

CAVEAT HISTORICUS: *BRYCE V RUSDEN REVISITED*

LET the historian beware of writing contemporary history, for "whosoever in writing a modern History, shall follow truth too near the heels, it may haply strike out his teeth".¹ Historians have ignored this warning at their peril. The law of libel has been brought to bear on a number of writers, especially those who have followed the truth too near the heels of politicians. It is one thing for a person's political opponents to malign them in the House; it is another for an historian to try it outside while the person is still living. It is safer to deal with the past, while the dust settles on the present.

Last century a New Zealand politician, John Bryce, brought an action for libel against an Australian historian, George William Rusden, who had written history as it was happening. The *Bryce v Rusden*² libel trial of March 1886 was heard before Baron Huddleston and a special jury in the Queen's Bench Division of the High Court of Justice in London. The trial lasted eight days, and was followed with great interest by press and public alike. John Bryce was a member of three successive New Zealand ministries between 1879 and 1884. George Rusden was a public servant and historian who had allegedly defamed Bryce by portraying him as a cruel and callous person, both as a militia officer and later as Minister of Native Affairs. The verdict in the case went against Rusden and resulted in the suppression of his book, *History of New Zealand*³ and the award of £5000 damages to Bryce. The London press generally applauded the verdict although *The Times* remarked that the penalty for writing contemporary history had rarely been so heavily paid.⁴

Rusden was born in England, the son of a clergyman, but had lived in Australia since his teens. He had originally wanted to study law, but

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1 Sir Walter Raleigh, cited in Beaglehole, *New Zealand: A Short History* (Allen & Unwin, London 1936) p9.

2 *Bryce v Rusden* [1885-86] 2 TLR 435; *Bryce v Rusden: In the High Court of Justice, Queen's Bench Division, Royal Courts of Justice, Thursday, 4th March, 1886, before Baron Huddleston and a special jury* (1886).

3 Rusden, *History of New Zealand* (Chapman & Hall, London 1883).

4 *The Times*, 13 March 1886.

became instead a travelling 'agent' for the establishment of a system of national schools in New South Wales and later an Inspector of Schools.⁵ His territory covered the whole of eastern Australia; he had an immense task which was spread over two years and ten thousand miles of "arduous and dangerous travel".⁶ At times he and his horses barely survived the journey. In 1851, when Victoria separated from New South Wales, he resigned his post and became chief clerk to the Colonial Secretary in the Victorian Parliament, and by 1856 clerk of the Legislative Council and then clerk of the Parliament.⁷

Rusden was a prolific writer on political, religious, educational and literary topics. As an older man, he was seen as a "quaint old world figure", a "delicious bundle of prejudices", fond of cultivating friendships in high places, yet kind and generous to a fault, and "honest as the day". He was said to be "a violent Tory on everything except where natives were concerned".⁸ During his long journeys through the outback he had often come into contact with Aborigines at first hand. His work for the Victorian Parliament had brought him in touch with the history of his adopted homeland and had raised his interest in the history of New Zealand as well. Over the years many friends had suggested to Rusden that he write a history of the two countries, and although he finally undertook to write a one volume history of Australasia, he ended up writing three volumes on Australia and New Zealand each, all of which were published in 1883. In Australia his *History of Australia* came in for some scathing comment; Alfred Deakin, a prominent figure in Australia's political history, called it "as untrustworthy as a partisan pamphlet well can be without deliberate dishonesty".⁹

However, no Australian politician took exception to Rusden's *History of Australia*¹⁰ as Bryce did to his *History of New Zealand*. Bryce was then Minister of Native Affairs in the Whitaker ministry; he had been Native

5 Serle & Ward (eds), *Australian Dictionary of Biography, 1851-1890* Vol 6 (Melbourne University Press, Melbourne 1976) p72.

6 Austin, *Australian Education, 1788-1900: Church, State and Public Education in Colonial Australia* (Pitman, Melbourne 1961) pp53-54.

7 As above p55; see also Humphreys (ed), *Men of the Time in Australia: Victorian Series* (M'Carron, Bird & Co, Melbourne 1878) p182.

8 Serle & Ward (eds), *Australian Dictionary of Biography, 1851-1890* Vol 6 pp72-73.

9 Deakin, *The Crisis in Victorian Politics, 1879-1881* (Melbourne University Press, Melbourne 1957) ppxii, 61.

10 Rusden, *History of Australia* (Melville, Mullen & Slade, Melbourne, 2nd ed 1897).

Minister most of the time since 1879, and before that chairman of the Native Affairs Committee since 1876. Bryce was a self-educated man with little formal schooling who had arrived in New Zealand in 1840 as a seven-year-old. From an early age he worked on farms, in the bush, and later on the Australian goldfields, before settling on his own farm near Wanganui. He was severely practical, stubborn and independent, and a difficult colleague. Bryce was very eurocentric, and his attitudes and interests remained those of the frontier settler. He disapproved of the way governments handled native affairs and believed the Maori must be brought to recognize the supremacy of the Europeans.¹¹ Although he was a west coast settler and had lived much of his life in close proximity to the Maori, he neither spoke the language nor understood or admired the people or their culture.

When Titokowaru's war threatened Wanganui in 1868, the local settlers formed the Kai Iwi Cavalry, and Bryce, with a lieutenant's commission, was put in command. In November 1868 the Kai Iwi Cavalry encountered a group of Hauhau, or 'rebels', who proved to be unarmed children, boys 10 or 12 years old, out chasing pigs and geese near Handley's woolshed on the Nukumarū flats in south Taranaki. The troop charged on the 'enemy' and shot or sabred several boys, killing two and wounding others. The commanding officer reported that they had killed eight Hauhau "with sabre, revolver or carbine", that Sergeant George Maxwell, who was "extremely gallant", sabred two and shot one, and that Lieutenant Bryce, commanding the troop, was "prominent ... and set the men a gallant example".¹² There was no mention of the fact that the 'enemy' were children.

