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ROYAL COMMISSION ON THE COURTS

The report of the Nuremberg trials brings home the enormity of the crimes committed, not by the horrendous description of a few greatly evil deeds, but by the unemotional recital by person after person after person of much the same lesser, but still awful incidents. The Report of the Royal Commission on the Courts chaired by Mr Justice Beattie illustrates, one suspects unintentionally, the shortcomings of the present state of judicial administration in much the same way. The big statistics as to the volume of work and the like have less impact than the frequent comments throughout the Report on little things that are needed – adequate support services for the Judges such as more Judges' Clerks, better working conditions for Judges' Associates, improved equipment for recording evidence, more adequate jury facilities, witness rooms, reception facilities and so on. These, and other similar items, one would normally expect to be upgraded as a matter of course. Certainly that would be the case in any business. That they have not been, and that it has been necessary for the Royal Commission to comment on these matters of detail and maintenance brings home, as nothing else, how far our Courts administration has lagged behind.

It therefore comes as no surprise to find that the major changes recommended relate to Court administration. Certainly the extension of jurisdiction of the Magistrates' Courts is a considerable structural change. However, the extended jurisdiction will have much less effect on Judges and Magistrates as Judges than the administrative changes will have on their function as administrators and indeed on the administration of the Courts as a whole.

Essentially it was felt that the present three-tier structure of Courts, Magistrate's, Supreme and Appeal (to be named District, High and Appeal) best suited New Zealand in view of our size and in terms of economy and the best use of judicial talent.

One of the factors giving urgency to the Royal Commission was that criminal work in the Supreme Court was causing delays in the hearing of civil matters. Indications were that criminal business would continue to increase. Unclogging the Supreme Court of criminal blockages was obviously the key to successful change. The means suggested is to amalgamate the best features of the minor offences, standard fine and similar procedures and extend their ambit; to upgrade the Magistrates' Courts and enable Magistrates, who will be renamed District Judges, to conduct jury trials of electable offences; and to have only major criminal prosecutions heard at first instance by the High Court which would also continue to exercise its appellate jurisdiction. The object is not so much to reduce the overall criminal work handled by the High Court as to peg it at roughly the same proportion by removing much of the lesser criminal case load. A slight increase in the Supreme Court establishment was recommended to handle present work, but there was a high degree of unanimity in submissions that continually increasing the Supreme Court establishment was not a long term solution to anything.

The other major structural change recommended was the creation of a Family Court as a branch of the District Courts. Its jurisdiction would cover not only the central trilogy of domestic proceedings, matrimonial proceedings and matrimonial property but also all matters relating to children and young persons and to dependent persons. Support services- probation, psychiatric etc – would be closely integrated with and in some cases part of the Court administrative structure.

Thus in essence the three tier structure is to be retained but with a reorganisation of jurisdiction to ensure that at all levels the nature of the work is appropriate to the Judge.

The main thrust of the administrative recommendations is towards enabling Judges to get on with judging, and enabling the Courts to provide a better service to the public. The major recommendation is the creation of an integrated management structure, headed by a judicial commission. The administrative functions would range from recommending judicial appointments to directing the day to day case flow through the Court. It was suggested that several innovations be tried including the appointment of masters to assist with preliminary matters, and, of course, it was regrettably necessary for the Commission to draw attention to neglects of the past of the type itemised earlier.

The Minister of Justice, Mr Thomson, has said it will take time to consider and implement changes. It will. Before District Judges conduct jury trials, facilities will be needed for juries; Registrars and Court staff will need training; and almost certainly more District Judges will be required and refresher courses needed for present Magistrates. Management systems will need careful planning. The specialists to be integrated with Family Courts are already in short supply and extensive staff training will be needed before these Courts can operate fully. New Court facilities will be needed for the increased judicial establishment and staff recommended. And we certainly hope that necessary statutory changes will not be the victim of political games. These changes, which will take time, are essential to the implementation of the Report's recommendations. The sooner a commitment is made to them and a timetable proposed the better.

Other changes are needed anyway. Better witness facilities, improved reception facilities for the public, additional support services for the Judges, better evidence recording methods, and in particular the conditions of employment of Judges' Associates demands urgent review. Their situation, as described in the Report, is a disgrace to the State Services. Many of these needs require additional staff. The Justice Department is already having difficulty operating within its present staff ceiling. We suggest though that the existence of staff ceilings is neither excuse nor justification for further delay.

