sydney Governor Gipps had come to the opposite conclusion in framing and defending his Land Claims Act. It might be thought, therefore, that the Act would have been rejected outright in London as proceeding on a wrong basis—that Maori were not owners but merely occupiers of land vested in the Crown. However, as introduced and particularly as enacted (with the amendment to the preamble), the Land Claims Act did not purport to deny Maori ownership.<sup>1</sup> It dealt directly simply with the invalidity of European purchases. Although Gipps's speech did assert that Maori had "a right of occupancy only" over land,<sup>2</sup> the view was not embodied in the legislation, certainly not in its operative provisions. The legislation<sup>3</sup> was well-received by the Colonial Office.<sup>4</sup> It seems to have been pleasantly surprised that Gipps had been able to accomplish a measure so limiting of the pretensions of the pre-Treaty land purchasers.<sup>5</sup> (The 1839 Colonial Office concerns about land-sharking in New Zealand will only have been amplified by the 1840 reports it received from Gipps and Hobson as to the extent of purchases, including those of

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<sup>1</sup> See Chapter 16, text accompanying ns 49 & 165.

<sup>2</sup> See Chapter 16, text accompanying n 125.

<sup>3</sup> The Bill as introduced to the Legislative Council was received in London on 26 October 1840. The Bill as it passed its second reading (with an indication from Gipps that "no further alteration will be made in it") was received on 25 November 1840. The Act and Gipps's speech of 9 July 1840 as published by him were received on 5 January 1841. See Gipps to Russell, 29 May 1840, CO 201/297, 186a-201a; Gipps to Colonial Office, 25 July 1840, CO 209/6, 246a-251b; and Gipps to Russell, 16 August 1840 x 3 (No. 110, No. 1 Separate, No. 2 Separate), CO 209/6, 233a-244b, 258a-261b, 262a-284b (reproduced at GBPP 1841 (311) XVII.493 at 61-78).

<sup>4</sup> See, for example, Stephen to Smith, 5 January 1841, CO 209/6, 236b: "This appears to have been very carefully framed."

<sup>5</sup> See, for example, Stephen to Smith, 19 February 1841, CO 209/6, 419b & 423a-b at 423a: "I also think that having obtained a Law for the settlement of these affairs, which Law is certainly not favorable to the Settlers, it would be good policy to confirm it, leaving the Legislature of New Zealand to make such amendments as may be required hereafter to adapt it to the altered circumstances of the case. It may be very difficult to obtain as good a Law hereafter or perhaps to obtain such a Law at all within New Zealand itself."

Wentworth and Busby.<sup>6</sup>) Although the Colonial Office was ultimately to disallow Gipps's Act (after some equivocation about whether that course was necessary or sensible<sup>7</sup>), that was not because of its content but principally because of the establishment of New Zealand as a separate colony.<sup>8</sup> Indeed before the Colonial Office received the Act as passed<sup>9</sup> and Gipps's speech, Hobson was instructed to enact an ordinance "for the same general purpose".<sup>10</sup> His 1841 Ordinance (which substantially re-enacted the New South Wales Act) was not disallowed.<sup>11</sup>

Although Gipps's speech, received in its printed form in London on 5 January 1841, was not consistent in its reliance on American law with the views Stephen had earlier expressed in his 28 July 1840 minute and finds no support in the Colonial Office records from 1837 to 1840, it was not received with any expression of reservation. Indeed, Stephen suggested that it might be appropriate to take "some notice ... of the Gov<sup>r</sup>'s speech" which

seems to me a very good one, and it is not improbable that he may be of the same opinion, in which case it would be satisfactory to him to find his judgment confirmed by that of Lord John Russell.<sup>12</sup>

Russell did approve the communication of his appreciation of the speech to Gipps.<sup>13</sup> A first draft of this, prepared by a clerk, expressed "concurrence in the opinions so correctly set forth in the speech". This draft was altered, it seems by Russell himself, to record that he had "read with much pleasure the very able

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<sup>6</sup> See, for example, Gipps to Russell, 16 August 1840 (No. 110), GBPP 1841 (311) XVII.493 at 61 ("Your Lordship is, I dare say, aware, that there are persons who claim hundreds of thousands, and even millions of acres in New Zealand"); Gipps to Russell, 16 August 1840 (No. 1 Separate), GBPP 1841 (311) XVII.493 at 62; and Hobson to Normanby, 20 February 1840, GBPP 1841 (311) XVII.493 at 12-13.

<sup>7</sup> See, for example, Colonial Office minutes at CO 209/6, 236b & 261b (January 1841) and 419b-423b (February 1841).

<sup>8</sup> Russell to Hobson, 16 April 1841 & Russell to Gipps, 16 April 1841, GBPP 1841 (311) XVII.493 at 60.

<sup>9</sup> See above n 3.

<sup>10</sup> Russell to Hobson, 9 December 1840, GBPP 1841 (311) XVII.493, 24-31 at 30. See also Russell to Hobson, 16 April 1841, GBPP 1841 (311) XVII.493 at 60: "... the Act of New South Wales may be followed as a safe and proper guide."

<sup>11</sup> Land Claims Ordinance 1841 (NZ) 4 Vict No 2.

<sup>12</sup> Stephen to Smith, 9 January 1841, CO 209/6, 269b.

<sup>13</sup> Russell minute, 12 January 1841, CO 209/6, 269b.

exposition of your views on the subject of purchases made from the Chiefs of N Zealand”.<sup>14</sup>

It is not easy to know what to make of this commendation. The Colonial Office was clearly pleased that Gipps had been able to pass legislation which would solve decisively the problem (which Stephen had earlier described as an “abuse”<sup>15</sup>) posed by the huge land purchases. Normanby’s Instructions had not required the cap on acreage that Gipps had achieved;<sup>16</sup> and Gipps’s success may well have been seen as deserving some praise. It was evident from the speech that Gipps had put a great deal of effort into justifying the legislation. As Stephen seems to have appreciated, the circumstance that Gipps had caused his speech to be published indicated that he himself was proud of his effort. It would have been ungenerous not to express appreciation for it, especially since it had obtained such a satisfactory outcome.

It is also not clear whether any future implications for Maori were taken from the speech, particularly given the terms of the Act. The printed version of the speech on the Colonial Office file is unannotated, giving no clue to how closely it was read.<sup>17</sup> Certainly there is no contemporary commentary about the content of the speech in the record. It should be noted also that the despatches from Gipps conveyed little sense of how central arguments about the nature of Maori interests in land had been in the debate in Sydney. No other speeches, press reports or editorials were included by Gipps in his despatches. More importantly, the compliment paid to Gipps for a job well done does not support any inference that the Colonial Office was agreeing that Maori had only a right of occupancy over their lands. Any such inference would be contrary not only to Stephen’s minute on *Johnson v M’Intosh* but also to the firm approach taken consistently by the

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<sup>14</sup> Russell to Gipps, 16 January 1841, CO 209/6, 267a-b at 267b (also GBPP 1841 (311) XVII.493 at 78-79). See also Russell to Gipps, 16 April 1841, GBPP 1841 (311) XVII.493 at 60.

<sup>15</sup> See Chapter 9 n 459.

<sup>16</sup> See Chapter 8, text accompanying ns 24-26. As seen in Chapter 9, while the Colonial Office had considered imperial legislation to invalidate future purchases of land, it seems to have regarded invalidation of past purchases as politically unachievable.

<sup>17</sup> See CO 209/6, 270a-284b.

Colonial Office over the next five years when the nature and extent of Maori interests in land came under question.

### 1840–41

It is true that there is some material within the Colonial Office record in the 1840–41 period that was later used by the New Zealand Company to suggest that the Colonial Office itself had treated pre-1840 European purchases of land as necessarily invalid in law and Maori interests in land as being limited to those lands occupied and cultivated by them. In particular, the Company was to rely in its arguments on a letter of 2 December 1840 to it from Robert Smith and the terms of the 16 November 1840 Charter establishing the colony of New Zealand. The letter advised the Company that all titles would be investigated on the basis of an “assertion on behalf of the Crown of a title to all lands situate in New Zealand, which have heretofore been granted by the chiefs of those islands according to the customs of the country, and in return for some adequate consideration”.<sup>18</sup> The Charter authorised the Governor “to make and execute ... grants of waste land” with the proviso:<sup>19</sup>

Provided always, that nothing in these our letters patent contained shall affect or be construed to affect the rights of any aboriginal natives of the said colony of New Zealand, to the actual occupation and enjoyment in their own persons, or in the persons of their descendants, of any lands in the said colony now actually occupied or enjoyed by such natives.

Smith’s letter was later used by the Company to suggest that there was no requirement for it to prove the validity of its purchases because, as a matter of law, such purchases could never be a source of property. Only a Crown grant could found title.<sup>20</sup> The point was made in connection with the Company’s position (discussed further below) that the Government had agreed in November 1840 to

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<sup>18</sup> Smith to Somes, 2 December 1840, GBPP 1841 (311) XVII.493, 88–89 at 88.

<sup>19</sup> Charter for erecting the Colony of New Zealand, 16 November 1840, GBPP 1841 (311) XVII.493, 31–33 at 32.

<sup>20</sup> See, for example, the Report of the 1844 House of Commons Select Committee on New Zealand (July 1844), GBPP 1844 (556) XIII.1, iii–xiv at ix–x.

grant it land according to a formula based on its expenditure rather than the validity of its purchases from Maori. The two points to be made immediately here are that the letter was concerned solely with pre-1840 European purchases and is consistent with an assertion of a policy of non-recognition by act of state rather than arising out of legal doctrine (whether an a priori right of Crown pre-emption, application of feudal doctrine of tenures, or the legal impossibility of pre-existing property in Maori). The language used in Colonial Office minutes and correspondence in this period draws a distinction between “valid” and “invalid” European purchases from Maori, which may be another pointer to the withholding of recognition upon the transfer of sovereignty being a matter of policy imposed by act of state.<sup>21</sup>

The terms of the proviso in the Charter were later relied upon by the Company in support of its contentions that Maori had rights only in relation to land actually occupied.<sup>22</sup> The language used was not free from ambiguity. It depended upon the view taken of the words “lands ... now actually occupied or enjoyed” and the Company’s narrow interpretation was contested in later debates.<sup>23</sup> The significance properly to be attributed to the language of the proviso as indicating Colonial Office understanding about the nature and extent of Maori interests in land may

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<sup>21</sup> See, for example, Stephen to Smith, 27 November 1840, CO 209/6, 204a-205a at 204a-b (“I apprehend that the general principle of Law as to the holding of Lands within the Queen’s Dominions by Aliens must be relaxed in favour of any Aliens possessing Lands in New Zealand by virtue of valid titles acquired previously to the Proclamation of the Queen’s Sovereignty there”); and Stephen to Hope, 16 February 1843, CO 209/26, 303b-304a at 303b (“As far as the meaning of the New Zealand Company can be discovered through the cloud of words under which they envelope it, I suppose the meaning of their letter to be as follows:—namely ... that they do wish to dispossess any Purchasers from the Natives of an earlier title than their own, because (they say) no such earlier title can be good for anything ...”; “My own conclusion on this matter is that the Agreement did not give them any right of selection of any Lands, excepting only such as they had acquired by valid contracts from the Natives, or others”).

<sup>22</sup> See, for example, Somes to Stanley, 21 December 1842, GBPP 1844 (556) XIII.1, Appendix 2, 18-20 at 20 & Somes to Stanley, 15 February 1843, GBPP 1844 (556) XIII.1, Appendix 2, 37-40 at 39.

<sup>23</sup> See, for example, Coates to Stanley, 14 August 1844, as discussed in the text accompanying n 171 below.

also be diminished by the fact that it seems simply to have been taken verbatim from the 1836 Charter establishing the colony of South Australia.<sup>24</sup>

There is also material in the Colonial Office record which indicates that, in the period 1840–41, there was an expectation that there were lands not claimed by Maori (not counting those lands they had already alienated) which, with the acquisition of sovereignty, were demesne lands of the Crown available for it to grant to settlers.<sup>25</sup> The assumption seems to have been that such “waste lands” would prove to be extensive.<sup>26</sup> This was, however, treated as a matter of fact for inquiry.<sup>27</sup> There is no suggestion that Maori would be denied property held

<sup>24</sup> Letters patent establishing the Province of South Australia, 19 February 1836. See Chapter 5, n 60.

<sup>25</sup> See, for example, Russell to the Colonial Land and Emigration Commissioners, 14 January 1840, as discussed by Donald Loveridge “‘An Object of the First Importance’: Land Rights, Land Claims and Colonization in New Zealand 1839–1852” (Report for the Crown Law Office, Wairarapa ki Tararua Inquiry, Wai 863, February 2004) [“Loveridge ‘An Object of the First Importance’”] 31–32; Russell to Hobson, 14 February 1841, CO 209/8, 31a–32b at 31b–32a (“You will accordingly assert the right of the Crown to cut wood in the Pine Forests of the Colony wherever the Land has not become the private property of the Natives or the Settlers— &, whenever the Crown alienates the Land on which this description of Timber grows, to reserve to itself a right of pre-emption on the Timber at a fixed price ...”) & 32a–b (“You will grant to that officer [appointed by the Admiralty] a Licence to cut the Timber so long as the Land remains waste—and you will reserve to the Crown the right of pre-emption whenever the Land is acquired by purchase on the part of private settlers”); 5 December 1840 Royal Instructions to Hobson, GBPP 1841 (311) XVII.493, 34–42 at 40 (“it is our will and pleasure that all the waste and uncleared lands within our said colony, belonging to and vested in us, ... shall hereafter be sold and disposed of at one uniform price per acre ...”); Russell to Hobson, 9 December 1840, GBPP 1841 (311) XVII.493, 24–31 at 30 (“It is absolutely necessary, 1st, that a commission should ascertain, and that the law should determine, what lands are private and what are public property”; “When the demesne of the Crown shall thus have been clearly separated from the lands of private persons, and from those still retained by the aborigines, the sale and settlement of that demesne will proceed according to the rules laid down in the accompanying instructions under the Royal Sign Manual”).

<sup>26</sup> See, for example, Loveridge “An Object of the First Importance”, above n 25, 32 quoting Russell’s statement to the Colonial Land and Emigration Commissioners, 14 January 1840, that New Zealand contained “districts which it is not possible to exhaust by any rational scheme of colonization for a long course of years”. See also n 27 below.

<sup>27</sup> Russell to Hobson, 9 December 1840, GBPP 1841 (311) XVII.493, 24–31 at 27 (“[Maori] have established by their own customs a division and appropriation of the soil”) & 30 (see above n 25); Colonial Office minutes at CO 209/6, 396b (Stephen to Smith, 18 February 1841: “This Despatch [Gipps to Russell, 5 October 1840] ... places beyond all doubt the fact that there are Crown Lands in New Zealand available for Sale of which till now we had no distinct proof”; Russell minute, 22 February 1841: “I am not convinced by this despatch that there is land for sale in New Zealand. ... There is no doubt however there will be land for sale in New Zealand, but it is curious that Gov<sup>r</sup> Hobson has not mentioned it”) and at CO 209/7, 185b–186a (Stephen to Smith, 9 March 1841: “I infer from what is stated [in Hobson’s despatch of 15 October 1840] ... that there can be no doubt whatever that we have land to sell in abundance,

according to their customs if, in fact, such customary entitlements extended beyond the lands occupied and cultivated by them. At most, there is an indication (discussed below) that Russell's initial instincts may have been that the Crown could grant unoccupied and uncultivated lands, perhaps subject to securing some benefit to Maori from the sales. That was, however, an attitude that did not find its way into the policy ultimately implemented.

Russell's 9 December 1840 Instructions to Hobson on the setting up of the colony did not introduce any change of approach in relation to Maori property interests from those of Normanby in August 1839.<sup>28</sup> That nothing changed after August 1839 is made explicit by additional Instructions provided to Hobson on 28 January 1841 in response to alarm expressed by the Aborigines' Protection Society in a Memorial in late December 1840 that Maori property interests were being denied. These Instructions affirm the continuing Colonial Office policy that Maori were the proprietors in law of their land.

The Aborigines' Protection Society Memorial was prompted by the agreement reached between the Government and the New Zealand Company in November 1840. The provision which attracted the Society's attention permitted the Company to purchase "any lands" in New Zealand "except from the natives".<sup>29</sup> This the Society took to be a suggestion that the Government intended to offer for sale any lands in New Zealand including even the pas, cultivations and burial places of Maori despite the fact that their "proprietary interest has not be extinguished either

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and I suppose the [Colonial Land and Emigration] Comm<sup>rs</sup> may be authorized to offer it for Sale"); Russell to Hobson, 17 April 1841, GBPP 1841 (311) XVII.493 at 121 ("I gather from your report, that there is an abundance of Crown land at the disposal of the Government, and I shall accordingly authorize the Colonial Land and Emigration Commissioners to advertise the sale of the Crown lands of New Zealand in this country, as is done in regard to the waste lands of the Australian colonies").

<sup>28</sup> Compare Russell to Hobson, 9 December 1840, GBPP 1841 (311) XVII.493, 24-31 at 30 to Normanby to Hobson, 14 August 1839, GBPP 1840 [238] XXXIII.587, 37-42 at 38-39.

<sup>29</sup> Smith to Somes, 18 November 1840, enclosing an agreement between the British Government and the New Zealand Company, GBPP 1841 (311) XVII.493, 85-87 at 87.

by conquest or treaty”.<sup>30</sup> In its Memorial the Society also endorsed the Company’s system of native reserves as a method of protecting Maori.<sup>31</sup>

On this Memorial, Russell sought Stephen’s advice, principally on whether land should be reserved to Maori as part of any Crown purchase. In speaking of reserves, Russell made it clear that he “[took] for granted” that lands occupied and cultivated by Maori would be excluded from any Crown sales. Beyond those lands, however, he sought Stephen’s advice on whether further benefit in the sales should be secured to Maori through reserves of land or through applying 15% of the purchase money for their benefit or a combination of both (as was his preliminary preference).<sup>32</sup> Stephen responded in a memorandum to Smith of 28 December expressing amazement that Government policies could be so misconstrued as “to suppose that they authorize the dispossession of the Natives from so much as an Acre of Land, unless they first freely sold it to the Governor, or unless, antecedently to the proclamation of British Sovereignty, they had sold it for an equivalent price, and according to their Native customs”.<sup>33</sup> With that background, Stephen’s response to Russell’s query about securing reserves or other benefit to Maori from Crown sales was that the idea was based upon “some contradiction, or at least ... endanger[ed] some confusion of ideas”.<sup>34</sup>

If I dealt with you for a tract of Land, paying you the fair value, as determined by an arbiter between us, it would be at variance with the sense of that transaction to acknowledge in you any further claim on the Land, or any thing less than an absolute claim to the whole purchase money. Why is not this true of a purchase of Land in New Zealand, in which the Chiefs are the Sellers and Capt. Hobson on the part of the Crown, the Buyer? To reserve a part of the Land for them is virtually to admit that they have not had the value of the rest. To pay to them 15 per Cent of the future purchase money is virtually to admit that our purchase from them does not create in us an absolute and

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<sup>30</sup> “The Memorial of the Aborigines’ Protection Society to Lord John Russell, Her Majesty’s Principal Secretary of State for the Colonial Department”, c. late December 1840, CO 209/8, 424a-425a at 424a-b.

<sup>31</sup> Ibid 425a.

<sup>32</sup> Russell to Stephen, 24 December 1840, CO 209/8, 442a-b.

<sup>33</sup> Stephen to Smith, 28 December 1840, CO 209/8, 443a-450b at 443a-b.

<sup>34</sup> Ibid 443b-444a.

plenary title, but merely constitutes us their Brokers for the Sale of the Land at a Commission of 85 per Cent.

Stephen pointed out that if a transaction were inequitable it could not be dressed up by reserving to Maori some of the very lands of which they had been cheated.<sup>35</sup>

It seemed a virtuous and liberal action to secure to these Savages one tenth of their own property as some writers convert a Highwayman into a Hero by making him give back a few Guineas out of the purse he has taken.

Rather than reserves, it would be preferable to declare certain property of Maori to be “absolutely inalienable in favour even of the British Crown” and that the consideration provided for in every contract with Maori for the purchase of land should, in addition to the “immediate purchase money”, include a liability of the Government to pay to Maori or to “Protectors on their behalf” a percentage of any price which the Government might obtain in the future from resale of the land<sup>36,37</sup>.

In short, I would take care that the mere forms and phraseology of the Contracts should embody and recognize the great cardinal principle, that the Lands are not ours, but theirs—that we have no title to them, except such as we derive from purchase—and that their future claims upon us in respect of such Lands, are the Claims, not of Paupers for Alms, but of Vendors for the fulfilment of a binding Contract. Subject to the fulfilment of these terms, I would maintain the right of the British Gov<sup>t</sup> to the Land, without making any Reserves in the proper sense of that word.

Stephen expanded on the manner in which Maori property could be made inalienable, citing the example of the Church Missionary Society trusts of Maori land.<sup>38</sup> He suggested that such land as was “essential to the comfort, health, or maintenance of the Natives” could be conveyed to the Protector of Aborigines and to the Members of the Executive Council to be held inalienable for the benefit of those who “according to the Native Custom of the Country, had been entitled to

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<sup>35</sup> Ibid 444b-445a.

<sup>36</sup> Ibid 445a-b.

<sup>37</sup> Ibid 445b-446a.

<sup>38</sup> Ibid 446a (“I should be disposed to imitate the example, and adopt the principle of the best teachers we have—I mean the Church Missionary Society”) & 446b-447a (“The Church Missionary Society created such trusts as this, and I believe they judged rightly in doing so”).

them”.<sup>39</sup> A further advantage Stephen saw in this approach was that protection of such property rights at law would be assisted by trustees “bearing English Names”.<sup>40</sup>

The outlandish Names of the New Zealanders are a sort of non-conductus for all human sympathy when brought before twelve men who have been talking English all their lives. Therefore, I am for the interposition of Trustees with pronounceable Names, through whom the Natives might sue and be sued. I am afraid that mere Lawyers would laugh at us for this, as a most cumbrous expedient, but I do not think we should have to apprehend the ridicule of any one who is accustomed to reflect on what is passing within him, and about him.

Smith passed Stephen’s note on to Russell who, on 31 December, responded that he agreed with Stephen about reserves.<sup>41</sup> He directed that instructions regarding Maori land be given. He noted that it appeared necessary to confirm that “lands occupied by the Natives, & not sold by them, should be recognized as their property”.<sup>42</sup> The Aborigines’ Protection Society were to be told that “the Instructions already given, & those to be given, will be communicated to Parliament, & will evince the interest taken by the Gov<sup>t</sup> in this question.”<sup>43</sup>

The additional Instructions were drafted by Stephen on 1 January 1841. They were approved by Russell on 5 January and issued and sent to Hobson on 28 January.<sup>44</sup> They covered five numbered points. First, they confirmed “the general principles” that:<sup>45</sup>

The territorial rights of the natives, as owners of the soil, must be recognized and respected, and that no purchases hereafter to be made from them shall be valid, unless such purchases be effected by the governor of the colony on Her Majesty’s behalf.

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<sup>39</sup> Ibid 446b.

<sup>40</sup> Ibid 447a-b.

<sup>41</sup> Russell minute, 31 December 1840, CO 209/8, 452a-453b.

<sup>42</sup> Ibid 452a-b.

<sup>43</sup> Ibid 453b.

<sup>44</sup> Russell to Hobson, 28 January 1841, GBPP 1841 (311) XVII.493 at 51-52 (also CO 209/8, 454a-456b).

<sup>45</sup> Ibid 52.

In addition, the Surveyor-General and the Protector of Aborigines were required to identify Maori lands and those tracts of land “essential to [their] well being” which should be regarded as inalienable.

Secondly, Hobson was to enact a law to declare the invalidity of “any conveyance, or contract, or will, for the disposal of land” by Maori to any person of European birth of descent except when expressly authorised by the Governor on the report of the Protector of Aborigines.<sup>46</sup> Thirdly, on every resale of land purchased by the Crown from Maori, 15-20% of the purchase money was to be “carried to the credit of the department of the protector of aborigines ... [to] constitute a fund for defraying the charge of the protector’s establishment, and for defraying all other charges ... for promoting the health, civilization, education and spiritual care of the natives”.<sup>47</sup> Fourthly, the land claims commissioners were “in any case where such a measure shall be found expedient” to be given a summary jurisdiction to determine conflicting Maori claims to land (within and between tribes).<sup>48</sup> Fifthly, Hobson was to enact legislation to appoint the Protector of Aborigines as the “advocate or attorney *ex officio*” for Maori “in all suits, prosecutions, and other proceedings to which they may become parties”.<sup>49</sup>

### **The contest intensifies, 1842–43**

The Colonial Office view of the nature and extent of Maori interests in land became the subject of an important exchange of correspondence with the New Zealand Company in the period October 1842 to March 1843. It is necessary to give some background. However, because the history of dealings between the Colonial Office and the Company which led to this exchange, and which continued to dominate British politics in relation to New Zealand until at least 1846, have

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid. Little came of this instruction: see Alan Ward *National Overview* (Waitangi Tribunal Rangahaua Whanui Series, GP Publications, Wellington, 1997) vol 1, 22-23 & 44 & vol 2, 28 & ch 20.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

been well described by Patricia Burns and Donald Loveridge, it is possible to summarize.<sup>50</sup>

By October 1840 the New Zealand Company appears to have appreciated that its attacks on the Colonial Office and its New Zealand policy were getting it nowhere. At that point, it seems that the Company changed tack and decided to attempt an accommodation with the Colonial Office. Separately, they approached not only Russell, the politician, but also, and unusually, Stephen, the public servant, who had been the object of much intemperate invective by members of the Company.<sup>51</sup> Stephen was approached by Charles Buller who appears, from an extraordinary account given by Stephen when his integrity was later impugned by the Company, to have disarmed Stephen by frankly acknowledging the desperate position of the Company and seeking his help. Stephen later speculated whether he had allowed himself to be flattered and had been too anxious to demonstrate that he had no animus against the Company. He also acknowledged liking and feeling sorry for Buller for whom he had “a sort of fellow feeling for a Brother Barrister whom I saw struggling out of his depth in an attempt to establish a professional reputation”. Stephen seems to have accepted that it was right to come to some accommodation with the Company since steps had not been taken to prevent it proceeding with its colonisation plans in 1839.<sup>52</sup> In a contemporary minute, he reported to Smith that the Company, through Buller, acknowledged itself to be “completely defeated” and was “suing for mercy”. He himself recommended that such “suit ... ought to be graciously entertained”.<sup>53</sup>

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<sup>50</sup> Patricia Burns *Fatal Success: A History of the New Zealand Company* (Heinemann Reed, Auckland, 1989) [“Burns *Fatal Success*”] chs 20-29; Loveridge “An Object of the First Importance”, above n 25, 42-45, 90-102, 196-219, 306-332.

<sup>51</sup> See, for example, Chapter 13, text accompanying n 44; and [Charles Buller] *Responsible Government for Colonies* (2nd ed, James Ridgway, London, 1840) chs 6 (“Mr. Mothercountry, of the Colonial Office”) & 7 (“Mr. Mothercountry’s Faults: The Sighing Rooms at the Colonial Office”).

<sup>52</sup> Stephen to Stanley, 15 December 1841, CO 209/11, 462a-503a at 464a-465b.

<sup>53</sup> Stephen to Smith, 4 October 1840, CO 209/8, 320a-325b at 325b.

By the time of Buller's overture to Stephen, Russell himself had also been approached and was also of the view that an accommodation should be reached.<sup>54</sup> The upshot was that Stephen assisted Buller to put together the terms of an agreement between the Government and the Company which was entered into in November 1840.<sup>55</sup> Under the agreement, the Company was to be given a charter for forty years for the promotion of settlement. (The Charter was granted in February 1841.<sup>56</sup>) Under a formula in the agreement, the Company was to obtain a grant from the Crown of four acres for every one pound of expenditure on the purchase of land and costs of the organised emigration it had incurred, very broadly expressed, down to the date of the agreement.<sup>57</sup> The costs were to be verified by an accountant, Mr Pennington. The lands to be assigned were to be selected by the Company from lands "in that part of the colony of New Zealand at which their settlement has been formed, and to which they have laid claim in virtue of contracts made by them with the natives or others, antecedently to the arrival of Captain Hobson, as Her Majesty's Lieutenant-governor at New Zealand". Such lands were required to include lands already on-sold to emigrants by the Company. The agreement provided that the total size of the tracts of land to be selected by the Company could not "collectively amount to more than 160,000 acres". The Company was obliged to relinquish all claims to land not granted to it and to accept that the reservations it had committed to make for Maori would be provided by the Crown out of the lands to which it was otherwise entitled, with the Crown making such arrangements as to such reservations "as ... shall seem just and expedient for the benefit of the natives".

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<sup>54</sup> See Stephen to Smith, 14 October 1840, CO 209/8, 279a-290a at 279a-b; and Stephen to Stanley, 15 December 1841, CO 209/11, 462a-503a at 464b-465a.

<sup>55</sup> See above n 29.

<sup>56</sup> Charter for Incorporating the New Zealand Company, 12 February 1841, GBPP 1841 (311) XVII.493 at 90-96.

<sup>57</sup> The agreement recited that the Company had "invested large sums of money in the purchase of lands in New Zealand from the native chiefs and others; in taking up, chartering, and despatching ships for the conveyance of emigrants thither; in the maintenance of such emigrants before and during the outward voyage; in the purchase and transmission of stores for the public use of the settlers collectively on their arrival; in surveys; in the erection of buildings, or the erection of other works dedicated exclusively to the public service of the settlement; and in other heads of expenditure or absolute liabilities, unavoidably required or reasonably incurred for the before-mentioned purposes".

The Company was delighted with the agreement reached. Burns quotes a letter written by Edward Gibbon Wakefield to Sir William Molesworth in which he says that “[t]he satisfaction of the triumph is almost intolerable.” The Government had offered “all that we could desire”. Wakefield was very glad that Molesworth’s shares in the Company “must now turn out very profitable”.<sup>58</sup> When the Charter was issued, Russell was the guest of honour at a celebratory banquet put on by the Company.<sup>59</sup> The Company was referred to, no doubt with some irony, by Smith as “[o]ur new friends”.<sup>60</sup>

Despite the agreement, the Company continued to try to wring further concessions from the Colonial Office. While Russell remained Secretary of State it had some significant successes.<sup>61</sup> In particular, it achieved a spectacular lift in the cap of 160,000 acres, based upon its expenditure as verified by Pennington, to approximately 1 million acres.<sup>62</sup> The Colonial Office appears to have been shocked by the scale of the expenditure claimed by the Company and suspicious that it had been deliberately understated at the time of the negotiations.<sup>63</sup> Certainly it quickly tired of the Company and its “system of puffing and falsehood”.<sup>64</sup> Stephen himself was deeply offended when the Company impugned his honesty in connection with his interpretation of a clause of the agreement, which was said to be inconsistent

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<sup>58</sup> Burns *Fatal Success*, above n 50, 167.

<sup>59</sup> Ibid 170.

<sup>60</sup> Smith to Russell, 27? October 1840, CO 209/8, 307a-308a at 307a.

<sup>61</sup> Burns *Fatal Success*, above n 50, 168-174.

<sup>62</sup> Smith to Somes, 28 May 1841, GBPP 1842 (569) XXVIII.293 at 4-8.

<sup>63</sup> Burns *Fatal Success*, above n 50, 171; Stephen to Smith, 27 August 1841, CO 209/11, 271a-279b at 277b-278b (referring to the Company “reaping exclusively the fruits of their own misrepresentations” and writing that “[i]f it had been known or supposed that they were to acquire so great an extent of Land, it may be doubted whether any agreement at all would have been made with them regarding their future acquisitions. For the error as to the extent of their outlay they alone are responsible. Perhaps they were really ignorant of the amount of their expenditure, and practiced no willful deception on Mr Buller when they authorized him to represent it as not exceeding £120,000”); Russell minute, 28 August 1841, CO 209/11, 279b-280a at 280a (“the advantages to the Company are much greater than had been anticipated”); Smith to Somes, 1 September 1841, CO 209/11, 283a-284b at 284a-b (“according to the award of Mr Pennington, the Lands thus acquired by the Company will probably much exceed one million Acres—a result unforeseen by Lord John Russell, and, as he believes, by the Company themselves when the original Agreement was made”).

<sup>64</sup> Stephen, 27 August 1841, CO 209/11, 281a-282a at 282a.

with his representation at the time it was negotiated.<sup>65</sup> The ferocity of the attack unsettled him so much<sup>66</sup> that he was effectively to take a backseat in dealing with the Company about New Zealand from 1842.<sup>67</sup> By December 1841, Stephen was expressing regret about the accommodation reached with the Company in November 1840.<sup>68</sup>

Despite the exasperation of the Colonial Office, the Company had done well during Russell's tenure as Secretary of State for the Colonies. It is not clear whether Russell had some sympathy for the aims of the Company (later, in opposition, he was to take a pro-Company stance in Parliament<sup>69</sup>), or whether the Whig's paper-thin majority meant that he could not be indifferent to its political clout. It may be that he was simply worn down by the persistence of the Company.<sup>70</sup> Whether or not Russell was sympathetic to the Company's position, it was a blow when the Whig Government fell following the general election in the summer of 1841 and Russell was replaced as Secretary of State by Lord Stanley.<sup>71</sup>

The change-over occurred in September 1841. In addition to Stanley succeeding Russell, George Hope succeeded Smith as Parliamentary Under-Secretary. Edward Stanley, the future 14th Earl of Derby, was someone of deep political conviction and philosophy. He began his political career as a Whig and held office as Under-Secretary for the Colonies (1827–28), Chief Secretary for Ireland (1830–33), and Secretary of State for the Colonies (1833–34). During his time as Secretary of State, he oversaw the framing and enactment of the Abolition of Slavery Act.

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<sup>65</sup> See Burns *Fatal Success*, above n 50, 245–246.

<sup>66</sup> See the indications of this in Stephen to Stanley, 15 December 1841, CO 209/11, 462a–503a and Stephen to Hope, 8 January 1842, CO 209/11, 504a–508b.

<sup>67</sup> Burns *Fatal Success*, above n 50, 254.

<sup>68</sup> See above n 52.

<sup>69</sup> See, for example, Lord John Russell (19 June 1845) 81 GBPD HC cc 929–947.

<sup>70</sup> Burns *Fatal Success*, above n 50, 173 writes: “[t]he company did not let up its pressure on Lord John Russell. Its cocky, cheeky letters, full of virtue and self-congratulation, are revealing, and essential reading for the student of the company”; “Lord John Russell was ... a born leader with a strong personality. The New Zealand Company was one of a very few organisations which were almost too much for him”; “it can be said that from the signing of the agreement until Lord John left office in early September 1841, the company never ceased to pressure him, or to see how far the agreement could be stretched”.

<sup>71</sup> Burns comments that the Company “was as sad as Queen Victoria”. Burns *Fatal Success*, above n 50, 174.

Stanley was a commanding speaker in Parliament, and played an important part in the Reform Bill debates of 1831–32. He resigned from Melbourne’s Government over a disagreement about Irish Church reform in 1834. His personal political convictions were conservative. He sought “peaceful, well-ordered progress” through “moderate judicious reform” and was opposed to “reckless and destructive radical change”. With these views, it is not surprising that he parted with the Whigs and gravitated towards Peel’s Tories. In May 1838, he endorsed the view that it was through the Tories that the traditional Whig values of moderate and responsible reform would be achieved. Stanley remained Secretary of State for the Colonies in Peel’s Government until his resignation in December 1845 (his relations with Peel had cooled from 1844), from November 1844 in the House of Lords (which deprived the Government of his voice in the House of Commons in the New Zealand debates of 1845).<sup>72</sup> In 1846, he opposed Peel’s repeal of the Corn Laws. Eventually, after the Whig years in office (1846–52), Stanley, who had by now succeeded as the Earl of Derby, led the Tories and was Prime Minister for three short terms between 1852 and 1868.<sup>73</sup>

Less is known of George Hope.<sup>74</sup> As Under-Secretary from September 1841 to January 1846, he was, however, an important figure in New Zealand history, a significance that may have been amplified as Stephen first withdrew from New Zealand matters in the Colonial Office and then moved towards retirement. Without researching his contribution through the Colonial Office files, it is difficult to assess his abilities. Those memoranda produced by him consulted for this thesis suggest that, although not in Stephen’s league, he was capable enough (although his handwriting, in common with that of almost all Under-Secretaries of the period, was appalling). While his questioning of Edward Gibbon Wakefield in the 1840 Select Committee hearing on New Zealand and his vote in favour of Lord Eliot’s

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<sup>72</sup> Following his elevation there as Lord Stanley of Bickerstaffe. Before then, although referred to by the courtesy title of “Lord Stanley”, he had sat in the House of Commons as the Member of Parliament for North Lancashire.

<sup>73</sup> Angus Hawkins “Stanley, Edward George Geoffrey Smith, fourteenth earl of Derby (1799–1869)” *Oxford Dictionary of National Biography*.

<sup>74</sup> There is no *Oxford Dictionary of National Biography* entry for Hope.

draft report might have suggested otherwise,<sup>75</sup> Hope does not seem to have been particular sympathetic to the Company when in office.<sup>76</sup> He was at times exasperated and offended by the Company and its arguments.<sup>77</sup> Although outside the scope of this thesis, it would be interesting to see if Hope's 1840 view as to the continuing sovereignty of American Indian nations<sup>78</sup> carried through into views about the relationship between British sovereignty and Maori society.

It fell to Stanley, Hope and Stephen to deal with the emerging problems facing the New Zealand Company after 1842. During 1841, the Colonial Office had begun to receive reports, including from Hobson, which called into question the validity of the Company's purchases from Maori.<sup>79</sup> Initially the Company batted away these concerns<sup>80</sup> and the Colonial Office did not pursue them, clearly on the basis that they would be the subject of investigation in due course in New Zealand under the land claims legislation. That investigation, conducted by William Spain, did not get under way until May 1842. Spain had been appointed by the Colonial Office as a land claims commissioner in January 1841 (addressing the New Zealand Company

<sup>75</sup> See Chapter 15, text accompanying ns 42-47 & 69.

<sup>76</sup> Hope's support for the Company in 1840 may therefore simply have been prompted by political considerations while in opposition.

<sup>77</sup> See, for example, text accompanying n 100 below.

<sup>78</sup> See text accompanying n 45 above.

<sup>79</sup> Hobson to Secretary of State for the Colonies, 15 October 1840, GBPP 1841 (311) XVII.493, 113-121 at 114, enclosing a letter from Willoughby Shortland at 120-121 ("your Lordship will perceive [from Shortland's letter] that the chiefs do not recognise [the Company's] titles, and deny having sold it to them. This question will, of course, be left to the decision of the Commissioners"); Hobson to Secretary of State for the Colonies, 10 November 1840, GBPP 1841 (311) XVII.493, 126-127 at 127 ("The title of the Company to the land they have re-sold, is at least questionable. It is disputed by the natives, by the Church Missionary Society, who have bought extensive tracts of the land claimed by the Company in trust for the natives; and by many British subjects, on the grounds of priority of purchase"); Coates to Russell, 9 March 1841, enclosing a petition to the Queen from Rev William Williams dated 1 February 1840 concerning the need for inquiry into the "pretended purchases" of the Company, GBPP 1841 (311) XVII.493 at 139-140. See also Colonial Office minutes of 9 March 1841 and 27 April 1841 at CO 209/7, 186b-188b & 255b respectively; Smith to Somes, 16 April 1841, GBPP 1841 (311) XVII.493 at 127; Smith to Somes, 19 March 1841, GBPP 1841 (311) XVII.493 at 141.

