

A COLLUSIVE SUIT TO "CONFOUND THE RIGHTS OF PROPERTY THROUGH THE LENGTH AND BREADTH OF THE COLONY"?: *BUSBY V WHITE* (1859)

*Ned Fletcher** and *Rt Hon Dame Sian Elias***

In Busby v White, James Busby sought to challenge the validity of the Land Claims Ordinance 1841 which treated his pre-Treaty of Waitangi land purchases as "null and void". He had campaigned against the New South Wales statute which preceded the Ordinance, and throughout the 1840s continued to argue against the legislation through political channels, while maintaining his claim to hold the lands under his "native title". By the 1850s holding by "native title" was increasingly precarious as the Government moved to acquire Busby's lands for the purposes of settlement. Busby was forced to law. His aim was to set up the validity of the legislation as a question of law which could be taken to the Privy Council for authoritative resolution. Busby v White was the second attempt to establish a platform for appeal. As in his earlier claim, Busby v McKenzie, the Supreme Court avoided a determination on the merits, thus thwarting Busby's strategy of appealing to London. Although no substantive decision was delivered, the extensive argument was fully reported in The Southern Cross newspaper, from which the Lost Cases Project has recovered it. Its interest today is in arguments which question the course set by R v Symonds (1847) on the nature of native property in New Zealand and the subsequent relegation of the Treaty of Waitangi to legal limbo in Wi Parata v Bishop of Wellington (1877).

I INTRODUCTION

Busby v White was an action for ejectment brought in the Supreme Court by James Busby, the former British Resident at New Zealand (1833–1840) and a principal author of the Treaty of Waitangi. It was brought to recover an allotment of land at Marsden, at the southern entrance of the Whangarei Harbour. Busby claimed the land belonged to him following his purchase of it in December 1839 from Te Parawhau, the tribe of the area. The defendant to the action was Titus

* PhD Candidate, The University of Auckland.

** Chief Justice of New Zealand.

White who had purchased the allotment from the Crown at auction and obtained a Crown grant for it in December 1856. The case, in which Busby appeared for himself, took three days to hear before Arney CJ. The argument was described by the Chief Justice as "colossal" and having the potential to "confound the rights of property through the length and breadth of the Colony".

Busby does not seem to have expected to be successful in the Supreme Court. Rather, his purpose was to set up points of law which could be appealed to the Judicial Committee of the Privy Council to obtain an authoritative ruling that the local land claims legislation (under which his pre-Treaty purchases of land were declared to be void in the absence of a confirmatory Crown grant) was invalid as inconsistent with the Treaty of Waitangi and English law. The outcome of the case frustrated this aim. The Chief Justice avoided a determination on the merits of the arguments addressed to him by deciding that the suit was a collusive one which should not be entertained because of the prejudice it would cause to the rights of third parties.

Through the lens of today, the arguments advanced may seem bold. They were, however, matters of contemporary debate in the 1850s. Their lack of authoritative resolution was seen by one commentator as a missed opportunity. And some of the questions raised by Busby still resonate in New Zealand history and law.

Busby v White was but one battle in a campaign carried on by Busby from 1840 in support of his pre-Treaty land purchases. Throughout this period, the arguments put forward were consistently pressed. In order to understand the case of *Busby v White*, it is necessary to see it in the context of Busby's pre-Treaty land purchases, the land claims legislation, and Busby's attempts to find political and legal solutions to his claims, including through his earlier and ill-fated court case, *Busby v McKenzie* (1855).

II BUSBY'S PRE-TREATY LAND "PURCHASES"

The allotment at Marsden was claimed by Busby to have been part of a substantial purchase by him of land south and west of Whangarei (the Ruakaka purchase). It was only one of three large purchases by Busby on the eve of the signing of the Treaty of Waitangi. The others were at Ngunguru (to the north of Whangarei) and at Waipu (to the south, adjoining the Ruakaka lands).²

1 In this article we are not concerned with the validity according to Māori custom, effect, or fairness of the transactions entered into by Busby. Nor do we describe their complexities, including the provision made for continued Māori occupation of some of the lands.

2 Busby's Waitangi, Ruakaka, Waipu, and Ngunguru purchases (and his subsequent efforts to have them confirmed) are most completely considered by Bruce Stirling in a report for the Waitangi Tribunal's Northland Inquiry. 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 commissioned by the Crown Forestry Rental Trust) (2007), Wai 1040, A9, at 1421-1520 (Waitangi) and 1586-1664 (Ruakaka, Waipu and Ngunguru) ["Not With the Sword But With the Pen"]. The original materials are mostly held by Archives New Zealand (ANZ) in Wellington and spread between two different files series: ACFC 16153 OLC1/2/OLC14-24 and ACGO 8347 IA15/1/5a-g. Although some material is duplicated between the files, the deeds, evidence and

The lands were not surveyed at the time of the purchases, but were found in 1868 to amount to 143,000 acres in total. The Ruakaka and Waipu purchases alone were then put at 98,000 acres (although Busby himself had in 1841 estimated the Ruakaka purchase to contain 25,000 acres,³)⁴ In addition to these 1839 purchases, Busby claimed purchases at Waitangi between 1834 and 1839 amounting to 10,000 acres.⁵

Land purchases in New Zealand which pre-dated the Treaty required confirmation under the Land Claims Act 1840 (NSW) and the Land Claims Ordinance 1841 of the New Zealand Legislative Council which replaced it.⁶ The deeds of the Waipu and Ngunguru purchases were not entered into until 29 January 1840,⁷ after a 14 January 1840 proclamation issued by Governor Gipps in Sydney declaring that purchases after its date would be "considered as absolutely null and void, and neither confirmed nor in any way recognized by Her Majesty".⁸ Hobson, acting as Lieutenant-Governor,

reports of the 1841-1842 Land Claims Commissioners relating to Busby's Waitangi purchases (claims numbers 14-22), further discussed below, are at ACGO 8347 IA15/1/5d. The deeds, evidence and reports relating to the Ruakaka and Waipu purchases (claim numbers 23 and 24) are to be found in ACFC 16153 OLC1/2/OLC14-24. The Māori deeds, with English translations, to these purchases are also reproduced in Henry Hanson Turton *Maori Deeds of Old Private Land Purchases in New Zealand, From the Year 1815 to 1840, with Pre-emptive and other Claims* (Government Printer, Wellington, 1882) at 283-284 (Ruakaka) and 285-286 (Waipu). General correspondence and memoranda in the period 1840-1871 relating to all these purchases can be found in ACFC 16153 OLC1/2/OLC14-24 and ACGO 8347 IA15/1/5a-e. All materials relating to Busby's Ngunguru purchase (OLC 1324), not investigated until 1859, are at ACGO 8347 IA15/1/5f-g. Significant contemporary sources containing good summaries of Busby's land claims are to be found in memoranda by Francis Dillon Bell, 1858-1862: Bell to Whitaker, memorandum entitled "In the claims of James Busby", 5 January 1858, ACGO 8347 IA15/1/5c; Bell memorandum, 9 March 1859, ACGO 8347 IA15/1/5f; Bell memorandum, 26 August 1861, ACGO 8347 IA15/1/5f; "Report of the Land Claims Commissioner, 8th July 1862" [1862] AJHR D10 at 9-11.

- 3 Evidence of James Busby on claim number 23, 2 February 1841 at 2; Evidence of James Busby on claim number 24, 8 February 1841 at 4: ANZ, ACFC 16153 OLC1/2/OLC at 14-24.
- 4 "Arbitrators' Award in the Case of James Busby, Esq., under The Land Claims Arbitration Act, 1867" [1869] AJHR D11 at 4.
- 5 A table showing the area in acres claimed and awarded in claims numbers 14-22 is given by Stirling "Not With the Sword But With the Pen", above n 2, at 1481.
- 6 Court of Claims Act 1840 (NSW) 4 Vict No 7 [Land Claims Act 1840]; Land Claims Ordinance 1841 (NZ) 4 Vict No 2. The New South Wales Act was passed for New Zealand in the period when New Zealand was a dependency of New South Wales and before New Zealand was created a separate colony with its own Governor and Legislative Council.
- 7 Copy of Waipu deed (in Māori, with English translation), 29 January 1840, ANZ, ACFC 16153 OLC1/2/OLC14-24; copy of Ngunguru deed (in Māori only), 29 January 1840, ANZ, ACGO 8347 IA15/1/5f. See also Turton *Maori Deeds of Old Private Land Purchases*, above n 2, at 285-286 (Waipu only).
- 8 "Despatches from the Governor of New South Wales, February 1840" at 3, *Great Britain Parliamentary Paper [GBPP]* (1840) xxxiii (560) 577.

subsequently issued a similar proclamation at Kororareka on 30 January but 14 January continued to be used as the cut off date in practice.⁹ The Ruakaka deed was entered into on 13 December 1839 and so was not caught by the terms of either proclamation.¹⁰

The Land Claims Act 1840 declared that all purchases from Māori 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".¹¹ The Act set up a mechanism (foreshadowed in the January 1840 proclamations¹²) 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.¹³ The Act provided by schedule a table guide to how prices were reasonably to be assessed on a per acre basis.¹⁴ 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. This was subject to the important provisos that no grant could be recommended which exceeded 2,560 acres or which included land of public utility.¹⁵

III THE LAND CLAIMS LEGISLATION

The Land Claims Bill,¹⁶ presented to the Legislative Council of New South Wales by Governor Gipps, was a matter of great controversy in Sydney.¹⁷ There had been considerable purchases of land in New Zealand by speculators in anticipation of the acquisition of British sovereignty. They formed an association of New Zealand landholders to protect their interests.¹⁸ Busby, who was in Sydney at the time the Bill was introduced, asked to be heard by the Legislative Council on it. So too did William Charles Wentworth, a leading lawyer and landowner in Sydney who headed a

9 Ibid, at 8-9, *GBPP* (1840) xxxiii (560) 582-583.

10 Copy of Ruakaka deed (in Māori, with English translation), 13 December 1839, ANZ, ACFC 16153 OLC1/2/OLC14-24. See also Turton *Maori Deeds of Old Private Land Purchases*, above n 2, at 283-284.

11 Land Claims Act 1840, above n 6, preamble.

12 Which in slightly different terms had announced that the Queen would not recognise as valid any title to land not derived from, or confirmed by, her. See above n 8 and 9.

13 Land Claims Act 1840, above n 6, s 2.

14 Ibid, s 5 and sch D.

15 Ibid, ss 5 and 6.

16 On which see Donald Loveridge "The New Zealand Land Claims Act of 1840" (evidence for the Crown) (revised version 2002), Wai 45 (Muriwhenua Land Claim), 16.

17 Ibid, at 22-24 and 59-64.

18 Ibid, at 63.

syndicate which had purported to purchase much of the South Island.¹⁹ Two lawyers on behalf of the association of landholders were also allowed to be heard.²⁰

The principal arguments put forward were developed by Gipps, Busby and Wentworth in the debates in the Legislative Council and continued in the pages of Sydney newspapers.²¹ Gipps defended the Bill by reference to the principles upon which he said it was framed. They included the views that European purchasers could not buy land because the exclusive right of purchasing land (the right of pre-emption) was inherent in the Crown and that Māori lacked the capacity to sell land.²² Included in the first point was an assumption that only the Crown could give title to land recognisable in law,²³ a position that may itself have assumed the applicability of the English system of tenure of land, by which title to land was ultimately derived from the Crown.²⁴ That Māori lacked the capacity to sell land was a proposition based on the considerations that they had no individual property in land because they were "uncivilised", without Government, and because they had not "subjugate[d] the ground to their own uses, by the cultivation of it"; their interest was "but a qualified dominion ... or a right of occupancy only".²⁵ In developing this position, Gipps invoked the United States Supreme Court decision of *Johnson v M'Intosh*, which he knew 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*.²⁶ This reliance on American law, which he

19 Ibid, at 59-63; *The Wentworth Indenture* (The Nag's Head Press, Christchurch, 1979).

20 Loveridge "The New Zealand Land Claims Act of 1840", above n 16, at 74.

21 For a description of the speeches for and against the Bill on its second reading, see Loveridge, *ibid*, at 74-108. Gipps' speech was reported in *The Colonist* (Sydney, 11 July 1840) and *The Sydney Herald* (Sydney, 13 July 1840) newspapers. It was also published as *Speech of His Excellency Sir George Gipps, In Council, On Thursday, 9th 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 on CO 209/6, 270a-284b, The National Archives, London, subsequently printed in "Correspondence relative to New Zealand, 1840" at 63-78, *GBPP* (1841) xvii (311) 559-574). Full reports of Busby's and Wentworth's speeches were provided in *The Sydney Herald* (Sydney, 6 July 1840). Wentworth's speech was also reported in *The Colonist* (Sydney, 4 July 1840). In addition to reporting the speeches, the Sydney press commented extensively on the Bill and on the speeches, and the editorials continued even after the Bill had been read a second time. See for example "The Right of Discovery" *The Colonist* (Sydney, 25 July and 4 August 1840). Wentworth also subsequently wrote a reply to Gipps' speech: see "Mr Wentworth's Reply" in Edward Sweetman *The Unsigned New Zealand Treaty* (The Arrow Printery Pty Ltd, Melbourne, 1939) at 133-171.

22 Speech of Sir George Gipps on the second reading of the Land Claims Bill, 9 July 1840, in "Correspondence relative to New Zealand, 1840" at 63-64, *GBPP* (1841) xvii (311) 559-560.