In short we accept that it will take time to fully implement the recommendations in the Report. Is not that all the more reason for giving it top priority?

Tony Black

LEGAL PROFESSION

A PROUD INHERITANCE

Address of BRUCE ST JOHN BLAKE, *immediate past-President of the Incorporated Law Society of Ireland, at the New Zealand Law Society Luncheon during the 1978 New Zealand Law Conference, Auckland on 29 March 1978.*

I would like to address you on a topic which should, I consider, seriously engage the attention of conference of lawyers, namely, the independence of the legal profession. As lawyers we should appreciate that this is a matter which should be considered by us very seriously particularly because I believe that all of us here can be classified as coming from the free world. The freedom which we in our respective countries enjoy has in many instances been dearly bought and it can only be preserved at a certain cost. The role of the legal profession is crucial to the preservation of this freedom. The role of the judiciary in the countries of the free world is, of course, also quite vital in this matter because it is upon the judiciary that the responsibility rests for ensuring that the rights and liberties of individual citizens are vindicated and guaranteed. Notwithstanding the role of the judiciary, sight must never be lost of our role as legal practitioners as guardians of the rights and liberties of the individual citizens of our respective countries.

It is, as has already been referred to by your Chief Justice, a world phenomenon that governments are seeking greater and wider powers of control over the lives of their citizens. This trend is leading to an inevitable dilution of the observance of the rule of law. Now, we are all, far too inclined to use the phrase "the rule of law" without really realising or appreciating what it signifies and what it is supposed to represent. A most serious mistake on the part of all governments, and I do not absolve those in the free world, is that they constantly confuse the rule of law with the concept of law and order. They are totally different things. Law and order

should not be regarded as a policy for any government but rather as, on the other hand, a fundamental and unshakeable principle on which government must be based. I consider it to be opportune at a conference such as this for us lawyers to take the opportunity of restating the essential principles of the rule of law. It is timely to do so. We forget that there were such things as Magna Carta, the Bill of Rights, the preamble to the American Declaration of Independence and that they still exist and are equally valid today. Let us recall the opening words of the American Declaration of Independence – "We hold these truths to be self evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends it is the right of the people to alter or abolish it". Stirring words, but nonetheless true, and words that should be borne in mind both by the citizens and the governments of the free world because they express with matchless clarity the theory of democracy.

I have myself, a very great admiration for the democracy that has been created in the United States of America. Admittedly, they drew a tremendous amount of inspiration from Great Britain, from the British system of parliamentary government but they shaped a constitution to meet their own needs in their own mould. They gave to their president the functions and the role which they believed to be that of the British monarch. It remains to be seen whether they were correct or not. They provided a system of checks and balances. But essential to the maintenance of the fundamental rights enshrined in the Constitution of the United States is the position of the Supreme Court. Here again the role of lawyers in the United States, in the Courts and in the field of civil rights is very much paramount. Now, therefore, the point I am trying to make here is that essentially law and government must be based on consent and the striking of the balance between the rights of the individual and the duty of the state to protect and vindicate these rights and at the same time to maintain law and order is very difficult indeed. I cannot think of a better way of articulating this dilemma than was done by Abraham Lincoln in his first message to Congress after the outbreak of the American Civil War in their special session on 4 July 1861 when he used these words:

> "This issue embraces more than the fate of these United States. It presents to the whole family of man the question whether a constitutional republic or democracy – a government of the people by the same people – can or cannot maintain its territorial integrity against its own domestic foes. It presents the question whether discontented individuals, too few in number to control administration according to organic law in any case, can always, upon the pretences made in this case or any other pretences, or arbitrarily without any pretence, break their government and thus practically put an end to free Government upon the earth. It forces us to ask: 'Is there, in all republics, this inherent and fatal weakness?' 'Must a government of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?' "

Therein lies the essential dilemma for democracy and what Lincoln said in 1861 holds good for us in the free world today.