<sup>80</sup> Somes to Smith, 29 March 1841, GBPP 1841 (311) XVII.493 at 141-145 ("the subject of Mr. Coates' letter and Mr Williams' petition may be deemed altogether bygone ..."); Somes to Russell, 19 April 1841, GBPP 1841 (311) XVII.493, 128-130 at 129 ("nothing has been reported to us which would permit us to allow that these statements [of Lieutenant-Governor Hobson] are correct. We have not heard of a single instance in which a bargain between the Company and the natives has been disputed by the latter, though accounts have reached us of strenuous efforts made by one of the church missionaries to cause such disputes").

concern at the 1840 Select Committee that commissioners appointed from New South Wales would not be sufficiently independent<sup>81</sup>) but did not arrive in New Zealand until December 1841 and did not assume responsibility for investigating the Company's purchases for some months.<sup>82</sup>

Initially William Wakefield, the principal officer of the Company in New Zealand, was not perturbed by the prospect of Spain's investigation, which opened on 18 May.<sup>83</sup> By 30 May, however, he seems to have become alarmed by the course of events. Although purporting to "not the smallest apprehension as to the result of the inquiry", he expressed concern to the Company in London that the delays of investigation would impede the Company's sales of land and protested that the November 1840 agreement should have made it unnecessary for the Company's purchases to be investigated at all. He blamed Hobson for not understanding that the agreement superseded the need for investigation of the Company's titles and for persisting with the original plan for investigation "to meet the conditions of the treaty of Waitangi". In so doing, he had broken the "assurance" created by the November 1840 agreement "that all the difficulty the Company had encountered in their views of colonization had been removed by the generous conduct of Lord John Russell".<sup>84</sup>

Contrary to William Wakefield's expression of confidence in the result of the inquiry and his opinion "nor do I think that Mr. Spain has any idea of the validity of the Company's titles being questionable",<sup>85</sup> he had reason by 30 May to be very concerned indeed. That is apparent from his own record of proceedings in the Commissioner's Court in May, subsequently included by him in a letter of 3 June

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<sup>81</sup> See Chapter 15, text accompanying n 62.

<sup>82</sup> David Armstrong "The Land Claims Commission: Practice and Procedure, 1840–1845" (evidence for Muriwhenua Land Claim, Wai 45, 1996, I4) ["Armstrong 'The Land Claims Commission'"] 35-38 & 108-110.

<sup>83</sup> See Loveridge "An Object of the First Importance", above n 25, 93.

<sup>84</sup> William Wakefield to the Secretary of the New Zealand Company, 30 May 1842, GBPP 1844 (556) XIII.1, Appendix 2, 9-10 at 10.

<sup>85</sup> Ibid.

to the Company.<sup>86</sup> The record showed that the Company's purchases were disputed by both settlers and Maori (Wakefield felt himself on the other side of "a long-nurtured vindictive family law-suit"<sup>87</sup>). Worse, it was evident that Spain himself was taking a keen interest in it all. And indeed Spain's inquiries were to uncover substantial problems with the Company's purchases.<sup>88</sup>

Wakefield's reports, indicating at best delay and at worst the prospect that the Company's ambitions were under serious threat, must have been most unwelcome news to the Company when received a few months later in London. It seems likely that the Company was already under the financial pressure that was to be acknowledged in May 1843.<sup>89</sup> It was certainly galvanised into strenuous efforts to forestall Spain's inquiry by insistence that any such investigation was contrary to the agreement reached in November 1840.

The correspondence between October 1842 and March 1843 between the Company and the Colonial Office is important in understanding the Colonial Office attitude to the Treaty of Waitangi and the Crown's recognition of its obligations to recognise and protect Maori property in land. It is interesting, too, because it marks a shift in the debate from one concerned with whether Maori had property in land (a necessary precondition for recognition of validity in pre-Treaty sales to Europeans) to one concerned with the extent of such property interests (and therefore with what land was available for future settlement through Crown grant). It is the beginning of the "waste lands" controversy, with the Company taking the line that Maori interests in land were confined to their habitations and cultivations, leaving unoccupied and uncultivated lands available for settlement as demesne lands of the Crown. Although the correspondence for the Company was conducted by Somes, its Governor, the style of at least some of it (which is marked by

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<sup>86</sup> William Wakefield to the Secretary of the New Zealand Company, 3 June 1842, GBPP 1844 (556) XIII.1, Appendix 2, 10-14.

<sup>87</sup> Ibid 12.

<sup>88</sup> See Loveridge "An Object of the First Importance", above n 25, 92-93; and Burns *Fatal Success*, above n 50, 214-215 & 224-225.

<sup>89</sup> See Burns *Fatal Success*, above n 50, 248-249.

invective, bluster and length) suggests that Edward Gibbon Wakefield was a principal author.

The opening salvo was fired by Somes in a letter to Stanley of 24 October 1842, enclosing William Wakefield's 30 May and 3 June reports. The letter picks up Wakefield's complaint that the proceedings of Commissioner Spain were "founded on an entire misconception" because, following the agreement of November 1840 and Pennington's confirmation of expenditure, the Company was entitled to a grant of land. The Company's entitlement no longer "rested ... solely upon those purchases from the native chiefs". Such purchasers were "renounced in consideration of a grant from the Crown to a much smaller extent under the agreement in question". The title of the Company to land in New Zealand rested "exclusively upon the letter and spirit of the agreement of November 1840", as the Colonial Office had accepted in confirming Pennington's award.<sup>90</sup> As a result, the Company's entitlements did not fall "within the scope of an inquiry into the validity of titles derived from the aboriginal inhabitants". Stanley was called upon to direct Hobson to make the grant.<sup>91</sup>

Hope responded on behalf of Stanley on 7 November 1842. Stanley refused to accede to the proposition that the Company's titles did not need to be investigated. Even if the construction the Company put on the agreement was correct (a proposition not accepted) it was

impossible to maintain that the rights of the natives of New Zealand to the soil which had been recognized as indisputable by Her Majesty's Government in 1839, could be thereby affected; or that the Crown either intended to deprive them, or did in fact deprive them of "the full, exclusive and undisturbed possession of their lands and estates," which had been "confirmed and guaranteed" to them by the treaty of Waitangi.<sup>92</sup>

Somes responded on 11 November. He asserted that it was not proper to look outside the "four corners of the agreement", which did not suggest that "the

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<sup>90</sup> The reference was to Smith's letter to Somes of 28 May 1841; see above n 62.

<sup>91</sup> Somes to Stanley, 24 October 1842, GBPP 1844 (556) XIII.1, Appendix 2, 8-9.

<sup>92</sup> Hope to Somes, 7 November 1842, GBPP 1844 (556) XIII.1, Appendix 2, 14.

fulfilment of the grant ... was to be dependent in an manner or degree upon the validity of the Company's antecedent purchases from the natives." It was wrong to import into the agreement the terms of Normanby's Instructions to Hobson. The Company was not arguing for despoiling Maori of their property. The Government had entered into an engagement with the Company for a "full and unconditional grant of the land". In so doing, it became responsible to extinguish "any titles incompatible with the full and entire possession guaranteed to us". The Government might well have a duty to make some compensation to Maori. Since the agreement, however, "the New Zealand Company has nothing to do with the native claim; it looks to the Government alone for the fulfilment of its agreement, and does not venture to interfere with the mode in which Her Majesty's Government may enable itself, with justice to third parties, to fulfil its equitable contract with the Company".<sup>93</sup>

In a further letter of 21 December, written after the Company had had an interview with Stanley, Somes suggested that, as an alternative to compensating any European third parties with grievances, the Government could compensate the Company if it was not able or willing to fulfil its obligations.<sup>94</sup> In the same letter, he proposed a new solution for conflicting claims, European and Maori: the Governor should be instructed to make the grants of land to the Company subject to conflicting claims. As explained by Somes, however, this offer was hardly a concession on the part of the Company. That was because, as he went on to say, there could be no such conflicting claims by Europeans:

The Crown, in taking possession of New Zealand, set aside all European titles founded on purchases from the natives, and gave the Company, by the agreement, the first title which it ever gave to any lands in New Zealand.

The only realistic potential claims were those of Maori, "who may say that the lands which we claimed by purchase never had been fairly purchased from their lawful proprietors, and that the Crown, in granting such lands to the Company,

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<sup>93</sup> Somes to Stanley, 11 November 1842, GBPP 1844 (556) XIII.1, Appendix 2, 15-16.

<sup>94</sup> Somes to Stanley, 21 December 1842, GBPP 1844 (556) XIII.1, Appendix 2, 18-20 at 19.

granted that which was not its property”. This claim was either one of “insurmountable magnitude” or was of “very manageable dimension, according to the standard by which the proprietary rights of the natives of New Zealand are to be estimated”.<sup>95</sup> Some explained why Maori claims were “very manageable”.<sup>96</sup>

If an interest in land, never yet recognized by any Christian nation as possessed by savages, is to be attributed to the natives of New Zealand; if the aborigines are to be regarded as being, with the exception of such small portions as they may have legally sold, proprietors of the whole surface of New Zealand, ninety-nine hundredths of which are probably covered with the primeval forest, then, doubtless, the claims of the natives would be co-extensive with our own; an inquiry into them would put our title to our whole property again at issue; and the agreement and award would be mere nullities. But the only interest in land which our law has ever recognized as possessed by savages, is that of “actual occupation or enjoyment”, and this would obviously be a peculiarly fitting measure for the rights of an agricultural population like that of New Zealand, requiring no extent of territory for hunting or pasture, but confining itself to the small area which it could cultivate. This, the directors are happy to find, is the very one specified in the charter of the colony, and the Governor’s instructions under the sign-manual, in defining those lands which were to be regarded as the property of the natives, and not of the Crown. If the claims of the natives be limited to such lands in their actual occupation, as they may now assert that they did not alienate to us, the question can, at the utmost, become one only of a few patches of potato-ground and rude dwelling-places, and can involve no matter of greater moment than some few hundreds of acres. It would be useless indeed to violate the agreement by putting us to the public proof of an entire title, if the result of the inquiry were to affect no weightier interests than these.

Colonial Office responded to the Company’s 11 November and 21 December letters on 10 January 1843 in a letter from Hope. Much work had gone into the letter. Hope had prepared a first draft<sup>97</sup> sometime before 27 December when he asked Stephen to review it, asking specifically for it to be examined critically. Stephen had clearly either distanced himself or been distanced from dealings with the Company by this time: Some’s letter of 21 December is marked by Stephen

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid 19-20.

<sup>97</sup> CO 209/18, 415a-439b.

“this relates to viva voce communications of which I know nothing”;<sup>98</sup> Hope’s covering note of 27 December (written on the draft itself) to Stephen begins “[t]his being one of the subjects you expect me to write upon I have tried to but must ask you to give me the benefit of an unscrupulous criticism on it”.<sup>99</sup> Hope explained to Stephen in his covering note that “[t]he draft is much longer & more controversial than I like but the propositions of the Co<sup>y</sup> strike me as so monstrous & are advanced with so much hardihood that I did not like to leave them unnoticed”.<sup>100</sup> Stephen comments were contained in a minute of 28 December (also written on Hope’s draft) which he, self-deprecatingly, referred to as a “mere impromptu outline” in which he had relied upon his memory, not having the files with him.<sup>101</sup> Hope then prepared a second draft<sup>102</sup> of the letter before 30 December (mostly following his own initial draft rather than picking up Stephen’s suggestions), which he submitted to Stanley together with the first draft containing Stephen’s comments.<sup>103</sup> Stanley reviewed the documents and drew on Stephen’s comments in changing Hope’s re-draft. A final draft<sup>104</sup> was resubmitted to Stanley on 7 January by Hope and approved on 8 January. It was then sent to Somes on 10 January.<sup>105</sup>

It is not necessary to track through the suggestions and changes made in the drafting process or to analyse the extent to which there may have been different

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<sup>98</sup> Stephen to Hope, 22 December 1842, CO 209/18, 387b.

<sup>99</sup> Hope to Stephen, 27 December 1842, CO 209/18, 415a-b at 415a. The extent of Stephen’s discomfort in dealing with the Company is indicated by a comment at the end of his note on Hope’s draft:

For myself I have no objection to prepare the required Draft ... except as every reasonable man must object to holding the pen against disputants who have done all in their power to upset his equanimity and to provoke his personal resentment. ... It more concerns Lord Stanley than me whether his Lordship employs me to block out what is to be written in his name and by his orders to the Company. I have lived and written here so long and so much that I suppose it is not difficult to detect the tricks & habits of my pen, and there might be an inconvenience in the Company being able to say that a very unwelcome Letter was in any sense the composition of a person whom they had always regarded, and treated with hostility, and who can therefore hardly be supposed to be exempt from some corresponding ill-will to them.

Stephen to Hope, 28 December 1842, CO 209/18, 416a-421b at 420b-421a.

<sup>100</sup> Hope to Stephen, 27 December 1842, CO 209/18, 415a-b at 415b.

<sup>101</sup> Stephen to Hope, 28 December 1842, CO 209/18, 416a-421b at 416a & 420b.

<sup>102</sup> CO 209/18, 402a-414b.

<sup>103</sup> See Hope’s note of 30 December 1842 to Stanley on the top of the first draft at CO 209/18, 415a.

<sup>104</sup> CO 209/18, 388a-400a.

<sup>105</sup> Hope to Somes, 10 January 1843, GBPP 1844 (556) XIII.1, Appendix 2, 20-22 (also CO 209/18, 388a-400a).

shades of view between Stanley, Hope and Stephen. What is important for present purposes is the final version sent to the Company and a few of the drafting suggestions which are not inconsistent with it but which impart something of the attitude of Hope and Stephen to the Company's arguments.

The letter first rejected the Company's contention that Normanby's Instructions to Hobson were not relevant and had been overtaken by the agreement:<sup>106</sup>

Lord Stanley has received this intimation with extreme astonishment. The letter to which reference is here made had been presented to Parliament and printed, in the session immediately preceding the date of the agreement with the New Zealand Company. In that letter Her Majesty distinctly recognized the proprietorship of the soil in the natives; and disclaimed alike all territorial rights, and all claims of sovereignty, which should not be founded on a free cession by them. Lord Stanley cannot allow the Company to plead ignorance of a document thus formally and authoritatively communicated to the public, or permit them to assume that in entering into the arrangement with them, Her Majesty could contemplate deliberately violating the faith which she had publicly pledged to the natives, on conveying to the Company rights which on the part of the Crown she had solemnly disclaimed.

Hope then responded to the claim that the agreement meant that the Company's purchases did not have to be investigated. The November 1840 agreement was said by Hope to have been "founded on the assumed correctness" of the Company's representation that it had acquired "by purchase from the natives a proprietary right to about 20,000,000 of acres of land":

Lord Stanley cannot now permit it to be maintained, either that the natives had no proprietary right in the face of the Company's declaration that they had purchased those very rights, or that it is the duty of the Crown, either to extinguish those rights, or to set them aside in favour of the Company. The fact of validity or invalidity of the purchase was known to the Company, and to them alone; the assumed validity was the basis of the promised grant; and if the facts were incorrectly stated at the time, or were incapable of proof, with the Company must rest the inconvenience and loss resulting from their own mis-statements.

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<sup>106</sup> Ibid 21.

The letter also made it clear that it was impossible that the Company's entitlements could be based on the say-so of "an accountant residing in London":

The grant by Her Majesty of any land, must be taken to be conditional upon the fact asserted by the Company, that by their previous arrangements Her Majesty had it in fact to grant; and the investigation of that question has been committed, by law, with which Lord Stanley cannot interfere, not to Mr. Pennington, but to a local and legally constituted tribunal. It is the duty of that tribunal not to suffer native rights, which have been recognized by Her Majesty, to be set aside in favour of any body of settlers, however powerful, and Her Majesty has neither the power nor the desire to influence their decisions.

Hope advised that the Government could not accede to the Company's proposal that the Governor should make grants to the Company exempting only occupied Maori lands (on the basis that "waste lands" were "lands of which no person could be proved to be entitled to act as vendor").<sup>107</sup> Hope reported that Stanley acknowledged the "probability" that much of the land in New Zealand could be "waste". He refused, however, to direct the Governor to make a grant "overrid[ing] all prior titles except those of the natives, or to define what constitutes a native title". These subjects required "inquiry on the spot". The most Stanley was prepared to do was to permit grants to the Company "of a *prima facie* title in the lands claimed" which would be conditional, "subject to prior titles to be established as by law provided". Hope concluded that Lord Stanley had asked him to say "that he feels he has carried concession to the utmost limit to which he can be justified in permitting it to reach, consistently with his duty towards others".<sup>108</sup>

The letter was, as has been discussed, a combined effort. Hope's immediate reaction to the Company's arguments is indicated by his characterisation of them as "monstrous" in his covering note to Stephen. His initial draft addressed first the

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<sup>107</sup> Ibid.

<sup>108</sup> Ibid 22.

Company's claim that no Christian nation had ever recognised property in savages such as Maori. To this, Hope's suggested response was:<sup>109</sup>

Into the wide field opened by this allegation L<sup>d</sup> S. does not think it necessary to enter, still less to discuss the question how far the practices of many Christian nations in their dealings with savages will bear being tried by the standard of humanity & justice. His L<sup>p</sup> considers it sufficient to say that even admitting your allegation to be correct, & the practices to which you refer to having been just in the cases to which they were applied, he does not admit the case of the New Zealanders to be that of mere savages (such as the Australian Aborigines), and he desires me to state that he knows no good cause why under new circumstances such as he considers to exist in New Z<sup>d</sup> a new mode of dealing with savage nations should not be adopted.

Stephen's attitude, shown in his minute of 28 December, was similarly affronted by the Company's claims.<sup>110</sup> He would not have offered the compromise put forward in Hope's draft and maintained in the final letter (offering conditional grants subject to any prior titles as might be established, whether European or Maori), believing it to be "out of place".<sup>111</sup> He favoured explicitly reminding the Company that Hobson had treated with Maori for a cession of sovereignty "on the basis of recognising their proprietary titles to the Soil"<sup>112, 113</sup>

[I]t is in virtue of the Treaty so made with them, and on that basis alone, that Her Majesty's Title to Sovereignty in New Zealand at this moment rests.

Any property possessed by Maori at the date of the Treaty "must belong to them still, because nothing has since occurred to dispossess them of it".<sup>114</sup> He, too, weighed in on the Company's claim that it was a "maxim common to all Christians

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<sup>109</sup> Hope draft, c. 27 December 1842, CO 209/18, 415a-439b at 416a-417a.

<sup>110</sup> Stephen referred to the "extravagance and injustice of [the Company's] pretensions"; CO 209/18, 420b.

<sup>111</sup> Stephen to Hope, 28 December 1842, CO 209/18, 416a-421b at 416a: "I would in this letter simply negative the demand, avowing a general readiness to do whatever could be justly done for the relief of the Company and the Settlers. But I would have them on the face of the correspondence suitors for the proposed benefit. How far they are persons to whom it is safe to be generous and confiding you have by this time had it in your power to judge."

<sup>112</sup> Ibid 416b.

<sup>113</sup> Ibid 416b-417a.

<sup>114</sup> Ibid 418b.

that Savages can have no property in the Land over which they range”. He suggested that Lord Stanley point out that this was an argument that

proceeds with peculiar infelicity from a Body whose contract and charter rest upon alleged purchases from the very persons whose competency to sell they now dispute, and is addressed with peculiar inappropriateness for a government which derives all its authority in New Zealand from Compacts with the Natives, of which Compacts the proprietary rights of the Natives form one of the essential [bases?].<sup>115</sup>

Stephen suggested that the reply convey that, in Lord Stanley’s view, “it could answer no good purpose to prolong the correspondence” unless the Company was prepared to admit, first that their November 1840 agreement with the Government did not obviate the need to investigate their titles, and secondly “that the Natives of New Zealand are entitled to the protection of the Queen in their proprietary rights as fully as the Company themselves, or any other of HM’s subjects”.<sup>116</sup>

Hope’s letter was treated as inflammatory by the Company. Its response of 24 January 1843 was intemperate and, at 119 pages, lengthy. Trevor Williams is surely right to say that “the hand was the hand of Somes, but the voice was the voice of Wakefield”.<sup>117</sup> The Company rejected the concessionary offer to grant it lands on a provisional basis.<sup>118</sup> It reiterated its contentions that it was entitled to stand on the agreement of November 1840 which, it claimed, was a new basis for its title, making the validity of prior purchases from Maori irrelevant.<sup>119</sup> While it blustered that it was confident that the Company could prove its purchases, its concern was that it would have to contend with the “mass of perjuries [that] the boundless mendacity of savages will produce, under the direction of white advisers”.<sup>120</sup> A “wise Government” would seek to avoid this result by interference to prevent “this hubbub of contending perjuries,—this gibberish of native notions

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<sup>115</sup> Ibid 419a-b.

<sup>116</sup> Ibid 419b-420b.

<sup>117</sup> Trevor Williams “The Treaty of Waitangi” (1940) 25:99 History 237-251 at 245.

<sup>118</sup> Somes to Stanley, 24 January 1843, GBPP 1844 (556) XIII.1, Appendix 2, 22-33 at 22 (also CO 209/26, 35a-92a).

<sup>119</sup> Ibid 23-27.

<sup>120</sup> Ibid 31.

of law, and this irritating litigation, from which no satisfactory decision can ever result”.<sup>121</sup>

On the subject of Normanby’s Instructions to Hobson and the Treaty, the Company maintained the view that they were irrelevant,<sup>122</sup> but in any event described the Instructions as “confused, ... irreconcilable with law, [and] ... inconsistent in themselves”. Although the Instructions were acknowledged to “declare the intention of Her Majesty’s Government to recognize the proprietary rights of the natives”, they failed to say “of what nature or extent those rights were”.<sup>123</sup> The November 1840 agreement, which the Company treated as having overtaken the Instructions (and, it is to be inferred, the Treaty), had been understood by the Company as a return to orthodox British imperial law and practice. Under it, a distinction had been drawn between countries in which the laws had developed to the extent that individuals were recognised as having property in land and “those vast regions, which the early discoverers found occupied by scanty tribes of savages ... [with] no idea of property in land according to our notions”, where tribes simply excluded others by reason of force. In the first type of colony (which *Somes* illustrated by reference to possessions obtained from France, Spain, Holland and Turkey and in India) the existing laws of property, however “peculiar” from an English perspective, were respected. In the second type of colony, English law “rightly held” that only the “actual occupation” of native peoples was to be respected.<sup>124</sup>

But whatever was unoccupied, was held to be unappropriated; and to this the Crown asserted its right. This is the foundation of the rights of the Crown to the waste lands of its colonies; and on the same principle, the Crown refused to recognise the validity of purchases effected from the natives; for it would have been inconsistent to treat the

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<sup>121</sup> Ibid 32.

<sup>122</sup> Ibid 28.

<sup>123</sup> Ibid 29.

<sup>124</sup> Ibid 29-30. In a letter of 15 February 1843, *Somes* was to say that “[t]he native title, by occupation, we acknowledge to be, as it has always been held by our law, paramount to every other”. *Somes* to *Stanley*, 15 February 1843, GBPP 1844 (556) XIII.1, Appendix 2, 37-40 at 37.

native as having a power of transferring rights which he did not possess, did not even understand.

In the context of imperial law and practice, the Company had regarded Normanby's Instructions to Hobson as "an anomaly sanctioned by no authority of law", being based on a "strange medley of the two principles applied by our law to the two different kinds of countries acquired by the Crown". On the one hand, Normanby had recognised Maori "property in the soil" and sovereignty as if they were a "civilized people"; on the other hand, "suddenly, viewing them as savages in the eye of the law, he declared all purchases from them invalid, and asserted the rights of the Crown over all lands purchased from the natives". In this last point, the Company relied on the section of the Instructions dealing with the treatment of pre-1840 European purchases which had been finalised by Labouchere as described in Chapter 8. The two approaches were said to be inconsistent with each other, since if Maori had property in land they must have been able to alienate it.<sup>125</sup>

Since Normanby's Instructions had been "based on a very anomalous, contradictory theory, reconcilable neither with sound reason nor with the acknowledged principles of our law", the Company had not believed "that even the Royal power of making treaties could establish, in the eye of our courts, such a fiction as a native law of real property in New Zealand":

We always have had very serious doubts whether the treaty of Waitangi, made with naked savages by a consul invested with no plenipotentiary powers, without ratification by the Crown,<sup>126</sup> could be treated by lawyers as any thing but a praiseworthy device for amusing and pacifying savages for the moment. But we thought it most probable, that whenever possession of New Zealand should be actually obtained by Her Majesty, the view hastily adopted by Lord Normanby would be found impracticable, and abandoned.

The Company, accustomed to shifts in policy with respect to New Zealand and holding the view that Normanby's Instructions were contrary to imperial law and

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<sup>125</sup> Somes to Stanley, 24 January 1843, GBPP 1844 (556) XIII.1, Appendix 2, 22-33 at 30.

<sup>126</sup> The basis on which the Company asserted that Hobson did not have authority on behalf of the British Crown to treat with Maori for sovereignty and that the Treaty had not been ratified is not explained.

practice, had therefore inferred from the November 1840 agreement (“based on the invalidity of our past purchases, and dealing with a third part of the islands in a tone of unqualified ownership”) “that Lord John Russell had abandoned Lord Normanby’s notions, and was prepared in a consistent and rational manner to assert Her Majesty’s right to the unoccupied lands of New Zealand”.<sup>127</sup> The Company therefore acquitted Russell of perpetrating through the November 1840 agreement “as gross, persevering and wicked a plan of fraud as ever was imputable to human being”.<sup>128</sup>

As if this missive was not enough, Somes wrote the next day again to Stanley expressing sensitivity that the Colonial Office should be portraying itself as protecting Maori from the Company.<sup>129</sup>

We cannot bear to have it inferred that this Company has been behind any other persons in regard for the true rights and real welfare of the natives.

The Company’s scheme of native reserves was even better than Penn’s willingness to pay Native American Indians for their lands (“a great step in the direction of humanity”) because it was calculated to achieve a lasting benefit for Maori.<sup>130</sup>

Of the 24 and 25 January letters from Somes, Hope noted to Stephen that “[t]here is matter which it would be very tempting to reply to had one as much time as they appear to have.”<sup>131</sup> Instead Hope replied to Somes on 1 February, laconically:<sup>132</sup>

Lord Stanley is not prepared, as Her Majesty’s Secretary of State, to join with the Company in setting aside the treaty of Waitangi, after obtaining the advantages guaranteed by it, even though it might be made “with naked savages”, or though it might “be treated by lawyers as a praiseworthy device for amusing and pacifying savages for the moment”. Lord Stanley entertains a different view of the respect due to obligations contracted by the Crown of England; and his final answer to the demands of the Company must be that, as long as he has the honour of serving the Crown, he will not

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<sup>127</sup> Somes to Stanley, 24 January 1843, GBPP 1844 (556) XIII.1, Appendix 2, 22-33 at 30.

<sup>128</sup> Ibid 26.

<sup>129</sup> Somes to Stanley, 25 January 1843, GBPP 1844 (556) XIII.1, Appendix 2, 33-36 at 33.

<sup>130</sup> Ibid 34.

<sup>131</sup> Hope to Stephen, 27 January 1843, CO 209/26, 92b.

<sup>132</sup> Hope to Somes, 1 February 1843, GBPP 1844 (556) XIII.1, Appendix 2, 36.

admit that any person, or any Government acting in the name of Her Majesty, can contract a legal, moral or honorary obligation to despoil others of their lawful and equitable rights.

The correspondence begun in October 1842 was brought to a close by a further exchange of letters in which the Company recapitulated its arguments on the extent of Maori property interests and, while allowing that the Government was free to “observe the treaty of Waitangi religiously”, claimed that the Treaty could not alter its contractual rights or, if invoked in a court of justice, could not affect “the character of the savage tribes who were made to play the part of contracting parties”. Furthermore, it claimed that the Treaty did not bear on the Company’s claims since it applied only to “the northern corner of the Northern Island”.<sup>133</sup>

After taking Stephen’s advice,<sup>134</sup> Hope replied to Somes on 1 March 1843 indicating that Stanley’s earlier offer of provisional grants remained open on the basis that “that Lord Stanley intends his offer to be understood as designed to protect the rights of all third parties, whether natives or Europeans, and as referring the decision of those rights to the Commissioner of Land Claims”.<sup>135</sup>

### **The 1844 House of Commons Select Committee**

The arguments conducted between the Company and the Colonial Office were to flare up again later, but in March 1843 they might conceivably have subsided, had it not been for later developments. At this stage, the Company was financially strapped. It needed to secure Crown grants in order to trade out of its difficulties. It was in no position to turn down the compromise solution proffered by Stanley which gave it an immediate way forward. It put forward its own counter-proposal to the Colonial Office in May which was effectively, as Loveridge has described, a “complete capitulation”. It was immediately accepted, no doubt with some relief, by the Colonial Office.<sup>136</sup> This might have led to loss of energy in relation to the

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<sup>133</sup> Somes to Stanley, 15 February 1843, GBPP 1844 (556) XIII.1, Appendix 2, 37–40 at 39.

<sup>134</sup> See Colonial Office minutes at CO 209/26, 303b–304b.

<sup>135</sup> Hope to Somes, 1 March 1843, GBPP 1844 (556) XIII.1, Appendix 2, 40–41 at 41.

<sup>136</sup> Loveridge “An Object of the First Importance”, above n 25, 100–101; Burns *Fatal Success*, above n 50, 247–249.

“waste lands” debate (although given the track record of the Company this might be optimistic), but the prospect for pragmatic accommodation was overwhelmed by the dire financial state of the Company which was greatly exacerbated when news of the deaths of Arthur Wakefield (brother of Edward Gibbon and William) and 21 other New Zealand Company settlers at Wairau was received in December 1843.<sup>137</sup> At this stage the prospects of the Company raising much needed capital and selling land to would-be emigrants plummeted. After failing to obtain a loan from the Government in early 1844, the Company suspended operations and decided to press its case through Parliament.<sup>138</sup> It succeeded in obtaining the appointment of a House of Commons Select Committee in April 1844 to “inquire into the State of the Colony of New Zealand, and into the Proceedings of the New Zealand Company”.<sup>139</sup>

Through this public platform, the Company was to reprise the arguments rejected by the Colonial Office in the October 1842–March 1843 correspondence. It was inevitable that the Colonial Office policy towards New Zealand since 1839 (especially in relation to the Treaty, recognition of Maori property, and the November 1840 agreement with the Company) would be a focus of the Committee. The background of the Wairau deaths brought a new dynamic into play. The Colonial Office regarded the settlers as having been at fault in the affray (and did not modify its views about Maori rights in land).<sup>140</sup> The Company was able to use it in the press and later in Parliament, however, to suggest that the Colonial Office policies towards Maori and land had been unwise and too indulgent.<sup>141</sup>

The members of the Select Committee were nominated on 30 April 1844 and heard evidence between 23 May and 2 July. The Committee was chaired by Viscount

<sup>137</sup> For a description of the “Wairau affray” see Burns *Fatal Success*, above n 50, 232–233.

<sup>138</sup> Burns *Fatal Success*, above n 50, 252–254; Loveridge “An Object of the First Importance”, above n 25, 200–201.

<sup>139</sup> GBPP 1844 (556) XIII.1 at ii. Burns quotes Edward Gibbon Wakefield writing to his sister that the Company had “declared war to the knife with the Colonial Office”. Burns *Fatal Success*, above n 50, 254.

<sup>140</sup> See Stanley to Fitzroy, 10 February 1844, GBPP 1844 (556) XIII.1, Appendix 4, 171–174.

<sup>141</sup> See Loveridge “An Object of the First Importance”, above n 25, 198–200. See also the Report and 19th Resolution of the 1844 Select Committee on New Zealand, GBPP 1844 (556) XIII.1 at x and xiv respectively.

Howick and a majority of its members were either closely associated with the New Zealand Company or were known for their free trade and radical views which predisposed them towards support for systematic colonisation.<sup>142</sup> Howick as Under-Secretary for the Colonies in the period 1830–33 had been an adherent to the views of Edward Gibbon Wakefield on colonial land policy.<sup>143</sup> In 1837, as has been seen, he was broadly supportive of the aims of the New Zealand Association, although Wakefield's criticisms of his part in the negotiations of that year in evidence to the 1840 Select Committee—which had led to Howick being put on to that Committee to counter them—had caused a temporary cooling. With Howick in opposition in 1844, however, he and the Company again had common cause. Howick's role in the Committee in 1844 is chiefly significant because the views he there expressed were ones he was to act on when the Whigs returned to power in 1846 and he became Secretary of State for the Colonies. The Parliamentary Under-Secretary for the Colonies in that Whig administration was to be Benjamin Hawes who, as has been seen, was also a member of the 1840 Select Committee, where he had voted for Lord Eliot's report. Now as a member of the 1844 Committee, he joined the majority in taking a line critical of Colonial Office policy towards Maori and the Company.

Hope was a member of the Committee. Although he could count on the support of Sir Robert Inglis of the Church Missionary Society, and those Tories, like Edward Cardwell, who were staunch supporters of the Government, not all Tory members were supportive of the Colonial Office position. It was inevitable that the report brought down from the Select Committee would favour the Company, although by the slimmest of margins. A draft report provided to the Committee by Hope was rejected in favour of one prepared by Howick. Similarly, resolutions put forward by Cardwell (probably drafted in the Colonial Office), were not adopted. Instead

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<sup>142</sup> GBPP 1844 (556) XIII.1 at ii & xxxii. The *Oxford Dictionary of National Biography* has entries on most of the members of the Committee.

<sup>143</sup> Peter Burroughs "Grey, Henry George, third Earl Grey (1802–1894)" *Oxford Dictionary of National Biography*.

the Committee adopted, after some modifications, resolutions framed by Howick.<sup>144</sup>

It is not necessary for present purposes to examine the evidence or Howick's report in detail. The evidence does not appear to have been a weighty consideration in the report. Howick's report, for the most part, rehearsed familiar New Zealand Company arguments and sheds little light on the understandings of those who framed the Treaty. The report continued the line taken in the report of Lord Eliot which had been rejected by the 1840 Select Committee.

The Committee expressed the view that the "difficulties now experienced in New Zealand" were mainly due to the fact that, in establishing the British colony, "those rules as to the mode in which colonization ought to be conducted, which have been drawn from reason and experience, have not been sufficiently attended to". What those rules were was best described in "the very able address" given by Sir George Gipps in the Land Claims Bill debate in Sydney.<sup>145</sup> Howick's report quoted from Gipps's address as to the three "political axioms" to be observed: the "qualified dominion" or "right of occupancy" of "uncivilized inhabitants"; the Crown's exclusive "right of extinguishing the native title" ("the right of pre-emption of the soil"); the inability of settlers to form colonies except with the consent of the Crown.<sup>146</sup> The report expressed the view that sovereignty based on discovery should not have been disclaimed and that the Treaty of Waitangi was a mistake:<sup>147</sup>

It would have been much better if no formal treaty whatever had been made, since it is clear that the natives were incapable of comprehending the real force and meaning of such a transaction; and it therefore amounted to little more than a legal fiction, though it has already in practice proved to be a very inconvenient one, and is likely to be still more so hereafter.

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<sup>144</sup> See "Proceedings of the Committee", GBPP 1844 (556) XIII.1 at xv-xxx.

<sup>145</sup> GBPP 1844 (556) XIII.1 at iii.

<sup>146</sup> Ibid iii-iv. See text accompanying ns 123-127 above.

<sup>147</sup> Ibid iv-v. See also Resolution 2: "That the conclusion of the Treaty of Waitangi by Captain Hobson with certain Natives of New Zealand, was a part of a series of injudicious proceedings, which had commenced several years previous to his assumption of the local Government." Ibid xii.

The report asserted that the Treaty did not “even nominally extend” to the South Island and Stewart Island. The terms of the Treaty were said to be “ambiguous, and in the sense in which they have been understood, have been highly inconvenient, in this we refer principally to the stipulations it contains with respect to the right of property in land”. The “stipulations” in the Treaty in respect to the property in land had “firmly established in the minds of the natives” the notion (“which they had then but very recently been taught to entertain”) that they had “a proprietary title of great value to land not actually occupied”. They might have been brought to understand the true position (that they were “to be secured in the undisturbed enjoyment of the land they actually occupied, and of whatever further quantity they might really want for their own use”) if a “decided course had at that time been adopted” that the unoccupied territory was to “vest in the Crown by virtue of the sovereignty that had been assumed”.<sup>148</sup>

The report again quoted from Gipps and expressed the view that the error had been in the drafting of Hobson’s Instructions which led him into “the error of acting throughout upon the assumption that no part of the extensive and unoccupied territory of New Zealand was to be considered as belonging to the Crown, or available under its authority for the purposes of settlement until first regularly sold by the natives”. If this effect had been explicit in the Treaty, the report asserted that it would have been disallowed as it thought was evidenced by Russell’s approval of Gipps’s speech and the reference in the November 1840 charter setting up the colony to grants of waste lands subject to Maori rights to the “actual occupation and enjoyment” of lands.

If Maori rights to “ownership” had only been accepted when arising from occupation “there would have been no difficulty in giving at once to the settlers secure and quiet possession of the land they required, and they would thus have been able to begin without delay and in earnest the work of reclaiming and cultivating the unoccupied soil”.<sup>149</sup> The New Zealand Company could immediately

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<sup>148</sup> Ibid.

<sup>149</sup> Ibid vi.

have been put in possession of the land promised to it.<sup>150</sup> All difficulties encountered in the colonisation of New Zealand could be attributed the erroneous approach taken to the question of unoccupied lands.<sup>151</sup> What is more, there was no injustice to Maori in confining them to occupied lands: unoccupied lands had no value except that obtained through European labour and capital; Maori would simply “unprofitably squander” any payment to them in respect of such lands; and any payment to them would eventually come off the price paid by settlers to the Crown, meaning that a reduced sum would be available for “the great purposes of promoting emigration” which was of ultimate benefit to both settlers and Maori.<sup>152</sup>

In the end the Committee was not prepared to recommend that the Governor be directed to assert Crown title to unoccupied lands. Rather it was suggested that “he should have clearly explained to him what those rights are, and the principles on which they rest” so that he might “adopt such measures as he may consider best calculated ... to establish the title of the Crown to all unoccupied lands as soon as this can be safely accomplished”.<sup>153</sup> As for the Company, the report adopted the Company’s view that the 1840 agreement had overcome the need to prove the validity of their purchases from Maori and recommended Crown grants “with the least possible delay” (excepting “land not vested in the Crown”, in apparent reference to occupied Maori lands).<sup>154</sup>

The Colonial Office view is set out in Hope’s draft report, rejected by the Committee. It reiterated the Colonial Office’s consistent position that the Crown had dealt with Maori in 1840 on the basis that they were an independent and sovereign people. Although the Southern Islands had been claimed by right of discovery (because they contained “no population capable of entering into any thing resembling a civil contract”), Hope maintained that the distinction between the North and Southern Islands was not “material” in terms of “the right of property”:

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<sup>150</sup> Ibid vii.

<sup>151</sup> Ibid ix.

<sup>152</sup> Ibid vii-ix.

<sup>153</sup> Ibid ix.

<sup>154</sup> Ibid ix-x (Report) & xiii (Resolutions 4 & 5).

## Chapter Seventeen: London, 1840–47

The main cause of the Middle Island being dealt with throughout in a manner different from the Northern, was, the assumption that no natives, or but few claiming any rights of property, were to be found there. But should such not be the case, Your Committee think that whatever rights were secured by Treaty to the natives on the northern side of Cook's Straits, must, in equity, be conceded by the Crown to those on the southern side; and for practical purposes, therefore, they do not propose in this Report to draw any distinction as regards the title to land, between the Northern and the other Islands.

