No. 10.

# VOTES AND PROCEEDINGS

OF

# THE LEGISLATIVE COUNCIL.

## TUESDAY, 30 JUNE, 1840.

1. Council met pursuant to adjournment; His Excellency the Governor took the Chair, and laid upon the Table, "A Return of Convictions before the Supreme Court during the "February and May Sessions in the year 1840," designating the Offences, the Statutes or Acts under which those offences were tried, and the Sentences of the Court thereupon; to be printed.
2. Mr. H. H. Macarthur presented a Petition from Henry Croasdaile Wilson, Esq., representing, that he is a proprietor of about ten thousand acres of Land in New Zealand, and is very desirous that the Island in which his land is situated, should be ceded to the British Crown, and be under the protection of British Laws, by which the value of his property would be increased; but he fears the Native and other Land-holders in New Zealand will have the desire, as well as the influence, to prevent such cession being made, if the proposed Bill to empower the Governor of New South Wales to appoint Commissioners to examine and report on Claims to Grants of Land in New Zealand should become a Law; and representing further, that the proposed Bill is in many other respects inexpedient; and praying that it may not be further proceeded with. Petition read, and received; to lie on the Table.
3. Claims to Grants of Land in New Zealand Bill; the Colonial Secretary having moved the Order of the Day for the Gentlemen being heard who had been allowed to address the Council in opposition to this Bill, Mr. James Busby, and Mr. Wm. Charles Wentworth, and also Mr. A'Beckett and Mr. Darvel, Barristers at Law, and Mr. Unwin Solicitor were introduced:

Mr, Busby addressed the Council at great length; the purport of his address may be shortly stated as follows: He respectfully submitted, that the Council would be assuming a very arbitrary power, and one at variance with the principles of the British Constitution, were they to proceed in the confiscation of property at New Zealand which seemed to be contemplated by the provisions of the proposed Bill; he felt bound to oppose the measure as well on account of its inevitable effect upon his own pecuniary interests, as an act of justice towards those who had purchased from him; he felt conscious that his Land had been justly acquired, and he would not shrink from the strictest inquiry into his transactions; but there was one clause in the proposed Bill which would despoil him of all his possessions; the clause he alluded to was the Fifth, by which it was declared that no claims to Land would be allowed, which comprehended the Sea Coast, the Banks of Navigable Rivers, or any Promontory or Headland; part of his land he had been compelled to purchase with his own private funds, for the purpose of building upon it, a residence, shortly after his arrival at New Zealand as the Representative of the British Government in that Country; and that land having become almost the only inheritance of himself and his family, he should consider it a grievous hardship were he now to be deprived of it; many Aboriginal families who held lands under grants from him, would also become sufferers by such an act of oppression, and in such an event, he conceived it would be impossible to convince them that he and they were not despoiled by the hand of power; and he would suggest to the Council, whether such an impression might not be wholly destructive of that confidence in the British Government which the Natives had hitherto evinced; for one tract of land at the Bay of Islands, comprising about 300 acres, he had given little short of £146; and for another, about £1,000; he would admit that there were many claims which would not bear investigation; still there were many worthy possessors of land on the banks of the various Harbours and Rivers, who would suffer greatly if the proposed Bill, in its present form, became law; no attempt had been made on the part of Government to prevent British Subjects from acquiring property in New Zealand; such was not the case with the enterprising Settlers fron Van Diemen's Land who originated the now flourishing Colony of Port Phillip; no sooner was it known that they had purchased large tracts of land from the Natives of that District, than a Proclamation was published declaring the illegality of their proceedings; another proof of the injustice of the proposed measure was, that up to the time that New Zealand was taken under the protection of the British Crown, the Sovereignty of the Chiefs as ruling over an Independent People had been admitted, and their Flag acknowledged in such Ports as their Vessels had visited; and the Declaration of Independence made by the

No. 9.

# VOTES AND PROCEEDINGS

OF

# THE LEGISLATIVE COUNCIL.

## FRIDAY, 26 JUNE, 1840.

1. Council met pursuant to adjournment; His Excellency the Governor in the Chair. Hawkesbury Benevolent Society Bill; further considered and amended; to be fairly transcribed and presented to the Governor by the Lord Bishop of Australia, and Mr. H. H. Macarthur.
2. Deserted Wives and Children Bill; the Lord Bishop of Australia's Motion considered in Committee; and the suggested amendments agreed to; the Bill further considered and amended; to be fairly transcribed, and presented to the Governor by the Lord Bishop of Australia and the Attorney General.
3. His Excellency the Governor laid upon the Table, "*a Bill to Amend an Act* intituled '*An Act to Consolidate and Amend the Laws for the Transportation and Punishment of Offenders in New South Wales, and for defining the respective powers and authorities of General Quarter Sessions and of Petty Sessions,—and for determining the places at which the same shall be holden; and for better regulating the Summary Jurisdiction of Justices of the Peace; and for repealing certain Laws and Ordinances relating thereto:*'" Bill read a first time; to be Printed, and read a second time on Thursday next, July 2.

Council adjourned at Three o'Clock, until Tuesday next, June 30, at Twelve o'Clock.

## ORDERS OF THE DAY.

### TUESDAY, JUNE 30.

1. Claims to Grants of Land in New Zealand Bill;
   (1.) Mr. James Busby to be heard.
   (2.) Mr. Wm. Charles Wentworth to be heard.
   (3.) Counsel to be heard.
   (4.) Second reading.

   Municipal Corporations Bill; second reading.

### WEDNESDAY, JULY 1.

1. Ordnance Vesting Bill; third reading.
2. Preservation of Ports and Harbours Act Amendment Bill; re-committal.
3. Foreign Attachment and Laws as to Absent persons Amendment Bill; second reading.

### THURSDAY, JULY 2.

1. Punishment of Transported Offenders Amendment Act Bill; second reading.

### TUESDAY, JULY 7.

1. Commissioners of Police and Public Works Bill; second reading.

### WEDNESDAY, JULY 8.

1. Parish Roads Bill; second reading.

## NOTICE OF MOTION.

### TUESDAY, JUNE 30.

1. The Attorney General; That Notice being given to the Council that it is to assemble, if any Member from ill health, or other cause, is unable to attend at the appointed day and hour, he will be expected to send information to the Clerk of the Council at or before Ten of the Clock on the morning of the day of Meeting that he is unable to attend—And if any Member shall neglect to send such Notice, he shall, for every such neglect, pay a fine of Ten Pounds into the hands of the Clerk of the Council, such fine to be disposed of in such manner as the Council may direct.

WM. MACPHERSON,
*Clerk of Councils.*

the Confederated Chiefs had been approved, and ordered to be printed as a State Paper, by the Home Government; that in the recent Instructions to Captain Hobson, much anxiety was manifested to conciliate the New Zealanders; and in the Treaty between Captain Hobson and the Assembled Chiefs of New Zealand, the latter agreed to forego their right of selling Land to any but the British Government, thus giving to Her Majesty the right of pre-emption; but if, as assumed by the Bill, the Chiefs never had that right, why he would ask, were they called upon by that Treaty to relinquish that which they had never possessed. After replying to sundry interrogatories by His Excellency, and several Members of the Council, Mr. Busby withdrew.