Handley's woolshed affair gave rise to the alleged libel, and thus the case. In the second volume of his *History of New Zealand*, Rusden stated that Bryce and Maxwell had dashed upon women and children "and cut them down gleefully and with ease".¹³ In July 1883, soon after Rusden's book had made its appearance in New Zealand, Bryce told the House of Assembly that the book was full of slanders and an attack upon the colony, an effort "to prove that the New Zealand colonists are villainous in their

11 Riseborough, "John Bryce, 1833-1913: Farmer, Soldier, Politician" in Oliver & Orange (eds), *The Dictionary of New Zealand Biography* Vol 2 (Bridget Williams Books, Wellington 1993) pp61-62.

12 Newland to Colonel Whitmore, 27 November 1868: NZ, Parl, *Appendices to the Journals of the House of Representatives* (1869) A3 at 12; Belich, *I Shall Not Die: Titokowaru's War, New Zealand, 1868-9* (Allen & Unwin/Port Nicholson Press, Wellington 1989) ch10.

13 Rusden, *History of New Zealand* Vol 2 p504.

entirety". He found it a painful thing to be accused of the "gleeful slaughter of young women and children", and was not ashamed that he had publicly called the author "a liar, a slanderer and a coward".¹⁴ George Hutchison, a west coast politician like Bryce, thought the Native Minister had done well to defend himself from the charges levelled against him, but he thought "in a calmer moment, he must see that it is a mistake to brand an historian as a liar, a slanderer, and a coward, because he has been misinformed on a particular point". Few historians, he believed, would escape under such a system.¹⁵

Many of Bryce's colleagues were prepared to champion him to the extent of voting public money to enable him to take a criminal prosecution against Rusden in a London court.¹⁶ Several of them thought their own honour had been impugned, but for various reasons they sat back quietly and left the fight to Bryce. Frederick Whitaker, every bit as maligned by Rusden as Bryce, was said to be "wiser than to call attention to the fact". Sir Francis Dillon Bell believed that if Whitaker saw the evidence, he would deter Bryce from going on with the exposure.¹⁷

Rusden had been in New Zealand twice on brief visits. In 1878 he spent Christmas with the then Premier, Sir George Grey, at his Kawau Island home where he was given access to "a large number of original and private documents"; and in 1881 he stayed at Government House in Wellington with Governor and Lady Gordon.¹⁸ Lady Gordon, at least, did not relish his visit, as she told her sister in England:

We have had a horrid man staying here for a week - Mr Rusden (Clerk of the Parliament at Melbourne). He is writing a history of New Zealand, and Arthur thought he ought to be asked to stay to study Dispatches. He is a clever man, but odious, is very familiar and Colonial. We all hate him and see no prospect of getting rid of him. He is

14 NZ, Parl, *Debates* (1883) Vol 44 at 520-521; *Taranaki Herald*, 25 April 1883.

15 NZ, Parl, *Debates* (1883) Vol 44 at 521.

16 At 613.

17 Rusden to Mantell, 11 August 1885: Auckland Institute and Museum Library (AIML), *Letters of GW Rusden to WBD Mantell and Others, 15 July 1880 - 20 August 1895*; also found in Alexander Turnbull Library (ATL), *Mantell Family Papers* MS papers 83 folder 370.

18 *Bryce v Rusden: In the High Court of Justice* pp265, 270, 337.

provided with a sitting room, but he won't stay in it, and is always intruding in the drawing rooms!¹⁹

When Gordon saw the book in 1883 he thought it "much too long, and very much too abusive to be effective ... If it were boiled down into a one-volume essence and the contents well strained, it might be read, and if read might do good."²⁰

In writing his book, Rusden had been motivated by humanitarian ideals - carried away by them in fact. He had found the New Zealand Government's native policy repugnant in the extreme, and he set out to expose it; he would see "justice done upon the rascals" if he but lived a few months.²¹ He admitted to having used "expressions of indignation" in his writing, but excused them by arguing that "you cannot rouse sympathy without real feeling on your own part".²² He warned Sir Francis Dillon Bell, New Zealand's Agent-General in London, that he might "offend some persons by telling the plain truth about New Zealand affairs", but said it would have been "absurd to keep back the truth on that account". Bell agreed "and said that no history written to avoid giving offence could be worth a rap".²³

Rusden's first visit to New Zealand awakened his interest in events on the west coast of the North Island, and, "prescient of something to come", he began collecting newspaper cuttings about what was going on there.²⁴ He was first "alerted to Bryce's conduct" in January 1880 when Bryce sent the armed constabulary across the Waingongoro River to resume roadmaking,²⁵ just when the West Coast Commission began its hearings on the coast. The Commission had been established to enquire into Maori grievances over roadmaking, surveying and other intrusions into their territory.²⁶ As the situation on the coast deteriorated in 1881, Rusden's indignation mounted, and about half of the third volume of his *History of*

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- 19 Lady Gordon to Lady Ryan, 10-17 July 1881: ATL, *Sir Arthur Gordon Papers* Acc 86/4.
- 20 Gordon to Mantell, 6 September 1883: ATL, *Mantell Family Papers* folder 287.
- 21 Rusden to Mantell, 27 November 1881: AIML, *Letters of GW Rusden to WBD Mantell and others, 15 July 1880 - 20 August 1895*.
- 22 As above Rusden to Woodhouse (Mantell's English cousin), 2 July 1883.
- 23 As above Rusden to Mantell, 18 October 1882.
- 24 As above Rusden to Mantell, 27 November 1881; see also Riseborough, *Days of Darkness: Taranaki, 1878-1884* (Allen & Unwin, Wellington 1989).
- 25 *Bryce v Rusden: In the High Court of Justice* p274.
- 26 NZ, Parl, *Appendices to the Journals of the House of Representatives* (1880) G2 Appendix A at 1-2.

