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Remarks upon a Pamphlet entitled 'The Taranaki Question...'

James Busby

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REMARKS

UPON A PAMPHLET

ENTITLED

"THE TARANAKI QUESTION, BY SIR WILLIAM MARTIN, D.C.L., LATE CHIEF JUSTICE OF NEW ZEALAND;"

BY

JAMES BUSBY, ESQ.  
FORMERLY H. M. RESIDENT IN NEW ZEALAND.

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1860.

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## Remarks upon a Pamphlet entitled 'The Taranaki Question...'

### REMARKS

UPON A PAMPHLET ENTITLED

"THE TARANAKI QUESTION, BY SIR WILLIAM MARTIN, D.C.L., LATE CHIEF JUSTICE OF NEW ZEALAND."

An attempt to controvert the opinions and reasonings of a person so eminent as Sir William Martin, by a person like myself, may savour of presumption. I think it right, therefore, to preface the remarks I have to offer, on certain parts of his pamphlet, by the following narrative.

At the period (January 1840) when Captain Hobson, R.N., arrived in New Zealand with the appointment of Consul, and authority to treat with the chiefs and people for a cession to the Queen of the sovereign and territorial rights which had been acknowledged by the British Government, I had filled for seven years the office of H.M. Resident in New Zealand.

Though my official character terminated on the arrival of Captain Hobson, I did not the less consider it to be my duty to aid him with my experience and influence, and though I afterwards declined his invitation to join his Government, yet, till the Treaty was accomplished, our relations were of the most unreserved and confidential character. In writing to me afterwards he expressed himself in the following words: – "I beg further to add that through your disinterested and unbiassed advice, and to your personal exertions, I may chiefly ascribe the ready adherence of the chiefs and other natives to the Treaty of Waitangi, and I feel it but due to you to state that without your aid in furthering the objects of the Commission with which I was charged by H.M. Government, I should have experienced much difficulty in reconciling the minds of the natives, as well as the Europeans who have located themselves in these islands, to the changes I contemplated carrying into effect."

When it became necessary to draw the Treaty Captain Hobson was so unwell as to be unable to leave his ship. He sent the gentleman who was to be appointed Colonial Treasurer and the Chief Clerk to me with some notes, which they had put together as the basis of the Treaty, to ask my advice respecting them. I stated that I should not consider the propositions contained in those

notes as calculated to accomplish the object, but offered to prepare the draft of a treaty for Captain Hobson's consideration. To this they replied that that was

precisely what Captain Hobson desired.

The draft of the Treaty prepared by me was adopted by Capt. Hobson without any other alteration than a transposition of certain sentences, which did not in any degree affect the sense.

A statement of these facts I have thought necessary, to relieve me from a charge of presumption, and in the hope that I may find means to give the following remarks a circulation co-extensive with those of Sir William Martin, which the advertisement on the back of the title page informs us "are printed for circulation among members of the Imperial Parliament and members of the General Assembly of New Zealand."

"Native Tenure of Land," page 1: –

The terms in which Sir W. Martin, in the following sentences, speaks of the tenure of land by the natives, and the "rights" resulting therefrom, and what might and might not be done lawfully appears to me to be founded upon a misconception of the actual condition of the natives, who, down to the date of the Treaty, had no conception of the existence of a right implying an obligation on the part of others to respect that right.

"1. The land," (says Sir W. Martin) "occupied by a native community is the property of the whole community. Any member of the community may cultivate any portion of the waste land of the community. By so doing he acquires a right over that particular piece of land, and the right so acquired will pass to his children and descendants. If he have no descendants the land may then be cultivated by others of the community, as agreed amongst themselves."

"2. The chief naturally represents and defends the rights of his people. He has his own personal interest like the rest. He is also especially charged with the protection of their honor and interests: and would lose all his influence if he did not assert those rights manfully."

"3. To make a sale (of land) thoroughly regular and valid, both chief and people should consent."