While taking the line that whether the Treaty was consistent with “sound colonial policy” was not in issue, Hope would have declared it “whether wisely made or not” to be “binding on the faith and honour of the Crown”. Maori “clearly understand and fully rely upon the guarantee which the Treaty gives of their proprietary rights”. Consequently, the extent of Maori interests in land was:

[N]o longer one to be determined by reference to the general prerogative of the Crown, or to sound principles of colonization, but that it must be tried and decided upon the true construction of the Treaty only . . . .

The rights of Europeans in pre-Treaty purchases were, however, “determined by a different rule”.<sup>155</sup> The rule was “very fully and ably explained by Sir George Gipps” in his speech on the Land Claims Bill 1840. Its “substance” was summarized by Hope:<sup>156</sup>

That the Crown would recognize no title to land claimed by its own subjects in New Zealand as valid, unless either derived from itself originally, or, if founded upon acquisition from the natives, unless made before the date of the Treaty, and confirmed by a Crown grant, it being further provided, as regards land acquired from the natives, that an inquiry should be instituted by a Commissioner, before any such confirmation should take place, into the terms on which in each case the lands had been acquired; and that no confirmation should be recommended by him unless that acquisition appeared to have been fairly made; nor of a greater number of acres than in a certain specified proportion to the expenditure made in acquiring them, or, in any case, than a total extent of 2,500 acres.

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<sup>155</sup> Draft Report proposed for the consideration of the Committee by Hope, 23 July 1844, GBPP 1844 (556) XIII.1, xxv-xxx at xxvi.

<sup>156</sup> Ibid xxvii.

Hope's approach makes it clear that the attitude of the Colonial Office was that Gipps's Act had no application to Maori. It is consistent with questions of European titles to land being determined not as a matter of legal doctrine but through exercise of the powers of sovereignty upon its assumption. By contrast, Maori property was pre-existing and its extent was a matter of custom, guaranteed by the terms of the Treaty.

Hope acknowledged the difficulties in ascertaining Maori property interests. He allowed that in recent years, and having acquired "more definite ideas of ownership" (and of the value of land), Maori may have "put forward more extensive claims to uncultivated land than it appears probable they would have done at a former period". On the other hand, Maori clearly acted among themselves and in relation to Europeans according to rules. And although the land in "actual cultivation" might be "insignificant", Maori practice was to "occupy spots in rotation within certain districts, sometimes of considerable extent". It was clear, too, that "particular tribes are in the habit of maintaining exclusive rights within limits known to themselves, and admitted by neighbouring tribes". Individual ownership, although appearing to be "very limited", was still said to exist in relation to "certain spots, and to be founded on recognized rules". Altogether, while "far from the opinion ... that the whole wild lands in the Islands" were the subject of Maori rights, Hope was not "prepared to assert that they cannot show such right to parts of them".<sup>157</sup> It would not be "prudent or right" to decide on the extent of Maori property "without a much fuller investigation" which could not be undertaken "anywhere except in New Zealand itself".<sup>158</sup>

Crown land was land which did not "fall within the description which ... [the] Treaty guarantees to the natives". Whether the amount of Crown land proved to be large (as Hope thought likely) or small (so that the land available for settlement purposes was diminished) did not enter into the question: "[t]he alternative ... of disregarding the stipulations of the Treaty of Waitangi ... is one which [the

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<sup>157</sup> Ibid.

<sup>158</sup> Ibid xxvii–xviii.

Committee] cannot for a moment entertain”. Hope’s report suggested that the present state of uncertainty might be assisted by the “establishment of a Court of Registry, before which all parties could be called on to substantiate their titles”. This was one suggestion only. Hope would not have precluded any other course as improper “which proceeded on the distinct recognition of the rights guaranteed by the Treaty of Waitangi, and the admission and establishment of those rights, whatever on inquiry they might prove to be”.<sup>159</sup> Hope’s report expressed the opinion that the Government’s 1840 agreement with the Company was intended to confirm its title only to land “validly purchased”.<sup>160</sup> (In a resolution put forward by Cardwell, it was also suggested that the Company’s 1842–3 interpretation of the agreement was an “after-thought”.<sup>161</sup>)

Howick’s report was adopted by the Committee in late July 1844, possibly by a majority of only one (with Howick not voting).<sup>162</sup> The report, however, had little immediate effect.<sup>163</sup> It led to no change in the Colonial Office position. Stanley wrote to Governor Fitzroy, Hobson’s successor, on 13 August explaining why it was not necessary for him to follow the report. The letter substantially followed the line taken in Hope’s draft report. In particular, it reiterated the Colonial Office view that the theory that aboriginal peoples possessed only rights of occupation over lands, even if correct, could not be of universal application to all aboriginal peoples (and among “uncivilized nations” Maori held “a very high place”).<sup>164</sup> In any event, and “whatever may be the right theory”, the British Government had dealt with Maori on a different basis. It had recognised the chiefs as sovereign and independent and had accepted from them the grant of sovereignty “on conditions” embodied in the second article of the Treaty of Waitangi, an instrument “officially

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<sup>159</sup> Ibid xxix.

<sup>160</sup> Ibid xxviii.

<sup>161</sup> Resolutions proposed for the consideration of the Committee by Cardwell, 8 July 1844, GBPP 1844 (556) XIII.1, xvii–xix at xviii.

<sup>162</sup> Only the bare results of the votes on whether to adopt Hope’s and Howick’s drafts are given in the proceedings of the Committee. See “Proceedings of the Committee”, GBPP 1844 (556) XIII.1, xv–xxx at xxx. On the vote on the motion to adopt Cardwell’s resolutions, the Committee divided 7 to 6 against adoption (with Howick as the chair not voting). See *ibid* xix.

<sup>163</sup> Burns *Fatal Success*, above n 50, 255.

<sup>164</sup> Stanley to Fitzroy, 13 August 1844, GBPP 1845 (1) XXXIII.1, 3–9 at 3.

promulgated and laid before Parliament”.<sup>165</sup> These steps had been taken and had been sanctioned by Parliament “[b]efore the present Government assumed any responsibility for the affairs of New Zealand”.<sup>166</sup>

Personally, neither you nor I are interested in now considering whether this policy were wise or unwise. ... What you and I have to do is to administer the affairs of the colony in reference to a state of things which we find, but did not create, and to feelings and expectations founded, not upon what might have been a right theory of colonization, but upon declarations and concessions made in the name of the Sovereign of England.

As to the suggestion that Maori rights to land could be restricted to those “actually occupied for cultivation”, Stanley expressed the view that such approach was

wholly irreconcilable with the large words of the treaty of Waitangi: “lands and estates, forests, fisheries and other properties which they may collectively or individually possess”, and of which, “the full exclusive and undisturbed possession” is thereby “confirmed and guaranteed” to them. The claim of the Crown to all “unoccupied” land, to the exclusion of the natives, appeared to me not less at variance with the directions of the Marquis of Normanby to Captain Hobson, “to obtain by fair and equal contract with the natives the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers”, and to apply the proceeds of the “re-sales of the first purchases” to the provision of funds necessary for future similar acquisitions. It must be remembered, that these directions had not only been promulgated, but acted upon in the colony at an early period after the sovereignty had been assumed.

Stanley had anticipated that Fitzroy might find “considerable tracts of country to which no tribe could establish a *bona fide* title; and still more extensive districts, to which, by personal communication with the chiefs, you would obtain a title on easy terms and by amicable arrangements”.<sup>167</sup> (Stanley indicated, as Hope’s report had done, that in his opinion some Maori expectations of the value of land were “extravagant”.<sup>168</sup>) This was as far as Fitzroy should go in meeting the wish of the Committee to “forthwith ... establish the title of the Crown to all unoccupied

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<sup>165</sup> Ibid 4.

<sup>166</sup> Ibid 4-5.

<sup>167</sup> Ibid 5.

<sup>168</sup> Ibid 7.

land”.<sup>169</sup> The letter also recorded that Stanley was of unchanged opinion that the Company’s November 1840 agreement with the Government was based on the Company showing that its purchases of land from Maori were valid.<sup>170</sup>

### **Reactions to the Select Committee report**

It was not only the Colonial Office that was critical of the Select Committee report. Dandeson Coates, on behalf of the Committee of the Church Missionary Society, wrote to Stanley on 14 August to protest against the Select Committee’s report which he considered to be inconsistent with the Treaty. There was “no ambiguity” in the terms of article 2 which were “so clear and explicit as to shut out all doubt of their real import”. It was “painful” to find the Treaty referred to as “little more than a legal fiction”. It was rather “an instrument to which the faith and honour of the British Crown are pledged”:

The Committee [of the Church Missionary Society] are persuaded that such reasoning would not be applied to a treaty entered into between this country and France or the United States, or any other powerful nation; and they are confident that your Lordship will not sanction its being applied to the one in question, because the parties to it are weak, ignorant and barbarous.

Coates pointed out, too, that “the sense of the treaty for which the Committee [of the Church Missionary Society] plead was that put upon it by the immediate parties to it, Captain Hobson and the natives”:

This would seem to be conclusive as to the course which principles of justice and the faith of treaties prescribe to Her Majesty’s Government with regard to the lands of the natives.

Referring to the proviso in the 1840 Charter relied upon by the Select Committee to indicate that the Government in 1840 treated Maori as having an occupation interest only, Coates argued that such interpretation was not only contrary to the

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<sup>169</sup> Ibid 5.

<sup>170</sup> Ibid 6. See also Stanley to Fitzroy, 30 November 1844, GBPP 1845 (131) XXXIII.13, 49-56 at 51. By its May 1843 agreement with the Government, the Company was relieved of the obligation of proving its own purchases but was still required to disprove the claims of other parties.

terms of the Treaty and to the interpretation given to it by Hobson and Maori but also did not follow from the wording of the proviso itself.<sup>171</sup>

The reasoning of the Select Committee seems to proceed on the assumption that the terms “occupation” and “enjoyment” are synonymous; whereas it is clear that rights of property in land to an indefinite extent may exist, or, in other words, be “enjoyed”, quite distinct from actual occupation of it.

Coates also responded to Stanley’s impression, conveyed by him to the Church Missionary Society in conversation some months earlier, that there were large tracts of land to which no tribe could lay claim. Coates had made inquiry of the missionaries in New Zealand and advised Stanley that the missionaries were unaware of any such lands. Coates concluded by endorsing the draft report prepared by Hope and rejected by the Select Committee.<sup>172</sup>

The letter sent by Coates to Stanley was published later in 1844.<sup>173</sup> When New Zealand missionary reaction to the Select Committee report was received in London it supported the arguments made by Coates.<sup>174</sup>

The Select Committee report was also responded to by two men who had first-hand knowledge of how the Treaty was understood in New Zealand and who happened to be in London at the time, James Busby and Willoughby Shortland. Busby wrote to *The Times* taking issue with its endorsement of the New Zealand Company line that the Government had departed from “sound principles of colonization” by admitting Maori proprietorship of land and disclaiming any right to deprive them of it. The Company, he explained, had followed Sir George Gipps in developing the views that only land in actual occupation belonged to Maori and that the remainder were Crown demesne lands. Busby claimed that Gipps’s views had drawn on Vattel (and misunderstood Vattel). More directly, however, he

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<sup>171</sup> Coates to Stanley, 14 August 1844, GBPP 1844 (641) XXXIV.839, 2-7 at 6.

<sup>172</sup> Ibid 7.

<sup>173</sup> Dandeson Coates *The New Zealanders and Their Lands: The Report of the Select Committee of the House of Commons on New Zealand, Considered in a Letter to Lord Stanley* (Hatchards, Seeleys, Nisbet & Co, London, 1844).

<sup>174</sup> See Loveridge “An Object of the First Importance”, above n 25, 214-215.

challenged the entire thesis that “civilized countries” had a right to take possession of productive lands not being used by “aboriginal tribes”. He queried the morality of the approach (since Britain had other unoccupied territories and was not “distressed for land”) and he asserted the injustice of applying it to Maori who “are, and ever have been, ... an agricultural people”. He pointed out that Maori tribes, having little in the way of “animal food till Cook gave them the hog”, asserted rights of property in the forests in which they snared birds and rats: “[a]nd why should not their claim be as good as the Duke of Devonshire to his preserves?” He expressed the view that the best information was that, at least in the North Island, the whole of the land was tribal property. Hobson had been instructed that the right of Maori to the “soil and sovereignty of their country was unquestionable” and this had been made the basis of the Treaty:

[T]he article [article 2] which had been referred to as ambiguous (having been written by myself) was especially intended to exclude the pretensions of any foreign claimant to the lands of the natives, and to confirm them to the native owners in the fullest and most extensive sense.

Busby set out the text of article 2<sup>175</sup> in respect of which he said he was “as yet unable to discover where the alleged ambiguity is to be found”. He concluded by pointing out that since land was the “especial object of [Maori] jealousy, and it is still so”, it would be “calamitous” to the New Zealand Company’s settlers if the Government yielded to the Company’s demands even if it “were ... possible for the Government to forget what is due to natural justice and to national faith”.<sup>176</sup>

Willoughby Shortland (who had acted as Governor in New Zealand for the 15 month period between Hobson’s death and Fitzroy’s arrival in the colony) wrote to Stanley on 18 January 1845 to comment on the Select Committee report. He considered that the resolutions adopted by the majority

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<sup>175</sup> The text given by Busby follows the English draft or “official” English text of the Treaty with the exception that “to the respective families and individuals thereof” is rendered as “to each man and to all the men of New Zealand”.

<sup>176</sup> Busby to the editor of *The Times*, London, 27 December 1844, at 3.

appear to me to uphold principles incompatible with those on which the colony was founded, and to propose a change in policy towards the aborigines, which would not only be inconsistent with the provisions of a solemn treaty, and the forfeiture on the part of Her Majesty's Government of pledges again and again reiterated to the natives, but would inevitably plunge the islands into anarchy and bloodshed ...

It was unnecessary to set out the history of the colony because Hope's report and Cardwell's proposed resolutions "express views, to the correctness of which I can from a long local experience unhesitatingly add my humble testimony". Shortland therefore confined himself to the Treaty by which "the natives were to continue to enjoy all property, and rights over property, they enjoyed at the formation of the colony, unless abandoned and conceded by them to the Crown, by their own free and intelligent consent". He, too, set out the text of article 2.<sup>177</sup> He maintained that the Committee had misused Gipps's speech on the Land Claims Act, "an Act made long subsequent to the treaty of Waitangi". The Act was

I believe, deemed by Sir G. Gipps, and every other person concerned, either in the enacting or carrying into execution that ordinance, to apply simply to the power of disposition by the Crown over lands, the native rights to which had been abandoned by them prior to the treaty of Waitangi, in consequence of the lands having been sold to British subjects ...<sup>178</sup>

Responding to suggestions in the report that it would have been better if the Treaty had not been made because Maori were incapable of understanding such a transaction, so that it amounted to a "legal fiction", Shortland referred to his own presence at Waitangi, Mangungu and Kaitaia. The impression he had at the time was "that the subject was fully understood by them, and they were quite aware of the nature of the transaction in which they were engaged". He stressed not only that Maori understood the Treaty "but that they were peculiarly sensitive with regard to every question affecting their lands".<sup>179</sup> Shortland said that the Committee had been "in error in supposing that no value was attached by the

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<sup>177</sup> Shortland to Stanley, 18 January 1845, GBPP 1845 (108) XXXIII.353, 3-11 at 3.

<sup>178</sup> Ibid 4.

<sup>179</sup> Ibid 5.

aborigines to unoccupied territory, ‘until they learned to do so from Europeans’<sup>180</sup>.

[O]n the contrary, the boundaries of their territory have always been a continual cause of strife amongst the different tribes; for although between hostile tribes in New Zealand, as in more civilized parts of the world, “the right by which territory was held was often that of the strongest”, still a perfect knowledge of the lands of each tribe was always carefully preserved, and handed down with great accuracy from generation to generation; and the recovery of land formerly possessed by a tribe was always considered a sufficient cause for war, so soon as, either by alliance or otherwise, an accession of strength was gained by the weaker party.

### **The House of Commons New Zealand debate, 17–19 June 1845**

The Company, continuing to get nowhere with the Colonial Office, attempted to escalate the matter to Peel. Peel backed Stanley. The Company threatened to have the matter raised in Parliament when it resumed in February 1845 after being prorogued in the preceding September. Against the background of this threat (backed up by extensive lobbying), the Company continued to try to negotiate an outcome.<sup>181</sup> In May 1845 it presented a proposal to the Government, written by Charles Buller. It suggested a “bold course”, in an attempt to overcome the irreconcilable visions of the missionaries and the Company.<sup>182</sup> By it, New Zealand would be divided into two colonies: the upper North Island, to be governed under the Treaty on the “missionary system” (since “there alone can the treaty of Waitangi have any legal force”), and the remainder of the country, to be governed on the “colonizing principle” of the Company (said to have been adopted by Lord John Russell in his agreement with the Company).<sup>183</sup> Stanley rejected Buller’s proposal citing “insuperable” difficulties with it.<sup>184</sup>

The Company now had no option but to carry through on its threat to have the matter debated in Parliament. The battle in Parliament between the Company and

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<sup>180</sup> Ibid 6.

<sup>181</sup> Burns *Fatal Success*, above n 50, 256-257 & 263-265.

<sup>182</sup> Ingestre to Stanley, 5 May 1845, GBPP 1845 (357) XXXIII.417, 3-8 at 3.

<sup>183</sup> Ibid 4.

<sup>184</sup> Stanley to Ingestre, 23 May 1845, GBPP 1845 (357) XXXIII.417 at 8.

the Government over New Zealand policy began in earnest with three successive nights' debate in the Commons from 17 to 19 June,<sup>185</sup> and continued throughout the summer months in both the Commons and Lords.<sup>186</sup>

The debates were participated in by many of the politicians who had or were to play a principal role in British policy towards New Zealand in the 1840s (including Russell, Stanley, Grey, Labouchere, Hope, Hawes, Buller). The speeches contain much that is of interest but cannot be traversed here. In general, the same protagonists maintained the same positions on the question of Maori property (touching also on questions of sovereignty pre-1840, the advisability and meaning of the Treaty, the nature and extent of aboriginal land rights, the correctness and applicability to Maori of Gipps's approach in the land claims legislation, and British policy towards aboriginal groups in other parts of the Empire). Some spirited refutations of the applicability to New Zealand of the American approach (as endorsed by Gipps) of treating Indian title as a mere right of occupancy are made, of which that by Sir Howard Douglas (a former Lieutenant-Governor of New Brunswick and Lord High Commissioner of the Ionian Islands) stands out:<sup>187</sup>

<sup>185</sup> 81 GBPD HC cc 665-756 (17 June 1845), 761-846 (18 June), 853-968 (19 June).

<sup>186</sup> Burns *Fatal Success*, above n 50, 265-267.

<sup>187</sup> Sir Howard Douglas (18 June 1845) 81 GBPD HC cc 807-815 at 813-814. See also Captain Rous (18 June 1845) 81 GBPD cc 761-774 at 772-773:

As to the Report of the Committee, it was framed on the basis that a civilized power had a right of preemption to the soil, and that the natives of savage tribes had no valid title to their own land. Sir George Gipps quoted several legal authorities to convince his auditors; and he was sorry to say that he had convinced the Committee of the House of Commons, who ought to have known better, that by the old law of England they were entitled to the land in New Zealand. He had also quoted some of the most celebrated lawyers of the United States—Chief-Justice Marshall, Judge Story, and Chancellor Kent—as they gave him some information as to what had taken place with reference to the Americans and the aborigines of that country, the Indians. But Sir George Gipps and the Select Committee forgot that not one precedent, argument, or opinion so carefully collected, embraced the subject under discussion; these cases all related to American Indians, or to New Holland natives, whose independence we had never recognised, who had no national flag, who never enjoyed the rights and privileges of British subjects; and whose lands, fisheries, and forests were never guaranteed to them by a British Sovereign. Do not argue that the New Zealander is inferior to the American Indian;—that is not the question; it is whether we, as honourable men, should maintain the Treaty of Waitangi, which was not made for the benefit of the natives, but in order to assume the sovereignty of the island for the Queen of Great Britain, without which she could have no power to control her own subjects. Supposing the Treaty with the New Zealanders had been confirmed and ratified by two civilized Powers, was there any man who would doubt but that it was good and binding? And because they had entered into a Treaty with the natives of New Zealand, which they might now find to be inconvenient, were they to treat it as little better than a legal fiction? If they valued the name of British Gentlemen, they were bound in justice to maintain their engagements.

## Chapter Seventeen: London, 1840–47

I should like to ask where this principle of Colonial law is to be found? I find it not in Vattel, nor in Vaughan's Reports, nor in Stokes, nor in Blackstone. It is totally inconsistent with a strict observance of the stipulations of the Treaty of Waitangi. If carried out, it would violate the native rights which we have recognised and pledged to the New Zealand people. It would warrant a repetition of the worst atrocities of former times, which the noble Lord the Member for London so forcibly condemns. I suspect I know the origin of this new fundamental principle of Colonial law. It comes, I think, from the land in which the black man is a slave, and the red men of the forest have been driven and hunted from their lands, as the Seminole and other Indians have been, according to the prescription or adjudication that Indians have no other property to the soil of their respective territories than that of mere occupancy, and that the complete title to their lands vests in the Government of the United States! Diametrically different from this have been the policy and practice of Great Britain in her adjoining possessions—the Canadas. There the soil had been obtained by compact with the Indians. Every part of the vast region now settled has been obtained by regular conveyances and compacts from the native tribes. I have been a party to such compacts as a Commissioner to treat with numerous and extensive tribes in what were then remote unsettled parts.

Stanley in the House of Lords affirmed that Maori property, and whether there were unowned lands, could only be determined by “native law”.<sup>188</sup>

I am not prepared to say that there may not be some districts wholly waste and uncultivated—there are such in the northern island—but they are few in number; but I know that a large portion of the district in question is distributed among various tribes, all of whom have as perfect a knowledge of the boundaries and limits of their possessions—boundaries and limits in some places natural, in others artificial—as satisfactory and well defined, as were, one hundred years ago, the bounds and marshes of districts occupied by great proprietors and their clans in the Highlands of Scotland. With respect to the greater portions of New Zealand, I assert that the limits and rights of tribes are known and decided upon by native law. I am not prepared to say what number of acres in New Zealand are so possessed; but that portion which is not so claimed and possessed by any tribe, is, by the act of sovereignty, vested in the Crown. But that is a question on which native law and custom have to be consulted. That law and that custom are well understood among the natives of the islands. By them we have agreed to be bound, and by them we must abide. These laws—these customs—and the right arising from them on the part of the Crown—we have guaranteed when we accepted the sovereignty of the

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<sup>188</sup> Lord Stanley (10 July 1845) 82 GBPD HL cc 317-319 at 318-319.

islands; and be the amount at stake smaller or larger; so far as native title is proved—be the land waste or occupied—barren or enjoyed, those rights and titles the Crown of England is bound in honour to maintain; and the interpretation of the Treaty of Waitangi, with regard to these rights, is, that, except in the case of the intelligent consent of the natives, the Crown has no right to take possession of land, and having no right to take possession of land itself, it has no right—and so long as I am a Minister of the Crown, I shall not advise it to exercise the power—of making over to another party that which it does not itself possess.

Given his later role as advisor to the Colonial Office,<sup>189</sup> it is notable that the lead speech on the 17-19 June debate given by Charles Buller is marked by strong disparagement of the civilization and character of Maori of whom he said:<sup>190</sup>

It seems to me rather a capricious squeamishness to begin to hesitate about applying the old name of savages to the first people of whom we are very certain that they are extensively, habitually, and rather obstinately addicted to cannibalism. ... There is as little doubt that, except in so far as they have been affected by their contact with us, they are inferior to the Caffres, and to all the Indian tribes who peopled the West Indies, and the American Continent from the equator to Labrador.

This is not language that is seen in the public discourse, even that of the New Zealand Company, in the late 1830s or early 1840s and seems to indicate a shift in underlying attitudes. Such shift is possibly suggested by the Prime Minister, Sir Robert Peel, in his contribution at the very end of the debate on 19 June. He defended his government on the basis that it was bound to observe the Treaty as “an absolute engagement”. He reminded the House of the circumstances when the Instructions were given to Hobson:<sup>191</sup>

The feelings then entertained were very different from those of the present day; there was a different impression on the public mind with respect to Colonial relations eleven years ago, when your relations with New Zealand began.

Referring to Buxton’s Aborigines Committee and Report, he said that Normanby “was acting under the influence of the recommendations contained in that Report”:

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<sup>189</sup> See below n 197 and accompanying text.

<sup>190</sup> Charles Buller (17 June 1845) 81 GBPD HC cc 665-726 at 674.

<sup>191</sup> Sir Robert Peel (19 June 1845) 81 GBPD HC cc 947-963 at 954.

It may be said, that he made improvident engagements and wrote unwise despatches. It is as easy for you [the House] to lay down these doctrines with respect to Lord Normanby as you are now disposed to condemn Lord Stanley; but be it remembered what was the public feeling in regard to our relations with the aborigines which influenced Lord Normanby in 1839. It was under the influence of those feelings, and in the spirit of which the despatches were written, that your relation with New Zealand was formed, and which now constitutes the difficulty with which Lord Stanley has to contend. ... Then you acknowledged New Zealand as a sovereign and independent State. Now, I think, that you were wrong in doing so. I think, that you acted under impressions which were no doubt very natural; but, I think, that those impressions induced you and the Executive Government of that period to adopt a course that has weakened your future authority in the Colony, and has proved injurious to the natives. I think, that it would have been much better if we had claimed the right to New Zealand upon the ground of discovery, than to hold it by mere cession. You may say, that you have established your right to the Northern island; but I think, that the cession by chiefs, representing 8,000 inhabitants, is much less binding than our title to it on the ground of discovery. I do not hesitate to say that the Treaty of Waitangi has been a most unwise one, even for the natives. I think it would have been a much better course for us to have asserted the right of sovereignty on the ground of discovery, than to have accepted that sovereignty from the chiefs, and to have negotiated with them for the sale of the lands. These, however, are the engagements which you formed, and by which we must be bound. These are inconvenient, I admit, but you have already sanctioned them.

## Change

Although the Government continued to hold the line on its New Zealand policy and managed to survive each vote forced by the New Zealand Company supporters by insisting on party voting, its position was being eroded. The Colonial Office was pushed to a number of concessions to the Company. When news arrived in July 1845 of the northern uprising and sacking of Kororareka by Hone Heke and Kawiti, the Government was further on the back foot in the debates and the Colonial Office was forced to further concessions.<sup>192</sup> The ground was shifting. The claims of settlers to a measure of representative government was being conceded.<sup>193</sup> Burns's verdict of the outcome of Stanley's stewardship of the

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<sup>192</sup> See Burns *Fatal Success*, above n 50, 267.

<sup>193</sup> Ibid 266.

Colonial Office is that, although the Company fortunes did not prosper, there was a gradual shift in London to the view that a policy of priority for Maori could not be maintained against the interests of settlers.<sup>194</sup> This change in attitude, she believes, was implicit in instructions to the new Governor, George Grey. This position was reached in part because of the “inexorable pressure exerted by the company” which, by repetition, led to acceptance of the views that Colonial Office policy and the Treaty of Waitangi had been unwise. (Peel’s 19 June speech might be thought to demonstrate this shift of view, although his description of the Treaty as “unwise” may simply have been strategic political move to embarrass the Whigs who had been in government in 1840.) Burns’s conclusion is that, at the time that Stanley resigned office in December 1845, “the stage was set for the abandonment of a policy inspired, at least in part, by idealism in favour of one vitiated by more pragmatic political and commercial concerns”.<sup>195</sup>

It may be that this trend was irreversible (Stanley’s successor Gladstone was working on a Bill to lay the foundations for representative government in early 1846<sup>196</sup>) but it was accelerated when in mid-1846 the Whigs returned to power. Russell became Prime Minister; Howick, now Earl Grey following the death of his father, became Secretary of State for the Colonies; Hawes became Parliamentary Under-Secretary for the Colonies; and Buller, as McLintock writes, “came into the picture as an assistant of sorts in colonial affairs”.<sup>197</sup> Stephen was now on the eve of retirement and his successor, Herman Merivale, had started at the Colonial Office. Support for representative government for settlers led to the Constitution Act of 1846 and the view that only occupied lands were owned by Maori found expression in Earl Grey’s despatch of 23 December 1846 to Governor Grey. In this

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<sup>194</sup> Ibid 269-270.

<sup>195</sup> Ibid 270.

<sup>196</sup> Ibid 282-285.

<sup>197</sup> AH McLintock *Crown Colony Government in New Zealand* (RE Owen, Government Printer, Wellington, 1958) [“McLintock *Crown Colony Government*”] 286.

“waste lands” despatch Grey, citing in support the views of Thomas Arnold, asserted that:<sup>198</sup>

To contend that ... civilized men had not a right to step in and to take possession of the vacant territory, but were bound to respect the supposed proprietary title of the savage tribes who dwelt in but were utterly unable to occupy the land, is to mistake the grounds upon which the right of property in land is founded.

Neither the 1846 Constitution nor the waste lands despatch were implemented in New Zealand, due to New Zealand opposition and Governor Grey’s assessment that the first was premature and the second could not be accomplished without risk.<sup>199</sup> The expectation of representative government, however, was a tide that could not be stemmed and was to lead to the more thorough-going 1852 Constitution. Although Governor Grey was not prepared to free up land for settlement by treating unoccupied lands as waste available to the Crown, he secured funding from the Imperial Government to pursue an aggressive programme of land purchasing using the Crown’s right of pre-emption under the Treaty (in effect, as some commentators have suggested, using the Treaty against itself), which achieved the same end.<sup>200</sup> The waste lands despatch seems not to have been published in England until late 1847. At that time there was some outcry about it.<sup>201</sup> Public debate was not, however, reignited probably due to a combination of three reasons: Governor Grey had excluded reliance upon it as impolitic; the New Zealand Company had come to an agreement with the Government in May 1847 to

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<sup>198</sup> Grey to Grey, 23 December 1846, GBPP 1847 [763] XXXVIII.271, 64-87 at 68. Arnold’s writing on the right of property had earlier been used in the parliamentary debates of July 1845 by Viscount Ebrington, a member of the 1844 Select Committee. See Viscount Ebrington (30 July 1845) 82 GBPD HC cc 1247-1248.

<sup>199</sup> McIntock *Crown Colony Government*, above n 197, 289-291; Loveridge “An Object of the First Importance”, above n 25, 315-319.

<sup>200</sup> See, for example, Peter Adams *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland University Press, Auckland, 1977) 193 & 209; and Michael Belgrave “Pre-emption, the Treaty of Waitangi and the Politics of Crown Purchase” (1997) 31:1 *New Zealand Journal of History* 23-37 at 32-33.

<sup>201</sup> See, for example, 95 GBPD HC cc 1003-1030 (13 December 1847); 96 GBPD cc 328-365 (9 February 1848); and Louis Chamerovzow *The New Zealand Question and the Rights of the Aborigines* (TC Newby, London, 1848) (with legal opinions for the Aborigines’ Protection Society by Joseph Phillimore and Shirley Woolmer in an appendix). See also John Stenhouse “Church and State in New Zealand, 1835–1870: Religion, Politics, and Race” in Hilary Carey & John Gascoigne (eds) *Church and State in Old and New Worlds* (Brill, Leiden, 2011) 233-259 at 242-243.

scale back its operations and no longer had incentive to push its theories (and Wakefield, suffering from ill health and having fallen out with the Company over the agreement, was no longer a force);<sup>202</sup> all protagonists may also have grown weary of the New Zealand question. Land seems to have receded as an issue in London. It may not have arisen again until 1858 when the New Zealand Parliament passed the Native Territorial Rights Act, defining and systematising native title. The Colonial Office disallowed the Act. However, in a change of policy in 1861, the British Government indicated that it would not now oppose the establishment of a system of Crown grants for title to Maori lands.<sup>203</sup> This cleared the way for the establishment of the Native Land Court under the Native Land Acts of the New Zealand Parliament of the 1860s.

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<sup>202</sup> Burns *Fatal Success*, above n 50, 292-294.

<sup>203</sup> David Williams *“Te Kooti Tango Whenua”: The Native Land Court 1864–1909* (Huia, Wellington, 1999) 64-66.

CHAPTER EIGHTEEN  
NEW ZEALAND, 1840–77

In New Zealand throughout the period of Crown Colony government and into the early years of representative government, the nature and extent of Maori property in land was not directly confronted. It arose only indirectly, through opposition to the land claims legislation by pre-Treaty purchasers who argued that Maori had property in land, determined according to their custom and which included a power of alienation. Pre-Treaty acquisition according to native custom was, on their argument, valid while New Zealand was an independent and sovereign nation, and was entitled to recognition by the Crown when sovereignty was ceded. This argument was made most elaborately by James Busby, beginning at the time of the Land Claims Bill debate in Sydney, and carried on over three decades of letter writing, speech making and ultimately litigation.

By the time of Busby's litigation in the mid- to late-1850s, which I have described elsewhere,<sup>1</sup> the prospect of succeeding with such an argument in a New Zealand court had become too hard. In legislation and litigation concerned with settler land claims a course had been set which denied recognition to European titles obtained by purchase from Maori. Re-opening that question would, as Chief Justice George Arney was to later remark in Busby's litigation, "confound the rights of property through the length and breadth of the colony".<sup>2</sup>

What was not directly confronted in the land claims legislation and litigation were the implications of the reasoning adopted for Maori property. Gipps himself seems to have been of the view that Maori did not have property in land (he certainly said as much in 1840, although his immediate objective was solely the invalidation of

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<sup>1</sup> Ned Fletcher & Sian Elias "A Collusive Suit to 'Confound the Rights of Property Through the Length and Breadth of the Colony'? *Busby v White* (1859)" (2010) 41 Victoria University of Wellington Law Review 563-604 ["Fletcher & Elias '*Busby v White*'"].

<sup>2</sup> *Busby v White*, Supreme Court, Auckland, 14 December 1859, per Arney CJ; reported in *The New-Zealander*, Auckland, 17 December 1859, 5-6 ["*Busby v White*"] at 6, col 2.

British land claims).<sup>3</sup> But that does not seem to have been a view shared by those in New Zealand who participated in Treaty debates.<sup>4</sup>

Hobson's early correspondence, assurances to Maori, and land purchases (including of James Reddy Clendon's property at Okiato) suggest he treated Maori as owners of their lands.<sup>5</sup> He seems not to have expected that Gipps's Act would go as far as it did, although he endorsed it as a solution to the land-sharking problems.<sup>6</sup> Whatever his initial impulse, however, by the time his Land Claims

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<sup>3</sup> Busby's view in 1848 was that Gipps had been "alarmed by the claims which were made to large territories in the South & concluded that if he admitted the principle that any title acquired from the Aborigines could be valid the titles to these territories would also be so" (hence "the sophistries and misstatements by which he prevailed upon his Legislative Council to pass a law declaring them to be invalid"). Busby to JC Colquhoun, 10 January 1848, AML MS 46, Box 2, Folder 4.

<sup>4</sup> See Chapter 12, text accompanying ns 84–87.

<sup>5</sup> See, for example, English draft of Hobson to Nopera Panakareao, 13 May 1840, ATL fMS-Papers-2227-03 ("The Governor will use his influence and power to restore to all men their lawful rights and Property"); Hobson to de Thierry, 4 June 1840, CO 209/6, 178a-187b at 180a-b ("The fact is undeniable that to conclude a purchase in conformity with native custom you must satisfy the claims of the whole tribe before you acquire the right to it"); Hobson to Gipps, 25 October 1840, GBPP 1842 (569) XXVIII.293 at 90 ("Since my arrival in the Thames, I learn that the practice of taking land on fictitious leases from the natives for long terms ... is most universal in this district. I should be glad of a legal opinion how I can most effectually put a stop to such proceedings ... . The remedy I propose is, for the Government to purchase the fee-simple from the natives of some of these properties that are held on lease, and eject the tenants ..."); Hobson to Gipps, 17 February 1841, GBPP 1842 (569) XXVIII.293 at 91 ("The opinion of the Attorney-general [see *ibid*] ... does not ... meet the case complained of. If the lands held on lease from the aborigines could be deemed Crown lands, the course to be adopted is plain and obvious; but those lands are the property of the tribes, and the parties holding them, not having claim to them in fee, do not deem it necessary to prefer any claim before the Commissioners, but continue to occupy and cultivate them as tenants under the chiefs. The question is, How are such persons to be dealt with?) (See Gipps's reply to Hobson of 6 March 1841 at GBPP 1842 (569) XXVIII.293 at 91, advising him of the principle on which the Land Claims Act 1840 had been based that "uncivilized tribes, not having an individual right of property in the soil, but only a right analogous to that of commonage, cannot, either by a sale or lease, impart to others an individual interest in it"); Hobson to the Secretary of State for the Colonies, 26 May 1841, GBPP 1842 (569) XXVIII.293, 112–114 at 112 ("there is great reason to apprehend that none of this vast territory [Taranaki] has been legally purchased from the aborigines").

<sup>6</sup> Hobson to Russell, 15 October 1840, GBPP 1841 (311) XVII.493, 113–114 at 113 ("The New Zealand Land Bill ... is fully calculated to meet most of the difficulties that I enumerated in my letters of the 17th February last and the 23rd May"); Hobson to the Secretary of State for the Colonies, 4 August 1841, GBPP 1842 (569) XXVIII.293, 143–148 at 143 ("... I was totally uninformed of the measures contemplated by Sir George Gipps; and ... I was quite unaware that I was then or ever should be in a condition to assert a right on behalf of the Crown to any position which was adapted for a township. It was a subject on which I had no instruction, and all I could collect from colloquial communication with Sir George Gipps on the subject of recognition of claims to land in this country was, that 'all improved property, with a good belt of land round it, would certainly be recognised'").

Ordinance was enacted in June 1841, Hobson seems to have adopted the Gipps approach, and indeed it might be thought that clause 2 of the Ordinance went further than Gipps in enacting that “all unappropriated lands within the said Colony of New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony, are and remain Crown or Domain Lands of Her Majesty”.<sup>7</sup> Whether this tightening up was prompted by an emerging issue with settler leases from Maori,<sup>8</sup> or whether it was influenced by Colonial Office approval of Gipps’s Act or the terms of the 1840 Charter (with its proviso about lands occupied and enjoyed by Maori) or the views of Francis Fisher, the acting Attorney-General, rather than Hobson’s own convictions, is not clear. As has been seen, Hobson seems to have been readily persuadable.<sup>9</sup> Certainly when William Swainson arrived to take up the position of Attorney-General, Hobson seems to have fallen in with his ideas about systematic colonisation as reflected in further land claims legislation in 1842 (one ordinance was withdrawn because of the extent of the opposition to it in New Zealand; a subsequent ordinance was passed but disallowed in London).<sup>10</sup>

Swainson was said by Samuel McDonald Martin to be “a friend and a disciple of Edward Gibbon Wakefield”.<sup>11</sup> If so that may explain his promotion throughout the period of Crown Colony government of a doctrine of Crown pre-emption, not dependent upon the Treaty agreement.<sup>12</sup> That, however, was not the view taken by Governor Grey in 1847. He considered that it was by virtue of article 2 of the Treaty that the Crown “alone” had acquired the right of pre-emption in carefully stipulated terms. He regarded Fitzroy’s pre-emption waiver certificates as

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<sup>7</sup> Land Claims Ordinance 1841 (NZ) 4 Vict No 2, cl 2. Busby wrote of clause 2 in 1848 that it had “reduced the aborigines of New Zealand to the precise condition they should have been in if the Country had been like America taken possession of by ‘right of discovery’—and which was either a direct violation of the Treaty or had no meaning”. Busby to JC Colquhoun, 10 January 1848, AML MS 46, Box 2, Folder 4.

<sup>8</sup> See correspondence between Hobson and Gipps at n 5 above.

<sup>9</sup> See, for example, Chapter 11, text accompanying ns 83–84.

<sup>10</sup> See Loveridge “An Object of the First Importance”, above n 25, 83–88; and Armstrong “The Land Claims Commission”, above n 82, 93–107.

