1948

NEW ZEALAND

REPORT OF ROYAL COMMISSION TO INQUIRE INTO AND REPORT ON CLAIMS PREFERRED BY MEMBERS OF THE MAORI RACE TOUCHING CERTAIN LANDS KNOWN AS SURPLUS LANDS OF THE CROWN

Laid on the Tables of both Houses of the General Assembly by Command of His Excellency

Royal Commission to Inquire into and Report on Claims preferred by Members of the Maori Race touching certain Lands known as Surplus Lands of the Crown

GEORGE THE SIXTH by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith.

To Our Trusty and Well-beloved Counsellor SIR MICHAEL MYERS, Knight Grand Cross of Our Most Distinguished Order of St. Michael and St. George, and to Our Trusty and Well-beloved HANARA TANGIAWHA REEDY, of Ruatoria, Farmer, and ALBERT MOELLER SAMUEL, of Auckland, Retired: GREETING.

WHEREAS, prior to the assumption of British sovereignty over the Islands of New Zealand, divers tracts or portions of land therein were claimed to be held by divers persons other than members of the aboriginal race (hereinafter referred to as land claimants) by virtue of purchases, or pretended purchases, gifts, or pretended gifts, conveyances, or pretended conveyances, or other titles either mediately or immediately from one or more of the Chiefs and other members of the aboriginal tribes inhabiting New Zealand:

And whereas by divers instructions under the hand of one of Her Majesty's principal Secretaries of State, Proclamations of the Governor of New South Wales and the Lieutenant-Governor of New Zealand, an Act of the Colony of New South Wales, and Ordinances and Acts of the Colony of New Zealand it was in effect provided that titles to land in New Zealand should not be recognized which did not proceed from or were not or should not be allowed by Her Majesty :

And whereas by the Land Claims Ordinance of 1841, Session 1, No. 2, it was enacted and ordained, amongst other things, that the sole and absolute right of pre-emption from the aboriginal inhabitants of the Colony of New Zealand vested in and could only be exercised by Her Majesty, Her heirs, and successors, and that all titles to land in the said Colony of New Zealand which were held or claimed by virtue of purchases, or pretended purchases, gifts, or pretended gifts, conveyances, or pretended conveyances, leases, or pretended leases, agreements, or other titles either mediately or immediately from the Chiefs or other individuals or individual of the aboriginal tribe inhabiting the said Colony and which were not or might not thereafter be allowed by Her Majesty, Her heirs, and successors, were and the same should be absolutely null and void :

And whereas, following upon a recital that Her Majesty had in certain instructions been pleased to declare Her Majesty's gracious intention to recognize claims to land which might have been obtained on equitable terms from the said Chiefs or aboriginal inhabitants or inhabitant of the said Colony of New Zealand and which might not be prejudicial to the present or prospective interests of such of Her Hajesty's subjects who had already resorted or who might thereafter resort to and settle in the said Colony, power was conferred on the Governor to appoint Commissioners who should have full power and authority to hear, examine, and report on all claims to grants of land in virtue of any of the titles aforesaid in the said Colony of New Zealand :

And whereas by divers other Ordinances and Acts of the General Assembly further provision was from time to time made in the premises :

And whereas by Proclamations of the Governor bearing date respectively the twenty-sixth day of March, one thousand eight hundred and forty-four, and the tenth day of October, one thousand eight hundred and forty-four, Her Majesty's sole and absolute right of pre-emption from the said aboriginal inhabitants was or purported to be waived to the extent therein appearing :

And whereas under divers of the enactments aforesaid Commissioners were appointed to examine into and report on the land claims, whether arising out of dealings with the aboriginal inhabitants of the Colony

prior to the establishment of British sovereignty or since that period with the sanction of the Government or under the Proclamations aforesaid:

And whereas, in accordance with the recommendations of the aforesaid Commissioners, grants of land were made and issued out of lands which had been the subject of such dealings as aforesaid (whether prior to the establishment of British sovereignty or thereafter), and by reason of the limitations imposed by certain of the Ordinances and Acts hereinbefore referred to, parts only of certain areas the subject of the said dealings were granted by the Crown to the land claimants, the remaining parts of such areas (hereinafter referred to as surplus lands) remaining demesne lands of the Crown:

And whereas in and by petitions to Parliament and otherwise members of the Maori race have from time to time claimed and contended that the surplus lands should have reverted to the members of that race who would but for the purchases, gifts, conveyances, or other agreements aforesaid have been the owners thereof according to their customs and usages or to their successors by Native title:

And whereas the Government has not admitted such claims and contentions as aforesaid but is desirous that the members of the Maori race so claiming and contending should be afforded an opportunity of pleading and proving the justice and merit of their claims and contentions to the end that if those claims and contentions are well founded in equity and good conscience the General Assembly may be enabled to consider what relief (if any) should be accorded or granted to them:

Now know ye that We, reposing trust and confidence in your impartiality, knowledge, and ability, do hereby nominate, constitute, and appoint you, the said

Sir Michael Myers,
Hanara Tangiawha Reedy, and
Albert Moeller Samuel,

to be a Commission—

(*a*) To inquire in a general way into the transactions by reason of which certain parcels of land, being demesne lands of the Crown, became surplus lands as aforesaid, and particularly into any specific transactions the terms of which may be brought before you by any person interested, including transactions relating to the lands referred to in the Schedule hereto, and to report whether, having regard to the circumstances in which the lands of which the surplus lands formed part were originally alienated or disposed of by the aboriginal owners thereof, the surplus lands or any part thereof ought in equity and good conscience to have been or be returned to or vested in the former aboriginal owners thereof or have been and be regarded as Native land.

(*b*) If it be reported that the surplus lands or any part thereof ought in equity and good conscience to have been so returned or vested or so regarded, then to recommend what compensation in money or money's worth should now be granted to the representatives or descendants of the aboriginal owners, parties to such original alienation or disposition as aforesaid.

(*c*) To inquire into and report upon the claims and allegations made in the petitions referred to in the Schedule hereto so far as such claims and allegations are not covered by the preceding paragraphs of this order of reference, and to recommend what relief (if any) should be accorded in respect of the prayers of the several petitions.

And in any case where you shall see fit to recommend that compensation in money or money's worth should in equity and good conscience be granted in respect to any of the matters confided to you by these Presents, you shall further report for whose benefit—that is to say, whether that of any particular person, hapu, tribe, or other group or class of persons—the amount of such compensation should be appropriated and applied :

And we do hereby appoint you, the said

Sir Michael Myers,

to be Chairman of the said Commission :

And for the better enabling you to carry these Presents into effect, you are hereby authorized and empowered to make and conduct any inquiry under these Presents at such times and places as you deem expedient, with power to adjourn from time to time and place to place as you think fit, and so that these Presents shall continue force, and the inquiry may at any time and place be resumed although not regularly adjourned from time to time or from place to place :

And you are hereby strictly charged and directed that you shall not at any time publish or otherwise disclose save to His Excellency the Governor-General, in pursuance of these Presents or by His Excellency's direction, the contents of any report so made or to be made by you or any evidence or information obtained by you in the exercise of the powers hereby conferred upon you except such evidence or information as is received in the course of a sitting open to the public :

And you are hereby authorized to report your proceedings and findings under this Our Commission from time to time if you shall judge it expedient so to do :

And, using all due diligence, you are required to report to His Excellency the Governor-General in writing under your hands not later than the thirty-first day of March, one thousand nine hundred and forty-seven, your findings and opinions on the matters aforesaid, together with such recommendations as you think fit to make in respect thereof :

And, lastly, it is hereby declared that these Presents are issued under the authority of the Letters Patent of His late Majesty dated the eleventh day of May, one thousand nine hundred and seventeen, and under the authority of and subject to the provisions of the Commissions of Inquiry Act, 1908, and with the advice and consent of the Executive Council of the Dominion of New Zealand.

SCHEDULE

(1) Petition No. 120 of 1923, of Heta Kiriwi and others, concerning the Aurere Block. (File N.D. 1924/439.)

(2) Petition No. 180 of 1924, of Hare Popata and another, concerning the Pukewhau Block. (File N.D. 1925/314.)

(3) Petition No. 183 of 1924, of Keita te Ahere, concerning the Whakaangi Block. (File N.D. 1925/307.)

(4) Petition No. 143 of 1925, of Riri N. Kawiti and others, concerning the Opua Block. (File N.D. 1925/365.)

(5) Petition No. 24 of 1938, of Kipa Roera, concerning the Manawaora Block. (File N.D. 5/13/58.)

(6) Petition No. 97 of 1938, of George Marriner and others, concerning the Tapuae and Motukaraka Blocks. (File N.D. 5/13/125.)

In witness whereof We have caused this Our Commission to be issued and the Seal of Our Dominion of New Zealand to be hereunto affixed at Wellington, this fifth day of October, in the year of our Lord one thousand nine hundred and forty-six, and in the tenth year of Our Reign.

Witness Our Trusty and Well-beloved Sir Bernard Cyril Freyberg, on whom has been conferred the Victoria Cross, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, Knight Commander of Our Most Honourable Order of the Bath, Knight Commander of Our Most Excellent Order of the British Empire, Companion of Our Distinguished Service Order, Lieutenant-General in Our Army, Governor-General and Commander-in-Chief in and over Our Dominion of New Zealand and its Dependencies, acting by and with the advice and consent of the Executive Council of the said Dominion.

[L.S.]

B. C. FREYBERG, Governor-General.

By His Excellency's Command—
P. FRASER, Prime Minister.

Approved in Council—
W. O. HARVEY, Clerk of the Executive Council.

Extending Period within which the Commission appointed to Inquire into and Report on Claims preferred by Members of the Maori Race touching certain Lands known as Surplus Lands of the Crown shall report

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GEORGE THE SIXTH by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith:

To Our Trusty and Well-beloved Counsellor SIR MICHAEL MYERS, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, and to Our Trusty and Well-beloved HANARA TANGIAWHA REEDY, of Ruatoria, Farmer, and ALBERT MOELLER SAMUEL, of Auckland, Retired: GREETING.

WHEREAS by Our Warrant of date the fifth day of October, one thousand nine hundred and forty-six, issued under the authority of the Letters Patent of His late Majesty dated the eleventh day of May, one thousand nine hundred and seventeen, and under the authority of and subject to the provisions of the Commissions of Inquiry Act, 1908, and with the advice and consent of the Executive Council, you, the said

Sir Michael Myers,
Hanara Tangiawha Reedy, and
Albert Moeller Samuel,

were appointed to be a Commission to inquire into and report upon certain claims preferred by members of the Maori race touching certain lands known as Surplus Lands of the Crown as set forth in the said Warrant:

And whereas by Our said Warrant you were required to report not later than the thirty-first day of March, one thousand nine hundred and forty-seven, your findings and opinions on the matters thereby referred to you:

And whereas it is expedient that the time for so reporting should be extended as hereinafter provided:

Now, therefore, We do hereby extend until the thirty-first day of December, one thousand nine hundred and forty-seven, the time within which you are so required to report:

And We do hereby confirm the said Warrant and Commission save as modified by these presents.

In witness whereof, We have caused these presents to be issued and the Seal of Our Dominion of New Zealand to be hereunto affixed at Wellington, this nineteenth day of March, in the year of our Lord one thousand nine hundred and forty-seven, and in the eleventh year of our Reign.

Witness Our Trusty and Well-beloved Sir Bernard Cyril Freyberg, on whom has been conferred the Victoria Cross, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, Knight Commander of Our Most Honourable Order of the Bath, Knight Com-
[L.S.] mander of Our Most Excellent Order of the British Empire, Companion of Our Distinguished Service Order, Lieutenant-General in Our Army, Governor-General and Commander-in-Chief in and over Our Dominion of New Zealand and its Dependencies, acting by and with the advice and consent of the Executive Council of the said Dominion.

B. C. FREYBERG, Governor-General.

By His Excellency's Command—
D. G. SULLIVAN, For the Prime Minister.

Approved in Council—
T. J. SHERRARD, Acting Clerk of the Executive Council.

Extending Period within which the Commission appointed to Inquire into and Report on Claims preferred by Members of the Maori Race touching certain Lands known as Surplus Lands of the Crown shall report

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GEORGE THE SIXTH by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith.

To Our Trusty and Well-beloved Counsellor SIR MICHAEL MYERS, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, and to our Trusty and Well-beloved HANARA TANGIAWHA REEDY, of RUATORIA, Farmer, and ALBERT MOELLER SAMUEL, of Auckland, Retired: GREETING.

WHEREAS by Our Warrant of date the fifth day of October, one thousand nine hundred and forty-six, issued under the authority of the Letters Patent of His late Majesty dated the eleventh day of May, one thousand nine hundred and seventeen, and under the authority of and subject to the provisions of the Commissions of Inquiry Act, 1908, and with the advice and consent of the Executive Council, you, the said

Sir Michael Myers,
Hanara Tangiawha Reedy, and
Albert Moeller Samuel,

were appointed to be a Commission to inquire into and report upon certain claims preferred by members of the Maori Race touching certain lands known as Surplus Lands of the Crown as set forth in the said Warrant:

And whereas by Our said Warrant you were required to report not later than the thirty-first day of March, one thousand nine hundred and forty-seven, your findings and opinions on the matters thereby referred to you:

And whereas by Our further Warrant of date the nineteenth day of March, one thousand nine hundred and forty-seven, the time within which you were so required to report was extended until the thirty-first day of December, one thousand nine hundred and forty-seven:

And whereas it is expedient that the time for so reporting should be further extended as hereinafter provided:

Now, therefore, We do hereby extend until the thirtieth day of June, one thousand nine hundred and forty-eight, the time within which you are so required to report:

And we do hereby confirm the said Warrants and Commission save as modified by these presents.

In witness whereof We have caused these presents to be issued and the Seal of Our Dominion of New Zealand to be hereunto affixed at Wellington, this tenth day of December, in the year of our Lord one thousand nine hundred and forty-seven, and in the eleventh year of Our Reign.

Witness Our Trusty and Well-beloved Sir Bernard Cyril Freyberg, on whom has been conferred the Victoria Cross, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, Knight Commander of Our Most Honourable Order of the Bath, [L.S.] Knight Commander of Our Most Excellent Order of the British Empire, Companion of Our Distinguished Service Order, Lieutenant-General in Our Army, Governor-General and Commander-in-Chief in and over Our Dominion of New Zealand and its Dependencies, acting by and with the advice and consent of the Executive Council of the said Dominion.

B. C. FREYBERG, Governor-General.

By His Excellency's Command—

P. FRASER, Minister of Maori Affairs.

Approved in Council—

W. O. HARVEY, Clerk of the Executive Council.

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GEORGE THE SIXTH by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith.

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WHEREAS by Our Warrant of date the fifth day of October, one thousand nine hundred and forty-six, issued under the authority of the Letters Patent of His late Majesty dated the eleventh day of May, one thousand nine hundred and seventeen, and under the authority of and subject to the provisions of the Commissions of Inquiry Act, 1908, and with the advice and consent of the Executive Council, you the said

Sir Michael Myers,
Hanara Tangiawha Reedy, and
Albert Moeller Samuel,

were appointed to be a Commission to inquire into and report upon certain claims preferred by members of the Maori Race touching certain lands known as Surplus Lands of the Crown as set forth in the said Warrant:

And whereas by Our said Warrant you were required to report not later than the thirty-first day of March, one thousand nine hundred and forty-seven, your findings and opinions on the matters thereby referred to you:

And whereas by Our further Warrant of date the nineteenth day of March, one thousand nine hundred and forty-seven, the time within which you were so required to report was extended until the thirty-first day of December, one thousand nine hundred and forty-seven:

And whereas by Our further Warrant of date the tenth day of December, one thousand nine hundred and forty-seven, the time within which you were so required to report was extended until the thirtieth day of June, one thousand nine hundred and forty-eight:

And whereas it is expedient that the time for so reporting should be further extended as hereinafter provided:

Now, therefore, We do hereby extend until the thirty-first day of December, one thousand nine hundred and forty-eight, the time within which you are so required to report:

And We do hereby confirm the said Warrants and Commission save as modified by these presents.

In witness whereof We have caused these presents to be issued and the Seal of Our Dominion of New Zealand to be hereunto affixed at Wellington, this twenty-third day of June, in the year of our Lord one thousand nine hundred and forty-eight, and in the twelfth year of Our Reign.

Witness Our Trusty and Well-beloved Sir Bernard Cyril Freyberg, on whom has been conferred the Victoria Cross, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, Knight Commander of Our Most Honourable Order of the Bath, Knight Commander of Our Most Excellent Order of the British Empire, Companion of Our Distinguished Service Order, Lieutenant-General in Our Army, Governor-General and Commander-in-Chief in and over Our Dominion of New Zealand and its Dependencies, acting by and with the advice and consent of the Executive Council of the said Dominion.

[L.S.]

B. C. FREYBERG, Governor-General.

By His Excellency's Command—

P. FRASER, Minister of Maori Affairs.

Approved in Council—

T. J. SHERRARD, Clerk of the Executive Council.

To His Excellency the Governor-General, Lieutenant-General Sir Bernard Freyberg, V.C., G.C.M.G., K.C.B., K.B.E., D.S.O.

MAY IT PLEASE YOUR EXCELLENCY,—

SURPLUS LANDS COMMISSION

1. We have the honour to report that we have now completed the inquiry committed to us by Your Excellency's Commission dated the 5th October, 1946.

2. We held a preliminary sitting at Auckland on the 21st November, 1946. It was then represented to us by counsel for both the Crown and the Maoris concerned that the preparation of their respective cases required a vast amount of labour and research, and that it would be several months before they could hope to be ready. They thought, however, that they could be ready in about three months to address the Commission on the historical aspect of the case, and they suggested an adjournment accordingly upon the understanding that, after their addresses had been made on the historical aspect, there should be another adjournment to enable them to make the further investigations necessary for the purpose of placing the whole matter before us in detail.

3. The Commission agreed to the suggestion of counsel and adjourned until the 25th February, 1947. We sat at Auckland on that day and continued our sittings on the 26th, 27th, and 28th days of February.

4. At the commencement of our sitting at Auckland the Maoris asked that we should, instead of sitting there, adjourn to some place in the North, preferably Kaikohe, as there were large numbers of Maoris interested in the subject-matter of the inquiry who would like to be present so that they could hear everything that was said. As a matter of fact, a number of the northern Maoris had come to Auckland, and there were present, when our sitting at Auckland commenced, about one hundred persons altogether, including Auckland residents and visitors from the North. The suggestion was that we should go to Kaikohe, and, as it was said there was no hall large enough to accommodate all the Maoris who might be expected to attend, that we should hold our sitting in an open marae. The suggested arrangement was obviously impracticable, and counsel for the Maoris said in answer to questions from the Commission that they could not support the request, though they considered it their duty, having been asked by the Maoris to do so, to bring the request before the Commission. Eventually it was decided that we should proceed with the addresses of counsel on the historical side of the case, and that, at a later sitting to be held at Kaikohe, the historical aspect of the case could be made the subject of further addresses, or that the addresses to be made in Auckland should be interpreted to the Maoris who might assemble at Kaikohe.

5. On the 28th February the addresses on the historical side of the case having been completed, the question arose as to when the Commission should continue its sittings. Counsel represented that their investigation and researches would occupy several months, and eventually we provisionally fixed the 10th June, 1947, at Kaikohe as the time and place for the resumption of our sittings. We were subsequently informed that counsel would not be ready to proceed then, and that their investigation would take several months longer; and accordingly, with their consent, we postponed our sitting, which was eventually resumed on the 10th October, 1947.

6. We sat at Kaikohe in the Magistrate's Court. In order to meet the representations of the Maoris made to us at Auckland in February we arranged for the erection of a large marquee and for the installation of amplifiers so that any Maoris who could not find accommodation in the court-room could hear in the grounds in front of the court, or, if the weather was bad, in the marquee at the back, everything that went on.

7. When the proceedings opened the Maoris made a request that we should hold sittings also in such places as Mangonui, Russell, and Kaitaia. Upon our asking why such sittings should be held, the only answer was that some of the "surplus lands" were in those localities. If any witnesses had had to be called who lived in those neighbourhoods, we should certainly have been disposed to accede to the request; but that was not the case, and counsel for the Maoris said quite frankly that they could see no advantage to be gained or useful purpose to be served by holding sittings in any other places than Kaikohe. They agreed that, inasmuch as the presentation of the case consisted wholly of documentary matter and addresses, and no oral evidence would be, or could be, tendered, the ends of justice did not call for any sitting outside Kaikohe.

8. We accordingly proceeded with the inquiry and sat on the 10th, 13th, 14th, 15th, 16th, 17th, 21st, and 22nd days of October, 1947, when counsel addressed us at considerable length, and those addresses involved an examination of hundreds of files as well as other exhibits. The opportunity was also taken at the commencement of the sitting of explaining to the Maori audience the purport of the addresses that had been made in Auckland in February, and this was done partly by the oral statement of counsel and partly by the reading of a Maori translation by the Commission's interpreter.

9. Even the sittings at Kaikohe were not sufficient to conclude the inquiry. Counsel explained that there was still a great deal of research and investigation work to be done in order to place before the Commission all the information that would be required to enable us to complete our inquiry and make our report, and in order to prepare their final addresses counsel required information which involved the necessity of a further and complete examination of all the files by officers of the Lands and Survey Department. All this took several months, and it was not until May, 1948, that counsel were ready. Accordingly, the Commission sat in Auckland on the 11th, 12th, 13th, and 14th May, when the final addresses were made.

10. We have made this somewhat lengthy exordium for two reasons. First, we think that we should explain why the inquiry and the preparation of our reports have taken so long a time, and point out that the delay has not been due to the fault of either the Commission or counsel. Secondly, we desire to emphasize that every latitude has been given to the Maoris and their counsel, and that there can be no justification for any protests or complaints hereafter that the very fullest opportunity was not given to the Maoris of being represented and heard. It should be added that, as well as being represented by counsel provided by the Government at the expense of the Crown, the Maoris were notified by public advertisement in the press and by information circulated through the various Maori Land Court offices of the setting-up of the Commission and that any of them who so desired were entitled to appear and be heard.

11. The lengthy investigation that has had to be made by both Counsel and the Commission can be understood only if the complexity of the subject-matter be appreciated. The transactions to be investigated are for the most part more than a century old; they are several hundreds in number; each of them has been the subject of a separate file; and, in addition several voluminous general files have called for careful examination and consideration. The officers of the Lands and Survey Department have done their best to simplify our work by making a typewritten précis of each file so as to avoid the necessity of our having to read all the old files, which were, of course, in manuscript, some of it being badly faded.

12. We have considered the précis of each file carefully, and, in addition, we have wherever necessary examined the original file. The volume of our own work may be gauged from the fact that, in the estimation of the Chairman, it has involved the equivalent of the hearing and determination of over three hundred actions in the Supreme Court. Quite apart from the sittings of the Commission, we were necessarily engaged in independent individual research for many months, including, of course, the perusal of

all the relevant documents. This was all necessary to qualify us for the conferences which we have had to hold amongst ourselves and which have themselves occupied several weeks.

13. Mr. Commissioner Bell was occupied for about six years in investigating all these land claims under the Land Claims Settlement Act, 1856. Writing of the task that he had performed, he referred to it as "a task which has turned out to be incomparably more difficult and responsible than I thought, and which I may say I should certainly not have undertaken if I had known what it was." We have had to survey the effects of Mr. Commissioner Bell's decisions and carry out, as it were, an extension of his work. That has been a lengthy task, not nearly so lengthy, it is true, as Mr. Commissioner Bell's, but sufficiently lengthy, difficult, and responsible to make us sympathize with him in his somewhat plaintive observation.

14. During the various sittings held by the Commission, Mr. V. R. S. Meredith and Mr. F. McCarthy appeared for the Crown, while the Maoris were represented by Mr. H. O. Cooney and Mr. C. A. Herman, who were assisted by Mr. Lou Parore; and certainly it will not be open to either side to complain that its case has not been presented with very great care and ability. But, while giving every credit to counsel for their very competent presentation of their respective cases, it would be ungracious on our part if we failed to express our deepest sense of indebtedness to Mr. Darby, of the Lands and Survey Department at Auckland, and Mr. Blane, the Secretary of the Commission. It was freely admitted by counsel on both sides that, without the great assistance that was given to them by those gentlemen, a proper presentation of the matters which the Commission has to consider would have been impossible. We have much pleasure in joining with counsel in their appreciation of the service which Mr. Darby and Mr. Blane have rendered, and we have no hesitation in saying that, without their help, our inquiry and investigation, if possible at all, would have taken a very much longer time. We would also commend the work of Mr. Healy, who worked in conjunction with Mr. Darby, and was a very useful and able coadjutor; and we would add a word of praise to the stenographers, Misses Hill and Cooper, of Auckland, for their excellent work in reporting the proceedings of the Commission.

15. Concisely stated, the task committed to us by Your Excellency's Commission is in substance to make inquiry regarding the position and history of what are known as the "surplus lands," and to report whether, having regard to the circumstances in which the lands of which those surplus lands formed part were originally alienated or disposed of by the aboriginal owners thereof, the surplus lands or any part thereof ought in equity and good conscience to have been returned to the former aboriginal owners thereof. If it be reported that the surplus lands or any part thereof ought in equity and good conscience to have been so returned, then we are directed to recommend what compensation in money or money's worth should now be granted to the representatives or descendants of the aboriginal owners who were parties to the original alienation or disposition.

16. We are also directed to inquire into and report upon the claims and allegations made in the petitions referred to in the Schedule to the Commission so far as such claims and allegations are not covered by the preceding general paragraphs of the order of reference (that is to say, by the paragraphs relating to "surplus lands" generally) and to recommend what relief (if any) should be accorded in respect of the prayers of the several petitions. We shall directly explain these petitions more particularly (though it will not be necessary to do so at very great length), but they may all really be disposed of in a few words. Not one of them raises the question of surplus lands as such, nor do the petitioners base their claims on considerations of equity and good conscience to "surplus land." What they do is to claim on other and altogether different grounds.

17. (i) *Petition No. 120 of 1923, of Heta Kiriwi and others*, relates to the *Aurere* Block; but the *Tangonge* Block has to be considered in conjunction with Aurere. There have been several petitions regarding the Tangonge Block, but they are not included in the schedule to the Commission, though the matter of this particular block has been specifically brought before us by letter from the secretary to the Pukepoto Tribal Committee. The land in both cases was the subject of purchase by one and the same person —namely, the Rev. J. Matthews—and these two purchases, and also the purchase of another block, have always been considered to have been more or less inter-related, as, indeed, they must be because of the provision in the Ordinance of 1841 prescribing a maximum area of 2,560 acres to be granted to any one person. The petitioners in respect of the Aurere Block prayed for relief upon the alleged ground that no arrangement had ever been made for sale of the land to a European or to the Crown, and that the land had been "confiscated." In the Tangonge case the prayer for relief was based upon an allegation that Mr. Matthews had promised to return part of the land to the Maoris. The Tangonge petition was in 1907 referred, under the Commissioners Act, 1903, to Mr. R. M. Houston, M.H.R., who reported that the land had been given back to the Native owners by Mr. Matthews, that it did not become "surplus land," and was and should still be Native land vested in the Native owners. The report was not adopted by the Government, and in 1924 there was a further petition by the Maoris which was referred to the Native Land Court pursuant to section 45 of the Native Land Amendment and Native Land Claims Adjustment Act, 1924, and was inquired into by Judge McCormick, who in his report dated 25th March, 1925, said that it was quite clear that no verbal or written promise, nor even a deed, by Mr. Matthews, could have any effect against the Crown, and that the Natives in law had no claim to the land. He added, however, "Whether there should be any concession to the Natives out of the bounty and equity of the Crown is a matter entirely for His Majesty's Advisers, and it would be improper for me to express any opinion on that." The whole matter was again the subject of consideration by Mr. Justice Sim's (Confiscated Lands) Commission in 1927. That Commission took the same view as Judge McCormick, and said: "From the evidence produced at the hearing of this petition it is evident that the Tangonge Block was sold by the Maori owners to the Rev. Joseph Matthews, and the petitioners have failed to prove that Mr. Matthews agreed to give any part of the block back to the vendors." We agree entirely with the views taken by Judge McCormick and Mr. Justice Sim's Commission; Mr. Houston was clearly wrong in saying that the land had not become "surplus lands." Mr. Justice Sim's Commission, however, said in this connection: "It is a question whether or not, in good conscience and equity, 'surplus lands' in purchases of that kind"—it must be remembered that the Commission had the special circumstances of the Tangonge transactions in mind—"should be treated as belonging to the original Native owners and not to the Crown, and we do not express any opinion on that question."

(ii) Reverting now to the Aurere petition, plainly any suggestion of confiscation is out of the question, and, even if the question involved were merely one of a promise by Mr. Matthews to return the land, clearly the land came within the category of "surplus lands," and in law, as Judge McCormick rightly says, the promise could not be effective. That, however, still leaves open the question which was expressly reserved by both Judge McCormick and Mr. Justice Sim's Commission and is now before us for consideration —that is to say, the question, there being surplus land in these cases, whether the Maori vendors would have had a right in equity and good conscience to the return of the surplus areas, and we have considered this petition on that basis. What we have said in regard to Aurere and Tangonge is said merely by way of explanation, though we doubt whether such explanation was really necessary, because Mr. Cooney expressly and correctly admitted that the grounds upon which the petitions were based could not be supported, and that the only question that arose for consideration in respect to the petitions was the question of surplus lands.

18. *Petition No. 180 of 1924, of Hare Popata and another*, relates to the *Pukewhau* Block. The petitioners prayed for an inquiry in order to find out by what right the Government took this land. The answer is that the case is one of straight-out surplus land, and we deal with it accordingly.

