

New Zealand's Forgotten Income Tax[†]

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I INTRODUCTION

1844 marks the year in which one of the most significant events in New Zealand's tax history took place. A concoction of social, political and economic factors led to the promulgation of the Property Rate Ordinance (the Ordinance), which abolished indirect taxes and, in their place, imposed a one per cent flat tax on the combined value of taxpayers' income and property. The Ordinance was heralded as ushering in a new era of just and equitable taxation. It was repealed only six months later.

For reasons unknown, the history surrounding this fiscal revolution has been largely forgotten, and most modern commentators believe that New Zealand's first income tax was imposed by the Land and Income Assessment Act 1891. In fact, the Ordinance preceded that Act by almost half a century. It therefore also gave New Zealand the distinction of being one of the first British colonies to impose a tax on income. This article examines the events that led to the creation of the Ordinance, the way in which the tax operated, and the factors that led to its downfall.

Such an analysis is important for several reasons. It has been said that "[t]he history of state revenue production is the history of the evolution of the state".¹ A detailed examination of the Ordinance provides a snapshot of the social, political and economic circumstances of New Zealand at a very important stage in its history. The Ordinance is an important primary source from which it is possible to reconstruct life and thought patterns in colonial New Zealand, and it sheds light on important historical events, figures and policies from a tax perspective. A close examination of the Ordinance also illuminates the way in which taxes affect and influence society and, conversely, how society affects and moulds the structure of taxes. Its story can therefore provide valuable guidance to legislators, judges, tax practitioners and others responsible for shaping New Zealand's tax system. Indeed, even though the Ordinance is now almost 170 years old, it remains one of the foundations upon which that system is built. It is therefore an important but overlooked fiscal document that deserves detailed examination.

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¹ Margaret Levi *Of Rule and Revenue* (University of California Press, Berkeley, 1988) at 1.

II THE SEEDS

Introduction

Prior to 1840, New Zealand was not a British colony. Although English settlers had been arriving for a number of years and living amongst the native Māori people, the United Kingdom's involvement in New Zealand was limited to the appointment of James Busby as British Resident in 1832, whose role it was to manage and protect British interests in the islands.² However, "[h]e had no authority or power to raise taxes, legislate, raise an army or enforce British law even with British subjects living in the country."³

However, for various reasons, in 1838 the House of Lords Select Committee on New Zealand recommended that the land be annexed through a treaty with Māori⁴ and instructions to that effect were given to Captain William Hobson.⁵ These instructions explained the purpose and policy behind the annexation and set important guidelines that Hobson used to structure what would become the Treaty of Waitangi (the Treaty), the instrument upon which British authority in New Zealand would initially be predicated. On 6 February 1840, Hone Heke, who would later play an important role in the passing of the Ordinance, became the first Māori chief to affix his sign to the Treaty.⁶ By 21 May, Hobson believed that he had gathered enough signatures and issued a proclamation of sovereignty.⁷

From this point New Zealand was, at least on paper, a dependency of New South Wales until 16 November 1840, when it was formally proclaimed a separate Crown Colony by royal charter.⁸ Hobson now became Governor of New Zealand and he found himself at the helm of a government that was faced with the very large costs inherent in the process of founding a new colony. He was in the difficult position of having to establish an infrastructure for the extraction of revenue from a population that had, until recently, been living relatively ungoverned and outside the reach of any law. To add to this, Hobson was receiving little aid from the British Treasury to assist his administration. Indeed, "the British Government had seriously underestimated the costs associated with the establishment of

2 Paul Moon and Peter Biggs *The Treaty and its Times: the illustrated history* (Resource Books, Singapore, 2004) at 87–88.

3 *Ibid.*, at 89.

4 See *ibid.*, at 147–151.

5 Lord Normanby "Annexation of New Zealand to New South Wales" in W David McIntyre and WJ Gardner (eds) *Speeches and Documents on New Zealand History* (Clarendon Press, Oxford, 1971) 10 ["Annexation"] at 10–17.

6 See Moon and Biggs, above n 2, at 208–209.

7 *Ibid.*, at 231–232.

8 "Charter for erecting the Colony of New Zealand, and for creating and establishing a Legislative Council and an Executive Council (16 November 1840)" in W David McIntyre and WJ Gardner (eds) *Speeches and Documents on New Zealand History* (Clarendon Press, Oxford, 1971) 54 at 54.

formal British rule in New Zealand”.⁹ Given this state of affairs, it might have been wise for Hobson to manage the economy prudently and frugally. Instead, the new Governor spent copious amounts of public funds on his opulent lifestyle.¹⁰ Before he could be recalled, Hobson passed away in Auckland on 10 September 1842 as a result of ill health.¹¹

Willoughby Shortland became Acting Governor while the Colonial Office in London scrambled to find an official replacement for Hobson, but he was unable to improve the situation during his short stint at the helm of the government.¹² Eventually the Colonial Office stumbled upon Robert FitzRoy, who seemed well suited to the role of Governor. He was a respected captain, famous for surveying the South American coast with Charles Darwin in the *Beagle*. He had visited New Zealand previously and had experience with native peoples. He also had some experience in politics and was dedicated to his work.¹³ FitzRoy seemed to be a natural choice and, in May 1843, he was officially appointed as Governor of New Zealand.¹⁴

Prior to FitzRoy’s departure from England, the Colonial Office had been informed by Shortland that there was around £50,000 in the New Zealand treasury.¹⁵ However, on his arrival in New Zealand, FitzRoy discovered that there was actually a deficit of almost £12,000.¹⁶ It quickly became apparent that he had inherited an essentially bankrupt colony. Yet, despite the gravity of the situation, support from the home government would remain inadequate during FitzRoy’s tenure. He issued numerous requests for further support from London but the Secretary of State for the Colonies, Lord Stanley, eventually made the state of affairs very clear to him: FitzRoy’s administration would have to fend for itself.¹⁷

The Ineffective Tax System

Given this background, it is necessary to take a closer look at the state of the fiscal system in New Zealand at the time of FitzRoy’s arrival. As with many other Australian colonies, New Zealand’s first tax system consisted of indirect customs and excise duties.¹⁸ Alcohol and tobacco attracted the heaviest duty under this regime while goods from the United Kingdom and nearby colonies such as New South Wales received preferential treatment

9 Moon and Biggs, above n 2, at 309.

10 Ibid, at 305–307.

11 Ibid, at 323.

12 See *ibid*, at 323–327.

13 Ibid, at 339–343.

14 Ibid, at 342.

15 Paul Moon *FitzRoy: Governor in Crisis 1843–1845* (David Ling Publishing Ltd, Auckland, 2000) at 194.

16 Ibid.

17 Letter from Lord Stanley to Governor Fitzroy (27 October 1844) in *Correspondence respecting Issue of Debentures; Taxes; Outrages in Bay of Islands; Abolition of Custom-house; and Title of New Zealand Company and Land Claims, 1845* (131) HCPP XXXIII.13. 16 at 16.

18 See Peter A Harris *Metamorphosis of the Australasian Income Tax: 1866 to 1922* (The Australian Tax Research Foundation, Canberra, 2002) at 25.

and attracted less duty.¹⁹ Along with customs duties, the other main source of government revenue was the sale of Crown lands. Article II of the Treaty (the pre-emption article) gave the Crown the right of pre-emption over Māori land, meaning that Māori could only sell to the government and not to private persons. The government used this article as a revenue raising device by buying land cheaply from Māori and selling it at a higher price to incoming settlers.²⁰ Although the pre-emption article was said to have been created with the altruistic aim of protecting Māori from unscrupulous buyers,²¹ it also had the more pragmatic purpose of funding the government.²² Hence, on FitzRoy's arrival, receipts from customs duties and land sales together comprised the main financial lifeline of the New Zealand administration.

However, it would soon become apparent to FitzRoy that these sources of revenue were inadequate. Revenue from land sales depended on the willingness of Māori to sell, which could not necessarily be predicted. Māori were also becoming increasingly aware of the value of their land and the prices they demanded reflected this awareness.²³ In any case, the government was more or less in a state of bankruptcy. It could not afford long term investments in realty. As a result of such factors, revenue from land sales for the 1844–1845 financial year was predicted to be in the vicinity of only £3,700.²⁴ Considering that by 14 May 1844 the government's liabilities outweighed its assets by over £14,000,²⁵ this was paltry.