23 See, for example, *ibid*, at 65, *GBPP* (1841) xvii (311) 561.

24 See, for example, *ibid*, at 67, *GBPP* (1841) xvii (311) 563 (quoting Kent, below n 26, Lecture 51, at 376-377); and at 77, *GBPP* (1841) xvii (311) 573.

25 *Ibid*, at 63-64, *GBPP* (1841) xvii (311) 559-560.

26 *Johnson v M'Intosh* 8 Wheat 543, 21 US 543 (1823); James Kent *Commentaries on American Law* (3rd ed, EB Clayton, James van Norden, New York, 1836); Joseph Story *Commentaries on the Constitution of the*

claimed to be declaratory of English common law too,²⁷ required Gipps to base British sovereignty on Cook's discovery of New Zealand and to pass over the effect of the Treaty of Waitangi.²⁸

Wentworth argued that the Bill was unconstitutional in depriving British subjects of their property without compensation.²⁹ British subjects were able to purchase land in any foreign country, he said.³⁰ He maintained that the United States law on which the Bill was framed was not declaratory of English law or the law of nations.³¹ The view that Māori 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.³² Since Māori were more civilised than the North American Indians, their property rights could be no less extensive.³³ 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.³⁴ Wentworth 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 valid.³⁵ Nor was it correct that English courts could only recognise titles granted by the Crown.³⁶ Wentworth was later to contend that the American case law was not based on any rule of law but was merely policy which, having been acted upon, it was too late for the courts in the

United States (Hilliard, Gray, and Company, Boston, 1833). The possible application to New Zealand of American case law had been suggested to Gipps by Justice Willis of the New South Wales Supreme Court. See John Walpole Willis "Notes on the acquisition of N Zealand as a Dependency of New South Wales with reference to lands obtained by British Subjects from the Aborigines", Mitchell Library, Sydney, Pamphlets collected by Mr Justice Wise, ML A857, 11-68.

- 27 Speech of Sir George Gipps, above n 22, at 65 and 68ff *GBPP* (1841) (311) xvii 561 and 564ff.
- 28 *Ibid*, at 74-75, *GBPP* (1841) xvii (311) 570-571.
- 29 Speech of William Wentworth on the second reading of the Land Claims Bill, 30 June and 1 July 1840, reported in *The Colonist* (Sydney, 4 July 1840) at 2, col 6.
- 30 See for example *ibid*, at 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*".
- 31 *Ibid*, at 4, col 3.
- 32 *Ibid*.
- 33 *Ibid*, at 4, col 4.
- 34 *Ibid*, at 4, col 3.
- 35 *Ibid*, at 4, cols 4-5.
- 36 *Ibid*, at 4, cols 3-4 and at 2, col 7 to 3, col 1 (an argument developed in exchanges with Governor Gipps and the Attorney-General).

United States to controvert. It had no application to the circumstances of New Zealand.³⁷ He and newspaper editors questioned whether the views expressed by Gipps were in fact consistent with the more recent United States Supreme Court case of *Worcester v Georgia*.³⁸

A major plank of Busby's argument against the Gipps approach was that it was inconsistent with the Treaty of Waitangi on which "alone the right of the Council to interfere in the affairs of New Zealand is founded".³⁹ The Crown's sovereignty was based on the Treaty and not discovery. Until they ceded sovereignty through the Treaty, the chiefs were sovereign and independent in all internal transactions including as to disposal of land.⁴⁰ The Treaty was, according to Busby, a "sacred engagement entered into ... to preserve to [Māori] the property in their land".⁴¹ By article 2 of the Māori text (which Busby translated as confirming to Māori "the entire and exclusive property in their lands"), Māori "right or title to the soil" was "expressly saved" and "confirmed and guaranteed in the fullest sense which language could convey".⁴² Unless Māori 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. The terms of the Treaty therefore contradicted Gipps' assertion that the Crown's right of pre-emption was inherent.⁴³ Busby also spoke of the encouragement he had been given by Governor Bourke of New South Wales to purchase land, and the lack of any indication by the British Government to suggest pre-1840 that such purchases were invalid, a position he considered was confirmed by the instructions subsequently issued to Hobson.⁴⁴

When, despite these arguments, the Bill was enacted, Busby continued to maintain the view that the legislation was contrary to the Treaty and inconsistent with English law. He tried to negotiate a settlement of his claims directly with Gipps but was unsuccessful.⁴⁵ He then submitted for

37 "Mr Wentworth's Reply", above n 21, at 141-147.

38 "Mr Wentworth's Reply", *ibid*; Editorial "The Right of Discovery" *The Colonist* (Sydney, 4 August 1840); *Worcester v Georgia* 6 Pet 515, 31 US 515 (1832). Both Wentworth and *The Colonist* drew on Calvin Colton's *Tour of the American Lakes and Among the Indians of the North-West Territory, in 1830* (Frederick Westley and AH Davis, London, 1833) as additional support for their arguments and for their quotations from the judgments in *Worcester*.

39 Speech of James Busby on the second reading of the Land Claims Bill, reported in *The Sydney Herald* (Sydney, 6 July 1840) at 2, col 2.

40 *Ibid*, at 2, col 5.

41 *Ibid*, at 2, col 3.

42 *Ibid*, at 2, col 7.

43 *Ibid*.

44 *Ibid*, at 2, cols 2 and 5-7.

45 Busby to Gipps (12 July 1840) and Busby to Gipps (17 July 1840): ANZ, ACGO 8347 IA15/1/5e, "Busby Papers – 1840 to 1846".

investigation all purchases except Ngunguru (which was not inquired into until 1859).⁴⁶ During the investigation, the Land Claims Ordinance 1841 substantially re-enacted the New South Wales Act but with the addition that "all unappropriated lands" within New Zealand, "subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants", "are and remain Crown or Domain Lands of Her Majesty, her heirs and successors".⁴⁷

IV BUSBY'S LAND CLAIMS

Busby was eventually granted 3,264 acres of the Waitangi lands after Governor Fitzroy in 1844 agreed to adjust the Commissioners' 2 May 1842 recommended award of 2,923 acres in his favour,⁴⁸ although as will be seen it took another 30 years for his title to be finalised. But in respect of the Ruakaka and Waipu claims. Busby's attempts to rely upon his deeds of purchase and the evidence of a witness of the payments made, without calling the vendors of the lands, meant that the Commissioners were unable to conclude their inquiry in February 1841. At this time Busby's approach seems to have hardened because of his objection to the Land Claims Ordinance 1842 (later disallowed).⁴⁹ He declined to call two vendor witnesses, as required by the Commissioners, saying that he was not prepared to give any "indirect sanction" to the attempt by the 1842 Ordinance to vest all lands found to have been sold by Māori in the Crown (a further step in the "surplus lands" argument which outraged Busby and in respect of which he had been protesting to the Secretary of State for the Colonies).⁵⁰ The Commissioners therefore reported in June 1842 that the Ruakaka claim was rejected for want of proper proof.⁵¹ The Waipu claim was declined on the basis that the purchase there was made after the date of the proclamation of 14 January 1840.⁵²

46 Busby to Colonial Secretary (NSW) (22 August 1840), Colonial Secretary (NSW) to Busby (26 October 1840), and Busby to Colonial Secretary (NSW) (29 October 1840): ANZ, ACGO 8347 IA15/1/5e, "Busby Papers – 1840 to 1846".

47 Land Claims Ordinance 1841, above n 6, s 2.

48 See Stirling "Not With the Sword But With the Pen", above n 2, at 1481-1482.

49 Land Claims Ordinance 1842 5 Vict No 14.

50 Commissioners Richmond and Godfrey to Busby (22 April 1842) and Busby to Richmond and Godfrey (17 May 1842): The National Archives, London (TNA), CO 209/19, 145a-146b (also ANZ, ACFC 16153 OLC1/2/OLC14-24). Section 2 of the Land Claims Ordinance 1842 provided that: "All lands within the Colony which have been validly sold by the aboriginal natives thereof are vested in Her Majesty, her heirs and successors, as part of the demesne lands of the Crown."

51 Commissioners' report on claim number 23, 14 June 1842, ANZ, ACFC 16153 OLC1/2/OLC14-24; Shortland to Busby (14 June 1842) TNA, CO 209/19, 149a (also ANZ, ACFC 16153 OLC1/2/OLC14-24); Stirling "Not With the Sword But With the Pen", above n 2, at 1603-1604.

52 Commissioners' report on claim number 23, *ibid*; Stirling, *ibid*, at 1604.

Busby then wrote on 24 June 1842 to Willoughby Shortland as Colonial Secretary that, upon the evidence he had called in respect of his Ruakaka-Waipu purchases he was "quite satisfied to rest both my own title and that of the natives [to whom he had reconveyed part of the land],⁵³ as well as the responsibility, after this notice, of any interference with them, until the question shall be finally settled by competent authority".⁵⁴ Lord Stanley, Secretary of State for the Colonies, to whom the correspondence was forwarded, subsequently expressed himself of the view that the Commissioners had no option but to dismiss the claims, saying that Busby had to accept the consequences of his own course of action.⁵⁵ Busby professed himself "highly satisfied" with this answer in May 1844.⁵⁶ His later explanation, given in 1856, was that he had told the Commissioners that he was "quite satisfied to hold my land by the Native title".⁵⁷ It is likely he was influenced in this position not only by the point of principle he had long held and his unwillingness to give "indirect sanction" to the Crown's surplus lands grab, but also because he must have realised that the extent of his purchases so exceeded the usual limit that it was impossible for them to be the subject of further Crown grant following the Commissioners' recommendation in May 1842 of grants totalling 2,923 acres in respect of his Waitangi lands.⁵⁸

While at 1844 Busby may have been forced to profess contentment to hold the Ruakaka-Waipu land by "the Native title", he continued to press the view that the land claims legislation was invalid. In 1842 he had written to Lord Stanley enclosing a petition on behalf of the old settlers. In the covering letter he pointed out that the difficulty of the issues was illustrated by the "inconsistent

53 See Stirling, *ibid.*, at 1593-1597.

54 Busby to Shortland (24 June 1842) TNA, CO 209/19, 150a-b at 150b (also ANZ, ACGO 8347 IA15/1/5e, "Busby Papers – 1840 to 1846").

55 Stanley to Shortland (21 April 1843) ANZ, ACFC 16153 OLC1/2/OLC14-24.

56 Busby to Colonial Secretary (13 May 1844) ANZ, ACGO 8347 IA15/1/5e, "Busby Papers – 1840 to 1846".

57 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 and Wilson, Auckland, 1856) at 38 [*First Settlers*].

58 Without special authorisation of the Governor, the maximum grant the Commissioners could recommend to any individual in total across all claims was 2,560 acres. The disallowance by the Colonial Office of the Land Claims Ordinance 1842 also had the effect of reinstating this 2,560 acre limit in the 1841 Ordinance, which the disallowed 1842 Ordinance would have removed. This disallowance resulted in the Commissioners' award in respect of Busby's Waitangi lands being scaled back to the 1841 limit in September 1843. See Busby to Gilbert Mair (8 November 1843) Alexander Turnbull Library, Wellington, MS-Papers-0227-05.

opinions expressed respecting it by different high functionaries of Her Majesty's Government – if not indeed by the same functionaries at different periods":⁵⁹

It is contended, on the one hand, that the titles acquired from the native proprietors have no validity, unless sanctioned by the Queen, or confirmed by a Grant in her Majesty's name; as no British Court of Justice could take cognizance of a title to Land, not holding from the Crown; while it is maintained on the other hand that Lands acquired, and held in possession by an equitable and undisputed title during the Sovereignty of the Native Chiefs must be considered as holding from the Crown whose Sovereign rights were derived by treaty from the former Sovereigns; and that a British Court of Justice, without violating the principle of Law which makes all property in land hold from the Crown *in Capite* [in chief], would extend its protection to the owners of property thus equitably acquired, whether against the Crown or private intruders.

In the same letter, Busby invoked the 1839 instructions of the former Secretary of State for the Colonies, the Marquess of Normanby, to Hobson. He maintained they showed that the recognition of the native sovereignty "up to the date when the Sovereignty and right of pre-emption were ceded to Her Majesty" distinguished the "British Settlements in America, however strongly the precedents cited from that Country have been relied on, as invalidating the purchases of Land in New Zealand, from the native Proprietors".⁶⁰

For in no case was the right of the natives of America, to the Sovereignty or the demesne of their Country admitted by the Crown. Both were considered to have been acquired by right of discovery or conquest, and both were granted to individuals or to corporations, with as little reference to the Aboriginal Inhabitants, as if they had no existence.

Busby pointed out that Normanby had never asserted the right of the Crown to the lands acquired by individuals from the native proprietors (and indeed his contemplation of a tax on "uncleared lands" indicated that he saw the purchasers as having property) despite being aware from Busby's dispatches of many land sales:⁶¹

I have said thus much, My Lord, on the question of legal right, to shew that as far, at least as I have been able to understand the despatch of Lord Normanby, it would seem that in his apprehension it by no means followed, that because Her Majesty refused to acknowledge as valid the native titles, they would therefore be void in Law; or that a British Court of Justice, would refuse to extend the protection of the Laws, relative to property, to the proprietors of Land which could be shewn to have been acquired upon

59 Busby to Stanley (30 April 1842) TNA, CO 209/19, 107a-124b at 107b-108a. As will be seen, Busby's view of the application to New Zealand of the English doctrine of tenures was to shift by the time of *Busby v White*. See text accompanying n 170 below.