19. *Petition No. 183 of 1924, of Keita te Ahere*, which relates to the *Whakaangi* Block. The transactions in connection with this block are interrelated with those in the *Taemaro* Block, in respect of which there have been various petitions to Parliament, and we have considered the cases of the two blocks in conjunction. The story is a long and complicated one. Lands were sold to European purchasers prior to the advent of British sovereignty and were the subject of reference to the original Commissioners under the Land Claims Ordinances, and also later to Mr. Commissioner Bell. The lands are situate to the east of Mangonui Harbour, and the transactions provoked a conflict between two sets of Maoris, one led by Pororua and the other by Nopera Panakareao, and scrip was awarded to the purchasers representing the area of land for which in the ordinary course the Commissioners would have recommended a grant. The Crown therefore became in effect the purchaser, as standing in the shoes of the original claimants. However, the Crown was unable to obtain possession of the land because of the conflict between the two Maori Chiefs, and made a further payment to one of the Chiefs. Subsequently, in order to settle the troubles that had arisen, the Crown extinguished whatever rights or title the Maoris may have claimed to have remained in them by the payment of a further agreed sum. The whole question could only be one of surplus lands, and, even if there was any surplus in this case, any rights of whatsoever kind the Maoris might have had therein were extinguished by the Crown purchases from the Maoris.

20. *Petition No. 143 of 1925, of Riri M. Kawiti and others*, concerns the *Opua* Block. This petition claimed that the land had been wrongly taken by the Government, and had never been sold by the elders or any member of the tribe to whom the land belonged. There had been a previous petition about this block which had been referred to Mr. Houston, M.H.R., and he made his report (which included a finding in relation to the Tangonge Block as mentioned in paragraph 17 (i)) on the 22nd July, 1907. Several petitions, indeed, had been referred to Mr. Houston, and he reported that in the case of some of the lands mentioned in the schedule to the Commission (without mentioning specifically what those lands were) there were portions of surplus lands undisposed of by the Crown. He also reported that there were landless Natives residing in the locality of such surplus lands, and that, without prejudice to the Crown's legal right to such surplus lands, it would be an act of grace on the part of the Crown to confer portions of such lands on (*a*) the landless natives; or (*b*) on those who, but for the alleged sales, would have been the owners, according to Maori custom, of such lands; or (*c*) on both; and he recommended legislation with a view to portions of the surplus lands being set aside for such natives. No such legislation was in fact introduced. The petition that we have now under immediate consideration may be disposed of shortly by saying that there is no ground for the contention made in the petition that the land was wrongfully taken by the Government. That, however, still leaves open the question of surplus lands, and the case being one of straight-out surplus, we deal with it accordingly.

21. *Petition No. 24 of 1938, of Kipa Roera*, concerns the *Manawaora* Block. This is also a straight-out case of surplus lands, and the petition can be considered on no other basis. Mr. Cooney admitted that it should be dealt with in that way, and we are so dealing with it accordingly.

22. (i) *Petition No. 97 of 1938, of George Marriner and others*, concerns the *Tapuae* and *Motukaraka* Blocks. Originally Hone Hare and a number of other Maoris lodged a petition in 1926 for the return to them of the island of Motukaraka, containing 4 acres,

more or less. The petition was referred to Mr. Justice Sim's Commission for inquiry, and we think it desirable to repeat verbatim the report of that Commission. It is as follows :—

The petitioners in this petition pray "to have returned to them their island, Motukaraka, containing four acres, more or less." This island was purchased from the Maori owners by Thomas McDonnell in 1831, and a grant was issued to him under the Land Claims Settlements Acts on the 4th December, 1860, and the Native title has accordingly been extinguished. The petitioners, however, varied their claim at the hearing of their petition, and claimed the return of the Motukaraka Block on the mainland, amounting to 2,560 acres, or compensation in lieu thereof. Evidence showed that McDonnell purchased the Motukaraka Block from the Maori owners in 1831. In 1844 the purchase was inquired into by Commissioners Godfrey and Richmond. In a note on the report by the Commissioners it is stated that the Native owners admitted the payment they received and the alienation of the land described in the report. The Commissioners then recommended a grant of 2,560 acres to Thomas McDonnell within the boundaries of the report—that is, from Tokotoroa, in the Narrows, to the rocks in the Te Tapuwae Creek—as the balance of the area claimed by McDonnell was disputed by the Maoris. The boundaries mentioned in the report approximately coincide with the boundaries of the Motukaraka Block, the subject of this petition. A grant was issued to McDonnell for 2,560 acres at Motukaraka, the boundaries of which were as reported by Commissioners Godfrey and Richmond. After the passing of the Land Claims Act, 1856, this grant apparently was called in and a survey directed to be made for the purpose of issuing a new grant with a more accurate description of the land. Owing to the Taranaki war, it was thought best not to proceed with the survey of Motukaraka, and an exchange was made with McDonnell by which the Crown granted McDonnell land at Whangarei and took a conveyance endorsed on the original grant from McDonnell. Mr. John Curnin in 1885 reported upon the block, and recommended the Crown proceeding with the occupation of the land acquired from McDonnell. It appears that events long after the sale of the Motukaraka Block created the impression with the Maoris that the sale was not valid, but there is no good reason for disputing the finding of Commissioner Richmond in 1844 that the Maoris then acknowledged the sale of the block as defined later in the grant.

(ii) The finding of Mr. Justice Sim's Commission is really sufficient to dispose of the claim in the petition, but the same result arises from a consideration of the question of surplus lands on the principles we have applied in dealing with the whole topic. From no point of view can it be said that there is any surplus in this case to which the Maoris have a claim in equity and good conscience.

23. As previously stated, during the sittings that we held in Kaikohe and Auckland Mr. Cooney admitted frankly that the Maori petitioners in the various petitions to which we have referred could not succeed in obtaining the relief claimed by them in their petitions upon the grounds alleged in the petitions, and that the real and only valid ground upon which relief could be claimed is that there was an area of surplus land involved in the case of each petition, and that in each case the real and only question is whether the original Maori vendors of the land had a claim in equity and good conscience to the surplus. That was and is our own view, and in none of the petitions are we able to make any recommendation ; any portions of any of the lands referred to in the petitions which we find to be surplus lands in which the Maori vendors would have had a claim in equity and good conscience should for the reasons stated later be included *in globo* together with all other lands which may be found to be in the same category.

24. While on the subject of special cases, we may say that we have had various communications from Maoris in regard to their claims to surplus lands where there have been no petitions to Parliament. We do not think it necessary to make any reference to any of these communications. It is sufficient to say that in every case in which there appears to be any land coming within the description of surplus lands, whether or not it has been the subject of petition to Parliament or communication to us, we have considered the question whether the original vendors would have had a right in equity and good conscience to the return of the land.

25. There is one specific point which we think we should mention here. During our inquiry the Maoris made a request that any burial-grounds or sacred places that may exist on any of the "surplus lands" still in the possession of the Crown (in particular they mentioned Taemaro, Whakaangi, Opua, and Manawaora) should be

preserved. There exists ample statutory power in section 472 of the Native Land Act, 1931, to enable this to be done, and we assume that any necessary steps will be taken administratively as a matter of course. We would recommend that this be done.

26. It will have been seen from the foregoing paragraphs that in dealing with the Tangonge Block, where a promise by the original purchaser to give some of the land back was alleged, both Judge McCormick in 1925 and Mr. Justice Sim's Commission in 1927 suggested that there might be some question of equity and good conscience in connection with these surplus lands. Three Judges of the Native Appellate Court in 1942 made a similar suggestion in their judgment in the case of the *Motu Maire* and *Motu Orangi Islands*. In none of those cases, however, did the tribunal making the suggestion do more than suggest the possibility of the Maoris having some claim in equity and good conscience. They certainly expressed no opinion that there was any such claim; and, indeed, seeing that that question did not arise, it would not have been proper to express an opinion one way or the other. All that they did was to mention the point and leave it open. We apprehend that it is probably because of these various suggestions that the present Commission has been set up, and we understand the purpose of the Commission to be that we are to inquire into the very question which was expressly left open by Judge McCormick, Mr. Justice Sim's Commission, and the Judges of the Native Appellate Court—namely, whether the surplus lands or any part thereof ought in equity and good conscience to have been returned to or vested in the aboriginal owners who sold to the pakeha purchaser, or, in other words, whether the Maori vendors had a right in equity and good conscience to have the surplus lands returned to them.

27. Before the merits are examined of the general controversy whether the Maoris have a claim in equity and good conscience, we would refer again to the order of reference in the Commission. We are directed, in any case where we may see fit to recommend that compensation in money or money's worth should in equity and good conscience be granted in respect to any of the matters confided to us by the Commission, to report for whose benefit—that is to say, whether that of any particular person, hapu, tribe, or other group or class of persons—the amount of such compensation should be appropriated and applied. Although we have examined every case individually, it would be impracticable, in the event of compensation being ultimately given, after the lapse of one hundred years, and in view of the changed conditions during that period and the intermarriages that have taken place between members of the various tribes and hapus and families, to individualize the parties or persons to whom the compensation should be paid, and, even if the parties could be ascertained, to divide it in just proportions. Mr. Cooney expressly admitted—and we agree with him—that that would be a hopeless and impossible task; and this observation applies just as much to the specific petitions as to all the other individual cases in which it may appear that there are surplus lands to which the original vendors may have had originally a claim in equity and good conscience. While, therefore, it was necessary for us to examine every case individually for the purpose of ascertaining whether there was surplus land, and, if so, whether the original Maori vendors had any claim to such surplus in equity and good conscience, it is admitted by Mr. Cooney—and again in our view very properly admitted—that the only way in which the matter could be equitably dealt with to-day is to make a recommendation that the compensation, if any, shall be dealt with *in globo* for the benefit of the Maoris or of Maori institutions in the district or districts in which the surplus lands are located. We have examined the possibility, in the event of our making a recommendation that the Maoris have claims in equity and good conscience, of making any of the surplus lands that may still be held undisposed of by the Crown available for the benefit of the Maoris, but this would appear to be quite impracticable—the undisposed of lands are not of any considerable aggregate area, are scattered in various districts, and are not lands which would be suitable for profitable or successful occupation by the Maoris.

28. We are agreed that in the case of many transactions there was an area of surplus land to which the Maori vendors would have had no right in equity and good conscience but that in a number of other transactions where there was an area of surplus land they would have had a claim in equity and good conscience to the whole or part of such area. We are agreed, too, that some compensation should be paid. We regret, however, that we are unable to agree on a recommendation as to what that sum should be—Messrs. Samuel and Reedy hold one view, the Chairman another. In these circumstances, we consider it the best course—and, indeed, the only course—that we should submit the separate memoranda which are appended to this report, stating our respective views and giving full and detailed reasons therefor.

We have the honour
to be,

Your Excellency's humble and obedient servants,

MICHAEL MYERS, Chairman.
A. M. SAMUEL, Member.
H. T. REEDY, Member.

Wellington, 18th October, 1948.

MEMORANDUM BY MESSRS. SAMUEL AND REEDY

1. The Commission unanimously agreed that the Maoris have an equity in 87,582 acres of surplus lands, but disagreed on the question of value, and it now remains for us to state our reasons for arriving at a different conclusion to that of the Chairman. But, before doing so, we feel that, as this is one of the oldest Maori claims against the Crown, we consider it essential to present a brief history of the early land transactions in New Zealand and the ceding of sovereignty to Queen Victoria under the Treaty of Waitangi.

2. The problem of "surplus lands" is a legacy inherited by the people of to-day from the early days of colonization of this country, dating back to the period when the primitive inhabitants of these islands met for the first time the full force and impact of a vigorous and more highly civilized race. The weaker people lost much through this contact, but, on the other hand, gained a great deal in other respects, for, from the degradation of anthropophagy to the attainment of Christianity, from the depths of savagery, to the acting Prime Ministership of New Zealand in the comparatively short space of less than one hundred years is an unheard of achievement in racial relationships between brown and white men.

3. The frontiers of civilization had followed in the wake of Captain Cook's ship the "Endeavour," bringing new institutions, undreamed of techniques, a new way of life, the loftiest form of religion, and the laws of England's parliamentary system to a savage, though intensely proud and high-spirited, race, still ruled by superstition and tribal custom.

4. The accumulation of these surplus lands is but a chapter in the history of the journey of the Maori tribes across the wide cultural gulf which lay between the maraes of tribal custom and the Courts of British law. There was no smooth highway here, but a path littered with the differences, misunderstandings, and quarrels which culminated in ferocious battles between the two peoples.

5. The two races, however, are now living side by side as one society joined together by the bonds of precious blood shed on the field of battle against a common foe. We have reason, therefore, to feel confident that the people of New Zealand wish to have this problem finally disposed of, to enable the two races to march forward as one,

shoulder to shoulder, to meet the very difficult campaigns of the future ; and that, in doing so, it must be settled in a manner in keeping with the dignity of a proud people and compatible with the character of the New Zealand pakeha as the universally recognized champion of fair play towards Native peoples.

6. It is not our purpose to make adverse criticism of any person or groups of persons who are now voiceless and no longer able to speak for their actions before this tribunal.

7. Nor is it our desire to speak derogatively of utterances made by men of the past, or to stigmatize them as land-sharks, robbers, and marauders, be they missionary or otherwise. That is the prerogative of the historian, not ours.

8. Some of the colonists were drawn to the newly-discovered country by the hope of great gain, through land-speculation, but the great majority were seized with the genuine desire of building new homes in the land of their adoption for themselves and their families. While, at Home, the successive Secretaries of State who presided over the destinies of the Colonial Office were imbued with the spirit of the age—that of tolerance towards the down-trodden Native races of the world.

9. This was the post-Napoleonic period, an epoch in which almost every home in Europe was suffering from the results of those devastating wars. Perhaps it was this suffering which made the white man realize more fully the sad lot of subject races, and moved the hearts of men like William Wilberforce to preach the doctrine of racial tolerence which ended in the abolition of the slave trade, and the emancipation of the Negro peoples of America by Abraham Lincoln.

10. However, this reflection would be completely irrelevant to the subject-matter before us, only for the fact that this spirit of racial tolerance, fair play, and protection pervaded the instructions of the Marquis of Normanby, Lord John Russell, and Lord Stanley in their despatches to Governor Hobson which was embodied in the Treaty of Waitangi, the Magna Carta of the Maori people.

11. Kupe of Raiatea, his wife Hine Te Aparangi, and Peka Hourangi, the magician (priestly navigator), in their canoe "Matahourua," discovered New Zealand about the tenth century. Sir Peter Buck estimates the year 950. It was Kupe who left the sailing directions by which subsequent Polynesian navigators negotiated the waterways which led them to these islands. The people of the fleet of canoes which came over in the fourteenth century came to colonize. They brought their women and children with them, and on arrival dispersed to the different parts of the Islands and, without proclamation or flag, became the owners of all land, thus proving to posterity that the Maoris were the undisputed owners and rulers of what to them was known as Ao-tea-roa.

12. In New Zealand a generation passed before the first European settlement was followed by the establishment of some semblance of authority, in the person of James Busby, "the man-of-war without guns," as he was called by the Natives, and then by the Treaty of Waitangi, under which on a memorable day—6th February, 1840—the chiefs of the Maori peoples ceded to Her Majesty the Queen the rights and powers of sovereignty which they had exercised or possessed over their respective territories.

13. The whaler, the missionary, the adventurer, and the trader were the first to establish contact with the aboriginal owners, and some of the incidents of these contacts are of importance on account of the influence they were to exercise, for a generation at least after the establishment of British authority and influence, upon the relation of European to Maori, of the settlers to their own Government, and of this infant settlement generally to the Colonial Office.

14. The earliest land acquired in New Zealand was purchased by the Church Missionary Society in 1815, and this was the first land farmed and settled by Europeans. From 1815 to 1824 the land said to have been acquired by Europeans from the Maoris was 8,000 acres. From 1825 to 1829 the area was 1,000,800 acres ; from 1830 to 1834, 600,000 acres ; from 1835 to 1836, 120,000 acres ; from 1837 to 1838, 240,000 acres. In 1838, 12,000,000 acres, including Stewart Island, were the subject of purchase.

15. In these purchases much land had been acquired in New Zealand for the purpose of procuring timber. From 1836 onwards, owing to the prospect of the establishment of British Sovereignty, the processes of acquisition of land were quickened, and traders from Sydney, obviously prompted by speculation, bartered merchandise for land, and for a nominal consideration acquired vast areas. Native Commissioner Alexander Mackay states: "Almost every captain of a ship on arriving at Sydney from New Zealand exhibited a piece of paper with a tattooed Native head rudely drawn on it, which he described as the title deed of an estate, bought for a few muskets, hatchets, or blankets. Other captains were liberally supplied in Sydney with blank deeds of transfer for use in these purchases."

16. Edward Weller, of Sydney, acquired by grant from the Natives, 1,000,000 acres at Molyneux, 500,000 acres at Banks Peninsula, and 250,000 acres at Taumutu, Otago. George Weller acquired 64,000 acres at Stewart Island—being the whole of that island—and 480,000 acres at Thames and Auckland, including Rangitoto and Motutapu. The Wellers together had negotiated with Native chiefs for 3,557,000 acres.

17. Mr. Wentworth had acquired, either singly or in partnership with a Sydney syndicate, Jones, Leithart, and others, a right by grant from the Natives of some 20,000,000 acres, being the undisposed portions of the South or Middle Island, the consideration being £200 in cash with an annual payment of a like sum to the Native vendors.

18. Millions of acres were bartered for trinkets and merchandise of trivial value. Seven million acres in the North Island, including many whole islands in Cook Strait and the Gulf of Hauraki, were the subject of some three hundred and fifty grants to about two hundred persons.

19. Baron de Thierry, a Frenchman, purchased from Hongi and Waikato, through the agency of a Mr. Kendall, a lay missionary, who had taken these chiefs to England in 1820, 40,000 acres of land, the consideration for this huge transaction being thirty-six axes, and on the strength of his purchase he arrived in New Zealand in 1838 with six men, claiming for himself the title "Sovereign Chief of New Zealand." Finally he settled down in Auckland with the title of "Music Teacher."

20. In 1839 the New Zealand Land Company purchased 20,000,000 acres. This included the purchase by Wakefield of Port Nicholson (Wellington), and also land bordering on Cook Strait.

21. Wakefield, writing on the 24th October 1839 to the directors of the New Zealand Company, thus refers to his "latitude" and "longitude" purchases. After he had referred to the fact that he had on the border of Cook Strait acquired possessions for the company extending from the 38th to the 43rd degree of latitude to the western coast, and from the 41st to the 43rd on the eastern, he says: "The Ngatiawa chiefs do not recognize the rights of British claimants from want of a consideration having been received, whilst in others, where payment was made, no document recording the transaction exists. In all the vessels now arriving from New Zealand, deeds are brought to be filled up and signed, in consequence of the land having lately acquired a marketable value, but whenever the time may come when a Commission shall examine the titles to lands in these islands it will be found that but very few written records of purchases prior to this day's date of any portion of land within the boundaries of my purchase can be produced."

22. His utterances were prophetic with regard to other purchases, but he was certainly overoptimistic with his own, for he says: "In purchasing on the large scale I have done in this transaction, in marking the boundaries of territory acquired, upon the fullest and most satisfactory explanation and examination by parallels of latitude, I conceive that I have obtained as safe and binding a title as if the subject of negotiation had been but a single acre and defined by a creek or a notched tree; and it must be remembered that nine-tenths of the land is without an inhabitant to dispute possession, and that the payment I have made to the owners is large, when valued by the standard of exchange known amongst them, and perfectly satisfactory."

23. The company itself eventually waived its claim to the 20,000,000 acres purchased by Wakefield and had received instead an award of 1,000,000 acres as compensation for expenses incurred in connection with colonization, and even to this area William Spain, who had been appointed by Lord John Russell in January, 1841, to investigate the claims of the New Zealand Company, discovered that it could not establish a title.

24. In the New Zealand debate of 18th June, 1845, Captain Rous, dealing with the extravagant nature of New Zealand claims, showed that if the area of New Zealand were computed 56,000,000 acres, nine purchasers considered themselves entitled to 56,654,000 acres, leaving the Native owners of the country not only landless, but in debt to the nine purchasers of 654,000 acres of land.

25. Fortunately, most of these fantastic claims were disallowed, but of more relevance to the question which we have to consider are the smaller areas of land which had been acquired by several hundred of the earlier settlers and also by the missionaries prior to the advent of British sovereignty.

26. Much criticism has been written about the substantial areas held by the missionaries in their own right, but of Marsden, Saunders, in his *History of New Zealand* page 103, wrote, " He obtained no title, he acquired no landed estate."

27. The stage was now set for the assumption of British sovereignty over a country where the owners' rights to their land had been surrendered to a few individuals who regarded their titles as valid, and their method of acquisition as justifiable, having regard to the primitive, uneducated, and uncivilized character of the aboriginals.

28. Joseph Somes, governor of the New Zealand Company, in a letter to Lord Stanley dated the 25th January, 1843, compares the company's relations with the Natives with that of Penn, the founder of Pennsylvania, and he argues that their own actions had been of an even higher order. " The substitution of such payments for the violent assertion of the mere rights of force has consecrated, in the eyes of posterity, the great and good man who thereby first humanized English colonization in Pennsylvania. It was a great step in the direction of humanity, to effect the dispossession of Native tribes by fair means and their own consent, and to smooth *by apparent justice and substantial kindness the commencement of their inevitable decline.* But it cannot be contended—Penn certainly never would have contended that by the immediate payment of a single cargo of goods he really gave the Indian an adequate price for territory of the size of France—that compensated him for an arrangement which led to his exclusion from the possessions of his forefathers. It is obvious that no immediate payment can give such compensation to the uncivilized man. Be as lavish as you please of the ordinary materials of European barter; give clothing, arms, ammunition, tools, and tobacco, and what beyond the consumption of the day can you really give of value to the man whom you do not find *possessed, and cannot at once endow, with a gift of foresight.* Give more, and you only waste the surplus. And when the blanket is worn out, the second-rate finery torn to rags, the gun burst, the ammunition expended, the tool broken, and the day has produced its hour of intoxication, at the end of a year or two, or even ten, what better is the wild man for your gift? At the end of the short period of enjoyment, *he and his race are beggars midst the wealth that has grown out of their possessions,* doomed after a brief period of toil for the intruder, and of humiliation in his presence, to disappear from the land over which they once reigned undisputed masters." [The italics are ours.]

29. However, the British Government, in its wisdom, was determined to avoid the recognition of rights which could find no sanction in law. Even at an earlier date, Lord Goderick, in a dispatch to Governor Gipps, of New South Wales, had expressed his concern, stating that: " *New Zealand Natives will fall, to be added to the number of barbarous tribes fallen sacrifice to their intercourse with civilized man.*"

30. The Government was, however, reluctant to accept the responsibility which the acquisition of new territory would involve, but the steady increase of settlement, the necessity of establishing some semblance of law amid conditions of lawlessness, and the

education of public opinion by the published reports in England from the missionaries, and the schemes of Edward Gibbon Wakefield, were all factors combining to stimulate the British Government to a recognition of its responsibilities.

31. In 1836 a select committee of the House of Commons had inquired into the different modes in which land had been disposed of in the Australian colonies and the Cape of Good Hope, and Wakefield's evidence as to the evils of profuse grants of land in Australia had been illuminating. "New Zealand," he said, "is coming under the dominion of the British Crown." He then went on to refer to the adventurers from New South Wales and Van Diemen's Land, *who had for a few trinkets and a little gun powder obtained land*; and concluded: "*We are, I think, going to colonize New Zealand, though we are doing so in a most slovenly and scrambling and disgraceful manner.*"

32. But the stages in the establishment of British sovereignty were being rapidly expedited. On the 5th October, 1837, Sir George Gipps was appointed Governor of New South Wales. On 15th June the territorial limits of New South Wales were enlarged to include New Zealand, and on the 30th July, 1839, William Hobson was appointed Lieutenant-Governor of New Zealand, with the proviso that he was to obey the lawful instructions of the Governor of New South Wales.

33. On leaving England for New Zealand Hobson received instructions from the Marquis of Normanby. The following passage is extracted from the despatch of the 14th August, 1839:—

There is, probably, no part of the earth in which colonization could be effected with a greater or surer prospect of national advantage.

On the other hand, the Ministers of the Crown have been restrained by still higher motives from engaging in such an enterprise. They have deferred to the advice of the Committee appointed by the House of Commons in the year 1836, to inquire into the state of the Aborigines residing in the vicinity of the Colonial Settlements; and have concurred with that Committee in thinking that the increase of national wealth and power, promised by the acquisition of New Zealand, would be a most inadequate compensation for the injury which must be inflicted on this kingdom itself, by embarking in a measure *essentially unjust, and but too certainly fraught with calamity to a numerous and inoffensive people, whose title to the soil and to the sovereignty of New Zealand is indisputable, and has been solemnly recognized by the British Government.* We retain these opinions in unimpaired force; and though circumstances entirely beyond our control have at length compelled us to alter our course, I do not scruple to avow that we depart from it with extreme reluctance.

The necessity for the interposition of the Government has, however, become too evident to admit of any further inaction. The reports which have reached this office within the last few months establish the facts, that about the commencement of the year 1838 a body of not less than two thousand British subjects had become permanent inhabitants of New Zealand; that amongst them were many persons of bad or doubtful character—convicts who had fled from our penal settlements, or seamen who had deserted their ships; and that these people, unrestrained by any law, and amenable to no tribunals, were alternately the authors and the victims of every species of crime and outrage. It further appears that extensive cessions of land have been obtained from the Natives, and that several hundred persons have recently sailed from this country to occupy and cultivate those lands. The spirit of adventure having thus been effectually roused, it can no longer be doubted that an extensive settlement of British subjects will be rapidly established in New Zealand; and that, unless protected and restrained by necessary laws and institutions, they will repeat, unchecked, in that quarter of the globe, the same process of war and spoliation under which uncivilized tribes have almost invariably disappeared as often as they have been brought into the immediate vicinity of emigrants from the nations of Christendom. To mitigate and, if possible, to avert these disasters, and to rescue the emigrants themselves from the evils of a lawless state of society, it has been resolved to adopt the most effective measures for establishing amonst them a settled form of civil government. To accomplish this design is the principal object of your mission.

I have already stated that we acknowledge New Zealand as a sovereign and independent State, so far at least as it is possible to make that acknowledgment in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's immediate predecessor, disclaims, for herself and for her subjects, every pretension to seize on the Islands of New Zealand, or to govern them as a part of the dominion of Great Britain, unless the free and intelligent consent of the Natives, expressed according to their established usages shall be first obtained.

34. Sir George Gipps, as Governor of New South Wales, put forth a Proclamation on 14th January, 1840, which recited the instructions of the Marquis of Normanby to the effect that no title to land in New Zealand would be recognized unless it was derived from, or confirmed by, a grant made in Her Majesty's name and on her behalf, but that care should be taken at the same time to dispel any apprehension that it intended to dispossess the owners of any land acquired on equitable conditions, and not in extent or otherwise prejudicial to the present or prospective interests of the community, to be investigated and reported on by Commissioners to be appointed by the Governor. The Proclamation notified that to be Her Majesty's command, and notified also that all purchases of land in any part of New Zealand made by any of Her Majesty's subjects from any of the chiefs and tribes after the date of the Proclamation would be considered as absolutely null and void and would neither be confirmed nor in any way recognized by Her Majesty.

35. On 4th August, 1840, an Ordinance was passed by the Governor and Council of New South Wales embodying similar provisions and providing for the appointment of Commissioners to examine and report upon claims to grants of land in New Zealand. Claims were to be preferred in writing within six months, otherwise they were to be null and void, but power was given to the Governor to extend the period for a further six months.

36. Clause 5 of the Ordinance provided that in hearing and examining claims to grants, and reporting on them, the Commissioners were to be guided by the real *justice and good conscience* of the case without regard to legal forms and solemnities. The Commissioners were to ascertain the price, and the time and manner of payment, and the circumstances under which such payment was made. The Commissioners were also to inquire the number of acres which such payment would have been equivalent to according to the rates fixed in the Schedule to the Ordinance. Provision was made for the issue of a Crown grant if Commissioners were satisfied that the applicant was entitled.

37. The experience over the years has justified the wisdom of this measure. Settlers had speculated upon the approaching colonization of New Zealand, and the constitutional guarantee of British sovereignty was an advantage which they had given full consideration. The rights of persons who had acquired land on equitable conditions were amply safeguarded, but the valuation placed on the land acquired was made proportionate to the time it ante-dated 1840.

38. Faced with a difficult and intricate problem, a solution had been found. The claims could either have been summarily rejected, upon the grounds that the Natives had not understood the nature of the transaction, or, failing rejection, some scheme had to be devised which, while it might prevent the Natives being deprived of their land, would at the same time give value for payments actually made.

39. Under the Ordinance any person who could prove that he had *bona fide* acquired land was assumed to have paid a rate varying according to the year of purchase, the schedule being as follows :—

From	To	Per Acre.
1st January, 1815	31st December, 1824	6d.
1st January, 1825	31st December, 1829	6d. to 8d.
1st January, 1830	31st December, 1834	8d. to 1s.
1st January, 1835	31st December, 1836	1s. to 2s.
1st January, 1837	31st December, 1838	2s. to 4s.
1st January, 1839	31st December, 1839	4s. to 8s.

Fifty per cent. was assessed above these rates for persons not personally resident in New Zealand or not having a resident agent on the spot. *Goods when given to the Natives in barter for payment were to be estimated at three times their selling value in Sydney at the time.*

The purchaser was to be allowed as many acres as the purchase-money, divided by the above rate, would give, with a limitation of area with respect to any one grant.