<sup>11</sup> SMD Martin *New Zealand; In a Series of Letters* (Simmonds & Ward, London, 1845) [“Martin *New Zealand* (1845)”] 139.

<sup>12</sup> See, for example, in relation to Busby’s land claims, Swainson’s opinion of 8 October 1847, quoted in Fletcher & Elias “*Busby v White*”, above n 1, 574.

inconsistent with the Treaty and therefore illegal. The Treaty “must be regarded as a fundamental law of the country, and as one which must be so interpreted as to harmonize with the other laws of New Zealand relating to like subjects”.<sup>13</sup>

During the years of Crown Colony government and into the years of representative government, a number of officials were or had been connected with the New Zealand Company. Prominent among them was Henry Chapman, the Supreme Court judge appointed in 1843, whose judgment in *R v Symonds*, while not directly concerned with Maori property, imported the American case-law into New Zealand law.<sup>14</sup> That was a step that was eventually to allow adoption in *Wi Parata* of the view that Maori did not have customary property recognisable in law but only a claim on the honour of the Crown which held all land not granted.<sup>15</sup>

Developments in England were followed closely in New Zealand and often with some surprise. The missionaries in particular were quick to write correcting errors, particularly in the propositions put forward by the New Zealand Company. So, Henry Williams wrote critically to Coates about Wakefield’s evidence to the 1840 Select Committee disputing his claims that the chiefs did not exercise sovereignty over defined territories;<sup>16</sup> and the missionaries in New Zealand reacted in dismay to the report of the 1844 Select Committee<sup>17</sup> and to Grey’s 1846 waste lands despatch pointing out that it was wrong to assume that there was any land in New Zealand not claimed as property by Maori.<sup>18</sup> Missionaries petitioned the Queen

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<sup>13</sup> Grey memorandum, 20 April 1847, GBPP 1847-48 [892] XLIII.371 at 32-34. That this was not a wholly aberrant view is illustrated by Arthur Thomson’s verdict on the Treaty in 1859. Thomson, in New Zealand’s first major history, said “[f]or nearly twenty years the treaty of Waitangi has been law” and “[t]he Treaty of Waitangi ... clearly recognised [Maori] legal title to all the land in the country, and on that account the act may be denominated the Magna Charta of the people.” Arthur Thomson *The Story of New Zealand: Past and Present—Savage and Civilized* (John Murray, London, 1859) vol 2, 22 & 23.

<sup>14</sup> *R v Symonds* (1847) NZPCC 387.

<sup>15</sup> *Wi Parata v Bishop of Wellington and Attorney-General* (1877) 3 NZ Jur (NS) SC 72.

<sup>16</sup> Henry Williams to Dandeson Coates, 21 October 1841, CMS CN/M vol 13, 292-298 at 293.

<sup>17</sup> See Chapter 17, n 174. In contrast, the missionaries fully approved Stanley’s 13 August 1844 despatch to Fitzroy regarding the Select Committee’s report; see Loveridge “An Object of the First Importance”, above n 25, 218-219.

<sup>18</sup> See, for example, Henry Williams to Bishop Selwyn, 12 July 1847, reproduced in Hugh Carleton *The Life of Henry Williams, Archdeacon of Waimate* (vol 2, Wilsons & Horton, Auckland, 1877) 155-157; Memorial of the Wesleyan Missionaries in New Zealand to the Home Committee of the Society, 31 July 1847, ATL MS-Papers-2624-08; Henry Williams to

against an advertisement of New Zealand land by the Colonial Land and Emigration Commissioners which was said to contravene article 2 of the Treaty.<sup>19</sup> They also petitioned against the Charter granted to the Company as a violation of the Treaty which would expose Maori “to all those evils in the indiscriminate sale of lands, which your Majesty’s Proclamation on the arrival of His Excellency Captain Hobson had happily restrained”.<sup>20</sup>

Busby, when in London in January 1845, had written to Under-Secretary Hope that he and the missionaries could not have “conscientiously recommended [the chiefs] to agree to the treaty” if they had been aware that Crown pre-emption would be used to facilitate extensive settlement.<sup>21</sup>

When it was proposed to the natives to cede the sovereignty of their country to the Queen, the alleged grounds of that proposal were the great influx of Her Majesty’s subjects into New Zealand which she could not prevent ... . The only motives alleged were those of benevolence and protection. The chiefs were persuaded to agree to the treaty (so far as it was executed at Waitangi), by their confidence in the missionaries and myself. But had we been aware that it was the intention of Her Majesty’s Government to enter into a competition with the New Zealand Company in colonizing the country by the profits to be realized from the lands to which the natives were invited for their own protection to yield the pre-emption, we could not, with our knowledge of their feelings and sentiments, have conscientiously recommended them to agree to the treaty ... .

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Governor Grey, 1 December 1847, GBPP 1849 [1120] XXXV.87; [George Selwyn & William Martin] *England and the New Zealanders* (Auckland, 1847) (which also reproduces letters from Rev John Hobbs and Rev Robert Maunsell on the subject of Earl Grey’s despatch at 73–81). See also John Stenhouse “Church and State in New Zealand, 1835–1870: Religion, Politics, and Race” in Hilary Carey & John Gascoigne (eds) *Church and State in Old and New Worlds* (Brill, Leiden, 2011) 233–259 at 241–242; and the other “notable examples” listed by Loveridge “An Object of the First Importance”, above n 25, 314 n 760.

<sup>19</sup> Petition of the Missionaries of the Church Missionary Society to Queen Victoria, 26 January 1842, reproduced in [Dandeson Coates] *Memoranda and Information for the Use of the Deputation to Lord Stanley in Reference to the New Zealand Mission of the Church Missionary Society* (London, 1843) 18–23 at 21. (The advertisement was said to contravene the guarantee in article 2 to Maori “and to their posterity for ever, [of] a full and exclusive property in their Lands, Forests, Fisheries, and all other possessions of whatever kind; your Majesty merely preserving the right of pre-emption in making purchases of Land”.)

<sup>20</sup> Ibid.

<sup>21</sup> Busby to Hope, 17 January 1845, GBPP 1845 (108) XXXIII.353, 14–19 at 15. See also James Busby “The British Government in New Zealand” (1844 or 1845), AML MS 46, Box 2, Folder 7 (holograph), 212–213.

## Chapter Eighteen: New Zealand, 1840–77

It was not without a feeling of great uneasiness and alarm that we first became aware of these intentions on the part of the Government; and on the appearance of a notice from the Emigration Commissioners, that parties in England purchasing land in New Zealand to the extent of eight square miles would be entitled to a right of selection in any part of the colony, at a time when the Government had not acquired the possession of more than from 2,000 to 3,000 acres, a petition to the Queen was prepared on the part of the missionaries and myself, setting forth the excitement and disaffection occasioned in the minds of the natives ... . But this petition was not forwarded to Her Majesty, as the missionaries afterwards decided upon petitioning or representing these facts through their society.

...

It, therefore, need excite no surprise, that they [Maori] should consider themselves as overreached and betrayed, when that right of pre-emption which they were prevailed upon to yield to the Queen, for the benevolent purpose of protecting them from the fraudulent dealings of Her subjects, should be made the very instrument of realizing their worst fears.

Although Busby was not the only old land claimant to continue to fight against the land claims legislation,<sup>22</sup> he proved perhaps the most persistent.<sup>23</sup> His campaign has its picaresque side, but what is important for present purposes, coming from one of the framers of the Treaty, are the arguments he made based upon the Treaty and the nature of Maori property. Over two decades he refined and developed arguments first raised by himself and Wentworth in the Land Claims Bill debate in Sydney in 1840. By 1859, the argument he presented in *Busby v White* was described by Chief Justice Arney as “one of the most colossal legal statements ever

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<sup>22</sup> See, for example, SMD Martin *New Zealand in 1842; Or the Effects of a Bad Government on a Good Country. In a Letter to the Right Honorable Lord Stanley, Principal Secretary of State for the Colonies* (John Moore, Auckland, 1842); Martin *New Zealand* (1845), above n 11; Protest of New Zealand landholders, c. late 1840, reproduced in Martin *New Zealand* (1845), above n 11, 364–367; Petition of Land Claimants to Governor Hobson, reproduced in *The Bay of Islands Observer*, Kororareka, 3 March 1842, at 1; and *The Bay of Islands Observer*, Kororareka, 17 March 1842, at 2.

<sup>23</sup> Although see Award of the American and British Claims Arbitration on William Webster’s Claim, 12 December 1925, (1926) 20 *The American Journal of International Law* 391–397; and John Greenlee “The Webster Land Claims in New Zealand” (1934) 3:4 *Pacific Historical Review* 416–432.

placed before a Court of Justice”.<sup>24</sup> It took over three days to deliver and was reported over nine editions of *The Southern Cross* newspaper. Part of his argument concerned the status of the Treaty of Waitangi. Busby maintained that the Treaty was comparable to the 1706 Treaty of Union between England and Scotland and was to be construed in the same manner as any treaty between “civilized nations” (as Maori had been acknowledged to be by the British Government). Such treaties were “sacred and inviolable, according to their intent and meaning” as was said in *Campbell v Hall*. As was the case in respect of the Treaty of Union 1706, in New Zealand “[a]ll our laws and institutions now existing derive their vitality from this treaty”.<sup>25</sup>

Busby also argued that the Treaty guaranteed his property interests because he had become a member of the Maori tribes he had purchased land from. As with Maori, he continued to hold his lands under Maori customary law which “remained in full vigour, notwithstanding the cession of their national sovereignty”:

[F]or, as the treaty guaranteed unto them all their property, it necessarily guaranteed the continuance in operation of the laws and customs constituting such property, and without which the rights in and to such property would become extinct.

In consequence:<sup>26</sup>

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<sup>24</sup> *Busby v White*, above n 2, 6, col 1. The submission is described in Fletcher & Elias “*Busby v White*”, above n 1, 586-593. It had been prepared for Busby by a barrister, Singleton Rochfort, drawing on library resources in Melbourne. Rochfort himself subsequently published it as *The Constitutional Law of England in its Relation to Colonial Settlements* (Philip Kunst, Southern Cross Office, Auckland, 1860).

<sup>25</sup> Supplement to *The Southern Cross*, Auckland, 1 November 1859, at 2, col 1. See also James Busby *The Rebellions of the Maories Traced to their True Origin. In Two Letters to the Right Honorable Edward Cardwell, Her Majesty's Principal Secretary of State for the Colonies* (Strangeways & Walden, London, 1865) 19-20: “The treaty of Waitangi was, therefore, a treaty of union, similar to that between England and Scotland. Many Englishmen possessed estates in Scotland at the period of the Union, but the Crown of England never pretended that the titles of those estates were null and void, unless allowed by the Crown. ... It requires but a very elementary knowledge of constitutional law to show that the High Court of Parliament was the only tribunal competent to deal with the proprietary rights of the subject, when the good of the community required them to be dealt with otherwise than by the provisions of existing municipal law.”

<sup>26</sup> Supplement to *The Southern Cross*, Auckland, 1 November 1859, at 2, col 4.

That part of the royal prerogative which takes its rise from the establishment of the feudal system in England, and under which the King is assumed to be the universal lord and original proprietor of all the lands in his Kingdom, from whom all titles to land are mediately or immediately derived, could have no existence within that territory, since no such system had ever obtained there, and no provision was inserted in the treaty for its introduction. That her Majesty never had any lands in New Zealand, either as original proprietor or as tenant, is patent on the face of the treaty; and the existence of a feudal custom in one country, as England, affords no legal inference of its existence in another country, as Jersey.

In addition to the guarantee of property in the Treaty, by obtaining the rights and privileges of British subjects,<sup>27</sup> Maori obtained the benefit of “[a]ll the laws of England which protect life, liberty, and property”. Busby submitted, indignantly:<sup>28</sup>

How could the maories have the rights and privileges of British subjects without the laws which create, define, and protect such rights and privileges? the maories stand in the same relation to the United Kingdom, that the Scots did to Great Britain, after the union of their country with England. Had a judge, after this union, declared that no Englishman could purchase lands of the natives of Scotland, save for the Crown, what would have been thought of him? what would have been said, if such judge had cited the case of the North American Indians in support of the doctrine? The cases of Scotland and New Zealand are identical.

Busby’s submission was supported by an English back-translation of the Treaty in Maori which had article 2 as confirming and guaranteeing “the full chieftainship of their lands, their estates, and all their property”,<sup>29</sup> which Busby also explained as guaranteeing to the “chieftains and nations, their dignities, offices, and properties”.<sup>30</sup> It is of interest that Busby indicated that what had been treated as the English text or translation of the Treaty was in fact “merely a copy of the original draft of the intended treaty” given to Henry and Edward Williams to translate into Maori. The “substance of both [the English draft and the Maori text]” was “alike”.

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<sup>27</sup> See also Busby to JC Colquhoun, 10 January 1848, AML MS 46, Box 2, Folder 4: “it must ever be remembered that the New Zealanders became the Queen’s subjects by Treaty & subject to the conditions of that Treaty.”

<sup>28</sup> Supplement to *The Southern Cross*, Auckland, 14 October 1859, at 1, col 5.

<sup>29</sup> Supplement to *The Southern Cross*, Auckland, 30 September 1859, at 2, col 1.

<sup>30</sup> Supplement to *The Southern Cross*, Auckland, 1 November 1859, at 2, col 3.

“[A]ny variations” between the Treaty (the Maori text) and the English draft were “to be accounted for, by the difficulty of rendering complex ideas into the language of a people having no literature”.<sup>31</sup>

Throughout, Busby had adhered to the view (first put forward by Wentworth and the editorial writers in Sydney and New Zealand in 1840) that Gipps had been wrong to draw on *Johnson v M’Intosh* because it was inapplicable to the circumstances of New Zealand. Busby was to later claim that support for his views had been provided to him by Justice Joseph Story of the United States Supreme Court. Story had sat in *Johnson v M’Intosh* and cases subsequent to it which dealt with the nature of Indian rights, and his *Commentaries* had been influential with Gipps. Busby had taken the opportunity when in Boston in 1844 to meet with Story. He referred to the meeting in correspondence in 1848<sup>32</sup> and gave a more detailed account of it in a speech to the New Zealand House of Representatives in 1856.

According to Busby, Story was interested to learn how his *Commentaries* had influenced the debate in Sydney and asked to see the report of the debates. He told Busby at a subsequent meeting that he had referred to the debate in lecturing to his class at Harvard (where Story was Dane Professor of Law) on aboriginal or Indian titles, exciting much interest in his description of “the new aspect under which the question had arisen in your distant part of the world”.<sup>33</sup> Busby reported that Story expressed “a high eulogium” on the speech of Wentworth and that “he also stated that the views I had myself expressed were perfectly correct”. Busby quoted Story’s words “as I noted them down at the time”.<sup>34</sup>

The Government will find it necessary in the long run to acknowledge all your titles which are undisputed by the Natives. I know what trouble our Government has had with

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<sup>31</sup> Ibid. See also Supplement to *The Southern Cross*, Auckland, 30 September 1859, at 2, col 1: “The treaty, whereof a true and attested copy is set out in *extenso*, was drawn up in Maori, the language of the country, and is to the effect following;— ...”.

<sup>32</sup> Busby to JC Colquhoun, 10 January 1848, AML MS 46, Box 2, Folder 4.

<sup>33</sup> James Busby *The First Settlers in New Zealand, and Their Treatment by the Government, being a speech delivered at the table of the House of Representatives, August 1st 1856* (Williamson & Wilson, Office of the “New-Zealander”, Auckland, 1856) 13-14 at 13.

<sup>34</sup> Ibid 14. Compare Busby’s 1848 account (above n 32).

questions of a similar character. Your titles do not belong to the category of Aboriginal or Indian titles. It is of no consequence what was the social or political condition of the New-Zealanders, the British Government had recognised and treated with them as a substantive and Independent State, and whatever other Nations might say to it, the British Government is bound by its own act. The Chiefs of New Zealand ceded to the Queen the pre-emption of their own lands, but they had divested themselves of all title to your lands before the Treaty. And they could not convey to the Queen rights which they had ceased to possess.

These views arguably reflected the approach of the United States Supreme Court in *Mitchel v The United States*.<sup>35</sup> The fact that Busby was never to cite this case suggests, however, that Story did not draw it to his attention.

Ultimately Busby was to be unable to prevail in his legal arguments (although after another decade of campaigning he was eventually able to secure a handsome settlement from the Government<sup>36</sup>). He seems to have recognised that his arguments were unlikely to prevail in a New Zealand court and tried to set up a claim that could be taken on appeal to the Privy Council. The New Zealand courts, in ways I have described elsewhere, managed the court processes to deny him that opportunity.<sup>37</sup>

Busby's arguments based on property principles and the Treaty were not without merit. Lack of sympathy for the old land claims purchasers (whose claims could have been more directly dealt to by exercise of the sovereign power) may have obscured the risk to Maori property in land if the *Johnson v McIntosh* line were adopted in New Zealand (as it was in *R v Symonds*,<sup>38</sup> where however the implications for Maori property were not squarely addressed).<sup>39</sup> The risk was

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<sup>35</sup> *Mitchel v The United States* (1835) 34 US 711. See Chapter 5, text accompanying ns 267-278.

<sup>36</sup> See Fletcher & Elias "Busby v White", above n 1, 602-604.

<sup>37</sup> See discussion of *Busby v McKenzie* (1855) and *Busby v White* (1859) in Fletcher & Elias "Busby v White", above n 1.

<sup>38</sup> *R v Symonds* (1847) NZPCC 387.

<sup>39</sup> Following Busby's loss in *Busby v McKenzie* (1855) (see Fletcher & Elias "Busby v White", above n 1, 577-583), an editorial in *The Southern Cross* expressed concern that the important question at issue, whether "native title was a true and valid" title, had been avoided. It pointed out that the issue was one that was as critical for Maori proprietors as for Busby and other old land claimants:

raised in connection with the treatment of Mrs Meurant. Mrs Meurant was a Maori woman married to a European whose marriage led to her being treated as a European under the Native Land Purchase Ordinance 1846, with the effect that the lands her Maori relatives had settled on her were forfeit to the Crown. Her plight excited local sympathy in the 1840s and 1850s and was settled after the intervention of the Aborigines' Protection Society in London.<sup>40</sup> It seems however to have been the only case in the first two decades of the colony where Maori property was directly questioned.<sup>41</sup> By the time the courts were asked to rule upon the nature of Maori property the circumstances of settlement had changed greatly and there had been a significant deterioration in race relations.

Busby himself reflected these changing attitudes as newspaper proprietor of *The Aucklander*, increasingly embittered by his own disappointments. While continuing to press the arguments he had always made in support of his own land claims (that he had acquired property from a sovereign people), by the early 1860s he was writing that by the Treaty Maori had “returned” their lands to the status of aboriginal title, held of the Crown rather than being recognisable in law as property, as a consequence of the right of pre-emption.<sup>42</sup> By the 1860s there was

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If his Honor's [Chief Justice Martin] view of the question were right, it would destroy the proprietary rights of every native in the country. The Government have only to seize upon the native land, ... sell it under Crown grant, and unless there be a grant on the other side—which is an absurdity—the first Crown Grant could not be questioned or set aside.

*The Southern Cross*, Auckland, 15 June 1855, 2, col 6 to 3, col 1 at 3, col 1.

<sup>40</sup> See Fletcher & Elias “*Busby v White*”, above n 1, ns 126 & 229; James Busby *Our Colonial Empire and the Case of New Zealand* (Williams & Norgate, London, 1866) [“Busby *Our Colonial Empire*”] 132-133.

<sup>41</sup> Or so Busby claimed. See Busby *Our Colonial Empire*, above n 40, 156.

<sup>42</sup> See *The Aucklander*, 9 September 1862 & 16 September 1862. Even more inconsistently with the arguments advanced in support of his land claims, see James Busby *Remarks Upon A Pamphlet Entitled “The Taranaki Question, By Sir William Martin, D.C.L., Late Chief Justice of New Zealand”* (Philip Kunst, Southern Cross Office, Auckland, 1860) claiming that: Maori had not had rights of property in land before the Treaty because New Zealand “was, in an emphatic sense, a country without a law and without a prince” (p 5); “I have not a copy of the Treaty of Waitangi before me, but unless my memory fails me, the word ‘rights’ does not once occur in that document”; (because of the transfer of the right of right of pre-emption by the Treaty) it was “unreasonable and unfounded” for Maori to claim the right to have the title to their lands (“thus qualified and restricted”) “dealt with according to the laws defining the rights of real property in England” (p 11); the legal non-recognition of Maori property was not “in any sense inconsistent with all the rights and privileges of British subjects to which they became entitled by the Treaty” (p 11); aboriginal titles (except in Australia) “have always been restricted by the colonizing power to the ‘use and occupation of the land’. In no case did the

considerable debate about whether the right of Crown pre-emption should be maintained or Maori land opened up for direct purchase by settlers. Busby continued to insist that the right of pre-emption in article 2 of the Treaty was never a right of first offer but was “used in the technical sense, in which it has always been used in dealing with the American Indians ...—that is, as an exclusive right to deal with them for their lands” rather than its “etymological sense”.<sup>43</sup> Busby’s explanation here seems to draw on the judgment of Justice Henry Chapman in *R v Symonds* (1847).<sup>44</sup>

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land become subject to the laws regarding property until the Native title was extinguished” (p 12); “I can perceive no difference between the aboriginal titles, as recognised in America, and those possessed under the Treaty in New Zealand” (p 12); “To maintain the faith of Treaties there exists no Law” (p 13). Busby’s claims in this pamphlet were strongly refuted by George Clarke, the former Protector of Aborigines. Compare George Clarke *Pamphlet in Answer to Mr James Busby’s on the Taranaki Question and the Treaty of Waitangi By Sir William Martin (Late Chief Justice of New Zealand)* (1st ed 1861; reprinted AF McDonnell, Auckland, 1923); and William Martin *The Taranaki Question* (Melanesian Press, Auckland, 1860) 9: “The Treaty of Waitangi carefully reserved to the Natives all then existing rights of property. It recognised the existence of Tribes and Chiefs, and dealt with them as such. It assured to them ‘full, exclusive and undisturbed possession of their lands and other properties which they may collectively or individually possess, so long as it is their pleasure to retain the same’. This Tribal right is clearly a right of property, and it is expressly recognised and protected by the Treaty of Waitangi. That Treaty neither enlarged nor restricted the then existing rights of property. It simply left them as they were. At that time, the alleged right of an individual member of a Tribe to alienate a portion of the land of the Tribe was wholly unknown.” See also Henry Williams to William Williams, 1 May 1861, AML MS 91/75, Box 3, Folder 95, item 666: “You have seen Mr Busby’s effusion; of course he sticks to his own idea and who can alter that—or even attempt to do so.”

<sup>43</sup> Busby to WF Porter, *The Southern Cross*, Auckland, 25 June 1858, at 4, col 1:

They were told that it was not the intention of the Government to deprive them of their lands; but that, if they wished for the protection of the Queen’s Government, they must agree to sell no more lands to individuals, and agree to sell it only to the Queen, who would appoint agents to deal with them for it. This, in the English translation of the Treaty, is termed ‘Yielding to the Queen the right of pre-emption’. But the word, in the English version of the Treaty, is used in the technical sense, in which it has always been used in dealing with the American Indians (and, as far as I am aware, the use of the word is peculiar to such transactions),—that is, as an exclusive right to deal with them for their lands. The etymological sense of the word ‘pre-emption’ may be different, but it assuredly was never understood by the Natives that the Queen was only to have the first offer of the land; which would have been a mere mockery. The relinquishment of the right to sell land to anyone but to agents appointed by the Queen was as absolute in the Maori version of the Treaty as one of the best Maori scholars could make it.

<sup>44</sup> *R v Symonds* (1847) NZPCC 387 at 391: “Mr Bartley contends that all that the Natives convey to the Queen by the Treaty of Waitangi is a right to have the first offer of the land, or, say, in one word, the refusal, a conclusion which he draws from the etymological structure of the word pre-emption. ... [T]he Court must look at the legal import of the word, not at its etymology. ... [T]he framers of the Treaty found the word in use with a peculiar and technical meaning, and, as a short expression for what would otherwise have required a many-worded explanation, they were justified by very general practice in adopting it. No one now thinks of

In a manner that was totally inconsistent with the views he had expressed in 1845,<sup>45</sup> however, Busby now insisted that the aim of pre-emption had not been to protect Maori from loss of land.<sup>46</sup> In fact, the understanding of all parties had been that “the Queen should purchase their lands whenever they were disposed to sell them”. It was, he suggested, a “violation of the spirit” of the Treaty that the Crown had not been prepared to purchase more Maori land:<sup>47</sup>

The lands not required for their own use were of no value to them, and never would have been of value but for the introduction of English settlers and English capital.

By this time Busby was being described by Henry Williams “as mad as any of them—a bitter enemy against the natives, and every one else —himself excepted”.<sup>48</sup>

In the context of the 1870s, when *Wi Parata* was decided, the authority of *R v Symonds*, with its adoption of *Johnson v McIntosh*, proved irresistible. In the 1840s and 1850s, however, there was no such inevitability about its adoption, as can be seen from the reasoning employed by Judge Fenton in *Kauwaeranga* in 1870 (“[w]e must seek then in the Treaty itself for the true solution of our problem”; “the ownership was before the King, and the King confirmed and promised it”) and from later Privy Council reluctance to accept that there was no legally recognisable Maori customary property.<sup>49</sup> It is by no means certain that if Busby had been able

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objecting to the use of the word sycophant, in its secondary meaning, because its true meaning is a ‘shower of figs’.”

<sup>45</sup> See text accompanying n 21 above.

<sup>46</sup> *The Aucklander*, 20 May 1861, 2-3 at 3 (“the Aborigines’ Protection Society are under a great mistake in assuming that the right of pre-emption was obtained from the natives for their protection against fraudulent purchases. No such reason was ever assigned from any authoritative quarter. The reason assigned was, that both races might live and trade together in peace and quietness under the protection of the Queen’s Government”); Busby *Our Colonial Empire*, above n 40, 96 (“Now it must be admitted that the natives were not informed that it was intended to make the resale of land purchased from them the means of raising a fund to settlement the country with British emigrants. ...”).

<sup>47</sup> Busby to WF Porter, *The Southern Cross*, Auckland, 25 June 1858, at 4, col 1.

<sup>48</sup> Henry Williams to William Williams, 23 July 1861, quoted in Ruth Ross “Te Tiriti o Waitangi: Texts and Translations” (1972) 6:2 NZJH 129-157 at 152 n 108.

<sup>49</sup> Alex Frame “Kauwaeranga Judgment” (1984) 14 Victoria University of Wellington Law Review 227-245 at 243 & 244; *Nireaha Tamaki v Baker* [1901] 1 AC 561; *Wallis v Solicitor-General for New Zealand* [1903] AC 173. Compare Jim Evans “Reflections on *Nireaha Tamaki v Baker*” (2005) 2 Te Tai Haruru: Journal of Maori Legal Writing 101-134 and Mark

to take his case to the Privy Council the subsequent approach adopted in *Wi Parata* (1877) would have taken root.

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Hickford “John Salmond and Native Title in New Zealand: Developing a Crown Theory on the Treaty of Waitangi, 1910–1920” (2007) 38 *Victoria University of Wellington Law Review* 853-924.

## CHAPTER NINETEEN

### **THE QUEEN'S SOVEREIGNTY AND MAORI SOCIETY AFTER 1840**

A comprehensive review of the history of British administration in New Zealand from 1840 for indications of how the Treaty of Waitangi was understood and shaped official decisions is beyond the scope of this work. Here, my aim is to show what was said on the subject of how British government was to apply to Maori society both immediately and in the future rather than what can be inferred from how British administration was conducted. Nor do I attempt a full survey of views such as would enable a conclusion as to the preponderance of opinion (which, in any event, is likely to have shifted over time). Instead, my purpose is to draw attention to expressions of view in the post-1840 record which indicate that the cession of sovereignty was not seen to foreclose a range of options for ongoing Maori self-government according to custom. The fact that some of these possibilities were held out as available as late as the 1860s suggests that they could certainly have been seen as options for the future under the Treaty by its framers in 1840.

The views outlined in what follows do not seem fully explicable in terms of a temporary strategy while the Government gathered strength and could properly assimilate Maori society into a single system of government and law. Nor do they seem fully reconcilable with a strategy of indirect rule through chiefs deprived of any legal status in the new order. Rather, there are enough statements by people highly placed apparently accepting of customary authority, including of the chiefs, to suggest that that outcome was plausible and seen as consistent with the Treaty.

Views about the implications of British sovereignty for Maori society are encountered only from time to time in the historical record. This section concentrates in particular on Russell's Instructions to Hobson of 9 December 1840 because they are a rare occasion on which it was necessary for British policy towards Maori to be spelt out. Also discussed are English back-translations of the

Treaty in Maori (including translations by James Busby and Henry Williams). They are significant because their rendering of “kawanatanga” as “sovereignty” and “rangatiratanga” as “chieftainship” suggests that no conflict was seen between the Maori and English terms. Finally, reference is made to a number of statements made in different contexts down to the mid-1860s, usually in reaction to some crisis or challenge in British-Maori relations, which are supportive of the continuation of custom and chiefly authority. Again, the purpose of referring to these statements, made in an increasingly hostile climate to Maori as New Zealand and the wider world moved on, is to show that it cannot have been preposterous in 1840 to regard British sovereignty as compatible with Maori self-government. There may well have been substantial variation of opinion as to how colonial and Maori government could coexist. That is not a matter developed in this section. It does not detract from the point sought to be made that such accommodation was understood as appropriate and required by the Treaty.

### **Russell's Instructions to Hobson**

Russell's Instructions of 9 December 1840 to Hobson, which accompanied the Charter establishing the Colony of New Zealand, the Commission appointing Hobson Governor, and further instructions of 5 December 1840, are important elaboration of British policy.<sup>1</sup> The 9 December Instructions addressed aspects of administration under six headings:<sup>2</sup>

- I. Legislation.
- II. Administrative authority.
- III. The use of the Public Revenue.
- IV. The Aborigines.
- V. The sale and settlement of Waste Lands; and

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<sup>1</sup> Russell to Hobson, 9 December 1840 (with enclosures), GBPP 1841 (311) XVII.493 at 24-47 (also CO 209/8, 460a-504a).

<sup>2</sup> Ibid 24.

## Chapter Nineteen: The Queen's Sovereignty & Maori Society

VI. The general care of the education of youth, and the religious instruction of all classes within your government.

What is immediately striking about the Instructions is that they draw a distinction between government of the settlers and government of Maori. Apart from the Instructions under heading IV, Maori do not feature under any of the other headings (except for a reference under heading V to make it clear that the demesne lands of the Crown do not include “those still retained by the aborigines”<sup>3</sup>). This difference in treatment extends even to the concerns under heading VI, relating to “the education of youth, and the religious instruction of all classes within your government”, which are confined to “colonists”.<sup>4</sup> Under heading I, it was envisaged that the Legislative Council would enact laws for the colonists to meet local conditions (with the recommendation that the governor would find useful precedents in the laws of New South Wales and Van Diemen's Land) to augment the laws carried with the settlers “as their birthright”.<sup>5</sup> The fact that the Protector of Aborigines (the key officer under heading IV) was not a member of the Legislative Council<sup>6</sup> may suggest that it was not anticipated that the laws enacted by the Legislative Council would generally bear directly on Maori society. Under heading III (where the concern is principally with the need for frugality), the Instructions looked to the establishment of municipal and district governments to undertake much of the work of government, including the provision of police, local prisons and court-houses, as well as roading and drainage. It is clear that this local government (which was described as eminently “consonant with the English character and habits”) was to be undertaken by the colonists and was seen to provide an opportunity for “training the colonists to the exercise of the more important duties of a free people, and a representative government”.<sup>7</sup>

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<sup>3</sup> Ibid 30.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid 24.

<sup>6</sup> In addition to the Governor, the Legislative Council was to be composed of the Colonial Treasurer, Colonial Secretary, Attorney-General, and “the three senior justices of the peace, not holding any place of emolument under the Crown”. Ibid 25.

<sup>7</sup> Ibid 26.

Although the Instructions relating to Maori are confined under a single heading, Russell emphasised the importance of this topic: Maori were to “be the objects of your constant solicitude, as certainly there is no subject connected with New Zealand which the Queen, and every class of Her Majesty's subjects in this kingdom, regard with more settled and earnest anxiety”. The particular claims of Maori to such solicitude were identified by Russell as based on both the condition of Maori society (including the progress of Christianity among them) and the history of British dealings with them:<sup>8</sup>

[A]mongst the many barbarous tribes with which our extended colonial empire brings us into contact in different parts of the globe, there are none whose claims on the protection of the British Crown rest on grounds stronger than those of the New Zealanders. They are not mere wanderers over an extended surface, in search of a precarious subsistence; nor tribes of hunters, or of herdsmen; but a people among whom the arts of government have made some progress; who have established by their own customs a division and appropriation of the soil; who are not without some measure of agricultural skill, and a certain subordination of ranks; with usages having the character and authority of law. In addition to this, they have been formerly recognized by Great Britain as an independent state; and even in assuming the dominion of the country, this principle was acknowledged, for it is on the deliberate act and cession of the chiefs, on behalf of the people at large, that our title rests. Nor should it ever be forgotten, that large bodies of the New Zealanders have been instructed by the zeal of our missionaries in the Christian faith.<sup>9</sup>

The principal anxiety identified with respect to Maori in the Instructions was the threat to them from contact with settlers, a threat acknowledged to have been borne out by experience in other colonies. In many there had been a rapid process of “extermination”, facilitated by inequality in “military prowess and social arts”. Even in the absence of such “positive injustice”, Russell acknowledged that, for reasons that were “obscure”, the experience had been of “the rapid disappearance of the aboriginal tribes in the neighbourhood of European settlements”. The

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<sup>8</sup> Ibid 27.

<sup>9</sup> Russell omitted here from Stephen's draft the additional words “also that they have exhibited no want of wisdom to appreciate the blessings, or of self-control to perform the duties, incidental to the character which they have thus assumed”. Russell to Hobson, 9 December 1840, CO 209/8, 460a-504a at 481a.

“dread” of repeating this experience had been, as Normanby’s Instructions to Hobson had made clear, the reason for the British Government’s reluctance to intervene in New Zealand “until the irresistible course of events had rendered the establishment of a legitimate authority there indispensable”. (In the text, Russell removed from Stephen’s original draft the further explanation that the establishment of authority had been “chiefly with a view to the preservation of the natives from the oppression of the lawless multitude which had settled in their neighbourhood”, perhaps out of concern for settler sensibilities.<sup>10</sup>) The risk of “extermination” meant that “it is our duty to leave no rational experiment for the prevention of it unattempted”.<sup>11</sup>

The experiments proposed in the Instructions were all measures for the protection of Maori, while looking to their longer-term or “higher” interests. The “practical measures” recommended to the Governor were to support the endeavours of the missionaries, to appoint officers to protect Maori “in the enjoyment of their persons and their property” supported by laws to prevent and punish “wrongs to which their persons or their property may be exposed”, to encourage the education of Maori youth, and to offer opportunities for military training and employment.<sup>12</sup>

Although the importance of the work of the missionaries and the education of Maori youth were acknowledged,<sup>13</sup> it is clear from the Instructions that it was not envisaged that the colonial government would be required to take a direct role. Its task was rather to facilitate the work being carried out and financed by the missionary societies. While Hobson was told he could use public revenues to aid the work of the missionaries, he was also instructed that “the missions must ... continue chiefly dependent” on their fundraising in Great Britain: “[t]he contributions of the Government can only be subsidiary to this principal

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<sup>10</sup> Ibid 482b.

<sup>11</sup> Russell to Hobson, 9 December 1840, GBPP 1841 (311) XVII.493, 24-47 at 27.

<sup>12</sup> Ibid 27-28.

<sup>13</sup> For example, it was stated that “[t]he education of youth among the aborigines is of course indispensable to the success of any measures for their ultimate advancement in social arts, and in the scale of political existence”. Ibid 28.

resource".<sup>14</sup> The concern of the colonial government in relation to Maori was principally to manage the potential for conflict and the risks of contact between Maori societies and settlers (including the risks to Maori health from "the effect of sudden changes in dress, diet, and modes of living"<sup>15</sup>). Extermination was not the only risk: "all experience concurs to show that the injudicious care of savage by civilized men, though not the usual, is yet a fatal cause of their premature decay".<sup>16</sup> Apart from the protection to be provided by Protectors and laws, the Instructions looked to two ways in which Maori and settlers could be set up to coexist: through encouraging settler respect for the strength of Maori by providing them with military training for "maintaining the public peace, and ... resisting external aggression", and by establishing the usefulness of Maori labour to settlers (upon principles suggested by George Grey in Western Australia<sup>17</sup>). The first solution was acknowledged to be risky (and, in the final version of the Instructions, is a diluted version of Stephen's original proposal<sup>18</sup>) and the second, also expressed to be risky, is put forward with some doubt given what was known of the work-habits and preferences of Maori.<sup>19</sup> Despite these doubts, Russell was of the view that some such experimentation was necessary because there were limits to what could be accomplished by laws and education.<sup>20</sup>

Penalties, regulations, and even the precepts of religion, will prove unavailing to avert from the natives the dangers impending over them, if these be not aided by experiments,

<sup>14</sup> Ibid.

<sup>15</sup> Ibid 29.

<sup>16</sup> Ibid.

<sup>17</sup> It is important to note that Grey's report was referred to Hobson for its aboriginal labour proposals rather than for its recommendations about replacing aboriginal custom with English law. As is indicated in Chapter 3 (text accompanying n 239), Grey's proposals as to law were not embraced as suitable for general application. Even in respect of the labour proposals, Russell in his Instructions to Hobson expressed caution about their application to New Zealand. They were drawn to Hobson's attention as "an illustration" of a possible policy and Hobson would "probably find some of [Grey's] suggestions inapplicable to the state of New Zealand". Ibid 29. See Peter Adams *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (Auckland University Press, Auckland, 1977) ["Adams *Fatal Necessity*"] 216.

<sup>18</sup> See Russell's changes to Stephen's draft at CO 209/8, 483a-b, 489a-490a.

<sup>19</sup> Russell to Hobson, 9 December 1840, GBPP 1841 (311) XVII.493, 24-47 at 28-29: "It is only in proportion as either respect for the strength of the aborigines, or a clear sense of the utility of their services and co-operation, shall possess the public mind, that they will be placed beyond the reach of those oppressions of which other races of uncivilized men have been the victims".

<sup>20</sup> Ibid 29.

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wisely conducted, to show at once the practicability and the advantage of enlisting the services of these people in works of public utility.

Russell expressed anxiety about the success of the suggestions he made for protecting Maori. He acknowledged that the Governor would have to assess what was most effective on the ground but was confident that there could be no difference between them on the ends in view:<sup>21</sup>

Those ends are, the protection of the aborigines from injustice, cruelty, and wrong; the establishment and maintenance of friendly relations with them; the diversion into useful channels of the capacities for labour, which have hitherto been lying dormant; the avoidance of every practice towards them tending to the destruction of their health or the diminution of their numbers; the education of their youth; and the diffusion amongst the whole native population of the blessings of Christianity. If the experience of the past compels me to look forward with anxiety to the too probable defeat of these purposes, by the sinister influence of the many passions, prejudices, and physical difficulties with which we shall have to contend, it is, on the other hand, my duty and your own to avoid yielding in any degree to that despair of success which would assuredly render success impossible. To rescue the natives of New Zealand from the calamities of which the approach of civilized man to barbarous tribes has hitherto been the almost universal herald, is a duty too sacred and important to be neglected, whatever may be the discouragements under which it may be undertaken.