60 Busby to Stanley, above n 59, at 108b. Whether Busby was in fact correct in this view is another matter. It is to be contrasted with Wentworth's, see text accompanying n 32.

61 Busby to Stanley, above n 59, at 108b-109b and 122a.

equitable conditions, and to have been held by an undisputable title, under the former Sovereigns of the Country:- much less that a British Subject could, without a Jury of his Countrymen, and in contravention of the provisions of *Magna Charta* be dispossessed of Land so held.

In this exchange it is possible to see Busby's growing emphasis on claim of legal right and the inapplicability of American case law. Busby was not alone in adopting these positions.⁶²

In 1844 Busby took the opportunity when in Boston to meet with Justice Joseph Story of the United States Supreme Court who had participated in *Johnson v McIntosh* and cases subsequent to it which dealt with the nature of Indian rights, and whose *Commentaries* had been influential with Gipps. Busby referred to the meeting in correspondence in 1848 and gave a more detailed account of it in a speech to the New Zealand House of Representatives in 1856.⁶³ Story was apparently interested to learn how his *Commentaries* had influenced the debate in New South Wales 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".⁶⁴ 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".⁶⁵

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 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 also reflect the view the United States Supreme Court itself took of Indian rights in the context of the cession of Florida by Spain (which had acted on the basis of Indian proprietorship of land) in *Mitchel v United States*.⁶⁶ From the absence of reference to this case, it

62 See, for example, Editorial *The Bay of Islands Observer* (Kororareka, 17 March 1842) enclosed in Busby to Stanley (30 March 1842) TNA, CO 209/19, 103a-106a at 106a.

63 Busby to J[ohn] C[ampbell] Colquhoun (10 January 1848) Auckland Museum Library, Busby Papers, MS 46, Folder 4; Busby *First Settlers*, above n 57, at 13-14.

64 Busby *First Settlers*, above n 57, at 13.

65 *Ibid*, at 14.

66 *Mitchel v United States* 9 Pet 711, 34 US 711 (1835).

does not appear that Story drew it to Busby's notice. Nor were Story's apparent views borne out in New Zealand by the important decision in *R v Symonds*, decided in 1847, which was eventually to prove fatal to Busby's legal arguments.⁶⁷

By 1847, Busby still did not have title to the lands granted to him at Waitangi. His grant remained, as the Commissioners had left it, undefined as to boundaries (and boundary disputes and wāhi tapu issues were soon to emerge). Busby seems to have delayed in obtaining survey, perhaps because he still hoped to obtain the full extent of the claim.⁶⁸ Apparently under some financial pressure, Busby offered to sell the Ruakaka, Waipu and Ngunguru lands to the Crown. In making the offer, he expressed his view that he regarded his ownership of the land "as mine by as equitable (and according to the laws of England by as legal) a title as any estate is held by in England".⁶⁹ Governor Grey on 8 October 1847 referred Busby's letter to William Swainson, the Attorney-General, for his opinion "as to the power of the Governor to entertain and comply with Mr Busby's request".⁷⁰ Swainson, in a brief opinion the same day, was categorical:⁷¹

No British Subject can acquire a title to land in New Zealand by purchase from the Natives: and all lands alienated by the rightful Aboriginal owners to a Subject vest in and become a part of the Demesne of the Crown. So much of the land as may be found to have been actually purchased from the Natives by Mr Busby and not granted to him by the Crown, is therefore already the property of the Crown without further purchase.

This opinion, not sent to Busby (who was simply advised that the Governor had no power to grant the request)⁷² states the surplus land practice which was the policy followed in application of the land claims legislation. By October 1847, when Swainson gave the opinion, it had also been adopted as a matter of law by the Full Court of the Supreme Court in *R v Symonds*, in which judgment had been given in June of that year.

The option of continuing to hold land under "native title" became increasingly insecure as pressure from settlement increased. Busby's lands at Ngunguru were plundered by European

67 *R v Symonds* (1847) NZPCC 387.

68 See Stirling "Not With the Sword But With the Pen", above n 2, at 1484-1508.

69 Busby to Colonial Secretary (30 September 1847) ANZ, ACGO 8347 IA15/1/5d.

70 Grey to Swainson (8 October 1847) ANZ, ACGO 8347 IA15/1/5d.

71 Swainson opinion (8 October 1847) ANZ, ACGO 8347 IA15/1/5d.

72 Colonial Secretary to Busby (12 October 1847) ANZ, ACGO 8347 IA15/1/5d.

sawyers from 1849 and his requests to the Government for help were met with the response that he had no legal entitlement to the land.⁷³

In 1853 Busby faced a more serious threat, one that would potentially set up a conflict with his land holding and a subsequent Crown grant, when the Ruakaka and Waipu lands came under consideration for Government purchases for the settlement of Scottish immigrants from Nova Scotia.⁷⁴ Grey authorised John Grant Johnson to undertake the purchases. Johnson later reported that he had faced difficulties in obtaining sales north of Whangarei.⁷⁵ His initial purchases in Mangawhai did not meet with the approval of the "Highlanders", who preferred land at Ruakaka and Waipu,⁷⁶ most of which was claimed by Busby and on which Māori continued to live in settlements on some of the land considered most desirable by the settlers.⁷⁷ One block within Busby's Ruakaka purchase, Poupouhenua, had been partly surrendered to the Crown in 1845 as compensation for a robbery at Matakana committed by one of the vendors to Busby, and partly obtained by purchase in 1854.⁷⁸ Much of the remaining Ruakaka and Waipu land was purchased by Johnson in 1854 (with some land originally within Busby's purchases excluded from Crown purchase or created as Māori reserves). The sellers were principally those who had sold to Busby, augmented by some Māori who had returned post-1840 to the land after absence. Many of the original vendors seem to have dealt with Johnson on his assurance that Busby, whose purchase of the land they did not dispute, had been

73 Busby to Colonial Secretary (24 August 1849); Elliott memorandum (26 September 1849); Executive Council minute, 10 October 1849: ANZ, ACGO 8347 IA15/1/5g; Busby to Colonial Secretary (19 June 1850) ANZ, ACGO 8347 IA15/1/5e, "Busby Papers – 1846 to 1854".

74 On the Crown purchases at Whangarei, Ruakaka and Waipu in the 1850s and 1860s, including land claimed by Busby, see Vincent O'Malley "Northland Crown Purchases, 1840-1865" (report commissioned by the Crown Forestry Rental Trust) (2006), Wai 1040, A6, at 275-334.

75 He attributed this in part to a Ngāpuhi "land league": Johnson to Colonial Secretary (20 March 1854) in Henry Hanson Turton (ed) *An Epitome of Official Documents relative to Native Affairs and Land Purchases in the North Island of New Zealand* (Government Printer, Wellington, 1883) at C, 58; Johnson to McLean (16 September 1861) ANZ, ACFC 16153 OLC1/2/OLC14-24. Vincent O'Malley, however, has expressed skepticism about whether there was such a league: O'Malley, *ibid*, at 279-283. See also Stirling "Not With the Sword But With the Pen", above n 2, at 1612-1617.

76 O'Malley, *ibid*, at 277; Stirling, *ibid*, at 1612.

77 In 1854, the land occupied by Māori within Busby's purchases appears to have been well in excess of the land re-gifted to them in 1839. This was known to Busby and was possibly consistent with arrangements made in 1839. See Stirling, *ibid*, at 1597 and 1612-1614. However, in the late 1860s, Busby took a more limited position as to Māori rights in his lands at Ruakaka-Waipu, as he did also in relation to Māori claims to portions of his Waitangi lands. See Stirling, *ibid*, at 1516-1518 and 1654-1664.

78 O'Malley "Northland Crown Purchases", above n 74, at 71-80. See also Judy Richards *Ruakaka (A Brief History)* (Ruakaka, 1984) at 12 and 60; and Henry Hanson Turton (ed) *Plans of Land Purchases of the North Island of New Zealand*, vol 1, *Province of Auckland* (Government Printer, Wellington, 1877) at 96 and 100.

or would be compensated by the Crown.⁷⁹ They included the principal chief, Te Tirarau Kukupa, who was a figure of considerable authority throughout the region.⁸⁰ When these vendors later learned that Busby had not been compensated they wrote to the Governor:⁸¹

We told Johnson that the land had been sold to Mr Busby of the Bay of Islands. After long urging by Johnson, we consented to take money for Mr Busby's land because he told us that the Queen would not let Mr Busby have that land. ... Our hearts are dark because we were deceived by Johnson, and we are now told that Mr Busby has got nothing for his land and he is not satisfied.

Johnson acknowledged later that he was able to secure some of the land – and at Waipu for a reduced price – because Māori accepted their own connection to the land was diminished by reason of their earlier sale to Busby.⁸²

Busby was galvanised into a fresh round of attempts to undo the land claims legislation and policies. He spoke in the Provincial Council of Auckland to a motion that a Select Committee be appointed to:⁸³

... prepare a petition to Her Majesty the Queen and both Houses of Parliament, praying that the Executive Government of New Zealand be directed to expunge from the Colonial Statute-book all such Ordinances or pretended Ordinances of the Local Legislature as, being repugnant to the laws of England, have no legal force or validity; or which contain provisions inconsistent with the faith of a treaty made in Her Majesty's name with the aborigines of this territory and ratified by Her Majesty.

In his speech in support of the motion, Busby acknowledged that the argument would be raised against him that "a native title is not a legal title until confirmed by Her Majesty".⁸⁴ He explained at length his view that the basis on which sovereignty had been acquired in New Zealand made precedents from jurisdictions where it was derived from discovery or conquest irrelevant. In language which echoed his report of his conversations with Joseph Story, he referred to the pre-Treaty acknowledgements of the sovereignty of the Māori tribes. Titles derived from them when

79 See Stirling "Not With the Sword But With the Pen", above n 2, at 1612-1618; O'Malley, *ibid*, at 277-281.

80 See Steven Oliver "Te Tirarau Kukupa ?-1882" (2007) Dictionary of New Zealand Biography <www.dnzb.govt.nz> [DNZB].

81 Typescript of a letter to the Governor (unsigned and undated), quoted in Stirling "Not With the Sword But With the Pen", above n 2, at 1613.

82 Johnson to McLean (16 September 1861), Johnson to McLean (21 October 1861), and Johnson to Bell (13 November 1861): ANZ, ACFC 16153 OLC1/2/OLC14-24; Stirling, *ibid*, at 1613-1618.

83 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 Principle Secretary of State for the Colonial Department* (Auckland, 1853) at [iii].

84 *Ibid*, at 4.

sovereign "did not come within the category of Indian or aboriginal titles, which required the assent or the confirmation of the colonizing power to give them validity".⁸⁵ It was a "necessary consequence" of the Treaty of Waitangi "that all private rights of property existing before it was entered into, remain unaffected by it".⁸⁶ He was particularly scathing about Hobson's 1841 Ordinance providing for Crown property in "unappropriated lands" (subject to occupation and use of Māori), which he considered irreconcilable with the Treaty guarantee of "full exclusive and undisturbed possession" of their lands by Māori. Since the legislation "transcends the authority of the Local Legislature", it had "no legal force or validity" but "while it remains on the statute book, it is not the less a stain on the national honor".⁸⁷

V *BUSBY V MCKENZIE*

On 4 January 1854, Busby wrote to the Colonial Secretary that he was aware of the Government's "apparent intention" to offer land at Ruakaka and Waipu for sale, in part to the "Highlanders". Busby advised the Colonial Secretary that he would seek to have his "native title" upheld in the Supreme Court and would apply for a declaration that the land claims legislation was invalid. He invited the Government "to facilitate [the legal issues] being at once brought into Court in such form as may be agreed upon between the law officer of the Crown and my legal adviser".⁸⁸ Busby's proposal was declined on the advice of the Attorney-General that:⁸⁹

... as no doubt is entertained by the Government as to the invalidity of Titles to land in New Zealand, not allowed or granted by the Crown, they cannot become parties to any arrangement for raising the question in a Court of Law.

When the Government also declined to consider compensation established by arbitration as an alternative,⁹⁰ Busby seems to have realised that no solution could be obtained through Government co-operation. On 24 December 1853 he published a notice in *The New-Zealander* in response to a Gazette notice published by the Commissioner of Crown Lands that Duncan McKenzie (one of the "Highlanders") had applied for a run on the Ruakaka lands. The notice warned McKenzie and "all

85 Ibid, at 6.

86 Ibid.

87 Ibid, at 7.

88 Busby to Colonial Secretary (4 January 1854) ANZ, ACGO 8347 IA15/1/5e, "Busby Papers – 1854 to 1857".

89 Swainson memorandum (7 January 1854) ANZ, ACGO 8347 IA15/1/5e, "Busby Papers – 1854 to 1857".

90 Busby to Colonial Secretary (24 January 1854), and Swainson memorandum (24 January 1854) ANZ, ACGO 8347 IA15/1/5e, "Busby Papers – 1854 to 1857".

other parties" that "all the lands comprised within the boundaries specified" were "my property, and no person has any lawful authority to interfere therewith without my permission".⁹¹

It is not clear whether the run advertised was taken up, but in December 1854, Busby issued an action for ejectment against McKenzie in respect of an allotment on One Tree Point, a part of the Poupouwhenua block which was within the lands purchased by Busby.⁹²

Busby v McKenzie came on for hearing before Chief Justice Martin on 6 June 1855.⁹³ Like the subsequent case of *Busby v White*, it was an action for ejectment. Busby was represented by Singleton Rochfort, the barrister who was later to prepare the legal argument for *Busby v White*. Busby and Rochfort seem to have anticipated that the Supreme Court would decide against Busby on the question of the validity of his native title. Their plan in bringing the case was to set up a basis for taking the question of the validity and effect of the January 1840 proclamations and the subsequent land claims legislation to the Judicial Committee of the Privy Council.