40. With the severance of New Zealand from New South Wales this Ordinance became inoperative. Under it, Sir George Gipps had appointed Colonel Godfrey and Captain M. Richmond of His Majesty's 96th Regiment to be two of the first Commissioners. The legislative restrictions thus imposed aroused among many of the land claimants feelings of concern, and they were stirred to protest. The New Zealand Association in Sydney voiced the indignation of the claimants.

41. Prior to the departure of Captain Hobson for New Zealand a group of New Zealand settlers, resident for the time being in Sydney, had waited upon him, presenting a loyal address, and expressing the hope that their titles would be recognized and validated.

42. Meetings of protest were also held in New Zealand against the infringement of the titles which they alleged to have been obtained from the Natives. Of one of these meetings of protest held at Coromandel, Dr. Martin, who was a general practitioner and afterwards became a newspaper editor and member of the Legislative Council, voiced the feelings of the claimants. "*To crown the infamy of the whole concern, the surplus lands, instead of going back to the Natives, the parties alleged to have been injured, are strangely enough declared to be the property of the Crown. We are tried, because we are said to have stolen the Natives' property: when our crime is proved, the property is taken from us, but instead of being restored to the Natives from whom we stole it, it is kept by the Judge himself. Abominable and grossly unjust as this act is, with the exception of Mr. Hannibal M'Arthur every one of the members of the Botany Bay Council approved of it. If their own large grants and convict-gathered properties were dealt with in a similar manner I scarcely think they would like it.*"

43. At the meeting held at Coromandel Harbour a memorial of protest to the Home Government was drawn up, and protest was also made in the name of the subjects of England, America, and France against the right of the British Government to seize upon the sovereignty of a country whose independence she had acknowledged.

44. Captain Hobson, on 29th January, 1840, arrived at the Bay of Islands. His instructions from the Colonial Office included a proviso that he was to dispel any apprehension which might be created in the mind of the settlers that it was intended to dispossess the owners of any property which had been acquired on equitable conditions. These instructions had been embodied in the Proclamation issued by Governor Gipps on the 19th January.

45. The Treaty of Waitangi ceded sovereignty to Great Britain, but it confirmed to the chiefs and tribes of New Zealand the undisturbed possession of their lands and estates and other properties which they collectively or individually possessed, the chiefs yielding to Her Majesty the exclusive right of pre-emption over such lands as the proprietors were disposed to alienate.

46. The Treaty by its recognition of British Sovereignty and of the paramount powers of the Crown, as well as of the rights of the Natives, became a check to the land claimants who held that the Native chiefs had an undoubted right to dispose of their lands as they thought fit. The New South Wales Ordinance and the Treaty meant frustration to the land claimants. The missionaries had been largely instrumental in securing the assent of the chiefs to the Treaty, and they were insistent that the rights of the Natives with respect to their lands should be protected. Much bitter feeling was caused between the representatives of the missionaries and of the colonists. Owing to

their attitude with respect to Native lands, the Church Missionary Society was influential with the Colonial Office, and Lord Stanley was concerned that the Treaty should be implemented and given full effect.

47. An attempt was made by the New Zealand Company to prune the Treaty of those sections which recognized the rights of the Maoris to the undisturbed possession of their lands *and to restrict the operation of the Treaty to the lands only in which the Natives were in actual occupation.* This intention was made clear by Joseph Somes in a letter to Lord Stanley: "We always have had very serious doubts whether the Treaty of Waitangi, made with naked savages by a Consul vested with no plenipotentiary powers, without ratification by the Crown, could be treated by lawyers as anything but a praiseworthy device for amusing and pacifying the Natives for the moment."

48. On 9th June, 1841, the New South Wales Ordinance having become inoperative through the establishment of New Zealand as a separate colony, Hobson re-enacted the measure with but few changes. He fully realized the difficulty of reconciling conflicting claims, and at the same time preserving the rights of the Natives. Soon after his arrival he wrote:—

> Tracts of country, in some cases of 500 square miles, are claimed by single individuals. . . . I greatly fear that the conflicting claims will create a violent ferment through every class of society, both Native and European.

49. In the North Island nearly every harbour headland, river-bank and gulf had become the subject of land grants. In the Middle Island more land was claimed than it contained. Stewart Island was claimed for the alleged payment of £100. The claims overlapped one another, and the Commissioners had no easy task in discharging duties which were bound to arouse the antagonism of the colonists.

50. It was necessary to treat the rights of aliens who had acquired land from the chiefs prior to the proclamation of Hobson with some circumspection, and he was instructed by Lord John Russell on the 17th March, 1841, that in cases of doubt the settler must be treated as a British subject and his claim disposed of accordingly.

51. In the meantime the Commissioners appointed by the Government's Ordinance proceeded to investigate the claims. They held their first sitting in the Bay of Islands District, at Russell, on the 11th October, 1841. Godfrey and Richmond were hampered in the discharge of their duties by the necessity for hearing at length the evidence of Natives in opposition to the claims and also by difficulties of communication and the complications arising out of many of the individual claims. One or other of the Commissioners visited the locality of each claim, and took the evidence of the claimant and his witnesses, and also of the Natives. The evidence was aways taken down in the handwriting of the Commissioner who received it. Afterwards the Commissioners met at headquarters, and agreed upon a joint or separate report, as the case may be.

52. Two hundred and eighty of the claims had been gazetted at Sydney. The New Zealand numbering followed until the total number of claims amounted to 459. On 8th March, 1844, Major Richmond was appointed Superintendent of the Southern Division of New Zealand, and Colonel Godfrey returned to England. The powers previously entrusted to two Commissioners under the Ordinance of 1841 were now, under the amending Ordinance of 1844, exercised by one Commissioner, Mr. Robert Fitzgerald.

53. From February, 1842, to September, 1843, an amending Ordinance was in force whereby the limitation of 2,560 acres imposed by the 1841 Ordinance was removed and the Commissioners were empowered to recommend grants exceeding this maximum area. This Ordinance was disallowed by the Home Government on the grounds stated by Lord Stanley in a despatch to Governor Hobson dated 19th December, 1842; "It might," he wrote, "prove the means of exposing New Zealand to those evils which have resulted in other colonies from throwing large and unmanageable grants into the hands of

individuals unable profitably to use them." Continuing, he wrote: "When I see it officially reported that nearly nine hundred claims had already been lodged involving demands for not less than 20,000,000 acres, I cannot think that it would be prudent for Her Majesty's Government to dispense with the direct and wholesome check upon the undue acquisition of land which the former Ordinances had imposed, and which from the earliest Proclamations the settlers must have been led to expect."

54. There were in all 1,050 old land claims. But there were many other transactions which subsequently swelled the area of lands surplus to the Crown. Some of these were the result of the ten-shilling-per-acre pre-emption waiver and subsequently a great many more under the penny-per-acre waiver.

55. In this brief history of New Zealand land transactions we might mention that, quoting from the report of Mr. Commissioner Bell, dated 8th July, 1862: "No one . . . can doubt . . . that the great body of the claimants accepted the Ordinance in perfect good faith and that they were content to abide by its limitations, in consideration of the exchange it gave them of an English title, for a precarious occupation under the law of the strong arm." The subsequent conflicts between Maori and European centred chiefly round land, and in our opinion they might have been avoided if wiser counsels had prevailed, thus preventing much bloodshed, turmoil, and racial bitterness.

56. William Martin, afterwards Sir William Martin, had been appointed as New Zealand's first Chief Justice. He was a man of very high scholastic attainment who always sought to preserve the balance between Maori and European, and to reconcile differences, the solution of which seemed almost insuperable. In conjunction with Selwyn, he set himself the task of persuading the British Government and the colonists of the necessity of strict adherence to the letter and spirit of the Treaty of Waitangi.

57. The Treaty of Waitangi was not accomplished without difficulty, hostility, and opposition by the Maoris as a result of their land claims.

58. Mr. T. Lindsay Buick, in his book *The Treaty of Waitangi*, page 123, describes, at great length, the ceremony and events leading up to the signing of the Treaty, and we think it of importance to quote these proceedings verbatim as it will be seen that during the ceremony Mr. Busby, who had been the resident officer of Britain in New Zealand for some years, and who was one of the Governor's party, and who had also been closely concerned in the drawing of the Treaty, made a very important statement to the Maori people assembled. At page 126, Mr. Buick writes:—

> There being some little hesitancy displayed, Mr. Busby rose and, addressing the Natives, assured them that the Governor had not come to deprive them of their lands, but rather to secure them in possession of what they had not already sold. *He reminded them that he had frequently given them his word that land not properly acquired from them would not be recognized as the property of the person claiming it, but would be returned to the Natives to whom it rightly belonged.* He was proceeding to say that this promise the Governor would of a certainty be prepared to carry out, when suddenly he was interrupted by Te Kemara, a chief of the Ngati-Kawa tribe, who, springing from his place in front of the platform, exclaimed . . .

59. In the following paragraphs it is recounted that several chiefs made hostile and often insulting remarks with reference to those whom they accused of robbing them of their land. They were subsequently overruled by chiefs of superior mana, amongst whom were Hone Heke, Tamati Waaka Nene, and his brother, Patuone.

60. During these speeches, denouncing certain land purchasers, and on these being interpreted to Captain Hobson, he immediately arose, and in the most earnest manner, assured the gathering that: " . . . *lands unjustly held would be returned, and that after the date of the Proclamation all land, however purchased, would be the subject of inquiry, and no purchase would be lawful until sanctioned by the Crown.*"

61. "In a clear voice His Excellency then read the Treaty in English for the benefit of the European settlers, the terms of the document being as follows:—

TREATY OF WAITANGI

HER MAJESTY VICTORIA, Queen of the United Kingdom of Great Britain and Ireland, regarding with her Royal favour the native chiefs and tribes of New Zealand, and anxious to protect their just rights and property, and to secure to them the enjoyment of peace and good order, has deemed it necessary, in consequence of the great number of Her Majesty's subjects who have already settled in New Zealand, and the rapid extension of emigration both from Europe and Australia, which is still in progress, to constitute and appoint a functionary properly authorised to treat with the aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands. Her Majesty, therefore, being desirous to establish a settled form of Civil Government, with a view to avert the evil consequences which must result from the absence of the necessary laws and institutions, alike to the native population and to her subjects, has been graciously pleased to empower and to authorise me, William Hobson, a Captain in Her Majesty's Royal Navy, Consul and Lieutenant-Governor over such parts of New Zealand as may be, or hereafter shall be, ceded to Her Majesty, to invite the Confederated and Independent chiefs of New Zealand to concur in the following articles and conditions:

ARTICLE THE FIRST

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

* It is important to remember that the process by which New Zealand became a portion of the British Empire was one of cession, and not of annexation, as is so frequently stated.

ARTICLE THE SECOND

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

ARTICLE THE THIRD

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

62. "'Captain Hobson spoke briefly but emphatically and with strong feeling,' Mr. Felton Mathew tells us, 'and when he had concluded, he turned to Mr. Henry Williams and invited him to read to the Natives the translation which had been prepared in the Maori language.'

"'In the midst of profound silence,' Mr. Williams wrote in subsequent years, 'I read the treaty to all assembled. I told all to listen with care; explaining clause by clause to the chiefs, giving them caution not to be in a hurry, but telling them that we, the missionaries, fully approved of the treaty, that it was an act of love towards them, on the part of the Queen, who desired to secure to them their property, rights, and privileges. That this treaty was a fortress to them against any foreign Power which might desire to take possession of their country, as the French had taken possession of Otiaiti.'"

Then follows the Maori translation of the Treaty of Waitangi as printed at the press of the Church Missionary Society, Paihia. This can be taken as read, but Maori scholars of to-day confess their inability to grasp the full implication of the translation, especially that portion of Article 2 referring to Her Majesty's exclusive right of pre-emption. So it must be obvious that the Maoris of that day had at least as great a difficulty in understanding.

63. " The whole subject was now before the meeting for discussion, and the chiefs were invited to express their views upon it, or to make any inquiries upon points that were still obscure."

At this stage, Busby made the important statement referred to in paragraph 58 (*ante*) : " There being some little hesitancy . . . belonged."

64. The Missionaries themselves were not altogether clear in their minds that the Maoris comprehended the full implications of the Treaty. The Rev. Mr. Colenso at the ceremony on 6th February, 1840, requested the indulgence of the Governor to make some remarks. This is how he records them in his book " Authentic and Genuine History of the Signing of the Treaty of Waitangi " :—

Colenso : " Will your Excellency allow me to make a remark or two before the chief signs the Treaty."

The Governor : " Certainly, sir."

Mr. Colenso : " May I ask your Excellency whether it is your opinion that these Natives understand the articles of the treaty which they are called upon to sign ? I this morning . . . "

The Governor : " If the Native chiefs do not know the contents of this treaty it is no fault of mine. I wish them fully to understand it . . . I have done all that I could do to make them understand the same, and I really don't know how I shall be enabled to get them to do so. They have heard the treaty read by Mr Williams."

Mr. Colenso : " *True, your Excellency ; but the Natives are quite children in their ideas.* It is no easy matter, I well know, to get them to understand—fully to comprehend a document of this kind ; still, I think they ought to know somewhat of it to constitute its legality. I speak under correction, your Excellency. *I have spoken to some chiefs concerning it, who had no idea whatever as to the purport of the treaty.*"

Mr. Busby here said : " The best answer that could be given to that observation would be found in the speech made yesterday by the very Chief about to sign, Hone Heke, who said, ' *The Native mind could not comprehend these things ; they must trust to the advice of their missionaries.*' "

Mr. Colenso : " Yes ; and that is the very thing to which I was going to allude. The missionaries should do so ; but at the same time the missionaries should explain the thing in all its bearings to the Natives, so that it should be their very own act and deed. Then, in case of a reaction taking place, the Natives could not turn round on the missionary and say, ' You advised me to sign that paper, but never told me what were the contents thereof.' "

The Governor : " I am in hopes that no such reaction shall take place. I think that the people under your care will be peaceable enough ; I'm sure you will endeavour to make them so. And as to those that are without, why we must endeavour to do the best we can with them."

Mr. Colenso : " I thank your Excellency for the patient hearing you have given me. *What I had to say arose from a conscientious feeling on the subject.* Having said what I have, I consider that I have discharged my duty."

Here Hone Heke signed the treaty, on which several others came forward and did the same. The signatures of forty-three chiefs were obtained. After this ceremony had been completed each *signatory was presented with two blankets and a quantity of tobacco.*

65. The primitive Maoris had no knowledge of international law and the powers such law conferred on sovereignty, whether it was by cession or annexation.

66. Apart from the great influence of the missionaries, in our opinion, the chiefs were mainly *influenced to sign the Treaty by Mr. Busby's pronouncement and Governor Hobson's declaration, and that they must have been quite content in the knowledge that those of their lands which were wrongly acquired were to be returned to them. These statements must have appeared to the Native mind as a definite promise made for and on behalf of the " Great White Queen."*

67. It is true that the words " surplus lands " were not specifically used, but the orations of both Mr. Busby and Governor Hobson were an assurance to the Maoris that all lands wrongly acquired would be returned to them and not kept by the Government.

68. A more definite promise was made to the Maoris by Governor Fitzroy upon his arrival in Auckland in reply to their addresses of welcome. This is recorded by Dr. Martin in his book *Martin's New Zealand*, page 183 :—

Among the parties introduced to the Governor were several Natives, whom he addressed at *great length* through the Chief Protector, Mr. Clarke, informing them of the anxiety of the Home Government to benefit them, for which purpose he said he had been sent to them. After this address,

the Natives handed to him two well-written Native addresses, embodying the subject of their numerous grievances since the establishment of British authority. They particularly dwelt on the injustice of preventing them from selling their lands to Europeans, as well as that of the Crown resuming the surplus lands of the old settlers, or land-claimants. The subject of Customs, especially the duty on tobacco, was also dwelt upon. These addresses were read in English by Mr. Clarke, who was instructed by the Governor to inform the chiefs that he would do all he could to adjust their grievances; that he was requested to assure them that the Queen of England sought no benefit to herself from their lands; that she sent a Governor to them for the purpose of preserving peace and order, and teaching them to grow up in the habits and arts of civilised life. *With regard to the surplus lands, he disclaimed on the part of the Crown any intention of reserving them—they would revert to the Natives themselves.* The other subject—the liberty of selling their own lands—he hoped would also be granted to them.

This latter promise was fulfilled by the two pre-emption waivers.

69. The rest of the speech is hardly relevant to our purpose, and we see no reason to doubt the correctness of this report. This historian was a member of the gathering and was presented to the Governor at the levee. He was a medical practitioner, a newspaper editor, and was subsequently appointed by Governor Fitzroy to the Legislative Council. The doctor was without doubt a gentleman of considerable standing in the community. He was a forthright critic of public men, and absolutely fearless in his utterances. We have had the records of the period investigated, and Mr. R. Blane, the Secretary to the Commission, has consulted the Librarians of both the General Assembly and the Turnbull Libraries, and nowhere can it be discovered that the accuracy of Dr. Martin's report has ever been questioned or the statement alleged to have been made by Governor Fitzroy contradicted or controverted. *We cannot find any pretext to doubt Dr. Martin's integrity or veracity.*

70. In the face of this explicit promise by the newly-appointed representative of the Queen whose word would be regarded as sacrosanct it seems abundantly clear to us that the Natives were entitled to consider that the surplus lands were to be returned to them. If this contention be correct then they should have had the equity in the lands so soon as the formalities of return could have been complied with.

71. Had this been done it would have saved the country a great deal of money and would have removed the root cause of much bitterness and ill feeling between the two races, and would have obviated the necessity for this Commission.

72. It is of interest to quote Governor Grey in reply to a congratulatory address of welcome at Auckland on the 29th January, 1847, the seventh anniversary of the Colony:—

In his reply to the address, the Governor gave vent to some of the irritation which six months' battling with opposing interests had aroused:—

"I shall, I think, most effectually serve the interests of the really influential portion of the community by speaking plainly. Many persons are disposed to make, in some cases most illegal, in other cases most unjust, pretended purchases from the Natives, and who have then resorted to most improper means to compel the Government to recognize most exceptional claims. I have also seen most improper attempts made to excite the Natives and to fill them with distrust and suspicions of the Government . . .

" . . . My regret was that I never saw public opinion manifest itself against the improper proceedings which were taking place, and that so few friendly hands were held out in the north of New Zealand to aid me."—(*Despatch Governor Grey to Earl Grey, February 4, 1847.*)

73. This most illuminating reply is self-explanatory.

74. For over one hundred years the Maoris have been clamouring to have their surplus lands grievance redressed. This is the first occasion in which a tribunal has been requested to decide the matter on the basis of equity and good conscience, and we consider that it would be to the honour of the Crown to have this long-standing dispute disposed of amicably, and so establish in the minds of the descendants of the parties alleged to have been injured that spirit of mutual confidence so necessary to the harmony of our national life.

75. The independence and sovereignty of New Zealand under Maori ownership was never questioned by the British Government. Indeed, it was continually emphasized by successive Colonial Secretaries.

76. The Maoris were not a conquered people nor was their country annexed, as is often erroneously stated, but they were induced to cede sovereignty to Britain by signing the Treaty of Waitangi, and we wish to emphasize that the signatures of the chiefs were not obtained without considerable difficulty owing to their land problems being unsettled. Without the promises made by Busby, Governor Hobson, and the Missionaries generally, it is very doubtful if the Treaty would have been completed in its present form.

77. In the unanimous report of the Commission we have drawn attention to the comments of Judge McCormick and Mr. Justice Sim's Commission, and also of the three Judges of the Native Appellate Court, with reference to surplus lands. The question of equity and good conscience was obviously exercising the minds of all of these learned gentlemen when deciding points of law.

78. In one of the schedules put before the Commission large areas of land were classified as "reverting to Maoris." We consider this a misleading statement, for these were areas in which alleged contracts had not been consummated and the lands concerned had not ceased to be the property of the Maoris. Our contention is that none of these transactions have any relation to the value that should be given to the surplus lands in which it had been decided by the Commission the Maoris have an equity.

79. In passing we deem it not inappropriate to draw attention to the settlement of some of the Maori claims of recent years which have promoted amity, understanding, and better relationships between the two peoples :—

(*a*) Rotorua Lake Settlement (with respect to Arawa Claims).
(*b*) Taupo Waters and Fishing Rights—(Tuwharetoa Claims).
(*c*) Ngaitahu Claim.
(*d*) Taranaki Claim.
(*e*) Waikato Claim.

80. We are fully aware that in fixing the value of this area of surplus land we are confronted with a very difficult problem, but we must approach its solution on the grounds of equity and natural justice ; indeed, as laymen, we can view it from no other standpoint. If these lands should have been and had been returned to the Maoris at the time of the creation of the surplus, then, allowing for development comparable with that of similar lands, the asset would at this date be very substantial.

81. We have already taken into consideration the question of returning to the descendants of the people concerned in this century-old dispute the land in which they have an equity. The claim could have been amicably and honourably settled on that basis, but, as already mentioned, there are no Crown lands suitable for this purpose. The alternative then is to recommend reasonable compensation.

82. In arriving at the amount of compensation to be paid, there are two methods which appeal to us :—

(*a*) To make the computation on the assumption that these surpluses should have been returned to the original owners at the time of their coming into being and fixing the value upon the prices then ruling, and adding interest to the date of settlement.

A strong case could be made out for adopting this method, but we fully realize that the legal answer may be an effective bar to its use, as no legal contract had been broken, as there was in the Ngaitahu claim.

(*b*) To be guided by the directions contained in the despatch of Lord Stanley of 1843, and the subsequent legislation of New Zealand, Land Claims Settlement Act, 1856.

83. We propose to adopt the latter method, and in so doing we refer to—

(*a*) The despatch to Governor Fitzroy dated the 21st August, 1843, wherein he states, *inter alia :* " I entirely agree in the principle of the land orders—that is to say, the order receivable, as money, in payment for public lands ; which document Mr. Shortland proposes to offer to claimants who will accept them in lieu of the particular land included in their claims. It should be the great object to give such parties every facility to take their lands where a settlement is in progress, and for this purpose the proposed orders afford a simple and commodious expedient. But while agreeing in the principle of the arrangement there is one of the details which appears likely to defeat this object. The orders are not to be for a number of pounds sterling, equal to the number of acres which have been awarded to the party, but for the actual sum reported by the Commissioners to have been originally expended by the claimants. Thus if a party having proved an expenditure of £200, and being entitled therefore to a quantity of 800 acres, at the rate of 5s. per acre, or even to much more, under some parts of the graduated scale of prices, were to accept one of the proposed orders available for the Crown lands, of which the minimum price is £1, he could not obtain more than 200 acres. This would appear much the reverse of an encouragement ; and unless the measure shall have been since modified in this particular, I am apprehensive that it may have proved a failure. Should this have been the case, and should you contemplate a renewal of some similar arrangement for claims hereafter decided your best course would appear to be to make the offer at *once of orders equivalent at £1 per acre to the quantity of land awarded to the party.*"

Where the land was not available for grant to the claimant by reason of the Government having disposed of it, scrip, money, or debentures were issued in lieu thereof. *Where scrip or debentures were granted, it was at the rate of £1 per acre.*

As to the amount of money, scrip, or debentures issued in respect of the above we quote from the report of Mr. Commissioner Bell of the 8th July, 1862 :—

> The totals under these heads amount in the aggregate to the large sum of £109,289 14s. 11d. Of this amount, scrip to the amount of £91,510 15s. was granted by Governor Fitzroy ; scrip, debentures, and money, to the amount of £8,467 0s. 6d. by Governor Sir George Grey ; and scrip to the amount of £8,932 5s. by me. £101,152 5s. 4d. was issued in old land claims ; in pre-emptive claims, £8,137 9s. 7d.
>
> The scrip issued by Governor Fitzroy was in exchange for awards of the Commissioners, under an arrangement sanctioned by Lord Stanley for giving claims a credit at the Treasury equal to the award, to enable them to buy land in the vicinity of the capital. In order to show what the public got out of this transaction it is only necessary to mention two facts :—
>
> (1) A large proportion of the scrip was expended in the purchase of allotments within the City of Auckland, which allotments must now be worth at least ten times what they cost at auction in 1844.

We would draw attention to the paragraph in the above referring to scrip or debentures being exchanged for allotments within the City of Auckland —the fact of this value of £1 per acre being placed upon the land at that time and scrip being issued in place of grants, enabled many of these old land claimants to amass considerable fortunes.

(*b*) The Land Claims Settlement Act of 1856, section 32, reads :—

> In any case of claim or grant, when the particular lands which would otherwise have been directed to be granted shall have been alienated by the Government, the Commissioners may direct a grant to be made of other lands, being part of the demesne lands of the Crown in the province in which the claim arises, by way of compensation for the original claim. In estimating the quantity of compensation land to be given as land aforesaid, the Commissioners shall estimate the same by the amount realized upon such alienation of the land comprised in the original claim, but in no case shall the original land be estimated as having realized more than £1 per acre.

This is the case where the Government had taken, for its own purposes, land to which the claimant would have been entitled; the claimant could be granted compensation in land up to the amount that the land taken realized on sale, but with a maximum of £1 per acre, although it may have realized a much greater figure.

84. Taking the Act of 1856 as setting the compensation of these lands at not more than 20s. per acre, and the Crown having undertaken to recompense the old land claimants at this rate, then we see no reason why the Maoris should not be entitled to similar treatment; but there being no legal obligation on the part of the Crown, we must approach the problem on the broad basis of equity and good conscience as directed by Your Excellency's Commission.

85. The Maori is a full partner in our conception of citizenship. He has shown his willingness to shoulder his responsibility in both peace and war, and we were much impressed by a prominent member of his race when at a previous hearing of the Commission in connection with another matter he expressed the sentiment: "What is good enough for my pakeha brother is good enough for me."

86. Section 9 of the Land Claims Settlement Extension Act, 1858, provided as follows:—

> Whenever the exterior boundaries of the land comprised in any claim or grant examined by the Commissioners shall contain a larger quantity than can be granted under the "Act of 1856," it shall be lawful for the Governor, if he shall think fit, on the recommendation of the Commissioners, to grant to the claimant a pre-emptive right of purchasing the residue or any part thereof at the price of ten shillings per acre, whereupon the Commissioners may direct a grant of such residue or part to be issued:
>
> Provided always that if the Commissioners shall be satisfied the land is of such inferior character as not to be worth ten shillings per acre, they may recommend the Governor to reduce the price thereof to any sum not less than five shillings per acre, and the Governor may, if he think fit, reduce it accordingly:
>
> Provided also that such pre-emptive right shall be exercised within six months after the same shall have been granted.

This Act gave the old land claimants the privilege of buying back certain portions of surplus land at the price of 10s. per acre. This was a concession and not a Government value of land, and applied only to lands within the boundary of the grant already made.

87. If "surplus lands" were still the property of the Crown, it would not have altered our unanimous opinion of the Maoris' equity in the 87,582 acres, *and we would not, nor could not, have any hesitation in recommending handing them back for settlement. We did, indeed, explore this avenue, but a careful study of the maps and plans produced by Mr. Darby of the Lands Department clearly showed that no lands remained suitable for this purpose.* Had the contrary been the case, the Maoris may have found themselves possessed of a very valuable asset, the worth of which would be difficult to estimate. Their position would have been analogous to that of many of the old land claimants who used their £1 per acre Government scrip in lieu of unavailable land to purchase sections in and about the City of Auckland.

88. The Commission had before it two estimates of the area of surplus lands:—

(1) That of Mr. Commissioner Bell of 205,000 acres:
(2) That of Mr. Meredith compiled by the officers of the Lands and Survey Department of 104,000 acres.

The Commission as a whole discarded, as a measure of land values, the schedule under the Ordinance of 1841 which was described by both counsel for the Crown and the Maoris as the "yardstick" and adopted the principle of deciding every case on its merits, and it was by this rule that, after a most searching and exhaustive overhaul of these two estimates and eliminating all areas which have or had been the subject of Government purchase, and other areas which in the opinion of the Commission the Maoris did not have a claim, we unanimously arrived at the lower figure of 87,582 acres in which

the Maoris had an equity, as aforementioned. This total was made up under old land claims 71,155 acres, under the ten shillings-an-acre waiver, 9 acres, and under the penny-an-acre waiver, 16,418 acres.

89. (*a*) This unanimous decision of the Commission answers question (*a*) of the order of reference.

(*b*) Regarding this question we are at variance, hence the necessity for the separate memoranda.

(*c*) This question has been referred to in the unanimous report of the Commission and is being decided together with the general question of surplus lands.

90. We have not had to consider the legal aspect of this long-standing dispute. That has been decided long since. We are solely concerned with settlement on the broad basis of equity and good conscience as directed by Your Excellency's Commission.

91. Mr. Meredith, in his submissions to the Commission, endeavours to show that the Maoris had no claim under what he refers to as "the equity and good conscience doctrine." His reasoning under the above heading is in contradistinction to the unexpressed but implied sentiments of Judge McCormick, Mr. Justice Sim's Commission, and the three Judges of the Native Appellate Court hereinbefore referred to.

92. However, the Commission have decided to disagree with Mr. Meredith by declaring that the Maoris have an equity; therefore there is no necessity to quote his submissions *in extenso*, with the exception of one important statement as follows:—

Supposing 100,000 acres of land, and it should have gone back to them. The greatest equity you could say, "Well, here, take it." Supposing it was given back to them. Well, the test is, What could they have got for it? isn't it?

93. Had these lands been returned when the surplus was created, the test might have been as suggested by Mr. Meredith, in which case there would have been no necessity for this Commission; but as they were not returned and have been in the possession of the Crown for over a hundred years, the crucial test is no longer what the Maoris might have got for their lands then, but the amount of compensation to be paid to them *now* as directed by (*b*) in the order of reference, which is as follows:—

(*b*) If it be reported that the surplus lands or any part thereof ought in equity and good conscience to have been so returned or vested or so regarded, then to recommend what compensation in money or money's worth should *now* be granted to the representatives or descendants of the aboriginal owners, parties to such original alienation or disposition as aforesaid.