I was indeed very glad to hear Cardinal Delargey yesterday at the opening ceremony in St Matthew's Church refer to the one man who should be the model for all Lawyers, namely, St Thomas More. The Cardinal gave us a quotation which many of us may never have heard but which I think bears repetition. He said "his cause being good, the devil should have rights". We should remember this because it is in recognising the fact that somebody as evil as the devil has rights that you will at least deprive him of the opportunity of saying that he is being unfairly treated and it is therefore absolutely essential that the rights of everybody irrespective of their cause be recognised and given equality before the Law. In this context I am reminded of another quotation this time from Voltaire when he said "I disagree with everything that you say but I would die for your right to say it". As long as we can maintain this kind of attitude in the free world and as long as the legal profession is prepared to fulfil its role as the watchdog and the guardian of the rights of the individual then we have not too much to fear. It can and does happen that these rights are abrogated in countries in the free world. We have had examples in our own country, we have had examples in Britain, we have had examples everywhere. There is no point in singling out any one particular country for special mention. Therefore in the words of another famous philosopher let us in the legal profession bear in mind that eternal vigilance is the price of liberty and let us always remember that an independent legal profession is the proud inheritance of the free world. It is our duty as the legal profession in all free nations, both small and large, to guard this inheritance and thus ensure that it becomes the birthright of future generations.

CASE AND COMMENT

Local authority obligations – Implied terms – Repudiation by conduct

The decision of Perry J in *Robins and Devon Harbour Ltd v Devonport Borough* (Supreme Court Auckland, 2 May 1978, A1666/75) affirms the principle that a local authority that enters into a valid contract does not enjoy any inherent privileges or immunities concerning the duties arising out of a contract and may not rely upon aspects of the public interest or changes in attitudes after entering the contract as a justification for failing to carry out duties and obligations.

The case concerned a proposal to develop Ngataringa Bay following the enactment of the Auckland Harbour Board and Devonport Borough Council (Ngataringa Bay) Empowering Act 1970, which authorised the Auckland Harbour Board and the Devonport Borough Council to grant investigation licences concerning feasibility of development and if necessary to grant a further licence to develop the specified area of the Bay and to transfer title to the developer. The plaintiffs proved that they were parties to a deed executed in July 1971, which granted a right to investigate for two years, subject to renewals at the discretion of the Council, and also conferred a right to request a licence to develop and ultimately obtain the freehold, upon the Council and Harbour Board being satisfied with the proposed comprehensive development scheme.

The evidence established that after working closely with the Council the developers obtained approval in principle for their proposals in July 1974 subject to certain conditions relating to an environmental impact study. However, after a change of Council following the elections later in the year, the new Council declined in April 1975 to give a further two year extension to the investigation licence and declined to approve the development plan submitted at that point. Furthermore the Council would not specify what requirements it needed for a satisfactory scheme and it granted initially a two months' extension to the investigation licence which was to expire.

Concerning the contract, Perry J considered that certain terms should be implied, as submitted by the plaintiffs; that the Council was bound to give fair and reasonable consideration to a request to extend the investigation licence, to give fair and reasonable consideration to approval of the scheme, and for this purpose it was implied that the Council would co-operate and work with the developer as far as reasonably possible. The *Moorcock* case (1889) 14 PB 64 and other authorities were relied upon. In addition, His Honour considered it correct to refer to activities prior and subsequent to confirm that certain duties were obviously intended by the parties to be implied under the contract.

After considering the evidence in detail, His Honour concluded that the Council had deliberately set out to repudiate the contract under five separate heads, including the failure to acknowledge that the environmental impact report had no legal basis or standing, by failing to update the district scheme to facilitate the development (and in this respect the case makes an interesting contrast with the decision of Mahon J in *Anderton v Auckland City Council and James Wallace Properties Ltd* (judgment 20 June 1978)), by revocation of the approval in principle by the former Council without giving any reasons or explanation of the alternatives envisaged, and by failing to extend the investigation licence for a reasonable time to enable any alternative scheme to be produced.

The Council simply denied the implication of any terms into the contract, denied an intent to repudiate the contract, and in any event relied on an exclusion clause in the contract which stated the Council were not liable to pay the licensee any compensation or damages whatsoever in the event of revocation of the licence or in respect of or consequent upon any act or omission of the Council.

With reference to the exclusion clause, His Honour found after consideration of authority, including the *Suisse Atlantique* case [1967] 1 AC 361, that the Council was in fundamental breach of its obligations and accordingly the contract was at an end and the exclusion clause no longer protected the Council from liability. Accordingly, the Council were found to be liable and the case was adjourned for a further hearing on damages.

