

CHAPTER 1

THE ORIGINS OF PRE-EMPTION IN BRITISH COLONIAL POLICY

1.1 Introduction

Keith Sorrenson has commented that the Treaty, at least in its English text, contained very little that had not already been expressed in earlier treaties or statements of British colonial policy.¹ Crown pre-emption was not new to British colonial officials when they contemplated the annexation of New Zealand.² But neither had they employed it universally in British colonies.³ It was adopted by the British in some instances, notably in colonial North America, Australia and New Zealand. Its adoption in these instances was by choice, not law.⁴

British common law did not require that the Crown alone could purchase land from indigenous landholders.⁵ But where British officials chose to implement pre-emption as a matter of colonial policy, it was generally later backed by legislation. Its use was not a consequence of the application of British law. It was instead a catalyst for the creation of legislation enforcing it.⁶

Paul McHugh, who has written extensively on the nature of aboriginal title, noted that limiting the alienation of native land to the Crown became an ‘invariable theme’ of Indian-settler relations in colonial North America. From as early as 1609, it was evident in Virginia. The New England colonies of Massachusetts, Rhode Island, Connecticut and New Hampshire all adopted this practice during the mid-seventeenth century. Other North American colonies followed suit.⁷

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1. M P K Sorrenson, ‘Treaties in British Colonial Policy Precedents for Waitangi’, in *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts*, W Renwick (ed), Wellington, Victoria University Press, 1991, p 15. See also D V Williams, ‘Te Tiriti o Waitangi – Unique Relationship Between Crown and Tangata Whenua’, in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Waitangi), I H Kawharu (ed), Auckland, Oxford University Press, 1989, pp 64–65
 2. See E Hertslet, *Commercial Treaties and The Map of Africa by Treaty*, London, 1967, vol 1
 3. For example, Kent McNeil, *Common Law Aboriginal Title*, Oxford, Clarendon Press, 1989, p 227, notes that lands in British India could apparently be purchased from the native inhabitants by aliens as well as subjects, ‘to the extent that such purchases were not prohibited by legislation’, and in the Gold Coast colony private purchases of native lands were generally accepted.
 4. McNeil, p 224; P G McHugh, ‘The Aboriginal Rights of the New Zealand Maori at Common Law’, PhD thesis, University of Cambridge, 1987, p 200
 5. McNeil, p 300; Frederika Hackshaw, ‘Nineteenth Century Notions of Aboriginal Title and Their Influence on the Interpretation of the Treaty of Waitangi’, in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, I H Kawharu (ed), Auckland, Oxford University Press, 1989, p 99. Nor did it require that all subjects must derive title to land from the Crown. McNeil refers to this idea as a ‘legally invented fiction’.
 6. McNeil, p 227
 7. McHugh, pp 200–202

1.2 Right of Pre-emption and Fitzroy's Waiver

By the end of that century, colonists were referring to the limitation on alienation of native land to the Crown alone as the Crown's 'pre-emptive right'.⁸ By the middle of the eighteenth century this practice of the Crown's pre-emptive right had become 'a settled basis of colonial relations with the Indian tribes'.⁹

1.2 Peace and Protection

Legislation implementing the Crown's pre-emptive right, including some of the reasons for its legal recognition, followed. As early as 1660, the colony of Virginia passed an Act which held that:

Whereas the mutuall discontentes, complaints, jealousies and Æares of English and Indians proceed chieeŷ from the violent intrusions of diverse English made into their lands, The governor . . . councill and burgesses . . . enact, ordaine, and conârme that for the future noe Indian king or other shall upon any pretence alien and sell, nor noe English for any cause or consideration whatsoever purchase or buy any tract or parcell of land now justly claymed or actually possess by an Indian or Indians whatsoever; all such bargaines and sales hereafter made or pretended to be made being hereby declared to be invalid, voyd and null any acknowledgement, surrender, law or custome formerly used to the contrary notwithstanding.¹⁰

Over a hundred years later, on 7 October 1763, a royal proclamation gave the principle of pre-emption uniformity throughout British North America. It held that:

whereas great Frauds and Abuses have been committed in the purchasing lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie . . .¹¹

McHugh noted that the restriction on alienability of Indian title was 'connected with the control of the settlement of the colony and maintenance of peaceful relations with the tribes'. Certainly the reasons stated in the statutes – protection of

8. Ibid, p 205

9. Ibid, p 202

10. McHugh, p 201, cites W W Hening (ed), *The Statutes at Large; Being a Collection of All the Laws of Virginia from . . . the Year 1619*, New York, R & W & E Barrow, 1823, vol 2, p 34. By 1675, it was a recognized principle of colonial law.