On the execution of the laws “in whatever concerned more immediately the rights and interests of the natives”, Russell was less tentative. The Instructions were based around the mediation of a Protector, with “such subordinate assistance as may be found necessary”.

The Instructions respecting the Protectors and laws are not free from ambiguity.<sup>22</sup> The view expressed here is that they must be interpreted in the context of the Instructions as a whole. As has been explained, the Instructions drew a distinction between settlers and Maori as objects of government. In relation to Maori, the principal concern expressed in them was with the risks to those living “in the neighbourhood of European settlements”. It is this concern which prompted the

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<sup>21</sup> Ibid 29-30.

<sup>22</sup> Ibid 28.

institution of the office of Protector and the elaboration in the Instructions of how disputes, whether criminal or civil in nature, were to be resolved with recognition of Maori custom.

The instructions dealing with the Protectors and laws follow and are separate from the treatment of tribal warfare. In a prominent insertion into Stephen's draft made by Russell, following the opening statement that Maori were to be the objects of Hobson's "constant solicitude", Russell wrote:<sup>23</sup>

At the same time you will look rather to the permanent welfare of the tribes now to be connected with us, than to their supposed claim to the maintenance of their own laws and customs. When those laws and customs lead one tribe to fight with, drive away, and almost exterminate another, the Queen's sovereignty must be vindicated, and the benefits of a rule extending its protection to the whole community must be made known by the practical exercise of authority.

It is striking that it is only warfare that is treated in the Instructions as implicating the Queen's sovereignty. By contrast, in the section (some paragraphs later) dealing with Protectors and laws, the relationship between colonial law and Maori custom is not treated as determined by the Queen's sovereignty.

The instructions about the Protectors provide for laws to be framed permitting them to interfere, "prompt[ly] and decisive[ly]", in criminal and civil disputes involving Maori. In criminal cases (which may or may not have been confined to mixed cases and in which the focus seems to have been on European offending against Maori), the Protectors were to be invested with "magisterial authority" ("more prompt than that of our justices of the peace, and less fettered with technical forms and strict legal responsibilities") but with "immediate access" to colonial criminal courts to prosecute crimes where necessary. In the case of civil disputes, the Protector<sup>24</sup> was to be given a "summary jurisdiction, for arbitrating

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<sup>23</sup> Ibid 27; Russell to Hobson, 9 December 1840, CO 209/8, 460a-504a at 479b-480a. It would be a mistake to read anything slighting in Russell's words "supposed claim" which are consistent with an assumption of the position in New Zealand without precise knowledge.

<sup>24</sup> Russell deleted the reference in Stephen's draft to the Protector's assistants. See Russell to Hobson, 9 December 1840, CO 209/8, 460a-504a at 486a.

on<sup>25</sup> all questions controverted between the European and the native settlers” (with a possible right of appeal in “weighty cases” to “the ordinary tribunals of the colony”). The Instructions continued that, “[i]n the same way”, “questions disputed among the natives themselves should fall under the cognizance of the protector,—so far as this might be compatible with a due regard to any native customs, not in themselves immoral, or unworthy of being respected”. Whether this related back to the “native settlers” or expanded the dispute-solving powers of the Protector to all Maori is not clear.

It is in connection with the role of the Protectors (and the authority to be given to them by statute) that the Instructions then dealt with how the Protectors were to take “cognizance” of custom. Three categories of custom were identified upon which it was “important to advert distinctly”. Those which violated “the eternal and universal laws of morality” (*mala in se*), identified by reference to “cannibalism, human sacrifice, and infanticide”, it was “the duty of the Government not to tolerate”. “[N]o compromise” in respect of them could be made, “under whatever pretext of religious or superstitious opinion they may have grown up”. It appears that such violations were able to be prosecuted by the Protector. The second category of customs identified, of which Stephen in his draft had given the example of polygamy,<sup>26</sup> were those which, “however pernicious in themselves”, were to be “gradually overcome by the benignant influence of example, instruction, and encouragement” rather than by “legal penalties”. Finally, there were customs which were more “absurd and impolitic, than directly injurious”. These were to be “borne with, until they shall be voluntarily laid aside by a more enlightened generation”. The Instructions required the enactment of “some positive declaratory law” authorising the Executive to “tolerate” customs in the second and third categories because without such authorisation “the law of England would prevail over them, and subject the natives to much distress, and many unprofitable hardships”. It was a duty of the Protectors to “make themselves conversant with these native customs” and to inform the Government about them.

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<sup>25</sup> Russell substituted the words “arbitrating on” for “determining” in Stephen’s draft. *Ibid.*

<sup>26</sup> *Ibid* 487a.

As has been described in Chapter 4, a distinction in treatment between natives living apart from their tribal communities in European settlements and those still living traditionally is one encountered in other colonies. It is quite possible to read Russell's instructions on law as it affected Maori as limited to individuals living outside their tribes in British settlements. Certainly that is suggested by the reference to "the European and the native settlers". The reference to "native settlers" seems have been deliberate: a specific amendment to the draft to insert the definite article before "European" suggests that "native settler" was no slip.<sup>27</sup>

It is also possible to read the reference to need for a "positive declaratory law, authorizing the executive to tolerate ... customs" as referring to a rule to permit recognition of custom in the colonial legal system where conflict between Maori custom and the law applicable to colonists arose. If so, the Instructions are not inconsistent with continuity of a system of Maori custom coexisting with the colonial legal system but requiring reconciliation where the two collide. Clearly such coexistence was not possible in the case of warfare, even if customary, because the tribes had surrendered that right with the surrender of sovereignty. As the Instructions went on to explain, the limit to the toleration of custom was crimes which were mala in se. These are not treated in the Instructions as following from the Queen's sovereignty. The Instructions are ambiguous as to whether the non-recognition of custom which permitted such crimes was confined to areas of British settlement, as was the case in some of the other colonies already surveyed. Certainly, the fact that the Instructions envisage that any interference by the Executive with Maori be undertaken through the Protector and his assistants (rather than by judges, justices of peace, or constables) suggests that the reach of colonial authority may have been seen to be so limited. If this is the sense of the Instructions, then they are comparable with the approach seen in British North America, from the *Mohegan Indians* case down, as described by Mark Walters.<sup>28</sup> On this approach, Maori tribes could have retained their laws and institutions "excepting in point of sovereignty", with custom "cognizable" under the British

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<sup>27</sup> See Russell to Hobson, 9 December 1840, CO 209/8, 460a-504a at 486a.

<sup>28</sup> See Chapter 4.

legal system (at least, in the view of the Instructions, with some statutory authorisation) in cases of conflict except where it permitted crimes *mala in se*.

The Instructions, properly read, do not suggest that Maori custom had no existence unless recognised in colonial statute, contrary to generally-held scholarly opinion.<sup>29</sup> The requirement for “some positive declaratory law” to authorise “toleration” of custom applied only to customs which, in English estimation, were “pernicious” or “absurd and impolitic”. It said nothing about custom not so characterised, to which the Protector was required to have “due regard”. Nor is there any clear support in the Instructions for an intention to interfere with Maori tribal organisation and custom as opposed to moderating disputes and punishing crimes that were *mala in se*, and then arguably only in areas of British settlement or in cross-racial cases.

### **English back-translations of the Treaty in Maori**

English back-translations of the Treaty began to be circulated from its signing and continued to appear for some decades.<sup>30</sup> To begin with, they filled a gap for those without knowledge of Maori because the Treaty text had been published by Hobson in Maori only.<sup>31</sup> The English draft (see Chapter 1) was published in the British Parliamentary Papers in July 1840<sup>32</sup> and by the Government Printer in Auckland in 1844 as if an official Treaty text.<sup>33</sup> Contemporaries, however, seem to have understood that the Maori text was the true treaty. The back-translations, therefore, continued to be made after 1844 when the terms of the Treaty were under discussion by English speakers. The recourse to back-translations, it should

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<sup>29</sup> See, for example, Alan Ward *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland University Press, Auckland, 1973) 37-38; Adams *Fatal Necessity*, above n 17, 215 & 222; and Paul McHugh “Brief of Evidence for the Crown” (Te Paparahi o Te Raki—Northland Inquiry, Wai 1040, 16 April 2010, A21) 78-79.

<sup>30</sup> See Phil Parkinson “‘Preserved in the Archives of the Colony’: The English Drafts of the Treaty of Waitangi” (2004) 11 *Révue Juridique Polynésienne*/New Zealand Association for Comparative Law, Special Monograph [“Parkinson ‘Preserved in the Archives’”] chs 7 & 8 and Appendix (Documents 7-14).

<sup>31</sup> *BiM* 83.

<sup>32</sup> GBPP 1840 (560) XXXIII.575 at 10-11. See also GBPP 1841 (311) XVII.493 at 9 & 98-99.

<sup>33</sup> Parkinson “Preserved in the Archives”, above n 30, 65; *BiM* 215.

be noted, was not generally prompted by controversy about perceived conflict between the English and Maori texts. Rather, the Maori text was treated as authoritative.<sup>34</sup>

Henry Williams has left one "literal translation of the original Maori document", which was published in the *Westminster Review* in 1864. Before then, he had provided partial texts or explanations of the Maori treaty to Dandeson Coates (1841) and Bishop Selwyn (1847). In addition, Williams set down an account of the signing of the Treaty in his "Early Recollections", reproduced in his biography, published in 1877. In all these accounts, Williams made it clear that the Treaty preserved the rights of the chiefs.

In the letter to Coates, Williams referred to missionary assurances to Maori that "the Government would exercise no authority of their rights and privileges". He also acknowledged the "desire of the Missionaries to keep the Natives to their own districts apart from the Europeans under the persuasion that this is the only means of preserving peace between the parties".<sup>35</sup>

The letter to Selwyn in 1847 was elicited by Selwyn's inquiry, in the context of Earl Grey's waste lands despatch, as to how the Treaty had been explained to Maori at Waitangi. Williams was indignant that the waste lands policy was in breach of the Treaty.<sup>36</sup>

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<sup>34</sup> A striking example of this (and an early suggestion of dissonance between the English and Maori texts) is a translation that appeared in *The Southern Cross* of 26 August 1843 and later in a book published by Samuel McDonald Martin in 1845. In commentary, it was suggested that the cession of "kawanatanga" (in exchange for recognition of "the entire chieftainship of their land") meant that "the natives have made no surrender of any of their rights and privileges" because "kawanatanga" was an invented word to which Maori attached no meaning: "The treaty of Waitangi is in truth a hoax imposed upon the British Government by Captain Hobson and his advisers, and New Zealand, as far as that treaty is concerned, is no more a part of the British empire than it was when Captain Cook first landed upon its shores". *The Southern Cross*, Auckland, 26 August 1843, at 2; SMD Martin *New Zealand; In a Series of Letters* (Simmonds & Ward, London, 1845) 360-363.

<sup>35</sup> Henry Williams to Dandeson Coates, 22 June 1841, CMS CN/M vol 13, 89-92 at 89.

<sup>36</sup> Henry Williams to Bishop Selwyn, 12 July 1847, reproduced in Hugh Carleton *The Life of Henry Williams, Archdeacon of Waimate* (vol 2, Wilsons & Horton, Auckland, 1877) ["Carleton Henry Williams"] 155-157.

## Chapter Nineteen: The Queen's Sovereignty & Maori Society

I ... am truly grieved to find that the Queen of Great Britain can be thus dishonoured. I have always maintained to the aborigines that her Majesty's word was sacred and inviolable.<sup>37</sup> This treaty between her Majesty the Queen and the chiefs of this country was made in the presence of the whole world, and now, by the flourish of the pen of her Majesty's Minister, seems to be revoked and scattered to the winds. ...

...

My view of the Treaty of Waitangi is, as it ever was, that it was the Magna Carta of the aborigines of New Zealand.

Your Lordship has requested information in writing of what I explained to the natives, and how they understood it. I confined myself solely to the tenor of the treaty.

That the Queen had kind wishes towards the chiefs and people of New Zealand,

And was desirous to protect them in their rights as chiefs, and rights of property,

And that the Queen was desirous that a lasting peace and good understanding should be preserved with them.

That the Queen had thought it desirable to send a Chief as a regulator of affairs with the natives of New Zealand.

That the native chiefs should admit the Government of the Queen throughout the country, from the circumstance that numbers of her subjects are residing in the country, and are coming hither from Europe and New South Wales.

That the Queen is desirous to establish a settled government, to prevent evil occurring to the natives and Europeans who are now residing in New Zealand without law.

That the Queen therefore proposes to the chiefs these following articles:

Firstly,—The chiefs shall surrender to the Queen for ever the Government of the country, for the preservation of order and peace.

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<sup>37</sup> The language "sacred and inviolable" is that used by Lord Mansfield in *Campbell v Hall* (see Chapter 2, text accompanying n 259) and its use by Williams in relation to the Treaty of Waitangi is surely not coincidental.

## Chapter Nineteen: The Queen's Sovereignty & Maori Society

Secondly,—The Queen of England confirms and guarantees to the chiefs and tribes, and to each individual native, their full rights as chiefs, their rights of possession of their lands, and all their other property of every kind and degree.

The chiefs wishing to sell any portion of their lands, shall give to the Queen the right of pre-emption of their lands.

Thirdly,—That the Queen in consideration of the above, will protect the natives of New Zealand, and will impart to them all the rights and privileges of British subjects.

...

In an article in the *Westminster Review* in April 1864 by Hugh Carleton, Williams's son-in-law and biographer, reference is made to the "new policy" of Governor Gore-Browne in the late 1850s that only individual rights could be recognised in land and that there was "no right in the tribe, or in the chiefs". Carleton found it difficult to understand the rationalisation for the Governor's approach but thought that the "missing link" was that the Governor "believed the rights and powers of Maori chieftainship to have devolved upon the Governor, when sovereignty was assumed by treaty in 1840; and that consequently, in any dispute about the ownership of land, he had the authority to decide between the rival claimants" (there being no court with jurisdiction). Carleton's comment was that, while it was possible that this "doctrine" could be "implied" from the English text of the Treaty, "in the Maori version it is expressly provided against".<sup>38</sup> To substantiate this assertion, Carleton, in a footnote, reproduced a "literal translation of the original Maori document, made expressly for us, and subjected to the scrutiny of some of the best Maori scholarship in the colony".<sup>39</sup> Although the authorship of the translation is not identified, a note on a manuscript copy indicates that it was the work of Henry and Edward Williams.<sup>40</sup> The translation of the preamble records Queen Victoria's "kindly regard towards the chiefs and tribes"

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<sup>38</sup> [Hugh Carleton] "Art V—New Zealand" (1864) 25:2 *Westminster Review* 420-472 at 458.

<sup>39</sup> *Ibid.*

<sup>40</sup> EF Hadfield "The Treaty of Waitangi as translated, for Mr Hugh Carleton, by Archdeacon Henry Williams and Edward Williams from the Maori version. Vide 'Westminster Review' April 1864, 'New Zealand' by Mr Hugh Carleton" (dated London, 1887), ATL MS-Papers-1925-46/05. Earnest Frederick Hadfield was a son of Bishop Octavius Hadfield and Catherine Williams (a daughter of Henry Williams).

and “her desire also to guarantee to them their rank as chiefs and their land”. In order that they might have peace and “quiet possession”, she had sent “a chief to regulate affairs with the aborigines of New Zealand”. By Article 1, the chiefs “surrender[ed] to the Queen of England for ever the entire sovereignty over their country”. By Article 2, Queen Victoria “guarantee[d] and consent[ed] to the chiefs, to the tribes, to all men of New Zealand, the *entire chieftainship of their lands*, of their kaingas, of their property”.<sup>41</sup>

In his “Early Recollections”, published in 1877, Williams recalled the circumstances of the signing of the Treaty at Waitangi, when he had “read the treaty to all assembled”, and explained it “clause by clause to the chiefs”. He had advised the chiefs that the Treaty was “an act of love towards them on the part of the Queen, who desired to secure to them their property, rights, and privileges”. He had explained that the Treaty was “as a fortress for them against any foreign power which might desire to take possession of their country”.<sup>42</sup> Williams in his recollections wrote that he had illustrated this risk by reference to the French acquisition of Tahiti, although, as Claudia Orange has pointed out, in 1840 that was to anticipate the event by two years.<sup>43</sup> Williams further recalled that, to reassure Maori who were concerned that their country would be “gone” and they would be slaves (suggestions put around by “ill-disposed Europeans”), the missionaries had given them “but one version [of the Treaty], explaining clause by clause, showing the advantage to them of being taken under the fostering care of the British Government”. By that act they would become “one people with the English, in the suppression of wars, and of every lawless act; under one Sovereign, and one Law, human and divine”. The Treaty was “for their own benefit, to preserve them as a people”.<sup>44</sup>

James Busby, as has been described in Chapter 16, put forward a back-translation of article 2 in support of his opposition to the Land Claims Bill in June 1840.

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<sup>41</sup> [Hugh Carleton] “Art V—New Zealand” (1864) 25:2 Westminster Review 420-472 at 458-459.

<sup>42</sup> Carleton *Henry Williams*, above n 36, 12.

<sup>43</sup> Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987) 46.

<sup>44</sup> Carleton *Henry Williams*, above n 36, 14.

Although his translation did not refer to “chieftainship” but was a flat property guarantee (“in the fullest sense which language could convey”), he proffered the view that the closest Maori equivalent to “independence” was “rangatiratanga”.<sup>45</sup> This is a significant acknowledgement coming from a framer of the Treaty who knew that “rangatiratanga” had been guaranteed in article 2 of the Maori text and had earlier been used for “independence” in the 1835 Declaration of Independence. In 1844 or 1845, Busby wrote of the approach taken in the Declaration (writing of himself in the third person):<sup>46</sup>

It became, at a very early period, evident to the Resident that the only basis upon which there was any hope of establishing the Functions of Legislation and Government was the Federal Union of these Tribes represented by their chiefs. And he determined in any negotiation which might be considered of an international character to acknowledge no authority in any individual chief, but to defer every matter to the decision of the majority, while at the same time it was his object as much as possible to distinguish and elevate the character of each chief amongst his own people.

Many years later, Busby also described the chiefs' petition for protection in the Declaration as a prayer that William IV “would continue to be a parent for them in their childhood as a nation, lest their chieftainship should be destroyed”.<sup>47</sup>

In his *Busby v White* litigation in 1859, Busby offered a full back-translation of the Maori text of the Treaty in his pleadings, later elaborated on in his extensive

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<sup>45</sup> See Chapter 16, text accompanying ns 94 & 100-101.

<sup>46</sup> James Busby “The British Government in New Zealand” (1844 or 1845), AML MS 46, Box 2, Folder 7 (holograph), 19. The note by Busby currently in Folder 7 that “This M.S. was intended as an appendix to a paper read at the Meeting of the National Association for the Promotion of Social [sic] at York on the 23 Sept 1865—and published with their transactions” evidently applies to a different manuscript (possibly that at AML MS 46, Box 4, Folder 14). That this manuscript was written in 1844 or 1845 seems clear from two circumstances. First, in the same folder are “Notes from New Zealand newspapers” which run only until mid-1844. Secondly, and more significantly, the pencil notations on the fair copy of the manuscript in the folder match up with the comments of one WH Christie, who wrote to Busby in December 1845 that he had “read over your M.S. with great pleasure—and have noted pretty freely in pencil any Remarks that struck me”. See WH Christie to Busby, 29 December 1845, AML MS 46, Box 4, Folder 13.

<sup>47</sup> James Busby *The Case of Mr. Busby Stated in an Address Delivered at the Table of the House of Representatives of the Colony of New Zealand, on the 30th July, 1869* (William Atkin, Auckland, 1869) 30.

argument.<sup>48</sup> He described the back-translation as “the first that has been made”.<sup>49</sup> In the translation of the preamble it is said that the Queen is anxious that the chiefs “should retain their chieftainships and their land”. By article 1, the chiefs “cede ... for ever, the sovereignty of their territories”. By article 2, the chiefs, tribes and people of New Zealand were guaranteed “the full chieftainship of their lands, their estates, and all their property”.<sup>50</sup> In his argument, Busby explained the second article as guaranteeing “to the chieftains and nations their dignities, offices, and properties”.<sup>51</sup>

There are a cluster of English texts of the Treaty associated with the United States Consul, James Reddy Clendon. All are back-translations of the Maori text but some (including the so-called “Littlewood Treaty”<sup>52</sup>) correspond so closely to the English draft as to suggest that they are not true translations. Of the true translations, there are two variants. The first was made by Captain Gordon Brown before 3 April 1840.<sup>53</sup> The second, undated and unattributed, was found in the Clendon House Papers at Rawene.<sup>54</sup> In the preamble of both versions, there is an expression of Queen Victoria's wish to preserve the chiefs in their chieftainship.<sup>55</sup> In article 1 of Brown's translation, the chiefs “give up entirely to the Queen forever the Government of all their land”. In the Clendon House version, the chiefs “wholly let go to the Queen of England hereafter for ever all the Government of their Lands”. By article 2 of the Brown treaty, “[t]he Queen of England agrees and consents to secure to all the Tribes, Chiefs and all men in New Zealand, and the head chiefs to all their rights in their lands, Villages and other property”. In the Clendon House translation, “[t]he Queen of England makes strait and consents to the Chiefs, to the Tribes, to all the people of New Zealand (is) [sic] the full

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<sup>48</sup> See Chapter 18, text accompanying ns 24-31.

<sup>49</sup> Supplement to *The Southern Cross*, Auckland, 1 November 1859, at 2, col 3.

<sup>50</sup> Supplement to *The Southern Cross*, Auckland, 30 September 1859, at 2, col 1.

<sup>51</sup> Supplement to *The Southern Cross*, Auckland, 1 November 1859, at 2, col 3.

<sup>52</sup> See Chapter 1, n 25.

<sup>53</sup> Translation of the Treaty of Waitangi by Gordon Brown, APL NZMS 705, Box 1, Bundle 1, No. 8.

<sup>54</sup> Anonymous translation of the preamble and articles 1 & 2 of the Treaty of Waitangi, APL NZMS 705, Box 1, Bundle 1, No. 1.

<sup>55</sup> In the Clendon House version a marginal note puts this as “rank as chiefs”.

Chieftainship over their Lands, Villages and all their property". In a marginal note, it seems in explanation of "full chieftainship", appear the words "or exercise of the power of chiefs".<sup>56</sup>

**Contemporary statements supportive of the continuation of Maori custom and chiefly authority**

In his 9 July 1840 speech on the Land Claims Bill, Gipps, as has been seen, expressed the opinion that Normanby's Instructions "must have" been written with the *Commentaries* of Kent and Story in mind "so exactly do they tally with his Lordship's description of the qualified dominion or sovereignty enjoyed by the chiefs over the territory of New Zealand, and of the protection which it is our duty, in settling that country, to afford them".<sup>57</sup> Since the passage from Kent which was quoted by Gipps immediately before this conclusion described the Indian tribes as being "dependent allies" (subject only to "such restraints and qualified control in their national capacity" as was thought "indispensible" both to the safety of European settlers and the protection due to the native Indians),<sup>58</sup> this suggests that Gipps thought that the American approach was applicable in New Zealand not only to questions of land rights but also to questions of sovereignty and self-government. This is also supported by Gipps's use of a further passage from Kent and one from Story. The passage from Story referred to the Indians being "permitted to exercise rights over sovereignty" over the lands they occupied.<sup>59</sup> That from Kent referred to approach of the New England Puritans who had "always negotiated with the Indian nations as distinct and independent powers".<sup>60</sup>

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<sup>56</sup> Similar back-translations of the Maori treaty were provided by Edward Jerningham Wakefield (1845) and Rev Richard Davis (1865). See EJ Wakefield *Adventure in New Zealand, from 1839 to 1844* (John Murray, London, 1845) 459-462; and Richard Davis *A Memoir of the Rev. Richard Davis, for Thirty-Nine Years a Missionary in New Zealand*, comp. by John Coleman (James Nisbet & Co, London, 1865) 455-456. See also the back-translation, discussed above at n 34, given in *The Southern Cross* of 26 August 1843, and reproduced in Samuel McDonald Martin's *New Zealand* (1845).

<sup>57</sup> See Chapter 16 n 134 and accompanying text.

<sup>58</sup> GBPP 1841 (311) XVII.493, 63-78 at 68.

<sup>59</sup> Ibid 66.

<sup>60</sup> Ibid 68.

## Chapter Nineteen: The Queen's Sovereignty & Maori Society

[N]either the right of pre-emption, which was uniformly claimed and exercised, nor the state of dependence and pupilage under which the Indian tribes, within their territorial limits, were necessarily placed, were carried so far as to destroy the existence of the Indians as self-governing communities.

Whether Gipps did indeed hold the view that Maori tribes remained “domestic dependent nations” in the America sense is open to doubt. As has been seen, in other parts of his speech he maintained that Maori were not “civilised” because they lacked government and law.<sup>61</sup> The terms of his “unsigned treaty”, under which the Queen’s sovereignty over the country and over Maori was to be exercised in the same manner as over her other dominions and subjects, seems irreconcilable with Maori having “domestic dependent nation” status.<sup>62</sup> Gipps’s speech was, of course, directed at issues of property rights in land and not questions of continuing sovereignty and self-government. On the other hand, it is striking that Chief Justice Dowling in his speech on the Bill also used as apposite to New Zealand other passages from Kent which unambiguously treated Indian tribes as “nations” which it was impossible either “to govern ... as a distinct people” or as part of a single community with settlers.<sup>63</sup> Kent, as quoted by Dowling, said that Indian tribes were “separate, subordinate, and dependent, with a guardian care thrown around them for their protection”.<sup>64</sup>

The English crown considered them as nations competent to maintain the relations of peace and war, and of governing themselves under her protection.

Dowling himself considered, on the basis of these passages from Kent, that the United States Supreme Court had held the Cherokees to be “an independent nation” with only the qualifications expressed.<sup>65</sup>

In New Zealand, the political status of Maori tribes arose for consideration when, in December 1842, the acting Governor, Willoughby Shortland, was obliged to

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<sup>61</sup> See, for example, Chapter 16, text accompanying n 147.

<sup>62</sup> See Chapter 14.

<sup>63</sup> *The Sydney Herald*, 13 July 1840, at 3, col 3.

<sup>64</sup> Ibid cols 3-4.

<sup>65</sup> Ibid col 4.

intervene to prevent war between Ngaiterangi and Ngati Whakaue following a raid by Ngati Whakaue on Mayor Island. Shortland considered prosecuting the Ngati Whakaue chief, Tongoroa, but was advised by George Clarke, the Protector of Aborigines, and (more significantly) William Swainson, the Attorney-General, that jurisdiction over Tongoroa and Ngati Whakaue could not be asserted because they (as was the case with Ngaiterangi also) were not signatories to the Treaty. Shortland did not accept this view, being of the opinion that the whole of New Zealand was under British sovereignty and all inhabitants subject to English law. In this opinion he was supported by the Colonial Treasurer, Alexander Shepherd. Shortland was not, however, prepared to act given conflicting views without obtaining guidance from the Secretary of State for the Colonies.<sup>66</sup>

The response by Lord Stanley affirmed the sovereignty of the British Crown over the whole territory of New Zealand. It was “neither necessary or convenient” to enter into the “justice or the policy” of the course adopted by the Crown in asserting sovereignty over the entire country and all its inhabitants. It was “sufficient to say that Her Majesty has pursued it” by the commissions granted for the government of New Zealand. Stanley, however, declined to draw the inference from sovereignty that English law therefore applied in full to all Maori, thus avoiding the perception of injustice which he judged to lie behind Swainson's opinion:

The only practical difficulty which Mr Swainson suggests, as flowing from this principle, may be readily overcome. He assumes that it is a necessary consequence that the natives of New Zealand must be liable to all the penalties, and amenable to all the tribunals of the English law. I cannot perceive the necessity; there is no apparent reason why the aborigines should not be exempted from any responsibility to English law or to English courts of justice, as far as respects their relations and their dealings with each other. The native law might be maintained, and the native customs tolerated, in all cases in which no person of European birth or origin had any concern or interest. An exception should indeed be made of such customs as are in conflict with the universal laws of morality, such, for example, as the customs of cannibalism and human sacrifice. But, with this

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<sup>66</sup> See Shortland to Stanley, 31 December 1842 (with enclosures), GBPP 1844 (556) XIII.1, Appendix 19, 456-475.

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exception, I know not why the native New Zealanders might not be permitted to live among themselves according to their national laws or usages, as is the case with the aboriginal races in other British colonies.

I am aware, indeed, that theoretical difficulties may be suggested to this solution of the problem which Mr Swainson has raised; but the same thing is true of every other possible solution of it, and I believe that the difficulties of the course I have suggested will be less numerous and less considerable than of any other which could be taken.

In the case of the war between Ngaiterangi and Ngati Whakaue, however, Stanley expressly approved Shortland's claim of "royal authority over the chiefs and districts of Tauranga".<sup>67</sup>

At much the same time as Stanley was responding to Shortland, his views were sought on a number of matters by Captain Robert Fitzroy, then about to depart England to take up the governorship of New Zealand. Among other questions, Fitzroy was concerned to know "[h]ow far, and in what manner, ought we now to take part or interfere in wars, or even quarrels, between aboriginal tribes or individuals?"<sup>68</sup> Fitzroy proffered his own answer:<sup>69</sup>

Is it not, at present, unwise to take any forcible part in quarrels between native tribes? The native character and habits cannot be changed suddenly; argument, treaty, conciliation, compensation, every moral means, should be used indefatigably; but on no account, may I presume to say, does it appear, that we ought to intermeddle by force of arms in a purely native quarrel among the aborigines.

To this query, Stanley was cautious in response, indicating that the matter was one in which Fitzroy would have to exercise discretion:<sup>70</sup>

To a question of so much importance, proposed in terms so abstract, it is not in my power to make any precise answer. It is indeed obvious, and easy to say, that I deprecate any active intervention in such disputes, and earnestly desire that the British authority should be known, not as a party, but as a mediator in them.

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<sup>67</sup> Stanley to Shortland, 21 June 1843, GBPP 1844 (556) XIII.1, Appendix 19, 475.

<sup>68</sup> Fitzroy to Stanley, 16 May 1843, GBPP 1844 (556) XIII.1, Appendix 13, 387-389 at 387.

<sup>69</sup> Ibid 389.

<sup>70</sup> Stanley to Fitzroy, 26 June 1843, GBPP 1844 (556) XIII.1, Appendix 13, 389-390 at 390.

When Fitzroy arrived in New Zealand, the question he had posed to Stanley had arisen in acute form in connection with the Wairau affray (June 1843). News of the affray had been sent to London in despatches from Shortland before Fitzroy took up his post. Stanley's advice to Fitzroy was therefore sent in the knowledge that, by the time it was received, he would already have decided what action to take. It was therefore provided principally for future guidance in like cases.<sup>71</sup> It is of particular interest that this correspondence concerns a mixed settler-Maori clash which involved settler deaths.

Stanley's letter was based on a memorandum written by James Stephen, with which Stanley expressed complete agreement.<sup>72</sup> In his memorandum, Stephen denied that the law and procedures for its enforcement applicable to settlers applied to Maori. Application of "positive rules derived from English law, books, or recognised in Westminster Hall" seemed to Stephen to be "little short of an absurdity".<sup>73</sup>

We had to do with two savage chiefs & their tribes, to whom our law, our language, our religion, & our manners, were all equally strange & unknown. To inculcate them for non conformity to our legal maxims, or to inculcate the party acting against them, for deviating from the practice of our English magistracy & police, would seem alike unreasonable. In our relations with such people it is necessary to be circumspect, & just, & to keep as close to the law as circumstances will allow—a complete observance of it is out of the question.

This language and sentiment was adopted in Stanley's despatch. The despatch went on to acknowledge that "[t]he effect of this latitude in enforcing our law on the native New Zealanders will, I admit, be to leave the European settlers and magistracy without any positive rule for their conduct towards them". This, however, was "precisely one of the motives which led to the assertion of the Queen's sovereignty over the whole country". Positive law, adapted to New Zealand conditions, would have to be enacted by the local legislature to govern

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<sup>71</sup> Stanley to Fitzroy, 10 February 1844, GBPP 1844 (556) XIII.1, Appendix 4, 171-174 at 171-172.

<sup>72</sup> Minute by Stanley, 31 December 1843, CO 209/22, 254b.

<sup>73</sup> Stephen to Hope, 28 December 1843, CO 209/22, 247a-254a at 247a-b.

clashes between the races. Unmodified English law could not apply. Until the legislature enacted "specific laws" tailored to New Zealand conditions "the magistracy must be governed in their conduct towards the aborigines by those considerations of equity and prudence which will seldom fail to afford a safe conduct in such difficulty".<sup>74</sup>

In his memorandum, Stephen reiterated the position taken in Stanley's earlier despatch to Shortland regarding Swainson's opinion on sovereignty. To the extent that Swainson's opinion rested on the assumption that "subjection to British sovereignty, & subjection to English law are convertible terms", Stephen thought the assumption to be "itself unfounded".<sup>75</sup>

All this legal pedantry (for it is nothing better) about arson, & warrants, & the Queen's book, & so on, in our intercourse with savages is just as needless as it is unmeaning. I know of no reason why in all matters purely inter se—their marriages, inheritances, contracts, & so on, & even in the definition & punishment of crimes—they should not live under their own law or customs, such customs only excepted, as are abhorrent from the universal laws of God—, as for example infanticide & cannibalism. And even in questions between the State & the Natives, I know not why they should not be governed by their own laws & customs to the utmost possible extent; gradually of course superseding them by our own law, as the natives may learn to understand & to appreciate it. At this moment this is the case in Ceylon in many respects. It is the custom throughout the whole of British India. Even in Canada, the Indian is at once subject to the British Crown, & exempt from subjection to very much of the laws of the province. Establish this distinction, & the Queen's sovereignty would in no conceivable manner injure the native chiefs or their people. But ... if these black men are, in respect of their new allegiance, to be brought under the yoke of Blackstone's commentaries, it would be as good a *reductio ad absurdum*, as could be proposed.

This view was adopted by Stanley in the despatch sent to Fitzroy. He, too, refuted the assumption of the "impossibility of separating the sovereignty of the Crown over the aborigines from their subjection to the same code of laws by which their

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<sup>74</sup> Stanley to Fitzroy, 10 February 1844, GBPP 1844 (556) XIII.1, Appendix 4, 171-174 at 172. In fact, in the instant case, Stanley wrote that Thompson's party had been in the wrong according to English law.

<sup>75</sup> Stephen to Hope, 28 December 1843, CO 209/22, 247a-254a at 252b-254a.

European fellow-subjects are governed". He referred to India, Ceylon, the Cape Colony, and Canada as examples that showed that there was "no theoretical or practical difficulty in the maintenance, under the same sovereign, of various codes of law, for the government of different races of men"<sup>76,77</sup>.

Native laws and native customs, when not abhorrent from the universal and permanent laws of God, are respected by English legislatures and by English courts; and although problems of much difficulty will occasionally arise out of this state of things, they have never been such as to refuse all solution, or as to drive the local authorities on the far more embarrassing difficulty of extending the law of England to persons wholly ignorant of our language, manners and religion.

A further example of reliance on comparative imperial practices to explain non-application of English law to Maori is to be found in the proceedings of the 1844 House of Commons Select Committee on New Zealand. The Select Committee proceedings provide much material on contemporary views about British-Maori relations but, for present purposes, it is sufficient to refer to one exchange. George Hope, by then the Parliamentary Under-Secretary for the Colonies, asked the witness, George Earp, whether Maori were to be regarded as "British subjects under their own peculiar laws, in the same manner as the Hindoos are?" Earp, a New Zealand trader, responded that that was not how Maori regarded themselves.<sup>78</sup>

[T]he light in which they consider themselves in relation to us is perhaps more that in which we should regard the North American Indians; they are a kind of *imperium in imperio*; they have their own laws and customs, and we have nothing to do with them, except in cases occurring between British subjects and natives.

The Select Committee, as has been seen in Chapter 17, ultimately adopted Howick's draft report and resolutions, reflecting New Zealand Company views, in preference to Hope's draft and Cardwell's resolutions, reflecting the position of the Colonial Office. There was a sharp divide between the two positions. The report adopted by the Committee deprecated the "want of vigour and decision in the

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<sup>76</sup> Stanley to Fitzroy, 10 February 1844, GBPP 1844 (556) XIII.1, Appendix 4, 171-174 at 173.

<sup>77</sup> Ibid 173-174.

<sup>78</sup> GBPP 1844 (556) XIII.1 at 142.

general tone of the proceedings adopted towards the natives". It remarked that there was "too much respect for native customs" and recommended "firmness" as "no less necessary than kindness".<sup>79</sup> The end in view was "to amalgamate the two races".<sup>80</sup> The Committee endorsed both George Grey's June 1840 proposals for civilising the Australian Aborigines and the New Zealand Company's system of native reserves for Maori.<sup>81</sup>

Hope's draft report and Cardwell's resolutions maintained the Colonial Office line that application of English law to Maori was a long-term project to be accomplished only with Maori consent. One of Cardwell's resolutions was that "leading the native race to habits of civilization ... must ... be effected peaceably and equitably, by gradual means, and by negotiations with the natives, conducted by the local authorities with moderation and fairness, in exercise of a large discretionary power".<sup>82</sup> Hope's draft report expressed the "utmost importance" of "gradually ... wean[ing] the native tribes from their savage habits, render[ing] them submissive to British law, and incorporat[ing] them in the community of British subjects". This object could only be attained, however, "by convincing their minds of the justice of British law, and by making them feel that in their persons and property they enjoy full protection; while the strict application of its penalties must be tempered with much discretion and forbearance".<sup>83</sup> These views are in marked contrast to those of the Company and Howick as adopted by the Committee. Even so, it is apparent that they represent a shift towards assimilation as a project for British government. One of Cardwell's resolutions would have led to the registration of native titles as a step towards Maori civilisation. It would lead Maori "to a clearer and more definite recognition of the use and rights of property, and would tend to extinguish slavery and other evils".<sup>84</sup> Hope's view as to the desirability of incorporating Maori in the "community of British subjects" is plain. Although its expression in the draft report may in part have been an attempt to

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<sup>79</sup> GBPP 1844 (556) XIII.1 at x.

<sup>80</sup> Ibid xi.

<sup>81</sup> Ibid x-xi & xiv (resolutions 17 & 18).

<sup>82</sup> Ibid xviii.

<sup>83</sup> Ibid xxix.

<sup>84</sup> Ibid xviii.

build a majority in the Committee, there is other evidence to suggest that it was also his personal view.<sup>85</sup> If so, it may mean that his views as to assimilation (with exceptional laws as an interim expedient) departed somewhat from those of Stephen, who was much more cautious about the desirability of bringing the races together under the same system of laws. Hope's approach seems also to have been in step with the views of Lord Stanley.<sup>86</sup> Despite what may have been a shift in the timeframe envisaged for assimilation, the Colonial Office continued to maintain (as, for example, in Stanley's Instructions to Governor Grey in June 1845<sup>87</sup>) that the process had to be gradual and that, for the time being, Maori custom had to be respected.

That Stephen's views remained that Maori should be left under their own customs is indicated by a memorandum he wrote for Lord Lyttelton, briefly Parliamentary Under-Secretary for the Colonies, in February 1846. The memorandum was in relation to a report of George Clarke, the Protector of Aborigines, of 1 July 1845 (forwarded to Stanley by Fitzroy in August 1845).<sup>88</sup> Stephen wrote that Clarke had "point[ed] out the value of our Native Alliances" and identified "[t]he practical evils ... that there is no effectual provision for the administration of Justice among the Natives, and none for the maintenance of such Native Customs as ought to be tolerated". Stephen wrote that Clarke had recommended that custom should be "legalized", "that the Natives should enjoy much more self Government", "that the Chiefs sh<sup>d</sup> be invested with Magisterial Authority", and (in Stephen's view "more ambiguously") "that Protectors sh<sup>d</sup> be multiplied and attached to all the Tribes".<sup>89</sup>

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<sup>85</sup> See, for example, Hope's questions to Earp in the course of the proceedings of the Select Committee. Ibid 142-144.