The claim relied on Busby's purchase from the native proprietors pre-Treaty.⁹⁴ Busby and Rochfort expected that McKenzie would assert his Crown title as a defence, leaving Busby to demur as to its validity, thus setting up a dispute of law suitable for appeal to the Privy Council. It appears from Rochfort's later explanation to the jury that the questions of law hoped ultimately to be determined were whether Busby's native title could be recognised in New Zealand courts, whether the land claims legislation was valid and effective to avoid any such interest, and whether McKenzie's Crown grant gave him priority. These arguments were not able to be developed in *Busby v McKenzie* because of the course the hearing took. McKenzie did not appear on Busby's demurrer to assert his Crown grant, apparently because it was defective. So the issue of the legal effect of the Crown grant on prior "native title" was not live and did not require determination in the case by the judge. Whether, however, Busby was able to obtain an order for McKenzie's ejection was still to be decided. Since McKenzie had not admitted Busby's purchase according to native custom (saying that he did not know whether the allegations of purchase were true or untrue),⁹⁵

91 Busby notice, *The New-Zealander* (Auckland, 24 December 1853) quoted in NR McKenzie *The Gael Fares Forth: The Romantic Story of Waipu and Her Sister Settlements* (2nd ed, Whitcombe & Tombs Ltd, Wellington, 1942) at 56-57.

92 See also Busby to Colonial Secretary (22 March 1854) and McKenzie to Colonial Secretary (15 December 1854) ANZ, ACGO 8347 IA15/1/5e, "Busby Papers – 1854 to 1857". It appears from Busby's letter of 22 March 1854 that McKenzie's allotment was on that part of the Poupouwhenua block that had been surrendered to the Crown for the Matakana robbery in 1845.

93 It may not have been helpful to Busby's prospects that the Chief Justice had, the previous day, presided over the trial of *Snowden v Busby* in which Busby had been held liable for £200 damages for false imprisonment: see *Snowden v Busby* Supreme Court, Auckland, 7 June 1855, reported in *The Southern Cross* (Auckland, 8 June 1855) at 2, col 6, and (12 June 1855) at 3, cols 1-4.

94 "Auckland Civil Minute Book", 1844-1856, ANZ, Auckland, BBAE 5635/1a, at 309-315.

95 *Ibid*, at 315.

Busby was obliged formally to prove his purchase according to native custom, to support a possessory interest entitling him to eject McKenzie. This raised a preliminary question of fact for the jury, before it would be possible to get to the legal question of the effect in law of Busby's interest in the land.

Busby gave evidence of the purchase.⁹⁶ John White, an expert in Māori language and traditions who had worked with the Land Purchase Department,⁹⁷ confirmed the English translation of the Māori deed of sale of 13 December 1839.⁹⁸ Rochfort then called eight Māori witnesses to the sale, all members of Te Parawhau. Some had been signatories to the deed; others had witnessed it or the gathering of the tribe at which payment was made and the boundaries walked. The witnesses described the sale entered into by 22 chiefs, signed by 17 of them, and witnessed by nine others.⁹⁹ They gave evidence of a large gathering of members of the tribe (estimated by three witnesses at 340,¹⁰⁰ although one witness put the number at 100) at which the payment for the land was distributed. Some of the witnesses also described the walking of the boundaries of the land, which seems to have been at the same time.¹⁰¹

McKenzie acknowledged receipt of Busby's trespass notice but called no evidence on his own behalf.¹⁰² He did not seek to rely on his Crown grant, which appears from the report of the case in *The New-Zealander* to have had some defect.¹⁰³

Rochfort then addressed the jury.¹⁰⁴ He explained the case was the first of its kind heard by a New Zealand court and outlined the background of the legal issues involved to explain that he was seeking from the jury a special verdict on the facts which would allow the legal points to be further argued before the Judge. They were whether Busby's possession, no other right to possession having been asserted against him, was good to support his action of ejectment. Rochfort explained to the

96 *Busby v McKenzie* Supreme Court Auckland, 8 June 1855, reported in *The Southern Cross* (Auckland, 12 June 1855) 3, at cols 4-5 (evidence of James Busby); and in a Supplement to *The New-Zealander* (Auckland, 13 June 1855) at 1, col 4 (evidence of James Busby).

97 Michael Reilly "White, John 1826-1891" (2007) DNZB, above n 80.

98 *The Southern Cross*, above n 96, at 3, col 5; *The New-Zealander*, above n 96, at 1, col 4.

99 The numbers given vary in different accounts but not by more than one or two.

100 Stirling "Not With the Sword But With the Pen", above n 2, at 1620, provides an explanation for this coincidence in estimation as likely to have arisen through translation of a common Māori term for a large group of people.

101 *The Southern Cross*, above n 96, at 3, col 5; *The New-Zealander*, above n 96, at 1, col 4 and 2, col 1.

102 *The Southern Cross*, *ibid*; *The New-Zealander*, *ibid*, at 1, col 4.

103 *The New-Zealander*, *ibid*, at 2, col 2.

104 *The Southern Cross*, above n 96, at 3, cols 5-6; *The New-Zealander*, *ibid*, at 2, cols 1-2.

jury that, in the legal argument, the effect of the proclamations and land claims legislation would require consideration.¹⁰⁵ The three matters of fact on which Rochfort said he sought the verdict of the jury were: whether the land had been conveyed to Busby according to Māori custom; whether Poupouwhenua (the block upon which McKenzie was settled) was part of the purchase; whether Busby had sold the land to McKenzie or to anyone through whom he claimed. According to *The Southern Cross* report, he told the jury:¹⁰⁶

If the Jury found specially it would relieve the Jury from the question of what was possession. If his Honor afterwards decided that it was not a legal title, the question could be referred to the Queen in Council. He regretted that there was no Crown Title,¹⁰⁷ but the sooner the question was settled whether the Queen could take the lands of her subjects by proclamation or not was decided the better. He did not wish the Jury to find on points of law.

The Chief Justice was not prepared to play along with this strategy. First, he expressed doubts to the jury over their ability to be confident about the Māori evidence of sale, pointing out that it was long after the transaction and, being heard in Auckland, was at a distance from other members of the tribe who might contradict it. "Happily", however, the jury could be "spared this difficulty and perplexity" because of the legal position.¹⁰⁸ Over Rochfort's objections, Martin CJ instructed the jury that Busby's argument was contrary "to a fundamental law of the colony assented to by the Crown, and by which every colonist must be bound". He did not think it fair that McKenzie should have the burden of defending the proceedings "which might ... harass the defendant for years".¹⁰⁹ Restating the position taken in *R v Symonds* (without referring to the case) that "some enactment of this kind was necessary to secure the proper colonization of these Islands", Martin CJ advised the jury that the Land Claims Ordinance was decisive and that Busby had to show a Crown title because his native title was null and void.¹¹⁰

105 See the slightly more comprehensive report of Rochfort's address to the jury in *The New-Zealander*, *ibid*.

106 *The Southern Cross*, above n 96, at 3, col 6. See also the report in *The New-Zealander*, above n 96, at 2, col 2, in slightly different terms.

107 In apparent reference to the unanticipated failure of McKenzie to assert a Crown grant in defence, which meant that the validity of the Crown grant could not be tested in the proceedings. See, in connection with Rochfort's disappointment that the issue of the validity of the Crown grant could not be raised in these proceedings, *The Southern Cross* editorial of 18 September 1855 on Crown grants which begins: "New Zealand is not more noted for the length of its spars, or the peculiar qualities of its gum, than for the superstitious belief of its inhabitants in the omnipotency of Crown grants": Editorial "Crown Grants" *The Southern Cross* (Auckland, 18 September 1855) at 3, col 3.

108 *The Southern Cross*, above n 96, at 3, col 6; *The New-Zealander*, above n 96, at 2, col 3.

109 *The Southern Cross*, *ibid*; *The New-Zealander*, *ibid*, at 2, col 2.

110 *The Southern Cross*, *ibid*; *The New-Zealander*, *ibid*, at 2, col 3.

Rochfort objected to this that such charge was "calculated" to "stifle enquiry".¹¹¹ *The New-Zealander* reported that the exchanges between Rochfort and Martin CJ became heated and that Rochfort had to be persuaded by another counsel present to resume his seat and let the Chief Justice proceed.¹¹² Martin CJ then directed the jury.¹¹³

As no such proof as that which I was alluding to when interrupted, is given [that Busby had a Crown grant], that alleged title [Busby's native title] is to be treated in this Court as null and void — and the defendant is entitled to your verdict.

The jury obliged after a retirement of only a few minutes.¹¹⁴

Rochfort then moved promptly for a new trial on the basis that the verdict was against the evidence and that the Judge had misdirected and prejudiced the jury in its inquiry. In particular, the application claimed that the Judge had given evidence to the jury as to the existence of the Land Claims Ordinance 1841, which had not been pleaded and was not part of the record "and of which His Honour could not take judicial notice".¹¹⁵ Nothing more was heard of this application for some months (it was speculated that the delay was due to the illness of the Chief Justice) until at the end of October 1855 Stephen J read the decision of the Chief Justice.¹¹⁶

The Chief Justice rejected the contention that he was not able to take judicial notice of the Ordinance. He took the opportunity to say that ss 2 and 3 of the Land Claims Ordinance 1841 were "declaratory" as well as "enacting", as was established by the authorities referred to by Governor Gipps in his speech on the Land Claims Bill 1840 (NSW) and as had been settled in *R v Symonds*.¹¹⁷

The principle in its less technical form is this, that in all countries situated as these Islands were at the commencement of our colonization, the colonizing nation collectively has a right in respect of the soil to be colonized, subject, indeed, to the rights of the native owners, but paramount to any right of any

111 *The Southern Cross*, *ibid*.

112 *The New-Zealander*, above n 96, at 2, col 3. A correspondent with *The Southern Cross* newspaper wrote in to express the opinion that although Rochfort's interruptions were inexcusable he had received provocation and that the Judge too was in the wrong: Letter to the editor from "An Ear-Witness" *The Southern Cross* (Auckland, 15 June 1855) at 3, col 3.

113 *The Southern Cross*, above n 96, at 3, col 6; *The New-Zealander*, *ibid*, at 2, col 3.

114 *The Southern Cross*, *ibid*; *The New-Zealander*, *ibid*.

115 *Busby v McKenzie* SC Auckland, 18 June 1855, reported in *The Southern Cross* (Auckland, 19 June 1855) at 3, col 2.

116 *Busby v McKenzie* SC Auckland, 24 October 1855 per Martin CJ, reported in *The Southern Cross* (Auckland, 2 November 1855) at 3, col 4.

117 *Ibid*.

individual citizen of that nation; that of this national right (as of other national rights) the Crown is the representative and guardian, and that no such individual citizen can acquire a valid legal title to a portion of the soil by a purchase from the natives unless such title be allowed or confirmed by the Crown.

The Chief Justice said he had thought it his duty to advise the Jury not to find the special verdict sought by the plaintiff. Although such special verdict, leaving the Judge to apply the law to the facts as found, was appropriate where the rule of law was in doubt, "in this case, there was no uncertainty as to the rule of law, which was plainly expressed in the Ordinance".¹¹⁸ In those circumstances, it was unfair to the defendant to allow the plaintiff opportunity for further dispute.¹¹⁹

The peculiar form of verdict was suggested by, and for the benefit of, the plaintiff only, and for the express purpose of obtaining an opportunity of disputing the authority of a law assented to by the Crown at the commencement of the colonization of this country and acted on ever since, a law which both the Judge and the Jury were bound to administer.

The application for retrial was therefore rejected on the basis that, if a new trial were granted, the result must be the same because Busby could not recover in ejectment on the title "upon which alone he relies", a "purchase from the natives unconfirmed by the Crown".¹²⁰

Busby was not in a mood to accept defeat. He published a notice renewing his warning to potential purchasers of allotments from the Crown, that the Government could not give a legal title to the Ruakaka-Waipu lands. He gave public notice of his intention to appeal to the Judicial Committee of the Privy Council against the doctrine laid down by the Chief Justice in *Busby v McKenzie* that a colonial subject of the Crown "cannot be permitted to question the validity of Colonial Law, in a Colonial Court".¹²¹ Busby also spoke in the House of Representatives against the Land Claims Settlement Act 1856 (under which his Waitangi grants came later to be called in for reconsideration), repeating many of the arguments he made in his 1853 speech to the Auckland Provincial Council and invoking his conversations with Justice Story.¹²² After its enactment, Busby also applied to the Supreme Court for an injunction to prevent the Land Claims Commissioner, Francis Dillon Bell, from carrying out the provisions of the Land Claims Settlement Act in respect of his Waitangi lands, an action the Court declined to entertain on grounds that included its challenge to the validity of the Act.¹²³ In his affidavit and argument in support, Busby

118 Ibid, at 3, col 5.

119 Ibid.

120 Ibid.

121 Notice "Land At Whangarei" dated 21 June 1855, ANZ, ACFC 16153 OLC1/2/OLC14-24.

122 Busby *First Settlers*, above n 57.

123 See Busby's 5 May 1862 note on the "Argument prepared for application of an injunction, July 1858", ANZ, ACGO 8347 IA15/1/5f.

foreshadowed some of the arguments he was later to make in *Busby v White* including the "tapu" status of his rights and his person according to Māori custom in relation to the purchases at Waitangi, the inability of the Crown to acquire land except "by matter of record", the inapplicability of the American case law relied upon by Gipps (given recognition of Māori as independent and sovereign peoples), the status of the Treaty of Waitangi which he said was inconsistent with any title to the soil in the Crown not obtained by voluntary cession (and which he compared to the 1706 Treaty of Union between England and Scotland), and the inability of the Crown to dispossess someone in possession of land except through establishing its own title.¹²⁴

VI *BUSBY V WHITE*

Following the loss in *Busby v McKenzie*, 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.¹²⁵ It pointed out that the issue was one that was as critical for Māori proprietors as for Busby and other old land claimants:¹²⁶

If his Honor's 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.