94. We deem it important to quote fully the submissions of Mr. Cooney, which are as follows:—

(1) This Commission is the culmination of numerous and vigorous complaints and protests extending over many years by a large body of Maoris who claim that the Crown has not honoured its obligations of protecting their rights and property, whereby they have suffered grave injustice.

(2) Whatever factors and motives induced the British to take steps to establish British sovereignty in New Zealand, the protection of the rights and property of the Maoris and to secure to them the enjoyment of peace and good order was a dominant consideration. This is clear from Hobson's instructions.

(3) The serious view taken by the British Government of unfair purchases of land from the Maoris for inadequate consideration is evidenced by the Proclamations of 30th January, 1840—declaring all such transactions would not be recognized, and prohibiting further purchases from the Maoris. This, it is to be noted, was prior to the signing of the Treaty of Waitangi, and the Maoris would be entitled to assume when accepting the Treaty that all such transactions would result in the restoration to them of lands purchased on unfair terms by Europeans or, at any rate, that such transactions would be revised and their interests protected and justice done to them.

(4) Prior to British sovereignty all lands were owned and occupied by the Maoris tribally and communally according to their customs and usages.

(5) The existing communal right was recognized by the Treaty of Waitangi.

(6) The Treaty did not create or confer any legal rights on any individuals—Maori or pakeha—cognizable in a Court of law, excepting the moral obligation on the Crown to protect Maori rights.

(7) The Ordinance of 1841 directed an inquiry as to the equity of purchase from the Maoris—restricted purchasers to 2,560 acres, and fixed the scale of consideration. Transactions were declared null and void except to the extent allowed.

(8) The general effect of the Treaty was not to vest the land in the Crown by right of its prerogative, but to vest in the Crown a bare legal estate (in accordance with the legal theory that the fee of all land is vested in the Crown), subject to the rights of the Natives.

(9) No provision was made in the Ordinance of 1841 or at any time for compensation to the Natives in cases where a transaction was found to be inequitable.

(10) A transaction which was inequitable could only be such a transaction in which the purchaser did not pay or the Native vendors receive a consideration according to the scale. (Where fraud was involved clearly nothing less than complete restitution to the Natives could be supported or justified.)

(11) If the area of a purchase was reduced on account of inadequacy of consideration, then in equity and good conscience the Native vendor should have been compensated by either:—

(*a*) Return of the surplus land; or

(*b*) By payment of fair compensation.

(12) It is immaterial whether the Crown did or did not have any legal right to the surplus, but once having found that a purchase was inequitable, in equity and good conscience, the Native vendor was entitled to compensation. A purchase could not be inequitable or unreasonable on the purchaser's part without being inequitable to the vendors.

(13) The legality of the Crown's action is not in issue at any stage. Assuming that everything the Crown did was entirely legal, the question, nevertheless, is, Was it in accordance with equity and good conscience ?

(*a*) The appropriation of land by the Crown without cost of payment could never be in accordance with equity or good conscience.

(*b*) From a legal point of view the effect of the Crown's action in declaring purchases null and void was to revive the Natives' customary title—*i.e.*, the legal title remained in the Crown as it had been from the Treaty of Waitangi, subject to the Natives' communal rights of ownership. The only instance of the Crown claiming land without payment is that of surplus lands, excepting confiscation for disloyalties.

(*c*) The Crown's expressed intention—prior to the Treaty of Waitangi—of protecting the rights and property of the Maori and the letter and spirit of the Treaty itself cast an onus or moral obligation on the Crown so weighty and paramount that the slightest element of unfairness could not be justified or supported.

(14) It is conceivable that if British sovereignty had not been established the Natives in the course of time might themselves have taken steps to nullify the purchases which were subsequently declared null and void by the Crown.

(15) The Crown cannot in equity and good conscience take any benefit for itself arising from an alleged extinguishment of Native title by private purchase prior to the establishment of sovereignty unless according to British standards of law and justice such purchase—

(*a*) Was entirely free from fraud:
(*b*) Properly understood in its effect by the Native vendors:
(*c*) Fair and equitable in all respects:
(*d*) Was for a reasonably adequate consideration.

Can the transactions which resulted in "surplus lands" measure up to such standards ?

(16) The Crown must recognize and implement its obligation to protect the Maoris by compensating them for the lands which the Crown acquired "without cost to the Crown."

95. We agree with these submissions and proceed with reasons for recommending an amount as compensation to be *now* granted to the representatives or descendants of the aboriginal owners.

96. If words mean anything, then promises to return the surplus lands were made to the Maoris by many persons in "high places," amongst whom were Governor Hobson, James Busby, Henry Williams, and Governor Fitzroy.

97. Without a doubt these promises were made in all sincerity, and it could not have been contemplated by those responsible for making them that they could have any other meaning.

98. No other construction could be put upon their utterances by the simple and trusting people of those times.

99. That the Natives regarded the word of the representatives of the "Great White Queen" and the missionaries as tapu or sacrosanct will not be doubted by any one having the slightest knowledge of Maori character or custom.

100. The Maoris have been waiting for more than a century for the redemption of these pledges.

101. In our opinion, their right and title to this heritage is unquestionable.

102. We feel sure that the people of New Zealand would not hesitate in agreeing that as a matter of good conscience the surplus lands should have been returned to the Maoris according to promises.

103. Their equity in this asset over the long period of the dispute should be taken into consideration when recommending the amount of compensation to be awarded.

104. In our opinion, the retention of the surplus lands was an expedient to help the Government over a period of financial difficulty.

105. Owing to the vagaries of politics, this grave injustice remains still unsettled.

106. This obligation should now be equitably and honourably discharged in a manner compatible with the dignity and sense of fairness of the two races.

107. Having adopted the principle of dealing with each case separately and discarding as a measure of values the schedule to the Ordinance of 1841, the Commission unanimously agreed that the Maoris have an equity in 87,582 acres of land.

108. Had we not agreed to discard the "yardstick," the amount of surplus land would have amounted to between 16,000 and 20,000 acres greater. However, whether the area be greater or less, the Maoris have a just claim to it; but as the land is not available it cannot now be returned to them, so compensation must be awarded in lieu thereof.

109. In recommending compensation there are two important factors to consider:—

First, the length of time during which the Maoris have been deprived of their land and the increase in value during that period.

Second, the value put upon these lands in Lord Stanley's despatch to Governor Hobson in 1843 and in 1856 by New Zealand statute.

110. Indeed, after much serious thought we find that adequate or equitable justice could not be arrived at without their application.

111. To enlarge on the first consideration regarding increased value would be superfluous. The production of the country answers that. To be fair we must stress the fact that the increased value is the result of progress and the combined efforts of both peoples, but the Maoris cannot be excluded from a share of such increase.

112. The second consideration is an inescapable fact and was applied by the Government to compensate claimants in respect of land which through various causes they (the Government) were unable to deliver.

113. These lands were grants made by Commissioners to claimants who had purchased from the Maoris. Where alternative lands were not taken up, scrip or cash at the rate of £1 per acre was issued in lieu thereof.

114. *By this action the Government placed a value upon surplus lands, and if it was equitable to compensate the European at this rate, would it not be equally fair to adopt a similar system now? In our opinion, it would be unfair not to do so.*

115. The case of the Maori claimants now is parallel to that of the old land claimants of the "forties."

116. For a clearer picture of the scattered nature of the surpluses it is necessary to indicate the locations and extent of the areas, which are as follows :—

District.	Area (Acres).	District.	Area (Acres).
Awanui	5,280	St. John's Lake	118
Mangonui	5,013	Whau (Avondale)	1,444
Kaitaia	9,813	Rangitopuni	360
Whangaroa	7,360	Pine Island	88
Kaeo	4,163	Lucas Creek	1,000
Bay of Islands	19,543	Weiti	39
Waimate	1,745	Manukau	1,900
Hokianga	654	Onehunga	94
Whangarei	3,890	Ellerslie	113
Kaipara	5,825	Mangere	2,169
Great Barrier Island	6,765	Papakura	1,286
Upper Waitemata	228	Waiuku	547
Waitemata	577	Coromandel	118
Waiheke Island	763	Waipa	35
Remuera	3	Opotiki	6,641
Epsom	8		87,582

117. Generally speaking, these surplus lands were of a mixed quality, and on this account it would be impossible to fix individual values.

118. We have reviewed the history and the circumstances surrounding this long-standing dispute. We have given it our earnest and deepest consideration, and we conscientiously believe that equitable justice will be served by payment to the Maoris concerned at the rate of 14s. per acre.

119. We unhesitatingly recommend to Your Excellency's advisers—and, we might add, in arriving at our recommendations we have not allowed sentiment or expediency in any way to influence our thoughts or conclusions :—

(*a*) That the Maoris concerned have by the unanimous decision of the whole Commission an equity in 87,582 acres of surplus land.

(*b*) That they be compensated for this area at the rate of 14s. per acre, amounting to £61,307.

(*c*) That this sum be in full and final settlement of certain lands known as "surplus lands of the Crown," and the schedule thereto as set out in Your Excellency's Commission of the 5th October, 1946.

120. If legislation be enacted to give effect to these recommendations, we respectfully suggest that—

(*a*) This sum, or whatever amount may be granted, be administered for the benefit of the people interested by a Trust Board already in existence or to be created.

(*b*) The amount of such settlement be paid to the Trust in ten annual instalments, thus extinguishing the claim in that length of time.

(*c*) The Trust be directed to consider some scheme of settlement or housing contiguous to works of a permanent or semi-permanent character and so help to stem the drift of the Maoris to the big cities.

We consider the suggestion to extinguish this claim in ten years is preferable to an annual payment in perpetuity. We also consider that the larger amount received by the Trust in any one year would be sufficiently substantial to carry out some comprehensive plan of settlement.

121. We conclude by a quotation of Mr. T. Lindsay Buick in the preface to the second edition of his book, *The Treaty of Waitangi* referring to the spot whereon the Treaty was signed as "the classic ground on which white and brown men met and decided to put their trust in each other."

A. M. Samuel.
H. T. Reedy.

MEMORANDUM BY THE CHAIRMAN

1. Even if the Commission were unanimous in a recommendation as to the amount of compensation to be paid in this case, Your Excellency's advisers and the public who have to pay would be entitled to expect a full statement from the Commission by way of explanation and justification. Where there are, as is the case, two widely differing recommendations, a statement of the supposed justification for each becomes all the more necessary. Hence the separate memoranda, one by Messrs. Samuel and Reedy, the other by myself. My personal view is that the importance and complexities of the case call for a comprehensive survey, which I shall endeavour to make.

2. As will be seen in due course as I proceed, the Maori case was based upon a certain principle, the principle of what has been called the "yardstick." That basis, for my own part, I totally rejected, and, after a great deal of understandable dubiety (for on first impression, and, indeed, until one has acquired a clear understanding of the whole problem the question is a very perplexing one), and as the result of very much discussion and consideration, I understood the other members of the Commission to accept my view. Expressing again my own point of view, the rejection of the "yardstick" basis would have been fatal to the Maori claims, which would accordingly fail unless some other principle or principles could be found to support them.

3. As the result of much consideration, I found myself able to propound certain principles which do not appear to have been previously developed or even enunciated, but which seemed to me to be equitable and to justify a finding in partial support of the Maori claims. Again, after much discussion, I understood the other members of the Commission to accept the principles that I propounded. At all events, we acted upon them in considering and deciding, in the case of each transaction, the area (if any) of surplus land, and to what portion (if any) of such area the Maoris would have a claim under the terms of our Commission. The principles so acted upon will be stated in due sequence, so that he who reads may understand. But, seeing that I myself propounded them and accept responsibility for them, I consider it due to Your Excellency's Advisers, to the public, to the Maoris, and to myself, though I fear it may involve a somewhat lengthy dissertation, that I should give a history from my own point of view of what I regard as the essential facts and features of the case.

4. But first, in order that there may be no misconception as to the Commission's line of approach to the investigation and determination of the matters confided to it, I propose to state my own view, in which I understood the other members to concur, of the interpretation of the mandate upon which the Commission's inquiry was based.

5. The term "equity," like the term "justice," is used in different senses. As is pointed out by various learned text-writers, including Sir John Salmond in his work on jurisprudence, justice is of two kinds, being either (i) natural or moral justice, or (ii) legal justice. "The first of these is justice in itself—in deed and in truth; the second is justice as actually declared and recognized by the civil law and enforced in the Courts of law." Similarly, when a lawyer speaks in legal parlance of equity or of rights in equity, he refers to that branch of our law or jurisprudence called equity as administered in our Courts. As Sir John Salmond points out, equity, according to the nomenclature of lawyers, is now really a particular kind of law, being that body of law which is administered in the Court of Chancery, as contrasted with the other and rival system administered in the common-law Courts. (In New Zealand we have but the one Court, the Supreme Court, which administers both systems.) "Equity," he says, "is Chancery law as opposed to the common law . . . The final result was the establishment in England of a second system of law standing over against the older law, in many respects an improvement on it, yet, no less than it a scheme of rigid, technical, predetermined principles." The term "equity" is also used in a popular sense as being practically equivalent to natural justice, and, indeed, as Sir John Salmond says, it is really nothing more than a synonym for natural justice, or, may I put it, justice in a broad and popular sense.

6. In the present Commission the inquiry is not limited to the ascertainment of rights merely in equity. The expression used is " in equity and good conscience." This expression has not been uncommon in New Zealand legislation, particularly in legislation dealing with the Maori and the alienation of his land. It has been actually the subject of a judgment of the Court of Appeal, to which I shall refer a little later. Suffice it to say for the present that the use of the expression " good conscience " strengthens the view that what the Commission is directed to consider is the question of doing justice in a broad sense to the Maori in connection with the surplus lands. Wherever, therefore, I may hereinafter use the term " equity " or " rights in equity " or " in equity and good conscience " I must be understood as using these terms in the popular meaning and not in the legal sense ; and I also use the terms " equity " and " justice " as synonymous.

7. I shall proceed presently to state as briefly as possible, and without going further than I consider is strictly material to the questions that the Commission is asked to report upon, the history of the original purchases from the Maori and the way in which these " surplus lands " arose. In the meantime, there are certain preliminary observations that should be made. The question of the rights generally to the surplus lands has given rise to a great deal of confusion of thought, and it is necessary to dispel that confusion if a clear understanding of the position is to be obtained.

8. For example, it has been urged upon the Commission over and over again that " the Crown acquired these surplus lands for nothing " ; that, having acquired them for nothing, the Crown can have no equitable or moral right to them, and that therefore they should have reverted to the Maoris. That is entirely fallacious ; and the basic statement that the Crown acquired the lands for nothing (even if it be the fact) completely begs the whole question. The rights of the Maoris in equity and good conscience must depend upon the moral strength of their own case, not upon some fact which they suggest constitutes a weakness in the Crown's case, but which, even if correct, is really quite irrelevant to the issue. For example, if one person has bought property, whether real of personal, from another (whoever and whatever the vendor may be)—assuming for present purposes that the purchase was made on equitable terms—and then the Crown comes along and confiscates the property, whether with or without good reason, or in some way the land becomes forfeited, the vendor obviously can have no rights, either legal, equitable, or moral, as against the Crown. The vendor would have parted with the property by his sale to the purchaser, and the only person who could possibly have any claim or any right in equity against the Crown would be the purchaser. In this inquiry, however, the words " despoiled " and " spoliation " have been used by counsel for the Maoris to describe the actions of the Crown as against the Maoris ; but the truth is that, speaking generally, and subject to certain exceptions which will be mentioned and developed later, if any one has been " despoiled " of his property or rights, it was not the Maori vendor, but the purchaser who bought from him.

9. The Maori argument before the Commission from beginning to end assumed a case of conflicting rights or equities as between *the Crown* and the Maori. It is really nothing of the kind. It is primarily a case of conflicting equities as between *the purchaser* (in whose place the Crown now stands) and the Maori vendor ; and if in any case a purchase was made *bona fide* and on equitable terms which would have entitled the purchaser in justice either to the whole of the land purchased or to a particular portion of it, and the Crown then takes, or confiscates—if one wishes to use strong language—any of the land to which the purchaser was in justice entitled, I repeat that, if any one had any right to complain, it was the purchaser, and not the vendor. The fact, if fact it be, that the Crown took or acquired the land from the purchaser for nothing was no concern whatever of the original Native owners and has no bearing on the matter that the Commission is called upon to consider. Any assertion to the contrary merely tends to confuse an issue which to my mind is perfectly clear and not open to doubt as a matter either of law or of conscience.

10. It is said that the Crown made no payment to the Native vendor. Of course it didn't, for the very good reason that the Native vendor had already been paid by the European purchaser, and if any one was entitled as a matter of justice and equity to claim any purchase-money or anything else from the Crown, I say again that it was the purchaser and not the vendor. Any further payment by the Crown to the Maori would have meant that he would be paid twice over for the same property; although in point of fact it did happen in quite a number of cases that the Maori was paid over again in this way.

11. Nor, indeed, is it correct to say that the Crown gave nothing to the European purchaser for the land. True it made no payment and gave no consideration in the sense in which that expression is used in referring to a transaction as between vendor and purchaser, but it did give a great deal to the purchaser. It gave law and order in place of chaos and anarchy; it gave an English title to land in exchange (as Mr. Commissioner Bell puts it) for "a precarious occupation under the law of the strong arm"; it gave the individual security of his person and of his rights and liberty. All this was surely valuable consideration to the land-purchasers for what amounted to a surrender of portion of their land, a surrender which, after all, was necessary to provide the necessary sinews for the carrying-on of Government.

12. But although, as I have said, the Commission has to consider the question of the claims of the Maori vendors in equity and good conscience—in other words, to consider the position on the basis of broad justice as opposed to strict justice according to law—it is necessary to a proper determination of this issue that the legal rights should be first ascertained. If the legal rights appear to do substantial justice, they should not be lightly disregarded and set aside. After all, justice even in the most liberal sense should be based upon reason, common-sense realities, and reasonable inferences, and not upon sentimentality, expediency, speculation, or fanciful theories. What I apprehend the Commission has really to do in this case is to see if, in what way, and to what extent, the legal position falls short of doing justice in the broad sense, and, in substance, to recommend how any apparent deficiency may be made good.

13. Fortunately, there is no doubt or dispute as to the legal position. It is briefly, and for practical purposes correctly, stated in a memorandum of the 25th April, 1887, written by Mr. John Curnin, who was then, or subsequently became, Parliamentary Law Draftsman. The statement is as follows:—

> By international law all the territory in a country which becomes conquered by or ceded to a nation belongs to the nation and not to its individual members, or, as it is generally said, vests in the Sovereign of the nation as part of the estate of the Crown.
>
> This was the case in New Zealand, saving as modified by the Treaty of Waitangi, which conserved to the Natives their lands—that is to say, the lands in their possession at the time of making the Treaty.
>
> If at the time of that Treaty it could be proved that they had parted with any of their lands, those lands at once belonged to the Crown.
>
> The question of surplus lands must not be debated in relation to the Natives, but really in relation to the Crown. For it is indisputable that all lands bought by individuals from Natives in New Zealand became absolutely the property of the Crown on the Treaty of Waitangi, or even before that; and that it was out of the just bounty and equity of the Crown that the old land claimants were granted some land; which no doubt they had originally bought, but which equally without doubt belonged to the Crown by right of International Law.

14. Mr. Curnin was only expressing the view which had been taken throughout by the British Government in and from the year 1839, when Captain Hobson was first commissioned to come to New Zealand. It was the view of English lawyers and of American authorities alike, as shown in a very lucid speech of Sir George Gipps, Governor of New South Wales, on the 9th July, 1840, on the second reading of the New South Wales Bill for appointing Commissioners to inquire into claims of grants of land in New Zealand. It was the view taken in 1847 by the Supreme Court of New Zealand (Chief

Justice Sir William Martin and Mr. Justice H. S. Chapman) in *The Queen* v. *Symonds*, the judgment in which case is published in the *New Zealand Gazette*, 1847, page 63, and is also reported in *New Zealand Privy Council cases* at page 387. The material part of the headnotes to the report, so far as present purposes are concerned, is as follows :—

Purchases of land by subjects from Natives are good against the Native seller—sc., subject to legislative provisions—but not against the Crown.

Such purchases, therefore, as the Judges point out, are not absolutely null and void at law, but only null and void *as against the Crown*. The Judges also point out that this is the law that has always been applied, and Mr. Justice Chapman says : "The early settlements of Port Philip are equally in point. The opinions of eminent lawyers were without exception against the claims of the purchasers, and, as in New Zealand, the claimants were glad to take a Crown grant of a portion of their acquisitions, *leaving a large portion of territory in the hands of the Crown*."

15. Prior to the Treaty of Waitangi in February, 1840, numerous subjects of the British Crown had made or purported to make purchases of land from the Maori owners in varying areas. In some cases the purchases comprehended immense tracts of country, all or practically all of which purchases were eventually disallowed, withdrawn, or abandoned : but, speaking generally (I am speaking now of the purchases in the North), the areas purchased were not immoderate, though in some cases running into some thousands of acres. In connection with these purchases there are two points in particular to be borne in mind. One is that surveyors were not in those days available. Anything in the nature of a survey therefore was impossible, and the land included in the deed of sale simply described the boundaries of the land by geographical or physical features. In some cases, though they form a minority, the supposed area of the land was stated in the deed. The other point is that in those days, having regard to the facts that the land was in its virgin state, that the conditions existing in the country were most primitive, that there was no such thing as any established system of law and order, that the land, except here and there in very small areas, lay uncultivated and unused by the Maori, land was of very little exchangable value. No one could then foresee the vast changes which would take place in one hundred years, and, indeed, it must be remembered that for several decades after the Treaty of Waitangi the progress of the country was exceedingly slow, and the rise in value of land by no means rapid or considerable.

16. Of the numerous purchases prior to the Treaty of Waitangi some had been made from as far back as the early 1820's, though they increased in number towards 1840 as the prospect of intervention by the British Crown in some form or other appeared to increase. When Captain Hobson first came to New Zealand as Her Majesty Queen Victoria's Consul he was furnished by the Marquis of Normanby, who was then Secretary of State for the Colonies, with a letter of explanation and instructions dated the 14th August, 1839. I pause to observe that, whatever may be said—and a good deal has been said down the years—about the actions of Government in connection with the Maori race, the dispatches of the British Government show beyond question that the Government was actuated by the purest motives, and that much of what has been written and spoken by way of adverse criticism is most unjust. In the first place, Captain Hobson was authorized to treat with the Aborigines for the recognition of Her Majesty's sovereign authority over the whole or any part of the Islands which they might be willing to place under Her Majesty's dominion. He was also instructed to announce immediately on his arrival by a proclamation addressed to all the Queen's subjects in New Zealand that Her Majesty would not acknowledge as valid any title to land which either had been or should thereafter be acquired in the country which was not either derived from or confirmed by a grant to be made in Her Majesty's name and on her behalf. This was strictly in accordance with the legal position as I have already explained it as between the Crown and the land-purchasers.

17. Lord Normanby's letter, however, contained the following specific instruction :—

You will, however, at the same time, take care to dispel any apprehensions which may be created in the minds of the settlers that it is intended to dispossess the owners of any property which has been acquired on equitable conditions and which is not upon a scale which must be prejudicial to the latent interests of the community.

18. At that time, though this position obtained for a few months only—until May, 1841—the proposed colony was placed as a dependency under the general administration of New South Wales, and, in accordance with Lord Normanby's letter, the Governor of New South Wales, with the advice of his Legislative Council, was instructed to appoint a Legislative Commission to investigate and ascertain what were the lands in New Zealand held by British subjects under grants from Natives, how far such grants were lawfully acquired and ought to be respected, and what may have been the price or other valuable considerations given for them. The Commissioners would make their report to the Governor, and it would then be decided by him how far the claimants or any of them might be entitled to confirmatory grants from the Crown and on what conditions such confirmation ought to be made.

19. The extent to which grants would be made by the Crown to the land-purchasers was a very important matter of public policy from the point of view of the due and proper administration of the country. This must be borne in mind when I come to consider the reason for, and the effect of, the schedule to the Lands Claims Ordinance, 1841.

20. The question of the Crown itself purchasing land from the Natives was also an important question of policy ; and, indeed, such purchases (as also the acquisition of the "surplus lands" out of the lands purchased by the "land-purchasers") were vitally necessary to the progress of the colony and the successful administration of Government. The question of direct Crown purchases was thus referred to in Lord Normanby's letter :—

Having, by these methods, obviated the dangers of the acquisition of large tracts of country by mere land-jobbers, it will be your duty to obtain, by fair and equal contracts with the Natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers resorting to New Zealand. All such contracts should be made by yourself, through the intervention of an officer expressly appointed to watch over the interests of the aborigines as their protector. The re-sales of the first purchases that may be made will provide the funds necessary for future acquisitions ; and, beyond the original investment of a comparatively small sum of money, no other resource will be necessary for this purpose. I thus assume that the price to be paid to the Natives by the local government will bear an exceedingly small proportion to the price for which the same lands will be re-sold by the Government to the settlers. Nor is there any real injustice in this inequality. To the Natives or their chiefs much of the land of the country is of no actual use, and, in their hands, it possesses scarcely any exchangeable value. Much of it must long remain useless, even in the hands of the British Government also, but its value in exchange will be first created, and then progressively increased, by the introduction of capital and of settlers from this country. In the benefits of that increase the Natives themselves will gradually participate.

That passage emphasizes the distinction, which becomes of importance when one comes to deal with any question of compensation, between the value of the land in aboriginal ownership (particularly before the assumption of British sovereignty) and its value subsequently after purchase by the Crown under the new conditions that might be expected to arise under a proper system of Government.

21. On the arrival of Captain Hobson in the Bay of Islands at the end of January, 1840, Proclamations were made by both Sir George Gipps, then Governor of New South Wales, and Captain Hobson, on the lines directed by the Marquis of Normanby. It was further proclaimed that all purchases of land in any part of New Zealand which might be made from any of the chiefs or Native tribes thereof after the date of the Proclamation would be considered as absolutely null and void and would not be confirmed or in any way recognized by Her Majesty. The Maori chiefs were also told prior to the Treaty of Waitangi being executed that the Governor had not come to deprive

them of their lands, but rather to secure them in possession *of what they had not already sold*, and that *land not properly acquired* from the Natives would not be recognized as the property of the person claiming it, but *would be returned to the Natives to whom it rightly belonged—vide* Buick's "*Treaty of Waitangi*," 2nd Edition, p. 126. [The italics are mine.] I may say at this stage that hundreds of thousands of acres of land which Europeans purported to have purchased did in fact subsequently revert to the Maoris by reason of the withdrawal of the claims by the purchasers or their disallowance for various reasons by the Commissioners, and in all those cases the Maoris not only had their lands returned to them, but also retained the consideration which had been paid to them by the purchasers as the purchase-price or part thereof in connection with these transactions and which aggregated a very substantial sum amounting to many thousands of pounds.

22. In August, 1840, the Governor and the Legislative Council of New South Wales enacted an Ordinance appointing Commissioners for the investigation of the purchasers' claims to land, &c., in accordance with the Marquis of Normanby's original instructions, and incidentally one of the purchasers of a vast tract of country, a Mr. Wentworth, having appeared before the Legislative Council to object to the enacting of the ordinance, Sir George Gipps delivered the address mentioned in paragraph 14 in which he stated lucidly the legal position in regard to the title to land purchased by the Queen's subjects in New Zealand prior to the acquisition by Her Majesty of sovereignty over the Islands.

23. The position taken up by Captain Hobson, as instructed by the Marquis of Normanby, in regard to the purchases of land prior to British sovereignty has already been indicated. Also I have indicated what Captain Hobson told the Maori chiefs regarding an inquiry into those purchases. So far as concerns lands remaining in the ownership of the Maoris, that is dealt with in the Treaty itself, and perhaps it is desirable at this stage to set out the three articles of the Treaty in their authenticated form in the English language. They are as follows:—

Article the First

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

Article the Second

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

Article the Third

In consideration thereof Her Majesty the Queen of England extends to the natives of New Zealand her royal protection and imparts to them all the rights and privileges of British subjects.

24. Various ideas have been at different times expressed with regard to the provisions of the second article of the Treaty, but it has been the general and accepted view, with which I entirely and respectfully agree, that the Crown's guarantee of full, exclusive, and undisturbed possession of the Maoris to their lands and estates, &c., extends only to the lands which they still owned according to Native custom; it did not include, and was never intended to include, lands to which the Native title had been already extinguished by the purchase thereof by Europeans in good faith and for fair consideration. That view is supported by the statement made to the chiefs before the signing of the Treaty, as already quoted from Mr. Buick's book.

25. Commissioners were actually appointed under the New South Wales Ordinance mentioned in paragraph 22, but very shortly after that Ordinance was passed—viz., on the 3rd May 1841—New Zealand was, pursuant to Royal Charter dated the 16th November, 1840 created a separate colony with its own Governor and Legislative Council, and Captain Hobson, who had previously been Lieutenant-Governor when the country was a dependency of New South Wales, became Governor of the Colony. There was then enacted—on the 9th June, 1841 (Session I, No. 2)—an Ordinance which did not contain any short title, but which is always referred to and known as *The Land Claims Ordinance, 1841*. That Ordinance first of all repealed the New South Wales Ordinance and then proceeded to deal with the settlement of the claims made on the basis of purchases prior to the Proclamations by Sir George Gipps and Captain Hobson, of January, 1840. These claims are generally known as the "old land claims"; and it is the surplus lands arising out of those claims that this Commission is concerned with now. The Commission has also, under Your Excellency's direction, to deal with surplus lands that have arisen in connection with what are known as the "ten-shilling-per-acre Proclamation" and the "penny-per-acre Proclamation," which I shall explain later. Somewhat different considerations may apply to these last-mentioned "surplus lands" from those which apply to surplus lands arising from the settlement of the "old land claims." For the present I propose to deal only with the surplus lands arising from the settlement of the "old land claims."