Mr. Wentworth next addressed the Council, in a speech of very great length, and abounding in quotations from Legal, and other authorities; the purport of what he said may be stated shortly as follows: He was a proprietor of Land, in both the Northern and the Southern Islands of New Zealand; some of his possessions in the latter, had been acquired since the publication of His Excellency's and Captain Hobson's Proclamations, which proved that in his opinion at least, those Proclamations were a perfect nullity, and such being his opinion he would dispose of them at once by referring the Council to the Law of the case as laid down by Blackstone Vol. 1. chap. 7. page 270; in accordance with the doctrine there laid down, it was clear that a Proclamation to be binding, must be founded upon some Law previously existent; if the Proclamations in question were founded on any Law, it was for those who had issued them to shew what that Law was; having shewn that the Proclamations were not founded in Law, that they were issued without Legal authority, and that they were therefore not binding, he would next advert to the principle contained in the Preamble of the Bill; if that principle were true, the Bill might be sustained, but if otherwise, it must become a nullity; the principle was, that no Chiefs or other Individuals of Tribes of Uncivilized Savages had any right do dipose of the Lands occupied by them;—a principle at variance with Lord Normanby's Despatches, which proceeding on the assumption that the Natives of New Zealand had an indisputable right to the soil, authorised the Government to treat with them for the cession of the Sovereignty, and for the purchase of the soil; if the principle of the preamble were true, and that of the instructions false, the self evident consequence would be, that if the New Zealanders had no right to sell to British Subjects, neither had they a right to sell to the British Government; and thus while Britain would be "estopped" (as the lawyers would say) by her own Law, New Zealand would be open to the French, to the Americans, and to all other Nations: it had been said that the preamble was not intended to be declaratory of a new principle, but of an old law; he would defy the Learned Gentleman whom he was bound to consider as the framer of the Bill, to put his finger on any part of the British Law, or of the Law of Nations, on which it was founded; it might be a law of America, but then it should have been introduced as such, and not under false colours; in order to ascertain how far the declaration of the disability of the New Zealanders to sell their Lands was justified by the Law of Nations, he would call the attention of the Council to the state of the New Zealanders as compared with that of the North American Indians, whose Territories it would be admitted had been acquired by right of conquest, and parcelled out by the Government into immense Grants, yet the right of the Natives to the soil remained undisturbed, and he could point out numerous instances of purchases from them both by Individuals and by the Government; he would refer the Council to Abiel Holmes' Annals of America at pages 247 and 248 and elsewhere; he would mention the cases of John Davenport, Theophilus Eaton, and others in the year 1639; of Richard Smith in 1641; of John Wenthrop in 1659 and others: In 1633, 1648, and 1662, the State of Massachusets, the Colony of Plymouth, and the State of Virginia respectively passed Laws prohibiting the purchase of Lands from the Indians by Individuals; those Acts did not annul past, but prohibited future purchases,; they were all prospective and did not interfere with any man's rights or possessions. The grand difference between those laws and the Bill now before the Council was, that they interfered with no man's rights whilst that Bill was intended to sweep away all Property acquired before the Bill was even thought of. Those Laws shewed that not only were the Indians considered capable of holding and dealing in lands, but that their right to do so was exercised even within the limits of the King's Patents; and if it was considered competent for those American Savages to deal in Land why should the like competency be denied to the New Zealanders? The New Zealanders were not less civilized than were the Americans—the latter did not cultivate their land—they had no fixed habitation, but lived together solely for the purposes of the chase and war—whilst the New Zealanders had fixed habitations, cultivated their land, reared domestic animals—had a national flag, and many of them had been converted to the Christian Religion and had learnt the rudiments of a common education; they knew the value of their property, and exacted it from those who dealt with them—They could not then be inferior to those American Savages to whom the rights of soil had been ceded by British subjects and the British Crown. There was another great difference too between the position of those Indians and the New Zealanders—The Indians inhabited a Country which had been conquered, inhabited, and planted, by British subjects, and to which the Commissions of the Crown extended; whilst as regards New Zealand, if the Crown ever had any power, it had entirely divested itself of it, and yet an attempt was made to deprive the New Zealanders of their rights, *in limine*, before Britain had even obtained a footing in the soil, or knew that she ever would. The proposition was therefore the more unjust, as it was advanced when Britain had scarcely a footing on the soil,

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before any of the soil had been ceded, and before it was known whether it or the Sovereignty ever would be ceded to Her Majesty. He cared not whether the New Zealanders were an Independent Nation or only a few Independent Tribes or Families scattered over the Country—they still possessed the Demesne or soil of that Country, and had a right to use it as they thought proper, and those who had bought from them only acted in accordance with the natural rights of the Natives and the law of Nations, as would be seen on reference to Vattel, whom he had heard the late Mr. Canning refer to as a standing authority. The deduction from all the authorities to which he had referred was, that until the Council passed a restrictive law, the New Zealanders had a right to dispose of their land in whatever quantities and manner they pleased—The Council had no power whatever to examine into titles—All the Council could do was to establish Courts of Law to which the New Zealanders could appeal if they felt aggrieved—He would not object to such a measure, but he did object to an *ex post facto* enactment like the one proposed, founded on a fiction, under which it was intended to sweep away all land whether acquired justly or not. It had been said that British subjects had no right to form Colonies without the previous sanction or authority of the Crown; whether they had a right to form Colonies was one proposition, and whether they had a right to buy land in an Independent Country was another; with the former he had nothing to do; but he imagined that he could shew that both propositions were true—As to the first he would again refer to Vattel, according to whom Individuals landing in an uninhabited Country might not only establish Colonies, but also erect a Government and an Empire; and if that might be done in an uninhabited Country, it resulted *á fortiori*, that it might be done in a Country that was peopled, if the Natives of that Country gave their consent thereto; and he would instance, in support of that position, the first settlement of New England in 1620 under Davenport and others, which was conclusive that British Subjects, without the pale of a Royal Charter, might form Colonies and erect Governments, as had been done in Connecticut, where the Government so established had continued unmolested for upwards of two centuries.

The further hearing of Mr. Wentworth was then deferred until to-morrow; and the Council adjourned at Half-past Five o'Clock, until to-morrow, at Twelve o'Clock.

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## ORDERS OF THE DAY.

### Wednesday, July 1.

1. Claims to Grants of Land in New Zealand Bill;
   (1.) Mr. Wm. Charles Wentworth to be further heard;
   (2.) Counsel to be heard;
   (3.) Second reading.
2. Municipal Corporations Bill; second reading.
3. Ordnance Vesting Bill; third reading.
4. Preservation of Ports and Harbours Act Amendment Bill; re-committal.
5. Foreign Attachment and Laws as to Absent persons Amendment Bill; second reading.

### Thursday, July 2.

1. Punishment of Transported Offenders Amendment Act Bill; second reading.

### Tuesday, July 7.

1. Commissioners of Police and Public Works Bill; second reading.

### Wednesday, July 8.

1. Parish Roads Bill; second reading.

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## NOTICE OF MOTION.

### Wednesday, July 1.

1. The Attorney General; That Notice being given to the Council that it is to assemble, if any Member from ill health, or other cause, is unable to attend at the appointed day and hour, he will be expected to send information to the Clerk of the Council at or before Ten of the Clock on the morning of the day of Meeting that he is unable to attend—And if any Member shall neglect to send such Notice, he shall, for every such neglect, pay a fine of Ten Pounds into the hands of the Clerk of the Council, such fine to be disposed of in such manner as the Council may direct.

Wm. MACPHERSON,
*Clerk of Councils.*

No. 11.

# VOTES AND PROCEEDINGS

OF

# THE LEGISLATIVE COUNCIL.

## WEDNESDAY, 1 JULY, 1840.

1. Council met pursuant to adjournment; His Excellency the Governor in the Chair. Claims to Grants of Land in New Zealand Bill: The Colonial Secretary having moved the Order of the Day for the further hearing of Mr. Wentworth, and the hearing of Counsel, and Mr. Wentworth, Messrs. à Beckett, and Darvell, Barristers at Law, and Mr. Unwin, Solicitor, being introduced,

Mr. Wentworth resumed his argument; He said, he endeavoured yesterday, and he thought he had succeeded in establishing, 1st—That the Proclamations issued at Sydney and at New Zealand had no validity; 2nd—That Independent Tribes, situated exactly as the New Zealanders were—the Indians of America—exercised without interruption or controul that right of disposing of their Lands, of which it was intended to deprive the New Zealanders; 3rd—That that right was not only not opposed to the Law of England, but that the Law of England was totally silent upon it, and that it was completely recognized by the Law of Nations; 4th—That it was competent by the Law of Nations for British subjects to found Colonies, as was proved more particularly in the instance of the Colony of New England, which had formed a Government for itself, which it continued to enjoy for two centuries, without either interference or confirmation. Having thus clearly, as he thought, established the right of the New Zealander to sell land, the next proposition he would enquire into was, whether there was any thing in law to prevent a British subject from purchasing land from a native, or any thing in his allegiance,—of which he admitted a British subject could not divest himself, —which militated against his right to do so; and that right he thought quite clear from a variety of cases, which he quoted, all tending to shew that a British subject could hold Lands in a foreign state, and enjoy all the privileges of a subject of that state, and yet not forfeit his allegiance, provided he did not take up arms against his natural Sovereign, and that he returned home if called upon so to do by a Writ of Privy Seal, or by Proclamation. If that was not allowed by the Law of Nations, there might be some reason for saying that British subjects could not hold lands in New Zealand; but it would be absurd to dwell on the topic of allegiance, as the Independence of New Zealand had ceased, and it was now a Colony of Great Britain, or else that Bill would not have been laid upon the Council-table; and he would only advert to one topic more before he closed his argument as to the right of the New Zealanders to sell, and of British subjects to buy, their land. In his first letter, Lord Normanby made no difference between the Northern and Southern Islands; nor did the Bill make any distinction between them, yet a distinction was sought to be made by Captain Hobson, who adverted to the comparative state of Civilization, and the small number of Natives upon the Southern Island, upon which Lord Normanby remarked, that his observations relative to the Independence of New Zealand, bore reference only to the Northern Island, and that if the number of Inhabitants was small, and there should be any difficulty in entering into a treaty with them, Captain Hobson was authorised to assert Her Majesty's right to the Sovereignty of the Island, by virtue of discovery. Here then was a distinction endeavoured to be established which would materially affect the rights of some of Her Majesty's subjects. It was said in the Despatch, that the Natives of the Southern Island were fewer in number and inferior in civilization to those of the Northern Island. Whether such was the fact or not, was a question which perhaps he was not competent to deal with; but he had seen the savages of both Islands, and he could see no difference between them, or, if there was a difference, the Inhabitants of the Southern Island were the most civilized of the two, as indeed they ought to be, inasmuch as they had been in constant communication with the British, settled on the establishments of various merchants at different Ports, who had taught them many habits of civilized life, with which the natives of the Northern Island were totally unacquainted. They formed part of the crews of the boats engaged in the Black-whale Fishery; in some cases they were headsmen, and in others boatsteerers, and were treated in every respect the same as British subjects. They had lays, and earned considerable sums of money, which they expended in the purchase of such articles as they required; and when the whaling seasons terminated, they went about in boats and caught seals for their own profit; therefore, as far as he could ascertain, they were more civilized than the Natives of the Northern Island. He adverted to that part of the case, because it was assumed by Captain Hobson