"4. The holdings of individual cultivators are their own, as against other individuals of the community. No other individual, not even the chief, can lawfully occupy or use any part of such holding without the permission of the owner. But they are not their own as against the community. If it is said of a piece of land 'the land belongs to Paora,' these words are not understood by a Maori to mean that the person named is the absolute owner, exclusive of the general right of the society."

"5. It is established, by a singular concurrence of the best evidence, that the rules above-stated were generally accepted and acted upon by the natives in respect of all the lands which a tribe inherited from its forefathers. Of course many cases must have existed in which might overcame right, still the true rule is known and understood: the natives have no difficulty in distinguishing between the cases in which land passed according to their custom and those in which it was taken by mere force."<sup>1</sup>

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It is usual for writers on Ethics to treat of what are called "natural rights," meaning thereby the duty and obligation which rests upon every man to treat his neighbour as he would be treated himself, with that sense of justice which is implanted in the breast of every human being by Him who made of one blood all nations of the earth, and fashioned their hearts alike; and which, however obliterated by that selfishness and cruelty which reign in the dark places of the earth, requires only to be brought fairly before the mind even of the most ignorant savage in order to command his assent.

The NATURAL RIGHTS are generally considered to be the right to life, liberty, and property; and in this sense Sir W. Martin's rules and observations might be accepted without comment. But this is not the sense in which the words used will be understood by the generality of readers, or by those statesmen whose business it will be to consider the obligations created by the Treaty of Waitangi upon the justice and good faith of the British Government.

In these remarks we have only to do with the rights of property, as they are necessarily understood by jurists and statesmen, implying corresponding obligations to respect such rights. In this sense I do not hesitate to say, that so far as we can trace their history, there is no evidence of the New Zealanders ever having possessed any rights, with the exception of those which were created by the Treaty of Waitangi. Of what use is it, practically, for a man to say I possess a right to my property, when there is no law to define the obligations which are created by such a right, or government with power to administer the law, supposing it to have existed? New Zealand was, in an emphatic sense, a country without a law and without a prince. It is doubtful whether the New Zealander, until he witnessed the exercise of authority under the British Government, possessed any idea corresponding to that which is conveyed to our minds by the word "authority." Their only law was that of the strong arm. "When a strong man armed kept his palace his goods were in peace, but when a stronger than he came upon him, and overcame him, he took from him all his armour and divided his spoils: and there was no redress."

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I have not a copy of the Treaty of Waitangi before me, but unless my memory fails me, the word "rights" does not once occur in that document. The Queen guarantees to the natives the possession of their property in land which they may individually or collectively possess. I believe it is in accordance with the rule of international law, as well as with the customs of the New Zealanders, that the obligations created by this guarantee could only extend to the actual possession at that time existing, and that no more fatal error could be committed than that which was committed by Governor Fitzroy when he admitted a right to land as existing in such of the Taranaki tribes as had been driven from their possessions at Taranaki by the more powerful tribes of Waikato, and had located themselves on the coasts of Cook's Straits. This was assuming an obligation on the part of the British Government which was not created by the Treaty of Waitangi – an obligation which implied the duty of investigating not only the title by which those tribes who had been driven from their land claimed to possess it, but the title of the tribes who might have possessed it before and had been driven from it by those tribes who were now fugitives and exiles in their turn; and so on, in an endless series.

I do not make this observation as applying to Wi Kingi and his party, who appear to have migrated to the south before the Waikatos swept those who remained from their homes.

Of the difficulties of my position when holding the office of British Resident, which were neither few nor small, not the least arose out of the frequent reference to me, both by the natives and my own countrymen, of questions and disputes respecting the title to land. One result of these difficulties, however, was to bring me acquainted with the ideas held by the natives on this subject, before such rules existed as those laid down by Sir W. Martin, and of which it is affirmed by him that "It is established by a singular concurrence of the best evidence that the rules above stated were generally accepted and acted upon by the natives."