<sup>86</sup> See, for example, Stanley to Fitzroy, 13 August 1844, GBPP 1845 (1) XXXIII.1, 3-9 at 7 & 9 and Stanley to Fitzroy, 30 November 1844, GBPP 1845 (131) XXXIII.13, 49-56 at 50.

<sup>87</sup> Stanley to Grey, 13 June 1845, GBPP 1846 (337) XXX.151, 68-72 at 70: "It will also be your duty to take care that in the government of this class of Her Majesty's subjects every possible respect be shown, both in the structure of the law and in the administration of it, for the opinions, the feelings and the prejudices by which they may be possessed, and from which they cannot be rudely or abruptly divorced. I, of course, refer to opinions, feelings and prejudices not in themselves opposed to the fundamental laws of morality, nor inconsistent with the peace and welfare of the colonists of European descent."

<sup>88</sup> Fitzroy to Stanley, 16 August 1845, CO 209/35, 44a-46a, enclosing Clarke to Colonial Secretary (NZ), 1 July 1845, CO 209/35, 48a-86b.

<sup>89</sup> Stephen to Lyttelton, 26 February 1846, CO 209/35, 46a-47a at 46b.

Stephen's view, premised on Clarke's assertion that native custom had been ignored,<sup>90</sup> was that:

The great practical conclusion deducible from [Clarke's report] is, I think, that it was a great error to set aside the Native Customs, or to attempt to govern these people, in their relations with each other, excepting only so far as might be necessary for the prevention of War and inhuman practices. This is an opinion maintained on the first foundation of the Colony by Lord John Russell, and afterwards maintained by Lord Stanley. It has been opposed in practice by that spirit of legal pedantry from which no English Society is ever emancipated, and by the contempt and aversion with which the European race everywhere regard the Black races.

Stephen advised Lyttelton that "insisting again on this principle" in Instructions to the new Governor would be "superfluous" before despatches were received from Grey advising of the opinions he had formed and the steps he had taken "for the conciliation of these disputes, and for the avoidance of these dangers".<sup>91</sup>

The New Zealand Constitution Act 1846 of the United Kingdom Parliament,<sup>92</sup> and the Charter and Instructions made pursuant to it, provided the Governor with authority to "set apart" by proclamation "particular districts of New Zealand, under the designation of 'Aboriginal Districts'". Within such districts "the laws, customs, and usages of the aboriginal inhabitants, so far as they are not repugnant to the general principles of humanity, shall for the present be maintained". Enforcement of native law "in all cases in which the aboriginal inhabitants themselves are exclusively concerned" was to be undertaken within the districts by "such native chiefs or others as shall be appointed or approved by the Governor-in-Chief for that purpose". Non-Maori within any such district were required to "respect and observe such native laws, customs, and usages ... on pain of such penalties" as might be imposed by "any court or magistrate in any other part of the province within which such aboriginal district may be situate". The courts of the province

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<sup>90</sup> The accuracy of this opinion of Clarke's should not be accepted at face value but is beyond the scope of this thesis. It seems hardly consistent with it that Clarke referred in the same report to the tribes having nationhood.

<sup>91</sup> Stephen to Lyttelton, 26 February 1846, CO 209/35, 46a-47a at 47a.

<sup>92</sup> New Zealand Constitution Act 1846 (UK) 9 & 10 Vict c 103.

had jurisdiction over the aboriginal districts “in respect all such cases as aforesaid” subject to a duty to take notice of and give effect to Maori law, custom and usages.<sup>93</sup> Outside the aboriginal districts, in cases concerning dealings between Maori only, provincial magistrates and courts were required to enforce Maori laws, customs and usages.<sup>94</sup>

This scheme never came into effect because Governor Grey considered the Constitution as a whole to be ahead of its time.<sup>95</sup> There are, however, four important points to be made about the scheme provided for in 1846 for the purposes of this thesis. First, it continued the policy of the British Government in accepting that Maori should continue to live under their customs both in the proposed native districts and also in their dealings inter se in other areas, including in British settlements. Secondly, Maori custom was recognised as law in its own terms: British law was not constitutive of it. Thirdly, it was not considered inimical to British sovereignty and the rights of British subjects for Europeans to be subject to Maori law within native districts. Fourthly, Maori custom was cognisable as law in colonial courts.

In accompanying Instructions from Earl Grey to Governor Grey, Russell's 9 December 1840 Instructions to Hobson were affirmed as containing “the general principles by which our relations to [Maori] should be governed”. The provisions of the New Zealand Constitution Act relating to Maori were, Earl Grey explained, Parliament's fulfilment of the principle expressed by Russell that:<sup>96</sup>

[T]he laws and customs of the native New Zealanders, even though repugnant to our own laws, ought, if not at variance with general principles of humanity, to be for the present maintained for their government in all their relations to and dealings with each other; and

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<sup>93</sup> It is not clear from the text whether the jurisdiction of provincial courts extended only to proceedings against Europeans, as would have been the case if “aforesaid” referred to the immediately proceeding clause only.

<sup>94</sup> Chapter XIV (“Respecting the Aborigines of New Zealand”) of Royal Instructions, enclosed (together with the New Zealand Charter) in Earl Grey to Governor Grey, 23 December 1846, GBPP 1847 [763] XXXVIII.271, 64-87 at 87.

<sup>95</sup> See James Rutherford *Sir George Grey K.C.B., 1812–1898: A Study in Colonial Government* (Cassell & Company Ltd, London, 1961) 142-144 & 148-154.

<sup>96</sup> Earl Grey to Governor Grey, 23 December 1846, GBPP 1847 [763] XXXVIII.271, 64-72 at 70.

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that particular districts should be set apart within which such customs should be so observed.

In the native districts, government would be “by such methods as are in use among the native New Zealanders”:

The chiefs or others, according to their usages, should be allowed to interpret and to administer their own laws.

Outside the native districts, “the same practice should be followed in all cases, whether civil or criminal, in which the natives alone have any direct and immediate interest”. Earl Grey acknowledged that difficulties would “of course arise in the execution of such rules” but considered they would be “easily surmounted”:

[F]or the administration of different laws to different races of men, inhabiting the same country under one common Sovereign, is a practice which has prevailed so extensively, that scarcely any civilized nation can be mentioned in which some examples of it have not occurred. With the increase of Christian knowledge, of civilization, of the use of the English tongue, and of mutual confidence between the two races, these distinctions of law and of legal customs will, I trust, become unnecessary and obsolete. In the mean time we must await that consummation with every reasonable indulgence for the innocent habits and for the venial prejudices of the aboriginal race with which we have thus been brought into contact.<sup>97</sup>

Native districts were again provided for in the 1852 Constitution, which did come into effect.<sup>98</sup> No native districts were ever set aside under the provisions of the Act. It may be that the maintenance of native districts in the Act was a tactic to overcome reluctance to grant representative government to the settlers and that by this time the 1840 idea that Maori should be self-governing was fading. Certainly in Under-Secretary Pakington's correspondence with Governor Grey it was explained that the power to set aside native districts under the Act was one “not to be exercised without strong ground, and which, it is rather to be hoped, you may

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<sup>97</sup> Ibid 71: “the provincial districts will progressively extend into the aboriginal, until, at length, the distinction shall have entirely disappeared”. See also Henry Labouchere (13 December 1847) 95 GBPD HC cc 1003-1009.

<sup>98</sup> The New Zealand Constitution Act 1852 (UK) 15 & 16 Vict c 72, s 71.

not find it necessary at present to exercise".<sup>99</sup> Proposals for chiefly involvement in government did not disappear. In 1861, for example, the Secretary of State for the Colonies, the Duke of Newcastle, urged Governor Grey to consider whether "a distinct legislation and administration" in native districts, "in which the natives themselves should take a part", "would not better promote the present harmony and future union of the two races, than the fictitious uniformity of law which now prevails".<sup>100</sup> In a further despatch, Newcastle expressed the view that trying to extort from Maori renunciation of the Maori King and admission of the rights of Queen Victoria was wrong:<sup>101</sup>

We should endeavour, really, to attain the same object by seizing the present opportunity to introduce into Native Districts the beginnings of law and order, and so to wean their minds from foolish and dangerous ideas; partly by the sense of good government, and partly by the observation of the power, dignity and emoluments which we are prepared to give to the Chiefs through whom, acting in concert with the Queen's officers, the Native government must be carried on, and who in the course of this government must gradually fall more and more under the influence of the constituted European authorities. This is no new experiment, but a tried policy which has succeeded in different quarters and different ages of the world, and it is peculiarly free from prospective danger where, as in the present case, the same independent authority which it is proposed to foster is to be committed to those whose power cannot fail from natural causes steadily to decline.

Despite these suggestions, chiefly authority was never recognised in law and Maori districts were not proclaimed.

In New Zealand, also, the attitudes of 1840 did not disappear and continued to be invoked, including against the backdrop of the land wars of the 1860s. William Martin, the former Chief Justice, in 1860 criticised the proceedings of the Government in the Taranaki by reference to the Treaty:<sup>102</sup>

The rights which the Natives recognised as belonging thenceforward to the Crown were such rights as were necessary for the Government of the Country, and for the

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<sup>99</sup> Pakington to Grey, 16 July 1852, GBPP 1854 [1779] XLV.1, 300-304 at 304.

<sup>100</sup> Newcastle to Grey, 5 June 1861, AJHR (1862) E-1, Sec. III, 3-4 at 4.

<sup>101</sup> Newcastle to Grey, 22 September 1861, AJHR (1862) E-1, Sec. III, 5-6 at 6.

<sup>102</sup> William Martin *The Taranaki Question* (Melanesian Press, Auckland, 1860) 9-10.

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establishment of the new system. We called them "Sovereignty"; the Natives called them "*Kawanatanga*", "Governorship".

This unknown thing, the "Governorship", was in some degree defined by a reference to its object. The object was expressed to be "to avert the evil consequences which must result from the absence of Law". To the new and unknown Office they conceded such powers, to them unknown, as might be necessary for its due exercise. To themselves they retained what they understood full well, the "*tino Rangatiratanga*", the "full Chieftainship", in respect of all their lands.

These rights of the Tribes collectively, and of the Chiefs have been since that time solemnly and repeatedly recognised by successive Governors, not merely by words but by acts. For, through the Tribes and through the exercise of the Chiefs' power and influence over the Tribes, all cessions of land, hitherto made by the Natives to the Crown, have been procured.

George Clarke, the former Protector of Aborigines, writing in 1861 in defence of Martin (whose pamphlet on the "Taranaki Question" had been attacked by Busby), asserted that the Treaty had "reserved to the Maori chiefs their full chieftainship over their own tribes and over their lands".<sup>103</sup>

[T]he rights of Chieftainship over the tribes and lands were fully recognized and protected by the Treaty of Waitangi. The expressive language used and fully understood by both parties to the Treaty was this—that "the *shadow* of the land was to be the Queen's" (meaning the Queen's sovereignty) "and the *substance* to remain to the native Chiefs";—their lands and the "*tino rangatiratanga*" (chief chieftainship) over their own tribes.

Mr Busby lays stress upon his having had a hand in the Treaty of Waitangi. I have an equal right to do the same; and do here affirm that when the subjects contained in the Treaty were under consideration, the subject of Tribal rights and the full power of the Chiefs over their own tribes and lands was explained to the natives, and fully understood by the Europeans present. I further state, that from the feelings manifested at the time, as expressed in the speeches made, and also in the negotiatory conversations and explanations which took place during the transaction, it was evident that not one Chief

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<sup>103</sup> George Clarke *Pamphlet in Answer to Mr James Busby's on the Taranaki Question and the Treaty of Waitangi By Sir William Martin (Late Chief Justice of New Zealand)* (1st ed 1861; reprinted AF McDonnell, Auckland, 1923) 5 & 11.

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would have signed the Treaty had not Tribal rights been fully recognised and protected.

So tenaciously did the natives cling to these rights from the first.

These were opinions that Clarke had maintained since 1842. In December 1842, in written answer to questions put to him by the Executive Council, Clarke had said that:<sup>104</sup>

The natives alone who signed the treaty acknowledged the Queen's sovereignty, and that only in a limited sense, the treaty guaranteeing their own customs to them; they acknowledge a right of interference only in grave cases, such as war and murder, and all disputes and offences between themselves and Europeans, and hitherto they have acted upon this principle.

And in July 1843, in a report to the Colonial Secretary, he had written that "[t]he inapplicability of the English law to the natives of New Zealand arises, in the first place, from the provision of the treaty of Waitangi, which guarantees all native customs".<sup>105</sup>

When George Grey arrived in New Zealand in 1861 to take up his second term as Governor he was presented with a number of minutes from Ministers. They regretted that earlier proposals to set up Maori institutions "adapted to their habits and capacities" had not been persevered with.<sup>106</sup> They reminded Grey of the ability to "define Native districts within which, as between nations, their own laws and customs shall prevail".<sup>107</sup> They suggested that the "village or *hapu*" runanga (councils) that had been established could be brought "under the recognised shelter of the law" without undermining a system which "exists as a universal custom, and constitutes the only deliberative and legislative institution of the Maori race".<sup>108</sup>

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<sup>104</sup> Minutes of Executive Council meeting, 29 December 1842, GBPP 1844 (556) XIII.1, Appendix 19, 459-461 at 459.

<sup>105</sup> Clarke to Colonial Secretary (NZ), 31 July 1843, GBPP 1844 (556) XIII.1, Appendix 9, 346-350 at 346.

<sup>106</sup> Minute by Ministers on the Position of the Colony at the Date of Arrival of Sir George Grey: Chiefly in Relation to the Native Insurrection, 8 October 1861, AJHR (1862) E-2, 3-8 at 4.

<sup>107</sup> Minute by Ministers on the Machinery of Government for Native Purposes in Existence at the Date of Sir George Grey's Arrival, 8 October 1861, AJHR (1862) E-2, 8-10 at 8.

<sup>108</sup> Further Minute by Ministers in Reference to His Excellency's Plan, 31 October 1861, AJHR (1862) E-2, 13-15 at 13.

The object was “not so much to govern the Natives, as to assist them in governing themselves as an integral part of the Colony”.<sup>109</sup>

In 1864, the former Premier and Attorney-General, Henry Sewell wrote about the causes of the land wars. His pamphlet drew on Chief Justice Marshall's judgment in *Worcester v State of Georgia*, Stanley's 10 February 1844 despatch to Fitzroy, and the native district provisions of the 1852 Constitution Act. Sewell identified the principal cause of the wars as being the insistence on a monolithic sovereignty which left no scope for Maori government and law:<sup>110</sup>

Did the New-Zealanders, any more than the American Indians, imagine that by placing themselves under the guardianship of the British Empire they forfeited their inherent rights to govern themselves according to their own usages, and to retain the ownership of their land? As to the latter the treaty of Waitangi expressly reserves to them their territorial rights. As to the former, it is true they surrendered to the Queen the “Kawanatanga”—the governorship—or sovereignty; but they did not understand that they thereby surrendered the right of self-government over their internal affairs, a right which we never have claimed or exercised, and could not in fact exercise. The acknowledgment of sovereignty by the New-Zealander was the same in effect as in the case of the American Indians. It carried with it the exclusive right of pre-emption over their lands, and the exclusion of interference of foreign nations. No doubt it imposed on us the right and duty of extending our law to them so soon as they should be able and willing to understand and accept it; but it could not authorise us to inflict on them, as ordinary citizens the penalties of laws which they never heard of, expressed in language of which they are ignorant. ...

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It is of course possible to embarrass this question by difficulties of a superficial kind. The Queen's sovereignty, it is said, extends over the whole colony. All persons therefore within it are subjects of her Majesty. All are therefore subject to the same law. This is the sort of flimsy reasoning to which Lord Stanley gives the answer which I have quoted

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<sup>109</sup> Ibid 14. See also Papers Relative to the Native Meeting held at Peria, in October, 1862, AJHR (1863) E-12—discussed in John Stenhouse “Church and State in New Zealand, 1835–1870: Religion, Politics, and Race” in Hilary Carey & John Gascoigne (eds) *Church and State in Old and New Worlds* (Brill, Leiden, 2011) 233-259 at 257-258. Compare Minutes of Proceedings of the Kohimarama Conference of Native Chiefs, July-August 1860, AJHR (1860) E-9.

<sup>110</sup> Henry Sewell *The New Zealand Native Rebellion: Letter to Lord Lyttelton* (Auckland, 1864) 9-11.

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from his [10 February 1844] dispatch [that there is “no theoretical or practical difficulty in the maintenance under the same sovereign of various codes of law for the government of different races of men”]. Natives as well as settlers, are it is true, equally subjects of her Majesty, but there is nothing inconsistent with her Majesty's paramount authority in permitting natives to enjoy as law their own usages and customs, nor anything criminal in their seeking to embody this native law in some fixed form under a head and magistrates of their own choice.

## CHAPTER TWENTY

### CONCLUSION

The Treaty is not “ambiguous and contradictory in content”. It does not say “whatever we want it to say”.<sup>1</sup> It was not a blank canvas with a meaning to be arrived at through later negotiation. Its meaning is not yielded up simply by twenty-first century textual analysis, but close study of the text is more useful than has usually been credited. The meaning of the Treaty also requires the context of Empire. The Treaty was faithful to Normanby’s Instructions but it was also the work of more than one mind, and those responsible brought different experiences and perhaps ambitions to its drafting (both as to what needed to be included and what did not need to be covered). In order to unpick the influences at work, it is first necessary to identify those responsible for drafting the text and the sources or ideas they may have drawn on.

#### Drafting

The ultimate English draft of the Treaty of Waitangi seems to have been the work of Hobson and Busby. Hobson wrote the preamble, drawing on the draft in Freeman’s hand (itself likely to have been dictated by Hobson), but not until he had reviewed Busby’s draft of the articles and subscription. The guarantee of property in article 2 of Busby’s draft is likely to have caused Hobson to include a reference to protection of property in his preamble. The full subscription in Busby’s draft may also have influenced Hobson’s adoption in the preamble of reference to the “Royal Favor” of Queen Victoria for the chiefs and tribes.<sup>2</sup> The

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<sup>1</sup> In this chapter I omit citations for all quotations discussed in previous chapters.

<sup>2</sup> Busby’s draft, in its reference to the reasons the Confederated Chiefs had from “past Experience of the benignity and good faith” of the Queen and her “Royal Predecessors” to “repose entire Confidence” in Queen Victoria, had invoked a personal relationship between the chiefs and the British monarch. Hobson’s preamble invokes the same relationship but from the perspective of the Queen. It is possible that, in addition, the reference in the preamble to the Queen’s concern to protect the chiefs’ and tribes’ “just Rights” may pick up the suggestion in Busby’s subscription that the Confederated Chiefs were concerned about their ability to defend their territories and restrain lawlessness. It seems more likely, however, that the reference to “just Rights” relates to customary authority, for reasons discussed below.

third article of the English text was principally Hobson's work, with Busby making only inconsequential changes to the draft in Freeman's hand. Although Hobson, through Freeman, had drafted articles ceding sovereignty and a right of pre-emption, the ultimate and expanded expression of both was provided by Busby. The guarantee of property in article 2 of the English text was not foreshadowed in the Freeman draft and was Busby's principal original contribution (Hobson making only one minor change to Busby's draft). The subscription also originated with Busby, although it had been substantially pruned by Hobson.

### **Normanby's Instructions**

Hobson was not directed as to the terms of the treaty he was to propose beyond being required to treat for sovereignty and for a monopoly on the purchase of land. And apart from a handful of phrases that were lifted directly from Normanby's Instructions or closely reflected its language, the expression of the preamble, articles and subscription was the work of Hobson and Busby.

Despite the discretion in framing the Treaty given to Hobson (who was expected to take the advice of the missionaries and "older British residents"), in fact the content of the English draft of the Treaty largely follows the Instructions. This is most obvious in the case of the preamble. There, phrases from the Instructions are directly reproduced<sup>3</sup> and the explanation given of British purpose in entering into a treaty follows the Instructions closely. Hobson seems to have written the preamble in partial fulfilment of the instruction he had been given to "frankly and unreservedly explain to the natives, or to their chiefs, the reasons which should urge them to acquiesce in the proposals you will make to them". Indeed, in his letter of 1 August 1839 to Labouchere, Hobson had referred to the section dealing with the purpose of British intervention as "the preamble" to the Instructions.

All the reasons for intervention summarized in Hobson's preamble can be traced to the Instructions. This includes even the reference to the protection of the "just

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<sup>3</sup> "[A]uthorized to Treat with the aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those Islands"; "established a settled Form of Civil Government"; "necessary Laws and Institutions".

Rights and Property” of the chiefs and tribes. The reference to the protection of “just Rights” (given in the subsequent Maori translation as “rangatiratanga”) may have been Hobson’s attempt to render Normanby’s direction that Maori “must be carefully defended in the observance of their own customs”. This assurance, otherwise not explicit in the English text (although arguably implicit in the promise of “Royal protection” in article 3), would have been of considerable importance to the chiefs, as Hobson and Busby must have known. Its omission would be surprising.<sup>4</sup> While specific reference to the protection of property in the preamble was probably the result of adoption of Busby’s property guarantee in article 2, both were consistent with the recognition in the Instructions that Maori “title to the soil ... is indisputable”. The Instructions had identified protection of Maori in land not surplus to their needs as a priority. Although one of the changes made by Labouchere to Stephen’s draft of the Instructions removed the requirement that Hobson explain to Maori that the “security of their proprietary rights will not be impaired but greatly strengthened by the abdication of their Sovereign authority”, it was plain from the Instructions that such assurance could be given. Busby may have added the explicit guarantee of property in article 2 for reasons other than mere compliance with the Instructions (as is discussed below), but Hobson must have thought that such guarantee would be acceptable in London to have adopted. And indeed it proved to be so.

In much the same way, the equivocation in article 1 about the extent of the “rights of powers of Sovereignty ... exercise[d] or possess[ed]” by the chiefs (introduced

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<sup>4</sup> While it may have helped in selling the Treaty to Maori to assure them that their custom would not be affected, the fact that the Instructions did not require Hobson to make the assurance a specific term of the treaty could be consistent with a British view that the change in sovereignty would not of itself affect the continuity of custom. The same assumption of continuity is likely to explain why Normanby did not specifically instruct Hobson to make a guarantee of property in the treaty. From the British perspective the protection of existing Maori property rights (self-evidently rights according to custom) went without saying and did not require the specific treaty term which Busby and Hobson ultimately considered it was prudent to include. On this view, the inclusion of a guarantee of property in article 2 (not present at all in the Freeman draft) does not mean that other rights not specifically confirmed in the Treaty were not protected under British sovereignty. The Instructions were explicit that Hobson was to treat for the cession to the Crown of two rights only: sovereignty and pre-emption. That may have been because they were the only rights that Maori were being asked to surrender.

into the text by Busby), while referable to Busby's views, as is discussed below, is unlikely to have been approved by Hobson (despite his similar views) without the justification provided by the similar qualifications expressed in the Instructions.<sup>5</sup>

The property guarantee in article 2 of the English text was consistent with the Instructions.<sup>6</sup> The term "undisturbed possession" had appeared in the February 1839 draft of the Instructions to Hobson but it seems unlikely that Busby's use of it was derived from this superseded draft. There is no evidence that Hobson had a copy of it or that he had opportunity to suggest the phrase to Busby. Everything, including Busby's accounts, suggests that the entire guarantee was Busby's idea. If Busby drew on any precedent, there are more likely candidates (as is discussed below).

Normanby had instructed Hobson to contract with Maori for their agreement that land would be sold only to the Crown in the future. The Instructions had also explained the process to be followed in purchasing land from Maori. The pre-emption clause in article 2 of the English text of the Treaty follows from these instructions, but the language in which it is expressed was not (either in the Freeman draft or the Busby re-writing of it) the language used in the Instructions. In particular, the Instructions did not refer to the monopoly right of purchase to be contracted for as a right of "pre-emption". The Colonial Office did not use the term before 1840. The origin of the phrase "the exclusive right of preemption" (which was present in Freeman's draft and was maintained in Busby's draft and the final English text) is discussed below.

The promise to "the Natives of New Zealand" of "Royal protection", included in the Freeman draft and maintained in the final form of article 3, may be traced to

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<sup>5</sup> In the 14 August 1839 Instructions, New Zealand was acknowledged "as a sovereign and independent state, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert". Additionally, the supplementary instructions of 15 August 1839 indicated doubt about the sovereign capacity of the chiefs of the South Island.

<sup>6</sup> As is discussed in n 4 above, it seems that, from the British perspective, continuation of existing Maori property rights needed no treaty recognition. That is a likely explanation for the fact that Normanby did not instruct Hobson to include a guarantee of property in the treaty.

the view expressed in the Instructions that “the benefits of British protection, and of laws administered by British judges,<sup>7</sup> would far more than compensate for the sacrifice by the natives, of a national independence, which they are no longer able to maintain”.<sup>8</sup> This link between the English text and the Instructions is underscored by the indication that the promises in article 3 are “[i]n consideration” for the cessions of sovereignty and pre-emption by the chiefs in articles 1 and 2 (or were, as the Instructions expressed it, the “compensat[ion]”).<sup>9</sup>

The promise to impart to Maori “all the rights and privileges of British subjects” (which was maintained from the Freeman draft) was not suggested in the Instructions; nor did the Instructions indicate that the extension to Maori of such rights and privileges (whether as British subjects or not) was a consequence of the acquisition of British sovereignty.

### **Other influences**

Although the English text of the Treaty stays close to Normanby’s Instructions, Hobson and Busby may have been influenced by other sources. As discussed in Chapter 14, there are similarities of content and expression between Freeman’s draft and Hobson’s preamble on the one hand and Gipps’s “unsigned treaty” on the other. As it is highly probable that Hobson and Gipps discussed the content of the treaty during Hobson’s visit to Sydney, it is possible that the similarities reflect the discussions. The similarities are, however, either superficial (“just Rights”<sup>10</sup> and “evil consequences”) or readily attributable to Normanby’s Instructions as the common source. On the whole, the dissimilarities are more striking and indicate that, whatever discussions took place between Gipps and Hobson, the shape of the

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<sup>7</sup> The reference to “laws administered by British judges” is, in context, principally a reference to the advantages to Maori of British settlers being brought under law.

<sup>8</sup> It is suggested here that the promise of “Royal protection” also applied to Maori custom.

<sup>9</sup> Similarly, the 24 January 1839 draft of the Instructions had recognised the “reciprocal obligation of protection” that would arise on a cession of sovereignty.

<sup>10</sup> As discussed in Chapter 14, the same, apparently common, expression was used in connection with Maori by Busby in 1835, Edward Marsh in 1838 and the *Australian Chronicle* in January 1840. It was also employed in a Sierra Leone treaty in 1825. Marsh’s use seems to treat “just rights” as synonymous with the “civil rights of the natives” which the Aborigines Committee had insisted be preserved.

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treaty was not settled in Sydney. The most likely explanation for why the treaty was left to be drawn up in New Zealand is that Gipps (who was involved in providing Hobson with proclamations and further instructions) considered that Normanby's Instructions were sufficient to enable Hobson to frame the terms of a treaty once he had assessed local conditions and taken the advice of the missionaries and "older British residents".

One place in the Treaty where the influence of Gipps may be seen is in the conferral on Maori of "all the rights and privileges of British subjects" in article 3, which had not featured in the Instructions. In the "unsigned treaty", Gipps was more definite that Maori would become "her Majesty's subjects". The Treaty text is more ambiguous but not necessarily inconsistent with the "unsigned treaty" and it is possible that, in discussions between Gipps and Hobson in Sydney, it was taken for granted that Maori, like Australian Aborigines, would be British subjects after cession of sovereignty.

Three significant phrases in the English text of the Treaty that do not appear in the Instructions are: "full exclusive and undisturbed possession"; "the exclusive right of preemption"; and "the rights and privileges of British subjects". While the first has no exact equivalent, it is reminiscent of the language used in a number of the British treaties surveyed in Chapter 5, especially the Sherbro/Ya Comba convention (1825) (which also gave British protection and granted the native population "the rights and privileges of British subjects"), the Aden treaty (1838), and the Grand River grant to the Six Nations Indians (1793). Although it is tempting to speculate that Busby drew on one of these or a similar precedent in framing the property guarantee in article 2, on balance it seems unlikely. In the first place, Busby, who was usually quick to show off his knowledge (as in advocating British intervention on the Ionian Islands model), never referred to these treaties before or after 1840. Secondly, it appears that none of the treaties was particularly accessible in 1840, making it unlikely that they had come to Busby's notice.<sup>11</sup>

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<sup>11</sup> For example, although the Sherbro/Ya Comba treaty was printed in the British Parliamentary Papers in 1826 (see GBPP 1826 (004) XXIX.397 at 160-162), it was not published in the *British and Foreign State Papers* until 1848.

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Although it is possible that Hobson may have been supplied with a treaty precedent by either the Colonial Office or the Foreign Office, the primitive Freeman draft exhibits no sign of such influence, either in content or, as might have been expected if a precedent had been used, in form. It seems unlikely that, if Hobson had copies or notes of other treaties, he would have passed them on to Busby without having made use of them himself. For these reasons, it seems more likely that Busby had no precedent when he formulated the article 2 property guarantee in language appropriate to his understanding of customary property. The words adopted appear to have been commonly used to describe the attributes of property. For example, “undisturbed possession” was used in the February 1839 draft of the Instructions; and “exclusive” in United States Supreme Court’s Indian cases and by Gipps in his “unsigned treaty”.

The phrase “the rights and privileges of British subjects” may similarly have been a common expression suitable for Hobson’s purposes for which he needed no precedent. If he did draw on a source for it, it is unlikely to have been the Sherbro/Ya Comba convention, for the reasons already given. A more likely source may be the repeated suggestions of Wakefield and the New Zealand Association that Maori within British settlements in New Zealand should have “the rights and privileges of British subjects” or “the same rights and privileges, as her Majesty’s free subjects in other foreign possessions”.

The phrase “the exclusive right of preemption” is in a different category. In ordinary usage a right of pre-emption was simply a right of first offer. Describing such a right as “exclusive” adds nothing to the priority obtained with it. A right of first offer was not, however, what Hobson was instructed to obtain from Maori. The Instructions required him to seek a monopoly right for the Crown to acquire any land Maori wished to alienate. Other purchasers were to be excluded. Since it is unlikely that Hobson intended to depart from the Instructions, he must have thought that “the exclusive right of preemption” was a monopoly right of purchase. The Colonial Office did not use the term “pre-emption” in the Instructions or indeed anywhere in its files relating to New Zealand before Hobson left England in

August 1839.<sup>12</sup> As described in Chapter 5, however, “pre-emption” was used in the sense of a monopoly right of acquisition in relation to the United States federal government’s purchases of Indian lands, including by the Supreme Court in cases concerning Indian rights. In them, the government’s right of pre-emption was often described as “exclusive”. This usage was disseminated in law books such as the *Commentaries* of Kent and Story and in more popular publications such as those by Evarts and Colton. Through sources such as these the American usage became known in Britain and the colonies. So, for example, the Duke of Richmond, in an exchange with Fitzroy in the 1838 House of Lords Select Committee on New Zealand explained the “Right of Pre-emption” in the United States as preventing anyone but the government dealing with Indians for land. In his pamphlet *New Zealand in 1839* advocating that the Crown use its “right of pre-emption” obtained by discovery to annul European land purchases, Lang cited American case-law and described the right as one of “treating exclusively with the natives for their land”.

Hobson may well have read the 1838 Select Committee evidence but, for the reasons discussed in Chapter 10, it is highly probable that he read Lang’s pamphlet. His use of the phrase “the exclusive right of preemption” in article 2 can therefore be regarded as adopting the American usage described by Lang.<sup>13</sup> That indeed is the explanation of the phrase given by Busby in 1858 (in which he seems to draw on the same explanation given by Justice Chapman in *R v Symonds* in 1847). The use of “pre-emption” in the North American sense does not seem to have caused any great confusion in 1840, either in the Colonial Office or elsewhere, suggesting that the American usage was understood and that its use in article 2 had obtained the monopoly right of purchase of the Instructions.

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<sup>12</sup> After Hobson’s Instructions were finalised, and while he was in Plymouth waiting for them before embarking, a Glasgow solicitor wrote to the Colonial Office to enquire whether the Crown intended to exercise its “right of Pre-emption” against the New Zealand Land Company.

<sup>13</sup> Although Gipps used the American case-law in July 1840 in the Land Claims Bill debate, he had not referred to a right of “pre-emption” in his “unsigned treaty”. It seems likely that his attention was drawn to the American material between February and July 1840 either by Willis’s “Notes” or by the discussion of Lang’s *New Zealand in 1839* in the Sydney press (there are indications, discussed in Chapter 16, that his views were developing during this period). Gipps would, therefore, appear to be an unlikely source of the reference to “preemption” in the Treaty.

### **The framers**

This review shows that the principal source for drafting the Treaty was Normanby's Instructions, as Trevor Williams and Donald Loveridge have concluded. On this basis, the chief architect of the Treaty was James Stephen, since the Instructions were his work. Although Labouchere and Normanby approved the Instructions and made minor amendments, they made no original contribution to the policy expressed in them. That policy had been under intensive development from January 1839. Its essential features had been settled when Glenelg left office. Later intelligence about the scale of European land purchasing in New Zealand and the plans of the New Zealand Association led the Colonial Office to decide to seek sovereignty beyond the lands already settled by British subjects. And Glenelg's rejection of government involvement in organised immigration was dropped. Although these were not insignificant shifts, they did not up-end the policy towards Maori, either as to the reasons for intervention or the future relationship between the Crown and Maori. This is contrary to the views of leading modern scholars that Colonial Office policy towards Maori shifted dramatically during the first half of 1839 to acceptance that New Zealand would be a settlement colony in which Crown government would apply to settlers and Maori alike and would actively pursue Maori assimilation within settler society. The conclusion reached here is that Colonial Office policy relating to Maori did not materially change from December 1837 (when the New Zealand Association was offered a charter) to July 1839 (when Normanby's Instructions were written).

The reasons for intervention remained the same—to protect Maori from British settlers by establishing government over the settlers. Government of Maori society was not envisaged. If eventual assimilation was an expectation, it was for the distant future, dependent on Maori acceptance and largely expected to turn on the success of missionary endeavours. For the foreseeable future, the focus of colonial government action was to be the protection of Maori society rather than its transformation.

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The first shift in policy was the decision to seek the sovereignty of as much of New Zealand as Maori were prepared to cede. It resulted from appreciation that, given the extent of recent land purchasing, the problems created by British subjects could no longer be controlled by establishing British sovereignty and government over a few coastal settlements. Acquisition of territorial sovereignty over Maori-held territories was not treated as entailing a reversal of the consistently-held policy of non-interference with Maori society. There is complete absence in the record of any indication that the Colonial Office believed that acquiring sovereignty of the whole country fundamentally changed the reasons for intervention or its policy towards Maori. Any “momentous” change of policy could hardly have been “unobtrusive”, as Peter Adams has argued. Absence in the record of any conscious shift is best seen as evidence of consistency in policy.

The second shift in policy in 1839 was the inclusion of instructions to purchase Maori land for re-sale to settlers, with some of the profits to be applied to bringing out further immigrants. The significance of this change between the February 1839 draft and the final Instructions again should not be overstated. In part it was a simply a reversion (after the departure of Glenelg) to Stephen’s original proposals, themselves consistent with general imperial practice concerned as much with defraying the costs of colonial government as with promoting emigration. The suggestion that support for colonisation in this way represented a shift in the balance being struck by the Colonial Office between British and Maori interests assumes that the scale and type of immigration contemplated would not allow for the protection of existing Maori society. Such assumptions are questionable. It is not apparent that the Colonial Office envisaged that there would be extensive Crown land purchases (and indeed the massive purchases did not begin until Grey’s governorship). In view of the patterns of British emigration to 1839, it is not clear that the Colonial Office would have contemplated that immigration would reach the level of the 27,500 immigrants that arrived in New Zealand in the period 1840–52. It is likely that its expectation was that immigrants would not require large amounts of land since pastoral farming was not then in prospect. Whaling, timber extraction and arable farming were the more likely pursuits. The belief was

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that the land to be purchased from Maori for settlement would be land that Maori did not require for their own purposes. Land they did require was not to be purchased. With these expectations and with government control of settlement achieved through a monopoly right of purchase of Maori land, there was no obvious inconsistency between the key policy of protecting Maori society (including by keeping Maori apart from settlers) and the further objective of creating successful British settlements in New Zealand.

Since the Colonial Office objectives in relation to Maori did not change after Glenelg's departure, and since Labouchere and Normanby adopted Stephen's draft without material change, it is unnecessary to go past Stephen himself when considering the question of how the Colonial Office understood the Treaty.

Those who are properly to be regarded as the framers of the Treaty are accordingly Hobson, Busby and, through the Instructions, Stephen.

### **Hobson**

The form of the English text of the Treaty owes more to Hobson than anyone else. He was the British official responsible for it. Paradoxically, his original contribution to its substance was least of the three framers. That is not because Hobson did not have independent views. Before he received his Instructions, Hobson privately supported colonisation and believed that British rule (supported by military strength) was beneficial for indigenous peoples. In this, his perspective differed from that of Glenelg and Stephen who were fearful of the consequences of colonisation for Maori. Perhaps because he thought that Maori decline meant that they would inevitably be supplanted by settlers, Hobson saw the desirability of British intervention principally in terms of the protection of British interests. He considered that Maori were incapable of establishing government themselves. He was always keen that sovereignty should be established over the whole country. Before learning that the Colonial Office took a different view, Hobson seems to have thought that Maori consent was not a necessary precondition to British assumption of sovereignty. He certainly doubted whether Maori had sovereignty to

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cede, especially those Maori outside the Confederation of United Tribes. Even in respect of the United Tribes, he had misgivings about the effectiveness of the Declaration of Independence and was quick to point out that any effect it had was limited to the northern part of the North Island. He floated with the Colonial Office the view that British sovereignty had already been obtained where land purchases had been made by British subjects and that the South Island and Stewart Island should be claimed by discovery because Maori living there were too uncivilised to enter into treaty relations.

These attitudes may have influenced Hobson's actions in relation to the limited process (both as to explanations offered and tribes visited) by which, after 6 February, he gathered further Maori consent for cession of sovereignty on the basis of the Treaty entered into at Waitangi (rather than through separately negotiated treaties). They are also perhaps part of the explanation for the 21 May 1840 proclamations of sovereignty issued by Hobson while signatures to the Treaty were still being gathered. What is of most importance, however, is that the personal views that Hobson did share with the Colonial Office had little impact on Stephen and the Instructions. Even in relation to the acquisition of the South Island and Stewart Island, where Hobson was authorised to take sovereignty on the basis of discovery, it was on the qualified basis that no other course was feasible.

Hobson understood the Colonial Office policy towards New Zealand and Maori. To the extent that he may have continued to have private reservations after receiving his Instructions, they find no expression in the English text of the Treaty or the explanations of it he and his officials gave, publicly or privately. The Treaty in English faithfully carries out the terms of the Instructions, both in the operative provisions of the articles and in the preamble which explains the reasons for the compact, indicating that Hobson well understood them.<sup>14</sup> This careful performance

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<sup>14</sup> This settled understanding of his Instructions is illustrated by Hobson's consistent explanations of the reasons for British intervention, as is seen by comparing the preamble to the English text with Hobson's explanations at the treaty signings at Waitangi and Mangungu (both as self-reported and as recorded by others) and in his earlier letter of 24 December 1839 to Gipps.

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of duty is entirely consistent with Hobson's character and determination to succeed in what he undoubtedly saw as a critical career opportunity.