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Hobson that the Queen had a right to that Island by virtue of discovery; but that assumption he denied; discovery gave no right to the occupation of an inhabited Country: discovery gave a sort of right of priority to the discoverer of a desert or uncivilized country, who might settle in it if he thought fit; but that right did not extend to any but to a desert, uncultivated, and uninhabited country; nor even in that case, according to Vattel, would the Law of Nations acknowledge the property and sovereignty of any nation, unless it had really taken actual possession, and had formed actual settlements, or made actual use of the country. But he would dismiss that subject, and again advert to the Bill; the Bill rested upon one proposition, which he thought he had disproved — the incompetency of the New Zealanders to sell, and of British subjects to buy, their land. The Bill itself was neither more nor less than a Bill of confiscation; its object being to take away property, annul grants, and, at one fell swoop, to do away with all the property acquired by British subjects in the Islands of New Zealand. Compensation for that wholesale spoliation was talked about, but he did not expect any thing very liberal; he objected to the Bill in toto, for he had proved by authorities which could not be refuted, that, the right of the New Zealanders to sell, and of British subjects to buy land was indisputable, and could not be restrained until the Council passed an Act for that purpose; and therefore he would say, that any Act to divest parties of their land in New Zealand, without a compensatory clause, such as was contained in Acts passed in England, to deprive parties of Property required for Public purposes, would be illegal; the compensation to be awarded must be decided by a Jury, and therefore he would say, that the proposed Bill was clearly repugnant to the law of England; that the Council could not pass it, or if they did, that the Judges could not certify it. Only a few days ago the Council passed a law, making all the laws of England and of this Colony applicable to New Zealand; and among other rights thus conferred, was the right of trial by Jury, of which the proposed Bill was completely suicidal: it took away the right of trial by Jury, and if there was no other objection to it, than that it deprived the subject of his right of trial by Jury, it could not pass—it violated *Magna Charta*—it violated one of the fundamental principles of the constitution, that no man should be deprived of his land but by the judgment of his Peers; and he would repeat that the Council could not pass the Bill, or if they did, that the judges could not certify it. It appeared to him that the Bill was not less objectionable in its details than in its principle; the compensation clause did not carry out the Instructions of Lord Normanby on that point, for it not only did not confirm any Claims, nor pretended to enquire whether they were injurious to the present or prospective interests of the country, in extent or otherwise, but said, that no Claims should be confirmed to any Land within a certain distance of the Sea-shore or Navigable Rivers, or Headlands, or in fact any where, where land was valuable. What could be the object of such an enactment?—what could it be for? Why, no title would be confirmed; instead of people getting their land, they would be driven forty or fifty miles up the country; and surely that would be contrary to Lord Normanby's Instructions, that all claims to land that were not prejudicial in extent or otherwise should be confirmed; the principal part of the land purchased was of course near the coast, where it was the most useful, and instead of those claims being confirmed, they were all to be rejected; so that, in that respect, at any rate, the Bill was one of spoliation. If, instead of prohibiting the holding of land beyond certain limits, there had been a clause, enacting that all beyond a certain quantity should be diminished in a certain degree, and the remainder devoted to Immigration purposes, he thought no one would have objected to it; but framed as the Bill now was, it was a Bill of confiscation and spoliation; it denied the right of the natives to sell the land, and of British subjects to purchase it, and it swept away the whole of the possessions in the country; it took away every thing, and gave nothing, and he would confidently, but with the greatest deference and respect, submit to the Council, that they could not pass it into a law, in its present shape. In reply to interrogatories from His Excellency and several Members of the Council, Mr. Wentworth said, he could not give any proximate idea of the extent of the Land which he claimed in New Zealand; the whole of the Southern Island had been conveyed to him and his associates, but the New Zealand Company claimed more than half of it now; there were some five or six associated with him, and he believed they claimed altogether some twenty millions of acres; he had possessions in the Northern Island also. Mr. Wentworth then withdrew.

Mr. à Beckett then addressed the Council, to the following effect;—As a preliminary to to his arguments, in order to induce the Council not to pass the Bill, he observed, that the claims of the rights of the Crown as to any portion of territory which it sought to exercise its jurisdiction over, were invariably founded on possession, acquired either by conquest or discovery; but in the case stated in the Bill proposed to be passed, it did not appear that the British Government had ever acquired such a right, either by discovery or conquest. He then quoted at considerable length from Storey's Commentaries, a case which he said he had no doubt the framer of the present Bill had in view when he drew it, but he need hardly say, that the case would not apply, it being a case of American, and not of English law. Storey contended, in the case quoted, that the right was founded on the Law of Nature, which was the substratum on which the Law of Nations was founded; but that was merely matter of opinion; besides Storey was not a British, but an American Commentator, and what he had written as a Commentary on a Trans-atlantic transaction could not be received as a precedent, or a principle of the

the Laws of the British Empire; he would observe, too, that in the work referred to, the Commentator spoke of the Indians as a race of beings so debased in the scale of existence, that they were merely the creatures of conquest; but such could not be said of the Aboriginal Inhabitants of New Zealand; the New Zealanders were an intelligent race, and had been elevated to the rank of a Nation; their chiefs had been received and honored by the British Empire as Sovereign Princes; it was preposterous to assert that they were savages: they were in fact civilized men; they had the use of language, and knew how to apply it; they were also a race capable of conveying their considerations to the purchaser, either by words, palpable tokens, or by visible symbols, and therefore ought not to be objected to as conveyancers of their own property; they knew and recognized the right of property: and if Mr. Busby's dictum could be at all received, it went to prove that the New Zealanders had rights, knew they were possessed of them, and were perfectly able to protect them, by reason, as well as by brute force. One of the principal arguments in favour of the Bill, he understood, was founded on the paternal care which the British Government had exercised over the rights of all its subjects resident in its Dependencies; but he would ask, what extent the rights of the Body Politic in New Zealand had been attended to, by the British Government, either in London or in Sydney? The fact was, that there had been no compassion asked, needed, or afforded, until that had been proffered, which was neither wanted nor required by the parties whose interests the Bill ostensibly advocated, or at least professed to protect; and in order to prove his statement, he need only mention the fact, that in the year 1839, a vessel from New Zealand had been refused a Colonial Register, merely because she was a vessel built by or belonging to a foreign nation; and in the Correspondence published by the British Government, New Zealand was officially styled a kingdom; and he confidently called upon the Council to remember that, up to the time that Governor Hobson had been dispatched from Britain to take possession of New Zealand, in the name of Her Majesty's Government, that country had been treated, spoken, and written of, and negotiated about as an Independent State; and until the public had been informed of the particular situation in which the Government of Great Britain regarded New Zealand, he thought that country had the right, according to the Law of Nations, of rejecting any interference in its internal Government, as well as of objecting to any attempt to control its subjects respecting the disposal of either heritable or personal property among themselves, or to the subjects of any other dynasty. The treaty by which the British Crown sought to extend its sovereignty over New Zealand contained three remarkable points: It purported to cede to the British Crown all rights of soil, on the ground that they are paternal subjects of Her Majesty's regard: Then as regarded the Colonial Proclamation, which had been called a warning, the one document, in fact, completely nullified the other, inasmuch as the one adverted to New Zealand as a Kingdom, while the other styles it a Dependency of the Colony of New South Wales, without shewing by what means New Zealand, an Independent Kingdom, had become a Dependency of the British Empire. The mode in which the Council had been legislating on the Bill, was not in accordance with the principles of the New South Wales Act, by which the Council were authorised to make Acts for the government of this Colony only. The preamble of the Bill itself, shewed that the regulation of property in New Zealand, in the terms proposed by the Bill, was not at all necessary; because, if the New Zealand Deeds were void, then no law could be necessary to make them so: and if they were valid, then a Bill must be passed for the express purpose of declaring them invalid; and therefore, he submitted, the Bill, ought not to pass without an alteration in those points, which his clients had distinctly objected to. But if the Bill, in its present shape, did pass through the Council, it must become a dead letter, as the Judges could not conscientiously reduce such a Bill to practice in the Courts, in which the legality of the measure must be ultimately contested; and he felt convinced that Honorable Members would not feel warranted in passing a measure by which they would ultimately be made to appear as having been legislating for the subjects, not of Britain, but of a foreign state, over which the British Crown had not hitherto exercised any rights of lordship; and he was not aware of any law of nations, or of Britain, by which persons, owing allegiance to Britain, could be prevented from purchasing lands in a foreign state; and this brought him to another question that had not yet been touched, as bearing on the Bill in question; it was the mode by which his clients had acquired their land—it was neither by discovery, nor conquest, but by purchase; and he was not aware that the purchase of lands in one kingdom by the subjects of another, gave the Government of the latter state any right to interfere in the arrangements of the Government of the former. He had searched the laws of England, and had found nothing there recorded that would favor such an opinion; and he confidently asserted, that if any such statute ever had existed, the laws of England, or the Commentators on them, would have noticed it. It had been stated, that the New Zealanders had laws and customs among themselves, and so long as they had such laws and customs, and were acknowledged independent, those laws and customs, however simple, must be respected. In looking over the Instructions given by Lord Normanby to Captain Hobson, he could not see that any such measure as the present Bill had ever been contemplated by the Home Government; as far as he could learn, there were two objects particularly aimed at in those Instructions, and to which Captain Hobson's attention was to be particularly directed. The first of those was, to establish a system of Civil Government for the protection of such subjects