In addition to the fact that land sales were not providing stable and adequate returns, there was another barrier to their continued use as a primary source of revenue: many Māori wanted the right to be able to sell their land freely to settlers. Article III of the Treaty guaranteed Māori the rights of British subjects. Yet, by virtue of the pre-emption article, Māori could not fully exercise these rights because they were not allowed to sell their land to whomever they pleased. Many of them did not expect that if the government refused the first offer to purchase, they would still be forbidden from selling the land privately. In a letter to Lord Stanley, the Secretary of State for the Colonies, FitzRoy stated that maintenance of a peaceful relationship with Māori would be impossible if the government continued to forbid private sales.²⁶

19 Customs Ordinance 1841 4 Vict 3, sch E.

20 See Lord Normanby "Annexation", above n 5, at 12–14.

21 Moon and Biggs, above n 2, at 164.

22 See Lord Normanby "Annexation", above n 5, at 12–14.

23 See WJ Gardner "A Colonial Economy" in WH Oliver and BR Williams (eds) *The Oxford History of New Zealand* (Oxford University Press, Wellington, 1981) 57 at 59.

24 Estimate of the Probable Amount of Revenue of the Government of New Zealand, for the Financial Year 1844–45 [Financial statements sent to Colonial Office] in Despatches from Governor of New Zealand, 1845 (247) HCPP XXXIII.71, 87 at 87.

25 Appendix A: Statement of the available Assets of the Colonial Treasury of New Zealand, and of the Liabilities requiring immediate Liquidation, on the 14th day of May 1844 in Despatches from Governor of New Zealand, 1845 (247) HCPP XXXIII.71, 79 at 79.

26 Letter from Governor FitzRoy to Lord Stanley (14 October 1844) in Despatches from Governor of New Zealand, 1845 (369) HCPP XXXIII.239, 20 at 21.

At the same time, settlers would have realised that the business of buying and selling Māori land could yield substantial profits and they too would have demanded that Māori be allowed to sell land privately. The reality was that the Crown's right of pre-emption under the Treaty gave the New Zealand government a monopoly over a very profitable business and FitzRoy was now under attack from all sides.

This growing discontent, along with his own personal views, forced the Governor to act. In contravention of the Treaty and without prior sanction from the home government, FitzRoy began to waive the Crown's right of pre-emption over certain land. The Proclamation of 26 March 1844 allowed for Māori land to be sold privately upon application to the Crown and the fulfilment of certain criteria,²⁷ and FitzRoy hoped that this would stimulate the economy.²⁸ He tried to limit the effects that these measures would have on state revenue by imposing a fee of 10 shillings for every acre for which a waiver had been issued.²⁹ However, this fee was too high for settlers to afford³⁰ and FitzRoy subsequently decided to reduce it to a meagre one penny per acre.³¹ Ultimately, it was clear that land sales were no longer viable as revenue generators.

This left the government almost wholly reliant on customs duties for revenue. As it turned out, however, receipts from these indirect taxes were also proving insufficient. While the figures relating to customs returns vary depending on the source from which they are obtained, it is clear that they were on a downward trend. One set of statistics sent to the Colonial Office indicate that in 1842 returns amounted to over £18,500 while in 1843 they had decreased to under £16,300.³² By the fourth quarter of 1844, when the Ordinance was being drafted, returns from customs duties for the preceding three quarters amounted to just over £11,100.³³

There seem to be various reasons why revenue from customs duties was shrinking. In the first place, only a few years earlier, ships coming into New Zealand ports were not subject to any taxes.³⁴ Now they had to pay, and it seems that many ships preferred to port in "such unsafe places

27 Proclamation by his Excellency Robert FitzRoy, Esquire, Captain in Her Majesty's Royal Navy, Governor and Commander-in-Chief in and over the Colony of New Zealand, and Vice-Admiral of the same [Proclamation of 26 March 1844] in Correspondence respecting Issue of Debentures; Taxes; Outrages in Bay of Islands; Abolition of Custom-house; and Title of New Zealand Company and Land Claims, 1845 (131) HCPP XXXIII.13, 48 at 48.

28 See Moon and Biggs, above n 2, at 363.

29 See *ibid.*, at 365.

30 See *ibid.*

31 Proclamation by his Excellency Robert FitzRoy, Esquire, Captain in Her Majesty's Royal Navy, and Governor and Commander-in-Chief in and over Her Majesty's Colony of New Zealand and its dependencies, and Vice-Admiral of the same [Proclamation of 10 October 1844] in Despatches from Governor of New Zealand, 1845 (369) HCPP XXXIII.239, 21 at 21–22.

32 Appendix B to Minutes of Tuesday, 8 April 1845: A Return of the Revenue derived from the Customs in New Zealand since the Establishment of the Colony, and of the Charges on the Collection of the same [Statistics sent to Colonial Office] in Communications between Lord Stanley and Governor FitzRoy and Lieutenant Governor Grey, relative to New Zealand, 1846 (337) HCPP XXX.151, 49 at 49.

33 *Ibid.*

34 See Moon and Biggs, above n 2, at 367.

as the Feegees and other unfriendly islands”³⁵ rather than pay their duties. The result was a general depression of trade in New Zealand. The Bay of Islands, the economic heart of the new colony, was hit particularly hard by these occurrences.³⁶ FitzRoy wrote to Stanley that, between 1830 and 1840, up to 40 vessels could be seen docking at the Bay of Islands annually. However, since 1840, seldom would more than 10 ships be seen in the same area.³⁷ Social unrest was beginning to take hold in this once prosperous region.

To add to this problem, New Zealand offered the perfect environment to facilitate smuggling and many of the ships that did continue to come to New Zealand resorted to such activities. FitzRoy wrote in hindsight that:³⁸

... in such a woody country, intersected by rivers and creeks, with a coast line of more than three thousand miles in extent, and abounding in harbours, smuggling might be carried on with impunity

Given these peculiar features, the government would have been more or less powerless to stop smugglers. In addition, the customs house, for all its inadequacies in raising revenue, remained significantly expensive to operate; FitzRoy indicated to Lord Stanley that in 1843 the collection of customs duties had cost £4,000.³⁹ The customs establishment was proving to be impossible to administer effectively or efficiently. In an attempt to combat the resulting lack of revenue, the Governor proposed a variety of economic measures including reducing government expenditure⁴⁰ and issuing debentures without the required authorisation from the home government.⁴¹ These measures were, however, to no avail.

Social Unrest

It was also soon evident that the government had more than economic adversity to overcome. While European settlers were very much against customs duties,⁴² the true cause for concern lay with rising Māori discontent. Whereas the concept of customs duties was unknown to Māori only a few years earlier, they were now contributing most of the government's revenue

35 Proceedings of the Legislative Council, Thursday, 19 September 1844 in Despatches from Governor of New Zealand, 1845 (247) HCPP XXXIII.71, 157 at 157.

36 See Letter from the Inhabitants of Kororarika to Governor FitzRoy (9 January 1844) in Despatches from Governor of New Zealand, 1845 (247) HCPP XXXIII.71, 28 at 28.

37 Letter from Governor FitzRoy to Lord Stanley (29 September 1844) in Despatches from Governor of New Zealand, 1845 (369) HCPP XXXIII.239, 11 at 11.

38 Robert FitzRoy *Remarks on New Zealand, in February 1846* (W and H White, London, 1846) at 34.

39 Letter from Governor FitzRoy to Lord Stanley (29 September 1844), above n 37, at 11.

40 See Letter from Governor FitzRoy to Lord Stanley (16 September 1844) in Despatches from Governor of New Zealand, 1845 (247) HCPP XXXIII.71, 140 at 141.

41 Debentures Ordinance 1844 7 Vict 4.

42 See Letter from the Inhabitants of Kororarika to Governor FitzRoy (9 January 1844), above n 36, at 28.

through their purchases of tobacco and liquor.⁴³ Having signed the Treaty, ostensibly for their benefit, Māori soon became upset that its only apparent effect was to depress their once thriving trade. One of the members of the Legislative Council later wrote that:⁴⁴

The free intercourse with the shipping which the natives had enjoyed while in their state of independence, was now restrained by Custom-house regulations; the prices of their favourite articles of consumption were increased by the duties now levied on imported goods.