New Zealand was devoted to the events surrounding the invasion of Parihaka on 5 November 1881. He had been in constant communication with New Zealand in an effort to tap all possible sources of information, and early in 1882 could write "I have now I think full material to enable me to depict the doings on 19 October, 5 November, etc. It is my fault if the picture be wanting in lurid colours."²⁷

The events at Parihaka were not part of the alleged libel in the case brought by Bryce, although Sir John Gorst, Rusden's counsel, contended that they were, in that Bryce's treatment of women and children there justified Rusden's description of him as cruel and callous.²⁸ The question of Parihaka occupied the greater part of Gorst's cross-examination of Bryce, and of his speech to the jury. Yet Sir Henry James, Bryce's counsel, relegated the whole Parihaka history to the category of 'political events', nothing at all to do with the case. The judge, too, thought it would be advisable to keep clear of all discussion on the repressive measures taken at Parihaka; it was politics, he said, and the illegality of Bryce's conduct there was not to be considered.²⁹ Bryce was sure the Parihaka evidence was immaterial. On the third day of the trial he noted that "John Gorst has not left Parihaka yet - a thing which has nothing to do with the case really".³⁰ But it was Bryce's conduct at Parihaka that had made Rusden go back to his already completed second volume and add the section on the attack on the children at Handley's woolshed, which in the end was his undoing. By the time Rusden finished the three volumes his writing had become a campaign, a crusade for justice for all Maori, and especially for those at Parihaka.

Regardless of the support (or lack of it) from his colleagues, Bryce was not to be deterred, although he did decide to proceed with a civil action in London rather than a criminal prosecution, since evidence could then be taken by commission in New Zealand. The case could have been heard in New Zealand, and indeed a writer for *The Times* of London commented that it was

27 Rusden to Mantell, 14 February 1882: AIML, *Letters of GW Rusden to WBD Mantell and others, 15 July 1880 - 20 August 1895.*

28 *Bryce v Rusden: In the High Court of Justice* pp5-6, 31; Rusden to Mantell, 1 September 1883: AIML, *Letters of GW Rusden to WBD Mantell and others, 15 July 1880 - 20 August 1895.*

29 *Bryce v Rusden: In the High Court of Justice* pp417, 494, 496.

30 ATL, *Diary of Hon J Bryce* 6 March 1886.

unusual - probably unprecedented for a Colonial Minister to bring his wrongs to this country and seek redress in an English court of law for a libel on his character; and it might not be well often to conduct here inquiries relating to far distant persons and places.³¹

Rusden's New Zealand solicitors, Messrs Izard and Bell, advised his London solicitors that it was in Rusden's favour that the case be tried in England, as in New Zealand popular feeling was entirely on Bryce's side, "or at any rate nearly so, and we should much fear Mr Rusden's chances with a New Zealand jury".³²

In November 1884, Bryce's lawyers applied for a commission to take evidence in New Zealand from, among others, some of the force engaged at Nukumarū in 1868. Rusden hastened to select his own witnesses, including the survivors of the attack and their living relatives who had dressed the wounds and buried the slain.³³ He told his friend Walter Mantell that "when such a creature" as Bryce had the impertinence to attack him for recording things which had been openly repeated in New Zealand without Bryce challenging them, he would not, through negligence, "spare him any punishment due to him in the conduct of the defence".³⁴

In London Bryce got the best possible judge for his purposes, the aged, idiosyncratic, and somewhat querulous Baron Huddleston, as well as some excellent counsel, Sir Henry James QC MP, Attorney-General in the Gladstone ministry in 1882, assisted by Mr Murphy QC. Rusden was defended by Sir John Gorst QC MP, and Sir Richard Webster QC MP. Gorst knew New Zealand and the history he was dealing with. He had lived in the Waikato from 1860 to 1863,³⁵ and he had written his own account of those times.³⁶

31 *The Times*, 13 March 1886.

32 Izard & Bell to Sladen & Mackenzie, 21 June 1884: AIML, *Letters of GW Rusden to WBD Mantell and others, 15 July 1880 - 20 August 1895*.

33 As above Rusden to Mantell, 20 November 1884.

34 As above 4 August 1884.

35 Sorrenson, "John Eldon Gorst, 1835-1916: Lawyer, Teacher, Magistrate, Civil Commissioner, Politician, Writer" in Oliver & Orange (eds), *Dictionary of New Zealand Biography* Vol 1 (Allen & Unwin, Wellington 1990) pp154-155.

36 Gorst, *The Maori King: Or the Story of Our Quarrel with the Natives of New Zealand* (Macmillan, London 1864).

It was apparently Gorst who advised Rusden that he had no need to be anxious about the outcome of the trial, since his primary sources had impeccable credentials: British and New Zealand parliamentary papers, parliamentary debates, and, especially as regarded the libel, Sir Arthur Gordon, Governor of New Zealand in 1881. Gordon had received his information from Bishop Hadfield, some of whose young flock had been attacked and killed at Handley's woolshed. During the research and writing of his book Rusden had also carried on an extensive correspondence with a former Premier of New Zealand, FA Weld, since appointed Governor of Tasmania.³⁷ It was Weld who suggested he contact Mantell, a member of the Legislative Council, and an early Minister of Native Affairs.³⁸ Mantell proved to be both a good friend and a fruitful source of information, but Rusden was not always inclined to accept Mantell's advice on the need for moderation, especially when his (ie, Rusden's) indignation outran his caution.