In 1857 Busby and Rochfort moved to set up a case which would allow them to take on appeal to London the points of law they had been prevented from ventilating in *Busby v McKenzie* because of the jury verdict directed by Martin CJ. This time, they were not prepared to risk the matter being derailed on the facts through jury verdict. They needed a defendant who would accept Busby's purchase under pre-Treaty custom but defend on the basis of the extinguishment of that title by the Land Claims Ordinance and a subsequent Crown grant in respect of the land. That would leave Busby free to demur that the Legislative Council had no authority to "declare law" and make the pre-Treaty alienations null and void, and that the Ordinance was repugnant to the law of nations, English law, and the Treaty. As a fall-back, they sought to argue that if the Ordinance was effective

124 Affidavit of James Busby, 3 July 1858, and "Argument" (or "History"), undated, ANZ, ACGO 8347 IA15/1/5f.

125 Editorial "Busby v. McKenzie" *The Southern Cross* (Auckland, 15 June 1855) 2, col 6 to 3, col 1 at 3, col 1.

126 *Ibid.* This was a point the editor illustrated by reference to the then "notorious" case of Mrs Meurant, a native woman married to a European, whose lands conveyed to her by her Māori relatives were treated as Crown lands and granted to settlers. *The Southern Cross* carried a number of articles on Mrs Meurant's case in the late 1840s and 1850s. It appears from them that Mrs Meurant's marriage led to her being treated as a European for the purposes of the Native Lands Purchase Ordinance. See *The Southern Cross* (Auckland, 15 January 1850) at 2-3, (17 February 1852) at 2, (23 December 1853) at 4, (23 May 1854) at 2, (18 September 1855) at 3.

to make the purchase void, it did not vest the property in the Crown and there was no legal basis on which Busby could be dispossessed.

This was the course followed. Titus Angus White purchased an allotment at Marsden, within Busby's Ruakaka purchase, from the Crown at auction.¹²⁷ Titus was the brother of John White, the interpreter who had given evidence for Busby in *Busby v McKenzie*, and the nephew of the former Wesleyan missionary at the Hokianga, William White.¹²⁸ As it later emerged at the hearing, Titus White was financed into the purchase at Marsden by Busby.¹²⁹

Rochfort prepared the pleadings for White as well as Busby.¹³⁰ Busby's claim recited the fact that before the Treaty "the islands of New Zealand were owned, possessed, occupied, and inhabited, by a number of sovereign and independent nations" each of whom exercised "absolutely and exclusively" all the "powers, jurisdiction, and dominion of a sovereign and independent state". The Parawhau tribe was one such sovereign nation. On 13 December 1839 "their King or head chieftain", Te Tirerau, and 21 other chieftains had sold the land to Busby "to hold the same of the nation, to the use of the plaintiff his heirs and assigns for ever, according to the laws and customs of the Parawhaus". The claim recited the deed and the consideration paid.¹³¹ It maintained that as a result of the purchase Busby became "a member of their nation", a state that continued "until the nation dissolved itself by becoming, through Te Tirerau, its king, a party to the treaty of Waitangi". Busby pleaded that he had remained in possession until ejected by the defendant on 1 January 1857.¹³²

The defendant admitted all allegations in Busby's pleading. Against it by way of defence he averred the legal sequence by which the Crown came to grant to him title to the allotment at Marsden: the 15 June 1839 letters patent by which the limits of New South Wales were extended to include territory that might be acquired in New Zealand; Hobson's Commission as Lieutenant-

127 As with the land in issue in *McKenzie*, the allotment at Marsden was part of the Poupuwhenua block. It may have been part of the block surrendered to the Crown following the Matakana robbery in 1845, as well as within the 1854 Johnson purchase.

128 Jeanine Graham "Martin, Hannah 1830-1903" (2007) DNZB, above n 80.

129 See text accompanying below n 202.

130 See text accompanying below n 199-201.

131 "This is the payment: Forty pounds in Gold money, sixty Blankets, ten Coats, ten pairs Black (ie cloth) Trowsers, twenty pairs white (ie duck) trowsers, twenty Black (ie Blue woolen) shirts, twenty-five white shirts (ie check), four cloaks, five pieces of print, fifteen Handkerchiefs, three Single Barrelled Fowling pieces, twenty spades, twenty hoes, twenty hatchets, fifteen Irons pots, ten axes and adzes, two bags of shot, five Canisters Gunpowder, Eighty pounds Tobacco, one box pipes": copy of Ruakaka deed, above n 10. See also Stirling "Not With the Sword But With the Pen", above n 2, at 1589.

132 Summary of plaintiff's declaration as given in the Supplement to *The Southern Cross* (Auckland, 30 September 1859) at 2, col 1.

Governor; Normanby's instructions to Hobson; the Treaty of Waitangi (as translated from the Māori to English);¹³³ the 16 November 1840 Royal Charter and 5 December 1840 Royal Instructions; the Land Claims Ordinance 1841 (as confirmed by the Queen); the absence of any Crown grant to Busby in respect of the land; the 9 February 1855 Letters Patent authorising Governor Gore-Browne to make grants of waste lands of the Crown; the 15 December 1856 grant of an allotment to White, entered on record on 27 December; White's entry on to the land to take possession on 1 January 1857 (confirming Busby's claim to have been ejected on that date).¹³⁴ The pleadings did not raise the Crown's claim of right to the land (whether by 1854 purchase or under the forfeiture in respect of the 1845 Matakana robbery).

On Busby's demurral to the defendant's plea,¹³⁵ the issues raised by the pleadings were, as later summarised:¹³⁶

1. Whether the Legislative Council did not exceed its powers in passing the Land Claims Ordinance.
2. Whether the Queen can convey to any person, by grant or otherwise, an estate, interest, right, or title in or to land in the possession of another, and whereof Her Majesty had never been, at any time seized or possessed.

The action came on for hearing in Auckland on 12 September 1859 before the new Chief Justice, George Arney, who had arrived from England the previous year. The arguments and the outcome are recorded in newspaper reports.¹³⁷ Rochfort himself also set out the argument in his

133 In both the pleadings and in the argument presented by Busby in *Busby v White*, the Māori text of the Treaty of Waitangi was recognised as the authoritative text of the Treaty. In the argument, Busby submitted that:

The translation of the treaty given in the pleadings is the first that has been made. The document which has hitherto passed as such is not one, it is 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. The substance of both is, however, alike; and any variations existing between them are to be accounted for, by the difficulty of rendering complex ideas into the language of a people having no literature.

In the pleadings, "kāwanatanga" in art 1 was translated as "sovereignty" ("wholly cede ... for ever, the sovereignty of their territories"), and "rangatiratanga", in both the preamble and art 2, as "chieftainship" ("anxious that they should retain their chieftainships and their land"; "confirms and guarantees ... the full chieftainship of their lands, their estates, and all their property"). In the argument, it was further stated that art 2 "guarantees to the chieftains and nations, their dignities, offices, and properties": Supplement to *The Southern Cross* (Auckland, 30 September 1859) at 2, col 1; and Supplement to *The Southern Cross* (Auckland, 1 November 1859) at 2, col 3.

134 Defendant's plea as given in *The Southern Cross*, above n 132, at 2, cols 1-2.

135 See *The Southern Cross*, *ibid*, at 2, col 2.

136 *Ibid*.

137 See below n 140 and 142.

book *The Constitutional Law of England in its Relation to Colonial Settlements*, published in 1860.¹³⁸ The book was published by *The Southern Cross* and is identical to the reports of the argument carried by that newspaper. The preface to Rochfort's book records that the case was long delayed because of the illness and death of Justice Stephen, who had been Acting Chief Justice for the two years before he died, and before whom the pleadings had apparently been settled. During the period of delay, Rochfort had settled in Melbourne and so was not available to present the argument, which was left to Busby. But the delay in the hearing had allowed Rochfort when in Melbourne to use the Law Library there to expand the sources drawn on well beyond the materials available in New Zealand.¹³⁹

VII THE ARGUMENT PRESENTED BY BUSBY IN *BUSBY V WHITE*

The argument presented by Busby was extensive. That on the validity of the Land Claims Ordinance alone (one of 10 points taken) was said by Arney CJ to cover "one hundred closely-written folio pages".¹⁴⁰ The Chief Justice described the whole argument as "one of the most colossal legal statements ever placed before a Court of Justice".¹⁴¹ Busby's argument took three days to deliver and was reported over nine editions of *The Southern Cross*, from 30 September 1859 to 10 February 1860 (four such editions being after Arney CJ had delivered his decision).¹⁴² After some initial reluctance to hear Busby out,¹⁴³ the Chief Justice seems to have resigned himself to listening to the whole, and indeed Busby was to acknowledge later his "sense of deep obligation for the extreme courtesy which [the Chief Justice] extended to me personally during the many hours in which I occupied his attention".¹⁴⁴ The submissions were organised around ten propositions:¹⁴⁵

138 Singleton Rochfort *The Constitutional Law of England in its Relation to Colonial Settlements* (Philip Kunst, Southern Cross Office, Auckland, 1860).

139 *Ibid.*, [i].

140 *Busby v White* Supreme Court Auckland, 14 December 1859 per Arney CJ, reported in *The New-Zealander* (Auckland, 17 December 1859) 5-6 at 5, col 5. As set out in Rochfort's book, above n 138, the entire argument comprises 103 pages.

141 *Busby v White*, *ibid.*, at 6, col 1.

142 Report of argument in *Busby v White* in *The Southern Cross* (Auckland): 30 September 1859, Supplement, at 2; 14 October 1859, Supplement, at 1-2; 1 November 1859, Supplement, at 2; 11 November 1859, Supplement, at 2; 6 December 1859, Supplement, at 2; 20 December 1859, Supplement, at 2; 6 January 1860, Supplement, at 2; 3 February 1860, Supplement, at 2; 10 February 1860, Supplement, at 2.

143 *Busby v White*, above n 140, at 5, col 4.

144 "Busby v. White", letter to the editor from James Busby *The New-Zealander* (Auckland, 24 December 1859) at 3, col 5.

145 Supplement to *The Southern Cross* (Auckland, 30 September 1859) at 2, col 4.

1. A permanent and exclusive property in the soil of a country not previously appropriated is acquired by occupancy.
2. The titles of the maori nations to their respective territories were before and at the time of the treaty of Waitangi, as well-founded and indisputable as are those of European states to their respective dominions.
3. Every maori nation, how weak or uncivilised soever it might be, was, with respect to its rights and obligations, on a footing of perfect equality with the Britanno-Hibernian nation.
4. The English and the British nations exercised, at all periods of their respective histories, the power of admitting foreigners to be members thereof respectively, and of allowing them to settle within their respective territories, which power has been invariably exercised by the Britanno-Hibernian nation, ever since it was first constituted.
5. The laws of England authorized its subjects, from time immemorial, to acquire and hold lands in the territories of foreign states, for their own use and benefit; which laws were adopted by the British and Britanno-Hibernian nations.
6. The treaty of Waitangi is a treaty of union between the United Kingdom and the respective states of Maorania or New Zealand, and is to be construed in the same manner as the treaty of union between England and Scotland, or as any other treaty between civilized nations.
7. The lands of the plaintiff described in the declaration were guaranteed to him by the treaty of Waitangi.
8. Those portions of the national territory commonly called *colonies* or *plantations* are integral parts of the United Kingdom.
9. The power of making 'laws and ordinances,' delegated to the local legislature of New Zealand by the 3 & 4 Vict c 62, did not authorize that body to repeal any of the national laws, and consequently, such power did not authorize it to dispose of the property of the subject, in an arbitrary manner.
10. Any grant, by the Queen, of lands whereof she was never seised or possessed, does not convey any estate or interest therein to the grantee.