The decision is important in confirming the contractual liability of a local authority and pointing out the principle that one council may enter a contract which binds the actions of a later council and the later council may only repudiate a contract upon facing up to liability for damages. Although it is a general principle of constitutional law that one parliament may not bind a later parliament, the former principle probably applies as to contracts entered into by one government and repudiated by the subsequent government. The only distinction of course between Central Government and Local Authorities is the ability of Central Government to secure the passage of legislation limiting or excluding altogether liability of the Crown for compensation in this type of situation. It is of interest that Perry J noted that after local opposition to the reclamation of Ngataringa Bay arose a petition to Parliament to repeal the local act was not successful, and no doubt this failure arose out of the compensation problem. His

Honour also drew attention to the fact that the Commissioner for the Environment under his audit, in which he disapproved reclamation, was stating a conclusion contrary to the intention of Parliament in the Local Act empowering reclamation and the Commissioner should have acknowledged that he had no legal basis for the recommendation which he made. It is possible that the Council thought it had an ally in acting upon the recommendation as one reason for rejecting the scheme, whereas the Commissioner in fact has no power to override earlier legislation and cannot grant immunity to any person.

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TAXATION

TAX PLANNING FOR ESTATES CONTAINING LIVESTOCK

Part II: Retention of Livestock at the Taxpayer's Death

By JOHN PREBBLE, an Auckland practitioner.

An earlier article at [1978] NZLJ 349 outlined the operation of the standard value for livestock scheme authorised by the Income Tax Act 1976 for purposes of farm accounting. It was emphasised in particular that an important result is that a farmer availing himself of the scheme tends to build up a large, deferred income tax liability. The existence of this deferred liability tends to dictate the steps which the farmer should take in his estate planning, with a view to minimising both income tax and gift and estate duties. The questions that arise fall into two groups: where the farmer retains livestock at his death, and where he disposes of it in his lifetime. A subsequent article will deal with the latter.

To be effective, most re-arrangements of property pursuant to an estate plan must be completed during the lifetime of the deceased. A donatio mortis causa, for example, will be ineffective to withdraw the subject-matter of the gift from a dutiable estate: s 9 of the Estate and Gift Duties Act 1968. Thus, apart from arguing about values, there is relatively little that executors can do to minimise duty in an estate they are administering.

An important exception occurs where the estate includes livestock. For the purposes both of the income tax return of the deceased to the date of his death, and of the income tax of the estate, s 86 (4) of the Income Tax Act 1976 gives the executors the option of accounting for the livestock of the deceased at any of the following values:

(a) probate, that is, market, value, or a lower value being
(b) where the deceased had adopted a standard value (including a nil value) that value
(c) where the deceased had not adopted a standard value (which will be rare) a reasonable standard value to be agreed with the Commissioner
(d) a higher standard value than (b) or (c), but no higher than probate value.

Moreover, where the valuation chosen results in the last tax return of the deceased showing an income substantially in excess of his average income from that farming business, the executors have the option under s 93 of the Act to spread that income back for up to three years, with a view to minimising tax. Finally, when the executors transfer the stock to the beneficiaries of the deceased, the beneficiaries' opening value for tax purposes will be those adopted by the executors.

While these various powers of the executors refer in the first instance to values to be adopted for income tax purposes, indirectly the decisions of the executors in this context will affect the amount of duty paid by the estate. This is because, pursuant to s 17 (4) (a) of the Estate and Gift Duties Act 1968, income tax payable in respect of income of the deceased for any period up to the date of his death is a debt allowable in the calculation of the final balance of the estate of the deceased. It will be seen that calculation of the most advantageous value for the executors to select depends on a number of factors that vary from case to case.

Factors tending to suggest that a high value should be nominated include:

– the income of the deceased, and thus his marginal tax rate, was low in the one, two, or three years prior to death.

– The duty in the deceased's estate is high. Income tax for the period up to the date of death is allowable in ascertaining the dutiable final balance of the estate. Consequently, death duties can be reduced at the cost of paying more income tax. However, it should be noted that, at maximum marginal death duty rates, $100 dollars owing in income tax saves only $40 in estate duty. The amount of duty saved diminishes as the final balance of the estate reduces below $255,000, the figure at which the marginal rate of forty percent is reached. At first glance, paying income tax rather than estate duty might generally appear to be a bad bargain. Nevertheless, the exchange may be worth while for the family as a whole, rather than the estate considered in isolation. In particular, this may be so where the beneficiaries are already enjoying high incomes and their situation dictates that there should fairly soon be a disposal of a good deal of the stock they have inherited.