26. The Ordinance then by clause (2), after reciting that it was expedient to remove certain doubts which had arisen in respect of titles of land in New Zealand, declared, enacted, and ordained that all unappropriated lands within the Colony of New Zealand, subject, however, to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the colony, were and remained Crown or domain lands of Her Majesty, her heirs and successors, and that the sole and absolute right of pre-emption from the aboriginal inhabitants vested in and could only be exercised by Her Majesty, and that all titles to land in the colony which were held or claimed by virtue of purchases or pretended purchases, gifts, conveyances or pretended leases, agreements, or other titles, either mediately or immediately from the chiefs or other individuals of the aboriginal tribes inhabiting the colony, and which would not or might not thereafter be allowed by Her Majesty were, and the same should be, absolutely null and void.

27. I pause again to make two observations. The first is that the *Land Claims Ordinance 1842*, Sess. II, No. 14, enacted (by clause 2) 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." The Ordinance of 1842 was disallowed by Her Majesty, and therefore did not come into effective operation. Clause 2, however, was merely declaratory of the common law, and, though the same words are not used in the previous Land Claims Ordinance of 1841, the same meaning is implicit in clause 2 of the earlier Ordinance. My second observation is that that clause and the provisions contained in other clauses of the 1841 Ordinance in substance give full effect to the promises of the Crown made to the purchasers of land from the Maoris by Sir George Gipps and Captain Hobson in their respective Proclamations of January, 1840, and to the Maoris by what Captain Hobson told the chiefs and by the provisions of Article Two of the Treaty of Waitangi.

28. Clause 2 of the Land Claims Ordinance, 1841, in substance vested in the Crown all the lands in the colony, subject, as to the lands still in the ownership of the Maoris, to their rightful and necessary occupation and use. The clause then provided, in effect, that all titles claimed to land by virtue of previous purchases, &c., should be absolutely null and void. But plainly that does not mean null and void as between the purchaser and the Maori vendor; all that it means is that, in accordance with the legal position, the Crown took over, as demesne lands of the Crown, lands which had been bought

by its subjects prior to the Crown obtaining sovereignty in New Zealand, and that the purchases from the Natives were to be null and void *as against the Crown*. There was no legal obligation on the Crown to part with any of these lands or any portions thereof to the purchasers. No doubt, had that attitude been taken up by the Crown, the purchasers would have had very grave reason to complain, but the Maoris would have had no legal ground of complaint, nor would they have had any moral ground of complaint unless it were shown, in respect of any particular purchase, that such purchase had not been made in good faith and on equitable terms.

29. It is plain, then, that the Maoris had no claim at law to any of these surplus lands, and indeed that is admitted now by Mr. Cooney. I use the word "now," though it should in fairness be said that I am not aware that Mr. Cooney can be said at any time to have disputed the legal position.

30. The determination of the question of rights in equity and good conscience to the "surplus lands" depends upon an examination of the Land Claims Ordinance, 1841, and subsequent legislation, and the way in which the old land claims were dealt with. Clause 3 of the Land Claims Ordinance, 1841, recited that Her Majesty had in her instructions dated the 14th August, 1839, under the hand of one of her principal Secretaries of State been pleased to declare her gracious intention to recognize claims to lands which might have been obtained on equitable terms from the chiefs or aboriginal inhabitants of the colony and which might not be prejudicial to the present or prospective interests of such of Her Majesty's subjects who had already resorted or who might thereafter resort to and settle in the colony. It then recited that it was expedient and necessary that in all cases wherein lands were claimed to be held by virtue of any purchase, conveyance, lease, agreement, or any other title from the chiefs or tribes, or any other aboriginal inhabitants, an inquiry be instituted into the mode in which such claims to land had been acquired, the circumstances under which such claims might be and were founded, and also to ascertain the extent and situation of the same. It then proceeded to authorize and empower the Governor to appoint Commissioners with power and authority to hear, examine, and report on all claims to grants of land in virtue of such titles.

31. By clause 6 it was enacted and ordained, *inter alia*, that in hearing and examining all claims to grants and reporting on the same, the Commissioners were to be guided *by the real justice and good conscience* of the case—*i.e.*, as between the purchaser and the Maori vendor—without regard to legal forms and solemnities. It is plain that clauses 3 and 6 imposed upon the Commissioners the primary duty of ascertaining, in the case of each claim, whether the transaction on which the claim was based was made on equitable terms, and it is also plain that the determination whether or not the purchase was made on equitable terms involved an examination and determination as to the adequacy of the consideration for the purchase. I should have thought that that was beyond doubt implicit in the language used in clauses 3 and 6 of the Ordinance, but, if authority be necessary to support this view, it is to be found in the judgments of the Supreme Court and the Court of Appeal of New Zealand in *Moore* v. *Ngarino Horima and others*, 14 N.Z.L.R. 609, in which it was held that where the consideration was not a reasonably adequate or fair one, such an inadequacy of consideration would, without other circumstances, be a ground upon which a Trust Commissioner might refuse his certificate in respect of an alienation of land by Natives as being "contrary to equity and good conscience" within the meaning of section 5 of the Native Land Frauds Prevention Act, 1881.

32. Moreover, there is documentary evidence that Commissioners Godfrey and Richmond, who had been first appointed under the New South Wales Ordinance and subsequently confirmed or reappointed under our own Ordinance of 1841, acted upon this view, for in a letter written by them to the Colonial Secretary, dated 22nd July, 1842, they say: "It is impossible for a Court like ours—wherein *we are obliged to ascertain very clearly that the Natives have actually received a fair consideration for their*

land—to admit from motives of charity any allowance" (*i.e.*, to the purchaser) "for goods not delivered to them." I repeat that it was the primary duty of the Commissioners to ascertain whether in each case the purchase was made on equitable terms. If they found that it was not on equitable terms, then it was their duty to disallow it and to report accordingly. In that case the land would revert to the Maoris, who would also retain—and the purchaser would lose—the purchase-money which had already been paid; and, as already mentioned, this in fact happened in a very large number of cases. It was only in the event of the Commissioners coming to the conclusion that the purchaser had proved that the purchase was made on equitable terms that they then proceeded to deal with the matter further under the further provisions of the Ordinance to which I shall now refer.

33. The Commissioners, by clause 6 of the Ordinance, were required in every case to inquire and set forth so far as it was possible to ascertain the same the price or valuable consideration, with the sterling value thereof, paid for the lands claimed to any of the chiefs or tribes or aboriginal inhabitants, as well as the time and manner of the payment and the circumstances under which the payment was made. That inquiry was necessary first of all to ascertain whether the purchase had been made on equitable terms. Mr. Cooney urges that the reports of the Commissioners do not refer to the question of adequacy of consideration, and that the record of the proceedings before the Commissioners does not show that any questions were asked on that point. But the reports do say, where it is the fact, that the Commissioners found the purchase to have been made in good faith and taking that in conjunction with the provisions of the Ordinance and the oath taken by the Commissioners as required by the Ordinance, and their express statement in the letter of the 22nd July, 1842, I cannot doubt that the Commissioners did their duty as honourable men. After all, one would not expect, in the conditions that existed in those days, to have evidence called in each case as to the adequacy of the payment for a parcel or a block of land. The Commissioners must be assumed to have made general inquiries and to have made themselves acquainted with the general conditions as to the then value of land: and they knew, of course, that at that time and in the then conditions land was of little exchangeable value. Even so, if a transaction came before the Commissioners for inquiry and it turned out that there was a vast area of land purchased for a mere trifling consideration, it may be assumed that such a transaction would have been disallowed by the Commissioners. Indeed, that is the only inference to be drawn from the fact that very many such transactions were disallowed, abandoned, or withdrawn, and I should think it a fair deduction that in most cases where they were abandoned or withdrawn it was because the claimants knew that the transaction would not be allowed by the Commissioners.

34. But, if the transaction were found by the Commissioners to have been made in good faith and on equitable terms, then they had to proceed further. This is what clause 6 of the Ordinance says: "and" (the Commissioners) "shall also inquire into and set forth the number of acres which such payment would have been equivalent to, or" (*sic*) "according to the rates fixed in a Schedule marked B annexed to this Ordinance." (The word "or" in the text is an obvious error and may be disregarded as surplusage.) The clause then proceeds further: "And if the said Commissioners, or any two of them, shall be satisfied that the person or persons claiming such lands or any part thereof is or are entitled accordingly to the declaration of Her Gracious Majesty as aforesaid to hold the said lands or any part thereof, and to have a grant or lease thereof made or delivered to such person or persons under the Great Seal of the Colony, they, the said Commissioners, shall report the same and the grounds thereof to the Governor accordingly . . . Provided, however, that no grant of land shall be recommended by the said Commissioners which shall exceed in extent two thousand five hundred and sixty acres, unless specially authorized thereto by the Governor with the advice of the Executive Council . . . " It will be seen that these last quotations support the

view I have expressed that the Commissioners were to proceed with their recommendation as to a grant being made *only* if they first came to the conclusion that the purchase had been made on equitable terms.

35. Schedule B, referred to in clause 6 of the Ordinance, is as follows :—

"SCHEDULE B"

Period When the Purchase was Made.				Per Acre.					
				s.	d.		s.	d.	
From 1st January,	1815	to 31st December,	1824	0	6	to	0	0	
,,	1825	,,	1829	0	6	,,	0	8	
,,	1830	,,	1834	0	8	,,	1	0	
,,	1835	,,	1836	1	0	,,	2	0	
,,	1837	,,	1838	2	0	,,	4	0	
,,	1839	,,	1839	4	0	,,	8	0	

And fifty per cent. above these rates for persons not personally resident in New Zealand, or not having a resident agent on the spot.

Goods when given to the Natives in barter for land to be estimated at three times their selling-price in Sydney at the time.

That is the schedule as set out in the Ordinance, but the proviso in clause 6 as to the maximum of 2,560 acres must really be read into, and as part of, the schedule.

36. The Commissioners who heard the "old land claims" that I am at present dealing with, and with whose reports I am concerned, were Commissioners Godfrey and Richmond. Those gentlemen seem to have done their work conscientiously and well, and if the lands could have been surveyed before they held their inquiries, the portions to be granted to the purchaser and the "surplus" (if any) which the Crown retained could have been at once defined; but this, of course, was not possible in the absence of a survey. The Commissioners required the attendance before them of the purchaser or his authorized agent, and the purchaser was required also to bring before the Commissioners the Maori vendors. In addition, there seems to have been a notice issued to the Maoris, but, as the files do not show how it was issued, or whether and in what way it actually reached the Maoris, I place no reliance on it. I simply refer to it in passing. It is in the following form :—

CIRCULAR

Natives to appear in Land Claims Court

.....day of ....., 184...

FRIEND,—

This book is to inform you of the sitting of the Queen's Investigators (or Commissioners) of Land for New Zealand at and they will inquire as to the equity of the land sales by the Europeans from the New Zealanders, and they then will report to the Governor, who will acknowledge or invalidate them. The Governor says (to you) that you, the land-sellers, should come at the same time with the Europeans, on the day of the month , to give correct evidence concerning the validity or invalidity of the purchase of your lands. Hearken! this only is the time you have for speaking; this, the entire acknowledgment of your land sale for ever and ever.

From your friend,

W. HOBSON.

37. The purchaser was required to prove the purchase and that the persons named in the deed of sale as vendors were the true owners, and to satisfy the Commissioners that the Maoris knew the effect of what they were doing and knew that they were selling their land. Furthermore, as I have already stated, it was the duty of the Commissioners to satisfy themselves, on the question of equitable terms, that the consideration was fair and adequate. If the Commissioners were satisfied on all these matters, then they had to apply the schedule, or the "yardstick" as it has been called throughout the inquiry; and I shall so refer to it hereafter in this memorandum.

38. In their written claims the purchasers were required to state, and, if it were not stated in the claim, they seem to have been called upon by the Commissioners to state in evidence, the supposed area of the land which they were purchasing. The Commissioners (if they considered that the purchase was made in good faith and that the consideration was fair) would then recommend, as might be appropriate in the circumstances, either a grant of the whole of the land or else a grant of the supposed area, or a lesser area if the application of the " yardstick " so required, out of the lands described in the deed of sale. These grants would in law have been voidable on the ground of uncertainty and perhaps on other grounds, but in the circumstances it was the best and, indeed, the only thing that the Commissioners could do. Legislative steps were subsequently taken to remove the uncertainty and other legal objections to the grants. They will be mentioned later, but they do not affect the point that I am dealing with at the moment. It is the fact, however, that in a large number of cases, when the land came later on to be surveyed, it was found that the area as surveyed turned out to be greater (in some cases very much greater) than the supposed area—that is to say, the area which the purchaser thought he was buying. However, the claims were all heard by Commissioners Godfrey and Richmond, grants were issued in accordance with the recommendations made, and there the matter rested for the time being.

39. It may be stated at this stage that some of the grants were issued for larger areas then the Commissioners had recommended, but, of course, it must be remembered that the Commissioners were bound by the " yardstick," which they could not exceed. In some cases where, even by the yardstick, a purchaser would have been entitled to more than 2,560 acres, the recommendation was necessarily, by reason of the provisions of the Ordinance, limited to that area, and Governor Fitzroy, on his own initiative, or at least by his own volition, where he thought that there should be a grant for more than the area recommended, whether the recommendation was 2,560 acres or less, took steps whereby the area was increased. In many cases he referred the recommendation for reconsideration to a new Commissioner (Mr. Fitzgerald). It has been said that he should have referred the reports back to the Commissioners who made the original reports, but he was unable to do that because what I am now speaking of all took place after the retirement from the office of Commissioner of Messrs. Godfrey and Richmond in 1844, Mr. Fitzgerald being appointed under an amending Ordinance of that year.

40. That some of Governor Fitzroy's actions were irregular and *ultra vires* on his part is shown by the case of *The Queen* v. *Clarke*, which went to the Privy Council on appeal from the judgment of the Supreme Court of New Zealand and is reported in *New Zealand Privy Council cases* at page 516. But I can pass over all this without further discussion because whatever awards of lands were made by Governor Fitzroy were made out of lands which were the property of the Crown and did not in any way prejudicially affect the Natives. It must always be remembered that, after all, in the case of each and every purchase the Crown could, had it chosen to do so, have granted the whole of the land to the purchaser, or none of it, and in neither case could the Natives have had any ground of complaint. *The Queen* v. *Clarke* was apparently heard by the Privy Council in July, 1849, but judgment was not given till May, 1851. In the meantime the *Quieting Titles Ordinance, 1849* (of which more anon), was passed which had the effect in a general way of validating doubtful titles; that is another reason why Governor Fitzroy's acts in increasing the areas of grants have no significance in this inquiry.

41. It has been objected that Governor Fitzroy acted wrongly in making the extended grants as the claims were heard in open Court before the original Commissioners, and the rehearing therefore should likewise have been open to the Natives, or at least an agent should have been appointed to watch the proceedings on their behalf. There is no validity in this objection, because, as is correctly pointed out by Mrs. Wilson in *Land Problems of the Forties* (p. 88), a work to which I understand the other members of the

Commission attach some importance, in the Commissioners' Court *evidence had been heard as to whether the lands claimed by the whites had been fairly bought from the Maoris, and, once this was established, the Natives had nothing further to do with the subsequent allotment of the whole or only part of the land to the white claimants.* [The italics are mine.] Though, of course, the author is not an authority on the legal aspects of these problems, she does in the passage from which I have quoted, though perhaps implicitly rather than explicitly, state both the legal and the equitable position quite correctly in that the Crown was the owner of the land at law and the Native vendor could have no equity in any surplus lands where the lands had been held to have been fairly bought. But in any case the doubt, if there ever was one (which in my view there clearly was not) was resolved by the Quieting Titles Ordinance.

42. The next legislation dealing with land claims—omitting the Land Claims Ordinance, 1842, mentioned previously in paragraph 27, which was disallowed by the Queen—was the Land Claims Ordinance Amendment, 1844 (Sess. III, No. 3). All that that did was to provide that the powers of hearing, examining, and reporting on claims under the original Ordinance, given thereby to two Commissioners, might be exercised as fully and effectually by any single Commissioner, and to validate all acts previously done by a single Commissioner which might have been lawfully done by any two Commissioners under the authority of the original Ordinance. As stated already, Mr. Fitzgerald was appointed a Commissioner under this amendment, the original two Commissioners, Messrs. Godfrey and Richmond, having retired from office, one of them to accept another position in the South.

43. There was another Ordinance of the same year (1844, No. XX), which enacted that, in all cases where any claim to land had been or might be confirmed by a grant from the Crown under the provisions of the original Ordinance of 1841, the legal estate in the land comprised in such grant was deemed to have been in the grantee thereof from the date of the purchase by him of such land.

44. Notwithstanding the provision contained in the last-mentioned Ordinance, the position still remained very unsatisfactory, because of the fact that the lands had not been surveyed and the description in the grants of the land actually granted to each grantee was necessarily vague and uncertain. This vagueness and uncertainty, however, was a matter which concerned only the grantee and the Crown, inasmuch as the Crown was at law the owner of any surplus that there might have been over and above the actual acreage intended to be granted to the purchaser; the Maori vendors were not concerned, because they had sold the land to the purchasers and their title had thereby been extinguished. That position is implicit in a "Notice to Land Claimants" issued as early as 27th September, 1842, and published in the *New Zealand Gazette* of the following day, the material paragraph being as follows:—

> The Crown Grants will convey the number of acres to which the Claimant shall have been found entitled. Should the boundaries marked out by the Contract Surveyor at any time be found to contain a greater quantity of land than shall be contained in the Deed of Grant, the excess will be resumed. The particular portion of the land to be resumed, will be selected at the discretion of the Surveyor-General.

The word "excess" of course means the "surplus land," and the words "will be resumed" connote resumption by the Crown.

45. Next in historical sequence come the two Proclamations by Governor Fitzroy purporting to waive the Crown's right of pre-emption in respect of certain lands—the first dated the 26th March, 1844, and referred to as the "Ten-shilling-per-acre Proclamation," and the second dated the 10th October, 1844, referred to as the "Penny-per-acre Proclamation." But, as I indicated earlier in passing, these two Proclamations raise problems of their own and should be considered separately from the "old land claims." I shall deal with this particular subject-matter after I have concluded my

discussion on the "old land claims." This makes unnecessary at the moment anything more than the mere mention of the Land Claims Ordinance of 1846, which affects only the claimants under the two Proclamations of Governor Fitzroy. This Ordinance will require further reference later.

46. An endeavour was made by Governor Sir George Grey in 1849 to settle the difficulties that existed in regard to the titles of the purchasers to whom the grants had been made pursuant to the recommendations of the original Commissioners. An Ordinance of 25th August, 1849 (Sess. X, No. 4), known as the "Quieting Titles Ordinance," 1849 (also known as the "Crown Titles Ordinance"), was enacted for this purpose. It was recited in the preamble that numerous grants of land had been made in the name and on behalf of Her Majesty by the Governor, Lieutenant-Governor, or other the Officer Administering the Government for the time being; that in many cases doubts were entertained whether such Governor or other officer was duly authorized and empowered to make such grants in the name and on behalf of the Crown, and whether such grants were otherwise made in conformity with the regulations for the time being in that behalf: that numerous grants of land claimed under the provisions of the Land Claims Ordinance, 1841, had also been made wherein the land of which the grantee was recited to be entitled to a grant formed a part only of the quantity claimed to have been purchased by him from the aboriginal Native owners and was not particularly set forth and described in such grant, and it was doubtful in point of law whether by reason of such uncertainty any or what portion of land was validly conveyed by such grant; that certain cases had already been submitted to the judgment of the Supreme Court (apparently this reference is to *The Queen* v. *Clarke* and another case of *The Queen* v. *Taylor*); and that it was essential to the prosperity of the Colony that such doubts should in all cases be removed with the least possible delay.

47. "Now therefore," the Ordinance proceeded, "for the more speedy removal of such doubts and for the effectual quieting of Crown titles," a number of substantive provisions were enacted and declared, to only some of which it is necessary to refer, at all events at the moment. Clause 1, validated previously, made grants in the following terms:—

> Every grant of land within the Province of New Ulster, sealed with the Public Seal of the Colony or Province and made before the passing of this Ordinance, in the name and on the behalf of the Crown, by the Governor, Lieutenant-Governor, or other the Officer Administering the Government for the time being, shall be deemed and taken to be a good valid and effectual conveyance of the land purported to be conveyed by such grant, and of the estate or interest purported to be conveyed thereby, as against Her Majesty, her heirs and successors, and as if the same had been a valid grant of the demesne land by the Crown, and against all other persons whatsoever: Provided always that in case the land comprised in any such grant shall not be set forth and described by definite metes and bounds, the quantity of land deemed to be conveyed by such grant shall not exceed by more than one-sixth part thereof the quantity of land to which the grantee shall be therein recited to be entitled. (Entitled, that is to say, according to the Commissioners' recommendation based on the "yardstick" plus such area if any as was added by Governor Fitzroy.)

48. To meet the possibility that the issue of the original grants and their subsequent validation might in some cases prejudice the rights of Natives, the Ordinance now under discussion enacted by clause 2 as follows:—

> Provided always and it is hereby further enacted, that if it shall be proved to the satisfaction of a Judge of the Supreme Court that the Native title to the land comprised in any such grant made or purporting to be made on the report of a Commissioner appointed to hear examine and report upon claims to land hath not been fully extinguished, it shall be lawful for any such Judge to award to the Native claimant or claimants proving title to the same, such sum or sums of money in satisfaction of the claim so to be substantiated as aforesaid as shall appear to such Judge to stand with equity and good conscience, and to direct the payment of the same to be made by instalments or otherwise and at such time or times and in such manner as to him may seem meet.

There followed provisions as to the payment of such satisfaction moneys or compensation, so that, as will be seen, the interests of Native claimants were safeguarded.

49. Clause 5 enacted that, until it should be amended as thereinafter provided, each grant which recited that the grantee was entitled to receive a grant of a specified quantity of land, but which did not set forth and describe the particular piece or parcel of land intended to be thereby conveyed, or in which such particular piece or parcel of land was not set forth and described by definite metes and bounds, or was otherwise insufficiently described, was to be deemed and taken to vest in and confer upon the grantee, his heirs and assigns, the right of selecting out of the whole of the land included within the boundaries named in the grant the quantity of land to which he might be so recited to be entitled. The Ordinance made provision, to which detailed reference is unnecessary, as to how the right of selection was to be exercised, and generally as to the description of boundaries to be contained in, and the map to be endorsed on, the grant. It also made provision for an exchange of land when the exercise of the right of selection was obstructed by the Natives, but that provision does not call for comment.

50. The Quieting Titles Ordinance was undoubtedly a necessary, useful, and statesmanlike enactment, because it was essential to resolve, as between the grantee and the Crown, the doubts that existed as to the efficacy of the grants which the Crown had issued. Even if not then passed, it would certainly have become necessary later after the decision of the Privy Council in 1851 in *The Queen* v. *Clarke*. Apart from the uncertainty of the description in the various grants of the land intended to be granted, that decision would have been a very disturbing factor which necessarily would require to be eliminated if there was to be any sanctity or certainty in titles granted by the Crown. The Quieting Titles Ordinance really anticipated the judgment in *Clarke's* case, and it had the effect, *inter alia*, of validating grants such as those which had been questioned in that case, but here again it should be remembered that the issue in *Clarke's* case was an issue only as between the Crown and the grantee which did not in any way affect or concern the aboriginal Maori owners from whom Clarke had purchased. In substance the point was whether, at the time that Governor Fitzroy extended Clarke's grant, he had the right to do so, and so bind the Crown, without the prior sanction of the Legislative Council.

51. The well-intentioned objects of the Quieting Titles Ordinance of 1849 (apart from the mere quieting of titles) were not realized. It had been hoped that all the claimants would have their lands surveyed and would receive new grants for the actual areas intended to have been originally granted, plus an addition of up to one-sixth in order to enable natural boundaries where practicable to be taken instead of survey lines. For various reasons, most of them involving practical difficulties, very few of the old grantees obtained new grants for their original ones, and in 1856 a Select Committee was set up by the House of Representatives under the chairmanship of Mr. Domett. The Committee gave very careful consideration to the difficulties created by the Old Land Claims and also by the Waiver of Pre-emption Proclamations, and made a lengthy report on the 16th July, 1856, recommending, *inter alia*, the setting-up of a Court of Commissioners; and on the 16th August the Land Claims Settlement Act, 1856, was passed, "to provide for the final settlement of claims arising out of dealings with the Aborigines of New Zealand." Mr. (afterwards Sir) F. Dillon Bell was appointed to act as Commissioner under this Act, and he certainly performed a monumental task, which occupied about six years of apparently continuous work, his final report being made on the 8th July, 1862. The cases which came before Mr. Commissioner Bell were those relating to (*a*) "old land claims" which had been before the original Commissioners under the Ordinance of 1841 and in which those Commissioners had made recommendations for the issue of grants; (*b*) "old land claims" which, for one reason or another, had not been before or had not been dealt with by the original Commissioners; and (*c*) claims in respect of the Ten-shillings-per-acre and Penny-per-acre Proclamations.

52. The object and purpose of the Land Claims Settlement Act, 1856, were set out in the preamble which, after referring to the Ordinances passed in 1841, 1844 (No. 3), 1846, and 1849 proceeded : " And whereas many of the said land claims are still unsettled and the validity of the said grants is disputed on various grounds, and it is essential to the peace and well-being of the Colony that all such land claims should be finally settled and disputed grants corrected : And whereas by reason of lapse of time and other circumstances, proceedings cannot be effectually taken under the said-recited Ordinances for effecting the said objects and it is expedient that new and other provisions should be made in that behalf." So much of the Ordinances referred to as was " repugnant to the provisions of this Act " was repealed, and provision was made for the appointment of Commissioners. The tribunal of the Commissioners was expressed to be a Court, and, though not so styled in the Act itself, has always been referred to as the " Court of Claims." By Part II of the Act the Commissioners (though in fact only one person, Mr. Bell, was appointed as Commissioner, and I shall therefore henceforth use the term Commissioner in the singular, though the Act uses the plural) were given power to hear and determine all claims which might have been heard, examined, and reported on under the provisions of the Land Claims Ordinances of 1841 and 1844, and all claims whatsoever to land or compensation arising out of dealings with the aboriginal inhabitants of the Colony prior to the establishment of British sovereignty, or since that period, with the sanction of the Government, or under the two Proclamations issued by Governor Fitzroy, of the 26th March, 1844, and the 10th October, 1844, and to examine and determine all questions relating to grants issued in respect of the same, subject to the exceptions and provisions contained in the later provisions of the Act. By Part III (section 15) there were certain classes of claims which were declared not to be lawful for the Commissioner to entertain or investigate.

53. Provision was made in Part IV of the Act for the calling-in of Crown grants in respect of claims made of lands over which it might be alleged that the Native title had not been extinguished, or in which it might be alleged that there was such uncertainty of description as would render the grant void or voidable in law, or that there was not a map which had been approved of by the Government of the lands granted, delineated, or endorsed thereon. Such Crown grant was to be produced to the Commissioner, and if not produced, or if on production and examination of the circumstances it appeared that the Native title over the land granted or over any part thereof was not extinguished, or that there was in such grant such uncertainty of description as would render the same void or voidable in law, then, after hearing the case, if the Commissioner after giving effect to the provisions of the Quieting Titles Ordinance, 1849, was of the opinion that the grant was void or voidable in law, he might adjudge and determine the grant to be null and void, and such adjudication should have the same force and effect in annulling and making void the same as if the same were repealed by process of *scire facias*. If it appeared that the grant was not void or voidable in law, but that no accurate map of the lands granted was delineated or endorsed thereon, an order might be made requiring the person or persons producing the grant to deliver to the Commissioner an accurate map certified by a competent surveyor, and in default thereof the Commissioner might adjudge and determine the grant to be null and void. Every grant so adjudged to be null and void was to be forthwith delivered up and cancelled.

54. Where in pursuance of the provisions of the Act any such grant was adjudged to be null and void and was delivered up and cancelled, it was declared to be lawful for the Commissioner to direct that there should be issued in favour of the person or persons who might appear to the Commissioner best entitled thereto a new grant or several new grants under the Public Seal of the Colony of such lands as the Commissioner should direct ; and it was provided by section 23 that the Commissioner should proceed according to the following rules :—

(*a*) Where a definite quantity of land shall have been specified in the cancelled grant, if the boundaries described shall be of sufficient extent, the Commissioners shall adjudge such quantity, with an addition not exceeding one-sixth, to be selected by the grantee out of the lands comprised within such boundaries.

(*b*) If the boundaries described shall not contain the requisite quantity, the grant shall be adjudged for so much as the boundaries do contain, in satisfaction of all claim.

(*c*) Where there shall be several grants of the same land, or of land within the same boundaries, the Commissioners shall adopt such scheme of division, selection, or apportionment as shall in their judgment be best adapted to meet the justice of the case.

(*d*) In no case shall any person be entitled to a new grant of more than the quantity expressed in the cancelled grant, except that the grant may be extended to one-sixth more than such expressed quantity.

(*e*) In all cases accurate maps of the lands to be granted shall be furnished to the Commissioners at the cost of the parties; such maps to be certified by some competent Surveyor to be approved of by the Commissioners.

(*f*) In any case not specially provided for, the Commissioners shall proceed according to such rules as they may judge best adapted to meet the justice of the case, but as near as may be in accordance with the provisions of this Act.

Provision was also made for the inclusion in the area to be granted of a quantity of land by way of allowance for surveys and fees authorized by the Act.