The first proposition (that a permanent and exclusive property in the soil is acquired by occupancy) was developed from scriptural references, through philosophers and writers on the law of nations. The submission quoted Blackstone in claiming that, whether such consequence arose from first occupancy by the "tacit and implied sense of mankind" (as Grotius and Pufendorf would have it), or only upon a degree of "bodily labour" (as Barbeyrac, Titius and Locke asserted) – a dispute Blackstone described as savouring "too much of nice and scholastic refinement" – was

immaterial because "both sides agree in this, that occupancy is the thing by which the title was in fact originally gained".¹⁴⁶

The second proposition (that the titles of Māori at the time of the Treaty to their territories were "as well-founded and indisputable as are those of European states to their respective dominions") followed from the fact of their nationhood.¹⁴⁷ The third proposition (that the Māori "sovereign" nations, "how small soever in numbers, or defective in civilization", were on a footing of "perfect equality" with the British nation and "might lawfully do, with regard to the admission of members, or the alienating of lands to foreigners, whatever has been done by the latter, at any period of its history") was developed by reference to international law writers, most importantly Vattel.¹⁴⁸ Such equality had been recognised by the Queen: "[s]he entered into a public Treaty with the New Zealand nations, and made the first advances for that purpose; and in all treaties the power of the one party, and that of the other, ought to be equal (4 Inst 152)".¹⁴⁹ The Māori chiefs, acting "on behalf of their respective nations", had ceded to the Queen "the sovereignty of such nations, and the *directum* dominium (but not the 'utile' dominium) of their territories".¹⁵⁰ In return, the Queen had extended to the Māori nations all the rights and privileges of British subjects, and "expressly guaranteed to them all their property, of whatsoever kind or description".¹⁵¹ This Treaty was to be interpreted "according to the inflexible rules of interpretation", without taking into account "the power or weakness of the contracting nations".¹⁵² The position of North American Indians was not comparable because there had been no such acknowledgment or guarantee of their rights: "But the legal existence of the maories was acknowledged."¹⁵³ In addition to the guarantee of property in the Treaty, by obtaining the rights and privileges of British subjects, Māori obtained the benefit of "[a]ll the laws of England which protect life, liberty, and property".¹⁵⁴ Busby submitted, indignantly:¹⁵⁵

146 Supplement to *The Southern Cross* (Auckland, 30 September 1859) at 2, col 4.

147 Supplement to *The Southern Cross* (Auckland, 14 October 1859) at 1, col 4.

148 *Ibid.*, at 1, cols 4-5.

149 *Ibid.*, at 1, col 5. The reference is to Coke's *Institutes of the Laws of England*.

150 *Ibid.* On the terms *directum dominium* and *utile dominium* see Blackstone *Commentaries on the Laws of England* (Oxford, 1766) book 2, ch 7, at 105, and Richard Tuck *Natural Rights Theories: Their Origin and Development* (Cambridge University Press, Cambridge, 1979) at 15-17. Although Busby's submissions suggest later that the doctrine of tenures did not apply in New Zealand, the point here made may be similar to that made by Kent McNeil that, in any event, the effect of the Crown's "paramount lordship" over lands is formal and limited: Kent McNeil *Common Law Aboriginal Title* (Clarendon Press, Oxford, 1989) at 79-83.

151 *Ibid.*

152 *Ibid.*

153 *Ibid.*

154 *Ibid.*

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.

The fourth argument (the admission of foreigners as members of the English and British nations) was developed by reference to British history from the time of Alfred and Guthrum. It pointed to the admission of Normans under Edward the Confessor, Henry III's admission of "Poictevins [Poitevins], Germans, Provençals, and Romans", through the admission of Lombards and Flemish weavers, French Protestants, and so on down to the present.¹⁵⁶ The fifth proposition (that British subjects were permitted to acquire and hold lands in foreign countries) was contrasted with the "novel doctrine" introduced into "this colony" from "Sydney in New South Wales" to the effect that no such lands could be acquired except by the Queen in a foreign country "inhabited by a people supposed to be uncivilized".¹⁵⁷ It expressed surprise at the "credence with which [this view] has been received".¹⁵⁸ The contrary position was substantiated by history. In discussing this point, the submission found it necessary to look into the origin and effect of the feudal system of tenures.¹⁵⁹ It then went into extensive detail about the history of feudalism and the overlapping allegiances owed in respect of territories subject to different overlordship in support of the argument that it had never been suggested that British subjects could not hold lands in foreign territories.¹⁶⁰ Treaties had acknowledged such rights.¹⁶¹ British courts of equity had been prepared to "receive and maintain bills for the specific performance of contracts touching [the landed property holden by British subjects in the territories of foreign states]".¹⁶²

Millions of British subjects hold lands, at the present day, in the United States of America; and yet, such lands have never been claimed by her Majesty, in right of her subjects who acquired the same. And if we consider the subject irrespectively of the immemorial usage of the nation, we shall find that the right of a

155 Ibid.

156 Ibid, at 1, col 5 and 2, col 1.

157 Ibid, at 2, col 1.

158 Ibid.

159 Ibid, at 2, col 2.

160 Ibid, at 2, cols 1-4.

161 Ibid, at 2, col 4.

162 Ibid and Supplement to *The Southern Cross* (Auckland, 1 November 1859) at 2, col 1.

British subject to hold lands in a foreign country is, and ever must be, co-extensive with the right of sovereign states to dispose, as they please, of their own property. The right is conferred by the government of the foreign country, and not by that of our own.

The sixth point, that the Treaty of Waitangi was comparable to the Treaty of Union between England and Scotland, meant that it was to be construed in the same manner as any treaty between "civilized nations" (as the Māori 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: "All our laws and institutions now existing derive their vitality from this treaty [the Treaty of Waitangi]."¹⁶³

The seventh argument (that Busby's lands were guaranteed to him by the Treaty) was based upon Busby's membership of the Parawhau nation through acquisition of lands within its territories.¹⁶⁴ It was argued by reference to numerous examples that:¹⁶⁵

... according to the law of nations and to our own municipal law, a British subject may become the subject of a foreign state, and may, as such *foreign* subject, claim of his *native* state, whatever rights or privileges his native state may, by treaty, have conceded to the foreign state whereof he has become a member.

The legal effect of the Treaty between the Queen and "Tirerau, the King or head chieftain of the Parawhau nation" was said to be similar to the case of the Treaty of Union.¹⁶⁶ Busby's lands in the Parawhau territory were guaranteed to him by the Treaty "as fully as the lands therein belonging to naturalized *Maori* members of the Parawhau nation had been thereby guaranteed to them".¹⁶⁷ The source of the title of both (naturalised Māori members and Europeans who became members by purchase of property) was derived from the one source: "namely, the laws and the customs of the Parawhaus, the people to whom such territory exclusively belonged".¹⁶⁸ Those laws and customs "remained in full vigour, notwithstanding the cession of their national sovereignty".¹⁶⁹

... for, 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.

163 Supplement to *The Southern Cross* (Auckland, 1 November 1859) at 2, col 1.

164 *Ibid*, at 2, cols 1-4.

165 *Ibid*, at 2, cols 2-3.

166 *Ibid*, at 2, col 3, where the argument is developed in some detail.

167 *Ibid*, at 2, col 4.

168 *Ibid*.

169 *Ibid*.

In consequence, "[t]hat 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 lands are mediately or immediately derived":¹⁷⁰

... 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.

On this argument, just as the Prince Consort had been admitted as a "member of the British Nation", Busby had been adopted into the Parawhau nation and was guaranteed under article 2 of the Treaty "the possession and enjoyment of his lands within the Parawhau territory, as fully as it guaranteed to the Tirerau or any other *Maori* member of the nation, the possession and enjoyment of his lands or other property".¹⁷¹

The eighth point argued (that the colony was an integral part of the United Kingdom) entailed a lengthy argument drawing on practice from Greece and across history.¹⁷² Arney CJ described its scope as starting with the "apoikia" and "thugarter-poleis" of the ancient Greeks, proceeding via the Romans to "probe with William of Malmesbury, Thierry, and the Saxon Chronicles, into the genius" of such matters as the French feudal system and the right of William the Conqueror to recover from Harold "England-proper, except Cambria".¹⁷³ The proposition was said by the Chief Justice to have been pressed to the conclusion:¹⁷⁴

... that the King had no power to legislate for colonies obtained by cession or conquest, and it was argued that the only instances in which a Sovereign of England had so legislated were instances, in which they did so, not as kings of England, but in other capacities, such as Duke of Normandy, Earl of Anjou, Duke of Guienne, &c.

Busby submitted that conquered and ceded territories were "considered part and parcel of the realm" (just as with colonies established in uninhabited lands).¹⁷⁵ The royal prerogative "was the

170 Ibid.

171 Ibid.

172 Ibid and Supplements to *The Southern Cross* (Auckland, 11 November 1859) at 2, (6 December 1859) at 2 cols 4-5, (20 December 1859) at 2, col 1.

173 *Busby v White*, above n 140, at 5, col 5.

174 Ibid.

175 Supplement to *The Southern Cross* (Auckland, 11 November 1859) at 2, col 3.

same within the newly-acquired territory as it was within the older members of the national domain".¹⁷⁶ The conquered people, "if taken into the King's protection, become members of the nation ... [and] can claim the rights of citizens".¹⁷⁷

Allegiance and protection are reciprocal; and all subjects, whether they are such by birth, naturalization, or denization, are under the laws, and protected by them.

Busby said this was the position at common law, "and thus it must stand at present day according to English jurisprudence, unless the Parliament has otherwise ordained".¹⁷⁸

The ninth proposition (that the Land Claims Ordinance was outside the competence of the Legislative Council) was developed through an extensive history of local and limited law making bodies in England and in the British overseas territories starting with Ireland and moving on to the Americas.¹⁷⁹ Since the Treaty of Waitangi was "a document inscribed in the law of nations, and forming a portion of our municipal code", the local legislature "could not alter or repeal any part of that treaty, because every such act of state is rendered sacred by the common law, and cannot be altered but by the *express* authority of Parliament".¹⁸⁰ Even without such guarantee through the Treaty, the Crown could dispossess Busby of lands he possessed only through assertion of its own claim "by regular judicial proceedings, the same as would be instituted in England in cases of a similar nature".¹⁸¹ The argument invoked the 29th clause of Magna Carta and claimed that, similarly, the local legislature could not deprive a subject of his property.¹⁸² An Act of the local legislature which encroached on such common law and Charter rights was invalid. It was not a dispossession of land "by the judgment of his peers, or by the law of the land".¹⁸³

The final point addressed was that the Crown could only acquire lands by "matter of record" or through inquest of office.¹⁸⁴ If the Queen was never seised in this manner of lands, she could not

176 Ibid, at 2, col 4.

177 Supplement to *The Southern Cross* (Auckland, 6 December 1859) at 2, col 5.

178 Supplement to *The Southern Cross* (Auckland, 11 November 1859) at 2, col 4.

179 Supplements to *The Southern Cross* (Auckland, 20 December 1859) at 2, (6 January 1860) at 2, (3 February 1860) at 2, (10 February 1860) at 2, col 4.

180 Supplement to *The Southern Cross* (Auckland, 3 February 1860) at 2, col 2.

181 Ibid.

182 Supplement to *The Southern Cross* (Auckland, 10 February 1860) at 2, col 4.

183 Ibid.

184 As to the method by which the Crown could acquire title to lands, see McNeil *Common Law Aboriginal Title*, above n 150, 93-103.

convey them. The Ordinance was not competent to effect acquisition by the Crown, even if it was valid in voiding the title of the purchaser.¹⁸⁵

It should be noted that in all this lengthy argument there is no elaboration of the American cases and nor is there any attempt to address the effect of the decision of the Full Court of the Supreme Court in *R v Symonds*.

VIII THE DECISION OF CHIEF JUSTICE ARNEY

The decision of the Chief Justice, delivered on 14 December 1859, was reported in *The New Zealander* of 17 December.¹⁸⁶ *The Southern Cross* (which had not yet finished reporting Busby's full argument) did not print it but summarised its effect in an editorial critical of the course taken by Arney CJ, criticism discussed below.

Arney CJ's recital of the pleadings and Busby's argument dripped with what *The Southern Cross* described as "subacid humour".¹⁸⁷ The Judge recorded that he had been obliged to listen for three days (and until "5 or 6 o'clock in the evening") to an argument that seemed in large part far from the point.¹⁸⁸ Although it was understandable that the defendant might not wish to respond to the more abstruse analogies invoked by the plaintiff, he expressed, almost certainly with tongue in cheek, the view that the Court might have expected more help from the defendant "when called upon to place any construction at all upon the Treaty of Waitangi" and "especially when required to enforce the naturalisation-laws of the Parawhaus – the one as analogous to the treaty of union between England and Scotland, and the other as being very similar to the laws of Prussia, Saxony, Wurtemberg, Bavaria, Hanover, Portugal, and England".¹⁸⁹ Arney CJ took the view that the proposition that the colonies are "integral parts of the United Kingdom" should not have required a lengthy discourse on the practice of the Greeks, Romans, Saxons, and so on.¹⁹⁰

Throughout, Arney CJ poked fun at the argument, for example, noting that it suggested comparison between an Ordinance which had received the Royal Assent and "the bye-laws, if such could be once imagined, among the stones of Gatton, or promulgated to a customer by the solitary publican of Old Sarum". It was not "worth while to follow the elaborate argument as to the supposed power or powerlessness of the King to enact laws for the Colonies as conquered territories". By

185 *The Southern Cross*, above n 182, at 2, cols 4-5.

186 *Busby v White*, above n 140.

187 Editorial "Busby v. White" *The Southern Cross* (Auckland, 27 December 1859) at 2, col 5.

188 *Busby v White*, above n 140, at 5, col 4.

189 *Ibid*, at 5, col 5.

190 *Ibid*.

contrast, the ninth and tenth propositions put forward by the plaintiff (that the Land Claims legislation was invalid and that the Crown could not convey an interest in land of which it was never seised or possessed as a matter of record) were ones that "came home to the questions immediately before the Court"¹⁹¹ and were ones on which the Court could have expected some help from the defendant.¹⁹² Instead, it was clear that Titus White was not putting up any genuine defence.