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subjects of the Crown as were either settled at, or had an interest in New Zealand; but there was nothing in that object which called on the Council to pass such a Bill as the present; the next object to which Captain Hobson's attention had been particularly directed was, to induce the Chiefs, in return for the establishment of a regular form of Government, *henceforward* to sell their lands and alienate their claims to them to the British Government only; but that assuredly was not an authority to the Council to pass a Bill to render null and void, contracts which had been made prior to the promulgation of Captain Hobson's Proclamation, which, as he had already said, was only a warning, and intended to act prospectively only. If such a Bill had been contemplated by Lord Normanby, there could have been no embarrassment to his explicitly intimating his intention of having it called into being. Such a Bill as the present could not be passed, even by the British Parliament; because the authority of that Legislative Body, great as it was, was circumscribed by the well-known principle, that it could not pass any law which would be repugnant to the principles of British liberty; and one of the most prominent of those was well known to be, that no Subject could be divested of his property without the intervention of a Jury of his countrymen; whereas, according to the present Bill, the Crown, by appointing Commissioners, and furnishing them with their instructions, became in reality the judge, jury, and administrators of the law. There were other and legitimate modes by which the Crown could regain possession of such lands as it claimed the ownership of; and he submitted that the Government, in enforcing those claims, could only proceed by those modes by which the rights both of the Crown and its Subjects would be preserved without any violation being done to the principles of the British Constitution. Mr. à Beckett then withdrew.
Mr. Darvell next addressed the Council, and having briefly recapitulated some of the leading arguments of the gentlemen who preceded him, also withdrew.
Second reading of the Bill deferred until Thursday, July 9.

2. Municipal Corporations Bill; second reading deferred until Thursday, July 9.
3. Ordnance Vesting Bill; third reading deferred until To-morrow, July 2.
4. Preservation of Ports and Harbours Act Amendment Bill; re-committal deferred until To-morrow.
5. Foreign Attachment and Laws as to Absent Persons Amendment Bill; second reading deferred until To-morrow.
6. The Attorney General's Motion relative to the Absence of Members; deferred until To-morrow.

Council adjourned at Five O'Clock, until To-morrow at Twelve O'Clock.

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## ORDERS OF THE DAY.

### Thursday, July 2.

1. Ordnance Vesting Bill; third reading.
2. Preservation of Ports and Harbours Act Amendment Bill; re-committal.
3. Foreign Attachment Act and Laws as to Absent Persons Amendment Bill; second reading.
4. Punishment of Transported Offenders' Amendment Act Bill; second reading.

### Tuesday, July 7.

1. Commissioners of Police and Public Works Bill; second reading.

### Wednesday, July 8.

1. Parish Roads Bill; second reading.

### Thursday, July 9.

1. Claims to Grants of Lands in New Zealand Bill; second reading.
2. Municipal Corporations Bill; second reading.

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## NOTICE OF MOTION.

### Thursday, July 2.

1. The Attorney General; That Notice being given to the Council that it is to assemble, if any Member, from ill health, or other cause, is unable to attend on the appointed day and hour, he will be expected to send information to the Clerk of the Council, at or before Ten of the Clock on the Morning of the day of Meeting, that he is unable to attend; and if any Member shall neglect to send such Notice, he shall, for every such neglect, pay a fine of ten pounds into the hands of the Clerk of the Council; such fine to be disposed of in such manner as the Council may direct.

Wm. MACPHERSON,
*Clerk of Councils.*

No. 12.

# VOTES AND PROCEEDINGS

OF

# THE LEGISLATIVE COUNCIL.

## THURSDAY, 2 JULY, 1840.

1. Council met pursuant to adjournment; His Excellency the Governor in the Chair.
   The Attorney General's Motion relative to the absence of Members, after some discussion, withdrawn.
2. Ordnance Vesting Bill; read a third time and *Passed*.
3. Preservation of Ports and Harbours Act Amendment Bill; re-committed and further amended; to be fairly transcribed and presented to the Governor by the Collector of Customs and Mr. Berry.
4. Foreign Attachment and Laws as to Absent Persons Amendment Bill; read a second time; committed and amended; to be fairly transcribed and presented to the Governor by the Chief Justice and the Attorney General.
5. Punishment of Transported Offenders' Amendment Act Bill; second reading deferred until Friday, July 10.
6. Hawkesbury Benevolent Society Bill; presented by the Governor as amended; re-committed and further amended; to be fairly transcribed and presented to the Governor by the Lord Bishop of Australia and Mr. H. H. Macarthur.

   Notice having been given that several Members would be unable to attend on Tuesday and Wednesday next, Resolved,

   (1.) Commissioners of Police and Public Works Bill; that the second reading, appointed for Tuesday next, be postponed until Thursday next, July 9.

   (2.) Parish Roads Bill; that the second reading appointed for Wednesday next, be postponed until Friday, July 10.

   (3.) Municipal Corporations Bill; that the second reading appointed for Thursday next, be postponed until Friday, July 10.

   Council adjourned at Three o'Clock, until Thursday next, July 9, at Twelve o'Clock.

## ORDERS OF THE DAY.

### Thursday, July 9.

1. Claims to Grants of Land in New Zealand Bill; second reading.
2. Commissioners of Police and Public Works Bill; second reading.

### Friday, July 10.

1. Punishment of Transported Offenders Amendment Act Bill; second reading.
2. Municipal Corporations Bill; second reading.
3. Parish Roads Bill; second reading.

Wm. MACPHERSON,
*Clerk of Councils.*

No. 13.

# VOTES AND PROCEEDINGS

OF

# THE LEGISLATIVE COUNCIL.

THURSDAY, 9 JULY, 1840.

1. Council met pursuant to adjournment; His Excellency the Governor in the Chair.

Claims to Grants of Land in New Zealand Bill; On the Order of the day being called for the second reading of this Bill, His Excellency the Governor addressed the Council at great length in refutation of the positions maintained by the Gentlemen who had been heard in opposition to the Bill, and read a number of passages from Works of standard authority to prove, that by the Law and practice, not only of England, but of all the Colonizing Powers of Europe, as well as of the United States of America, the Uncivilized Aboriginal inhabitants of any Country, have always been held to have but a qualified dominion over it, or a right of occupancy only: and that until they establish amongst themselves a settled form of government, and subjugate the ground to their own uses, by the cultivation of it, they cannot grant to individuals, not of their own tribe, any portion of it, for the simple reason, that they have not themselves any individual property in it.

Secondly, that if a settlement be made in any such country by a civilized power, the right of pre-emption of the soil, or in other words, the right of extinguishing the Native title, is exclusively in the Government of that Power; and cannot be enjoyed by individuals without the consent of their Government.

Thirdly, that neither individuals, nor bodies of men belonging to any Nation, can form Colonies, except with the consent, and under the direction and control of their own Government: and that from any settlement which they may form without the consent of their Government, they may be ousted; that is simply to say, in so far as Englishmen are concerned, that Colonies can not be formed without the consent of the Crown.

The first passages read by His Excellency were extracts from Storey's Commentaries on the Constitution of the United States, Chap. I sect. 6, 7, and 8.