55. Proceedings with regard to "old land claims" which the Commissioner was empowered under the provisions of the Act to investigate were provided for in Part V of the Act, sections 25 to 28. The Commissioner was directed, in order to ascertain and determine the quantity of land which might be granted to any claimant, to inquire into and set forth, so far as it was possible to ascertain the same, the price or valuable consideration, with the sterling value thereof, paid to aboriginal owners of the land; the time, manner, and circumstances of the payment; and the number of acres such payment would have been equivalent to according to the rates fixed in Schedule C to the Act (which was identical with Schedule B to the Land Claims Ordinance, 1841): and the Commissioner was to direct the issue of a grant to the person he in his judgment might deem entitled thereto, for the number of acres so to be ascertained. In any case where special hardship had been suffered by a claimant by reason of delay in settling the claim without default of the claimant, the Commissioner had power to increase the number of acres to be granted by not more than one-fourth, with the proviso, however, that no grant was to be issued of land exceeding in extent the quantity originally claimed. There was a further proviso, as in the Land Claims Ordinance, 1841, that no grant was to be issued which would convey more than the maximum of 2,560 acres to any one claimant; but under special circumstances the Commissioner had power to recommend the Governor to extend the amount to be granted beyond such maximum, accompanying such recommendation with a report of the special circumstances: and the Governor was empowered in such special case to issue a grant of land not exceeding the quantity recommended by the Commissioner.

56. The element of equity and good conscience upon which the Commissioner was required to decide the matters that came before him was emphasized throughout the Act. In the rules above quoted, taken from section 23 of the Act, he was required to proceed in any case not specially provided for according to such rules as he might adjudge best adapted to meet the justice of the case. By section 33, which is in Part VI, under the heading "General Provisions," he might be required to investigate cases of proved injustice, and to award compensation; and he was to hear the case and decide it according to equity and good conscience, and he was empowered to direct a grant of land or compensation in land as he might think equitable according to circumstances. Section 50 enacted that all proceedings under the Act were to be conducted, not according to strict law, but according to equity and good conscience, and that no informality whatever should vitiate such proceedings, and the section proceeded thus: "And in all cases not specially provided for by this Act, the Commissioners shall make such orders and adjudications and give such directions as shall in their judgment be most agreeable to equity and good conscience, and as nearly as may be in accordance with the provisions of this Act."

57. The Land Claims Settlement Act, 1856, was amended and extended by the Land Claims Settlement Extension Act, 1858, but it is not necessary to refer in detail to the provisions of this later Act. It is sufficient to say that Mr. Commissioner Bell examined carefully all the cases that came before him, that he caused a survey to be made in each case, where it was necessary, of the whole of the land mentioned in each original grant, and of the quantity of that land to which he found the claimant entitled plus the addition and allowances provided for by the Act of 1856. He then ordered a grant to be issued for the area to which he so found the claimant to be entitled, and, wherever the total area surveyed exceeded the area so granted, the quantity in excess was regarded as being in the category of "surplus lands."

58. It is perfectly correct, as Mr. Cooney has emphasized, that in all the cases which had previously come before Commissioners Godfrey and Richmond, and in which grants had been made for the areas recommended by the Commissioners or increased areas allowed by Governor Fitzroy, Mr. Commissioner Bell accepted (as he was bound to accept), as the basis of his own adjudication, the area to which the claimant was stated in the grant to be entitled. That is to say, to use Mr. Cooney's expression, Mr. Commissioner Bell adopted the acreage previously fixed and "built on" it by making the additions provided for by the Act of 1856, and, as Mr. Cooney says, Mr. Commissioner Bell did not in those cases consider the question of whether the original purchase had been made on equitable terms. That, indeed, was no part of his duty, because the question had already been investigated and determined by the original Commissioners. So far as the "old land claims" which had been dealt with by the original Commissioners were concerned, what Mr. Commissioner Bell had to do was to consider the question of equity and good conscience only as between the purchasers and the Crown, and, in considering the question of equities of the purchaser, he could not go outside the "yardstick," which had already been applied, plus additions made pursuant to the Act of 1856.

59. But, as regards "old land claims" which came before Mr. Commissioner Bell for the first time that, is to say, which had not previously been investigated by the original Commissioners, his duty was the same as was that of the original Commissioners in the cases into which they inquired under the Ordinance of 1841, that is to say, he had to investigate the claims in the same way and satisfy himself that the purchase was made in good faith and for fair and adequate consideration, and it is impossible to doubt that he faithfully performed his duty. What he did in respect of these claims, after satisfying himself that a purchase was made in good faith and on equitable terms, was to apply the "yardstick," as he was compelled to do for the purpose of computing not the area to which the purchaser was entitled as against the Maori vendor, but the area for which the Crown, as the owner of the land, was prepared to give him a grant.

60. Mr. Commissioner Bell therefore had before him in the case of the old land claims which had not been previously investigated:—

(i) The deed of sale, describing the land as bounded by physical features, and in a very few cases stating the supposed area;
(ii) A statement by the purchaser of the area that he considered he was buying;
(iii) The surveyed area; and
(iv) The particulars of the purchase-money or other consideration.

He then ascertained, according to the yardstick and the provisions of the Act of 1856, the area that the Crown was prepared to grant to the purchaser. A grant was issued accordingly, and the difference between the area actually granted and the surveyed area was "surplus land" which in law was the property of the Crown. As to the old claims which had been before the original Commissioners, the position may be conveniently summarized, although it is really repetition, by saying that Mr, Commissioner Bell had the same particulars as those Commissioners had had, but in addition he had the surveyed area. He then ascertained what area the claimant was entitled to by adding

to the area previously awarded the allowances authorized by the Act of 1856, and on this basis a new grant was issued to the claimant. In those cases, again, the difference between the area finally granted and the surveyed area was "surplus land" which belonged in law to the Crown.

61. The aggregate of all these surplus lands, according to Mr. Commissioner Bell's report (inclusive of "surplus lands" in connection with Governor Fitzroy's proclamations), amounted to 204,000 acres. Mr. Cooney suggests that this aggregate should be increased by about 28,000 acres. On the other hand, counsel for the Crown contend that there are no real "surplus lands" at all or, if there are any, that Mr. Commissioner Bell's figure of 204,000 cannot be accepted and must be considerably reduced for various reasons. One reason is that Mr. Commissioner Bell, in his description of surplus lands, includes areas which are not surplus land at all, but simply lands which in various ways he found to be waste lands available for settlement, and he was not, after all, concerned with the distinction between those lands and surplus lands in the true sense. Indeed, he was not so much concerned in the question of surplus lands as he was in the question of determining what area each claimant was entitled to; and, according to his treatment of the case, the ascertainment of the surplus lands was simply a matter of arithmetic—that is to say, of subtracting the area actually granted from the total area surveyed. Moreover, Mr. Commissioner Bell did not deduct from his aggregate some of the so-called surplus land which had already been the subject of separate purchases by the Crown itself from the Maoris and which therefore had changed its character from "surplus" to "waste lands"; and in any case there have been purchases since Mr. Commissioner Bell's report of large areas (which have been referred to as "blanket" purchases) which include some of the so-called surplus lands and would therefore further reduce Mr. Commissioner Bell's figure. Be all that as it may, so far as this Commission is concerned, the area of surplus lands has had to be ascertained by meticulous examination of each case and by aggregating the results; and it is the indisputable fact that the ultimate area of true surplus lands, taking into account all the circumstances and particularly the Crown purchases direct from the Natives both before and after the date of Mr. Commissioner Bell's report of lands which he included as "surplus," is very much less than his figure of 204,000. It is also less than the figure shown in the schedules supplied by the Lands Department. That is accounted for by the fact that those schedules are based on the "yardstick" computation which the Commission rejects.

62. Mr. Cooney contends first in substance that the Natives were *deprived* of the surplus lands by a "highly technical rule of law which was implied in the act of cession." That, he says, is his "essential submission." If that were really the essence of the case, the present claim by the Maori would entirely fail. But the contention is fallacious. It was their own act of sale, and not any technical rule of law applied in their cession of sovereignty, that extinguished their title and "deprived" them of the lands of which the "surplus lands" form part.

63. But I take the real case for the Maori as presented to this Commission to be that all the "surplus lands" should on a somewhat different ground have reverted in equity and good conscience to the Maori vendor. The basis of the argument is that the schedule or "yardstick" was a statutory measuring rod of *value* of the land *as between the purchaser and the Maori vendor* according to the year, or portion of the year, in which a purchase was made, and therefore of the area which the purchaser must be assumed to have bought and paid the Maori vendor for. If that argument were sound, then no doubt *prima facie* the whole of the "surplus" land should in each case have reverted to the Maori vendor because *ex hypothesi* it had never been sold. Mr. Meredith, on behalf of the Crown, vehemently disputes the soundness of Mr. Cooney's argument. To meet the possibility, however, of its being upheld, Mr. Meredith has produced voluminous and elaborate tabulated lists purporting to show that, if the yardstick was the

basis of value and area as between the purchaser and the Maori vendor, then, taking all purchases together, the aggregate sum paid to the Maoris was more than sufficient purchase-money according to the yardstick for the total area eventually granted to the purchasers plus all the "surplus lands." In other words, he takes each transaction by itself, and where there is a surplus based on the yardstick he calls it a surplus, but where the purchase-money was sufficient according to the yardstick to give the purchaser a greater area than the yardstick permitted, he calls that a "deficiency," and he sets off the total deficiencies against the total surpluses. He contends that on that basis, taking all the transactions *in globo*, the Maori would have no claim at all in equity and good conscience because he would have been paid sums sufficient in the aggregate according to the yardstick to cover all the surplus lands as well as the lands actually granted to the purchasers.

64. I do not think it necessary to discuss Mr. Meredith's contention based on his tabulated lists, because I consider it plain that Mr. Cooney's basic contention cannot be accepted. If, however, Mr. Cooney's view were acceptable, the conclusion that Mr. Meredith seeks to draw, though it is idle to speak of "deficiencies," might not be without substance.

65. The truth is, as I see it, that the "yardstick" has no relation whatever to either the value or the area of the land *as between the purchaser and the Maori vendor.* If it had, then by reason of the fact that the provision for a maximum of 2,560 acres is really part of the "yardstick," if a purchaser paid as purchase-money a sum less than the yardstick rate, but which was nevertheless a fair and adequate consideration apart altogether from the yardstick for an area of, say, 5,000 acres, he could obtain a grant for no more than 2,560 acres, and the surplus would go to the Maoris. (And it seems to me that the same result might be claimed by the Maoris even if the consideration paid was sufficient according to the yardstick for 5,000 acres.) In other words, the Maoris would receive back a large area of land which they had sold and for which they had already received adequate consideration, they could sell it again and thus be paid twice for the same land. I am aware that Mr. Cooney's contention that the schedule was a fixation of value is supported by various suggestions or opinions made in the past to that effect—*e.g.*, in Mackay's Compendium and in the report of the Jones-Strauchon-Ormsby Commission in 1920—but the point never seems to have arisen in the form in which it arises before this Commission or to have received careful consideration in any quarter, and any such suggestions or expressions of opinion as I have indicated are, in my view, clearly erroneous and must be regarded as having been made *per incuriam.*

66. I am of the clear opinion, on careful consideration, that the schedule was a measuring-rod for one purpose and one purpose only—namely, to define the extent or quantity of land that the Crown was prepared to grant to the purchaser—and that it had nothing whatever to do with the value or area of the land as between the purchaser and the Maori vendor. It will be seen on reference to the schedule that the rate per acre varies according to the time of purchase from the 1st January, 1815, when it is practically nil, to the end of 1839, when it is 8s. In the first period, from 1st January, 1815, to 31st December, 1824, it goes up to 6d; from 1st January, 1825, to 31st December, 1829, from 6d. to 8d.; from 1st January, 1830, to 31st December, 1834, from 8d. to 1s.; during the next two years, 1835–36, from 1s. to 2s.; during the next two years, 1837–38, from 2s. to 4s.; and during the year 1839, from 4s. to 8s. It is obvious that these are simply arbitrary figures laid down by the legislative authority for ascertaining not the area of land purchased by a claimant from the Maoris, but merely the area of land which the Crown would be prepared to grant to the purchaser. Then we find that, to the rates that I have already alluded to—and, be it noted, the Ordinance speaks of *rates*, not prices or values—50 per cent. was to be added for persons not personally resident in New Zealand or not having a resident agent on the spot. What relation can non-residence

possibly have had to the value of the land? It *had* a relation to the quantity of land that the Government was prepared to grant to the purchaser, because it may be assumed that the non-resident was not a true settler, and therefore should not be entitled to hold as much land as should be allowed to the true pioneer, but it had no relation to the *value* of the land. More than that, the schedule placed the same rate upon any and every description of land. There was no classification as to nature, quality, or locality. The best potential pasture land was in the same position under the schedule as the hill-top or the sandy waste. The only factor, apparently, upon which the rates in the yardstick were based was the time of purchase and the number of years before the Gipps and Hobson Proclamations that the purchase was made. That is a factor which it is understandable that the Crown would take into consideration in fixing the rates, because it may well have been assumed that the person who bought in the earlier days and took up his residence in New Zealand had run greater risks than the man who came and purchased later, and that those risks entitled the earlier purchaser to greater consideration at the hands of the Crown and a grant of land to a greater extent than the later arrival.

67. In my view, it is an utter fallacy to say that the yardstick fixed the *value* of land *as between the purchaser and the Maori vendor*, or was, as Mr. Cooney argues, the measure of "equitable terms." That the yardstick can have no relation to the *value* of the land is also shown by the terms of the (disallowed) Ordinance of 1842, the effect of which would have been to abolish the yardstick and substitute a basis of a grant from the Crown for four times as many acres *out of the land* "validly sold" as the purchaser should be found to have expended pounds sterling—*i.e.*, at the rate of 5s. per acre for all lands whenever purchased, wherever situated, and whatever the quality. The words "out of the land" and "validly sold" necessarily presuppose that there may be a *valid* sale of a larger area than that which is granted by the Crown to the purchaser.

68. The point is that the schedule can have had no application to the position as between the purchaser and the Maori vendor if in fact and in law the whole of the land in the purchase was the property of the Crown, as it undoubtedly was. The truth of the matter is, as I see it, that the whole of the yardstick—and I include the provision as to the maximum grant of 2,560 acres—was devised by the Crown as a matter of public policy for the purposes of eliminating the "land-shark" or "land-jobber," limiting individual holdings, ensuring as far as possible proper and profitable user of the land—and all this in the assumed interests of the general prosperity of the country—and requiring the land-purchaser to make a reasonable contribution towards the expenses of the establishment and government of the new colony. The Crown alone was concerned in these limitations; the Maori who had sold the land on equitable terms had no interest in the matter.

69. The basic fallacy underlying the argument for the Maoris is in the contention that the question of equity and good conscience has to be regarded as a matter between the Crown and the Maoris, and that the burden lies upon the Crown to show that the Crown has rights in equity and good conscience, and that, if the Crown fails to show that, the lands should revert to the Maori vendor. That is most certainly not the position. It is for the Maoris to show that the original vendors had a right in equity and good conscience to have the surplus lands returned to them, and the question of conflicting rights arises not as between the Maori vendor and the Crown, but as between the Maori vendor and the purchaser. So far as concerns lands which were sold by the Maoris prior to the Treaty of Waitangi—*i.e.*, the lands comprised in the "old land claims"—the Crown stood in the place of the purchasers, and if in truth the surplus lands were in good faith the property of the purchasers, then it was their property and not the property of the Maoris that the Crown took. If that is so, the Maori vendors would have had no rights at all in equity and good conscience to have the "surplus" returned to them.

70. *Prima facie*, that would seem undoubtedly to be the position. In any case where a purchase was made in good faith and for a fair consideration, and the purchaser would have been entitled but for the yardstick to a grant of the whole of the land purchased, but by reason of the yardstick he received a grant for a smaller area than he had agreed to buy and the vendor to sell, thus giving rise to an area of what has been included in the general term of "surplus lands," the land would remain as demesne land of the Crown, and the Maori could have no claim to it either at law or in equity and good conscience. That seems to me to result as a matter of principle.

71. It is suggested by Mr. Cooney that the question of surplus lands going to the Crown was not thought of until Mr. Commissioner Bell had made his report in 1862. That is not correct, although it is correct that the question attained a prominence by reason of Mr. Commissioner Bell's report which had not previously attached to it. As a matter of fact, the question was specifically raised by Governor Fitzroy before he took office as Governor in New Zealand. In a letter of 16th May, 1843, to Lord Stanley, who was then Secretary of State for the Colonies, Captain Fitzroy asked the specific question: "To whom should land now belong which has been validly purchased from New Zealand aborigines, but which, exceeding a certain specified quantity, cannot be held under existing laws by the original purchaser or his representative?" Captain Fitzroy's own view was that the land in question ought to return to these aborigines from whom it was purchased, unless they or their descendants should not prefer any claim, in which case Captain Fitzroy presumed that it would lapse to the Crown. On 26th June, 1843, Lord Stanley replied to Governor Fitzroy on this question as follows:—

1. Your first inquiry is in the following terms: "To whom should land now belong which has been validly purchased from New Zealand aboriginals, but which, exceeding a certain specified quantity, cannot be held under existing laws by the original purchaser or his representative?"

The case thus supposed is (if I rightly understand it) a case in which the contract with the Natives shall be found by the Land Claims Commissioners to have been untainted by any such fraud or injustice as would render it invalid. It is assumed that neither on the ground of inadequacy of price nor on any other ground could the former proprietors of the land require that the sale of it should be set aside. But it is at the same time supposed that the land then acquired exceeded the limitation which defines the extent of land to be holden by any European under a title originally derived from the aborigines. The question then is: Who is the proprietor of the excess? To that question it must be answered that, by the terms of the supposition, the purchaser is not the proprietor; and that the hypothesis being that the claims of the aboriginal sellers have been justly extinguished, they are no longer the proprietors. Hence the consequence seems immediately to follow that the property in the excess is vested in the Sovereign as representing and protecting the interests of society at large. In other words, such land would become available for the purposes of sale and settlement.

But in reducing any such general principle to practice, not only the difficulties you yourself suggest, but others not now distinctly perceptible, will probably arise. Especially it may happen that the Natives may be found in possession of some such lands, or may be prompted by feelings entitled to respect, earnestly to solicit the resumption of them. In any such contingency it would be your duty (I am well aware how much it would be your inclination) to deal with the original proprietors with the utmost possible tenderness and even to humour their wishes so far as it can be done, compatibly with the other and higher interests over which your office will require you to watch.

72. The same view as is expressed by Lord Stanley in his letter of the 26th June, 1843, is implicit in the original Instructions of the 14th August, 1839, from the Marquis of Normanby to Captain Hobson. It must be understood that when Lord Stanley speaks of the limitation which defines the extent of land to be holden by any European under a title originally derived from the aborigines, he is by necessary implication referring to the excess created by the application of any limitation which might be imposed by the Crown, and the limitation created by the application of the yardstick is just as much a limitation for that purpose as the limitation created by the fixing of 2,560 acres as the maximum which could be held in any event; and obviously the same principle must apply to the surplus in either case.

73. Furthermore, as early as 19th September, 1842, the then Surveyor-General at a meeting of the Executive Council was asked certain questions: "Are you aware of the number of claims to be disposed of under the Land Claims Ordinance?" His

answer was: "I believe about 1,004." He was then asked: "What number of claims have already been submitted to you?"—to which he answered, "One hundred and two." He was then asked: "Are you aware of the number of acres recommended by the Commissioners to be granted in those 102 claims?" He answered, "Forty-two thousand acres. The original claims amounted to 192,000 acres. *One hundred and fifty thousand acres will consequently remain demesne lands of the Crown.*" Following almost immediately upon this meeting there was published in the *New Zealand Gazette* the Notice to Land Claimants dated the 27th September, 1842, and referred to in paragraph 44. And the fact that purchasers undoubtedly knew will appear further when I come to refer to certain statements made by Dr. Martin, who was himself a purchaser.

74. It will be seen, therefore, that the questions of surplus lands and their not being returnable to the Native vendors but constituting demesne lands of the Crown were all in mind and carefully considered from the very outset. The only reason why the questions assumed prominence by reason of Mr. Commissioner Bell's report in 1862 was that it was not until his investigation that surveys of the complete area comprised in each of the purchases were made, and the area granted to the purchaser and the area of surplus land respectively defined.

75. Nor was the position of the surplus lands lost sight of during Mr. Commissioner Bell's investigation. In a memorandum dated 15th May, 1858, in compliance with the desire of the Government, he submitted a summary of the progress made under the Land Claims Act 1856. In that memorandum he said:—

> The Commission has now been in operation for eighteen months . . . I am glad also to be able to assure the Government that the predictions of disturbances being certain to occur with the Natives in carrying out the Act have proved quite groundless. So far from having the least intention of opposing the law, the Chiefs have throughout expressed great satisfaction at its existence, and have everywhere met me in the most admirable spirit. There have been a number of very complicated cases, which afforded ample opportunity for the display of a bad disposition if any had existed; there have even been many spurious claims advanced by the younger men, because they knew it was their last chance; and it is an honour to the Natives that (with two or three unimportant exceptions) they have in every instance peaceably and patiently stated their claims before me, and cheerfully submitted to any adverse decision. They have done more than yield a passive acquiescence in the law; many of the Chiefs and Assessors have given me active and intelligent help, taking pains to make themselves acquainted with the principles and even details of the Act, and corresponding with me from distant places as to the settlement of boundaries and other matters. I may specially refer to their conduct with respect to the land exchanged for scrip in 1844, which they have in most cases faithfully preserved for the Government to this day, and also with respect to land formerly sold by them but not inquired into by previous Commissions, which they might easily have deceived the Government about if they had wished. *It was predicted they would resist the revertal of surplus land in claims to the Crown. So far from this* (and I have always carefully explained the effect of the law in such cases, and the grounds on which I required a survey of the whole exterior boundary of a claim as originally sold), *they have always admitted that where their title had been extinguished, any right of theirs to the land was at an end, and that they had nothing to do with the apportionment of it by law between the Crown and its subjects;* and their position in this matter is now so well understood that whenever they wish to have back any part of the surplus land they apply for it to the Government as a matter of course. [My italics.]

76. According then to Mr. Commissioner Bell, the Natives of that day (1856–1862) had no complaint, and were satisfied with the position taken up by the Crown in regard to these surplus lands. The suggested inference is that they knew that they had sold the land and saw the justice of their not claiming the return of something that they had sold on terms which at the time of the sale were satisfactory to them. The claims that this Commission is now looking into are made by a later generation.

77. At the time of Mr. Commissioner Bell's inquiry it was the purchasers who considered that they had been wronged by the Crown in being deprived of land which they considered they had fairly and honestly bought. This aspect of the matter was referred to by Mr. Commissioner Bell in his Report of the 8th July, 1862, as follows:—

> First, with respect to the Old Land Claims. The demand that was practically made last Session, and which I presume will be renewed this, was that the claimants being themselves entitled to their surplus land, the Crown had no real right to keep it. I am not going into the "colossal argument"

as to whether or no the Queen's subjects who settled here before the establishment of Her Majesty's authority had a right to buy land from the Natives, had a right to all they bought, had a right to require confirmatory grants of it from the Crown, and, failing that confirmation, had a right to the recognition of their titles by the Supreme Court. Still less shall I waste time in discussing the question whether the Ordinances of 1840 and 1841 were violations of Magna Charta and the Bill of Rights, or repugnant to the law of England. I do not suppose that the Government or the Assembly feel any interest in these fanciful controversies in the year of grace 1862. But I feel called upon to observe on one or two points, in order that my opinion, as the person to whom the Legislature has confided so much power and discretion, should not be misunderstood. Whether the Queen's subjects had or had not the right for which some of the land claimants contend, of buying land from the New Zealanders and keeping all they bought, we know at any rate for a fact that the Queen's Government denied it from the first . . .

Now it is upon this promise of Lord Normanby's that a few of the land claimants have based a belief in their possession of certain rights. They interpreted it to mean an absolute engagement to confirm them in whatever they had actually bought. But in order to find the true interpretation of that promise, we must seek it in the solemn acts of the Imperial Government itself. When Her Majesty was advised to give the Royal assent to an Ordinance which commenced with the formal declaration that "all titles to land in New Zealand which were held or claimed by virtue of purchases or pretended purchases, gifts or pretended gifts, conveyances or pretended conveyances, leases or pretended leases, agreements, or other titles, either mediately or immediately from the chiefs or other individuals of the aboriginal tribes, *were absolutely null and void*"; when in the same Ordinance certain conditions were laid down upon which alone confirmatory grants would be made; it is there we must look for the express interpretation of the Royal promise of 1839. To argue that the Land Claims Ordinance did not carry out the real intention of the Queen's Government at a time when Governors were ruled from Downing Street and Official Legislatures obeyed Governors, would be mere folly even if there were no other evidence than the Royal Assent to show that the Ordinance did carry out that intention. There is, however, plenty of proof that, Sir George Gipps' Proclamation and Ordinance of 1840, and Governor Hobson's Ordinance of 1841, really represented the mind of the Imperial Government at the time, and were considered to extend a reasonable liberality to the land claimants. The only wonder is that any student of the Blue Books should for a moment advance the contrary assertion . . .

No one who has read the records of the Land Claims Commission can doubt for a moment that when the Government came down here in 1840 the great body of the claimants accepted the Ordinance in perfect good faith, and that they were content to abide by its limitations, in consideration of the exchange it gave them of an English title for a precarious occupation under the law of the strong arm.

78. Mr. Commissioner Bell was certainly under no misapprehension as to the position either at law or in equity and good conscience. This is shown throughout his memorandum and report. I might perhaps refer particularly to the case of Mr. Clarke, which it will be remembered was the subject of the appeal to the Privy Council referred to in paragraphs 40, 46, and 50. Mr. Commissioner Bell said this :—

In referring to Mr. Clarke's grant, I should say that it is an instance of two things—on the one hand of there being no *right* in the claimant to the surplus; and on the other of the claimant's payment to the Natives being such as would have made it quite *fair* to give him the whole acreage included in his purchases.

That passage shows a clear conception and recognition by Mr. Commissioner Bell of the difference between a right at law and a right or claim in equity and good conscience. Nevertheless, he was, of course, bound to take as the basis of his investigation so far as Mr. Clarke's case was concerned the area which had been eventually granted to Mr. Clarke, and which was itself based primarily on the yardstick. Mr. Commissioner Bell adds :—

There never was any doubt that the Imperial Government considered the Crown was entitled to the surplus land; and Lord Stanley expressly declared in May, 1843, in answer to a question by Captain Fitzroy before he assumed the Government, that the excess in a claim over the quantity granted would revert to the Crown.

79. Mr. Commissioner Bell's view undoubtedly was the same as my own as expressed in this memorandum—namely, that, if the Crown was not to have the surplus land, the person entitled to it (*i.e.*, entitled to it in justice and equity) was the purchaser, for he says in his report :—

Still, if the Assembly is disposed to be generous, there is no great difficulty in the way. In the northern claims there will be little further inquiry wanted, and no new surveys; the annexed return shows exactly what has been taken as surplus out of the respective claims, and if the Legislature

resolves to grant the land it can be done without much delay or expense. But in that case I beg leave, on my own account, to make one observation. If the surplus land is to be given, let it be done on the only principle which is fair. Make a new declaration that every man shall be entitled to a grant for what he *bona fide* bought, irrespective of the original restrictions in the Ordinance of 1840 [*sic*]. Let it be announced that the old landmarks are removed, and give to those who abandoned their claims when they found they could merely get the maximum award, a fair chance to come in now and prove them. Remove, with the maximum, the schedule that fixed a scale at the rate of 8s. an acre for worthless hills bought from the Natives in 1839, while in 1862 you may buy finely grassed land from the Crown for 5s. an acre.

80. It is quite plain, however, from the context in Mr. Commissioner Bell's report that he was not advocating any such alteration; he was merely stating his view of the equities of the case if any alteration were contemplated by the Legislature. His own view, like that of the British and colonial authorities, was that the surplus land was, and should remain, the property of the Crown. He no doubt thought, as the British Government thought, that any lands which the purchaser lost by the application of the yardstick and the grant on that basis of an area substantially less than the area comprised in the deed of sale were amply compensated for by the security of title and personal and other advantages which the purchaser obtained by reason of the British Crown taking over the sovereignty of the country. But he makes it quite clear that, in his view, if the surplus were not to be retained by the Crown, it should in justice and equity go to the purchaser who had bought it in good faith and for fair consideration. That view certainly appeals to me: it seems to do no more than follow the dictates of common honesty.

81. Since the sittings of the Commission concluded my attention has been called to some observations made by a Dr. S. M. D. Martin in certain of a series of letters published in book form in 1845. In my opinion, neither the book nor the author commands any authority, but I refer to it because I understand that the other members of the Commission are inclined to place some reliance on it, and, if I refrained from reference to it, I might possibly be thought by some critic of this memorandum or student of Maori history to have omitted to consider something which may at first sight appear to be relevant to the question of "equity and good conscience."

82. The first letter that I refer to, though not the earliest in point of date, is dated the 6th April, 1844, and purports to describe what happened on the occasion of the ceremony that took place immediately after the landing of Governor Fitzroy at Auckland on the 26th December, 1843. The material part of the letter (Martin's book, pp. 183 and 184) is as follows:—. .