In opening the case for the plaintiff in 1886, Sir Henry James set the scene for the trial by informing the jury that in 1868 "there had been an outbreak of the native ... population. On their part it was a war of extermination against the European colonists. It was a war of brutality; they were cannibals."³⁹ Again and again throughout the trial the spectre of hordes of savage cannibals terrorizing the poor law-abiding European colonists was raised both by counsel for Bryce and by the learned judge himself. The history of the Wairau and of Te Kooti's massacre in Poverty Bay were aired, regardless of the fact that they had happened 25 years before the event and 200 miles from the place which was the subject of the case.

Sir Henry James admitted that public men ought not to be too 'careful' of attacks made upon them in relation to their public life. "There is almost a rule or canon of conduct ... to the effect that a public man, unless he is charged with murder ought never to bring an action of libel in respect of anything that is said against him." But Bryce had been charged with murder, so he had a reason to bring this action.⁴⁰ Rusden's book, he said, was "one mass of abuse", but beyond all the abuse and the attacks on Bryce, there was a certain passage that constituted the principle cause of the alleged libel in the case.

37 ATL, *Rusden Papers, 1877-1886* MS papers 722/4.

38 Rusden to Mantell, 15 July 1880: AIML, *Letters of GW Rusden to WBD Mantell and others, 15 July 1880 - 20 August 1895*.

39 *Bryce v Rusden: In the High Court of Justice* p3.

40 As above p2.

The literary cravers for blood were soon to be gratified on the west and east coasts by events of which some were not officially reported ... Lieutenant Bryce, who was in later years a Native Minister, distinguished himself. Some women and young children emerged from a pah [a Maori native settlement] to hunt pigs. Lieutenant Bryce and Sergeant Maxwell of the Kai Iwi Cavalry, dashed upon them and cut them down gleefully and with ease. This exploit will be looked for in vain in Mr Gudgeon's book, which records 'a rash and unfortunate affair,' in which, subsequently (28th December), Sergeant Maxwell, riding up to Titokowaru's pah, Tauranga-ika, was shot. But the treatment of the children was not unknown. Dr Featherston, the Superintendent of the province of Wellington, expressed his horror. Rangihiwini declared that he would not have joined the local forces if he had thought them capable of such acts. He earned thereby the hatred of Bryce, who long afterwards, when Native Minister, dismissed Rangihiwini from office. Bryce earned among the Maoris a title which clung to him. They called him Kohuru (the murderer).⁴¹

The second part of the alleged libel was less serious, in that it referred to Bryce's humble origins as the son of an immigrant tradesman; that in his early life he had been a cowboy, but by laudable industry had raised himself to comparative importance. His admirers had not cared to record much of his boyhood days, but his conduct as Native Minister justified the inference that he was

of the inferior order of cow-boy. He was self-opinionated, shrewd, and callous. He would have been incapable of comprehending a charge that he was wanting in manliness or generosity. He was at Wanganui when the inhabitants piteously appealed to England for help against Titokowaru, and by his own exploits with his Kai-iwi troopers near Taurangaika against little children he had earned the title of Kohuru (murderer) among the Maoris.⁴²

To a reader of the transcript of the trial the conduct of the judge seems quite extraordinary. He appeared to be cocooned in his own world,

41 Rusden, *History of New Zealand* Vol 2 p504.

42 Rusden, *History of New Zealand* Vol 3 p285.

oblivious at times to counsel, unable to follow the dialogue or to read his own writing, always a few questions behind, pursuing his own thoughts, reminiscing out loud, harking back to previous questions - even prompting counsel for the plaintiff. When Murphy was examining Bryce, Baron Huddleston interjected: "There is one question Sir Henry James opened, and I thought perhaps you would like to ask that question." Having ascertained the question, Murphy was only too pleased to ask it. Again the judge interrupted Murphy's questioning to ask "Where did the Maoris get their ammunition from?" "That", answered Bryce, "is the question my Lord". Gorst jumped in. "I did not catch your Lordship's question", to which Huddleston replied "It is a question I ought not, perhaps, to have put".⁴³

It was soon proved that there were no women present on that fateful day at Handley's woolshed. Even the Maori witnesses called in New Zealand testified so; "every one of those ... hostile, hating, Maori witnesses say that not one woman was present on that occasion". Sir Henry went on to explain that men had come from the pa, and that there was a question of whether or not there were any boys present, but that it was "immaterial" anyway and he would not raise the issue. Yet it was known that children were there, and that two boys were killed, and three wounded - pre-pubescent boys, wearing only shirts, out playing and chasing pigs and geese.⁴⁴ Trooper Handley, who had been present at the affair at his brother's woolshed in 1868 had testified to the commissioners in New Zealand in 1884 that he saw only small and big boys; that he saw "a lad die from having been shot", a lad "of about 12 or 14 years of age ... about four feet or four feet six inches in height"; that he had judged from what he "saw of his private parts, as to his age"; that he saw Maxwell slashing with his sword; and that he and Bryce "stood and looked at the boy's body together" - a fact that escaped Bryce's memory entirely. Most of the other troopers examined in New Zealand claimed they saw only men, but they admitted that they did not have a clear view and that they were 300 or 400 yards away.⁴⁵ All this was immaterial to James, and also to Huddleston who told the jury that although the native witnesses agreed those killed were children of a tender age, Maori did not measure age as Europeans did, and of course the Maori would say it was a group of children who had gone there to play. They would not admit "that their men should have sustained a defeat".⁴⁶

43 *Bryce v Rusden: In the High Court of Justice* pp23-27.