It was the duties imposed on tobacco that had an especially devastating effect on Māori. When British settlers introduced tobacco into New Zealand, it appears that many Māori acquired a taste for it and became easily addicted to smoking. Tobacco soon became indispensable to them. So indispensable, in fact, that it quickly became recognised as an almost universal currency amongst Māori.⁴⁵ In such circumstances, a tax on tobacco was particularly odious. It was reminiscent of the excise duties imposed on whiskey in the United States in the late 18th century that had spurred what would become known as the Whiskey Rebellion. In the western states, where few coins were circulating, whiskey had become a medium of exchange just as tobacco had for Māori in New Zealand.⁴⁶ The effect of the whiskey excise tax was particularly pernicious for the many poor, and the result was a rebellion that became so serious that federal authorities were eventually forced to dispatch troops led by George Washington himself to quell it.⁴⁷

The events that would transpire in New Zealand very much echoed those of the Whiskey Rebellion. In the Bay of Islands the situation had reached boiling point. Hone Heke, the first Māori chief to sign the Treaty, now became the first Māori chief to rebel actively against British rule. On 8 July 1844, Heke and some of his men cut down the British flagstaff erected at Kororāreka (Russell).⁴⁸ Some of the men who cut the pole down were apparently heard to say “that it prevented the ships coming in”.⁴⁹ FitzRoy was now in a difficult situation. On 13 July 1844, he wrote to the Governor-in-Chief of New South Wales, George Gipps, asking for assistance.⁵⁰ A ship of war carrying troops was promptly dispatched.⁵¹

43 Gardner, above n 23, at 59.

44 William Swainson *New Zealand and its Colonization* (Smith, Elder and Co, London, 1859) at 157–159.

45 RP Hargreaves *From Beads to Banknotes: The story of money in New Zealand* (John McIndoe Ltd, Dunedin, 1972) at 17.

46 See William Hogeland *The Whiskey Rebellion: George Washington, Alexander Hamilton, and the Frontier Rebels Who Challenged America's Newfound Sovereignty* (Scribner, New York, 2006) at 66–67.

47 See generally *ibid.*

48 Moon and Biggs, above n 2, at 405.

49 Letter from C Hector to Governor FitzRoy (8 July 1844) in *Despatches from Governor of New Zealand, 1845* (247) HCPP XXXIII.71, 89 at 91.

50 Letter from Governor FitzRoy to Sir George Gipps (13 July 1844) in *Despatches from Governor of New Zealand, 1845* (247) HCPP XXXIII.71, 93 at 93.

51 Moon and Biggs, above n 2, at 407.

However, a full-scale war with Māori at this point would have been catastrophic. In 1844, there were an estimated 109,550 Māori in New Zealand who outnumbered Europeans by 10 to 1,⁵² and who would have been well-armed and battle-hardened. Despite this, it was made clear from the very beginning that the British government would not be sending troops to New Zealand. In supplementary instructions to Hobson regarding the annexation of New Zealand, Lord Normanby stated that the dispatch of British troops was impracticable at present and would remain as such for the foreseeable future.⁵³

Despite constant requests, the home government never sent any troops to aid FitzRoy. He was simply told to raise a militia.⁵⁴ As it turned out, however, the display of power managed to quell the uprising and, in an exchange of letters, FitzRoy and Heke agreed to a cessation of hostilities.⁵⁵ Peace had been secured for the moment but the Governor knew that it would not be permanent if the situation in the north remained as it was. With no adequate military force, FitzRoy attempted to appease Māori by removing the customs house from the Bay of Islands. In order to maintain equality between settlements, he would ultimately have to eradicate the duties from New Zealand completely. With no returns from customs duties and land sales, a completely new system for revenue gathering would be required.

The Birth of the Property Rate Ordinance

Any system of taxation that would address the concerns of settlers and Māori had to encourage free trade, be proportionate and exempt the poor. It also had to be visible. To FitzRoy's mind, direct taxation was the answer. Before any of the disturbances in the Bay of Islands had occurred, the Governor had already proposed a direct tax on country land, houses with more than three rooms and dogs not owned by Māori.⁵⁶ This particular proposal was met with such opposition that it was never adopted by the Legislative Council, but the cutting down of the flagstaff at Kororāreka brought the issue of taxation to the fore once again. The situation was

52 Appendix A to Minutes of Thursday, 3 April 1845: Return of the Native Population of New Zealand, as far as it has been ascertained [Population estimates for 1844] in Communications between Lord Stanley and Governor FitzRoy and Lieutenant Governor Grey, relative to New Zealand, 1846 (337) HCPP XXX.151, 47 at 47; Appendix A to Minutes of Saturday, 22 March 1845: Return of British Population in New Zealand at the end of the following Years in Communications between Lord Stanley and Governor FitzRoy and Lieutenant Governor Grey, relative to New Zealand, 1846 (337) HCPP XXX.151, 45 at 45.

53 Lord Normanby "Captain Hobson's Supplementary Instructions" in W David McIntyre and WJ Gardner (eds) *Speeches and Documents on New Zealand History* (Clarendon Press, Oxford, 1971) 17 at 18.

54 John Gribbin and Mary Gribbin *FitzRoy: The Remarkable Story of Darwin's Captain and the Invention of the Weather Forecast* (Review, London, 2003) at 225.

55 See Letter from Governor FitzRoy to Hone Heke (5 October 1844) in Despatches from Governor of New Zealand, 1845 (369) HCPP XXXIII.239, 37 at 37.

56 Robert FitzRoy, Governor of New Zealand "Address to the Legislative Council" (Council Room, 14 May 1844) [Governor FitzRoy addressing the Legislative Council on 14 May 1844] in Despatches from Governor of New Zealand, 1845 (247) HCPP XXXIII.71, 34 at 35–36.

critical and FitzRoy began to think of ways to implement a system of direct taxation that would not be met with the same opposition as his previous proposal. On 19 September 1844, FitzRoy assembled the Legislative Council without the usual notice and announced:⁵⁷

As a substitute for the Customs' Ordinance—as a means of raising revenue within the colony—I have to propose the adoption of a general Rate on Property and Income, taken together—so levied as to give neither trouble nor annoyance—yet productive of more available revenue than the present Custom-house Establishment.

Thus the Property Rate Bill was put before the Council. Unlike FitzRoy's previous proposal for direct taxation, on 28 September 1844, the members of the Legislative Council assented to the Property Rate Ordinance.⁵⁸

III THE MECHANICS

Introduction

The Ordinance is a unique historical document that aggregated the income of a taxpayer with the value of all personal and real property belonging to that taxpayer. A flat rate of one per cent was then levied on this combined value. While it is likely that there was some influence from British law, the Ordinance largely appears to be an original piece of legislation drafted specifically for New Zealand. It is also much smaller and less complicated than its British counterparts. The income tax had been reintroduced in the United Kingdom only two years earlier in 1842.⁵⁹ The United Kingdom Income Tax Act consisted of 194 sections and was spread over 117 pages.⁶⁰ The Ordinance, on the other hand, was made up of only 23 clauses and spanned a mere 4 pages.

The Ordinance was easier to read than most 19th century British statutes. The clauses were clearly separated and they were given headings for ease of reference. Overly lengthy sentences were kept to a minimum. The intention that this new tax be transparent was evidently complemented by the intention that the Ordinance itself should be comprehensible to most literate people, and not just to lawyers. However, the briefness of the provisions may have been due in part to the insufficient time dedicated to their drafting. The Ordinance dealt with complicated tax matters that

⁵⁷ Robert FitzRoy, Governor of New Zealand "Address to the Legislative Council" (Council Room, 19 September 1844) [Governor FitzRoy addressing the Legislative Council on 19 September 1844], in *Despatches from Governor of New Zealand, 1845 (247) HCPP XXXIII.71*, 142 at 143.

⁵⁸ Property Rate Ordinance 1844 8 Vict 2.

⁵⁹ Income Tax Act 1842 (UK) 5 & 6 Vict c 35.

⁶⁰ Harris, above n 18, at 18.

probably required more consideration and attention than the Legislative Council actually afforded them and, as a result, there was much vagueness and ambiguity to be found. One newspaper opined that “[t]he only class to whom the Property and Income tax act may be profitable, is the lawyers, who will be paid for interpreting its meaning”.⁶¹ This Part is dedicated to examining closely the mechanics of the Ordinance and to ‘interpreting its meaning’. In particular, it analyses the purposes, functions and deficiencies of the key provisions in the Ordinance from a tax perspective.

Objects of Taxation

Clause 2 of the Ordinance stipulated two objects of taxation: income and property. The income tax element was mainly prescribed in cl 4 which defined income as “the nett yearly profits of any Trade, Business, or Profession, Rents arising from Real Property, Interest on Money lent, Pay, Salaries, Annuities, Pensions, and every other description of Income”. The ultimate goal appears to have been to define ‘income’ exhaustively without providing any loopholes for taxpayers to exploit. On 1 November of every year when taxpayers made their returns, they had to declare “the probable amount” of their income for the coming 12 months.⁶² Hence the annual income on which the taxpayer had to pay tax was an estimate, and it is reasonable to assume that most taxpayers would probably have based that estimate on their previous year’s income. There were no withholding mechanisms such as today’s Pay As You Earn (PAYE) or Resident Withholding Tax (RWT). Taxpayers were relied on to assess themselves honestly and make payments accordingly.