CH. 1. SECT. 6.—The principle, then, that discovery gave title to the Government, by whose subjects, or by whose authority it was made, against all other European Governments, being once established, it followed almost as a matter of course, that every Government, within the limits of its discoveries, excluded all other persons from any right to acquire the soil by any grant whatsoever from the natives. No nation would suffer either its own subjects, or those of any other nation, to set up or vindicate any such title. It was deemed a right exclusively belonging to the government in its sovereign capacity to extinguish the Indian title, and to perfect its own dominion over the soil, and dispose of it according to its own good pleasure.

SECT. 7.—It may be asked, what was the effect of this principle of discovery in respect to the rights of the natives themselves. In the view of the Europeans, it created a peculiar relation between themselves and the Aboriginal inhabitants. The latter were admitted to possess a present right of occupancy, or use in the soil, which was subordinate to the ultimate dominion of the discoverer. They were admitted to be the rightful occupants of the soil, with a legal, as well as just claim to retain possession of it; and to use it according to their own discretion. In a certain sense, they were permitted to exercise rights of sovereignty over it. They might sell or transfer it to the sovereign who discovered it; but they were denied the authority to dispose of it to any other persons: and, until such a sale or transfer, they were generally permitted to occupy it as sovereigns *de facto*. But notwithstanding this occupancy, the European discoverers claimed and exercised the right to grant the soil, while yet in possession of the natives, subject, however, to their right of occupancy: and the title so granted was universally admitted to convey a sufficient title in the soil to the grantees in perfect dominion, or, as it is sometimes expressed in treaties of public law, it was a transfer of *plenum et utile dominium*.

SECT. 8.—This subject was discussed at great length in the celebrated case of Johnson v. McIntosh (8 Wheat. 543); and one cannot do better than transcribe, from the pages of that report, a summary of the historical confirmations adduced in support of these principles, which is more clear and exact than has ever been before in print.

His Excellency remarked that the next passages which he would read, although taken from Storey, were in fact extracts from the judgment of Chief Justice Marshall.

SECT. 10.—France, also, founded her title to the vast territories she claimed in America on discovery. However conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country, not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil, which remained in the occupation of the Indians.

SECT. 19.—Thus has our whole country been granted by the Crown while in the occupation of the Indians. These grants purport to convey the soil, as well as the right of dominion to the grantees. In those governments, which were denominated Royal, where the right to the soil was not vested in individuals, but remained in the Crown, or was vested in the Colonial Government, the king claimed and exercised the right of granting lands, and of dismembering the government at his will. The grants made out of the two original colonies, after the resumption of their charters by the Crown, are examples of this. The Governments of New England, New York, New Jersey, Pensylvania, Maryland, and a part of Carolina, were thus created. In all of them, the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those

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those governments is dependent on these grants. In some instances, the soil was conveyed by the Crown, unaccompanied by the powers of government, as in the case of the northern Neck of Virginia. It has never been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

SECT. 20.—These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter, intended to convey political power only, would never contain words expressly granting the land, the soil, and the waters. Some of them purport to convey the soil alone; and in those cases, in which the powers of government, as well as the soil, are conveyed to individuals, the Crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed. And in some instances, even after the powers of government were revested in the Crown, the title of the proprietors to the soil was respected.

SECT. 21.—Charles the Second was extremely anxious to acquire the property of Maine; but the grantees sold it to Massachusetts, and he did not venture to contest the right of the colony to the soil. The Carolinas were originally proprietary governments. In 1721, a revolution was effected by the people, who shook off their obedience to the proprietors, and declared their dependence immediately on the Crown. The king, however, purchased the title of those who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government, but retained his title to the soil. That title was respected till the revolution, when it was forfeited by the laws of war.

SECT. 29.—By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the proprietary and territorial rights of the United States, whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to the soil, which had been previously in Great Britain, passed definitively to these states. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the Several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government, which might constitutionally exercise it.

SECT. 30.—Virginia, particularly within whose chartered limits the land in controversy lay, passed an Act, in the year 1779, declaring her exclusive right of pre-emption from the Indians of all the lands within the limits of her own chartered territory, and that no persons whatsoever have, or ever had, a right to purchase any lands within the same from any Indian nation, except only persons duly authorised to make such purchase, formerly for the use and benefit of the colony, and lately for the Commonwealth. The Act then proceeds to annul all deeds made by Indians to individuals for the private use of the purchasers.

SECT. 31.—Without ascribing to this Act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note, opposite to the title of the law, forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law to be repealed, it may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle, which had always been maintained, that the exclusive right to purchase from the Indians resided in the government.

SECT. 37.—The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

SECT. 38.—The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the Crown, or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist at the same time in different persons or in different governments. An absolute must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

His Excellency then read the following extracts from Kent's Commentaries on American Law.

SECT. 1.—It is a fundamental principle in the English law, derived from the maxims of the feudal tenures, that the king was the original proprietor of all the land in the kingdom, and the true and only source of title. In this country we have adopted the same principle, and applied it to our republican governments; and it is a settled and fundamental doctrine with us, that all valid individual title to land within the United States, is derived from the grant of our own local governments, or from that of the United States, or from the Crown, or loyal chartered governments established here prior to the revolution.*

SECT. 2.—The European nations, which respectively established colonies in America, assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil, subject only to the Indian right of occupancy. The natives were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion, though not to dispose of the soil at their own will, except to the government claiming the right of pre-emption.

SECT. 3.—The peculiar character and habits of the Indian nations, rendered them incapable of sustaining any other relation with the whites than that of dependence and pupilage. There was no other way of dealing with them, than that of keeping them separate, subordinate, and dependent, with a guardian care thrown around them for their protection. The rule that the Indian title was subordinate to the absolute, ultimate title of the government of the European colonists, and that the Indians were to be considered as occupants, and entitled to protection in peace in that character only, and incapable of transferring their right to others, was the best one that could be adopted with safety. The weak and helpless condition in which we found the Indians, and the immeasurable superiority of their civilised neighbours, would not admit of the application of any more liberal and equal doctrine to the case of Indian lands and contracts. It was founded on the pretension of converting the discovery of the country into a conquest, and it is now too late to draw into discussion the validity of that pretension, or the restrictions which it imposes. It is established by numerous compacts, treaties, laws, and ordinances, and founded on immemorial usage. The country has been colonized and settled, and is now held by that title. It is the law of the land, and no court of justice can permit the right to be disturbed by speculative reasonings on abstract rights.

The original Indian nations were regarded and dealt with as proprietors of the soil which they claimed and occupied, but without the power of alienation, except to the governments which protected them, and had thrown over them, and beyond them, their assumed patented domains. Those governments asserted and enforced

* In the elaborately-discussed case of De Armas v. Mayor, &c., of New Orleans, 5 Miller's Louis Rep., 132, it was admitted to have been uniformly the practice of all the European nations having colonial establishments and dominion in America, to consider the unappropriated lands occupied by savage tribes, and obtained by them by conquest or purchase, to be Crown lands, and capable of a valid alienation, by sale or gift, by the Sovereign, and by him only. No valid title could be acquired without letters patent from the king.

enforced the exclusive right to extinguish Indian titles to lands, enclosed within the exterior lines of their jurisdictions, by fair purchase, under the sanction of treaties: and they held all individual purchases from the Indians, whether made with them individually, or collectively as tribes, to be absolutely null and void. The only power that could lawfully acquire the Indian title was the state, and a government grant was the only lawful source of title admitted in the courts of justice. The colonial and state governments, and the government of the United States, uniformly dealt upon these principles with the Indian nations, dwelling within their territorial limits. The Indian tribes placed themselves under the protection of the Whites, and they were cherished as dependent allies, but subject to such restraints and qualified control in their national capacity, as was considered by the Whites to be indispensable to their own safety, and requisite to the discharge of the duty of that protection.

His Excellency said that it seemed to him, that Lord Normanby must have had these passages under his eye when he wrote his instructions, so exactly did they correspond with his Lordship's description of the qualified dominion or sovereignty enjoyed by the Chiefs over the territory of New Zealand, and of the protection which it was the duty of the British, in settling in that Country to afford to them. His Excellency said he would read only one passage more, as he would exhaust the patience of the Council if he were to go through all the passages which might be quoted to the same effect.