Among the parties introduced to the Governor were several Natives, whom he addressed at great length through the Chief Protector, Mr. Clarke, informing them of the anxiety of the Home Government to benefit them, for which purpose he said he had been sent to them. After this address, the Natives handed to him two well-written Native addresses, embodying the subject of their numerous grievances since the establishment of British authority. They particularly dwelt on the injustice of preventing them from selling their lands to Europeans, as well as that of the Crown resuming the surplus lands of the old settlers, or land-claimants. The subject of Customs, especially the duty on tobacco, was also dwelt upon. These addresses were read in English by Mr. Clarke, who was instructed by the Governor to inform the chiefs that he would do all he could to adjust their grievances; that he was requested to assure them that the Queen of England sought no benefit to herself from their lands; that she had sent a Governor to them for the purpose of preserving peace and order, and teaching them to grow up in the habits and arts of civilized life. With regard to the surplus lands, he disclaimed on the part of the Crown any intention of reserving them—they would revert to the Natives themselves. The other subject—the liberty of selling their own lands—he hoped would also be granted to them. He was required to report upon it, and if proved to their benefit, the right would be conceded; in the meantime, Europeans would as soon as possible, under certain regulations, be permitted to rent lands from them. The Natives having so far received favourable answers to their various questions, appeared highly pleased, and left with the impression that they were immediately to be permitted to sell their lands—for they have no idea of the difference between the promise and the fulfilment of the same, especially if the party concerned be a European. I feel quite certain, unless the Governor almost immediately permits them to sell their lands, that they will be more discontented than ever. They have been so anxiously looking out for his arrival, and so fully impressed with the idea that he was immediately to remove all restrictions, that they will not rest quite so satisfied unless he do it.

83. The second letter is undated, was apparently written some time later, and the material part of it (at pp. 306, 307 of the book) is as follows :—

The interference of the Government with their lands and properties, the restrictions on their sale, and the attempt to dispossess the party who had purchased land before the arrival of the Government, have opened their eyes at once to our ideas of justice. It was in vain that the Government attempted to persuade them these things were intended for their good. The simple fact of the Government paying less for the lands they purchased from them than the Natives could have obtained from private individuals, and the great prices at which these lands were resold by the Government, taught them at once to perceive that they were injured, oppressed, and unjustly dealt by. The injustice of the Government was also manifested in the declaration that the surplus lands which Europeans might have fairly purchased from the Natives, but for which they had not given a sufficient consideration, would revert to the Government, and not to the Native who was presumed to have been cheated or overreached. A Government that would thus profit by the crimes of its subjects, could not be supposed to have very nice ideas of justice.

84. The suggestions may perhaps be made that some equity arises to the Maoris in regard to all surplus lands by reason of what Governor Fitzroy is alleged by Dr. Martin to have said to the Maoris at the welcome to him on his landing in New Zealand. In my view there can be no validity in any such suggestion for the following reasons :—

(i) The letters, written merely to some private and unnamed correspondent, though exceedingly well written from a literary point of view, are so defamatory of every one whose name is referred to (with the exception of Governor Fitzroy, and this exception may be due to gratitude for Governor Fitzroy's acts of friendship towards him, including his appointment in June, 1844, as a member of the Legislative Council) that any statement of fact made by the author must be received with great caution. Amongst the persons defamed—and be it understood that I speak of defamation as distinguished from fair and legitimate criticism—are Sir George Gipps, Captain Hobson, Mr. Shortland, Mr. Felton Mathew, Sir William Martin, Mr. Swainson, Mr. Commissioner Richmond personally, the Land Claim Commissioners collectively, Mr. Cooper, and Colonel Wakefield. But perhaps worst of all Dr. Martin most grossly defames the Natives, whom he described as cowards, and particularly at page 171, when he speaks of them as "the greatest cowards in the world." For myself I should hesitate to accept any historical statement by such an author unless verified or supported by satisfactory and independent evidence.

(ii) I can find no such evidence. On the contrary the only contemporaneous evidence that has been discovered fails to support the author's statement. Verbatim reports of the two addresses of the Natives on the 26th December and of Governor Fitzroy's written replies are contained in the *New Zealand Gazette and Wellington Spectator* of the 31st January and 3rd February, 1844. In their addresses the Natives do complain that the Crown had not been making purchases of land and that they were not allowed (by reason, of course, of the pre-emption provision in the Treaty of Waitangi) to sell to Europeans and in reply to one of the addresses Governor Fitzroy said on this subject, "The Queen has authorized me to make inquiries among yourselves with the view of altering the present method of selling your lands"; and in reply to the other he said, "The Queen has heard of your wish to sell land to Europeans direct, without in the first place selling them to her representative, and her Majesty has authorized me to inquire among you, and make arrangements more pleasing to yourselves." But there is not a single word in either the Native addresses or Governor Fitzroy's replies touching the question of surplus lands or their reversion to the Natives.

(iii) It would seem incredible that Governor Fitzroy should have made immediately on landing a statement which was not only unauthorized but in actual violation of express written instructions given to him in England immediately before leaving for New Zealand. It may, of course, be said that he subsequently acted in an unauthorized manner in connection with the waiver of the Crown's right of pre-emption, but that was not till some three months and ten months respectively after his arrival. Moreover, there was some justification for his action, and he did make a report of it to the Home authorities, even if the report was somewhat belated; but neither in any of his dispatches nor in any contemporaneous document is there any record or mention of any statement relating to surplus lands such as Dr. Martin suggests.

(iv) Nor is there any evidence of any reference by the Maoris at any time to such a statement having been made by Governor Fitzroy. It seems incredible, if the statement were made, that the Maoris should at no time have referred to it. Had it been made, surely they would have said so, and relied upon it, in their discussions with Mr. Commissioner Bell in 1858/1862, instead of which the attitude they adopted was to admit that where their title had been extinguished—*i.e.*, by sale to Europeans—any right of theirs to the land was at an end, and that they had nothing to do with the apportionment of it between the Crown and its subjects.

(v) The statement is alleged to have been made on the 26th December, 1843. Dr. Martin's letter was not written till the 6th April, 1844. In giving his recollection of what had been said three months earlier he may well have made an honest mistake; he may even mistakenly but honestly have been attributing to Governor Fitzroy an expression of the idea of himself or some of his friends in their discussions of these land questions.

85. Even if Governor Fitzroy did make the statement, at best it was unauthorized, and in any case I do not see how it could raise an equity in the Maoris to the return of the surplus lands, and the same observation applies to any difficulty (if it existed) that the Maori may have had in understanding by what right the Crown acquired the "surplus." If the land had been bought in good faith and for a fair consideration, what equity could the Maori have to the return of any portion of the land?

86. The only reference that I have heard of to the statement imputed by Dr. Martin to Governor Fitzroy is contained in Mrs. Wilson's thesis, "Land Problems of the Forties," at pages 125 and 126, where Dr. Martin's statement is substantially reproduced, merely, of course, as a statement by Dr. Martin. But, as I have said, I cannot accept Dr. Martin or his book as authoritative, nor can I find that he has been so accepted by any historian.

87. As to the extract from pages 306 and 307 of Dr. Martin's book, the mind of the author was clearly confused, and the material part of the statement is self-contradictory. That material part consists in the sentence: "The injustice of the Government was also manifested in the declaration that the surplus lands which Europeans might have *fairly* purchased from the Natives, *but for which they had not given a sufficient consideration*, would revert to the Government, and not to the Native *who was presumed to have been cheated or overreached*." The portions of the statement that I have italicized are self-contradictory, and that makes the whole of it incorrect and worthless. If the land was *fairly* purchased, that necessarily connotes that a sufficient consideration was given; and, if the purchase was fair, how could it be *presumed* that the Native had been cheated or overreached? What the Government had said was that when land had *not* been bought on equitable terms (which includes a fair consideration) the land would revert to the Natives, the presumption being that in that case the Native had been cheated or overreached: it was only where the land *had* been purchased on equitable

terms that the surplus land would be retained by the Crown. And that is precisely what was done. The truth would appear to be that Dr. Martin mistakes the position owing possibly to confusion of thought: this is the only hypothesis which could be consistent with what he says on pages 183 and 184 if it were true that Governor Fitzroy did in fact refer to the reverter of surplus lands to the Natives. If he mentioned the matter at all, all he could have said was what Captain Hobson had previously told them in January, 1840, that lands which were found not to have been bought on equitable terms would revert to them.

88. Dr. Martin shows the same confusion of mind on page 111 where he had made a similar fulmination on the subject of "surplus land" in a letter much earlier in date—viz., 10th January 1841—after a meeting with other land-purchasers at Coromandel. On page 110 he refers to the original New South Wales Ordinance of 1840. After mentioning the assertion in that Ordinance that lands previously purchased by British subjects formed part of the demesne lands of the Crown, and mentioning also the right of pre-emption, he says: "Notwithstanding this assertion of the right of Her Majesty, it is still graciously made known that persons who have *equitably* purchased lands from the aborigines will, on proper inquiry being made into their claims by three Commissioners appointed for that purpose, receive, on the recommendations of such Commissioners, Crown grants for the same, *but not for a larger quantity than 2,560 acres in any case; the number of acres to be awarded according to a schedule attached to the Act.*" [The italics are mine.] And then, after referring to the scale, the author proceeds, at page 111:—

> To crown the infamy of the whole concern, the surplus lands, instead of going back to the Natives, the parties alleged to have been injured, are strangely enough declared to be the property of the Crown. We are tried, because we are said to have stolen the Natives' property: when our crime is proved, the property is taken from us, but instead of being restored to the Natives from whom we stole it, it is kept by the Judge himself.

The statement on page 110 was quite correct; but what he says on page 111 I cannot characterize as anything but an irresponsible and mischievous diatribe, unfortunately calculated to create discontent and unrest in the Maori mind. Like the statement on page 307, the two statements on pages 110 and 111 are, to begin with, contradictory and mutually exclusive. An "equitable" purchase is the very antithesis of a "crime" or an act of "stealing." The Natives were not "alleged to have been injured" by an "equitable purchase," but only where a purchase had been inequitable; and a purchase for a fair price was, of course, not inequitable. Dr. Martin and his fellow-purchasers were not "tried," nor were they said to have "stolen the Natives' property." On the contrary, a purchaser who was held to have "equitably purchased" the land was entirely free from any taint of dishonesty or impropriety. No property was "taken from" him because any "crime had been proved" or because he "stole the property from the Natives." Admittedly in a sense portion of the land purchased by him and which he had paid for was taken from him by the Crown, but why should it be "restored" to the Natives, who had parted with it and been paid for it on what Dr. Martin says, or at least implies, was an "equitable purchase"? It is well to note that the passages from Dr. Martin's book that I have quoted in this paragraph are taken from a letter dated the 10th January, 1841, three years before Governor Fitzroy arrived in New Zealand, so that Dr. Martin when he wrote his letter of the 6th April, 1844, referred to in paragraph 82, had apparently been brooding over his supposed grievance for a very long time. It is only just to Dr. Martin to say that he appears to have given the Maoris an exceedingly fair price for the land that he purchased from them, but, owing to the "yardstick," he was entitled to a grant for only a portion of the land, but in July and December, 1844, Governor Fitzroy considerably enlarged the areas granted, as he did in the case of many other purchasers. It seems to me, however, to be a fair inference that the attitude of some of the Maoris in asserting that, if the purchasers were not allowed to have the "surplus lands," those lands should go back to the Maoris

and not be kept by the Crown was directly due to seeds sown in their minds by purchasers who were suffering from what they considered to be a gross injustice at the hands of the Crown. One thing anyhow is clear—no equity could arise in favour of the return of the land to the Maori simply because of the Maori mind being inflamed or affected by diatribes against the Government authorities by disappointed purchasers.

89. But, notwithstanding all that I have said, and that in my opinion the foundation of the Maori claim as presented to the Commission according to my understanding of it cannot be sustained, it does not mean that there cannot be made out in favour of the Maoris a claim in equity and good conscience to at least some portion of the surplus lands on other grounds or in other respects than those urged by counsel. But even rights according to equity and good conscience must be based on reason and principle and not on mere sympathy, sentimentality, expediency, or speculation. I have endeavoured to find, and I think that I have found, a principle or principles which would seem to accord with good sense and reason, which would have done justice to both the original purchaser and the Maori vendor, and which therefore may be applied to-day as between the Maori vendor and the Crown as the successor in law and equity to the purchaser's rights. One principle which does not favour the Maori I have stated in paragraph 70. But the main principle upon which I am acting, and which does favour the Maori, may be best explained by illustration.

90. I have already said that, speaking generally, the boundaries of the land, the subject of each sale and purchase, were described by physical or geographical features. When the claim came originally before the Commissioners the purchaser was required to state the supposed area of the land purchased—that is to say, the area which he believed he was purchasing for the consideration expressed in the deed. Assume, for example, a case where the land sold was described in the deed of sale as being all the land from one hill to another in length and from one stream to another in breadth. Assume also that when the claim comes before the Commissioner the purchaser says that he supposed the area to be 1,000 acres, and that was in point of area what he thought he was purchasing and therefore paying for. The Commissioners find that the transaction was made in good faith, but that on the yardstick the purchaser would be entitled to a grant of only 800 acres. They recommend a grant accordingly, and a grant is then issued for 800 acres, but all that can be said in the absence of a survey is that the 800 acres, the lines of which are not defined, are located within the land described in the deed of sale. Later on, when the case came to be reviewed by Mr. Commissioner Bell, the area on survey was found to be, say, 5,000 acres. What Mr. Commissioner Bell then did was to make additions to the 800 acres in accordance with the provisions of the Land Claims Settlement Act, 1856, which, let it be assumed, brought the 800 acres to 1,200. The original grant having been called in, a new grant for 1,200 acres would then be issued, the boundaries of which would be defined in the grant. Thus there would be left 3,800 acres of "surplus land." Now, the question is as to which party—the purchaser or the Maori vendor—had the right in equity and good conscience to such 3,800 acres. There were a large number of cases of this kind.

91. There are two angles of approach to that question. The purchaser may say, "I bought the whole area as described in the deed and within the boundaries as there set out; what the actual acreage was is of no importance, because I bought, and the Maori intended to sell, the whole of the land whatever the area." On the other hand, the Maori may say, "Yes, but you had acreage in mind, whereas I knew nothing about acreages. You admit that you considered the area you were buying to be 1,000 acres, and you must be assumed to have computed your purchase-money on that basis. In those circumstances it is not in accordance with equity and good conscience that you should have more than the quantity you thought you were purchasing and paying for. If there is more than you thought you were purchasing and paying for, then the surplus should come to me."

92. Those, it seems to me, are the two conflicting views, and I think that, if the land had been surveyed prior to the original hearing of the claim, the Commissioners would have been justified in equity and good conscience in saying that the whole area had not been bought on equitable terms, and, if that was their view, they would either have disallowed the claim altogether, or else (and more probably, had they not been restricted by the "yardstick") have held that there was a valid purchase in good faith and for adequate consideration of 1,000 acres, and recommended a grant accordingly. Indeed, what they actually did was tantamount to that because their duty forbade them to recommend a grant at all unless they first came to the conclusion that there was a valid purchase on equitable terms of an area of 1,000 acres.

93. I consider that the principle to apply now in equity and good conscience in all cases such as I have illustrated is that the Maoris should be entitled to compensation for the actual area of surplus land that ultimately went to the Crown. In other words, speaking generally, where the surveyed area has been greatly in excess of the supposed area (or of the area actually granted if that be greater than the supposed area), whatever the position may have been in law, I treat the difference as surplus land in respect of which the Maori vendor would have had a claim in equity and good conscience. Where the surveyed area was either just equal to, or less than, or very little greater than, the area which the purchaser supposed he was buying and paying for, though the area actually granted according to the yardstick was less than the supposed area, and a surplus thus arose, I am of opinion that in principle the Maori vendor had no claim in equity and good conscience to the surplus; if there was any right at all in equity and good conscience, the right was that of the purchaser.

94. On the application of those principles to the cases arising out of all the "old land claims" the result is that the aggregate of all the "surplus lands" to which the Maori vendors would have had a claim in equity and good conscience is 71,155 acres.

95. I come now to a consideration of the position arising out of the ten-shillings-per-acre and penny-per-acre Proclamations. It will be remembered that under the Second Article in the Treaty of Waitangi the Natives yielded to Her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof might be disposed to alienate, at such prices as might be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them on that behalf. I see no reason to doubt that the Crown could, had it so chosen, have waived that right of pre-emption, either specially or generally; and that could have been done by the Governor had he been authorized so to do by the British Government. He had no authority, however, to do so on his own volition, but that is exactly what Governor Fitzroy did, and his action incurred the gravest censure by the Home Government. His proper course was to make his suggestions to, and obtain the approval of, the British authorities —see Lord Stanley's despatch to Captain Fitzroy just prior to the Governor leaving England for New Zealand. But there is no doubt that when he assumed office in New Zealand in December, 1843, the Governor found himself in a position of very great difficulty. The Treasury was empty, and he had no funds with which to buy lands for the Crown; the Maoris complained bitterly of their being unable to sell any of their land; and the only way to meet their complaints and urgent requests was to make some provision whereby they could sell to private persons. At that time communication with England was exceedingly slow, and Governor Fitzroy felt that he had to act promptly.

96. In those circumstances the Governor issued what is called the ten-shillings-per-acre Proclamation on the 26th March, 1844, the effect of which was that he would, on behalf of Her Majesty, consent to waive the right of pre-emption over certain limited portions of land in New Zealand on the conditions set out in the Proclamation. Application was required to be made in writing to the Governor through the Colonial Secretary "to waive the Crown's right of pre-emption over a certain number of acres

at or immediately adjoining a place distinctly specified, such land being described as accurately as may be practicable." It is unnecessary to burden this memorandum with all the conditions, but it should be said that there were certain conditions which were intended by Governor Fitzroy for the protection of the Maori interests. *Inter alia*, it was provided that, of all land purchased from the aborigines in consequence of the Crown's right of pre-emption being waived, one-tenth part of fair average value as to position and quality was to be conveyed by the purchaser to Her Majesty for public purposes, especially the future benefit of the aborigines. It was also provided that, as a contribution to the Land Fund and for the general purposes of Government, fees would be demanded in ready money at the rate of 4s. per acre for nine-tenths of the aggregate quantity of land over which it might be requested that the Crown's right of pre-emption might be waived, and these fees were payable into the Treasury on receiving the Governor's consent to waive the right of pre-emption. Further, on the issue of a Crown grant after an interval of at least twelve months from the time of paying the first-mentioned contribution, additional payments would be required at the rate of 6s. per acre, to be applied to the Land Fund and for the general purposes of Government. The land so obtained was to be surveyed at the expense of the purchaser. There was a further provision that no Crown grants would be issued under the arrangements set out in the Proclamation to any person or persons who might be found to have contravened any of the regulations.

97. The charge of 10s. per acre was in the nature of a tax upon the purchaser, but it was objectionable because it might have the effect of reducing the amount of purchase-money which any proposing purchaser would be prepared to pay the Maoris for their land. This point, however, is of very little importance, because the scheme was a failure—and it was a failure for the very reason, no doubt, that the tax or charge of 10s. per acre would have involved the purchaser in paying more for the land than he considered it was worth. In the result the aggregate area of the lands purchased in pursuance of this Proclamation and the certificates of waiver of pre-emption issued thereunder was only the negligible quantity of 1,795 acres. The total of surplus lands arising from these transactions is at the most what Mr, Cooney himself describes as the " paltry " acreage of 68 acres, and he admits that apart from these 68 acres the Maoris have no claim on the basis of surplus land in connection with the lands purchased under the ten-shilling-per-acre Proclamation. As a matter of fact, the Commission finds the true surplus to which the Maori vendor might have had a claim in equity and good conscience to be only 9 acres.

98. The ten-shillings-per-acre Proclamation having been a failure, and the Natives still being clamorous to be placed in the position of being able to sell land, Governor Fitzroy, on the 10th October, 1844, issued the penny-per-acre Proclamation, whereby he proclaimed that, from the date of the Proclamation, no fees would be demanded on consenting to waive the right of pre-emption, and that the fees payable on the issue of Crown grants would be at the rate of one penny per acre, which, of course, was nothing but a nominal charge, insufficient even to cover merely the clerical work in connection with the preparation and issue of grants. Various provisions as to making application for the waiver of the right of pre-emption and other matters were substantially the same as in the ten-shillings-per-acre Proclamation. In point of fact, though this is anticipatory in the narrative, the purchaser under this penny-per-acre Proclamation was eventually called upon to pay a Government tax or charge of 5s. per acre, but this was not open to the same objection as the 10s. charge in the first Proclamation, or, indeed, to any other objection, except from the view of the purchaser, because it was not imposed until long after the purchase was made, and therefore had no effect whatever upon the purchaser's decision as to the amount of purchase-money that he was prepared to pay. Under the penny-per-acre Proclamation many certificates of waiver of pre-emption were given, and the lands purchased under these certificates amounted in the aggregate

to about 90,000 acres. It should be added that by a notice published in the *New Zealand Gazette* of the 7th December, 1844, it was said that, "By a *limited* portion of land" (referring to the expression "limited portion" in the Proclamation), "not more than a few hundred acres is the quantity implied."

99. The Home Government was greatly incensed at the action of Governor Fitzroy in purporting to waive the Crown's right of pre-emption without first referring his suggestions to London for Lord Stanley's approval, and, partly at least because of that action, the Governor was recalled and Sir George Grey was appointed Governor in his place.

100. It must be pointed out that it was scarcely open to the Maoris to complain in any way of the sales made under Governor Fitzroy's two Proclamations. Firstly, the Proclamations were made under very great pressure from the Maoris themselves. Secondly, the Maoris were not bound to sell. It was a matter entirely for themselves whether or not they made any sales. If they did wish to sell, it was the sale of a known and limited area, and the question of price or consideration was a matter of agreement between the Maori vendor and the purchaser. The British Government evidently took this view of the matter, and, although incensed at the action of Governor Fitzroy, eventually consented to the first Proclamation, and, as to the second, instructed Governor Grey that, as far as pledged, the engagements made by Governor Fitzroy to the purchasers should be honoured as engagements made by the British Crown, but prohibited any such sales in future.

101. What immediately followed is succinctly stated in the Domett report of 1856 thus:—

> Sir George Grey accordingly, on the 15th June, 1846, issued notices declaring that no further certificates of waiver of pre-emption would be issued; requiring all claimants under the Proclamations to send in deeds, maps, and surveys connected with these alleged claims, to Commissioners appointed to examine them, on or before the 15th September then ensuing, after which no claims were to be received or entertained. It was further declared that, as evasions of the regulations and conditions under which the certificates of waiver were issued had in many cases taken place, the Home Government would be consulted before any final decision was come to respecting such cases.
>
> This exterminating process was accompanied by proposals to induce the voluntary abandonment or compromise of the claims, contained in an Ordinance (Land Claims Ordinance, Sess. 7, No. 22), passed the 18th November, 1846 . . .

102. The Ordinance mentioned in the Domett report is known as the *Land Claims Ordinance, 1846*. The preamble recited that, following the Proclamation of 10th October, 1844, numerous purchases were alleged to have been made from persons of the Native race of lands over which the Queen's right of pre-emption had been waived in pursuance of the Proclamation, but no Crown grant of any such land could be safely issued until it was ascertained that such alleged purchases had been made from the true Native owners of the land, that the rights of all persons thereto had been extinguished, and that the terms and conditions prescribed by the Proclamation had been duly complied with. After further reciting that the persons claiming to have made the purchases might in some cases be willing to forgo all further claims in respect thereof on receiving compensation for their outlay therein, the Ordinance empowered the Governor to appoint a Commissioner to examine and report upon all claims to compensation to be preferred pursuant to the provisions contained in the Ordinance. Any person desirous of taking advantage of the provisions of the Ordinance was required to give notice in writing of his intention so to do, and in such notice to state the amount of outlay incurred by the claimant in respect of his purchase, or in relation thereto or in the improvement of such land. Every such claim was to be referred to the Commissioner for investigation and report, and there was a proviso that the Commissioner should not investigate any such claim unless the person making it should have duly complied with

the terms and conditions prescribed by the Proclamation and by the Notice to Land Claimants published in the Government *Gazette* of 15th June, 1846. The Commissioner was required in every case to inquire into and set forth as far as it was possible to ascertain the same—

(1) The price or consideration, with the sterling value thereof, paid to the Native Sellers for the land alleged to have been purchased.

(2) The amount paid by the claimant (if any) for the deed of conveyance or agreement for purchase and other expenses attending such purchase.

(3) The amount of expenses incurred by the claimant in maps, plans, and surveys.

(4) And the outlay (if any) incurred by the claimant in the cultivation or fencing of the land, or in the erection of buildings or other improvements thereon.

103. Clause 7 of the Ordinance provided that in the hearing, examining, and reporting on any such claims, the Commissioner was to be guided by the real justice and good conscience of the case, and should direct himself by the best evidence he could procure or which should be laid before him. He was required by clause 8 to report in writing to the Governor as soon as convenient after hearing the claims, setting forth the name and address of the claimant, the situation and extent of the land alleged to have been purchased, the evidence adduced in proof of the outlay found to have been incurred under the several heads of expenditure previously mentioned, together with the total amount in respect of such outlay to which the Commissioner should find the claimant to be entitled pursuant to the provisions of the Ordinance.

104. Upon the confirmation of the report by the Governor, the claimant was to be entitled to receive from the Colonial Treasurer a debenture for the amount named in the report, and upon the receipt of any such debenture by the person named therein all right, title, interest, claim, and demand of such person in and to the land in respect of which such debenture was issued was extinguished, and so much of such land as should not be sold to the claimant as provided by the later provisions of the Ordinance was to be deemed and taken to become part of the demesne land of the Crown, saving always the rights which might thereafter be substantiated thereto by any person of the Native race. Where a claimant who had entered into occupation or taken actual possession of the land, either by cultivating, fencing, or erecting buildings on the same before the passing of the Ordinance should be desirous of purchasing the whole or any part thereof, it was declared to be lawful for the Governor to effect a sale of the land to such claimant by private contract at the rate of £1 per acre, but the claimant was to be allowed credit for the amount found to have been paid by him under the first three heads of expenditure previously mentioned, and provided further that such claimant should not in addition thereto in any case be required to pay any greater sum than at the rate of 10s. per acre.

105. To continue the history as set out in the Domett report:—

Meantime the decision of the Home Government having been applied for, Lord Grey, on the 10th of February, 1847, reinforcing the instructions given by Lord Stanley, conveyed his approval of the steps Governor Grey had taken, including the issue of the notice to send in claims within a prescribed period, on pain of the exclusion of them; declared Governor Fitzroy's Proclamation to have been "plainly in excess of his authority"; that "the arrangement was most impolitic; but that the faith of the Crown must be kept with purchasers so far as it was pledged"; that the claimants' title "resting only on strict and positive right," and "having no support from justice, equity, or public policy," Crown grants were to be given to "those only who could prove, in the strictest manner, that they had completely and literally satisfied the requisition of the Proclamations in every particular they contain." He further directs that claimants must be called upon to prove to the satisfaction of the Attorney-General that the "Native claimants were sole and true owners of the land they undertook to sell," the Attorney-General to certify the same; and, lastly, that the grant must, if issued, expressly declare that "it barred only Her Majesty's own right, and only transferred any right previously existing in her."

After receipt of this despatch Sir George Grey published notices, dated 10th August, 1847, laying down three modes of procedure as open to claimants, viz. :—

1. To abide by terms of Lord Grey's despatch.
2. To take compensation under Ordinance 7, No. 22.
3. To avail themselves of new conditions then published, viz. :—

Claimants under ten-shillings Proclamation to have absolute grants on payment of remaining fees.

Under the penny Proclamation to have grants for land up to 600 acres, on payment of 5s. per acre. If above 500, same power of purchase to that amount; surplus to vest in the Crown. This only within twenty miles of Auckland. Lands undisputed by Natives alone to be affected by this arrangement.

106. A Mr. Matson was on the 12th December, 1846, appointed Commissioner under the Land Claims Ordinance, 1846, and heard all the claims that came before him, but here again the results of all Sir George Grey's actions and of the hearing of the claims by the Commissioner are summarized in the Domett report, from which I quote as follows :—

The effect of these arrangements may be thus briefly stated :—

Ten-shilling Claims.—The greatest part of claims under the first Proclamation may be considered as disposed of. For out of sixty-two original claims,—

49 have been settled by issue of grants by Sir George Grey under the above terms.

9 were disallowed for non-payment of fees on certificate of waiver of pre-emption, which therefore could never have been issued; the land affected is about 280 acres in the aggregate.

2, of patches, not an acre together, were disallowed, on account of plans not having been sent in.

The only dispute existing about these claims is as to the right of reserving lines of road through the lands.

Penny-an-acre Claims.—The preserving and exterminating processes had the following effects respectively on these claims :—

There were 189 original claims, affecting about 90,000 acres.

53 have been settled by issue of grants by Sir George Grey, under the 5s.-per-acre payment.

21 have been resigned, on receipt of compensation, or debentures, or money.

80 were disallowed, for non-compliance with the requisitions of 15th June, 1846, for sending in plans and surveys.

28 were disallowed, because certificates that the Fitzroy Proclamation had been complied with were refused by the Attorney-General. The particulars of non-compliance are not given in any case in the Attorney-General's reports of the fact.

7 were disallowed or abandoned. Reasons not given.

It will thus be seen that the cause of the disallowance of the greater part of these claims was the failure to send in plans of the lands claimed by the 15th September, 1846. Numbers were sent in on the last day; those offered afterwards were invariably refused. Some of the lands comprised in disallowed claims have been resumed and resold by Government, and some are included in the reserves for the Pensioner Settlements.