It is interesting to note that the term “*nett* yearly income” (emphasis added) was used in cl 2 and similarly in cl 4. It implies that the tax was imposed only on the income left over after deductions were made for costs and expenses incurred in deriving that income. However, the Ordinance did not provide any mechanism for determining the extent of allowable deductions as none of the 23 clauses dealt with how one was to actually establish one’s “nett yearly income”. It would probably have been up to the courts to set the parameters of the word ‘nett’ and, ultimately, taxpayers would have been given much scope to make liberal deductions. It might have been wise for the Legislative Council to include specific provisions addressing this point as it would probably have made the income tax element of the Ordinance more successful in generating revenue.

With respect to the tax on the value of property, cl 3 stated that the property of a taxpayer included “every description of property whether real or personal”. Taxpayers were required to declare the “marketable value” of such property as at 1 November and pay tax on that value over

61 “Saturday, November 2, 1844” *New Zealand Spectator and Cook’s Strait Guardian* (New Zealand, 2 November 1844) at 2.

62 Property Rate Ordinance 1844 8 Vict 2, cls 4 and 7.

the following 12 months.⁶³ At the end of that 12 month period, taxpayers would have to declare the new market value of all their personal and real property. In doing so, they would have to take into account any property acquired or disposed of in the previous 12 months and any accretion or depreciation in the market value of property in respect of which they had made a return in the previous year.

The tax on property had an interesting side effect because it was introduced at a time when people had little income or ability to pay.⁶⁴ Hence, a person's property holding would not have represented that person's purchasing power. One commentator has noted that a phenomenon that can occur with property taxes is that "depressions or sudden inflations can distort the relationship of property tax payments to income and lead to widespread taxpayer dissatisfaction".⁶⁵ This was what happened in New Zealand. During this period of depression, there was little currency in circulation and, while taxpayers may have been asset-rich, they were cash-poor.⁶⁶ Hence, many simply had no money to pay the rate that the Ordinance levied on the unrealised value of their property.

The Ordinance used a global system of taxation rather than a schedular one. In other words, taxpayers were required to pay an annual tax of one per cent on the combined monetary value of their property and income as assessed for that year.⁶⁷ Imposing a property rate in conjunction with an income tax had some unique implications from a tax policy perspective. For one thing, it had the effect of aggregating for tax purposes the capital and income of taxpayers. Therefore, if a person owned a piece of land worth £1,000, from which that person derived a rent of £100 per annum, the Ordinance would impose 1 per cent tax on the combined value of £1,100. It is likely that this unique method of taxation created some undesirable incentives. For instance, if a person earned £100 of income and subsequently used it to add another room to his or her house, then it appears that that person would be subject to double tax. There would be tax on the person's income and then there would be tax on the extra value added to the property using that income. Such an occurrence would create an incentive to hoard money rather than spend it on acquiring property. In a country facing a lack of circulating currency,⁶⁸ this phenomenon would have likely created an undesirable state of affairs. The economy needed to be stimulated yet, in this respect, the Ordinance might have had the opposite effect.

63 Ibid, cl 3.

64 See Letter from Governor FitzRoy to Lord Stanley (16 September 1844), above n 40, at 140.

65 Arthur O'Sullivan, Terri A Sexton and Steven M Sheffrin *Property Taxes and Tax Revolts: the Legacy of Proposition 13* (Cambridge University Press, New York, 1995) at 16.

66 See Letter from Governor FitzRoy to Lord Stanley (16 September 1844), above n 40, at 140.

67 Property Rate Ordinance 1844 8 Vict 2, Schedule.

68 See Letter from Governor FitzRoy to Lord Stanley (16 September 1844), above n 40, at 140.

Parameters of the Tax Jurisdiction

With respect to the scope of the tax jurisdiction established by the Ordinance, generally speaking:⁶⁹

Tax authorities cannot impose a tax under the domestic law, unless there is a factor connecting the tax subject ('taxpayer') or the tax object ('taxable event') with the tax jurisdiction.

Today, the 'connecting factors' most commonly relied on to establish the authority to impose direct taxation are 'residence' and 'source'.⁷⁰ In the context of a modern income tax, if a taxpayer is 'resident' in a jurisdiction that seeks to impose such a tax, then that taxpayer will generally be taxed on all of his or her income regardless of where it is sourced. At the same time, if the taxpayer's income is 'sourced' from the jurisdiction seeking to impose a tax, then that jurisdiction can tax the particular income regardless of where the taxpayer is resident.

The approach of the Ordinance to establishing the jurisdiction to tax was distinctive. It was also complicated and contained many contradictions, which was perhaps as much due to the hasty manner in which it was drafted as it was to the complex nature of the subject matter. Clause 2 stated that:

... there shall be raised levied collected and paid in manner hereinafter mentioned, in respect of *all* property and nett yearly income within the *Colony of New Zealand*, a yearly rate ... (emphasis added).

Therefore, *prima facie*, it appears that the Ordinance established jurisdiction to tax on the basis of source alone. The words in cl 2 did not distinguish between residents and non-residents; they simply asserted that all property and income within New Zealand was to be taxed. However, while it seems to be a necessary implication of those words that only property physically situated within New Zealand was taxable, the case is not so clear with respect to income. The words 'income within the colony of New Zealand' may have meant the income had to arise in New Zealand, or that it merely had to be received within New Zealand. From cl 2 alone, it is not clear what connecting factors were required to exist between an item of income and New Zealand in order for that income to be taxable.

Clause 4 elucidated the matter slightly. It listed the various items that qualified as income and then went on to state that these items were liable to tax in New Zealand "*whencesoever* or from whatever source the same respectively may be derived" (emphasis added). These words, when read together with cl 2, suggest that income that arose overseas but was received within New Zealand was liable to tax under the Ordinance. The Legislative

⁶⁹ Roy Rohatgi *Basic International Taxation* (Kluwer Law International, The Hague, 2002) at 445.

⁷⁰ See *ibid*, at 612–615.

Council minutes indicate that this approach caused conflict between some of the members. One thought that it was unjust, for instance, to tax rents derived from property situated overseas because “such property, he had no doubt, paid its share of the taxes in the country where it was situated”.⁷¹ This argument was ultimately rejected on the grounds that everyone living in the colony had to pay their share and that, in any case, the low one per cent rate of tax could not harm anyone who had the capability of earning income from sources outside New Zealand.⁷²

Clause 7 complicated the matter significantly. It only required “every person *resident* within the colony” (emphasis added) to make a return in respect of their property and income. This seems to indicate that a person not resident in New Zealand was not required to make a return at all and, consequently, did not have to pay any tax. It therefore appears to be in direct contradiction to cl 2, which stated that “*all* property and net yearly income *within the Colony of New Zealand*” (emphasis added) would be taxed. Applying these words, a resident of England who owned property situated in New Zealand would be liable to tax in New Zealand. But under cl 7, such a person would not be required to make a return since they were most likely not a New Zealand resident; interestingly, the term ‘resident’, despite its importance, was not defined in the Ordinance.

The issue of whether non-resident owners of property in New Zealand were subject to tax was particularly important to many New Zealanders. Even before the passing of the Ordinance, one newspaper noted that “[a] large Government expenditure is demanded in consequence of the existence of absenteeism, while no equivalent return of good in any shape is made by absentees”.⁷³ Public funds were being spent on infrastructure from which absentee land owners were gaining pecuniary benefit through an increase in the value of their land and, consequently, through the higher rents they were paid. At the same time these owners were contributing nothing in the form of taxes and the local settler population was, in effect, bearing the brunt of the government expenditure incurred on the absentees’ behalf. It would not have helped that most absentees were also probably much richer than any of the depression-stricken settlers. Yet, despite outcries, it seems that absentee landowners were probably not intended to be subject to the tax. Notwithstanding the contradictions in the drafting, cl 7 simply did not require non-residents to make a return.

In summary, the tax jurisdiction of the Ordinance extended over all income received within New Zealand by a resident — regardless of that income’s geographic or economic source — and all property situated within New Zealand and owned by a resident. In modern terms, this jurisdiction to tax can be described as being based on a hybrid residence principle. While

71 “Legislative Council: Tuesday, September 24, 1844” *Daily Southern Cross* (New Zealand, 28 September 1844) at 2.

72 *Ibid.*

73 “Absenteeism” *New Zealand Gazette and Wellington Spectator* (New Zealand, 23 March 1844) at 2.