Adopting the eloquent words of Sir W. Martin (page 82), that "The compact" (created by the Treaty of Waitangi) "is binding irrevocably," that "we cannot repudiate it so long as we retain the benefit which we obtained by it," and "that it is the clear duty of every officer of the Crown and of every loyal citizen to do his utmost, by

deed and word, to fulfil this national undertaking," I, in fulfilment of this duty, which, rests upon me, not only as a loyal citizen but as an agent in creating this national obligation, am bound to say that Sir W. Martin ascribes to the natives rights

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which they never possessed, and claims for them privileges to which they have not a shadow of title. I sympathize, most sincerely with Sir W. Martin in his desire to uphold the national faith, but I consider that it is amongst the greatest of misfortunes that Sir W. Martin and other eminent persons, who possess influence with the natives, and whose truth and probity are above question, should entertain ideas so erroneous, and should publish opinions which cannot fail to be reported to the natives, and thus encourage them in resistance to the Government, by impressing their minds with the idea that they are suffering injustice by its dealings with them in respect to their lands.

I have no hesitation in saying that the rules which Sir W. Martin lays down as established by a singular concurrence of the best evidence are not rules of native origin. That they have been "generally accepted and acted upon by the natives" in the later periods of their dealings in respect to lands, I do not dispute, but they are the natural and necessary deductions from the proceedings to which our own countrymen had recourse in order to obtain an equitable title to the lands which they purchased from the natives. It is not more than twenty-five or thirty years since the natives first began to look upon land as an object of exchangeable value. Before that period they had as little idea of deriving advantage from its sale as of deriving advantage from the sale of the waters of the ocean, or of the air which they breathed.

The boundaries between the land possessed by different tribes or communities, which existed with more or less certainty, were rather a precaution against the inroads of enemies, than an assertion of title to property in the sense in which it is understood, amongst civilized communities.

I have not hitherto referred to what is called "tribal right," which Sir W. Martin describes as overruling individual right in regard to the transfer or sale of land out of the tribe. He states (page 6,) that "Generally there is no such thing as an individual claim clear and independent of the tribal right." This is a quotation from the report of a board appointed in 1856 to enquire into and report upon the state of native affairs. This is again a deduction from the assumption that the natives possessed before the Treaty of Waitangi any rights corresponding to those which, in civilized countries, are defined by law, and maintained by the administration of an established Government. In New Zealand, law had no existence, and there was an equal absence of authority. No man admitted the right of another to interfere with his conduct. We are accustomed to speak of the "chiefs" of New Zealand, in terms which to our minds convey the idea of authority. But the chiefs had no authority. Those were

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"principal chiefs" who, being free men, had acquired that ascendancy which, superior natural ability and strength of mind always obtain over the less gifted and more timid majority, as well as those who stood nearest in lineal descent to the original progenitor from whom they all traced their descent. But, however naturally gifted, or lineally descended, no man claimed a right to subject another to his will. The power exerted by Hongi and other leaders of the people, was only the influence of superior intelligence and bravery. They had no power but that of violence. Who ever heard of a Maori chief punishing a murder unless by the commission of another, or of many more murders, ("when the Pah was taken a hundred died for the sin of one man")<sup>2</sup> or of his punishing a theft, unless by digging up the potatoes of the tribe to which the thief belonged.

It followed from such a state of things not only, as Sir W. Martin states, that "in many cases might overcame right." But that might, not right, was the rule of conduct. Before the natives had acquired the ideas which arose in their minds from their dealings with our countrymen in the sale of their lands, there was not a New Zealander who had boldness enough to make the attempt, who would not by himself, or associated with others of the tribe, have engaged not only to sell the lands of their tribe, but to maintain the purchaser in possession. He knew of no title superior to his own. When this was done by a person whose character made him feared, there was nothing for the weaker, or more timid portion of the tribe but submission. When the sale was determined upon, those who made the sale encouraged those who had no part in it, to make an additional claim upon the purchaser, which was generally satisfied. Another mode in which an acquiescence in a sale of land by parties whose titles had been ignored was brought about, was the suggestion, often acted upon, that the latter should, in their turn, sell another portion of land in which the former had an interest, and thus restore the sense of equality which the former sale had disturbed.