11. McHugh, pp 202–203, cites C S Brigham (ed), 'British Royal Proclamations Relating to America', *Transactions and Collections of the American Antiquarian Society*, 1911, vol 12, pp 212, 216–217

the Indians, nurturing Indian-Crown relations, creating order in Indian-settler land transactions and providing a just system between the two – imply these motives. Kent McNeil, another prominent legal writer on the nature of aboriginal title, placed more emphasis on the legislation’s purpose being that of ‘pacifying and protecting the Indians’ although, as the 1660 Virginian Act indicates, discontent, complaints, jealousies, and fears were mutual to both the English and the Indians.¹²

The Crown’s role appears then, from the explanations given in the legislation by its drafters, to have been intended to be one of an ‘impartial’ keeper of peace, intermediary between the races and protector of native peoples’ rights to their land. Of course, a paternalistic colonial power in favour of expansion could not be ‘impartial’.

1.3 The Legal Question: Land Title and Administration

Legislation prohibiting or regulating private purchases, such as that above, made it unnecessary for the judiciary to formulate a common law basis for pre-emption. But despite this, colonial judiciaries sought to provide a common law explanation for this practice.¹³ This may have been because the existence of the legislation indicated that such transactions would otherwise be valid under the common law of those colonies. Or maybe there was some doubt about it.¹⁴ But it also served to answer a legal question which had emerged regarding native land title and administration.

By at least the beginning of the nineteenth century, a distinction had developed in British colonial practice between sovereign title to territory and private title to land.¹⁵ These had formerly been blended in British law. The legal effect of the sovereign’s acquisition of territory, on private property rights previously held under local law, had become a fundamental legal debate.

McNeil identified two common law approaches to this question: (i) the ‘recognition doctrine’,¹⁶ where ‘it is said that only such rights as the Crown deigned to recognize would be enforceable under the new regime’; and (ii) the ‘doctrine of continuity’,¹⁷ where ‘there is said to be a presumption that in the absence of express confiscation or expropriatory legislation, those rights would continue after the change in sovereignty’.¹⁸

12. McNeil, p 224

13. Ibid, p 235

14. Ibid, p 222

15. McHugh, p 186

16. McNeil, p 162, cites Geoffrey S Lester, ‘The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument’, DJur dissertation, York University, 1981, pp 57–58

17. McNeil, p 162, cites Brian Slattery, ‘The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown’s Acquisition of their Territories’, DPhil thesis, Oxford University, 1979, pp 50–59

18. McNeil, pp 161–162

1.3 Right of Pre-emption and Fitzroy's Waiver

McNeil viewed the doctrine of continuity as the 'historically correct' approach.¹⁹ His conclusions are helpful here. He first describes the recognition doctrine, then the doctrine of continuity:

In the course of acquiring sovereignty over a territory the Crown could seize private property by act of state. If the Crown chose to do so, the rights of the previous owners would come to an end unless it appeared that the Crown did not intend the seizure to have that effect. Such an intention might be expressed directly in the form of an act of recognition of pre-existing rights to that property, or might be implied from a mode of dealing amounting to acknowledgement that those rights were unaffected by the seizure. It was in this situation – and this situation alone – that the so-called recognition doctrine applied.

Where, however, the Crown left the inhabitants in possession of their private property, recognition of their rights thereto would be unnecessary. Whether the acquisition was by conquest, cession, or settlement, private property rights under local laws or customs would be presumed to continue. This presumption, known as the doctrine of continuity, would apply equally to chattels and lands. In the case of the latter, the Crown might acquire a paramount lordship (and possibly a right of pre-emption), but its interests would be subject to whatever private rights the inhabitants might have. The public lands of the former sovereign in a cession or conquest, and lands that were unoccupied and unowned in a settlement, would vest in the Crown as a consequence of the act of state by which the territory was acquired, but other lands would remain unaffected. If the Crown wanted to acquire other lands after the territory had been brought into its dominions, it would have to either purchase them or enact confiscatory legislation.²⁰