44 As above pp4, 6, 521-527.

45 As above pp530-532, 553-559.

46 As above pp460, 462.

More important than whether or not children were killed was the question of whether or not Bryce had been "prominent in the affair". The Maori witnesses - survivors of the attack, who had shown their scars to the New Zealand commissioners - had no idea whether he was there or not. The troopers testified that he had been one of the last on the scene, and that he had chased after his men to call them off the attack. They said Maxwell particularly had his blood up; that he cut one boy "across the back of the head with a sabre", that he was "stabbing at ... a native in the ditch", and, calling to the men to follow him, that "he would take the pah".⁴⁷ Bryce could see the danger. The pa was only about a mile away, and already armed warriors were swarming out of it, alerted by the firing down on the flats near the woolshed. Bryce's gallant example had been confined to ordering his men to retire and getting them unscathed away from danger. Bryce admitted to having seen a child "afterwards" - a boy of 12 or 13 years of age. But he had decided this was just "an ordinary foraging party of Maoris ... catching pigs in and about the fences ... and running about". Huddleston preferred this evidence to anyone else's and told the jury they would probably conclude that this was indeed a foraging party.⁴⁸

Thus it had already been admitted that two key points in the libel were untrue: no women were present, and Bryce had not cut anybody down. But Gorst ploughed on doggedly, sometimes arguing the wrong point at great length, then apologising to the learned judge: "I find, my Lord, I have made a great blunder."⁴⁹ Huddleston complained about counsel for the defence reading document after document from the Blue Books.⁵⁰ But he kept reading sections himself, favourable to Bryce, at which counsel would begin their lengthy reading all over again. Huddleston then announced that if he was in the position of a jurymen he would not pay the slightest attention "to the opinion of persons about facts of which they may have only one-sided information".⁵¹ Yet he was prepared to accept Bryce's every assertion, as though he were an expert witness, even though he admitted his information was often secondhand or hearsay: he had been informed, he had heard, and verbal reports had been made to him.

For a time Huddleston became his own expert witness in regard to the Maori, and talked of their great chivalry and courage - and their cannibalism. "There is no doubt there are few races - I do not call them

47 As above pp554, 559.

48 As above pp21, 462, 554, 558-559.

49 As above p143.

50 The British Parliamentary Papers [Colonies, New Zealand].

51 *Bryce v Rusden: In the High Court of Justice* p139.

savages - but natives who have exhibited more courage, and at the same time more ferocity. They are far superior to the natives of Australia, who are a very poor race."⁵² Turning to Gorst he said: "You and I recall that there was a gentleman at the bar a great many years ago, Mr Thompson, who was sent out as a police magistrate to New Zealand and met with an untimely fate."⁵³ The learned judge was referring to the events at the Wairau in 1843 when New Zealand Company settlers from Nelson, led by Captain Arthur Wakefield and Henry Augustus Thompson, attempted to take possession of land belonging to Te Rauparaha and Te Rangihaeata. "Whether it was true or not", Huddleston went on, "Mr Thompson was a contemporary of mine. He went out as a police magistrate in 1842 and, unfortunately, he was eaten up. That was the suggestion."⁵⁴ When Gorst attempted to assure him that although Thompson was killed, he was not eaten up, Huddleston droned on, "with half-plaintiveness, half-wonder", that "he was a very thin man indeed".⁵⁵ Rusden was himself half-plaintive, half-wondering: "Fancy Huddleston having known Thompson and retaining a horror of Maori ever since."⁵⁶ It seemed to Rusden, and to many others, that "the Judge was determined from the inception of the case", and when his solicitor 'Harry' Bell was in London in 1885, he had told Rusden that he hoped Huddleston would not try the case "as he would be against us".⁵⁷

Huddleston took another opportunity to express his horror of the Maori. He pointed out that Rusden had made reference to "a massacre in Poverty Bay, in which men, women and children had been killed ... under peculiarly atrocious circumstances".⁵⁸ In vain did Rusden and his counsel explain over and over that the Poverty Bay massacre had nothing to do with the case, that it had happened a couple of hundred miles away on the east, not the west coast. But Huddleston was determined: he read two or three pages from Rusden's book dealing with this extraneous event.⁵⁹ "Many people in the court seemed surprised, and the jury were very attentive."⁶⁰

52 As above p147.

53 As above.

54 As above.

55 As above; Rusden to Mantell, 6 April 1886: AIML, *Letters of GW Rusden to WBD Mantell and others, 15 July 1880 - 20 August 1895*.

56 As above.

57 As above.

58 *Bryce v Rusden: In the High Court of Justice* p371.

59 As above pp371-373.

60 Rusden, *History of New Zealand* Vol 1 (Melville, Mullen & Slade, Melbourne 2nd ed 1895) px.

At last Gorst got a word in. "Your Lordship has read to the jury an account of one of the most horrible atrocities ever committed in New Zealand ... I avoided it in my cross-examination of Mr Bryce, because it had nothing to do with this particular case."⁶¹ Huddleston remarked, with a certain satisfaction: "Counsel on both sides avoided this point."⁶² Then he came back to it in his summing up and told the jury:

if it is supposed for a moment that when I called attention yesterday to the transaction near Poverty Bay ... I was doing that for the purpose of in any way prejudging the view you might take of the case itself; I may say at once that I disclaim any such intention.⁶³

But the damage was done, and Huddleston proceeded to compound it by going over the massacre yet again, in grizzly detail.⁶⁴ The jury needed nothing more, especially one gentleman, who, Huddleston was pleased to see "knows something about New Zealand".⁶⁵

Gorst rested his defence on the question of privilege. He told the jury they had to decide, not whether Rusden's views were correct, not whether anything he had said was true, but whether the book containing the alleged libels had been written in a fair and honest spirit. It had not - but Gorst could not be sure of that. He had not read Rusden's private correspondence in which he held forth to Mantell on the callow calling of his callous hero Bryce: "If you can sharpen the arrows of my scorn so as to penetrate his hide the deeper, tell me how."⁶⁶ Mantell instead expressed his disapproval of the passage on Bryce as a cowboy, and Rusden, slightly chastened, thought he might "uncoarsen the blow, but it shall not be less sharp".⁶⁷ Then he showed the passage to "two or three college dons" at Cambridge who thought it "warm" but not "beneath the dignity of history", so he was not persuaded to take Mantell's "suave and prudent advice".⁶⁸

61 *Bryce v Rusden: In the High Court of Justice* p373.