In fine, the result of my experience during the seven years in which I held office, was a conviction that the natives had no idea of property in land such as exists in the minds of people where it has been the subject of legislation. And that the rules which Sir W. Martin lays down, were not rules established by natives, but suggested by the precautions adopted by our own countrymen in order to obtain a title which could not be justly disputed.

We now come to the rights and obligations established by the Treaty of Waitangi; and the question which has given rise to the present insurrection against the power of the Government, is

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whether or not the Government was bound by its having guaranteed to the natives the "full, exclusive, and undisturbed possession of their lands and other properties which they may collectively or individually possess, so long as it is their pleasure to retain the same." I quote from Sir W. Martin's pamphlet, not from the Treaty, which I have not before me.

"This tribal right (says Sir William) is clearly a right of property, and it is expressly recognised and protected by the Treaty of Waitangi. That treaty neither enlarged nor restricted the then existing rights of property. It simply left them as they were. At that time the alleged right of an individual member of a tribe to alienate a portion of the land of the tribe was wholly unknown." (page 9.) Upon which I would remark that the words tribal right do not occur in the Treaty; nor is there any definition by which to fix authoritatively what constituted the collective, and what the individual possession of the lands which are guaranteed by the Treaty. Sir W. Martin states that "That Treaty neither enlarged nor restricted the then existing rights of property." But how is such an assumption to be reconciled with the clause of the Treaty, which yields to the Queen in return for their adoption into the British family, and the inestimable privileges thereby conferred, the pre-emption of their lands, relinquishing the right to dispose of their lands to individuals as theretofore, and restricting that right to a sale to the Queen, through agents to be appointed by her?

Has, then, the Government violated the Treaty in its conduct with respect to the land at Waitara, which has occasioned this unhappy disturbance? Is Sir W. Martin right in his assumption that the title of the natives to their land ought to have been the subject of Judicial investigation before the resistance of the natives to the survey of the land was met by the employment of a military force?

I am convinced that Sir W. Martin would not for a moment maintain that a specific provision in any instrument could be overruled and avoided by general words contained in the same instrument. The specific provision with respect to native title in the Treaty of Waitangi is, that the natives should thenceforth relinquish their right to sell their lands to individuals, and sell them only to the Queen, when, by voluntary negotiation between the owners of the lands and an agent to be appointed by the Queen, both parties should agree upon the terms of transfer. In technical language this is called the right of pre-emption; and it established in New Zealand, by treaty, a power which not only Great Britain, but all other Colonizing powers had previously assumed, of preventing the transfer of an aboriginal

title to a subject. To me it

appears that the ascription to the natives of a right to have the title to their lands thus qualified and restricted, dealt with according to the laws defining the rights of real property in England, is as unreasonable and unfounded as would be the right of a lease holder to insist upon his title being dealt with as if it were a freehold. Nor is such a restriction in any sense inconsistent with all the rights and privileges of British subjects to which they became entitled by the Treaty.

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Having before observed that there are no such words in the Treaty as "Tribal right," and no definition of the distinction between the property in land held collectively and that held individually, though both kinds of property are admitted and recognised, I think it will not be disputed that these distinctions may be settled without serious difficulty. I think then that there can be no objection to the classification of all the untouched forest lands in the country, and of all the waste lands which have been cleared and cultivated, but abandoned after their fertility was exhausted by cultivation, as lands held collectively by the tribe or community. In what then are we to recognize the individual title to land, if not in those portions which a man or his forefathers has subdued from the forest, and enclosed for cultivation, and in which the land marks which separated the cultivations of individuals still exist. It is asserted by Sir W. Martin that though these portions of land may belong to an individual to possess, they do not belong to him to transfer. Having no knowledge of Taranaki, or the agents of the Government there, and considering that the only security for the due fulfilment of the Treaty, consists in the selection by the Governor, as representing the Queen, of such agents as from their tenure of office, and their personal character, may be raised as high as possible above the influence of local prejudices and of private interests, I wish to guard myself against any thing which I may say being construed into the expression of an opinion whether the provisions of the Treaty have in the case of Waitara been carried out with integrity, or not. The statements made upon this subject are so contradictory as to make it very difficult to come at the truth; and I believe I have not had an opportunity of reading all the statements which have been put forth. But assuming, as I do without hesitation, that the natural right of a man to land which he has subdued from the forest, to the uses of man, is not only well founded, but approaches to that instinctive sense of right which a man possesses in his own children, the next inquiry is whether the assumption of a right thus held by Teira and those who joined with him in their application to the Government to purchase the rights thus held, conflicted with any prior right existing in other parties.