Although the text of the Treaty was left to Hobson, there is nothing in it that is not anchored in the Instructions. As discussed above, the only arguable innovations are the references to "all the rights and privileges of British subjects" and "the exclusive right of preemption". Although Hobson had not been explicitly authorised to offer Maori the rights of British subjects, he may well have considered it followed from Normanby's reference to the benefits to be obtained by Maori from "British protection, and of laws administered by British judges". He may have understood (or been advised by Gipps) that such rights followed from British sovereignty, as others who made proposals for annexation of New Zealand seem also to have treated it. Such understandings may indeed have been correct. Certainly the Colonial Office did not express surprise at the inclusion of the promise, which was not unprecedented in the Empire. It seems from Hobson's May 1840 proposals to Gipps for the modification of criminal law in application to Maori that he may have seen a greater role for British justice in relation to Maori than was envisaged by the Colonial Office in 1839–40 in Normanby's and Russell's Instructions. If Hobson did have that view, it may have been one developed after his arrival in New Zealand in 1840 after being exposed to the views of Busby, the missionaries, settlers and even Maori.

The "exclusive right of preemption" was, for the reasons given, used by Hobson in the sense of a monopoly right of purchase. Although the derivation of the term was American, probably through Lang, it is clear that it was not used by Hobson to import American law on native title. In any event, Lang's description of American law was taken from *Worcester v The State of Georgia* rather than from *Johnson v M'Intosh* and therefore did not treat Indian interests in land as limited to rights of use and occupancy. The Treaty, consistently with the Instructions, referred to Maori as "proprieters" having possession that was "full exclusive and undisturbed". It is difficult to see that Hobson could have accepted Busby's draft of

article 2 if he had believed at that time that Maori did not own land but had only rights of use and occupancy.

### **Busby**

If Hobson was a man who followed orders and knew his duty, Busby was not. His overwhelming concern at all times was with his own career and standing. He was a man of decided opinion, often not disinterested, which was dogmatically maintained even in the face of contrary orders. He was constitutionally unable to acknowledge mistake or to give credit to others. He was quick to feel slighted and held furious grudges. Those who were the objects of his resentments were often oblivious to having given offence or were later bemused to find out they had. Because Busby was so self-preoccupied, he tended to imagine that people who offended him were scheming against him. This included high officials, in particular Governor Bourke, who are unlikely to have given him much thought. Their rejection of his proposals or reproof of his actions are explicable without attributing to them, as Busby did, any personal animosity, much less any continuing vendetta against him. Busby delighted in settling scores and being proved right, although these triumphs were also often in his own mind only. He saw his own hand in decisions made in London, even though there was no evidence for this.

Throughout his Residency Busby was always optimistic that his latest despatch would convince the Colonial Office to fall in with his views and that vindication would be received with the next mail. In his periods of optimism, Busby was capable of spurts of creativity and industry. But when the mail dashed his hopes, he often plunged into rage (sometimes expressed in intemperate letters to Sydney and London) and then into long periods of moody inactivity. It is tempting to speculate that he suffered from a bi-polar disorder. Perhaps because of pride, Busby held himself aloof from New Zealand society. His aloofness, his obstinacy of opinion, and his preoccupation with strategies for his own advancement, checked his personal maturity and meant that his ideas for New Zealand did not greatly develop during the period of the Residency. He passed up the opportunity to build on the

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Confederation of United Tribes and began aggressively to disparage the capacity of chiefs to act collectively to bring legal order when the enhanced role he had envisaged for himself in governing British settlers by treaty arrangement with the Confederation was rejected by Bourke and the Colonial Office in 1835–36.

It might have been expected that Hobson's arrival in New Zealand, which had the effect of terminating Busby's office, would have been resented by Busby. He had been dismissive of Hobson's factories proposal and taken the view that Hobson's appointment as Consul and Lieutenant-Governor had been jacked-up by Bourke. Hobson's appointment spelled the end of Busby's own ambitions for the senior British position in New Zealand.

In fact, Busby threw himself into helping Hobson. He immediately assisted with organising the meeting of chiefs at his home at Waitangi, extending the invitations himself. He took a prominent role in the reading of the proclamations at Kororareka on 30 January 1840. He assisted Hobson to complete the English draft of the Treaty and to vet its translation by Henry and Edward Williams. Indeed Busby appears to have been Hobson's principal support and adviser in the lead up to Waitangi and in the conduct of proceedings there. Since Busby was not the sort to suppress disappointment and swallow his pride (even if it would be to his advantage), this industry suggests that Busby fully supported Hobson's mission. There are two reasons why Busby may have been happy with the turn of events.

First, Busby may have believed that he was likely to secure a significant position in the new administration. If a speech given by Busby in 1853 is to be believed, Hobson had brought with him a private communication from a member of Gipps's Executive Council that he was being considered for appointment either as Colonial Secretary or as Land Claims Commissioner.<sup>15</sup> The latter was a position for which Busby was qualified, given his earlier experience on the New South Wales Land Board and knowledge of land purchasing in New Zealand. Busby is likely to have

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<sup>15</sup> James Busby *A Speech Delivered in the Provincial Council of Auckland, Exhibiting a Picture of Misgovernment and Oppression in the British Colony of New Zealand, Preceded by a Letter to His Grace the Duke of Newcastle, Her Majesty's Principal Secretary of State for the Colonial Department* (Auckland, 1853) 13.

been interested in the appointment. Since Gipps had earlier advised him of Glenelg's hope that a position could be found following the end of his Residency, Busby may have felt confident about securing a lucrative appointment. His visit to Sydney in early April 1840 may well have been in order to advance such an appointment. Ironically, the visit coincided with the appearance of the Land Claims Bill which pushed Busby into a lifetime of wrangling and ended any chance that he would be appointed to any office, let alone that of Land Claims Commissioner.

The second reason why Busby could have been pleased by the turn of events is that it is entirely possible that he believed Hobson's mission to be, finally, approval of plans he had long-promoted to London and thus as vindication for him and defeat for Bourke and his other enemies.<sup>16</sup> Hobson's factories proposal, which he had criticised, had not been adopted. Instead, as Busby himself had urged, Hobson had been sent to obtain a treaty from the chiefs which would allow Britain to establish government to maintain peace and order, for the benefit both of Maori and British subjects. It is quite possible that Busby also saw the treaty to be negotiated as establishing the sort of protectorate arrangement he had advocated, instancing the precedents of the Ionian Islands and Indian princely states. (As is discussed below, it would not have been fanciful for Busby to believe that, in its effect in relation to Maori, an arrangement akin to that of a protectorate was what the Colonial Office envisaged.)<sup>17</sup>

Although not inconsistent with the Instructions (and therefore able to be approved by Hobson), some of the additions made by Busby to the English draft seem to reflect his own preconceptions. They are: the rewording of article 1 to include surrender of the powers of sovereignty the chiefs "may be supposed to exercise or

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<sup>16</sup> It is not known for certain whether Hobson gave Busby the Instructions to read, but at the very least he must have provided sufficient detail from them to enable Busby to complete the English text of the Treaty, as is seen particularly in the addition made by Busby to the pre-emption clause to include the process to be followed by the Crown in purchasing land from Maori.

<sup>17</sup> One of the mysteries about Busby is why, having been a prolific correspondent with his family in New South Wales about his struggles and hopes, no letter concerning the Treaty and the role he played in it exists. Although it is speculative, it is possible that Busby obtained and destroyed such correspondence because it expressed views that he later came to repudiate or was embarrassed by.

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possess over their respective territories”; the property guarantee in article 2; and the distinct reference in the subscription to the authority of the chiefs not within the Confederation over their “Tribes and Territories”, a reference to be contrasted with article 1 where the powers of sovereignty are described as being over territories alone.

From 1835 Busby had regarded the chiefs of the Confederation as possessing sovereignty through confederation.<sup>18</sup> He never suggested that the Confederation’s sovereign powers were qualified. He saw the Declaration of Independence as constitutive of the sovereignty of the Confederation and excluding any claim to sovereignty by the individual chiefs of the Confederation. In the same way, from the time of the Declaration, he may have regarded the chiefs outside the Confederation as lacking sovereignty because they had not joined the Confederation or organised a similar polity. On this basis, Busby’s expansion of article 1 to refer to “supposed” rights and powers of sovereignty is likely to reflect his own doubt that the independent chiefs, who had now been included in the Treaty in an addition to the Freeman draft, had rights and powers that could properly be described as “sovereign”. If the qualification he introduced was to meet the position of the independent chiefs only and did not reflect on the sovereignty of the Confederation, it is not the same as Normanby’s qualification<sup>19</sup> in recognising the chiefs’ sovereignty which applied to the confederated chiefs equally.

Busby’s principal contribution to the Treaty draft was the addition of the property guarantee in article 2. He had argued since 1835 that in any treaty arrangement Britain should confirm the ownership of land to Maori, as he understood was the invariable practice in other parts of the Empire. In article 2, he described Maori as “proprietors”, and he considered them proprietors of land in the fullest sense. In

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<sup>18</sup> Although in May 1833 Busby had recognised that between 25 and 30 tribes “exercise[d] separately, and each with reference to the rest, all the functions of Sovereignty which their simple state of Society requires”, he had resolved at the same time that he would not deal with those tribes “in any transaction which might be considered of an international character”, except as a collective. The Declaration of Independence achieved that purpose.

<sup>19</sup> See above n 5.

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this he brought the perspective of a purchaser of Maori land who considered that his derivative rights were as good as full title in England. When Busby repeatedly later said that article 2 had confirmed title to land in “the fullest sense which language could convey”, it is hard to disagree. The guarantee of “full exclusive and undisturbed possession” is, as the United States Senate Committee on Foreign Relations said in 1877, as clear an expression of “perfect ownership” as could be devised. What is more, by including in the confirmation and guarantee of properties “collectively or individually” possessed not only chiefs but also tribes, families and individuals, Busby ensured that what was being protected were the range of interests accorded by Maori custom. This was a point made much later by Busby when he said that article 2 “necessarily guaranteed the continuance in operation of the laws and customs constituting such property”.

The difference between the reference in article 1 to the chiefs possessing and ceding sovereignty over “their respective territories” and the reference in the subscription to the chiefs’ “authority over [their] Tribes and Territories” may be intentional. On one view there is a distinction being made, so that article 1 does not involve the chiefs ceding authority over their tribes.

While a textual argument such as this could not be conclusive, the view that Busby did not understand the cession of sovereignty to affect tribal independence and the authority of the chiefs over their tribes is supported by Busby’s original draft which, before Hobson’s changes, had separate subscriptions for the confederated chiefs and the independent chiefs. In Busby’s draft “authority over ... Tribes and Territories” was asserted by the independent chiefs. Busby treated the chiefs of the Confederation separately because the sovereignty of the Confederation over its territory was already accepted and no further assertion of authority, such as was made by the independent chiefs in their subscription, was therefore necessary. In the subscription to the Treaty, the chiefs of the Confederation entered into the Treaty “being assembled in Congress” at Waitangi, underscoring that they acted as the Confederation. In Busby’s draft, before Hobson merged the two subscriptions into one, the confederated chiefs confirmed their cession in article 1 of “the

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sovereignty of our territories”, without equivalent reference to the authority over their tribes included by Busby in the draft for the independent chiefs.

What the confederated chiefs were to cede were the powers of the Confederation under the Declaration of Independence, which did not oust the authority of the chiefs of the Confederation over their tribes. This argument has to be developed. It turns on Busby’s view of the purpose of the Declaration and the relationship of the Treaty to it. It entails the consequence that, just as the confederated chiefs had not given up their authority over their tribes to the Confederation, nor did they do this through the Treaty to the British Crown. Similarly, the independent chiefs ceded territorial sovereignty in the Treaty but not authority over their tribes. For the independent chiefs and tribes the Treaty was both a declaration of sovereignty and a consequent cession of it.

By the Declaration of Independence the Confederation of the United Tribes was constituted as an “Independent State”. “All sovereign power and authority within the territories of the United Tribes” was declared to belong “exclusively” to the chiefs “in their collective capacity”. It included all “legislative authority” (to make laws “for the dispensation of justice, the preservation of peace and good order, and the regulation of trade”) and all “function[s] of government” (“te tahi Kawanatanga” in the Maori text). Busby’s explanation was that it was only by confederation under the Declaration that “sovereign power[s]” and “function[s] of government” had come into existence. That is why he took the view that the liquor law of the Hokianga chiefs was “a nullity from the commencement”; before the Declaration there was no legislative or governmental authority anywhere in New Zealand. In June 1837 he explained that no individual chief had “any sovereignty or territorial rights”.

From 1833, Busby had been unwilling to deal with separate tribes “in any transaction which might be considered of an international character”. For Busby, the Confederation was the solution. Its membership remained open and Busby obtained the adherence to the Declaration of another 18 chiefs by 1840, including Te Wherowhero of Waikato and Te Hapuku of Te Kahungunu. As he explained in

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1844 or 1845, Busby had “at a very early period” of his Residency formed the view that confederation was essential not only to the capacity to deal in matters of “an international character” but also to the establishment of government. A “Federal Union of these Tribes represented by their chiefs” was the “only basis upon which there was any hope of establishing the Functions of Legislation and Government”.

The language of “confederation” and “federal union” makes it clear that Busby understood the union as a federation. As a federation, the tribes united for joint action and mutual support while each retained control of its internal affairs. Busby himself made this distinction between internal tribal affairs and the collective governmental powers of the Confederation. In his 16 June 1837 “40 page” despatch he distinguished between the “acts approaching to acts of sovereignty or government” exercised by the “chiefs in their individual capacity as relates to their own people” and those exercised “in their collective capacity as relates to their negotiations with the British Government”. In respect of the latter, the “congress of chiefs”, as “the depository of the powers of the state as declared by its constitution”, was “competent to become a party to a treaty with a foreign power, and to avail itself of foreign assistance in reducing the country under its authority to order”. The distinction drawn between internal affairs and the new collective governmental power allowed Busby to say that an object of the Declaration was “as much as possible to distinguish and elevate the character of each chief amongst his own people”. This is consistent with his 1869 explanation that the chiefs’ prayer for the King’s protection in the Declaration was “lest their chieftainship should be destroyed”. Although Busby disparaged the extent of authority possessed by chiefs, he seems to have wanted to build up the authority of the senior chiefs.

The distinction between governmental power and internal tribal authority makes sense of Busby’s approval of the use of “kawanatanga” and “rangatiratanga” in the Treaty. “Kawanatanga” had been used in the Declaration to translate the “function[s] of government” brought into existence by confederation. Its use in the Treaty to translate “sovereignty” is consistent with the British Crown acquiring only the powers obtained by the Confederation under the Declaration, and which

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the independent chiefs also joined in ceding. The powers ceded by the confederated chiefs in the Treaty are properly to be seen as those they possessed by the Confederation, as Samuel Carpenter has also argued. They were the powers of government necessary “for the dispensation of justice, the preservation of peace and good order, and the regulation of trade”. Beyond these objects, the powers of the Confederation did not affect tribal authority or independence. Because of this understanding there was no inconsistency between ceding sovereignty or “kawanatanga” in article 1 and the guarantee of “te tino rangatiratanga” in article 2, language approved by Busby. As he told the Legislative Council of New South Wales only a few months after the Treaty was signed, “rangatiratanga” was the closest Maori equivalent for “independence”. In his later English back-translation of the Treaty he rendered article 2 as guaranteeing “full chieftainship” and to the “chieftains and nations, their dignities, offices, and properties”. Accordingly, he said that there was no inconsistency between the English and Maori texts of the Treaty.

The federation model, adopted in the Declaration, was maintained in the Treaty. That explains why Busby proposed separate subscriptions for the confederated chiefs and the independent chiefs (whose status was not already established) and why there is no reference to “authority over Tribes” in article 1 or in Busby’s draft subscription for the confederated chiefs (since the Confederation did not touch internal tribal affairs except for the purposes of justice, peace and good order, and trade). It is clear that Busby did not see the governmental power (“kawanatanga”) necessary to achieve the objectives of justice, peace and trade as swallowing the independence of the tribes in internal matters. His focus was on the problems that were beyond the capacity of the tribes to control peacefully: inter-tribal conflict, the impartial punishment of crime without giving rise to escalating feuds, and the problems arising from the activities of Europeans. The federal governmental power (“kawanatanga”) envisaged by Busby, and agreed to by the chiefs in both the Declaration and in the Treaty, did not extend further than its objects. Busby’s reference in his 26 January 1836 despatch to the “blessings” for Maori in receiving through cession of sovereignty “equal Govt and impartial Laws” is to be

understood in this context against the objects of intervention and does not mean that Maori and settlers were to be governed in an identical manner.

Busby's essential ideas for government in New Zealand did not change between the Declaration in October 1835 and the Treaty in February 1840. It remained a federal concept. On this view, the Treaty achieved what the Declaration had begun. It provided a government capable of exercising the federal governmental power which the chiefs had recognised to be necessary in 1835 but which Busby came to believe the Confederation could not supply. The collection of further signatures to the Declaration after Busby had abandoned plans to set up a form of government by the Confederation can only be explained by his holding the view that confederation was a vehicle for achieving by treaty an arrangement for British government, whether by a form of protectorate or by acquisition of sovereignty.

Initially Busby had hoped either that he would be authorised by treaty with the Confederation to exercise authority over British subjects and trade<sup>20</sup> or that the Confederation would place itself during a period of tutelage under British protection, enacting laws with the advice of the British representative and relying on a British military force to help enforce them. When cold water was poured on these ideas by Bourke (who rejected any direct British intervention and told Busby he must seek to work by influence through the chiefs), Busby back-pedalled. He became strident in expressing the view that the Confederation had been ahead of its time because the chiefs had no experience of authority of this type and its exercise would create more strife than it would suppress. Busby now firmed up in the view that direct British administration was necessary, although he continued to advocate a protectorate in which Maori might participate in government as preferable to an outright acquisition of sovereignty.

In substance Busby's conception of the effect of British administration on Maori society did not greatly differ according to whether it was a colony or a protectorate. The "sacrifice" entailed in ceding sovereignty was that British administration

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<sup>20</sup> Leaving the Confederation to exercise the new governmental powers in relation to Maori in respect of matters of justice, peace and good order, and trade.

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would not be a trust “upon the principle of protecting a Nation in its Minority”. Rather Maori would become British subjects. Under British sovereignty, as in a protectorate, Maori would, however, be “protected in the enjoyment of their Landed property, and their personal rights” and obtain the benefits of “equal Govt and impartial Laws”. Apart from the permanency, the manner of British administration would be very much the same, leading Busby to say that the protectorate he advocated would be “a Dependency of the British Empire in everything but the name”. That is the conclusion reached in Chapter 3 in considering the nature of protectorates. It also consistent with the view expressed by James Stephen in March 1839, in relation to New Zealand, that the difference between “British protection” and “British Dominion” was one that “may perhaps truly be said to be verbal rather than substantial”. The fact that British administration would not in substance be different whether the territory was acquired as a colony or a protectorate means that Busby’s explanations as to how a protectorate in New Zealand might work remain relevant when considering what he understood by the Treaty.

From 1836 Busby consistently pressed for British intervention in order to establish a “paramount authority” capable of maintaining peace and good order for the protection of Maori and Europeans alike. British government was required both because the “novel circumstances” of European settlement confronting Maori were acknowledged by the chiefs to be beyond their control and because tribal allegiances meant that the punishment of individual malefactors kept escalating into war. The maintenance of peace and the settling of disputes before they became a cause of war were to be the chief purposes of British administration. Because of this focus, the military force envisaged by Busby as necessary to enforce laws was that “just sufficient to enforce them against individuals”. The preoccupation with peace and good order is carried through into Busby’s draft subscription for the confederated chiefs. In it they acknowledge their “weakness and inability to repress internal dissensions and to defend our Country from external enemies” and their “want of authority to restrain and punish the evil disposed and criminal amongst us both natives and foreigners”.

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In Busby's pre-1840 plan, there was to be "no interference ... with the rights of the people, individually or collectively" except as necessary to secure the objects of British intervention. If, as it seems reasonable to infer, Busby regarded the "paramount authority" acquired by Britain as delineated by the objects of intervention (themselves the objects that had prompted confederation and similarly limited its powers), the view prefigured that expressed by William Martin, the former Chief Justice of New Zealand, in 1860. He treated "sovereignty", "kawanatanga" and "governorship" as identical and as amounting to "such rights as were necessary for the Government of the Country, and for the establishment of the new system". This "governorship" was a thing previously "unknown" to Maori which was "in some degree defined by reference to its object" of "avert[ing] the evil consequences which must result from the absence of Law" (a phrase taken from the preamble of the Treaty):

To the new and unknown Office they conceded such powers, to them unknown, as might be necessary for its due exercise. To themselves they retained what they understood full well, the "*tino Rangatiratanga*", the "full Chiefship", in respect of all their lands.

Although Busby was much later to explain the Treaty as comparable to the Treaty of Union between England and Scotland, and Ged Martin has speculated that the 1706 Treaty may have been Busby's pattern for Waitangi, there is no evidence that Busby had that model in mind in 1840. It is not necessary to go outside his despatches referring to British protectorates and explaining the Declaration to understand the thinking he brought to the drafting of the Treaty. These were fixed ideas which Busby had held since his arrival in New Zealand. Given his personality he may well have pursued them without encouragement, but indeed he was able to read Normanby's Instructions as effectively authorising the approach he had urged. While Busby is likely to have seen this as adoption of his proposals, Busby's despatches do not seem to have influenced Colonial Office policy and it is extremely doubtful that the Colonial Office intended Hobson to treat with Maori for sovereignty based on the powers of the Confederation.

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It seems that Busby envisaged a more extensive governmental power to achieve law and order among Maori than the Colonial Office. That is seen both in his despatches and initiatives he took such as the demonstration of “impartial” justice at Kati’s trial at Mangungu. Busby believed that Maori conceptions of justice were primitive and that kin group loyalties and responsibility for the actions of individuals escalated disputes into war which the chiefs had insufficient authority to check. His view was that an independent higher power to dispense justice (“Her Majesty’s Royal Justice and benignity” in his draft subscription) was required and would be welcomed by Maori. Whether there was justification for these views, which were certainly shared by others in New Zealand in 1840, is outside this topic. If, as seems likely from Busby’s use of similar language in his speech on arrival at Paihia in May 1833, Hobson’s acknowledgment “he iwi tahi tatou” when shaking hands with the chiefs at Waitangi was at Busby’s suggestion, it may have arisen from Busby’s preoccupation with peace rather than because of any assimilationist aspirations. In May 1833, Busby had said that the people of Great Britain had at one time been like Maori in that “[e]very Chief went to war with his neighbour, and the people perished in the wars of their Chiefs, even as the people of New Zealand do now”. After the people of Great Britain had been converted to Christianity, they had learnt that “all the tribes of the earth are brethren” and had “ceased to go to war with each other, and all the tribes became one people”.

These, then, were the ways in which Busby’s direct influence on the Treaty can be seen in the text of the English draft. How did he understand the parts of the Treaty in which he had no real hand? Busby’s views on the extent of Maori ownership of land guaranteed by article 2 is clear. In his subscription for the confederated chiefs, he adopted Freeman’s draft in referring to the right of pre-emption as applying to “all our Waste Lands”, implicitly acknowledging that unoccupied and uncultivated lands (“waste lands”) were owned by Maori. That is consistent with the unambiguous assertion made by Busby in October 1835 that “[a]s far as has been ascertained every acre of Land in this Country is appropriated among the different Tribes”.

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There is no reason to believe that Busby's post-Treaty statements that pre-emption in article 2 was a monopoly right of purchase for which the Crown had to bargain (and which therefore did not come with sovereignty, however obtained) were not views he held when the Treaty was signed at Waitangi. While twenty-years on, an embittered Busby was to say that the purpose of pre-emption had not been to protect Maori land ownership, that statement is contradicted by his 1845 letter to Under-Secretary Hope that pre-emption in the Treaty had the "benevolent purpose" of protecting Maori from the "fraudulent dealings of Her [Majesty's] subjects" for land. There is also no indication in the historical record that, at 1840, Busby regarded Maori property as a legally unrecognised political trust upon the Crown. His own land claims were predicated on Maori property rights being enforceable through legal process. His late switch in the 1860s (for which he was taxed by contemporaries with inconsistency) is not a reliable guide to the views he held in 1840. Certainly the importance Busby placed both on the need to guarantee Maori in their property and to provide them with British justice makes it difficult to imagine that he thought that Maori property in land would be unprotected by law. The contents of Busby's subscription provide some support since, unless covered by the reference to "Royal Justice and benignity", the guarantee of property alone of the operative provisions of the Treaty received no mention, otherwise a perplexing omission given Busby's view that it was critical for Maori acceptance of the Treaty that their property be protected.

As for Busby's understanding of the legal effect of the Treaty itself, there is little to go on at February 1840. In June 1840, he described the Treaty as a "sacred engagement" and as the basis of British sovereignty. In 1859, he invoked *Campbell v Hall*, compared the Treaty of Waitangi to the Treaty of Union 1706, and asserted that in New Zealand "[a]ll our laws and institutions now existing derive their vitality from this treaty".

### **Stephen and the meaning of the Treaty**

In contrast to the dutiful but unimaginative Hobson and the ungovernable and self-opinionated Busby, Stephen was by any standards an outstanding public servant.

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He was a man of high intelligence, vast experience, wise judgement, and strong moral compass. He was caring and idealistic without being sentimental or dogmatic. He was careful to be realistic in his expectations, being conscious that disappointment in the short-term could undermine resolve for the long-term. His clarity of thought, capacity to see the whole in any problem, and refusal to pretend omniscience, were matched by clearness and precision in expression. The Instructions to Hobson reflect Stephen's qualities and his particular concern for aboriginal peoples. Stephen's views in relation to the colony of Sierra Leone, described by TJ Barron, are reflected also in Normanby's Instructions. They too proceeded on the assumption that Maori, like the native population of Sierra Leone, possessed political and property rights that could be modified only by agreement. They are tolerant of custom and do not claim any right to impose British culture on Maori. They indicate a view that Maori were to be brought to "civilisation" by their consent, principally as a result of missionary influence, with little direct government involvement and a preference to keep Maori and European societies apart in the meantime.

While Stephen had thought these positions through, they were not idiosyncratic. As has been seen, they were consistent with the pattern followed in other parts of the empire. Even before Stephen wrote the Instructions, similar attitudes to his can be seen in the positions about British intervention in New Zealand taken by Busby, Hobson, Bourke and Glenelg. They were also reflected across a wide range of groups including missionaries, parliamentarians, newspaper editors and their correspondents, and even the New Zealand Association. While there were variations in approach, these were mostly shades of difference not touching the fundamentals. There was general agreement that intervention was necessary to bring law for the protection and benefit of Maori; that Maori had sovereignty and that their consent to British intervention was required; and that Maori owned their land and were to be protected in it.

The expression of British policy in the Instructions therefore did not cause surprise. And after their issue to Hobson there was general understanding of the British

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policy and subsequently of the meaning of the Treaty. That is evident from the consistency of the explanations of the Treaty given by Hobson, his officials and other participants at the signings. Seeds of future discord were sown by the American law approach taken in mid-1840 by Gipps in Sydney and the New Zealand Company in London. But their arguments were rejected as revisionist by Stephen, Busby, Shortland, Henry Williams and other missionaries, British politicians, and newspapers in Sydney and New Zealand, although they gained more traction from the mid-1840s.

By the 1860s opinion seems to have shifted towards the positions that Maori had lacked sovereignty in 1840, that Maori had no property in land but merely legally unenforceable occupation interests and no interest at all in unoccupied land, and that British sovereignty was indivisible (meaning that one law applied to Maori and to Europeans to the exclusion of Maori custom). Even then, however, there were defenders of the original understanding of the Treaty, such as William Martin, George Clarke and Henry Sewell.

### *Treating for sovereignty*

Obtaining a cession of sovereignty from Maori was treated by the Colonial Office as a necessary precondition for the assumption by Britain of sovereignty. This was not a matter of “show”. That Maori were seen as having the sovereignty of New Zealand is seen from the terms of Normanby’s Instructions (which had not changed in this respect from the January and February 1839 drafts). They maintained that Maori “title ... to the sovereignty of New Zealand is indisputable”. British acknowledgment of New Zealand “as a sovereign and independent state” meant that the Crown disclaimed “every pretension to seize on the islands of New Zealand, or to govern them as a part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages, shall be first obtained”. The position taken was consistent with Stephen’s views of the sovereign rights of the native tribes of Sierra Leone. Indeed it was standard British imperial practice to treat with indigenous peoples for sovereignty. Glenelg’s memorandum of 15 December 1837 had said that it would be “difficult

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or impossible to find in the History of Colonization an example of a Colony having been founded in derogation of such rights, whether of sovereignty or of property, as are those of the Chiefs and People of New Zealand". Britain had "no legal or moral right to establish a Colony in New Zealand, without the free consent of the Natives, deliberately given, without compulsion, and without fraud". Consistently with this, the jurisdiction asserted by imperial legislation over British criminals in New Zealand was on the basis of an acknowledgment that New Zealand was outside British dominions and that the jurisdiction was extra-territorial. In the same way, Governor Bourke denied that the New South Wales legislature could pass laws for New Zealand, which he described as "an independent state".

The British Treasury, the missionary societies, and even, initially, the New Zealand Association also accepted that Maori had sovereign rights which would have to be treated for. So, the Treasury had advised the Colonial Office in June 1839 that "any assumption of authority [in New Zealand] beyond that attaching to a British Consulate, should be strictly contingent upon the indispensable preliminary of the territorial cession having been obtained by amicable negotiation with, and free concurrence of, the native chiefs". Other than the representatives of the Association, which by 1838 was starting to question Maori sovereign capacity, other witnesses to the House of Lords Select Committee on New Zealand also assumed Maori sovereignty.

The annexation of New Zealand was not treated as a foregone conclusion in 1839–40. The Colonial Office sought a correction of a newspaper report of July 1839 that the establishment of a colony was "probable", declined to encourage would-be emigrants, and prevented the appointment of a Bishop for New Zealand and government officers until the outcome of Hobson's mission was known. It did not assume that sovereignty would be ceded for the whole country, as Russell acknowledged to Parliament.

When, after Hobson's departure for New Zealand, the New Zealand Land Company claimed that New Zealand was already British in sovereignty, Stephen wrote, in a memorandum which later became a paper to Cabinet, that "they are

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either being ill informed as to the facts, or very ill-disposed to make a fair statement of them”. He set out the background and concluded that “the proofs are ... overwhelming and superabundant” that “Great Britain has recognized New Zealand as a Foreign and Independent State”.

In Sydney, even though Normanby’s Instructions were not known, it was assumed by the press that Hobson was being sent to New Zealand to treat with Maori for sovereignty. The common understanding, although perhaps not one shared by Gipps, was that New Zealand was an independent country. This in part explains the outrage expressed in Sydney towards Gipps for his intervention to stop the auction of New Zealand land in January 1840 and for his February land titles proclamation. It was also a basis for the adverse reaction, first, to the newspaper serialization of Lang’s *New Zealand in 1839* which advocated Crown assertion of a right of pre-emption (invalidating all European land purchases from Maori) acquired with Cook’s discovery of New Zealand and, later, to Gipps’s Land Claims Bill.

At the Treaty signings Maori were told that the British Crown could exercise no “civil powers” in New Zealand without their consent. Felton Mathew’s journal on the day of the Treaty recorded his view that the establishment of a British colony hung in the balance: “This is an important day, big with the fate of ‘Hobson and New Zealand’. On the success of our negotiations with the Chiefs today, must depend our future operations.” A voluntary cession of sovereignty had been “rendered necessary” by the British Government “having some years ago formally recognised the independence of the country”.

In July 1840 Edward Gibbon Wakefield criticised the Colonial Office in the House Commons Select Committee for not having claimed New Zealand by discovery and following the doctrine applied in *Johnson v M’Intosh*. This led to Stephen’s minute in which he not only repudiated the approach as inconsistent with English law but also pointed out that an assertion of right by discovery was not one that Britain could make. The Dutch had discovered New Zealand and, despite Cook’s claim of sovereignty, nothing had been done to maintain the claim and “[t]he most solemn Acts have been done in repudiation and disavowal of it”.

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The Colonial Office maintained this view. In Russell's Instructions of 9 December 1840 it was said of Maori: "they have been formerly recognized by Great Britain as an independent state; and even in assuming the dominion of the country this principle was acknowledged, for it is on the deliberate act and cession of the chiefs, on behalf of the people at large, that our title rests". When in 1842–43 the New Zealand Company questioned whether Maori had property in land, Stephen suggested that it be reminded that Hobson had treated for sovereignty "on the basis of recognising their proprietary titles to the Soil" and that it was "in virtue of the Treaty so made with them, and on that basis alone, that Her Majesty's Title to Sovereignty in New Zealand at this moment rests". When the Company said that the Treaty was a "praiseworthy device for amusing and pacifying savages", Hope responded that Stanley was not prepared "to join with the Company in setting aside the treaty of Waitangi, after obtaining the advantages guaranteed by it".

Foden's argument that Stephen prospectively viewed New Zealand as a "settled colony" (so that the basis of sovereignty was not cession by Maori) is based on Stephen's expressed opinion that the Crown could not establish a non-representative legislature for New Zealand by exercise of prerogative powers, a legal impediment that did not exist in relation to ceded colonies. The conclusion drawn rests on slender evidence and is contradicted by Stephen's many assertions that sovereignty was acquired by the Treaty. His view that Parliament's authority was required to establish a non-representative legislature was not expressed to be on the basis that New Zealand would be a settled colony. He may equally have thought that legislative empowerment was required in respect of a ceded colony. More importantly, Paul McHugh is clearly right to say that the introduction of English law into New Zealand for settlers inevitably had the effect that a non-representative legislature could not be established by Crown prerogative.<sup>21</sup>

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<sup>21</sup> McHugh's view that the common law designation of a colony as "settled" or "ceded" follows from the introduction or non-introduction of English law, notwithstanding the mode of acquisition, is however questionable. It is arguable that the designation follows from the mode of acquisition but does not determine the shape of the legal order, as was shown in Chapter 3.

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Although Hobson was authorised to claim the South Island by discovery, that was only if he found that Maori there were “incapable from their ignorance of entering intelligently into any treaties with the Crown” and their protection made the assumption of sovereignty a matter of necessity. In the event, however, Hobson’s invocation of discovery in the 21 May 1840 proclamation of sovereignty over the South Island made no difference to its treatment by the Colonial Office. Hope’s draft report for the 1844 Select Committee explained the Colonial Office position that “whatever rights were secured by Treaty to the natives on the northern side of Cook’s Straits, must, in equity, be conceded by the Crown to those on the southern side”.

The qualification in Normanby’s Instructions that Maori were sovereign “so far at least as it is possible to make that acknowledgment in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert” is not properly read in context as repudiating the recognition of Maori sovereignty, as Gipps and many historians have treated it. This is made clear in the Instructions which immediately say: “But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown”. It has been suggested in Chapter 8 that the qualification may in part have been a way of justifying British intervention (which was otherwise “essentially unjust”) by reference to the fractured and uncoordinated nature of Maori political organisation. Alternatively, it may simply have been the expression of the obvious truth, referred to in the February 1839 draft of the Instructions, that Maori did not practice the full extent of “international relations”. Nor was the Colonial Office willing to rely on any Maori understanding that sovereignty had been ceded by sales of land: Hobson was to negotiate for sovereignty irrespective of the Maori view.

When doubts were later raised by the Attorney-General, William Swainson, about the status of the tribes whose chiefs had not entered into the Treaty, the Colonial Office took the view that the assertion of sovereignty over “the entire country and all its inhabitants” could not then be questioned. That approach is not, however,

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inconsistent with the view taken in 1840 and afterwards that the basis of British sovereignty was the Treaty. The gazetting of Hobson's proclamations of sovereignty had to be treated as conclusive, whatever the injustice to non-signatories (which was said to be "readily overcome" by allowing them to retain their customs without interference).

### *Reasons for British intervention*

The reasons for British intervention given in the preamble of the English text express in condensed form the explanation given in the Instructions. The Instructions spell out the belief that unless British settlers were "restrained by necessary laws and institutions" in New Zealand, the experience of colonisation was that Maori would not survive. The solution looked to was the establishment "amongst" the settlers of "a settled form of civil government". The sovereignty sought from Maori to establish such government was, if not for the whole country, "at least [of] those districts within, or adjacent to which, Her Majesty's subjects may acquire lands or habitations". The Colonial Office record and the explanations to Maori given at the Treaty signings do not deviate from this justification. Given the Colonial Office focus on bringing settlers under lawful control, it is an open question whether the acquisition of sovereignty would have seemed necessary had the Foreign Jurisdiction Act 1843 already been in existence.

From December 1837, the letters and internal memoranda of the Colonial Office described the objective as being to establish "some settled form of government". Hobson's factories proposal, considered by the Colonial Office during 1838 as the appropriate response to the New Zealand problem, was a plan for limited intervention directed at enclaves of British settlement and trade. While the Colonial Office plans evolved from January 1839, the underlying purpose for intervention remained constant. So in the 24 January draft of the Instructions, it was said that the British Government had decided to establish "a settled form of Gov<sup>t</sup> for Her Subjects in New Zealand". Hobson was to explain to Maori that the proposal for cession was in their interests so that the Queen could exercise "effective control" over "lawless" British subjects. He was to use his authority "for establishing and

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enforcing Law and Order amongst the British Inhabitants and for protecting the Natives from violence and injustice". In the February draft of the Instructions, similarly, the lawless Europeans were to be "subjugate[d]" to law and Maori "secure[d] ... against the perils of their vicinity". These were to be the "principal objects" of Hobson's mission.

The Colonial Office letters to the Law Officers and Treasury in May and June 1839 spoke of the need to set up a system of government over British subjects living in New Zealand. The Treasury reply, later expressed in a minute tabled in Parliament, referred to the proposal as being to establish "some British authority ... for the government of the Queen's subjects resident in, or resorting to, those islands". The Colonial Office itself used this minute to explain British policy in response to queries and also attached the correspondence with the Treasury to the eventual Instructions to Hobson and Gipps. In Parliament in late June 1839, the Under-Secretary, Labouchere, explained British intervention on the basis of the protection of Maori and the "maintenance of good order" among the settlers. Normanby's 15 August despatch to Gipps referred him to the 14 August Instructions, which were described as having been given to Hobson "on his embarkation to assume the government of the British Settlements in progress in New Zealand".

After British sovereignty had been obtained, the same reasons for the step having been taken were given by Russell in further Instructions to Hobson in December 1840. The fear had been that, without intervention, there would be "the rapid disappearance of the aboriginal tribes in the neighbourhood of European settlements", as had occurred in other colonies. Stephen's draft had been even more pointed in explaining the "indispensable" establishment of British authority as "chiefly with a view to the preservation of the natives from the oppression of the lawless multitude which had settled in their neighbourhood".

These Colonial Office explanations for British intervention were fully understood by Hobson and those who knew of Normanby's Instructions. Even in his personal communication with Gipps on his arrival in Sydney on 24 December 1839, Hobson's account of his mission is in complete accord with the Instructions. His

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description in the same letter of his interview with Glenelg in January 1839 is further indication that the fundamentals of Colonial Office policy had not changed during 1839. The maintenance of the official explanation in this personal communication is inconsistent with the view of Peter Adams that the Instructions were only “half the story” as to the motives for British intervention, intended as suggestions to assist Hobson in selling the treaty to Maori. Hobson’s explanation of the reasons for intervention to the deputation of landowners in Sydney on 13 January 1840 also emphasised the “Establishment of British Laws and authority” as “necessary and expedient” because the chiefs were unable to maintain “social order”.