62 As above p373.

63 As above p459.

64 As above.

65 As above p502.

66 Rusden to Mantell, 27 November 1881, 16 January 1882, 20 August 1882, 22 March 1883: AIML, *Letters of GW Rusden to WBD Mantell and others, 15 July 1880 - 20 August 1895*.

67 As above.

68 As above.

According to Gorst it was neither libel nor "a subject for the infliction of damages" if Rusden had been mistaken, if he had made comments which later proved not to be true, so long as he had written without malice. He stressed the point.

My case is that Mr Rusden ... wrote a fair and honest account of public events, from public documents and other information ... and in the course of writing ... he has, without malice, made observations upon the character ... the conduct and ... the motives of a public man like Mr Bryce.⁶⁹

But Huddleston interrupted. That was not the law as he saw it; in his summing up he would tell the jury so, and they must "implicitly adopt the law" from him. What he held to be the law was that laid down in the case of *Campbell v Spottiswoode*⁷⁰ by the full Court of the Queen's Bench "in a well considered judgement":

When a writer in a newspaper or elsewhere in commenting upon public matters makes imputations on the character of the individuals concerned in them, which are false and libellous, as being beyond the limits of fair comment, it is no defence that he bona fide believed the truth of these imputations.⁷¹

There followed a long and pointed discussion between the judge and both counsel on the law, on various libel cases, and on the question of malice, which Huddleston decreed was not an essential ingredient of libel.⁷²

What I shall in substance ask the jury on the issues are these - viz, First, Are the allegations true in substance and fact? Secondly, As matters of public interest are they fair comment upon the plaintiff as a public man? Thirdly, Was it written of Bryce without personal malice as fair comment upon him as a public man?⁷³

69 *Bryce v Rusden: In the High Court of Justice* pp209, 227.

70 (1863) 3 Best & Smith 769.

71 *Bryce v Rusden: In the High Court of Justice* p228.

72 As above p237-247.

73 [1885-86] 2 TLR 435 at 436.

Counsel pointed out that in a later case, *Clark v Molyneux*,⁷⁴ which Huddleston himself had tried, the verdict was overturned on appeal. But the judge was unmoved; he would abide by *Campbell v Spottiswoode*.⁷⁵

Soon after the publication of his book Rusden had learned that there were no women involved at Handley's woolshed, and from the start he had wanted to withdraw the words "and women" from the offending passage. "I entreated my lawyers not to attempt to justify the word 'women' ... I had a consultation with counsel in presence of my solicitor, and vehemently urged that as a historian I ought not to be put in the position of seeming to defend an erroneous phrase."⁷⁶ But he was advised that "women" was strictly in accordance with the information he had received, "the authority for which was Dr Featherstone", and that he could not therefore be charged with "setting down ought in malice".⁷⁷

The crucial information had in fact come in a letter from Sir Arthur Gordon dated 23 January 1882, in which he enclosed a note "with respect to Bryce's antecedents which will interest you and on which you can rely. My informant was Bishop Hadfield."⁷⁸ The note, and subsequent communications from the bishop, who had uncovered much stronger allegations, were the subject of a good deal of comment during the trial. Huddleston told the jury: "We shall have to deal fairly and impartially with the evidence, such as it is, of that prelate", and went on to discredit the bishop entirely. He was "a person with strong views upon these matters"; he was "a partizan". "If I were asked to consider what amount of reliance I should place upon the accuracy of the Bishop, I should not place the slightest reliance upon it."⁷⁹ He dismissed Gordon by saying that "Governors are nothing more than human beings", but James accused him of being "the origin of this foul slander and untruth".⁸⁰ Bryce was very satisfied with Sir Henry's speech - "the best I have ever heard. His remarks on Sir Arthur Gordon were trenchant to a degree, every word told like the lash of a whip."⁸¹

74 (1877) 3 QBD 237.

75 *Bryce v Rusden: In the High Court of Justice* pp377-379.

76 [Rusden], *Tragedies in New Zealand in 1868 and 1881, Discussed in England in 1886 and 1887* (Clay & Sons, London 1888) pp124-125.

77 Rusden, *History of New Zealand* Vol 1 (Melville, Mullen & Slade, Melbourne 2nd ed 1895) ppi-ii.

78 *Bryce v Rusden: In the High Court of Justice* p285.

As above pp480-490; see also ATL, *Hadfield Papers* MS papers 139 folder 11.

80 *Bryce v Rusden: In the High Court of Justice* pp428, 481.

81 ATL, *Diary of Hon J Bryce* 12 March 1886.

Under Sir Henry's vigorous cross-examination Rusden was remarkably evasive, far from ready to express regret for the mistakes in his book and continually falling back on his plea that he was in the hands of his lawyers. "I leave all law matters to them ... it would be very hard to fight against my lawyers ... Sir Henry James, did you ever allow a client to dictate to you?" "No", snapped Sir Henry tartly, "nor a witness either".⁸²

The outcome of the trial was inevitable. At 3.50 pm on the eighth day of the trial the jury retired to consider their verdict. They returned fifteen minutes later with "a verdict for the plaintiff, damages £5,000".⁸³

Gorst immediately asked for a stay of execution on the grounds of excessive damages, but "the Judge would not entertain such a plea".⁸⁴ A week later Gorst appealed to the Divisional Court for a stay of execution until the motion for a new trial could be heard. Sir Henry James obviously wished to avoid a new trial, and stressed that for Bryce it was as much a matter of character as of money. In other words, as long as the verdict was not challenged, he would settle for lesser damages. This enabled all parties to agree to a motion for a new trial on the sole grounds of excessive damages, with the "ground of misdirection in reference to damages" open to counsel for the defendant and costs to be paid to the plaintiff.⁸⁵