Sir W. Martin contends that such a right did exist, which he designates a Tribal right. Now, my acquaintance with the Natives dates back to a period at which I had better opportunities of judging of them in their aboriginal condition than Sir W. Martin could have, after they had imbibed the ideas of property which are held by civilized men, through their negotiations for the sale of land: and I am most decidedly of opinion that no such right had any existence, farther than as it might be the right of the strongest, to which the weak were obliged to submit. If Teira had, under the same circumstances, offered land for sale before the Treaty of Waitangi, he would, without doubt, have been forced to succumb to the superior influence of Wi Kingi and his party. That is, weakness must have yielded to power. But the question may be fairly put, whether the toleration of such a state of things at the present day is consistent with the obligations of the Treaty, by which the Queen engages to protect individuals as well as communities in the possession of their lands until they are willing to dispose of them on terms to be mutually agreed upon.

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Much may doubtless be said on the point of expediency in dealing for lands, especially under circumstances in which they may be likely to be required for the use of the Natives; and of the confusion which may be created in a Native Tribe by the settlement of one or two Europeans in their midst. Undoubtedly, it is of the highest moment that the Government should carefully regard such considerations. But, so far as I can ascertain, such questions were not raised in the case of Waitara. It would appear that Wi Kingi's cultivations lay upon the north side of the River, although according to Riwai Te Ahu's letter it would appear that he possessed, through his wife and his sons – probably by a former wife, – certain claims to one or more portions of the land.

In offering the block of about 600 acres to the Government, Teira acted as any Native would have acted before the Treaty of Waitangi, who was bold enough to take such a step. In opposing the sale Wi Kingi acted as he would have acted at the same period, if not disposed to participate in the sale. But in neither the one case nor the other would the decision have rested upon any Native custom or consideration of "right"; but solely on the power of the one party to carry out, or the power of the other party to prevent the carrying out of the proposition to transfer the land.

Of the expediency of raising such a question, under the circumstances, I desire to say nothing, not being in a position to judge; but the question having been raised I do not see how the Government could avoid the obligation of protecting Teira in dealing with whatever individual property he might have held in

the block, or of resisting Kingi in his attempt to enforce the law of the strongest – which was the only law known to the Natives before the Treaty, but which came to an end when the Treaty was concluded.

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I feel the great importance of giving public expression to my views upon this question. I have seen in a published despatch from the Governor to the Secretary of State a quotation given from the evidence of Mr. Merivale, one of the Under Secretaries in the Colonial Department, before a Committee of the Legislature, to the effect – I quote from memory – that the proprietary rights of the New Zealanders had been admitted as analogous to those of landlords in England." The same number of words could scarcely be made to convey a more erroneous impression.