The original English emigrants came to this country with no slight confidence in the solidity of such doctrines, and in their right to possess, subdue, and cultivate the American wilderness, as being by the law of nature and the gift of Providence, open and common to the first occupants in the character of cultivators of the earth. The great patent of New England, which was the foundation of the subsequent titles and subordinate Charters in that country, and the opinions of grave and learned men, tended to confirm that confidence. According to Chalmers, the practice of the European world had constituted a law of nations, which sternly disregarded the possession of the Aborigines, because they had not been admitted into the Society of nations. But whatever loose opinions might colonize America, it is certain, that in point of fact, the colonists were not satisfied, or did not deem it expedient, to settle the country without the consent of the Aborigines, procured by fair purchase, under the sanction of the civil authorities. The pretensions of the patent of King James were not relied on, and the prior Indian right to the soil of the country was generally, if not uniformly, recognized and respected by the New England Puritans. They always negociated with the Indian nations as distinct and independent powers; and neither the right of pre-emption, which was uniformly claimed and exercised, nor the state of dependence and pupilage under which the Indian tribes, within their territorial limits, were necessarily placed, were carried so far as to destroy the existence of the Indians as self-governing communities. The manner in which the people of this country, through all periods of their colonial history, treated and dealt with the Indians, is a subject of deep interest, and well worthy of the thorough and accurate examination of every person conversant with our laws and history, and whose bosom glows with a generous warmth for the honour and welfare of his country.

His Excellency said, he thought the passages which he had read proved at least, that in the opinion of the Americans themselves, their Law on this subject was derived from the English Law; or in other words, that the Law which prohibited individuals from purchasing land from the Indians, was English Law before it was American Law; and that it only remained for him to shew, that it is English Law still, which, most fortunately, he was enabled to do by the production of the opinions of three of the most eminent of living lawyers—Mr. Burge, Mr. Pemberton, and Sir William Follett; which opinions had been elicited by the Members of the Port Phillip Association, who, during the Administration of His Excellency's predecessor, Sir Richard Bourke, attempted a settlement on some extensive tracts of land at Port Phillip, which they had purchased from the Aboriginal Natives of that District, and not being satisfied with the decision of Sir Richard Bourke, who had issued a Proclamation declaring their purchase to be invalid, they sent some of their body to England to appeal to the Home Government; but not meeting with much success, they resolved to take the opinion of Counsel on the validity of their claims.

The opinions thus obtained, were then read by His Excellency to the Council.

## CASE AND OPINION.

The accompanying Report, No. 1, gives a detailed account of the occupation by Mr. Batman, of certain tracts of land situated at the south-western extremity of New Holland, and in the vicinity of a port marked upon the English charts as Port Phillip.

The documents, Nos. 2 and 3, are copies of deeds of Feoffment in favor of Mr. Batman, executed by the Chiefs of the native tribe, living at and contiguous to Port Phillip.

The document, No. 4, is a copy of a letter addressed by the Members of the Association for forming a settlement upon the tracts of land in question to the Secretary of State for the Colonies, soliciting a confirmation on the part of the Crown, of the tracts of land granted by the deeds, Nos. 2 and 3. This letter has not yet been delivered to the Colonial Secretary.

The tracts of country in question are within the limits of Australia, as defined in the maps, of which the line extends from the Australian Bight to the Gulf of Carpentaria, but they are situated some hundred miles from New South Wales, which is only a part of Australia.

Port Phillip was named after Governor Phillip, the first Governor of New South Wales, who formed a temporary settlement there, which was immediately abandoned, and no act of ownership has since been exercised by the Crown.

The natives are, as appears by the Report, an intelligent set of men, and the grants were obtained upon equitable principles, of which the reservation of the tribute is strong evidence, and the purport of the deeds was fully comprehended by them.

The gentlemen composing the Association have possessed themselves of the tracts of country in question, and have flocks and other property there of the value of at least £30,000.

The following documents are added as tending to illustrate the present situation of the colonists, as well as their views and intentions.

No. 5. Copy answer returned through the office of the Colonial Secretary of Van Diemen's Land to Mr. Batman's Report, addressed to the Lieutenant-Governor.

No. 6. Map of the ceded territory.

No. 7. Copy Indenture made by John Batman, Charles Swanston, and others, for defining the objects of the parties, who propose to establish a settlement on the ceded territories.

No. 8. Copy Conveyance of the ceded territories made by Mr. Batman, and relative declaration of trust.

Your Opinion is requested,

1. Whether the grants obtained by the Association are valid?

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2. Whether the right of soil is or is not vested in the Crown?
3. Whether the Crown can legally oust the Association from their possessions?
4. What line of conduct or stipulations would you advise the Association to pursue and make with the British Government; in particular, ought they to offer Government any specific terms, and ought the whole of the documents now laid before you to be at once communicated to Government, or ought such communication to embrace only part of them, and if so, what part?

## OPINION.

1 and 2. I am of opinion, that, as against the Crown, the grants obtained by the Association are not valid, and that, as between Great Britain and her own subjects, as well as the subjects of foreign states, the right to the soil is vested in the Crown. It has been a principle adopted by Great Britain as well as by the other European states, in relation to their settlements on the continent of America, that the title which discovery conferred on the government, by whose authority or by whose subjects the discovery was made, was that of the ultimate dominion in and sovereignty over the soil, even whilst it continued in the possession of the Aborigines. Vattel, B. 2, c. 18. This principle was reconciled with humanity and justice towards the Aborigines, because the dominion was qualified by allowing them to retain, not only the rights of occupancy, but also a restricted power of alienating those parts of the territory which they occupied. It was essential that the power of alienation should be restricted. To have allowed them to sell their lands to the subjects of a foreign state would have been inconsistent with the right of the state, by the title of discovery to exclude all other states from the discovered country. To have allowed them to sell to her own subjects would have been inconsistent with their relation *of subjects*.

The restriction imposed on their power of alienation consisted in the right of pre-emption of these lands by that state, and in not permitting its own subjects or foreigners to acquire a title by purchase from them without its consent. Therein consists the sovereignty of a dominion or right to the soil asserted, and exercised by the European Government against the Aborigines, even whilst it continued in their possession. The Commission granted by England to Cabot, the Charter to Sir Humphrey Gilbert in 1578, and which was afterwards renewed to Sir Walter Raleigh, the Charter to Sir Thomas Gates and others in 1606, and to the Duke of Lennox and others in 1620, the grants to Lord Clarendon in 1663, and to the Duke of York in 1664, recognize the right to take possession on the part of the Crown, and to hold an absolute property, notwithstanding the occupancy of the natives.

The cession of "all Nova Scotia or Arcadia, with its ancient boundaries," made by France to Great Britain by the 12th Article of the Treaty of Utrecht in 1703, and the cession of other lands in America, made at the peace of 1763, comprised a great extent of territory which was in the actual occupation of the Indians. Great Britain, on the latter occasion, surrendered to France all her pretensions to the country west of the Mississippi, although she was not in possession of a foot of land in the district thus ceded. But that which Great Britain really surrendered was her sovereignty, or the exclusive right of acquiring, and of controlling the acquisition by others, of lands in the occupation of the Indians.

On the cession by Spain to France of Florida, and by France to Spain of Louisiana, and on the subsequent retrocession of Louisiana by Spain to France, and the subsequent purchase of it by the United States from France, these powers were transferring and receiving territories, the principal parts of which were occupied by the Indians.

The history of American colonization furnishes instances of purchases of land from the native Indians by individuals. The most memorable is the purchase made by William Penn. It has, however, been observed by Chief-Justice Marshall, in the case of Johnson v McIntosh, 8 Wheaton's Rep. 570, that this purchase was not deemed to have added to the strength of his title. Previously to this purchase the lands called Pennsylvania, and which comprised those subsequently purchased by him, had been granted by the Crown to him and his heirs in absolute property, by a charter in 1681, and he held a title derived from James II. when Duke of York. He was, in fact, as a proprietary governor, invested with all the rights of the Crown, except those which were specially reserved. Another instance is the purchase from the Narraghansetts Indians of the lands which formed the colonies of Rhode Island and Providence. They were made by persons whose religious dissensions had driven them from Massachusetts. The state of England at this period might account for this transaction having escaped the attention of the Government. It is evident, however, that the settlers were not satisfied with the title acquired by this purchase, for on the restoration of Charles II. they solicited and obtained from the Crown a charter, by which Providence was incorporated with Rhode Island. The grant is made to them "of our "Island called Rhode Island," and of the soil as well as the powers of Government. The judgment of Lord Hardwicke in the case of Penn v. Lord Poltimore, 1. Ves. 454, is not inconsistent with, but in many respects supports, this view of the rights of the Crown and its grantees.

In all the colonies which now constitute the United States, the Crown either granted to individuals the right in the soil, although occupied by the Indians, as was the case in most of the proprietary governments, or the right was retained by the Crown, or vested in the Colonial Government. The United States, at the termination of the Revolution, acquired the right to the soil which had been previously vested in the Crown, for Great Britain by treaty relinquished all claim "to the proprietary and territorial rights of the United States." The validity of titles acquired by purchases from the Indians has been on several occasions the subject of decision in the courts of the United States. The judgment of Chief-Justice Marshall, in the case of Johnson v. McIntosh, contains the elaborate opinion of the Supreme Court, that the Indian title was subordinate to the absolute ultimate title of the Government, and that the purchase made otherwise than with the authority of the Government, was not valid. A similar decision was given by the same court in the case of Worcester v. the State of Georgia, in January 1832. 3 Kent's Com. 382, and the case referred to in the note, p. 385.