It took another 15 months to get the case back to court. Sir Henry James managed, by some very fancy footwork, to have the case postponed again and again until he found judges to suit him. In the meantime there had been much comment both private and public on the "atrocious" verdict of 1886. The *Pall Mall Gazette* commented that "all historians of our own times must shake in their shoes at the thought of this truly preposterous verdict".⁸⁶ For *Punch* the moral was "don't write a history before the history is ready to be written; that is before the chief actors in it have qualified for immortality in the historians' pages. Be sure they are as dead as Queen Anne, than whom no-one is popularly supposed to be deader."⁸⁷

By the time the motion for a new trial did come before the court in June 1887, Rusden's counsel were unavailable and Rusden decided he must conduct his own defence. It was expected that he would be mauled

82 *Bryce v Rusden: In the High Court of Justice* pp311, 334.

83 As above p503.

84 ATL, *Diary of Hon J Bryce* 12 March 1886.

85 [Rusden], *Tragedies in New Zealand* pp58-64.

86 *Pall Mall Gazette*, 13 March 1886.

87 *Punch*, 20 March 1886.

severely by Sir Henry James representing Bryce, who had returned to New Zealand, and that the case would be over in minutes, but it lasted most of two days. Rusden used the opportunity as another platform to continue his crusade on behalf of the Maori. The judges kept telling him to keep to the question of damages, but they were remarkably tolerant and patient, indulgent even, when he continually strayed from it. In the long months while he waited for the court case, Rusden had used his time well, and was able to quote several libel cases in which minute damages had been awarded.⁸⁸ His efforts paid off, and more than one legal luminary told him he did better for himself than counsel could have done.⁸⁹

As the judges conferred on whether they should grant a new trial, Sir Henry James quickly told them that Bryce had given him "great discretion" as to reducing damages, as long as he was fully indemnified for his costs and expenses. Rusden had already paid £1,144 in costs. If, in addition, he would pay £2,531 instead of £5,000, and make a full retraction, that would be accepted in full satisfaction of damages and costs. Rusden needed only a little prompting to accept the "handsome offer" made to him, and to retract the libel fully.⁹⁰ It was certainly in his interests to do so, just as it was in Bryce's interests to avoid the risk of a new trial - and a judge of a different persuasion from Huddleston.

It had been a long business, but Rusden had not given up yet. A reprint of the 1883 edition of the book was issued, with asterisks replacing the offending passages, and in 1889 a second edition appeared. By mid-1886 he had already begun work on a one volume history, *Aureretanga*, dealing with Maori grievances in general.⁹¹ When he found that Bryce had had copies of the transcript of the trial printed in London "for distribution among his friends",⁹² he had the proceedings of the 1887 trial printed as *Tragedies in New Zealand in 1868 and 1881*.⁹³

88 [Rusden], *Tragedies in New Zealand* pp175-176.

89 Rusden to Mantell, 13 July 1887: AIML, *Letters of GW Rusden to WBD Mantell and others, 15 July 1880 - 20 August 1895*.

90 [Rusden], *Tragedies in New Zealand* pp60, 178-179.

91 Rusden, *Aureretanga: Groans of the Maoris* (Ridgway, London 1888); Rusden to Mantell, 10 August 1886: AIML, *Letters of GW Rusden to WBD Mantell and others, 15 July 1880 - 20 August 1895*.

92 It was supposedly not for sale, but was readily bought in New Zealand, though not in England; Rusden to Mantell, 20 December 1887, 13 March 1888: AIML, *Letters of GW Rusden to WBD Mantell and others, 15 July 1880 - 20 August 1895*; [Rusden], *Tragedies in New Zealand* pp67-68. A 'veteran' journalist, Tom L Mills, recalled that he knew Bryce and his son JJ Bryce. He wrote: "The latter had two hundred copies of *Bryce v Rusden* and he gave me a parcel of them for

Nothing so dramatic as the *Bryce v Rusden* trial has occurred in New Zealand this century, but when Keith Sinclair wrote his biography of Walter Nash⁹⁴ he was investigated by the Security Intelligence Service (the SIS) for his pains. He told the story in his autobiography published posthumously in 1993.⁹⁵ Sinclair was Professor of History at Auckland University. Most of his research had been in nineteenth century history, but he had developed an interest in twentieth century politics and had heard that Nash was a 'phenomenal' hoarder of papers, so he asked if he might write his biography. Nash died the following year, and in 1970 Sinclair was entrusted with the job and turned loose on the Nash papers which were a mess - uncatalogued and unsorted, housed in a locked but insecure room at National Archives in Wellington. An early find was a file of SIS reports, which the SIS perhaps had not even missed.⁹⁶

Sinclair was bound by some odd and unworkable agreements between himself and the Public Trustee, and the chief archivist and the Public Trustee. Among other things, he was to allow the trustee to read his manuscript before publication; the chief archivist was to provide a complete inventory of the papers, and get departmental permission for Sinclair to read anything which might be considered restricted. If Sinclair then used such material, the department concerned could forbid its publication. The problem was that it was Sinclair who did the cataloguing, and he was in no position to decide what might be restricted. In any case, the agreements were not enforced; the new chief archivist claimed she knew nothing about them.⁹⁷

The SIS was under fire at the time for its inept handling of various issues, and the Ombudsman, who had been called in to report on it, asked for any information anyone could give him. Sinclair offered a few choice SIS reports should he care to read them. Inevitably the balloon went up, and the SIS came down, rather cautiously, on Sinclair. They did not approach him directly, but went to the Public Trustee and got a copy of his typescript. Then, invoking the long-forgotten agreement, they demanded that he delete two passages, one dealing with the "No Maoris, No Tour"

sale in the Churchill Auction in the late Great War": Mills, "Letter to the Editor" of 13 July 1948 in *History and Bibliography* (Willis & Aiken, Christchurch 1948) 2 August 1948 p121.