Where a colonial court denied an indigenous peoples' right to alienate land, without legislative backing, it usually argued that the indigenous people in question did not have title, and therefore had nothing to sell. McNeil reasoned that if it could be shown that indigenes did have title, either on the basis of customary law, or due to occupation, 'then, in the absence of legislative restrictions (or, in the case of customary title, restrictions in their own laws), one would expect their interest to be alienable'.²¹

But this unfettered right of alienation was not actually what resulted. Instead, as McHugh notes, following contact within a colony between tribal societies (with a customary code of tenure) and English settlers (anxious to colonise tribal land), there developed a 'dual system of tenure'. The aboriginal inhabitants held a 'Crown-recognised' title, governed by their customary law. The settlers, however, required a 'Crown-derived' title, subject to British law. The Crown's 'exclusive right to silence the tribal title' (usually, but not always, by purchase), facilitated the operation of these two systems side by side.²² This exclusive right to 'extinguish' native title came to be known then as a presumption of the 'modified continuity' of

19. Ibid, pp 162, 175–179

20. McNeil, pp 191–192. McHugh has not drawn a distinction between the two approaches. He recognized a 'presumption of continuity' of native title alone (see McHugh, pp 189–190, 199).

21. McNeil, p 227

22. Possibly also, as noted above, by enacting confiscatory legislation.

the aboriginal title.²³ The native title ‘continued’, as in the doctrine of continuity, but was modified by a restriction in the extinguishment of native title to the Crown alone.

This ‘modified continuity’ of native title was recognized in the 1823 case *Johnson v M’Intosh*.²⁴ McHugh succinctly summarised the case as concerning:

the title to large tracts of land formerly within the colony of Virginia and later ceded to the United States as part of the Northwest Territories. In 1773 and 1775 the Illinois and Piankeshaw tribes sold land directly to a group of land speculators. The tribes subsequently ceded these lands by treaty to the United States, which granted the title to a portion of the land to a William M’Intosh. An action of ejection was brought against M’Intosh by the devisees of the speculators’ company. They sought to establish title to the lands by right of the earlier sale of the Indians. At issue, then, was the nature of Indian title and the capacity of the Indians to pass a title which could be sustained at law.²⁵

Johnson v M’Intosh became the leading account of the legal character of aboriginal title. Chief Justice Marshall held that colonial courts were to recognize continuity of Indian title to land, its regulation by the customary law and enforcement by tribal authorities. But, because of what the judge described as the ‘uncivilised’ character of this tenure, a modification of the normal presumption of the continuity was necessary when British sovereignty was assumed. This modification was to be through the recognition of the Crown’s exclusive right to extinguish Indian title.²⁶ Limiting alienation to the Crown ensured that British law applied to the title of the settlers, whose title could only be recognized and enforced in the colonial courts if supported by a Crown grant.²⁷

McNeil commented that ‘what Marshall did was invent a body of law which was virtually without precedent’. The Crown’s acquisition of territories inhabited by indigenous people presented an exceptional situation which gave rise to judicial innovation.²⁸ Pre-emption, seen from a common law viewpoint, had provided an answer to the question of the legal effect of sovereign acquisition of territory on private property held by native peoples. It had become a means of facilitating the eventual phasing out of the aboriginal title and the gradual imposition of the British system of tenure. It smoothed the transition to control of all land by the new sovereign. Continuity of tribal title was recognized, but only in so far as it remained in tribal hands. After the Crown had exercised its ‘exclusive right to silence’ that title, the laws of British land tenure applied. The rule was justified by the judiciary’s dubious claim that the ‘uncivilized’ character of tribal tenure made it necessary.

23. McHugh, p 200. This phrase was adopted from B Slattery, *Ancestral Lands, Alien Law: Judicial Perspectives on Aboriginal Title*, No 2 Studies in Aboriginal Rights, Saskatoon Native Law Centre, 1983.

24. *Johnson v M’Intosh* (1823) 8 Wheat 543, 595–596

25. McHugh, p 205

26. *Ibid*, p 208

27. *Ibid*, p 210

28. McNeil, pp 301–303. Williams in Kawharu (ed), p 87, refers to the adeptness of colonial judges at reaching ‘decisions convenient for colonial Governments’.