With the exception of the Colonies of Australia, where the Natives were in too degraded a state to admit of any dealings in respect to the land over which they wandered with as little right or pretension to any property in it, as their fellow wanderers the Kangaroos, aboriginal titles have always been restricted by the colonizing power to the "use and occupation of the land." In no case did the land become subject to the laws regarding property until the Native title was extinguished. The recognition of the title of the New Zealanders to the sovereignty of their country and the property in its soil, on the part of the British Government, involved the necessity of obtaining by treaty the right of pre-emption, which in former cases had been assumed as an incident of the right of the Nation to colonize a country which was occupied by scattered tribes not numbering the one-thousandth part of the human beings which the land was capable of maintaining. With this difference, that, in one case, the right was assumed as an incident of power, and that in the other case it was acquired by treaty, I can perceive no difference between the aboriginal titles, as recognised in America, and those possessed under the Treaty in New Zealand. Nor can it be maintained that any injustice has been done to the Natives by withholding from their titles the rights of property as established by law. The advantages they have obtained by the Treaty immeasurably outweigh the value of their lands, even if they had parted with all that they do not require, for nothing. It is therefore with pain that I see a claim put forth by some of their friends of a right to the value of their lands whatever they might bring in an open market. It is from its security that property derives its chief value. What right can the Natives have to claim that the British Government should give to their property a value which it could never acquire otherwise than by the protection of the British Government? While they are paid for their aboriginal titles at

such rates of value as they were anxious to dispose of them before the Treaty, there is not a shadow of ground for alleging that they have been unfairly dealt with; on the contrary, it may be affirmed that history affords no similar example of a savage people having been treated and cherished by a superior nation as they have been.

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There is still one point upon which I would, but with great diffidence, offer a remark. It appears (page 74) that "in December, 1859, the opinion of the law officers of the Crown in England was obtained upon the question whether the aboriginal Natives of New Zealand are entitled to the electoral franchise under the Constitution Act. In their opinion the following passage occurs, – 'Could he (one Native) bring an action of ejectment or trespass in the Queen's Court in New Zealand? Does the Queen's Court ever exercise any jurisdiction over real property in a Native district? We presume these questions must be answered in the negative.' It appears then (says Sir William) that the law officers hold that the Colonial Courts have no cognizance of questions of title or occupancy in any case." (Page 74.) It would appear, from the observations that follow, that Sir W. Martin entertains a different opinion from that expressed by the law officers of the Crown, as above quoted. He says: "What is maintained is this: that it was not their business (that of the Natives) to appeal to the law in the first instance, but the business of the Government." And again: "This is the point which has been forgotten throughout, that the Governor in his capacity of land buyer is as much bound by law as other land buyers." (Page 75.) These observations, and those which follow, appear to me, and I suggest it with humility, to arise from Sir W. Martin's overlooking the specific provision of the Treaty in favor of the general words of the Treaty. The native title is not known to the law, nor is it subject to, or entitled to be dealt with by law. It rests exclusively upon a Treaty entered into at the time between the British Government, who had recognized the New Zealanders as competent parties to a Treaty, and the New Zealanders. To maintain the faith of Treaties there exists no law. And I confess that, in the responsibility of the Queen's Governor acting in the name and on the behalf of the Queen, so long as he is not controlled by what is called a responsible ministry, I see a greater security for the due fulfilment of the Treaty than would be derived from any judicial tribunal which could be created for the purpose, could such an anomaly exist as a tribunal to try the administrative acts of the Government in matters of so high an import as the fulfilment of a Treaty. The issue, as it appears to me, was not as Sir William Martin puts it

(page 75), whether "the Governor has no more right to seize land upon the decision of his own agent than any other land buyer would have but whether he was maintaining the obligations of the treaty in defending the rights of Teira against the interference of Kingi with those rights.

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The greatest blessing which could befall New Zealand would be an Act of the Imperial Parliament reciting the uniform practice of the British Government in respect to aboriginal titles, and the necessity of maintaining the same in New Zealand, in such terms as would put down the mischievous agitation respecting the purchase of native lands, by rendering it hopeless that the law would ever be relaxed; and arming the Governor with power to take from the proceeds of the sale of public lands such sums as might be necessary for the discharge of all obligations created by the Treaty, and for the administration of Native affairs, independently of the interference of the local Assembly, making him responsible only to the Queen and Parliament for the exercise of the powers to be delegated to him by such an Act.

1 Pages 1 to 5.

2 Speech of Te Kihirini at the Kohimarama conference, July 13th, 1860.

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