Arney CJ noted that few who were acquainted with the history of the old land claims would fail to take from the pleadings that "they had been sedulously framed in the interest of the plaintiff, and that the defendant was not *bona-fide* pleading to the action".¹⁹³ Arney CJ pointedly referred to the defendant's admission in the pleadings that Busby "himself had become, on the 13th of December, 1839, and before the date of the Treaty of Waitangi, himself a Maori, or member of the nation of Parawhaus".¹⁹⁴ The impression that the defendant was not "bona fide" was only "confirmed by a consideration of the argument".¹⁹⁵ Arney CJ's irritation was augmented by the fact that, "not one book, report, copy, treaty, or statute" referred to by the plaintiff was put before the Court. None of the reported cases cited were to be found "on the shelves of the Supreme Court" and only a "very small proportion" of the "references to ninety-two learned writers and authorities ... would be found in this Colony".¹⁹⁶ In the absence of any attempt by the defendant to research the position, the Court was therefore being asked to "take all the statements and quotations upon credit".¹⁹⁷ Even apart from the problem with checking the citations, "not one point was put to the Court for the defendant". Nor did the plaintiff acknowledge and deal with the arguments that might have been made by a "zealous counsel for the defendant" to "strive to shatter this complex network in pieces". No "shadow of apology" was offered for the grant and Ordinance.¹⁹⁸ The defendant himself had taken almost no interest in the proceedings:¹⁹⁹

While this accumulated store of learning was poured forth by the plaintiff, there sat at the table of the Court one, who appeared unconscious that against *him* the entire argument was directed, that *his* wrongful seizure of his neighbour's estate had originated that plaintiff's complaint, and that much of the present and future welfare of the Colony depended upon the answer which *he* might offer to the present

191 Ibid.

192 Ibid, at 5, col 6.

193 Ibid, at 5, col 4.

194 Ibid, at 5, col 5.

195 Ibid, at 5, col 4.

196 Ibid, at 5, col 6.

197 Ibid.

198 Ibid.

199 Ibid.

demurrer. The officer of the Court had indeed placed before him upon the table a sheet of foolscap paper, which continued, during the three days' argument, held in its place by the inkstand and new pen resting upon it. But the person for whom this accommodation was intended, appeared not to comprehend it. He neither read, wrote, nor spoke – note or notice of argument he took none, although he occasionally showed signs of consciousness by picking the blue table-cloth, or shifting the posture of his limbs, in order to relieve the *ennui* of his mind or the weariness of his body. Yet this person constituted at once the defendant, the defendant's counsel, and the audience. On being called upon by the Court in the usual manner, he sat as if stupefied by that call. The Registrar suggested to him to stand up. He stood up, and I informed him, the Court would be happy to hear his argument; or, if more convenient to him, would adjourn till another day for that purpose. But this person only stood, silently and imploringly staring at the plaintiff, as if in hope that the latter might say something, which he could not himself find words to utter. At length, still gazing at the plaintiff, he muttered something, which was understood to be the words, "I rely upon my Grant". This defendant then, in answer to questions put to him, informed the Court that he "had no counsel or legal adviser in this action"; that he had spoken to a legal adviser, but found that the expense would be far too great; that he had spoken to no solicitor to prepare his plea for him. That he did not know the content of the record, and had never read it. That to the best of his knowledge Mr Rochfort prepared the plea for him; that he did not instruct Mr Rochfort to prepare any plea for him; that he only spoke to Mr Brookfield: and that he attended in Court only at the request of the plaintiff.

The decision records that after this questioning from the bench, Busby interposed to say that he had understood Stephen J had "sanctioned the preparation of the proceedings in the present form, by one solicitor for both parties" (although he was unable to say whether Justice Stephen had read the pleadings).²⁰⁰ Arney CJ, clearly by this stage unwilling to take anything at face value, checked the original plea and demurrer book, pointing out that the defendant had signed for himself. White then explained that he had spoken to a Mr Brookfield about arguing the case for him, but had not asked him to prepare the plea. He said he had signed the plea without reading it.²⁰¹ Arney CJ records in his decision that "at length" Busby explained that:²⁰²

"Of course it was all understood. The land was brought for the purpose," by his arrangement with the defendant.

After the parties had escaped from the Chief Justice, Mr Brookfield himself "hastened into Judge's Chambers", "saying that he understood his name had been mentioned in connexion with the

200 Ibid.

201 Ibid. As to Frederic Maurice Preston Brookfield, see CP Hutchinson "The Districts: Auckland" in Robin Cooke (ed) *Portrait of a Profession: the Centennial Book of the New Zealand Law Society* (AH & AW Reed, Wellington, 1969) 205 at 213.

202 Ibid.

cause of 'Busby v White', and he wished to explain".²⁰³ The Chief Justice invited him to write, so that the information could be conveyed to Busby. Brookfield then wrote in,²⁰⁴ explaining that he had first been approached by Busby to act as attorney (Busby himself intending to argue the case) but had heard nothing more about the matter for some time until he received a large volume of material from Rochfort, which Busby informed him was the written argument. Brookfield then on Busby's instructions had set down the demurrer for argument. After that had been done, Busby advised Brookfield that he intended to argue the demurrer himself but asked Brookfield to appear as counsel for the defendant. Brookfield pointed out that the argument would require a great deal of preparation and inquired about his fee. Brookfield said Busby's response was that "he did not wish me to go into Court and oppose him, but simply, when he had concluded his argument, to hand in the grant from the Crown to the defendant, and state that I [Brookfield] relied upon that as an answer".²⁰⁵ Brookfield explained that he took the view that "no professional man in the town" could act in this manner and that only the defendant himself could "venture to act so".²⁰⁶ Since Busby said a full opposition "would not answer his purpose", they parted.²⁰⁷ Although White had not personally asked Brookfield to act for him, he had inquired of Brookfield what steps he was to take to bring himself before the Court.²⁰⁸

Arney CJ directed the letter to be referred to Busby, who responded from the Bay of Islands on 4 October 1859 accepting the sequence while saying that he believed it likely that Brookfield had said "much which I did not distinctly hear or understand".²⁰⁹ (It may be that Busby was already suffering from the deafness that caused him to use an ear trumpet in later life.²¹⁰) The Brookfield letter did not convey the right impression in suggesting that Busby did not wish the matter to be thoroughly argued. He was, however, concerned about the cost as he could not afford the great expense Brookfield had foreshadowed:²¹¹

I was not at all apprehensive of the effects of Mr Brookfield's defence; on the contrary, I was most anxious that the case should be thoroughly argued: and, whatever might be Mr Brookfield's views, it was with me altogether a question of expense. Mr Brookfield would probably recollect that on another

203 Ibid.

204 Ibid, and at 6, col 1.

205 Ibid, at 5, col 6.

206 Ibid.

207 Ibid, at 6, col 1.

208 Ibid.

209 Ibid.

210 Claudia Orange "Busby, James 1802-1871" (2007) DNZB, above n 80.

211 *Busby v White*, above n 140, at 6, col 1.

occasion I said to him, that Mr White would plead his Crown Grant, and that, if it was not sufficient title, the fault lay with the Government, and that I questioned whether he (Mr Brookfield) or any other lawyer could say much more to the purpose.

Arney CJ expressed the view that Brookfield had been quite right to decline to become "the mere mouthpiece of a client".²¹²

... it is of the highest importance that the time of this Court should not be occupied, and its judgment misled, by the collusion of parties: and if counsel could be induced to aid that collusion, the administration of justice would be corrupted, and the integrity of this Court impaired.

The plaintiff himself should have appreciated from what Mr Brookfield told him that his course was not proper. Although Busby had said he was anxious that the case should be thoroughly argued, "he took every precaution to prevent that which he so anxiously desired".²¹³

It is true, indeed, that the plaintiff considers his own case so plain, that no lawyers can say much to the purpose against it, and yet he deemed it necessary to strengthen that case by the additional support of one of the most colossal legal statements ever placed before a Court of Justice.

While a "friendly" suit might not have been objectionable, the plaintiff's suit was "collusive", one in which "the whole proceedings and argument are concocted by a real plaintiff against a nominal defendant in order that the plaintiff's case alone may be argued and a stranger to the suit prejudiced".²¹⁴ A suit in which the plaintiff constituted himself both plaintiff and defendant to "dictate the terms on which he will permit the Supreme Court to hear the defendant's case argument" could not be permitted.²¹⁵

Arney CJ said that his observations were made "in vindication of the Court", rather than in rebuke of the plaintiff. He acknowledged that this was "probably a case in which the plaintiff has been led on by a persevering pursuit of one idea, and a conscientious conviction of one principle" to a course which, "upon any other question, he would be the first to condemn".²¹⁶ The upshot, however, was that on a "demurrer thus framed and half argued" that the authority of the Land Claims Ordinance 1841 was impugned.²¹⁷ The Ordinance had been acted upon "from the foundation of this Colony", through a succession of legislative measures which had all received the Royal Assent (on the advice of the most distinguished lawyers of the day), and by "the solemn judgment of

212 Ibid.

213 Ibid.

214 Ibid.

215 Ibid.

216 Ibid.

217 Ibid.

this Court, after careful consideration by both the learned Judges of the day" (in clear reference to *Symonds*).²¹⁸ Respect for such authority "surely" meant that a Judge of the Supreme Court "should at least be permitted by the plaintiff to hear what can be said in argument for their opinions". If effective, the plaintiff's argument would "affect the titles to a large proportion of the land in this Island, and would confound the rights of property through the length and breadth of the Colony".²¹⁹ Even if no authority were to be found for refusing to entertain a collusive suit, Arney CJ indicated that reasons of policy would drive him to refuse to determine Busby's suit. But, indeed, he considered there was authority in *Duntze v Duntze*,²²⁰ a special case stated under a statutory provision rather than a plea in demurrer. Arney CJ considered that the reasoning of the English Court of Common Pleas in that case applied by way of analogy, while acknowledging that Busby's claim to a decision was stronger since he complained of actual deprivation of land while the plaintiff in *Duntze* had only a remote interest in the question on which the opinion of the Court was sought.²²¹ He concluded that no judgment should be entered on the demurrer on the then state of the case.²²²

In the present case the parties may again appear before the Court (but it must be with affidavits), and satisfy me, if they can, that they have, by law, the right to force the judgment of this Court notwithstanding their collusion. Meanwhile no judgment upon the points raised by this demurrer will be delivered.

IX THE REACTION TO THE DECISION IN BUSBY V WHITE

Busby seems to have taken this decision relatively meekly. He does not seem to have sought to re-open the result. But in a letter to the editor of *The New-Zealander* he took issue with the impression that there was any impropriety in his action (while accepting that the Chief Justice was technically correct).²²³ He maintained that his pleadings had been "expressly authorised" by Stephen J, in the knowledge that ultimately the questions raised would have to be resolved by the Judicial Committee of the Privy Council.²²⁴

It was considered that there was little likelihood of a case involving consequences of such importance being finally settled without an ultimate appeal to the Judicial Committee of the Privy Council; and it was sought to raise the case in a form in which a judgment could be obtained from that tribunal on the

218 *Ibid*, at 6, col 2.

219 *Ibid*.

220 (1848) 6 CB 100, 136 ER 1189.

221 *Busby v White*, above n 140, at 6, cols 2-3.

222 *Ibid*, at 6, col 3.

223 "Busby v. White", letter to the editor of *The New-Zealander* from James Busby, above n 144.

224 *Ibid*.

law of the case, without danger of the question being put out of court on any of the numerous contingencies which so often interfere, or are brought about by the ingenuity of counsel, to intercept a decision upon the real point at issue. Mr Justice Stephen sanctioned this arrangement, by which it was sought to accomplish this object, and allowed the same counsel to prepare the pleadings for both parties. But his illness and death intervened to prevent the case coming to issue before him.

Busby explained that Rochfort had tried to get the matter heard before Arney CJ earlier, and before his own departure to Melbourne, and had altered the pleadings (in a manner Busby claimed not to know) to meet some objections expressed by Arney CJ. And although Busby was prepared to accept that Arney CJ's view might be more correct than Stephen J's, he was in no doubt that Stephen J had been "actuated by a wish to facilitate the administration of justice". Busby himself "went into court without any misgivings upon the propriety of the proceedings". Friendly suits, he said, were frequently brought before the superior courts of Westminster.²²⁵

Not everyone was convinced by the decision reached by the Chief Justice. The editor of *The Southern Cross* referred to the "fatality" which seemed to attend "Mr Busby's persevering endeavours to obtain a legal decision" on a matter he had "again and again" sought to take to the Supreme Court, with the "ultimate prospect of an appeal from an unfavourable decision to the Judicial Committee of the Privy Council".²²⁶ The question of law "remains in doubt" even though it raised distinctly ("after abstracting surplusage") "one of the most important questions of right that was ever submitted to a legal tribunal".²²⁷ That the suit was "in a moral point of view" collusive, "no one will for an instant maintain":²²⁸

The whole was done without the slightest attempt at disguise, or concealment; originally, under the sanction of the late acting Chief Justice [Stephen].

X CONCLUSION

It is not part of the purpose of this paper to argue whether or not Arney CJ was correct to refuse judgment on the merits in *Busby v White*. It is possible to wonder whether his side-step on the basis of collusion was convenient, given what appears to be a consistent pattern by which the New Zealand judges avoided deciding the issues of the effect of native title and the necessity of Crown

225 Ibid.

226 Editorial "Busby v. White", above n 187, at 2, col 5.

227 Ibid.

228 Ibid, at 2, col 6.

grant in the 1850s.²²⁹ Certainly it is hard to believe that Arney CJ was unaware before the hearing began that the suit was a friendly one set up to raise the important issues as discrete points of law.