1.4 Right of Pre-emption and Fitzroy's Waiver

The justification for this legal leap is important to understanding the framework of pre-emption. It is also important to understand that underlying this 'justification' were common Eurocentric assumptions of superiority. These assumptions failed to give due weight to indigenous traditional uses of land, describing them as 'uncivilized', and saw colonisation as beneficial to indigenous peoples as well as the colonisers.

1.4 Other Explanations: Humanitarian Arguments and Economic Motives

The policy of pre-emption, as practised in North American colonies, was implemented subsequently in Australia – at least insofar as it prevented settlers from buying land from indigenous peoples. In August 1835, Governor Bourke, of New South Wales, issued a proclamation declaring purchases of 'vacant' lands within the colony to be void. The proclamation was approved by the British Colonial Secretary, Lord Glenelg. Glenelg believed that allowing direct purchase of 'vacant' lands 'would subvert the foundation on which all Proprietary rights in New South Wales at present rest'. This foundation was based on the common law justification as explained above. He also claimed, in his approval, to be anxious that the Aboriginal people be protected and their rights defended. In his view Aboriginal welfare would not be promoted 'by recognising in them any right to alienate to private adventurers the Land of the Colony'.²⁹

Concern for the welfare of aboriginal peoples was at its height in Britain in the 1830s. British settlers, traders and speculators were continuing to venture to other lands in increasing numbers. The humanitarian movement sought to protect native peoples from the worst effects of such uncontrolled European contact. But it did not view the controlled expansion of the British Empire as uncomplementary to its aims. Humanitarians – who commonly sought to spread British civilization and Christianity – believed not so much in preserving traditional societies, but in amalgamating them with well-governed European settler communities.³⁰

One of the movement's successes, a few years prior to Bourke's proclamation, was the formation of a House of Commons Committee on Aborigines in British Settlements. Its brief was to consider what practices should be adopted toward native inhabitants of British colonies. It was to secure to native peoples 'the due observance of justice, and the protection of their rights', and promote British civilisation and Christianity. The committee issued its report in June 1837.³¹

This report recognized that the native inhabitants of any land had an 'incontrovertible right' to their own soil. It also recognized that this was not

29. McNeil, p 225, cites Glenelg to Bourke, 13 April 1836, *Historical Records of Australia*, vol 18, series 1, p 379 and J Bonwick, *Port Phillip Settlement*, London, Sampson Low, Marston, Searle and Rivington, 1883, p 348

30. Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen & Unwin and Port Nicholson Press, 1987, p 2

31. BPP, 1836, vol 1; BPP, 1837, vol 2

generally understood by European settlers. The committee suggested a number of policies that the Crown might enforce in its colonies to protect native peoples in this right. Two are particularly relevant here.

First, it believed that the duty of protecting native peoples belonged solely (and appropriately) to the executive government, with its administration either in Britain or by the governor of the colony. Its reasoning for this, was that settler disputes with native tribes could not in fairness be judged by a local legislature comprised of settlers. Secondly, the committee suggested that private purchases, by Her Majesty's subjects, of native land in, or in immediate contiguity to, the Crown's dominion, should be declared 'illegal and void'. While it was 'impracticable' to prevent the acquisition of land by British subjects in lands outside of these categories, the committee felt:

it should be distinctly understood, that all persons who embark in such undertakings must do so at their own peril, and have no claim on Her Majesty for support in vindicating the titles which they may so acquire, or for protecting them against any injury to which they may be exposed in the prosecution of any such undertakings.³²

Lord Glenelg's remarks reflect this contemporary view. But the Colonial Office's decision to intervene and implement pre-emption in New Zealand was influenced by other considerations as well, relating to the increasing numbers of settlers and speculators, and the like, on these shores.

Europeans had been active in purchasing Maori land for some years prior to the Treaty. This had increased markedly in the late 1830s. Critical accounts of the extent of land purchasing occurring at this time, forwarded to Britain by missionaries and others (including the British Resident, Busby, himself), were given in the hope that Britain would intervene, and the ill-effects they heard had occurred elsewhere might be avoided. If the Colonial Office believed that 'the speculative market for land in New Zealand was out of control, with dire consequences for Maori', as Michael Belgrave argues they had every reason to believe, they may also have feared, as he further surmises, that 'Britain could be drawn into costly military intervention if that market could not be contained'.³³ Such an expense is one that the Colonial Office would have actively avoided.³⁴ The implication in Belgrave's argument is that this may have induced the urgent measures later taken by colonial officials to implement pre-emption. Intervention via the immediate imposition of pre-emption, was necessary to prevent both dire consequences for Maori (feared by the Aborigines Committee and others) and the possibility of the costly involvement of the British military.