New Zealand residents were obliged to declare their worldwide income in their returns, they did not have to declare the value of their overseas properties. They would, however, have had to pay tax on income derived from any such properties and declare the value of their New Zealand properties. Non-residents, on the other hand, were not required to pay any tax regardless of whether they earned income or owned property in New Zealand.

Burden and Incidence

When the time came to make their returns, taxpayers had to ascertain how much tax they owed by using the Schedule at the end of the Ordinance. The scale in the Schedule indicated the ratio by which tax payments increased with the value of the taxpayer's property and income; that ratio being one per cent. The Ordinance, therefore, effectively imposed a flat tax of one per cent. There were, however, several exceptions. Settlers whose property and income combined was valued at less than £50 were exempt from tax altogether.⁷⁴ Also, the Schedule set a cap, or maximum tax payment, of £12. Known as a composition, it introduced a regressive element into the Ordinance. A person who made a return of £1,500 would pay the £12 maximum tax, resulting in an effective tax rate of 0.8 per cent. Yet someone with property and income worth £1,000 would pay £10 in tax and have a higher effective tax rate of 1 per cent despite having a lower net worth. As a result, high net worth individuals could end up paying proportionately less tax than poorer people. While it is probable that there were few very rich individuals in New Zealand at the time, this inequality would probably still have aggravated some of the poorer settlers.

In addition, the way the Schedule imposed the composition was problematic and its drafting caused much confusion amongst settlers. The overall intention of the Ordinance seems to have been to levy a tax of 1 per cent on income and property worth up to £1,200, at which point the tax cap of £12 would be reached. However, one newspaper opined that “[a]s the schedule now stands, the payment of the composition is perfectly voluntary, for there are neither figures declaring, nor words enforcing a rate above £1000”.⁷⁵ Indeed, according to the strict language and numerals in the Schedule or, more correctly, the lack thereof, there was no way to compel anyone to pay the composition. Taxpayers could only be required to rate themselves according to the Schedule that went up to £1,000, meaning that, technically, the maximum they had to pay was £10.

Despite the flaws in its construction, the composition was a necessary element of the Ordinance. Clause 5, in conjunction with cl 9, permitted the taxpayer to pay the composition without being required to state the amount that would otherwise have been payable by him or her. Hence, the maximum tax eradicated all compliance costs for those taxpayers who

⁷⁴ See Property Rate Ordinance 1844 8 Vict 2, cl 7.

⁷⁵ “Property Rate Ordinance” *Daily Southern Cross* (New Zealand, 8 February 1845) at 2.

simply chose to pay the £12. It therefore also lowered enforcement and monitoring costs for the revenue collection authorities. But perhaps the most important function performed by cl 5 was that it limited the perceived invasiveness of this new form of direct taxation. This was a serious issue for the colonists as many were very much against the concept of having to declare their income or the value of their property to the government. One author noted that the opposition to such a system was perhaps even greater in a new colony such as New Zealand because most of the colonists who carrying on a business were doing so chiefly on credit.⁷⁶ Many settlers therefore preferred to keep their affairs veiled by paying the composition despite possessing “not a tithe of the means that the rate would indicate”.⁷⁷

Anti-evasion and Deterrence

Although the fact that the Ordinance relied on the honesty of the taxpayer was almost used as a means of promoting the new tax, it was clear to the Legislative Council that some measures to discourage evasion would need to be implemented. The main anti-evasion provision in the Ordinance relied on whistleblowing. Settlers could inspect the returns of their neighbours — which were required by cl 14 to be displayed “in some conspicuous place or places” — and report them to the collector if they felt that any of the returns were untruthful. One tax theorist has opined that, in the case of taxes:⁷⁸

Successful monitoring turns on the capacity to pinpoint as well as to punish those guilty of cheating or corruption. In a tiny and compact polity where everyone regularly scrutinizes everyone else, this is a relatively simple matter.

The anti-evasion provisions in the Ordinance seem to have been drafted in accordance with this line of thinking. Rather than have authorities seeking to find out if taxpayers were cheating the system, the Ordinance relied on the taxpayers themselves to perform this task.

In practice this approach was unsuccessful. This may have been partly due to the general tendency of most of the population to evade the tax collectively. The reasons for this are examined in Part IV below, but, in short, it appears that many residents harboured more resentment towards the government than towards tax evaders. However, many also found a provision that encouraged whistleblowing to be distasteful. One newspaper commented that “[i]t is an invidious and ungracious task for

⁷⁶ William Brown *New Zealand and its Aborigines: Being an Account of the Aborigines, Trade and Resources of the Colony; and the Advantages it now presents as a Field for Emigration and the Investment of Capital* (2nd ed., J & DA Darling, London, 1851) at 241.

⁷⁷ *Ibid.* at 243.

⁷⁸ Levi, above n 1, at 30.

neighbours to become informers”.⁷⁹ Many settlers refused to report their neighbours who, in turn, continued to evade the tax with impunity.

In addition to the anti-evasion provisions, the Ordinance also relied on several penalty provisions to deter evaders. Clause 10 provided that if any person “knowingly and wilfully” made an underestimate, that person would be deemed guilty of a misdemeanour. Clause 11 imposed a “late filing” penalty on those who neglected to make a return and cl 12 set out the penalty for late payment of tax. While these provisions would normally have been effective in encouraging the prompt making of returns and payment of rates, their effect was once again undermined by the ease with which the tax could be, and was, evaded. The reasons for this are also explored in Part IV below.

Māori Exemption

Clause 20 was the shortest provision in the Ordinance but also one of the most important. It provided that “nothing herein enacted shall be held to extend to the property or income of any aboriginal native of the Colony”. In other words, Māori were exempt from tax under the Ordinance. The recent occurrences in the Bay of Islands had clearly indicated that Māori were unwilling to pay British taxes. FitzRoy had responded by removing customs duties and it would have been unwise for him to replace one tax on Māori with another, especially given the weak position his administration was in at the time. This was probably one of the most immediate reasons for exempting Māori from tax under the Ordinance.

Māori views on taxation were dissimilar to those of most Western societies. A writer in 1840 noted that Māori chiefs obtained some form of revenue from their subjects in the form of gifts, which were often made up of produce from plantations and even of the spoils taken from an enemy.⁸⁰ However, for Māori, giving ‘gifts’ to a chief was an act of reverence in a tight-knit community formed on the basis of commonality of descent. This was very different to handing money over to an unknown British tax collector who demanded it in the name of a monarch situated thousands of miles away from New Zealand. Māori would have been especially reluctant to pay taxes if they thought that the money they were handing over could be used against their interests. Clause 20 was an acknowledgment of this reality. The clause was also a reflection of FitzRoy’s own views regarding the extent to which Māori should be subject to British laws.⁸¹

79 “Property Rate Ordinance” (8 February 1845), above n 75, at 2.

80 JS Polack *Manners and Customs of the New Zealanders* (Capper Press, Christchurch, 1976) vol 2 at 41–42.

81 Letter from Governor FitzRoy to the Inhabitants of Wellington (29 January 1844) in Despatches from Governor of New Zealand, 1845 (247) HCPC XXXIII.71, 25 at 26.

Although the aboriginal natives of New Zealand are now British subjects, it is not a necessary consequence that they should be, in every respect, 'entirely' amenable to the 'British law.'

Perhaps the main reason necessitating the exemption, though, was the need to avoid the practical problems of making Māori subject to this new form of direct taxation. Prior to the arrival of Europeans, Māori society operated under a barter economy and the idea of currency, or a circulating medium of exchange, was unknown. Although the situation gradually began to change with the arrival of Europeans, many Māori continued to barter and trade as they always had.⁸² One historian noted that "[e]ven in 1845 when Maoris were much more aware of the value of coins, they were still reported to be commonly wearing them as ornaments".⁸³ Such a state of affairs would have made it very difficult to extract taxes effectively and directly from Māori, as many would not have had the means to pay them. An income tax generally requires a salaried work force and an economy in which income can be easily ascertained and monitored, but the Māori economy was still far from reaching such a state. In fact, had they not owned so much land, most Māori would probably have been under the £50 threshold and therefore exempt from tax.

However, rating Māori lands would have posed its own challenges in that Māori had a communal form of land ownership. One author has noted that, in regards to land, the influence of the tribe as a whole was of great significance, and any action affecting the land was only valid if it was ratified by the entire tribe.⁸⁴ This gave rise to many issues. If the land was communal, who was to pay the tax? What would happen if some of the tribe did not consent to paying it? Moreover, at this early stage of New Zealand's development as a British colony, there would have been no survey plans defining the boundaries and coverage of Māori land. How was the value and extent of such land to be established? There were also legal questions that could have posed an obstacle to rating Māori land. One report from the Waitangi Tribunal noted that:⁸⁵

Rates based on property values have their philosophical origins partly in the common law notion of tenure – the legal theory that all land is ultimately held from the Crown. ... This raises the question of whether land held by Maori under their customs should have been subject to rates.