Nor in this paper are we concerned with the validity according to Māori custom or fairness of Busby's "purchases" or his entitlement to the awards he finally received from the Government (see postscript below). It is not suggested that the old land claimants had the right to expect that the Crown would give full effect to their purchases. The extent of land speculation before the Treaty was clearly of concern to the Colonial Office and was one of the reasons for British intervention in 1840. The January 1840 proclamations were generally consistent with the instructions given to Gipps and Hobson. No doubt it was competent for the Crown to require Europeans to prove that they had validly purchased land according to Māori custom before it would give a Crown-backed title to such purchases. Excessive landholdings might then have been addressed by a number of mechanisms including that suggested in Normanby's instructions to Hobson of imposing a tax on uncleared lands. Perhaps it was open to the courts to say that the 14 January 1840 proclamation was an act of state they could not go behind and which prevented recognition in the courts of native land title held by Europeans that had not been investigated and confirmed by a Crown grant.²³⁰ To do otherwise would undermine the effort to get landholders to submit their purchases for investigation. (Busby himself, both before and after the Treaty, was in favour of investigation of all European purchases, and never changed his opinion on the appropriateness of this procedure.²³¹ Nor had he ever suggested that he was entitled as of right to Crown grants in respect of his purchases.)

However, the land claims legislation went a lot further. Not only did it impose significant conditions on the circumstances in which Crown grant would issue (particularly in the limitation to 2,560 acres), but more importantly it treated Māori property in lands as an occupation interest only and denied Europeans any property in land not granted by the Crown as a matter of grace (a position arrived at in application of "doctrines" of pre-emption and tenure). This was a view acted on by the New Zealand Supreme Court in *Symonds*. It is not clear that in *Symonds* the Court had in mind the impact for Māori ownership, as distinct from the interests of European purchasers from Māori. But, as the editorial in *The Southern Cross* on *Busby v McKenzie* appreciated,²³² the reasoning had

229 In addition to Busby's own litigation, the evasion is to be seen in Martin CJ's handling of the Meurant case. See *Meurant v Sinclair* and *Meurant v Keir* as reported in *The Southern Cross* (Auckland): 23 May 1854, at 2-3; 26 May 1854, at 3; 1 December 1854, at 3; 23 February 1855, at 3.

230 Such argument would have to meet the case that the doctrine of act of state could not be invoked against a British subject (perhaps on the ground that such immunity for British subjects applied only on British soil).

231 See for example Busby's speech to the Legislative Council of New South Wales on 30 June 1840, as reported in *The Colonist* (Sydney, 6 July 1840) at 2, cols 4-5 (referring to his dispatch of 16 June 1837 to the Colonial Secretary of New South Wales, also copied to London).

232 See text accompanying n 126 above.

implications for native owners too and was to lead in short order to the *Wi Parata*²³³ mindset as the circumstances of New Zealand society were transformed by immigration and deterioration in race relations.²³⁴ Whether consideration of Busby's arguments in London in the late 1850s might have led to a different perspective emerging is fascinating to contemplate.

Arguments deserving of more detached consideration and which have continued to rumble on in New Zealand history and law include the basis on which British sovereignty was acquired (whether New Zealand was a ceded or settled colony), the nature of Māori interests in land (whether full ownership or a right of occupation), the applicability of the American case law (even if properly understood) particularly in the light of Story's reported view that the Treaty displaced any such doctrine in New Zealand, the claimed doctrine of Crown pre-emption, the application and effect of the doctrine of tenures applied in England, the ability of colonial courts to recognise native title, and the legal effect in municipal law of the Treaty of Waitangi.

Busby's arguments on these questions were not as preposterous to his contemporaries (in New Zealand and arguably in the Colonial Office²³⁵) as they came to seem in New Zealand. If reassessed today they may indeed find support in the work of modern international scholars such as Kent McNeil and Stuart Banner,²³⁶ or, closer to home, in the (pre-*Wi Parata*) *Kauwaeranga* judgment of

233 *Wi Parata v Bishop of Wellington and Attorney-General* (1877) 3 NZ Jur (NS) SC 72.

234 Busby himself reflected these changing attitudes as a 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 claims as a purchaser pre-Treaty, he eventually (when taxed with inconsistency) expressed the view that Māori themselves, in relinquishing their right to sell land in exchange for the Crown right of pre-emption under the Treaty, had "returned" their lands "within the category of Aboriginal Titles as recognized by all the Colonizing Powers of Europe". William Atkin to the Editor of *The Aucklander*, and the Editor's Reply, *The Aucklander* (Auckland, 16 September 1862) at 3. See also Busby *Remarks Upon A Pamphlet Entitled 'The Taranaki Question, By Sir William Martin, DCL, Late Chief Justice of New Zealand'* (Philip Knust, Southern Cross Office, Auckland, 1860).

235 See for example Stephen to Vernon Smith (28 July 1840) TNA, CO 209/4, 343a-344a (the date of this minute is established by Mark Hickford "Decidedly the Most Interesting Savages on the Globe: An Approach to the Intellectual History of Māori Property Rights, 1837-53" (2006) 27 *History of Political Thought* 122 at 151 and n 143); Stephen to Vernon Smith (28 December 1840) TNA, CO 209/8, 443a-450b, resulting in Russell to Hobson (28 January 1841) TNA, CO 209/8, 454a-456b; Hopes to Somes (10 January 1843) TNA, CO 209/8, 388a-400a (and preceding drafts and minutes at TNA, CO 209/8, 402a-439b); Stanley to Fitzroy (13 August 1844) "Papers relative to the affairs of New Zealand", at 3-9, *GBPP* (1845) xxxiii (1) 3-9.

236 McNeil *Common Law Aboriginal Title*, above n 150; Stuart Banner *How the Indians Lost Their Lands: Law and Power on the Frontier* (Harvard University Press, Cambridge, Massachusetts, 2005) and *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press, Cambridge, Massachusetts, 2007).

Chief Judge Fenton of the Native Land Court, an earlier "lost case" brought to light by Alex Frame.²³⁷

X POSTSCRIPT

Busby's land claims were eventually resolved after an unrelenting and intemperate campaign over the next decade. Francis Dillon Bell as Land Claims Commissioner under the Land Claims Settlement Act 1856 tried to bring all Busby's land claims together for resolution. He first called in the Waitangi claims for investigation.²³⁸ Busby for his part took advantage of the Land Claims Settlement Extension Act 1858 to bring the Ngunguru claim within the process for the first time in June 1859.²³⁹ The Ruakaka and Waipu claims were brought within Bell's attempts to achieve overall settlement. Busby was largely unco-operative throughout. He seemed unable to appreciate that Bell – perhaps looking to a large surplus land advantage to the Crown²⁴⁰ – was attempting a solution that was generous to Busby. Pig-headedly, Busby refused to surrender his Waitangi grants as he was required to do under the Land Claims Settlement Act 1856, precipitating their cancellation in 1860.²⁴¹ He also tried, unsuccessfully, to sue the Attorney-General for slander of his title in calling in the Waitangi grants,²⁴² and later to injunct Bell from proceeding with the investigation.²⁴³ He sued Bell for libel on the basis of a note Bell had made on one of Busby's many memorials and when the matter went to trial, insisted that Governor Grey appear on subpoena to produce this and other documents. The jury, presided over by Arney CJ, took seven minutes to find for Bell.²⁴⁴ In respect of the Ngunguru lands, where arguably it was an indulgence for Bell to even entertain the claim given the date of purchase,²⁴⁵ Busby disputed interpretation of the legislation, and refused to

237 Alex Frame "Kauwaeranga Judgment" (1984) 14 VUWLR 227.

238 See Bell to Whitaker (5 January 1858), above n 2, at 9.

239 Busby to Bell (23 June 1859) enclosing Busby's "Notification of Claim" dated 23 June 1859, ANZ, ACGO 8347 IA15/1/5f.

240 Stirling "Not With the Sword But With the Pen", above n 2, at 1626, identifies this possible motivation on the part of Bell.

241 See Bell to Whitaker, 5 January 1858, above n 2, at 9-10; Bell memorandum, 26 August 1861, above n 2, at 1-2; Memorandum of Daniel Pollen, 17 April 1868, at 3, ANZ, ACGO 8347 IA15/1/5b.

242 Eric Ramsden *Busby of Waitangi: H.M.'s Resident at New Zealand, 1833-40* (AH and AW Reed, Wellington, 1942) at 318-319.

243 See Busby's 1862 notations on his 1858 affidavit and "argument", above n 124.

244 *Busby v Bell* SC Auckland, 7 June 1862, reported in *The Southern Cross* (Auckland, 9 June 1862) at 3; and *Busby v Bell* SC Auckland, 15 and 16 December 1862, reported in *The Southern Cross* (Auckland, 16 December 1862) at 3-4 and (Auckland, 17 December 1862) at 3-4; Ramsden *Busby of Waitangi*, above n 242, at 338-341.

245 Bell memorandum, 9 March 1859, above n 2, at 5-6; Stirling "Not With the Sword But With the Pen", above n 2, at 1626.

permit survey even after the points of interpretation had been decided against him by Arney CJ on a case stated.²⁴⁶ In respect of the Ruakaka and Waipu lands, Bell seems to have tried to find a basis for treating Busby generously, asking the former Crown land purchase agent, Johnson, to advise whether the Crown had benefitted in its purchases by Busby's earlier purchases.²⁴⁷ Bell seems not to have been troubled by some evidence that, in respect of all claims, Māori were disputing boundaries.²⁴⁸ In his July 1862 report Bell suggested to the legislature legislative changes to enable a settlement with Busby that would recognise he had some valid claim to compensation in the Whangarei lands which could be met by a grant to him of 10,220 acres at Waitangi.²⁴⁹ The generosity of this suggestion can be seen when it is contrasted with the 2,560 acre maximum under the 1841 Ordinance and the 3,264 acre total grant originally made to Busby at Waitangi.

Thereafter the matter dragged on through the political processes. Busby went to London to make representations to the Colonial Secretary but was not given an interview.²⁵⁰ He had, however, some supporters in Wellington who carried on the campaign in both chambers. Ultimately they were successful in securing in 1867 the passage of the Land Claims Arbitration Act, a vehicle solely for resolving Busby's land claims.²⁵¹ After hearings between December 1867 and March 1868, the arbitrators, with the Crown appointed arbitrator in dissent,²⁵² gave their award by which Busby's claims were recognised in respect of 9,374 acres at Waitangi, 98,000 acres at Ruakaka and Waipu, and 45,000 acres at Ngunguru. Compensation amounting to £36,800 in scrip was awarded in respect of all lands apart from those at Waitangi, in respect of which Busby was to receive the land itself.²⁵³

246 See Stirling, *ibid*, at 1637-1639; Bell memorandum, 26 August 1861, above n 2, at 2-3; *Re the Claim of James Busby now pending in the Land Claims Commissioners Court* SC Auckland, 20 March 1860 per Arney CJ, ANZ, ACGO 8347 IA15/1/5f, reported in *The Southern Cross* (Auckland, 20 April 1860) at 4.

247 See Donald McLean to Johnson (26 August 1861); Johnson to McLean (16 September 1861); Johnson to McLean (21 October 1861); Johnson to Bell (13 November 1861): ANZ, ACFC 16153 OLC1/2/OLC14-24; Stirling "Not With the Sword But With the Pen", *ibid*, at 1613-1618 and 1622-1623.

248 Bell memorandum, 9 March 1859, above n 2, at 5; Bell memorandum, 26 August 1861, above n 2, at 2; Stirling, *ibid*, at 1511-1514 and 1626-1639.

249 "Report of the Land Claims Commissioner, 8th July 1862", above n 2; Bell memorandum, 26 August 1861, above n 2, at 2.

250 Stirling "Not With the Sword But With the Pen", above n 2, at 1514.

251 The Land Claims Arbitration Act 1867 31 Vict No 53.

252 Memoranda of Daniel Pollen, 6 February 1868 and 17 April 1868, ANZ, ACGO 8347 IA15/1/5b.

253 "Arbitrators' Award in the Case of James Busby, Esq, under 'The Land Claims Arbitration Act, 1867'" [1869] AJHR D11. See also Stirling "Not With the Sword But With the Pen", above n 2, at 1514-1520 and 1656-1659; Ramsden *Busby of Waitangi*, above n 242, at 345-347.

As historians have commented, this was an astonishing result for Busby.²⁵⁴ Matters were not finally resolved, however, for a further two years because of arguments between Wellington and the Auckland Province about who was to pay. Eventually in 1870, the dispute was compromised, with Busby to receive £23,000 in cash (paid in instalments) as well as the Waitangi lands awarded. As a result Busby relinquished all his land claims to Ruakaka, Waipu and Ngunguru.²⁵⁵ It is said that most of the cash received went in paying off Busby's debts.²⁵⁶ In any event he did not get to enjoy his victory long, dying in July 1871 in London where he had gone for an eye operation.²⁵⁷ A Crown grant in respect of his Waitangi land was not issued to his estate until September 1872.²⁵⁸

254 See for example Stirling, *ibid*, at 1520, 1658 and 1663; Jack Lee *The Old Land Claims in New Zealand* (Northland Historical Publications Society Inc, Kerikeri, 1993) at 54-55 (commenting on the extent of the claim recognised by the arbitrators at Ruakaka-Waipu).

255 Stirling, *ibid*, at 1659-1660 and 1662; Ramsden *Busby of Waitangi*, above n 242, at 347-359.

256 Ramsden, *ibid*, at 359-360; Stirling, *ibid*, at 1662.

257 Ramsden, *ibid*, at 359-364.

258 Stirling "Not With the Sword But With the Pen", above n 2, at 1518 and 1520; Lee *The Old Land Claims*, above n 254, at 54.