93

As above fn76.

94

Sinclair, *Walter Nash* (Auckland University Press, Auckland 1976).

95

Sinclair, *Halfway Round the Harbour: An Autobiography* (Penguin Books, Auckland 1993) pp207-215.

96

As above pp207, 210.

97

As above p211.

protest against the All Black tour of South Africa in 1960, and the other regarding the historian and retired civil servant Dr William Sutch. Sinclair had sailed close to the wind, but not too close, yet that was immaterial to the SIS. Their 'security' had been breached, their honour impugned, and, like politicians, they took refuge in demanding that the offending material be suppressed. But Sinclair dug his heels in; no-one was going to censor his book. For a week or two the issue made headlines in the media. Asked by a television interviewer if he had not been indiscreet, he laughed and told him it was a historian's job to be indiscreet.⁹⁸

The university's lawyers and council backed Sinclair. The book launch was planned and present and past prime ministers were invited to attend. This gave the SIS a moment to pause. They had not enquired deeply enough to discover the book was not still the typescript they had read, but the printed version, about to be bound. They had struck just a little too late, and they were not prepared now to face the opprobrium they would generate by censoring the book and delaying its launch. Sinclair was lucky; the SIS quietly dropped the matter and he heard no more about it.⁹⁹

In Queensland in April 1984 Ross Fitzgerald was not so lucky. Just before the launch of the second volume of his book *From 1915 to the Early 1980s: A History of Queensland*,¹⁰⁰ the book was withdrawn from sale and pulped. It was already in the hands of the reviewers, and on sale in the bookshops. All the printed copies were recalled, but like Rusden's banned volumes some survived - and, like Rusden, Fitzgerald soon brought out a "slightly revised" form of the book.¹⁰¹ There are other parallels with the Rusden case: Fitzgerald was from Victoria, he was writing "someone else's history" as it happened, and he fell foul of a politician of New Zealand origin, very concerned for his reputation.

Ross Fitzgerald was an academic, a "dissident lecturer in history and politics" at Griffith University in Queensland.¹⁰² He had been indiscreet in his suggestion that the Queensland Premier had, against strong opposition, manoeuvred his nominee into the position of Chief Justice, and that this had facilitated the overturning of a Supreme Court decision adverse to the Premier. Fitzgerald was threatened with criminal libel by

98 As above pp212-215.

99 As above p215.

100 Fitzgerald, *From 1915 to the Early 1980s: A History of Queensland* (University of Queensland Press, Brisbane 1984).

101 *Sydney Morning Herald*, 29 July 1985.

102 As above.

the Queensland Attorney-General, but unlike Rusden he managed to avoid a court case.

The offending passage in Fitzgerald's book concerned a Queensland civil servant, one John Sinclair, whose outspokenness against "the National Party-dominated government, the Queensland premier and development interests" had raised the establishment's ire.¹⁰³

As an interesting sequel, in September 1981 Sinclair, in the Supreme Court defamation action initiated in 1977 against the premier (who ... had questioned ... Sinclair's ability to do his job as an adult education officer while at the same time being active in the conservation campaign), was awarded \$500 damages, plus court costs (over \$30,000). When the premier appealed against this decision, there was a furore in the press concerning allegations that state cabinet had guaranteed to pay the premier's costs for any court action. It transpired that at the same time cabinet had agreed to indemnify the premier against any personal liability over the action, cabinet had also agreed to abolish Sinclair's position in Maryborough. In 1981 Bjelke-Petersen actively opposed the nominees of the state attorney-general for the positions of chief justice and senior puisne judge which were to become vacant before his appeal was due to be heard. On 21 May 1982 the Queensland Full Court, led by Queensland's new chief justice Sir Walter Campbell, who had been appointed to the position despite the opposition of the Queensland Bar Association and the Liberal attorney-general Sam Doumany, in a unanimous decision overturned the Supreme Court ruling and awarded costs against Mr Sinclair who was left with a \$50,000 debt.¹⁰⁴

The appointment of Campbell to the position of Chief Justice in January 1982 had prompted a political correspondent, Quentin Dempster, to voice a prediction: "Ramsay [the Queensland Governor] retires in three years' time. The dogs are barking that Campbell will then become Governor."¹⁰⁵ The prediction came to pass in July 1985, when Campbell resigned from

103 Fitzgerald, *From 1915 to the Early 1980s: A History of Queensland* p354.

104 As above.

105 Whitton, *The Hillbilly Dictator: Australia's Police State* (ABC Enterprises, Sydney 1993) p72.

the bench and became Governor of Queensland.¹⁰⁶ But it so happened that he was also Chancellor of the University of Queensland - and it was the University of Queensland Press that had published Fitzgerald's book. No lengthy legal action was needed to suppress the book and silence the author. He was not even consulted about the book's recall. According to an informant, all that was required was a phone call from Campbell to the publisher, and the book was withdrawn. The University of Queensland Press refused to comment "because of the terms of the legal agreement reached in this case".¹⁰⁷ Fitzgerald cannot comment; he is still "under some legal restraint". All he will say is: "Such are the penalties of writing contemporary history".¹⁰⁸

Between idiosyncratic judges, intractable defence lawyers, unchallenged partisan witnesses with one-sided information, insecure security services, and corrupt politicians, a historian reckless enough to write on the doings of the living may but with difficulty avoid the pitfalls faced by the Rusdens, the Sinclairs and the Fitzgeralds. The moral of the story is clear. *Caveat historicus*: let the historian beware of writing contemporary history.

106 As above p104.

107 Personal communication, 22 November 1993.

108 Personal communication, 9 September 1993.