It therefore seems that a provision to exempt Māori from tax under the Ordinance was very much a necessity. An obvious result of this exemption

82 See Hargreaves, above n 45, at 14–21.

83 Ibid, at 15.

84 Raymond Firth *Economics of the New Zealand Maori* (RE Owen (Government Printer), Wellington, 1959) at 374.

85 Tom Bennion *Maori and Rating Law* (Waitangi Tribunal, Wellington, 1997) at 1.

was that it significantly decreased the tax base. Māori, who outnumbered Europeans by almost 10 to 1,⁸⁶ had once contributed most of the government revenue through indirect taxes.⁸⁷ They were now contributing nothing while the government nevertheless continued to expend a significant amount of money on their behalf. This phenomenon in turn shifted the tax burden onto settlers who would have been displeased with what they saw as a newly imposed inequality.

Payment and Collection

Clause 7 provided that on 1 November of every year, any taxpayer who possessed property and had a predicted annual income valued at more than £50 had to provide a return stating the rate payable by that taxpayer as per the Schedule. The taxpayer did not have to specify how much of the rate was attributable to his or her property and how much was attributable to his or her income. Again, this was to prevent the Ordinance being perceived as forcing taxpayers to reveal their financial circumstances.⁸⁸

In accordance with cl 6, the rate declared by taxpayers then had to be paid over to the government in equal quarterly instalments with the first instalment due on the actual day the return was made and the subsequent instalments being paid over the following year. The clause also stated that the declared rate could be paid in advance if the taxpayer so elected.

The fact that the Ordinance required only one return to be made each year was problematic. The result was that any settler who arrived in New Zealand immediately after the return date was exempt from tax for the remainder of the year, and any taxpayer who acquired property after filing his or her return would not have to pay tax on it for that year.⁸⁹ In one newspaper, it was suggested that returns should be made twice a year to avoid such discrepancies⁹⁰ and a proposal was even made in one of the Legislative Council debates that returns should be made quarterly.⁹¹ For reasons unknown, these calls went unheeded and, as a result, it is quite likely that a significant amount of potential revenue was lost.

The administrative provisions governing the collection of the tax were situated in cls 19–21. Importantly, cl 21 gave the Governor the power to appoint and remove — on reasonable cause — tax collectors. It is unclear whether the power to remove incompetent collectors was ever

86 Appendix A to Minutes of Thursday, 3 April 1845: Return of the Native Population of New Zealand, as far as it has been ascertained [Population estimates for 1844], above n 52, at 47; Appendix A to Minutes of Saturday, 22 March 1845: Return of British Population in New Zealand at the end of the following Years, above n 52, at 45.

87 See Gardner, above n 23, at 59.

88 See for example Brown, above n 76, at 242.

89 "Property Rate Ordinance" (8 February 1845), above n 75, at 2.

90 Ibid.

91 Proceedings of the Legislative Council, Thursday, 26 September 1844 in Despatches from Governor of New Zealand, 1845 (247) HCPP XXXIII.71, 161 at 162.

exercised but, as discussed in Part IV below, sources suggest that there certainly would have been reasonable cause to do so.

IV THE COLLAPSE

Introduction

Initially, many settlers received the promulgation of the Ordinance enthusiastically. One newspaper praised FitzRoy and the Legislative Council for having:⁹²

... emancipated the Colony and the commerce of the country from the iron yoke of Customs and Customs officers, and for having broken the bars, and opened wide the doors of the dungeons in which Free Trade has hitherto been bonded and enchained.

However, during the initial euphoria, FitzRoy and the Legislative Council probably had little idea that they would be abolishing their revolutionary tax only six months later and replacing it with the very same Customs Ordinances they had so enthusiastically repealed. The mechanical deficiencies in the Ordinance, as discussed in Part III above, were partly to blame for this. However, the vast majority of the factors that would lead to the downfall of the Ordinance already subsisted in New Zealand's social and political structure at the time it was promulgated. These factors would greatly magnify the effect of the Ordinance's inherent deficiencies and play the biggest role in its failure.

Conflict Reignites

Perhaps the most immediate and visible cause of the repeal of the Ordinance would be the reignited conflict between the government and Māori. Despite the removal of the customs house, Hone Heke, the man responsible for cutting down the flagstaff at Kororāreka, remained rebellious and, on 10 January 1845, he and his men again cut down the flagstaff.⁹³ This was the prelude to outright war. The flagstaff was re-erected and this time a regiment of troops was stationed in Kororāreka to guard the new pole.⁹⁴ However, these troops "were replaced with Maori soldiers in a pitiful bid to outwit Heke, presupposing that he would not attack 'his own people'".⁹⁵ As it turned out, Heke did not need to attack his fellow countrymen. On

92 "Property Rate Ordinance" *Daily Southern Cross* (New Zealand, 28 September 1844) at 2.

93 Moon and Biggs, above n 2, at 408.

94 *Ibid.*, at 409.

95 Paul Moon *Hone Heke: Nga Puhi Warrior* (David Ling Publishing Ltd, Auckland, 2001) at 61.

19 January 1845, he and his men marched through the Māori soldiers who were on guard duty and, without any intervention, cut down the flagstaff yet again.⁹⁶

FitzRoy's government was in a state of panic and a serious conflict appeared to be imminent. Heke now planned his next attack against the town and the forces assembled there, which included the warship *Hazard*. Before dawn on 11 March 1845, he made his move. After a brief skirmish, Heke, along with some of his men, triumphantly cut down the symbol of British sovereignty and authority for a fourth time. The once thriving, but now almost deserted, town was then looted and burnt.⁹⁷ The only remaining option open to FitzRoy was outright war. He convened the Legislative Council and began to plan his next move.⁹⁸

The sacking of Kororāreka was a testament to the fact that the removal of the customs duties had not achieved its intended purpose of securing a permanent peace. Why did a measure that was demanded by Māori and settlers alike fail to prevent an uprising? Felton Mathew, the Surveyor-General at the time, commented that the removal of customs had not resulted in lower prices; shopkeepers simply pocketed the surplus.⁹⁹

Another theory was that Māori had never paid any substantial duties to start with, due to the fact that smuggling was so rampant, so that the removal of customs changed nothing.¹⁰⁰ However, it appears that the true causes for Māori restlessness had deeper roots. FitzRoy remarked that:¹⁰¹

All efforts to remove discontent from the minds of the natives on account of the effects of the Customs establishment have failed. It is British authority that they dislike

While the Governor's removal of the duties had secured a temporary peace, many Māori remained unhappy with the course of events since the signing of the Treaty. They had been promised prosperity and improved conditions, but they had received the opposite. Put simply, it appeared that Māori did not trust the British anymore. The customs establishment was only one of the causes of this ill feeling and its removal was not enough to effect a change in the general mindset of many Māori. Now, with outright war having broken out, one of the immediate reasons for the existence of the new tax — the appeasement of Māori — had disappeared.

96 Moon and Biggs, above n 2, at 409.

97 See *ibid*, at 410–415.

98 See *ibid*, at 419.

99 Felton Mathew "The State of New Zealand — Native Troubles" in J Rutherford (ed) *The Founding of New Zealand: the journals of Felton Mathew, first surveyor-general of New Zealand, and his wife 1840–1847* (AH and AW Reed, Dunedin, 1940) 213 at 218.

100 *Ibid*.

101 Letter from Governor FitzRoy to Lord Stanley (9 April 1845) in Communications between Lord Stanley and Governor FitzRoy and Lieutenant Governor Grey, relative to New Zealand, 1846 (337) HCPP XXX.151, 27 at 27.

Evasion and Corruption

However, it would be a mistake to assume that the Ordinance was repealed solely because the removal of the customs duties had failed to suppress a Māori revolt. The Ordinance had a more rudimentary problem: it simply did not generate enough revenue. In the first quarter of its existence it yielded under £1,000,¹⁰² which was paltry in comparison to the returns received from the customs regime.¹⁰³ But why did the Ordinance generate so little? As already mentioned, it contained many shortcomings in its drafting due to the hastiness of its promulgation. There were plenty of loopholes and inadequacies to be exploited. However, there were also underlying social and political factors that magnified the harmful effect of these deficiencies; deficiencies that, by themselves, would probably not have caused such a spectacular failure.