For his part, Gipps authorised payment of the expenses for the new administration in New Zealand on the basis that the British Government had “direct[ed] the establishment of a settled form of Civil Government over British subjects in New Zealand”. This language was carried through into the two proclamations prepared in Sydney for Hobson to publish on arrival in New Zealand. The proclamations, read at Kororareka on 30 January, described Hobson as “Lieutenant-governor of the British Settlements in progress in New Zealand”. The first announced that “measures shall be taken for the establishment of a settled form of civil government over those of Her Majesty’s subjects who are already settled in New Zealand, or who may hereafter resort hither”. Before the Treaty was received in Sydney, the version Gipps had prepared to offer the visiting chiefs recited the reason for taking sovereignty as to avert the “evil consequences” likely to arise for Maori “from the settlement amongst them of Her Majesty’s subjects unless some settled form of Civil Government be established to protect the Native Chiefs and Tribes in their just rights, and to repress and punish crimes and offences which may be committed by any of Her Majesty’s subjects”.

The reasons why Maori should cede sovereignty were explained by Hobson and his officials at the Treaty signings in terms of the authority the Queen would then obtain to control her subjects. The preamble to the English text of the Treaty itself referred to the same motivation but would have been even more clear had Hobson

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not deleted the original explanation of the need for laws “to restrain and to Protect Her Subjects”. The change may not have been thought to have significance or it may reflect the view (certainly held by Busby) that Maori themselves would welcome English law to control their own troublemakers. The change does not, however, alter the dominant purpose of controlling British subjects by which the Treaty continued to be explained and which accorded with Colonial Office policy. It had also been the basis on which the New Zealand Association, missionaries, and visitors to New Zealand alike had urged British intervention.

There is no good reason to doubt that the motive for British intervention in New Zealand was to establish government over British settlers for the protection of Maori. There is no doubt that the policy of intervention was reached reluctantly and with the feeling that it was the lesser evil than unregulated settlement. The preference of the Colonial Office was that Maori should not be brought into contact with Europeans but that their “social improvement” should be left “to be worked out by the gradual influence of Christian missions”. The visceral reaction of Glenelg and Stephen to the initial proposals of the New Zealand Association in mid-1837 was because of their conviction that colonisation would be disastrous for Maori because its “evils” for native populations were “inherent, and not accidental”. By December 1837 it was, however, recognised that it was “impossible” to leave matters on such a basis because “[c]olonization to no small extent is already effected in those Islands”. By 21 January 1839, the harm of unregulated colonisation had become “irreparable” and was “daily increasing”. It was “perhaps to be regretted that the New Zealand Islands were ever visited by our Countrymen”, but “[t]he only question” by then was “between acquiescence in a lawless Colonization, and the establishment of a Colony placed under the authority of Law”. Both the 24 January and February drafts of the Instructions continued to express doubts about “the propriety” of intervention and to explain it on the basis that the obligation to protect Maori made it the lesser evil. Normanby’s Instructions retained the sense that British intervention was “essentially unjust” and fraught with risk to Maori (which, if realised, would also be injurious to Britain itself). This opinion continued to be held with “unimpaired force”. The change of

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course was taken with “extreme reluctance” and because “[t]he necessity for the interposition of the Government has ... become too evident to admit of any further inaction”. Hobson, too, reported to Gipps that Glenelg had expressed directly to him the “reluctance” with which the British Government intervened in the view that “the force of circumstances had left them no alternative”.

These repeated expressions of reluctance overcome by the necessity to protect Maori make it clear that British priority was for Maori and that intervention was not seen, as Peter Adams has argued, as equally a duty owed to British settlers. Rather, British purpose was, as Glenelg told Parliament in March 1838, “to protect the natives of the country, and the British settlers consistently with the interests of the natives”. Although, as expressed in the February draft of the Instructions, the establishment of law would be “partly for the protection of the Settlers of European origin”, it was “chiefly” in the hope that Maori would be “rescued from the Calamities impending over them”. The early drafts of the Instructions painted an unfavourable picture of most British settlers in New Zealand. They were said to be “for the most part people of disorderly habits, and profligate character” who were likely, if unchecked, to exterminate Maori and become “the nucleus of piratical Adventurers, dangerous to the peaceful Commerce of all Nations in the Southern Hemisphere”. A similarly low opinion of existing British settlers seems to have been held by Hobson and his officials. The view that the interests of existing British settlers were equally influential in the decision to intervene is not only inconsistent with the statements of priority for Maori but also is hard to reconcile with the treatment of the old land claimants following conclusion of the Treaty.

Although it is more plausible to suggest, as does Claudia Orange, that the Colonial Office was motivated to protect the more respectable emigrants to come, there is little evidence for such concern. When Hobson was dispatched, it is not clear that the Colonial Office envisaged large-scale emigration. Melbourne, the Prime Minister, had expressed the view that people would be “mad” to want to emigrate to New Zealand. There seems to have been some shock when, after Hobson’s dispatch, even the relatively modest scale of the New Zealand Company’s first

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wave of settlers became known. The Instructions themselves indicate that such emigrants were also seen as inimical to Maori interests and that the “settled form of civil government” was to be set up equally to protect Maori from them. That the Colonial Office, following Glenelg’s resignation, had not switched to a policy of colonisation in which Maori would have to be accommodated within a settler society is also indicated by the lack of encouragement given to would-be emigrants until after sovereignty was acquired.

Although the Instructions recognised that settlers themselves would benefit from civil government and that Britain’s own “national wealth and power” would be boosted by annexation because New Zealand offered such good prospects for successful colonisation, it is clear that these ends could be promoted only because they were believed to be reconcilable with the overwhelming object of protecting Maori. This belief has to be seen in the context of what was then expected. It is most unlikely that it was envisaged that the European population would reach the 30,000 it attained by 1852 or that a form of responsible government would devolve on settlers by that time. In 1840 New Zealand was expected to be a colony of a few maritime settlements focused on whaling, timber and some agricultural (but not pastoral) farming. The Crown’s monopoly on purchase of Maori land would ensure that European settlement did not impact adversely on Maori, since only land surplus to Maori needs would be purchased and European settlements would be apart from the lands occupied by Maori.

The attitudes concerning Maori protection and British responsibility, consistently maintained by the Colonial Office and understood by everyone else, reflected the prevailing opinion of the times. The view in the Instructions, that unless Britain dealt ethically with Maori it would inflict “injury” on itself, expressed the Burkean belief that misgovernment abroad would corrupt the body politic at home. There is an echo of Burke’s views of India too in the sense of the Instructions that interference with Maori society must be commensurate with the reasons for intervention and with the protection of Maori society pending gradual change. Priority for the protection of Maori also accorded with the 1830s climate of

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concern for the aborigines of the Empire. The energy of the anti-slavery movement, which had emphasised the “brotherhood of man”, flowed into the work of the Aborigines Committee which stressed the need for “fair dealing” with aborigines and “the preservation, for the time to come, of the civil rights of the natives”. Opinion had been shocked by the events at the eastern Cape and in reaction there had been greater emphasis placed on treaty protection of Xhosa rights.

The conclusion that the priority for Britain in intervention in New Zealand was the protection of Maori means that the positions taken by the earlier generation of historians, notably Trevor Williams and Keith Sinclair, are to be preferred to those of later writers such as Ian Wards, Peter Adams, Claudia Orange and Richard Hill. The view taken by Hill that the Treaty “disguis[ed] the full realities of imperial intentions” and was used as “the easiest and cheapest way of gaining a new colony” for “the benefit of settler capital” is modern expression of the New Zealand Company’s 1843 assertion that the Treaty was “a praiseworthy device for amusing and pacifying savages for the moment”. The Company’s view was rightly repudiated at the time by the Colonial Office.

### *Property*

The Colonial Office consistently treated Maori as owners of land. Normanby’s Instructions referred to Maori “title to the soil” as “indisputable”. In instructing Hobson to negotiate for a right of Crown pre-emption and in referring to the “lawful” acquisitions of land already made by British subjects in New Zealand, they assumed proprietary rights capable of being alienated. There is no language in the Instructions which suggests that the interest to be purchased under pre-emption was anything other than complete ownership of the land. Stephen’s draft before editing by Labouchere had referred to the “proprietary rights” of the chiefs. There are many other references in the pre-1840 Colonial Office record which acknowledge either Maori “property in the soil” or the “proprietary rights” acquired from them by British subjects. No one, not the New Zealand Association or any of the witnesses to the 1838 House of Lords Select Committee on New

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Zealand, took a different view. With this background, and with the heightened concern in London and New Zealand about Maori land losses, it is not surprising that the Treaty contained a guarantee of Maori proprietorship in the fullest terms (even if the text was supplied by Busby, drawing on his own similar views).

Before the Treaty was received in London, Stephen's minute concerning *Johnson v M'Intosh* made it clear that imperial law and practice did not treat aborigines as "mere possessors of the soil on sufferance". British law was said by Stephen to be "far more humane" and to require Crown purchase before Crown grant to settlers. After the Treaty was received in London, there were continuing references in the Colonial Office record to indicate that Maori were treated as being full owners of their lands which were held in accordance with native custom. In Russell's Instructions, Maori were described as "a people ... who have established by their own customs a division and appropriation of the soil". In Stephen's minute of 28 December 1840 to Smith, he was dismissive of the idea that reserving to Maori "one tenth of their own property" out of sales of land could be characterised as "virtuous and liberal" ("as some writers convert a Highwayman into a Hero"). Stephen considered that dealings with Maori over land "should embody and recognize the great cardinal principle, that the Lands are not ours, but theirs—that we have no title to them, except such as we derive from purchase". Stephen's opinion was reflected in Russell's additional Instructions of 28 January 1841 to Hobson which confirmed the "general principle" that "[t]he territorial rights of the natives, as owners of the soil, must be recognized and respected".

The Colonial Office maintained this view in the face of onslaughts from the New Zealand Company. For example, in January 1843, Hope expressed Stanley's "extreme astonishment" that the Company should suggest that Normanby's Instructions had been discarded. Again the Colonial Office affirmed that Normanby's Instructions had "distinctly recognized the proprietorship of the soil in the natives; and disclaimed alike all territorial rights, and all claims of sovereignty, which should not be founded on a free cession by them".

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Given these statements, the view that the property guarantee in article 2 was declaratory of a common law doctrine of aboriginal title under which Maori had rights of occupancy and use of land held under Crown ownership as described in *Johnson v M'Intosh* is untenable. The *Johnson v M'Intosh* approach was not the practice followed in Empire, as shown in Chapter 5 and as argued by Sir Howard Douglas in the House of Commons debate on New Zealand in June 1845. It was not consistent with British imperial law and English land law principles. As Kent McNeil says, the “right of occupancy” was an interest “unknown to the common law, the definition of which has understandably eluded judges ever since”. In addition, as Wentworth and others who referred to *Worcester v State of Georgia* pointed out, *Johnson v M'Intosh* did not accurately represent American law in 1840. Moreover, as Busby claimed to have been told by Justice Joseph Story himself, *Johnson v M'Intosh* did not apply to New Zealand because sovereignty had been acquired by treaty not by discovery. *Mitchel v The United States* made it clear that, even under American law, discovery doctrine could be displaced by the terms of a treaty. Nor was Maori ownership of land affected by application of the common law doctrine of tenures. Its importation into New Zealand was only to preserve the fiction of original Crown ownership for the system of Crown grants. Maori customary land was not Crown-granted.<sup>22</sup>

The indications are that the Colonial Office saw Maori customary ownership of land as a legal entitlement able to be vindicated through legal process. Certainly the first instinct of many pre-1840 European land claimants was that their native titles could be upheld through the courts, which may suggest that, equally, Maori were seen as having title able to be protected by law. In the United States, the “right of occupancy” was treated by the Supreme Court as legally enforceable. Hobson’s 7 May 1840 proposals to modify English law for Maori considered that real property cases were important enough to warrant remaining within the jurisdiction of the “English Courts of Law”. In the Colonial Office, Stephen’s December 1840 suggestion that Maori land might be held by trustees with English

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<sup>22</sup> Even in respect of Crown-granted land, the doctrine conferred on the Crown only a “paramount lordship” over lands owned by subjects.

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names since “[t]he outlandish Names of the New Zealanders” were not calculated to gain the sympathy of jurors, assumed that Maori could go to court in vindication of property rights. In December 1842, Stephen said flatly that Maori were “entitled to the protection of the Queen in their proprietary rights as fully as the [New Zealand] Company themselves, or any other of HM’s subjects”. Given the recognition of proprietary rights in relation to land, the conferral on Maori of the “all the rights and privileges of British subjects” is likely to have been an assurance of opportunity for legal redress for infringement or harm to property rights. That is consistent with the approach taken in Busby’s draft subscription where the only possible link to the article 2 guarantee is the reference to “Royal Justice and benignity”.

It does not seem as though any real consideration was given to the way in which Maori customary property would be vindicated. The expected continuity of Maori custom meant that most property disputes would be resolved within tribes under what Mark Walters calls “imperial continuity”. Inter-tribal disputes over land could be expected to be mediated by the Government, usually acting through Protectors or missionaries. Inter-racial title disputes could be expected to be limited by the Crown’s right of pre-emption and investigation of pre-1840 land claims, but disputes might arise in cases of trespass and other wrongs to property. To the extent that these could not be mediated by the Government, the expectation seems to have been that redress through the courts would be available to Maori. Still to be resolved in 1840 was the form such vindication would take, whether Maori custom would be enforced in the courts of the colony or the fact of Maori possession of land would be protected. If Maori custom were to be recognised in the courts, would it be by giving jurisdiction to the general courts or special tribunals to determine authoritatively interests according to custom, or would the general courts recognise custom applying conflict of laws principles on the basis of maintenance of two municipal legal orders? In 1840, these questions remained to be resolved by colonial administrators and judges. What is clear, however, is that Maori were seen as having legal rights that would be susceptible of vindication in the colonial legal system and that were not merely political claims against the

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Crown. Moreover, as is indicated in Chapter 3, there was a body of opinion in New Zealand in the 1840s and later that the Treaty guarantees themselves could be directly enforced in law by Maori.

### *“Waste lands”*

There was no suggestion in Normanby’s Instructions that, with sovereignty, the British Crown would become the owner of unoccupied and uncultivated lands. The Instructions were consistent with recognition of Maori title in such lands and with the Crown having no claim to any land in New Zealand before purchase from Maori. Under them, Hobson was to obtain “the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers resorting to New Zealand”. It seems clear that these “waste lands” were unoccupied and uncultivated lands. So, the Instructions indicate that the purchased land would be “of no actual use” to Maori and that much of it “must long remain useless, even in the hands of the British Government also”. Maori were not to be permitted to sell land that was “essential, or highly conducive, to their own comfort, safety or subsistence”. Rather, the Crown’s purchases were to be “confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves”.

The expectation that unoccupied land would still have to be purchased from Maori seems to have been widely held before the Instructions were issued to Hobson. Robert Fitzroy told the 1838 House of Lords Select Committee on New Zealand that there were “[n]o Lands which are unappropriated”—“every Acre of Land in those Islands is the property of one or another Tribe”: “I have heard it asserted, that there is a great deal of waste Land which anybody can make Use of; but from what I saw myself, I should say that every Acre of Land is owned, and that there is much Tenacity with respect to a particular Boundary.” Not even the New Zealand Association denied that Maori had property in unoccupied lands. It contemplated treaties to purchase “unoccupied and waste” lands from Maori. Others who made proposals for colonisation, such as Lang, proceeded on the same basis.

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The view that Maori owned all land in New Zealand that had not already been sold was held by Busby and the missionaries. Dandeson Coates told the 1840 Committee on New Zealand that the missionaries had made it clear that “the whole of the land is the property of one tribe or another”. Land purchasing practice and European settlement in New Zealand for more than two decades was based on the same view. It was also consistent with British imperial practice that uncultivated and unoccupied land was not automatically treated as unowned, as is seen in Chapter 5.

The earlier Treaty drafts reflected this view. So, in the Freeman draft of article 2 the chiefs ceded “the exclusive right of Preemption over such Waste Lands as the Tribes may feel disposed to alienate”. This was carried into Busby’s draft subscription, in which the confederated chiefs confirmed that they “yield[ed] to Her Majesty the exclusive right of preemption over all our Waste Lands”. Given the sense in which “waste lands” is used in Normanby’s Instructions and the consistency in views expressed about Maori property in unoccupied and uncultivated lands, it is impossible to read “waste lands” in these Treaty drafts as referring to occupied and cultivated lands which Maori might wish to sell. The guarantee of possession in the English text of “Forests” is also hard to reconcile with a narrow interest in occupied and cultivated lands. The guarantee of “Estates” as well as “Lands” may also indicate that occupancy and cultivation of land were not seen to be the hallmark of property.

The explanations of article 2 given at the Treaty signings did not differentiate between occupied and unoccupied lands. It would have been well known to all Europeans present at the Treaty signings that Maori would not have tolerated Crown pretensions to unoccupied or uncultivated land. Busby’s statement at Waitangi was that Hobson had come to secure Maori “in the possession of what they had not sold”.

Soon after 1840, there seem to have been some expectations in the Colonial Office that there was land in New Zealand which was not claimed in ownership by Maori which, with sovereignty, was demesne land of the Crown which it could grant to

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settlers. Whether that was so, and the extent of such lands, were, however, matters for inquiry. It is possible that Russell himself believed initially that Maori owned only the lands they were occupying and cultivating. If this was Russell's instinctive position however, it was not reflected in his additional Instructions to Hobson of 28 January 1841 which adopted the views held by Stephen. It is a long bow to draw from the slight evidence to suggest, as Peter Adams does, that Russell would have rejected the Treaty if he had appreciated that it had guaranteed Maori property in lands unoccupied by them, as Adams accepts that Hobson, Busby and the missionaries understood it to do.

As is explained in Chapter 17, the waste lands question (whether Maori owned unoccupied lands or whether they were demesne lands of the Crown) did not arise until December 1842 when the New Zealand Company suggested that the Crown should make grants to it of unoccupied lands. The controversy cast a long shadow but the consistent Colonial Office response before 1846 was that the extent of Maori property could be determined only by inquiry into Maori custom. It was not to be resolved by inquiry into what lands were or were not occupied. The Colonial Office position was never more clearly expressed than in Stanley's 10 July 1845 speech to the House of Lords. While Stanley accepted there might be some districts "wholly waste and uncultivated" (although he thought they would be "few in number" in the North Island), "[w]ith respect to the greater portions of New Zealand" he strongly maintained that "the limits and rights of tribes are known and decided upon by native law". While any land "not so claimed and possessed by any tribe" vested in the Crown "by the act of sovereignty", the portion in that category was "a question on which native law and custom have to be consulted":

That law and that custom are well understood among the natives of the islands. By them we have agreed to be bound, and by them we must abide. These laws—these customs—and the right arising from them on the part of the Crown—we have guaranteed when we accepted the sovereignty of the islands; and be the amount at stake smaller or larger; so far as native title is proved—be the land waste or occupied—barren or enjoyed, those rights and titles the Crown of England is bound in honour to maintain; and the interpretation of the Treaty of Waitangi, with regard to these rights, is, that, except in the

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case of the intelligent consent of the natives, the Crown has no right to take possession of land, and having no right to take possession of land itself, it has no right—and so long as I am a Minister of the Crown, I shall not advise it to exercise the power—of making over to another party that which it does not itself possess.

Earlier, in his despatch to Fitzroy concerning the report of the 1844 Commons Select Committee on New Zealand, Stanley had said that the suggestion that Maori rights to land could be restricted to those “actually occupied for cultivation” was “wholly irreconcilable with the large words of the treaty of Waitangi”. It was also “at variance with the directions of the Marquis of Normanby to Captain Hobson, ‘to obtain by fair and equal contract with the natives the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers’”. The view expressed by Adams that the inclusion of unoccupied lands in the article 2 guarantee was “not policy but accident, an accident to be regretted and to be neutralized” by the British politicians cannot be reconciled with Stanley’s statements.

Similar views to Stanley’s were also expressed by Busby, Shortland, Coates and the New Zealand missionaries. All were outraged by the Committee’s report and Earl Grey’s subsequent waste lands despatch. Henry Williams said of Grey’s despatch that the Treaty had been “revoked and scattered to the winds” by the “flourish of the pen of her Majesty’s Minister”.

### *Pre-emption*

While the use of the word “preemption” in article 2 was potentially ambiguous (at least until the American derivation is understood), it is clear that Normanby had instructed Hobson to obtain a monopoly right to purchase Maori land. The pre-emption right obtained by article 2 was understood by all officials and witnesses to the Treaty signings to have achieved such monopoly and it was implemented accordingly.

The Colonial Office took the position that a monopoly right of purchase was something that had to be treated for with Maori. It never proceeded on the basis

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that obtaining sovereignty would of itself confer such a right. Before it was decided to negotiate with Maori for the monopoly right, the Colonial Office envisaged legislation to prevent valid title being obtained by post-Treaty purchasers of Maori land. It was troubled about how it could deal with pre-Treaty purchases of land but did not suggest, even in response to the unwelcome plans of the New Zealand Land Company and enquiries from other prospective land purchases, that land acquisitions from Maori were altogether invalid. Its position is consistent with that taken in other parts of the Empire (with the notable exception of Australia) where, in the absence of prohibiting legislation, settlers had obtained good title to land directly from native sellers. The Aborigines Committee's recommendation that private purchases in British colonies should be "declared illegal and void" indicated its understanding that no monopoly right of purchase was inherent in the Crown as sovereign. Nor, prior to 1840, did the New Zealand Association or its successors suggest that acquisition of sovereignty of itself would prevent private purchases. In its 1838 Bill, for example, it proposed an exclusive power of purchase for Commissioners.

It was not until mid-1840 that Gipps and the New Zealand Land Company, independently of each other, drew on the American case-law to argue that pre-emption was an incident of sovereignty. Both by that stage were pre-occupied with how to deal with pre-1840 land purchases and saw sovereignty by discovery with an attendant right of pre-emption as offering a tidy solution. The Company thought that the Colonial Office had taken a wrong turn in treating with Maori for sovereignty and failing to insist on its right of pre-emption by discovery. Gipps in the Land Claims Bill debate simply ignored the Treaty and contended that Normanby's Instructions had proceeded on the basis of the same doctrine as had been expounded in the American cases.

As seen in Chapter 16, Gipps's views caused shock in Sydney and New Zealand. The land claimants and newspapers argued that New Zealand had been an independent country where Maori, as the proprietors, had been free to sell land. Wentworth pointed out that, even in British North America, in the absence of

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legislation settlers had obtained good title to Indian lands. Although public opinion in Sydney fell in behind Gipps's legislation once the extent of the greed of the land claimants became apparent, the view already expressed in this thesis is that Gipps was wrong to invoke the American case-law since British sovereignty in New Zealand was obtained through the Treaty and not by Cook's discovery and since, in any event, pre-emption had not followed from sovereignty in British North America or anywhere else in the Empire. In the Colonial Office, Stephen, in his minute of 28 July 1840 rejecting *Johnson v M'Intosh* as representing British imperial law and practice, denied any pretension to sovereignty over New Zealand on the basis of discovery. Although Gipps's Act and speech were well-received by the Colonial Office, that is because they had achieved a solution to the problem of the pre-Treaty land purchases. The invalidations achieved seem to have been looked upon by the Colonial Office as following from land titles proclamations which were acts of state rather than a result of a doctrine of sovereign pre-emption. Stephen clearly did not consider there was any such doctrine, as is shown by Russell's 28 January 1841 instruction to Hobson to enact a law to declare the invalidity of any conveyance of land by Maori to a European without express authorisation by the Governor.

There has been much debate among scholars about British purpose in seeking the right of pre-emption from Maori in the Treaty. It is treated substantially as an aspect of the question whether British intervention was primarily for the protection of Maori. Once pre-emption prevented private purchases and put an end to land-sharking much of its protective purpose was achieved. If it is accepted, as has been argued here, that the Colonial Office was of the view that the likely scale of immigration meant that future settler demand for land could be met by purchase of surplus Maori land away from their villages, then the benefits to the Crown from pre-emption of financing government and emigration through land sales and being able to control the locations of European settlement could be fully pursued without detracting from the purpose of protecting Maori. On this basis, the debate as to the relative importance of protection of Maori, financing a successful colony, and

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disciplining settlement is misconceived because it assumes trade-offs that do not arise.

### *British sovereignty and tribal government*

Less easily dismissed than the denial of Maori priority in British annexation of New Zealand is the view, which has almost complete support in the historiography, that the end to be pursued by government was the assimilation of Maori into settler society. Some historians consider this to have been a project for the longer term. Alan Ward, however, has argued that, during the course of 1839 as reports of expanding settlement and Maori land loss were received, British policy changed, for humanitarian reasons, to a policy of “rapid amalgamation”.

Support for a policy of rapid assimilation cannot be found in either Normanby’s or Russell’s Instructions to Hobson. A long-term hope that Maori would be “civilised” was clearly held by Stephen and all British officials. To elevate this aspiration, however, into a guiding policy of assimilation for British government in New Zealand in 1840 goes too far. The instructions were to defend Maori in their customs, subject only to the exceptions of warfare and practices contrary to “the universal maxims of humanity and morals”. The project of “civilisation”, which Coates in 1837 considered would take “one half century more”, was largely to be left to missionaries. Nor was Coates referring to a project of assimilation in this assessment but rather to the period required free of colonisation for the preservation of the Maori “race [and] ... national independence”. In North America, the project of bringing Indians under British laws was thought by William Johnson in 1764 to be a work of “some centuries”. There is no basis to think that Colonial Office viewed the period of “civilisation” as other than a work of many decades. Nor is there any basis to think that by “civilisation” it had in mind full assimilation to British society.

While there was a climate of support for aborigines when the Instructions to Hobson were developed in 1839, as has been seen in Chapter 3 there was an emerging view that the interests of aborigines were best served through

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assimilation by bringing native societies under British government and law. Proponents of this view found little worth conserving in aboriginal societies. Such attitudes are seen mostly starkly in the writings of James Mill but featured also in the proposals of the Aborigines Committee, the New Zealand Association, the Aborigines' Protection Society, and George Grey. While Stephen did not disagree with the aim of "civilisation", he was less confident that British rule would prove beneficial for native peoples and was less judgemental and more tolerant of native societies. His attitudes were more aligned with those of Glenelg's father, Charles Grant, who looked to support for missionaries and education rather than to direct government action to transform indigenous societies. The practice throughout Empire, as seen in Chapter 4, was to accommodate native systems of government and law under British sovereignty. This was a policy preference rather than a matter of expediency.

The Covenant Chain adopted in British North America in the seventeenth century continued in Upper Canada into the nineteenth century. Its respect for tribal autonomy is illustrated by the recognition given to the Credit River Mississauga Reserve Constitution. The Credit River example was extolled by the Aborigines Committee and was referred to in his 1838 pamphlet on New Zealand by Edward Marsh, Henry Williams's brother-in-law and cousin. The West Africa treaties ceding sovereignty to Britain contained recognition of tribal authority and custom, with the 1827 treaty with Brekama even acknowledging a continuing entitlement to go to war. Similarly, on the eastern frontier of the Cape Colony, the 1835 and 1836 treaties with Xhosa tribes preserved their laws and internal tribal government with stated exceptions. The Australian and Canadian maritime colonies were exceptional in having no deliberate policy of recognising indigenous polities, but neither was there any real attempt to impose British government on them.

Where colonial law was applied to natives accused of crimes in relation to other natives, such as in the cases of *Shawanakiskie*, *Billy William* and *Murrell*, it was because the crime was *malum in se*, committed in an area of British settlement, or the exercise of British authority was acquiesced in by the tribe to which the

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accused belonged. Even these cases were controversial and there was no established imperial principle that, by virtue of British territorial sovereignty, native peoples were in all cases subject to English law. While in the British Empire there was no nineteenth century case-law comparable to the recognition by the United States Supreme Court that Indian tribes were “domestic dependent nations”, the position in, for example, Upper Canada, British Guiana, and West Africa was not so very different. Indeed Henry Chapman, Edward Gibbon Wakefield, George Gipps and the New South Wales Chief Justice, Dowling, in 1840 all compared the position of Maori to that of the Indian nations of the United States, a parallel also drawn by Henry Sewell in 1864. While too much should not be made of these comparisons (some of which may have been opportunistic argument), they indicate that the continuation of some degree of Maori self-government after the Treaty was not seen as outlandish.

Certainly Stephen did not treat plurality in government and law as inconsistent with British sovereignty in New Zealand. That is clear from the Instructions he drew up for Normanby and Russell. Both were structured to deal separately with Maori and settlers. Maori were not treated as objects of government in the same way as settlers. As has been argued in Chapter 19, Russell’s Instructions were consistent with the retention by Maori tribes of their laws and institutions not inconsistent with British sovereignty. The Instructions did not authorise interference with Maori tribal organisation and custom beyond facilitating resolution of disputes and punishing crimes that were *mala in se* (at least in areas of British settlement or cross-racial cases). In Russell’s Instructions, Hobson was directed to establish and maintain “friendly relations” with “the tribes now to be connected with us”, language more reminiscent of alliance and the North American 1763 Proclamation than of subjection and George Grey’s rejection of aboriginal custom in favour of one system of law for all.

Subsequent despatches from the Colonial Office confirmed the policy of acceptance of Maori custom. In Stanley’s 21 June 1843 letter to Shortland, it was made clear that there was no necessity to make Maori “liable to all the penalties,

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and amenable to all the tribunals of the English law". On the contrary, Stanley wrote, "there is no apparent reason why the aborigines should not be exempted from any responsibility to English law or English courts of justice, as far as respects their relations and dealings with each other". Except where custom conflicted with "universal laws of morality", Maori could "be permitted to live among themselves according to their national laws or usages, as is the case with the aboriginal races in other British colonies". In respect of quarrels between tribes or individual Maori, the Colonial Office, as Stanley told Fitzroy in May 1843, preferred mediation to active intervention. Stephen himself, in his December 1843 memorandum to Hope, expressed impatience at the "legal pedantry" that "subjection to British sovereignty, & subjection to English law are convertible terms". In matters "purely inter se", including "the definition and punishment of crimes", he considered that Maori should be free to "live under their own law" as was the case in Ceylon, India and Canada. In 1846, Stephen deprecated interference with Maori custom, writing to Under-Secretary Lyttleton that it had been a "great error" not to follow the "opinion maintained on the first foundation of the colony by Lord John Russell, and afterwards maintained by Lord Stanley", that native customs should be respected and that there should be no attempt to govern Maori in their relations with each other (except to prevent war and inhuman practices). Consistently with this view, the New Zealand Constitution Act 1846 provided for "Aboriginal Districts" within which the "laws, customs, and usages" of Maori ("not repugnant to the general principles of humanity") would be maintained "for the present".

Apart from the Colonial Office expressions of view, support for the continuation of Maori custom and tribal organisation is to be found in the text of the Treaty, both in English and Maori, and the back-translations of the Maori text. Further support is also provided by the explanations and comments of Hobson and his officials when the Treaty signings occurred.

The English draft of the Treaty contains no explicit recognition of Maori self-government and custom. The preamble refers to the benefits Maori as well as

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British settlers will obtain from “Laws and Institutions”. Article 3 is capable of the meaning that Maori, under the Treaty, became British subjects. These circumstances are often pointed to in support of the view that, with sovereignty, British government and laws superseded Maori political organisation and custom. The attributes of “sovereignty” were not, however, so clear-cut in Empire as to justify this view and, as Henry Maine pointed out in connection with the Indian princely states of Kathiawar, the “mode or degree” in which the sovereign powers were “distributed” was “always a question of fact”. That question of fact required inquiry in each case because “no general rules apply”: “[i]n the more considerable instance, there is always some treaty, engagement, or sunnud to guide us to a conclusion, and then the only question which remains is, what has become of the sovereign rights which are *not* mentioned in the Convention?”<sup>23</sup>

Textual pointers within the Treaty to retention of tribal autonomy and custom include the distinction (which follows the federal model adopted in the Declaration of Independence) between the chiefs’ “authority over ... Tribes and Territories” in the subscription and their cession of sovereignty over territories alone in article 1, as has already been discussed. Additionally, the preamble’s expression of the Queen’s anxiety to protect not only the property but also the “just Rights” of the chiefs and tribes is something to which it is difficult to ascribe meaning if not a reference to custom. The promise of “Royal protection” in article 3 is in addition to the conferral of “all the rights and privileges of British subjects” and is suggestive of an additional and special status for Maori. The article 2 guarantee of property to chiefs and tribes indicates that they would continue to be recognised in the status they held according to custom. The guarantee of property was a guarantee of property according to custom. As Busby was later to say, “it necessarily guaranteed the continuance in operation of the laws and customs constituting such property, and without which the rights in and to such property would become extinct”. It is also possible to see in the terms of the guarantee of “full exclusive and undisturbed

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<sup>23</sup> Quoted in MF Lindley *The Acquisition and Government of Backward Territory in International Law, Being a Treatise on the Law and Practice Relating to Colonial Expansion* (Longmans, Green & Co Ltd, London, 1926) 196. In Indian usage, a “sunnud” was deed of grant, charter or warrant.

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possession” to chiefs and tribes, as well as families and individuals, recognition that Maori society was to be left to regulate itself. The guarantee of “Estates” as well as “Lands”, “Forests”, “Fisheries” and “other properties”, may be an attempt to capture different types of interest in land according to custom, but could be an attempt to recognise the rights attached to different ranks within the tribe, as indeed the Maori text of article 2 made explicit.

The guarantee of “te tino rangatiratanga” in the Maori text inescapably confirmed tribal and chiefly independence. That “rangatiratanga” conveyed that sense is shown by the contemporary and near-contemporary English back-translations of the Treaty. So, for example, Henry Williams reported that he had explained the “tenor” of the Treaty to Maori at Waitangi as including the Queen’s desire to “protect them in their rights as chiefs” and as confirming and guaranteeing “their full rights as chiefs”. Busby’s back-translations, referring to protection of the “dignities” and “offices” of the chiefs and tribes, have already been referred to.

Perhaps the most compelling evidence that the Treaty was understood to leave undisturbed intra-tribal government except in the matters of law and order for which sovereignty had been ceded is found in the explanations given at the Treaty signings or recorded in the accounts left by witnesses, discussed in Chapter 12. Hobson reported that he had assured the chiefs that their standing amongst their tribes would not be affected by British sovereignty. That assurance is confirmed by Father Servant’s report that the Treaty involved the chiefs giving Hobson authority to “maintain good order, and protect their respective interests” while preserving to them “their powers”. Major Bunbury agreed with Te Hapuku that the literal effect of the Treaty was to place the Queen over the chiefs as they were over their tribes but that this was only to enable the Queen to “enforce the execution of justice and good government equally amongst her subjects” and that it was “not the object of Her Majesty’s Government to lower the chiefs in the estimation of their tribes”.

The Colonial Surgeon, Johnson, considered that Nopera’s imagery of “the shadow of the Land” going to the Queen beautifully expressed the effect of the transfer of sovereignty. Felton Mathew, writing of the Treaty signing at Waitangi, wrote that

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the chiefs, in agreeing to cede the sovereignty of the country and in throwing themselves on the protection of the Queen, had nevertheless retained “full power over their own people—remaining perfectly independent”. He also commented on the “stipulations” the chiefs had made “for the preservation of their liberty and perfect independence” and expressed the expectation that, if Maori did not disappear as a result of colonisation, they might “in after centuries become an enlightened and powerful a nation as we are ourselves”. *The New Zealand Gazette*, the mouthpiece of the New Zealand Company, regarded the Treaty as a “union” or “confederation” between “a civilized and a savage state by treaty”. Because of continuing anxiety among Maori about the protection of custom, Hobson’s circular letter of 27 April 1840 promised Maori that “the Governor will ever strive to assure unto you the customs ... belonging to the Maori”. Similar assurance was given by Shortland at Kaitaia. He told the chiefs that Hobson had been sent to protect them from lawless “white men” and that the Queen “would not interfere with their native laws nor customs”. Bunbury, foreshadowing the approach later recommended by Stanley to Fitzroy, explained at Tauranga and Hawke’s Bay that the government would secure peace in inter-tribal conflict, not by military force, but by mediation and arbitration that observed the custom of the country.

The Article 3 extension to Maori of “all the rights and privileges of British subjects” does not explicitly confer the status of British subjects upon them. Nor did Normanby’s Instructions either authorise Hobson to offer Maori that status or explain that would be the outcome of cession of sovereignty. The retention of tribal independence might be thought to indicate that Maori were not to become subjects of the Queen, as Paul Moon has argued, not implausibly. The Native Rights Act 1865 was enacted to settle “doubts” that persisted as to the status of Maori as subjects.<sup>24</sup> Nevertheless the better view is that article 3 was intended and was understood to make Maori British subjects, although that status was not seen to be inconsistent with significant retained autonomy. Certainly at the Treaty signings, Shortland, Bunbury and Maunsell treated Maori as becoming British subjects.

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<sup>24</sup> The Native Rights Act 1865 (NZ) 20 Vict No 11.

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Before the Treaty, both Busby and Bishop Broughton assumed that the acquisition of sovereignty would make Maori British subjects. Gipps's "unsigned treaty" would have made the consequence explicit. It is one of the puzzles of Empire that there seems to have been no clear pattern as to when and how native peoples became British subjects, although it was the position all ultimately reached. Australia was unusual in the clear Colonial Office directives in the 1830s that aborigines were British subjects, but this seems to have been impelled by the need to put a stop to extra-legal violence against them, including by colonial administrations.

The Treaty in Maori is outside the scope of this thesis. Further close study of its text and context may well provide further insights. But the survey undertaken here suggests that, on the face of things, the implications of the English text were understood in the same sense as the division between "kawanatanga" and "rangatiratanga" in the Maori text. On this basis, it is quite conceivable that Busby and *The New Zealand Gazette* were not alone in understanding the effect of the Treaty as akin to the federal arrangement prefigured by the Declaration of Independence. On this view, "rangatiratanga" refers to independence in internal affairs, leaving "kawanatanga" or "sovereignty" (legislative, executive, and judicial powers), defined and limited, as William Martin maintained, by reference to its objects, as applying to foreign relations, justice, peace and good order, and trade.

Justice, peace and good order were also to be understood in the context of continuing tribal self-management. Inter-tribal disputes were to be mediated by the sovereign power and warfare was contrary to the cession of sovereignty and Maori allegiance to the Queen, as Russell's 9 December 1840 Instructions made clear. The sovereign power obtained full authority over Europeans, and British justice was to regulate inter-racial conflict, both criminal and civil (although it was envisaged by Russell that legislation would permit Maori custom to be taken into account). At least in British settlements or where a tribe relinquished authority over a malefactor, serious crimes not involving Europeans could also be prosecuted under colonial law. It might also have been expected that with the sovereign power

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came the right to raise revenue to defray the costs of government if not inconsistent with tribal independence (meaning that the impact was most likely to fall on those participating in the settler economy). Whether in 1840 the sovereign power could be exercised over Maori beyond the purposes for which it was conveyed in the Treaty was unclear but, as has been seen, there was a body of opinion that sovereignty could be limited by the terms of a treaty of cession.

Seen in this light, the Maori and English texts of the Treaty reconcile. The view taken here, that “sovereignty” in the English text is to be understood according to the principal purpose of establishing government over British subjects for the protection of Maori, aligns most closely in the historiography with the views of Paul Moon. The view I take of the effect of the Treaty in English, in setting up an arrangement similar to a federation in which the sovereign power does not supplant tribal government, is comparable to the view of the effect of the Treaty in Maori taken by Judith Binney, Samuel Carpenter and the Waitangi Tribunal. Although the Treaty was not without precedent, as Kenneth Keith, Tom Bennion and Keith Sorrenson have shown, it was the product of Normanby’s Instructions which themselves represented Stephen’s considerable experience of Empire and the intellectual ideas of 1839. Trevor Williams’s verdict that it “marked a new method, or the coherent enlargement of an older and more tentative method, of attempting to protect a native race from the inrush of a new and essentially different culture” is just.