Factors suggesting that a low value should be adopted by the executors include:

– it appears unlikely that the beneficiaries will need to make any major disposal of stock for some time. In this situation, the tax deferral involved in the standard value scheme can go on indefinitely.

– The income of the beneficiaries is expected to be low in the years subsequent to the death of the deceased. They can thus absorb some of the deferred tax liability at low marginal rates by annual increases in standard values. This course depends on the beneficiaries' having ready cash to pay tax on unrealised profits or, better still, enjoying a tax loss in respect of their other income.

– the liquidity of the estate is poor. Where funds are short for immediate needs, it may well be a mistake to opt for a higher value, and thus higher income tax, since the total liabilities of the estate, including tax and duty, will increase, even though there may be long-term tax advantages.

These various permutations furnish the farming executor with the opportunity for some fascinating, if demanding, calculations. Moreover, the need may well arise for the executor to exercise his discretion to make some difficult decisions. For example, there may be conflicts of interest between remaindermen and life tenants, or within the two classes. In many estates, these conflicts will be solved by the usual compromises adopted within families – the older generation sacrificing its interests for the younger, for example. However, a solution satisfactory to all parties may not be able to be found. Consequently, the well-drawn will of a livestock farmer will include ample powers for the executors to make the necessary decisions to establish the standard values they believe most beneficial in all the circumstances of the estate and the family at large.

The humble jury

Now, it is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things; he can even grow accustomed to the sun. And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it.

Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop. Therefore, the instinct of Christian civilisation has most wisely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets. Men shall come in who can see the court and the crowd, and coarse faces of the policeman and the professional criminals, the wasted faces of the wastrels, the unreal faces of the gesticulating counsel, and see it all as one sees a new picture or a play hitherto unvisited.

Our civilisation has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the Founder of Christianity.

"Tremendous Trifles"
by G K Chesterton

ARE HUSBANDS GETTING A FAIR SHARE?

Mr R L Fisher was born in 1941. At Victoria University of Wellington he was a Robert Orr McGechan prizewinner in 1964 and an LLM Graduate in 1966. He then practised for 10 years in Hamilton where he was a partner of the Crown Solicitor and later a Barrister and Hamilton District Law Society Council member. Following research at Southampton and London Universities in 1975 and 1976 he published a text book on Matrimonial Property in 1977. He has for several years been a member of the NZLS Magistrates' Courts Committee. He recently moved to Auckland where he currently practises as a Barrister.

Introduction

1 When marriages broke down, wives were not receiving enough of the matrimonial property. Husbands were getting more than their fair share. The Matrimonial Property Act 1976 was passed to change that. Did it go too far?

2 The Act has now been in operation for a year – long enough to suggest an answer to that question. In this paper the year's performance will be reviewed and further reforms suggested. Let it be said immediately that the Act contains many technical anomalies and blemishes. This paper is not concerned with them. Space and stamina limit the exercise to matters of major social impact only.

3 It will be recalled that the Matrimonial Property Act 1976 is principally "an Act to reform the law of matrimonial property; to recognise the equal contribution of husband and wife to the marriage partnership; [and] to provide for a just division of the matrimonial property between the spouses when their marriage ends by separation or divorce . . . ." (see long title to the Act). On application to the courts, all the spouses' property is divided into three categories:

(a) *Domestic property.* The matrimonial home or certain substitutes therefor and the family chattels (all referred to here for the sake of convenience as "domestic property") are normally shared equally irrespective of their source (s 11).

(b) *Balance matrimonial property.* Broadly speaking, property which had been commonly owned, or used by the spouses, or produced by their efforts during the marriage are shared equally unless there had been unequal contributions to the marriage partnership (s 15).

(c) *Separate property.* The remainder of the property, normally consisting of residual gifts, inheritances and pre-marriage property, is retained by the existing owner or owners (ss 9 and 10).

Having arrived at the quantum of the spouses' shares in this manner, the Courts must then create an appropriate scheme of appropriation, compensation, security and possession to give effect to those shares. This may be referred to as (d) *implementation of the division.* Finally, in those or other proceedings the Court must consider the independent question of (e) *the support of one spouse by the other.* It is proposed to now review each of these topics in turn to see how they have fared in practice.