A further factor, in line with fiscal considerations generally, was current social and economic theories of 'organized immigration', or 'systematic colonisation'.

32. Ibid

33. Michael Belgrave, 'Pre-emption, the Treaty of Waitangi and the Politics of Crown Purchase', NZJH, vol 31, no 1, 1997, p 26

34. James Belich, *Making Peoples. A History of New Zealanders From Polynesian Settlement to the End of the Nineteenth Century*, Auckland, Allen Lane and The Penguin Press, 1996, p 182

These theories had spawned the growth of colonisation companies, hoping to put the theories into practice. They believed that exporting British labour and capital (overproduced following the Industrial Revolution) to new colonies, would improve the emigrants' lot, strengthen imperial power, and relieve the domestic situation.³⁵ Such schemes relied upon the purchase of land from native peoples at a cheap price and its on-sale to new settlers at a high profit. The difference between the purchase and resale price was to finance the whole colonisation project.

Edward Gibbon Wakefield was a key advocate of these theories. He and his supporters had attempted such a model colony in South Australia. But it had not been successful. Eager to prove the theory, and determined that its failure in Australia was through factors outside his control, he had formed the New Zealand Association in the late 1830s, which subsequently became the New Zealand Company, to colonise New Zealand according to his prescribed scheme.

The proponents of buying cheaply and selling dearly convinced themselves that this was justified. They claimed that Maori land was 'really of no value', but that it could only become valuable 'by means of a great outlay of capital on emigration and settlement'.³⁶ This is what they would provide with the proceeds from the sales. They argued that while the money and goods paid for the land were nominal, the 'principal payment' to the Maori vendors would be the reservation of one tenth of the land purchased 'for the chief families of the tribe'. These 'tenths' were to be pepperpotted amidst settler properties, and would at first be rented to provide a fund for the benefit of Maori. When Maori 'learned to value' the land, they would be able to live there in British style, amongst British neighbours. Such paternalistic 'protective' provisions were clearly a sweetener (although not an entirely convincing one, as it turned out) for those humanitarians (and missionary societies) who opposed the plan. The dual goals of 'civilizing' and 'Christianizing' the Maori were more easily achieved through the amalgamation inherent in the tenths scheme.

But the New Zealand Company also intended to establish its own government for the new settlement. It was perhaps this aspect of the scheme which troubled the British Government the most. A number of members of the British Parliament were also advocates of 'organized immigration' (some simultaneously members of the New Zealand Company), but they could not be expected to agree with immediate self-government for New Zealand.

The implementation of pre-emption in New Zealand was decided independently of these current colonisation theories, and may have occurred even if the British Crown had merely decided to create a protectorate. But the fact that the Company took steps to carry out its scheme, despite the opposition of British Government officials, and that the Crown then chose to colonise New Zealand, made the protective potential of pre-emption in New Zealand even more significant than it may otherwise have been. Systematic colonisation theories were in effect adopted by the Colonial Office in its decision to annex New Zealand. And gaining the

35. Belich, p 183

36. Patricia Burns, *Fatal Success: A History of the New Zealand Company*, Auckland, Heinemann Reed, 1989, pp 85-89

valuable monopoly pre-emption provided, ensured that there were no competitors in creating such a colony in New Zealand. This provided an additional advantage in creating a (theoretically) self-financing colony. While the Company had no such monopoly over land purchase, the British Crown were to seek this right from Maori, at the same time arguing that pre-emption would provide the protection from land speculators which the Aborigines Committee and many others had seen to be so necessary for Maori (aboriginal) welfare. It could then choose to come to an arrangement with the Company, to waive pre-emption in the Company's favour, if it wanted to, as a vehicle with which to use pre-emption, while maintaining the essential control of colonisation. The decision to both control the colonisation of New Zealand, and to use pre-emption to finance it, added to the importance of pre-emption in New Zealand.