The generally negative disposition that many settlers had towards the government was one factor that made taxpayers less than forthcoming with their tax compliance. While views of government corruption were often unjustified, they were sometimes warranted. Corruption and ineptitude were also evidently prevalent among the officers who administered the tax. One newspaper was particularly scathing in regards to tax collectors: “[i]t is impossible for any person who sits at his desk all day, either to *collect* or *gather* anything, but this has been the system adopted here”.¹⁰⁴ In a rare occurrence, taxmen were actually being publicly accused of not collecting enough tax!

However, the Ordinance depended for its success not so much on the efficiency of those who administered it, but on the honesty of the actual taxpayers. The main reason for this was that FitzRoy’s government simply did not have the resources to enforce or monitor the new tax stringently. As discussed in Part III above, the few anti-evasion provisions that were included in the Ordinance were wholly inadequate. Both the public and FitzRoy soon became aware of this. People quickly began to question the appropriateness of relying almost entirely on the honour of taxpayers to make correct returns. In one newspaper, the editors opined: “[w]e would not take the valuation of any man’s property at his own arbitrary will and pleasure”.¹⁰⁵ Yet this is exactly what the Ordinance did.

Levi commented that taxpayers cooperate only when they expect

¹⁰² Appendix C to Minutes of Saturday, 8 March 1845: Statement of the Amount of Property Rates that have been received at the different Settlements, from 1st November 1844 to 31st January 1845, as far as ascertained [Returns from Property Rate Ordinance from period 1 November 1844 to 31 January 1845] in Communications between Lord Stanley and Governor FitzRoy and Lieutenant Governor Grey, relative to New Zealand, 1846 (337) HCPP XXX.151.45 at 45.

¹⁰³ See Appendix B to Minutes of Tuesday, 8 April 1845: A Return of the Revenue derived from the Customs in New Zealand since the Establishment of the Colony, and of the Charges on the Collection of the same [Statistics sent to Colonial Office], above n 32, at 49.

¹⁰⁴ “The Proposed New Taxes” *Daily Southern Cross* (New Zealand, 4 January 1845) at 2 (emphasis in original).

¹⁰⁵ *Ibid.*

that others will cooperate, as nobody wants to be a “sucker”.¹⁰⁶ Under the Ordinance, honest people were noticing that they were bearing the brunt of the tax, while others were not paying their fair share. In other words, the honest settlers were the “sucker[s]”.

The endemic evasion of the Ordinance would be the true cause of its downfall.

Taxation Without Representation

There were many factors that encouraged evasion to become so widespread but the maxim ‘no taxation without representation’ played a vital role in the failure of the Ordinance. In order to appreciate why this was the case, it is necessary to understand the structure of the colonial government at the time. The Letters Patent of 16 November 1840 formally constituted New Zealand as a separate Crown colony. They also specified the form of its administration. There would be a Governor, a Legislative Council and an Executive Council. The Governor held the greatest power in the administration of the colony with the Executive Council providing advice and assistance in the exercise of that authority. The Legislative Council conducted the legislative function of the government by passing ordinances and it generally consisted of the Governor and six other members — three of whom were Crown delegates while the remaining three were appointed by the Governor from the community.¹⁰⁷ If the latter three disagreed with him on any issue, the Governor “could invariably count on the support of the three permanent officials”.¹⁰⁸ Only the Governor could introduce questions for debate and he held a casting vote in the event of a deadlock.¹⁰⁹ As one author bluntly put it with respect to Australian governors, “[t]he Governor basically enjoyed autocratic rule, making what regulations he pleased”.¹¹⁰

This lack of any representative institutions in the New Zealand government was the source of much discontent among settlers, especially when it came to the issue of direct taxation. Under the customs establishment, the issue was not as pressing because the customs duties were, by their very nature, hidden. People were not visited by any tax collectors, as the taxes were paid by importers at the docks. This was reflected, at least to some extent, in the increased prices of goods but, although consumers paid the tax indirectly, it remained veiled and out of sight. However, the shift to direct taxation brought about a change in attitude. Settlers now had to contribute to the government directly from their own pockets without the involvement of any intermediaries. Under the customs regime, they could regulate the amount of tax they paid since they had the option of simply

¹⁰⁶ Levi, above n 1, at 53.

¹⁰⁷ See AH McLintock *Crown Colony Government in New Zealand* (RE Owen (Government Printer), Wellington, 1958) at 99–101.

¹⁰⁸ *Ibid.* at 101.

¹⁰⁹ *Ibid.*

¹¹⁰ Harris, above n 18, at 13.

not purchasing imported goods on which duties had been paid. However, settlers now had to give a specified portion of their overall wealth whether they liked it or not. As a result, the effects of the Ordinance were felt more strongly by taxpayers than those of customs duties. There was not yet any withholding mechanism such as PAYE to ease the pain of parting with money; taxpayers had to personally hand over their cash or write out a cheque to the government. In one sense, this new form of direct taxation was more democratic. It was clearly visible, and allowed citizens to know the extent of their contribution toward the state treasury and decide for themselves whether the benefits offered in return were commensurate. However, while the tax itself may have been democratic, the institutions that created and administered it were not. Now that citizens could really feel the sting of taxation, they wanted a stake in the government that was taking their money.¹¹¹

Many New Zealanders began to argue that it was unconstitutional for the unrepresentative government of New Zealand to impose taxes on them at all. British control in New Zealand was predicated on an English statute that gave the Crown authority to create an independent colony from any dependency of New South Wales and to constitute a Legislative Council to enact laws necessary only “for the peace, order, and good government of any such colony”.¹¹² It was argued by many that no explicit words were used to give the Crown the power to impose taxes and it could not therefore grant such powers to a Legislative Council that possessed no representative element.¹¹³ The Crown, for its part, obtained legal advice from the Solicitor-General of the United Kingdom and two attorneys-general — one current and one former — to the effect that the Legislative Council of New Zealand had the requisite authority to pass an Act imposing duties and taxes upon the population of New Zealand.¹¹⁴ It did not matter whether the legislative body imposing such taxes was of a representative character or not because, according to the home government, the power of taxation existed regardless. Of course, the legal opinion obtained by the Crown was of little comfort to the settlers. Samuel Martin, an active critic of the government, who FitzRoy had appointed to the Legislative Council in an attempt to show impartiality,¹¹⁵ wrote the following:¹¹⁶

111 See Walter Brodie *Remarks on the Past and Present State of New Zealand, its Government, Capabilities, and Prospects; with a Statement of the Question of the Land-claims, and remarks on the New Zealand Land Company; also, a Description (never before published) of its Indigenous Exports, and Hints of Emigration, the Result of Five Years' Residence in the Colony* (Whittaker and Co, London, 1845) at 89.

112 New South Wales and Van Diemen's Land Act 1840 (UK) 3 & 4 Vict c 62, s 3.

113 Letter from William Burge to Court of Directors of the New Zealand Company (10 July 1845) in Correspondence relative to Original Constitution of Legislature of New Zealand, 1845 (660) HCPP XXXIII.373, 3 at 4–5.

114 Question submitted for the Opinion of the Attorney and Solicitor-general, and Sir Thomas Wilde; and Opinion thereon [Legal advice to Crown in regards to legality of taxation in New Zealand] in Correspondence relative to Original Constitution of Legislature of New Zealand, 1845 (660) HCPP XXXIII.373, 5 at 5.

115 Brodie, above n 111, at 87.

116 SMD Martin *New Zealand; In a Series of Letters: containing an Account of the Country, both before and since its Occupation by the British Government; with Historical Remarks on the Conduct of the Government, the New Zealand and the Manakau Companies; also a Description of the Various Settlements, the Character of the Aborigines, and the Natural Productions of the Country* (Simmonds & Ward, London, 1845) at 346.

Let the people of New Zealand demand their rights ... and if the Government withhold them, then let them refuse to pay taxes, and have the question fairly tried before a court of law in England

That a member of the Legislative Council should advocate that settlers not pay their taxes because they were not represented is indicative of the significance of this issue. Interestingly, an income tax had been successfully introduced in the United Kingdom only two years prior to the promulgation of the Ordinance.¹¹⁷ But Britons, unlike New Zealanders, were ruled by a representative government and were therefore more willing to allow themselves to be taxed directly. One commentator has suggested that British citizens would never have allowed a strong monarch to impose such a tax and that they only accepted the income tax when they felt they had adequate political influence to limit its application.¹¹⁸ It seems that direct taxation and representation were seen as inseparable, and the evolution of the latter was necessary for the imposition of the former. In New Zealand this process had not yet occurred. The result was a strong reaction from many settlers who exploited the deficiencies in the Ordinance and vociferously advocated its evasion.