107. The Domett Committee apparently considered, *inter alia*, that the disallowance of claims by reason merely of the failure of claimants to send in by the date fixed in that behalf plans of the land claimed had resulted in injustice to the claimants, and made recommendations on the subject. The Land Claims Settlement Act, 1856 (previously referred to in paragraph 51 *et seq.*), was passed consequent upon the report of the Committee, and section 9 of the Act empowered the Commissioner to be appointed not only to hear and determine certain "old land claims" as previously mentioned in this memorandum, but also all claims whatsoever to land or compensation arising out of dealings with the aboriginal inhabitants of the Colony prior to the establishment of British Sovereignty, or since that period with the sanction of the Government, or under the Proclamations issued by Governor Fitzroy dated respectively the 26th March, 1844, and the 10th October, 1844. Section 29, which is the first of the sections under the heading "Pre-emptive Waiver Claims," enacted that "for all lands to be granted under direction of the Commissioners in satisfaction of claims arising under the said Proclamation of the tenth of October, one thousand eight hundred and forty-four, and in respect of which claims no grants or compensation shall have been received by the claimant,

there shall be paid by the claimant for every acre of land so to be granted a sum not exceeding five shillings: Provided that the Commissioners may reduce the sum to be paid by any claimant to any sum not less than one shilling per acre, and in fixing the payment to be made by any claimant, they shall, as nearly as may be, fix the amount to be paid at one-fourth the estimated value of the land." Section 30 enacted that no grant was to be directed in respect of any such last-mentioned claim for more than 500 acres of land, provided that the Commissioners might in their discretion award and direct a grant to be made of an additional quantity of land by way of compensation for loss and damage sustained by reason of the non-settlement of such claim, but in no case was a larger extent of land to be granted as compensation than 500 acres, nor more than was comprised in the original claim. Section 31 enacted that in every case of compensation in land in respect of claims under the Proclamation of the 10th October, 1844, the claimants were to pay after a rate not exceeding £1 and not less than 1s. per acre for all land to be granted to them as such compensation, and in fixing the payment to be made by any claimants, the Commissioners were, as nearly as may be, to fix the amount to be paid at one-fourth the estimated value of the land.

108. There is a large area in the aggregate (16,418 acres) of "surplus lands" arising from the purchases made under the penny-an-acre Proclamation. The surplus arises in this way; a person would apply for what is called a waiver of pre-emption certificate, and, after inquiry, if his application were granted, it would be granted to the extent of the area mentioned in the certificate. In a large number of cases the holder of the certificate purchased an area, in some cases small, in others large, in excess of the permitted area, and the question is what, if any, are the rights of the Maori vendors in equity and good conscience in respect of these excess or surplus areas. The question is not a simple one and may be looked at from different angles. So far as the purchaser is concerned, his position is quite different from that of the purchaser in respect of the old land claims who made his purchase prior to the assumption of British sovereignty. The last-mentioned person acted in no way improperly, whether legally or otherwise. He had the right to purchase, but he ran the risk of the Crown, in the event of its obtaining sovereignty, refusing to recognize his title. The purchaser under a waiver of pre-emption certificate, however, was in a different position. He could hardly be blamed, either legally or morally, for making a purchase under a certificate which he would naturally assume to be regular and legal; indeed, that would have been the general view until it was held some years later by the Courts that the action of the Governor in issuing the Proclamation and the certificate was irregular and in excess of his authority. But the purchaser did know that his purchase must be limited to the area permitted by the certificate, and he knew that any purchase in excess of the certificate would be irregular. It is quite true that he paid the Maori for the excess area, but it is difficult to see how he can claim any right in equity and good conscience as flowing from something done by him which he knew he was legally prohibited from doing. The purchaser's position is dealt with by Mr. Commissioner Bell as follows:—

> Then again the terms of the Proclamations themselves, and the regulations in the *Gazette*, were such as to make it in my opinion nearly impossible in most cases to comply with them. Governor Fitzroy published a notice condemning those who had made purchases prior to obtaining the waiver, and threatened to reject all applications where this had been done; but granted the waiver notwithstanding, in numerous cases after purchase. He said that only "a few hundred acres" were meant, and then granted applications for 1,000, 1,500, 2,000, and 3,000 acres. One thing, however, seems clear—no pre-emptive claimant could justly claim under any circumstances more land than his certificate entitled him to buy. If he had a certificate for 1,000 acres and bought 5,000 with it, he might have a just right to 1,000 acres, but under no interpretation could he have a just right to the excess. In this respect the pre-emptive claimant differs from the claimant under purchases made prior to the Queen's sovereignty; but if in the latter class the principle be admitted that they should have all they bought, in the pre-emptive claims it should be admitted so far as that they should have all they bought up to the amount of their certificate; and I hope nothing will be done which shall give any more land to one class and refuse it to the other."

109. On the other hand, it is difficult to see that the Maori vendor had any right in equity and good conscience, seeing that he had been actually paid for the excess area of land. The Proclamation was made as a result of his insistence. The transaction was not pressed upon him; it was made on his own volition and at his own initiative—and he was paid for all that he had agreed to sell, including what we call the surplus. As far as the Crown is concerned, although Governor Fitzroy exceeded his instructions, the Crown did in substance elect ultimately to recognize the full extent of the purchases made by the holders of the waiver of pre-emption certificates, but refused to grant to the purchaser, or (where payment was made instead of granting land) to pay him for more than the area actually named in the certificate.

110. At law the surplus lands arising from these penny-per-acre Proclamation transactions vested in the Crown, and, seeing that neither the purchaser nor the Maori vendor had any equity in them, the strict legal position should prevail. But it may be said that there is a difference in the Crown's position between these lands and the surplus lands arising under the "old land claims" in cases where on the principles laid down there is no equity in the Maori vendor. Before the Crown assumed sovereignty over the country the purchasers were at liberty to make their purchases if they chose at the risk, of course, of losing the land or part of it if the Crown subsequently assumed sovereignty, but the Crown could not interfere unless it did assume sovereignty. After the Treaty, sales were prohibited by its terms except to the Crown, and the lands now being considered were purchased under proclamations made by the Governor without authority. Apart from that, some of the purchasers bought land in excess of their permits which they knew or should have known it was unlawful for them to acquire. In these circumstances I can quite understand the force of the sentiment that it may not appear to be equitable that the Crown should have retained the surplus. Nevertheless, if there were nothing more than that, I should feel compelled to say that there was no equity in either the purchaser or the Maoris, and that therefore the legal position must prevail; that the land should have been (as it in fact was) retained by the Crown; and that no allowance should be made to the Maoris; and this would apply to the 9 acres of surplus under the 10s. per acre waiver Proclamations as well as the 16,418 acres under the one-penny-per-acre-waiver Proclamation.

111. But I think that there is another aspect of this surplus land question which justifies a broader view being taken as a matter of equity and good conscience to the advantage of the Natives. In determining the surplus lands under the "old land claims" in respect of which the Commission considers the Native vendors could have had a claim in equity and good conscience, the total of 71,155 acres would have been somewhat increased but for the "survey allowances" made by Mr. Commissioner Bell under the Land Claims Settlement Act, 1856. The effect of those "survey allowances" was that, in cases of surplus where the Native vendor would in this Commission's view have had an equity, the area fixed for survey allowance came out of the surplus whereas in equity only part of it should have been, as it were, debited in that way. In the result the total of 71,155 acres is less than it would have been if the charge for "survey allowance" had been apportioned. Just by how much the total of 71,155 would have been increased it is very difficult to say, but I think that it would be fair to regard the 16,427 acres of "pre-emption surplus" as being a reasonable equivalent of the aggregate area lost to the Maoris in the manner I have just indicated. On that ground—and that ground alone—I feel justified (though not without some hesitation) in, as it were, setting off the surplus against the loss and including the 16,427 acres with the 71,155 as surplus lands in which the Maoris would have had an equity. I am satisfied that this is on the whole quite fair to the Maoris.

112. There is one class of case that perhaps calls for some special mention. Not all the claims where the purchasers were found by the Commissioners to have made *bona fide* purchases from the Natives were dealt with on the basis of the purchaser being

given a grant of so much of the land as he was entitled to according to the yardstick. For various reasons, none of which need be gone into at length, it was not always expedient to give to the purchaser a title to the land that he bought—for example, the land may have been required by the Government for township or other purposes or difficulties in the way of securing the purchaser in the quiet possession of his area may have been anticipated. And so, under an arrangement which was early sanctioned, a system was adopted whereby the purchaser, his purchase having been proved to be a valid one, was granted, instead of the land or an area out of it, an order, commonly called "scrip" or a "land order," which entitled him to select out of Crown land elsewhere land to the value of the amount stated in his order. In some cases a purchaser was given a grant for a portion of the area he was entitled to, and compensation in the shape of scrip for the balance. Before this Commission it was suggested that these "scrip" claims, as they are called, might present a difficulty in the ascertainment of any rights in equity and good conscience which the Maoris might have. The Commission has not, however, found that to be so. In all cases where the Crown assumed to itself the benefit of the contract made by the purchaser—and it should be added that there were very many instances where the Crown gave scrip or compensation and did *not*, for the reason that the land reverted to the Maoris, receive any *quid pro quo*—the Commission determined what it considered to be the Maoris' equities by the application of the guiding principles as referred to in the foregoing paragraphs of this memorandum, and where, on the application of those principles a surplus was found to exist, the Commission proceeded further and determined to what extent the Maori vendor had a claim in equity and good conscience. In other words, the Commission dealt with these cases in the same way and on the same principles as the ordinary case of surplus where a purchaser was awarded a grant of part only of the area purchased or supposed to have been purchased.

113. To indicate in detail what the area is in each separate case in which the Commission considers the Maori vendors would have had a claim in equity and good conscience and precisely how the Commission arrives at it would unduly enlarge this memorandum and complicate issues which I have been endeavouring to simplify, and would, I think, serve no useful purpose. What is required to be ascertained is the aggregate area, and on the best consideration that the Commission was able to give to this matter it has come to the conclusion that the aggregate area of the surplus lands to the return of which the original vendors would have had a right in equity and good conscience is 87,582 acres, made up by the addition of the two areas of 71,155 and 16,427 acres previously referred to.

114. Some reference was made during the Commission's inquiry to certain lands known as Kapowai and Puketotara, containing 2,075 and 4,644 acres respectively, and to the fact that as a consequence of the report of the Jones-Strauchon-Ormsby Commission of the 8th October, 1920, those lands, or part thereof, which it is suggested were surplus lands, were given to the Maoris. That is true, at least in part, but those were very different cases from the cases involved in this Commission's inquiry. In those cases the basic dispute was not as to the ownership of admittedly "surplus" lands, but whether the lands in question were in fact surplus lands. The Crown contended that they were, while the Natives contended that the lands had never been sold and were still Native land. There was apparently a *bona fide* doubt, and a compromise was agreed upon by way of settlement, the substance of which seems to have been that about half the land in each case was given to the Maoris, the Crown retaining the remainder.

115. As the surplus lands in which the Commission finds that the Maori vendors would have had an equity cannot now be returned, because the greater part has been disposed of by the Crown, and those portions that remain would be unsuitable in their present state for profitable occupation, the question arises as to the compensation that should be paid. One has heard a great deal of the wrongs which the Maoris are said to have suffered in regard to the purchases of their northern lands and in regard to the

alleged inadequacy of the purchase-money. Though the purchase-money paid per acre may appear in the case of some of the purchases to be small, it is too generally overlooked that in the conditions of those days the land was of very little value and the risks to the purchaser were very great. Assuming, however, that there may have been a certain amount of inequity in some of the dealings of the pakeha in the old days in the purchase of Native lands, its extent is very much exaggerated. As previously stated, the Maoris had returned to them hundreds of thousands of acres for which they had received consideration which, though inadequate, nevertheless aggregated a considerable sum, amounting to many thousands of pounds, for which in the result the Maoris gave nothing. As Mr. Commissioner Bell says in his report:—

It appears that payments to the value of upwards of ninety-five thousand pounds were made by Europeans to Natives for the purchase of land. Yet this sum, though it includes all that can be ascertained with tolerable certainty, by no means represents the whole amount that was paid away. In many cases the consideration given to the Natives was not stated by the claimants, and will never be known; payments amounting in the whole to a large sum were wholly rejected by the investigating Commissioners as having been given to the Natives after Sir George Gipps' Proclamation of 14th January, 1840 . . . A considerable proportion of this (*i.e.*, the purchase price) consisted of ready money or cattle; the residue comprised merchandise of different kinds. It will be remembered by all who are interested in the subject, that the rule of the Original Land Claims Ordinances of 1840 and 1841, repeated in the Act of 1856, was to estimate the value of goods given in barter for land at three times the selling-price of such goods in Sydney. This was by no means an extravagant allowance; on the contrary, it barely represented the real value. The first Commissioners' instructions informed them that this multiplication by three was to include commission, freight, risk, presents, passage-money, charter of vessels, and every other kind of expense. If the amount of these charges, and especially the risk in those days, be taken into consideration, it will probably be allowed that trade was worth at least three times in New Zealand what it was worth in Sydney; perhaps in the early years of the irregular settlement of Europeans in the North it may have been worth a great deal more. It is an essential point, of course, whether the Commissioners adopted a moderate scale as the standard of estimating Sydney prices; and it may safely be said that the scale they adopted was very fair. In the case of the pre-emptive claims, no such multiplication was made; and the payments when given in goods are estimated at the actual value of those goods in the New Zealand market. On the whole, I have myself no doubt whatever that the sum of £95,215 above stated fairly represents the amount of money or money's worth which passed into the hands of the Natives in the purchase of land, exclusive of sums which cannot now be ascertained.

116. Subsequently the Maoris sold large portions of the reverted lands to the Crown, so that the consideration that they received on the original sale was just a profit to them, for which they gave nothing. In many other purchases where there was no question of inadequacy of consideration, lands aggregating a considerable area reverted to them for various reasons, so that here again they had the original purchase-money as well as the land which they could, and generally (it might, I think, be correct to say invariably) did, sell again to the Crown. In other cases where two sets of Maoris disputed the ownership of the land which one set had sold, the Crown, to avoid trouble with the Maoris, let them have the land back (which was generally sold again to the Crown) and had to find other land or scrip or cash for the purchaser who had bought the land originally. It is quite a mistake to suppose that the Maoris had a monopoly of such inequity as there was. Many of the purchasers and the Crown also suffered very greatly from the inequity of Maoris.

117. It is true that some of the purchasers did claim to have purchased hundreds of thousands, or perhaps millions, of acres for an utterly inadequate consideration, and it is that fact that has led to comment that one may have heard of the Maori having been "robbed" and "cheated" of his land, but it is perfectly safe to say that such claims were frustrated, and either abandoned, withdrawn or disallowed, and that the lands went back to the Maori. On the whole, so far as concerns the transactions out of which the "surplus lands" arose, they seem to have been made (as the Commissioners must be presumed to have found) on equitable terms—that is to say, in good faith and for fair and adequate consideration. It is only by applying principles which many minds may regard as strained in favour of the Maoris that I find myself able to hold that the Maori has any equity at all in these surplus lands.

118. In these circumstances all the talk that one may hear about the wrongs suffered by the Maoris must, for the purpose of assessing compensation in respect of surplus lands, be entirely disregarded. In any case, for the purposes of the consideration of the questions referred to this Commission it is really beside the point. All this Commission has to do is to determine the area of surplus land to the return of which the original Native vendors would have had a right in equity and good conscience, and then to recommend the amount of compensation that it is thought should be paid; and that amount of compensation, it seems to me, should be based upon the value of such surplus lands as at the time of the original transactions—that is to say, in respect of the old land claims transactions, prior to the Gipps and Hobson Proclamations in January, 1840, and, in respect of the penny-per-acre Proclamation lands, in the years 1844 and 1845, when the transactions took place.

119. Mr. Cooney admits that the valuation of the land may present difficulty, and he says that it would be impossible to obtain direct evidence to-day on which to base the value of land a hundred years or more ago. He suggests that the value should be based on the "yardstick," but that will not do, because the yardstick in the view taken by the Commission had no relation whatever to values. In any case, if the "yardstick" figures had to be applied as a measure of compensation, one would have to take each purchase and apply the "yardstick" to the surplus as at the time when the original purchase was made, and, if that were done, it would not work out to more than possibly from 3s. to 4s. per acre on the average.

120. He suggests alternatively that the surplus land should be considered as being worth 10s., or some of it even £1, per acre, because those were the amounts which were allowed to the purchasers in scrip, debentures, or land, where for any reason land which had been recommended to be granted to them could not be granted or where the original grant for one reason or another could not be implemented, and were also the amounts which purchasers were required to pay the Crown for some of the surplus or waste lands that the Crown held. The answer again is that the suggestion will not do—for various reasons. To begin with, I question its accuracy inasmuch as, though land was certainly disposed of by the Crown at 10s. and £1, much land, including, I feel certain, some of the "surplus lands," was sold as waste lands at 5s. per acre and less. Be that as it may, it has previously been pointed out that by reason of the advent of British sovereignty land became of greater value than it had theretofore possessed in the hands of the aboriginal owners. Even if it be suggested that the land in Commissioner Bell's day was worth 10s. or £1 per acre—which it certainly was not—that was twenty years or so after the event, and in the nature of things land should have been worth more in 1862 than it was worth before 1840, or within three or four years after 1840. But Mr. Commissioner Bell himself says in his report that *in 1862 finely grassed land could be bought from the Crown for 5s. per acre.* The Government records show that even now, after the lapse of one hundred years or more, surplus lands of which the Government valuations to-day are but 10s. and £1 per acre, are not saleable at those prices. Some of the land, it is said, is not worth 6s. per acre to-day. And there are other reasons which will appear later why this suggestion of Mr. Cooney's is fallacious.

121. It is very difficult to go behind the actual original transactions in which the original Commissioners found in substance that the transaction was made in good faith and on equitable terms, which involves a finding that the consideration was fair and adequate. It is also difficult to ignore the fact that lands that the Maoris sold to the Government ten and twenty years later which were worth on a per acreage value as much as and probably more than the surplus lands now under review, and, indeed, some of the very lands which had reverted to the Maoris were sold at prices of 7d., 8d., 1s., and 1s. 6d. per acre.

122. I cannot but think that there exists a feeling amongst the Northern Maoris that, because large sums of money have been awarded to the South Island Maoris, the Maoris of Taranaki and Waikato, and the Maoris of the Thermal lakes district by way

of compensation for the grievances of which they complained, the Northern Maoris must also receive a correspondingly large amount of compensation. That they are entitled to fair and reasonable compensation in respect of any legitimate grievance none would dispute; but to give more than that would it seems to me be yielding to expediency—and a false sense of expediency at that; false if for no other reason than that the cases are not parallel, or, where parallel, are not favourable to the present Maori claims in so far as value is concerned.

123. As to the case of the Rotorua and neighbouring lakes, it is true that the Government in 1922 agreed that a sum of £6,000 per annum should be paid in perpetuity; but, as was pointed out in paragraph 27 of the recent report of the Royal Commission in the Pukeroa-Oruawhata case (a Commission comprising the same personnel as this present Commission), the Government had treated the Arawas magnanimously and upon representations and in a belief as to the destruction of the food-supply of the Arawas that turned out to be wrong. It is only reasonable to assume, therefore, that the payment of £6,000 per annum was an excessive payment. The Lake Taupo settlement came not long afterwards, and the amount of the annual payment was without doubt influenced by the payment that had been made to the Arawas. Moreover, there was no criterion upon which a value could be based. Here criteria do exist, as will be shown directly; and in no respect can the Lakes cases be any basis for comparison.

124. The South Island case involved an area of twelve and a half million acres and was the subject of consideration by the Jones-Strauchon-Ormsby Commission in 1920. The case was a very peculiar one and seems to have been treated by the Commission really as in the nature of a case of breach of contract. The Maoris seem to have been promised very considerable reserves which, had the promise been carried out, would have been extremely valuable. But the promise had not been carried out, and the Commissioners solved the problem by recommending compensation upon the basis of the value of what they considered to be a reasonable estimate of the area of the land sold. The report says: "In order to ascertain what would be a fair thing for the Government to pay it is necessary to ascertain, for comparison, what private individuals were paying about that period. Fortunately, we have statutory authority for this. In the Land Claims Ordinance of 1841, Schedule B, the following prices are laid down as what would be considered fair and reasonable value of lands at the dates mentioned: and then the report sets out a copy of the Schedule. The Commission was merely following the statement that had been previously made in Mackay's Compendium, and, as I have said earlier, it is in my opinion clearly an erroneous statement. Moreover, as repeated by the Commission, it was clearly *obiter* because the immediately following portion of the report shows that the Schedule or "yardstick" was not followed or even treated by way of analogy or comparison. The South Island purchase was not made till 1848, when the Schedule was no longer applicable, and what the Commission did was to make an assessment on the basis of Government purchases about the time in question, and one of those purchases was of 400,000 acres in Otago in 1844 at 1½d. per acre. The Commission, in fact, assessed the 12½ million acres at 1½d. per acre, and, having allowed for a deduction of £2,000 paid to the Maoris, recommended interest at 5 per cent. for seventy-eight years. The report said: "We have therefore no hesitation in recommending what we have suggested as a reasonable basis on which this nearly century-old grievance, arising in the first instance out of misconception, prolonged through misunderstanding, and magnified by neglect in taking prompt measures to rectify it, should now, if possible, be amicably settled." Had the arrangement between the Crown and the Natives (which the Commission regarded as in the nature of a contract) been carried out, the reserves, which would presumably have been inalienable, would have remained as Native land, so that the Maoris had, in the view of the Commission, actually lost for a long period of years the use and profit of and from the very land which it would not have been in their power to sell. I consider there is no comparison between the South Island case and the case of these surplus lands, and there was an obvious reason for an allowance of interest there which does not exist in this case.

125. The case of the confiscated lands in the North Island presents a much closer analogy. There we have, as some evidence of the values of land even twenty years later than the Treaty of Waitangi, the report of Mr. Justice Sim's Commission (the Confiscated Lands Commission) in 1927. In the *Taranaki* case it was held by the Commission that the Maoris should be compensated in respect of an area of 462,000 acres (as against 87,582 acres here) of land of much better quality and greater average per acre value than the lands of the North. The Commission said that it was difficult, if not impossible, to arrive at any satisfactory conclusion as to the value of the land at the date of its confiscation, and recommended compensation at the rate of £5,000 per annum in perpetuity, which, capitalized at 5 per cent. equals £100,000, and on this basis the value of the land was 4s. 4d. per acre. In the *Waikato* case, the Commission seems to have fixed compensation on the basis of an area, as I work it out from the report of the address by counsel for the Natives, of 717,332 acres. Counsel had submitted that the land should be taken as worth 10s. per acre, but the Commission rejected that contention and recommended compensation at £3,000 per annum in perpetuity, which, capitalized at 5 per cent. equals £60,000; and on that basis the land must have been regarded by the Commission as being valued at just a fraction over 1s. 8d. per acre. I am aware that in the case of the *Waikato* Lands the annual sum was by the Waikato-Maniapoto Maori Claims Settlement Act, 1946, fixed at £5,000 (instead of £3,000 as recommended by the Commission), together with a cash payment of £5,000 and an additional payment of £1,000 per annum for forty-five years. But even supposing that all this amounted in the aggregate to £6,000 per annum in perpetuity (which it does not), that would mean a valuation of the land at only 3s. 4d., plus a fraction of a penny per acre.

126. But, while I have thought it desirable to refer to the compensation paid in the cases mentioned in the last few preceding paragraphs, the fact is that in the case of these surplus lands there is material upon which to base a sound judgment of their value without resorting to other cases where the circumstances may be quite different. I propose to refer to this material in some little detail:—

(i) As to the 16,427 acres of surplus under the waiver of pre-emption Proclamations which I have included in the total of 87,582 with great hesitation, the actual purchase-price for the whole aggregate of 90,000 acres bought under the penny-an-acre Proclamation averaged 1s. 3d. per acre. It must, however, be remembered that the Maoris have already been paid the full purchase-money for the whole area, including the surplus. They surely, therefore, cannot complain if it is now valued at the same rate per acre as compensation. On that basis the total in respect of this item of 16,427 acres would be £1,026 13s. 9d.

(ii) The item of 71,155 acres arising as surplus from the "old land claims" requires a more detailed statement. Mr. Commissioner Bell said that the purchase-price paid for the surveyed lands which included both "old claim" lands and waiver of pre-emption lands and which aggregated 474,146 acres was £95,215 2s. With fees and certain survey costs, &c., the total cost to the purchasers amounted to £131,000, so that, as Mr. Commissioner Bell says, the total cost to them was 5s. 6d. per acre, but the actual payment to the Maori—viz., £95,215 2s.—was at the average rate of 4s. per acre for the surveyed area of 474,146 acres. But as a matter of fact, while Mr. Commissioner Bell's figures are correct as far as they go, they do not give all the facts and figures which are necessary for the purposes of this inquiry. For example, so far as I can gather, the total of £95,215 2s. includes over £20,000 which represents the prices paid for the very many thousands of acres which reverted to the Maoris, while the 474,146 acres represent only the surveyed areas and do not include those reverted lands. Those were the only figures Mr. Commissioner Bell was concerned with, and he rightly

calculated the price per acre on the basis of the total payment and the surveyed area to which the purchaser would primarily have been entitled but for the provisions of the Ordinance. In order, however, to ascertain the actual price per acre that was paid as consideration for the surveyed area, there should be deducted from the total price so much thereof as was paid for the lands which reverted to the Natives. At the time when Mr. Commissioner Bell made his report and return, a considerable number of the claims had not finally been disposed of and he had no details, or at least accurate details, of the surveyed acreages in those claims; and in various cases where scrip or compensation was paid to the claimant he brings into account the purchase price but shows no set-off in his acreage. Nor, in some cases where grants had been issued but were not called in under the 1856 Act, does he always show the surveyed area, though he takes account of the price paid. For these reasons it is obvious that the average price actually paid for the surveyed area was much less than Mr. Commissioner Bell's figure of 4s. per acre.

(iii Having satisfied myself of that fact, I caused a further examination to be made by Mr. Blane and Mr. Darby to ascertain (*a*) the aggregate surveyed area of all the lands in the claims out of which the 71,155 acres of surplus now under discussion arise, and (*b*) the total purchase-money paid for that aggregate surveyed area. As the result I find the total area to be 185,099 acres and the total purchase-money to be £13,491 11s. 11d. From the area of 185,099 acres I deduct the surplus of 71,155 acres, for which, *ex hypothesi*, the Maoris were not paid, and I calculate the price per acre as being based upon an acreage of 113,944 purchased for £13,491 11s. 11d.: the result is slightly under 2s. 4½d. The assumption necessarily follows that that should be the value of the surplus, and on that basis the value of the 71,155 would have been £8,449 13s.

(iv) The fact is that for quite a long period (up to twenty years and perhaps more) after the event, the Maoris were actually selling land of a similar nature and quality to the lands comprised in the old land claims, and, indeed, some of the very land which had reverted to the Maoris by reason of abandoned or disallowed claims, at prices very much less than 2s. 4½d.—viz., 7d., 8d., 1s., and 1s. 6d. per acre.

(v) As Mr. Commissioner Bell says in his report in 1862, *finely grassed* land could *then*—*i.e.*, in 1862—be bought from the Crown at 5s. per acre.

(vi) The suggestion which seems to me to be implicit in the case presented on behalf of the Maoris is that the purchase-moneys shown in the transactions before the Commission to have been paid—*i.e.*, 1s. 3d. and 2s. 4½d. per acre respectively—were "unconscionable" or "grossly inadequate" is one that I find myself utterly unable to accept in view of what I have said in the foregoing subparagraphs and of the report dated the 8th March, 1948, concerning the Mokau (Manginangina) Block, to which I was a party. That was the case of a purchase in 1859 of a block of kauri forest land comprising 7,224 acres. The price was £240, or 8d. an acre. Judge Acheson had considered that the price was unconscionable. In disagreeing with him the report said: "The consideration paid by the Crown was £240, which is practically 8d. per acre. Admittedly that seems in these days a very trifling amount, but if it is compared with other purchases of similar land it would seem to be not unreasonably low." That transaction was a good many years after the sales out of which these "surplus lands" arise, and, by comparison, the prices which were paid for the "old lands" and the pre-emption lands and which must be presumed to have been approved by the Commissioners under the then existing legislation certainly cannot be regarded as inadequate.

(vii) Considering the fact that prior to 1840 the land was of very little exchangeable value, and that for very many years after 1840 it was selling at prices of 7d., 8d., 1s., and 1s. 6d., I think that the average price of 2s. 4½d. at which the "old" purchases were made was substantially more than its then value: certainly it cannot be said to have been an inadequate price. The lands were not inalienable, as the reserves would have been in the South Island case, and nothing can be more sure than that, if the surplus areas had been handed back to the Maoris in the eighteen forties, or even the sixties, they would have been promptly disposed of at prices much lower than 2s. 4½d. per acre.

127. It follows from what I have said in the last preceding paragraph that in my view the value of the 71,155 acres of "surplus lands" may be fairly estimated at not more than £8,449 13s., thus making the total value of the whole 87,582 acres £9,476 6s. 9d., but I would be prepared to add something to that amount by way of solatium, and on the whole I would recommend that a total sum of £15,000 be paid as compensation and by way of complete and final settlement of all the Maori grievances in respect of these "surplus lands." I have endeavoured in this memorandum to dispel the confusion that has given rise to erroneous and exaggerated notions of the Maori grievances, and to explain what I regard as the real equities and broad justice of the case; and on the whole case as I see it I consider that a payment of £15,000 would give the fullest measure of justice to the Maori claims.

128. If that recommendation be adopted, I would further suggest that the compensation should be paid to an appropriate Maori Land Board (either in one sum or by instalments over a short period of years as Your Excellency's Advisers might think fit) for Maori purposes at the discretion of the Board, but in the districts where the surplus lands are located. I am conscious that this may not be an easy task, particularly as fairly substantial portions of the surplus lands are situated near Auckland, but the probability is that the needs of the Maoris farther away from Auckland are the greater. Be that as it may, any difficulties that might arise in apportioning the money should be capable of solution if the needs of each district are recognized and the Maoris themselves are reasonable.

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