(a) *Domestic property*

4 Three broad conclusions may be drawn from the litigation over domestic property. The first is that the very existence of that category has attracted a large volume of litigation. This has flowed in part from the need to distinguish between domestic property on the one hand and the balance of the matrimonial property and separate property on the other. Considerable judicial time has been expended in determining whether the whole of a 10 acre block qualified as the "matrimonial home" *(a)*, whether a carpet was a "family chattel" or a fixture *(b)*, whether a motor scooter had been used "for family purposes" *(c)*, whether a yacht worth $20,000 was a "family chattel" *(d)* and whether the value of a homestead has been properly assessed in comparison with the remainder of a farm *(e)*. In addition, there has been a flood of applications, too numerous to list here, to invoke the "extraordinary circumstances" loophole in s 14 with the object of escaping equal division.

5 The second conclusion is that the legislative goal of closely controlling the Court's division of domestic property has been achieved. Equal sharing may be rebutted under s 14 but only where there are "extraordinary circumstances" which would render equal sharing "repugnant to justice". The clear legislative warning that s 14 is not lightly to be invoked has been heeded. Thus, it has been held insufficient to

invoke s 14: (i) that the husband had owned the matrimonial home section before marriage, was the sole income earner during the marriage and in addition performed domestic services to a degree not normally attained by husbands *(f)*, (ii) that midway through a marriage of approximately 40 years the wife developed a mental illness ultimately resulting in her admission as a psychiatric patient without prospect of recovery *(g)*, (iii) that the husband's yacht worth $20,000 qualified as a family chattel *(h)*, (iv) that the government valuation to be applied to farm homesteads under s 12 differed substantially from the value assessed by a private registered valuer *(i)*, (v) that two matrimonial homes had been financed by gifts from the wife's father, the husband did not keep steady employment and the wife frequently worked, usually earning more than her husband in addition to her normal domestic services *(j)*, (vi) that all financial contribution to the matrimonial home, together with its repair and renovation came from the wife *(k)* and (vii) that the matrimonial home had been purchased in the name of the wife alone, she having been the sole or major financial contributor to it *(l)*. The application of s 14 has been unpredictable but it will clearly be applied only in extreme cases eg (i) where the principal matrimonial asset was a matrimonial home worth $97,999 which had been owned by the wife since before the marriage *(m)*, (ii) where the wife had purchased the matrimonial home as protection for herself and the children in anticipation of the separation which occurred eight weeks thereafter *(n)* and (iii) where the matrimonial home had been inherited by the husband from his father 15 months before separation, the wife being entitled in any event to half the proceeds of the previous matrimonial home *(o)*. Among the 70 or so decisions under the new Act known to the writer the last are the only three in which s 14 was invoked. In short, the equal sharing of domestic property has proved in practice to be the rigid formula that the legislature intended.

6 The third conclusion is that neither husbands nor wives can claim that as a class they are unfairly treated in the division of domestic property. The most ardent feminist must concede that equality was been attained here. Equally, husbands will find that in a surprisingly large proportion of cases *(p)* the wife has been the one who in pre-1976 terms would have received the major share in the domestic property. Unhappily, however, a new class of maltreated spouse has sprung into being: the major contributor to domestic property. The fact that qualification for this class is non-sexist will be of little consolation to the husband or wife who brought the matrimonial home to the marriage from pre-marriage property or subsequent gift or inheritance.

(b) *Balance matrimonial property*

7 After division of the domestic property as above, the remainder of the matrimonial property is dealt with under s 15. Here the initial assumption of equal division is more readily rebutted. A spouse seeking more than half need merely show that his or her contribution to the marriage partnership was clearly greater than that of the other spouse. For this purpose the legislature has gone to great pains to ensure that the contribution normally made by a wife is intrinsically equal in value to the contribution normally made by a husband (s 18).

8 The comparison of contributions to the marriage partnership under the Act has worked well. Although some of the functions of a marriage partnership produce property while others do not, the partnership cannot abdicate from any of the functions listed in s 18. It is, therefore, immaterial which spouse performs which function. All that matters is (i) whether one spouse has introduced capital to the partnership from a source external to the operation of the partnership eg pre-marriage property *(q)* or post-marriage inheritance *(r)* and (ii) whether there has been clear inequality in the quality or quantity of the effort with which the objects of the marriage partnership have been pursued by the respective spouses *(s)*. Interesting value judgments arise under the latter but the Courts have so far risen to the task without obvious preference for either sex. On the one hand, the courts have been prepared to recognise clear inequality in the pursuit of partnership objects eg 60 percent to a husband who, in addition to basic employment as an agricultural scientist, undertook spare-time housebuilding, boat building and generally displayed superior talents and energies *(t)* and 66 percent to another husband who provided the home through steady employment, did more than his share of household chores, provided the bulk of matrimonial finances and used an inheritance for purchase of matrimonial property, his wife having left him for five periods in the course of the marriage *(u)*. On the other hand, it is clear that the courts are no longer preoccupied with the role, as distinct from the effort, displayed by a spouse within the marriage partnership. Thus the mere fact that the husband was an architect *(v)* or a successful businessman *(w)* or a farmer who had in the course of the marriage built up a substantial farm *(x)* has been insufficient to rebut equal division.