The Troubling Southern Settlements

Interestingly, the greatest opposition to the Ordinance would come from the southern settlements of New Zealand. The *Daily Southern Cross* reported that, of the more than 9,000 settlers living in Wellington, Nelson and New Plymouth, less than 600 actually made returns.¹¹⁹ By contrast, the Ordinance seems to have met expectations in the north.¹²⁰ Why were southerners proving to be so stubborn? For one thing, government expenditure in the south was minimal. While southern settlers could clearly see how much they were contributing to the government, they could also clearly see that little of it was coming back to them.¹²¹ New Zealand historian Gardner noted that most government money in the early 1840s was spent in the capital which, at the time the Ordinance was in force, was the northern town of Auckland.¹²² This inequality in the application of public funds was very apparent to southern settlers who in turn felt justified in evading FitzRoy's tax.

Perhaps the most pressing problem in the south, however, was the issue of land. Prior to New Zealand becoming a British colony, many

117 Income Tax Act 1842 (UK) 5 & 6 Vict c 35.

118 Levi, above n 1, at 140.

119 "Property Rate Ordinance" *Daily Southern Cross* (New Zealand, 1 March 1845) at 2.

120 See FitzRoy *Remarks on New Zealand, in February 1846*, above n 38, at 35.

121 See for example "Meeting of Rate-payers" *Nelson Examiner and New Zealand Chronicle* (New Zealand, 30 November 1844) at 155.

122 Gardner, above n 23, at 61.

settlers had already engaged in land dealings with Māori.¹²³ However, on proclaiming sovereignty over New Zealand, Hobson was instructed to inform settlers that:¹²⁴

... Her Majesty will not acknowledge as valid any title to Land in that Country which is not either derived from, or confirmed by, a Grant to be made in Her Majesty's name, and on her behalf.

All purchases made prior to the Treaty were now subject to government review. Despite the fact that settlers were assured that they would not be dispossessed of lands that had been purchased "on equitable conditions",¹²⁵ the reality was that many of the European claims to vast tracts of land were dubious at best.¹²⁶

But what relation does this have to the failure of the Ordinance? Southern settlements such as Wellington were established by the New Zealand Company, an entity created to promote the systematic colonisation of New Zealand. Its function was to buy land cheaply from Māori and sell it at higher prices to incoming settlers.¹²⁷ In the period prior to Hobson's arrival and the signing of the Treaty, the New Zealand Company had been purchasing large pieces of land from Māori, mostly in the south. These lands would form many of the southern settlements.¹²⁸ As a result, when British sovereignty was proclaimed, titles to land making up entire settlements effectively became invalid pending government investigation. This was the true root of the strong resentment in the south towards the government. Southerners wanted to get legal title to their lands and they were not about to give their money to a government that was preventing this.

Indeed, the property rate imposed by the Ordinance could not be expected to function properly in the south since, after the proclamation of sovereignty, many southern settlers simply did not know whether they would be allowed to keep their land. The reality was that "they were merely landholders on sufferance. The land itself had a certain intrinsic value, but the difficulty lay in attaching a specific value to an imaginary title".¹²⁹ As a result, settlers' land would have been seen as worthless without a Crown grant. Many would therefore have resolved that they did not have to declare it under the Ordinance. The results were, of course, catastrophic.

123 See Moon and Biggs, above n 2, at 281.

124 Lord Normanby "Annexation", above n 5, at 13.

125 *Ibid.*

126 See Moon and Biggs, above n 2, at 281.

127 *Ibid.*, at 152–153.

128 See *ibid.*, at 176–179.

129 "Meeting of Rate-payers", above n 121, at 155.

The Death of the Property Rate Ordinance

It quickly became apparent that, by abolishing the customs house completely and waiving the government's right of pre-emption over Māori land, FitzRoy had placed all his faith in the Ordinance that was now failing to produce an adequate revenue. By contrast, when the income tax was reintroduced in the United Kingdom in 1842, customs duties were only reduced rather than completely removed. Indeed, customs and excise taxes still generated 64 per cent of the total revenue in 1845 despite an increasing reliance on the income tax.¹³⁰ FitzRoy's tax may simply have been too revolutionary. By the time the first quarter of 1845 was nearing its end, and only six months after the Governor had promulgated his tax, evasion was so rampant that the Ordinance was clearly no longer sustainable. Settler opinion was firmly set against it and one newspaper declared that FitzRoy's tax was "a melancholy farce, at which we know not whether to laugh or cry".¹³¹

Recognising the hopelessness of the situation, FitzRoy assembled the Legislative Council on 8 April 1845 and told it that:¹³²

It was an old saying in England, that it is folly to go to law with a township; so it would be here, for the Government would have had to go to law with two-thirds of the population to enforce direct taxes.

Although the Governor continued to believe strongly in the principles behind the Ordinance, in his eyes the situation now demanded a different course of action. He embarked on the painful process of rationalising his view that the only way forward was to reintroduce customs duties. He reasoned that in a state of war, settler populations would become concentrated in a few principal areas and, with less dispersion, customs would be easier and cheaper to collect and smuggling harder to effect.¹³³ On 8 April 1845 the Property Rate Repeal Ordinance¹³⁴ was passed. Apart from abolishing FitzRoy's revolutionary form of taxation, it also reinstated the customs duties which had previously been the source of so much restlessness. New Zealand's first attempt at direct taxation had officially come to an end.

130 Carolyn Webber and Aaron Wildavsky *A History of Taxation and Expenditure in the Western World* (Simon and Schuster, New York, 1986) at 352–353.

131 "Saturday, November 2, 1844", above n 61, at 2.

132 "Legislative Council: Tuesday, April 8" *New Zealand Spectator and Cook's Strait Guardian* (New Zealand, 31 May 1845) at 3.

133 Letter from Governor FitzRoy to Lord Stanley (9 April 1845), above n 101, at 27.

134 Property Rate Repeal Ordinance 1845 8 Vict 4.

V CONCLUSION

Surveyor-General Felton Mathew effectively summed up the situation that FitzRoy found himself in when he arrived in New Zealand:¹³⁵

... [W]ith a bankrupt government and a large native population gradually rising into turbulence, Captain FitzRoy assumed the reins of Government with an empty Treasury, and a military force of One hundred and fifty men to protect six or seven scattered settlements.

At the same time, the two main sources of government revenue, customs duties and land sales, were yielding inadequate returns for various reasons. Settlers and Māori alike were used to a laissez-faire society with no impediments to trade and were demanding the removal of both the customs house and the government's right of pre-emption over Māori land. They were, in effect, asking FitzRoy to overhaul the fiscal system of New Zealand completely. In this respect, he was left with little choice but to succumb to their demands. FitzRoy's riposte was the Property Rate Ordinance.

However, due to the particular circumstances of New Zealand, the Ordinance was perhaps doomed to failure from the very beginning. Many Māori were not only opposed to the customs establishment, but were also opposed to British authority in general. For this reason, the Ordinance did not secure any permanent peace. But the new tax was not generating any revenue either. It relied on the honesty of taxpayers in assessing themselves, thus making evasion a very inviting option. Taxpayers enthusiastically obliged by underrating themselves or making no returns at all. They felt justified in their exploitation of the many deficiencies in the Ordinance for a variety of reasons. Some thought that it was illegal for them to be taxed without representation. Others could not see any government benefits or protection coming to them in exchange for their taxes. Many simply stopped complying with the Ordinance because nobody else was. In the end, the Ordinance was so avidly evaded that it became impossible to sustain.

Soon after the repeal of the Ordinance, FitzRoy received the news that he was being recalled.¹³⁶ He was replaced by George Grey who, unlike his predecessor, was immediately given substantial financial assistance from the United Kingdom as well as a salary almost twice as large.¹³⁷ It seems that the Colonial Office had realised just how much they had underestimated the costs of colonising New Zealand. FitzRoy departed from New Zealand

¹³⁵ Mathew, above n 99, at 225.

¹³⁶ See Moon and Biggs, above n 2, at 398–399.

¹³⁷ See Letter from Lord Stanley to Lieutenant-Governor Grey (28 June 1845) in Communications between Lord Stanley and Governor FitzRoy and Lieutenant Governor Grey, relative to New Zealand, 1846 (337) HCPP XXX.151, 75 at 75.

for England in early 1846.¹³⁸ The end of his tenure as Governor marked the end of a particularly explosive period in New Zealand's tax history. It would be many years before the country's fiscal system would again experience such sweeping and revolutionary changes.

¹³⁸ Moon and Biggs, above n 2, at 457.