

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

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

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

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

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