3. I am of opinion that the Crown can legally oust the Association from their possession.

The enterprise manifested by the expedition,—the respectability of the parties engaged in it, and the equitable and judicious manner in which they conducted the intercourse with the native tribes, and made their purchase, afford a strong ground for anticipating that the Crown would, in conformity with its practise on other occasions, on a proper application, give its sanction to, and confirm the purchase which the Association has made. Lord Hardwicke, in the case which has been referred to, expressed a very strong opinion, that the possession of persons making these settlements ought to receive the fullest protection.

There is no ground for considering that the lands comprised in this purchase are affected by the act erecting South Australia into a Province, 4 and 5 W. IV., c. 95. They are clearly not within the boundaries assigned to the territory which is the subject of the act, and therefore the Crown is not precluded from confirming the purchase.

4. I am of opinion that the Association should make an application to the Government for a confirmation of the above purchase, and accompany it with a full communication, not only of all the documents now laid before me, but of every other circumstance connected with the acquisition.

(Signed) WILLIAM BURGE.

*Lincoln's-Inn, 16th January*, 1836.

We have perused the extremely able and elaborate opinion of Mr. Burge, and entirely concur in the conclusions at which he has arrived upon each of the queries submitted to us.

(Signed) { THO. PEMBERTON,
W. W. FOLLETT.

*January* 21, 1836.

The

The Members of the Association being however still dissatisfied, applied, somewhat in the nature of an appeal, to Dr. Lushington; and His Excellency considered it as fortunate for his view of the case that they did so; as the Opinion which he had just read, was given with the knowledge that Port Phillip was within the British Dominions; whereas Dr. Lushington was evidently under the erroneous impression that it never had previously been annexed to the British Crown, and his Opinion was therefore strictly applicable to the case of New Zealand, and was more valuable than it would have been had the fact been known to Dr. Lushington, that Port Phillip was a part of New South Wales.

His Excellency then read the following Case as submitted to Dr. Lushington.

MEMORANDUM IN ADDITION TO CASE IN REGARD TO THE GEELONG AND DUTIGALLA ASSOCIATION.

Since the Case relative to the settlement made in Australia by the Geelong and Dutigalla Association was laid before Counsel, inquiry has been made at Mr. Mercer, one of the Members of that Association, whether the settlement in question fell within the limits of *South Australia*, which His Majesty was empowered to erect into a British Province by the Act 4 and 5 W. IV., c 95, (passed 15th August, 1834.)

It will be seen from that Act that the Province of *South Australia* is described as lying "between the meri-" dians of 132° and 141° east longitude, and between the Southern Ocean and 26° of south latitude, together " with the islands adjacent thereto."

The settlement in question is not included in any other British province theretofore erected in Australia.

Mr. Mercer has answered this inquiry as follows:—

" Port Phillip, where we have settled, lies 300 miles from Lake Alexandrina, into which the river Murray " flows, and between 37° 30′ and 38° 15′ south latitude, 144° 20′ and 145° 20′ east longitude, quite clear of the " South Australian new colony, recognised by the late Act of Parliament: This Act I will shew you if able to " go in on Friday next. The papers will shew that it had once been taken possession of, and afterwards aban-" doned; also that it is within the imaginary line drawn from the Gulf of Carpentaria to the Australia Bight. " Any map of New Holland will shew its position. A question might even be raised, whether the Crown or " Parliament had a right to Colonize South Australia, without a treaty with the native chiefs: this, however, is " not our business just now."

OPINION by Dr. LUSHINGTON.

1. I am of opinion, that the grants obtained by the Association are not valid without the consent of the Crown.

2 and 3. I do not think that the right to this territory is at present vested in the Crown; but I am of opinion that the Crown might oust the Association; for I deem it competent to the Crown to prevent such settlements being made by British subjects if it should think fit.

4. I think the most advisable course the Association can pursue is to give the Crown the fullest information on all points. I think it unwise and unsafe to hold back any document or information whatever. Indeed, the so doing, if in an important particular, might invalidate the security the Association might derive from the grants or acts of the Crown.

I further think that it would not be expedient, in the first instance, to propose specific terms. The best course would be, after getting full information, to request the countenance, sanction, and aid of the Crown; of course, afterwards, the security of the lands by confirmation or grant from the Crown must be obtained; under what conditions or restrictions must be matter for subsequent negotiation with Government.

This present plan is, truly speaking, the planting of a new colony, and nothing can be safely or effectually done but by the authority of the Crown.

(Signed) STEPHEN LUSHINGTON.

*Great George-street,*
*Jan.* 18, 1836.

His Excellency remarked, that he thought the Authorities which he had quoted, would be allowed fully to establish the three principles on which the Bill was founded; but he had yet a few words to say on the question, whether Colonies could be founded, and Governments established, without the consent of the Crown; and fortunately he could produce the Opinion of an eminent Lawyer on this subject also; the opinion of Mr. Sergeant Wilde, as given to the New Zealand Company, not long after the sailing from England of the first expedition to Port Nicholson where, it would be remembered, the Company had entered into an Agreement with the persons composing that expedition to form a Government of their own; a measure which, Mr. Wentworth in reply to a question put to him by His Excellency, had pronounced to be perfectly lawful. But before he proceeded to Mr. Sergeant Wilde's opinion, His Excellency said he would read an Extract from a letter addressed by the Secretary of the New Zealand Land Company by order of the Directors, to Colonel Wakefield their Agent at Port Nicholson, which letter together with the Opinion of Sergeant Wilde was communicated to the Colonial Office in testimony of the entire submission of the Company to the Government.

EXTRACTS FROM A LETTER OF INSTRUCTIONS FROM JOHN WARD, ESQUIRE, SECRETARY TO THE NEW ZEALAND LAND COMPANY, TO COLONEL W. WAKEFIELD, DATED 14th NOVEMBER, 1839.

I have now, by order of the Directors, to draw your attention to matters of very great importance to the Settlement, and which are a source of no less embarrassment to themselves.

Since the departure of the gentlemen composing the committee, to whom the bulk of the settlers agreed to submit in all things needful to peace and order, until the establishment of a regular Government, the Directors have learned that very competent judges of the law are of opinion, that any act of coercion or authority done under the agreement would be illegal. I enclose a copy of Sergeant Wilde's opinion on the subject, which the Directors obtained only this morning. It appears that the agreement by itself is of no force nor effect, neither illegal nor legal, but mere waste paper, and that it will ever remain so until *acted* upon. But, on the other hand, any act performed under the agreement would be without warrant of law, and the parties performing it would therefore be subject either to prosecution or civil action, according to the nature of the act. For example, the settlers agreed that if any of them committed a breach of the law of England, he should be punished in the same way as if the offence had been committed in England. Now, if one of the parties to the agreement should commit a murder or an assault, and should be executed or imprisoned accordingly, all the parties to the agreement would be liable to a prosecution for murder, or to an action for false imprisonment. They would also, perhaps, be liable to prosecution for usurping the functions of the Crown and Parliament, by setting up a jurisdiction,

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jurisdiction, whether in civil or criminal matters. I am now stating the case in its very worst point of view, and assuming the correctness of the most unfavourable of the legal opinions which the Directors have obtained. According to these opinions, whether such acts under such an agreement were done in a British dependency, or in a desert island, unknown to the Crown of England, or in a foreign country, having an independent government and laws of its own, they would, being done on British subjects by British subjects, be equally illegal, and would equally subject the parties performing them to the same penalties as if those acts had been performed in England.

Such the Directors are advised, is the strict letter of the law; and they have no reason to expect, from the feeling which the Colonial Office has recently displayed towards their enterprise, that the strict letter of the law would not be enforced in this case. Several cases have indeed occurred, in which a body of Englishmen, suffering in a distant land from the want of regular authority, have established some sort of tribunal for the protection of life and property, without incurring the displeasure of the government at home, or being subjected to any penalty or inconvenience for what was termed an act of self-preservation. The case of Honduras is the most remarkable. Even at the Bay of Islands, in New Zealand, a voluntary association for government has existed for at least two years, without being denounced or impeded in its operations by the Home authorities. In that case, as in this, the settlers did not act for themselves until after repeated applications to the Home authorities, for the establishment of British Law; but this case differs from that in a very important particular. The letter from Lord John Russell to Mr. Young, of which I enclose a copy, shows that, in this case, formal warning has been given by the Home Government of its intention to enforce the strict letter of the law.

This warning the Directors seize the first opportunity of conveying to you, in order that you may communicate it without delay to the Members of the Committee. And they further direct me to express to you, and to all the other servants of the Company, their positive order that you will all abstain from taking any part whatever in any act of coercion or authority under the agreement. With respect to the other settlers, the Directors do not possess, and cannot pretend to exercise any control over them; but they desire that you will communicate to every Member of the Committee their earnest advice and anxious hope that the agreement may not be put in force by any body. Whatever may be the consequence, they can have no hesitation in recommending implicit obedience to that which they are now informed is the law of the land. The Members of the Committee will indeed perceive that the agreement itself, viewed as a moral engagement, precludes the parties to it from committing any breach of that law which it is the declared object of the agreement to uphold.

The immediate consequence of complete obedience to the law, taken in conjunction with the neglect of the Colonial Department to provide any legal means of preserving order in the settlement, will be a state of things like to that which has long subsisted among the British settlers at the Bay of Islands, where the resident officer of the Crown has been described as resembling "a ship of war without guns." He has had a law to administer, but no means whatever of enforcing it. In the Company's settlement the law of England must be respected, even to the extent of inducing the settlers to abstain from adopting any means of enforcing the law of England. If they should punish breaches of the law, they would themselves break the law. In order to avoid one breach of the law, hundreds, perhaps, must be permitted. Such is the dilemma in which a strict interpretation of the law, together with Lord John Russell's threat, places the Colonists. Since, however, the law of England contemplates this dilemma, by leaving no excuse whatever for the exercise by British subjects, in any part of the world, of a jurisdiction not sanctioned either by the Parliament or by the Crown, the Directors have instructed me to explain the case thus fully to you, for the information of the settlers, in order that the latter may be exactly aware of their own position.

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Finally, with reference to my letter of the 16th of September last, I am again desired to impress on you the anxious wish of the Directors that you, and all the servants of the Company, should do whatever may be in your power to promote the success of Captain Hobson's Mission, and to accelerate as much as possible the time when it is to be hoped that he, as Her Majesty's Representative, may establish a British authority, and the regular application of English law, not only in the Company's settlements, but throughout the islands of New Zealand.

I have, &c.,

(Signed) JOHN WARD,
*Secretary.*

Counsel will please to advise:—

1st.—Whether persons acting under the articles of agreement above set forth will or will not be justified by law?

2nd.—And if you should be of opinion that the articles, or any of them, should be in any respect illegal, what would be the penal consequences to the parties who have affixed their signatures thereto, or to the Directors who have signed their qualified approval at the foot of the regulations, or to the persons who may act under the same, and what remedial steps should be taken by the Directors?

**OPINION.**

1st.—The parties will not be justified by law in acting under the agreement.

2nd.—No penal consequences will attach to the persons in consequence of their having been parties to the agreement, and affixed their signatures; but no acts which may be done or committed can be legally justified under the authority of the agreement. The consequences will be the same that would result from the acts being done as if no such agreement had been made.

The course for the Directors to take is to give notice to those who may be likely to act under the supposed authority of the agreement, that they must not do so on account of its illegality, and that the agreement is abandoned by the Directors.

(Signed) THOMAS WILDE.

14*th November*, 1839,
*Temple.*

His Excellency then remarked, that much had been said about an apparent discrepancy between Lord Normanby's instructions and the provisions of the Bill; it was true, he said, that Lord Normanby acknowledged New Zealand to be a sovereign and independent State; but it was equally true, that he qualified it afterwards by adding, "As far at least as it is possible to make that acknowledgment in favour of a People "composed of numerous and petty tribes, who possess few political relations to each "other and are incompetent to act, or even to deliberate in concert." The more completely Lord Normanby admits the right of the Chiefs to the sovereignty and soil of New Zealand, the more fully must he rely upon the third principle upon which the Bill is founded, namely, that Englishmen cannot found Colonies without the consent of the Crown; and can obtain no titles to lands in Colonies but from the Crown.

It is not Independence, His Excellency then observed, which confers on any People the

the right of so disposing of the soil they occupy, as to give to Individuals not of their own tribes, a property in it; it is Civilization which does this, and the establishment of a Government capable at once of protecting the rights of individuals, and of entering into relations with Foreign Powers; above all, it is the establishment of a Government capable at once of protecting the rights of individuals, and of entering into relations with Foreign Powers; above all, it is the establishment of Law, of which, property is justly said to be the creature. As bearing upon this, His Excellency read a passage from Robertson's History of America.

Book 4, Sect. 3.—People in this state retain a high sense of equality and independence. Wherever the idea of property is not established, there can be no distinction among men, but what arises from personal qualities. These can be conspicuous only on such occasions as call them forth into exertion. In times of danger, or in affairs of intricacy, the wisdom and experience of age are consulted, and prescribe the measures which ought to be pursued. When a tribe of savages takes the field against the enemies of their country, the warrior of most approved courage leads the youth to the combat. If they go forth in a body to the chase, the most expert and adventurous hunter is foremost, and directs their motions.

Sect. 4.—Among people in this state, Government can assume little authority, and the sense of civil subordination must remain very imperfect. While the idea of property is unknown, or incompletely conceived; while the spontaneous productions of the earth, as well as the fruits of industry, are considered as belonging to the public stock, there can hardly be any such subject of difference or discussion among the members of the same community, as will require the hand of authority to interpose in order to adjust it. Where the right of separate and exclusive possession is not introduced, the great object of law and jurisdiction does not exist. When the members of a tribe are called into the field, either to invade the territories of their enemies, or to repel their attacks, when they are engaged together in the toil and dangers of the chase, they then perceive that they are part of a political body. They are conscious of their own connexion with the companions in conjunction with whom they act; and they follow and reverence such as excel in conduct and valour. But, during the intervals between such common efforts, they seem scarcely to feel the ties of political union. No visible form of government is established. The names of magistrate and subject are not in use. Every one seems to enjoy his natural independence almost entire. If a scheme of public utility be proposed, the members of the community are left at liberty to choose whether they will or will not assist in carrying it into execution. No statute imposes any service as a duty; no compulsory laws oblige them to perform it. All their resolutions are voluntary, and flow from the impulse of their own minds. The first step towards establishing a public jurisdiction, has not been taken in those rude societies. The right of revenge is left in private hands. If violence is committed, or blood is shed, the community does not assume the power either of inflicting or of moderating the punishment. It belongs to the family and friends of the person injured or slain, to avenge the wrong, or to accept of the reparation offered by the agressor. If the elders interpose, it is to advise, not to decide, and it is seldom their counsels are listened to; for as it is deemed pusillanimous to suffer an offender to escape with impunity, resentment is implacable and everlasting. The object of government among savages is rather foreign than domestic. They do not aim at maintaining interior order and police by public regulations, or the exertions of any permanent authority, but labour to preserve such union among the members of their tribe, that they may watch the motions of their enemies, and act against them with concert and vigour.

In reference to the preamble of the Bill part of which had been much objected to, His Excellency observed that what had served as a hint for that passage, was a suggestion thrown out by the Committee of the House of Commons which was appointed in the year 1837 to enquire into the condition of the Aborigines in British Colonies. At page 78 of their Report are the following words;

So far as the lands of the Aborigines are within any territories over which the dominion of the Crown extends, the acquisition of them by Her Majesty's subjects, upon any title of purchase, grant, or otherwise, from their present proprietors should be declared illegal and void. The prohibition might also be extended to lands situate within territories which, though not forming a part of the Queen's dominions, are yet in immediate contiguity to them; but it must be admitted, that we have not the power to prevent transactions of this kind in countries which are neither within the Queen's allegiance, nor affected by any of those intimate relations which grow out of neighbourhood.

His Excellency added that New Zealand although not immediately in contiguity with New South Wales, has certainly relations with it growing out of neighbourhood, and therefore comes within the recommendation of the Committee.

His Excellency having gone into an elaborate explanation of the real objects of the Bill, and the substantial justice of its various enactments, concluded by stating, that he would commit it to the hands of the Council, who would, he felt assured, deal with it according to their consciences, and with that independence which they ought ever to exercise, having always before them a due regard for the honor of the Crown, and the interests of the Subject.

Several Members having then given their opinions, the further consideration of the Bill was postponed until to-morrow.

2. Commissioners of Police and Public Works Bill; second reading postponed until to-morrow.

Council adjourned at Six o'Clock, until to-morrow at Twelve o'Clock.

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## ORDERS OF THE DAY.

### Friday, July 10.

1. Claims to Grants of Land in New Zealand Bill; further consideration.
2. Commissioners of Police and Public Works Bill; second reading.
3. Punishment of Transported Offenders Amendment Act Bill; second reading.
4. Municipal Corporations Bill; second reading.
5. Parish Roads Bill; second reading.

Wm. MACPHERSON,
*Clerk of Councils.*