9 This has proved the most successful part of the new Act. Wives need no longer feel that they embark upon marriage with any inherent disadvantage when it comes to assessing the property value of their contributions to the marriage part-

nership yet hardworking husbands are not at the mercy of social butterflies. The Courts will recognise inequality in contribution, but only where the inequality flows from effort, and not from the particular marital role allotted to a spouse by the conventions of society. As in the case of domestic property, the sex of the parties is no longer a determining factor.

(c) *Separate property*

10 In general, separate property remains with its existing owner. Predictably, the inept drafting of the distinction between matrimonial property and separate property (ss 8, 9 and 10) has given rise to a good deal of uncertainty and complicated litigation. Similar problems have been encountered in such fields as matrimonial debts (s 20). Notwithstanding these difficulties, no major social injustice appears to arise in this area and space does not permit its further discussion here. It is sufficient to observe that if and when the opportunity to amend the Act does arise, a thorough spring cleaning is called for in these and other areas of the Act.

(d) *Implementing the division*

11 Having arrived at the quantum of shares to be awarded to each spouse, the courts must then go on to implement that finding by allotting possession, ownership and monetary compensation accordingly. The similar discretion under the 1965 Matrimonial Property Act was sometimes used in a manner which removed much of the purpose of the original division. Thus in *E v E* [1971] NZLR 859 a court which deprecated a statutory bar which prevented regard to the wife's adultery when arriving at quantum, was forced to award to her a half share in the matrimonial home but then gave indefinite possession to the husband. Husbands, in particular, frequently found that their awarded share in property looked impressive on paper, but left little benefit in practice while the other spouse enjoyed possession for an indefinite period.

12 Although the new Act contains no express change on this point, the Courts have recently shown themselves to be less sympathetic to postponement of the enjoyment of property shares. Thus postponement of sale and division has been refused (i) where the husband and his 18 year old son were in occupation of the matrimonial home while the wife was in rented accommodation with two younger sons *(y)*, (ii) where the husband had left and had a new home with his new wife while the previous wife was still in occupation of the original matrimonial home *(z)*, (iii) where the wife wanted to occupy a beach cottage as a home for herself and her 8 year old grandson of whom she had custody *(aa)*, (iv) where the wife was in occupation of the matrimonial home with two young children but the parties were young, she was able to work, the husband was in rented accommodation, it was better to uproot the children while they were still young, the wife had an association with another man and the wife's $12,500 share would with Housing Corporation assistance enable her to re-establish herself *(bb)* and (v) where the wife was in occupation of the matrimonial home with her intellectually handicapped son, her husband had deserted her to live with another woman, but it was held unjust to deprive husband of his share indefinitely, and the wife's share of $14,000 together with the son's savings of $5,000 would enable her to purchase alternative accommodation *(cc)*. It would seem that, in general, a spouse will be denied enjoyment of his or her share under the Act only for such period, and to such extent, as this may be essential to preserve a home for dependent children of the marriage. Husbands can scarcely now complain that they are unfairly treated in the disposal of the matrimonial home.

13 Perhaps the most difficult cases are those involving farms and businesses which cannot service the additional finance required to pay out the share of a claimant spouse. The problem has always existed in matrimonial property cases but is now presented in a more acute form having regard to the greater share enjoyed by wives and to the wider range of the classes of property affected. So far, the courts have been able to avoid a head-on confrontation with the problem by making a finding as to quantum and then adjourning, leaving it to the parties to arrive at the implementation themselves *(dd)*. Sooner or later, however, the Courts will be left with no alternative but to order forced sales of farms and businesses.

14 When fears were expressed on this score by Federated Farmers and similar bodies at the time that the Matrimonial Property Bill was under consideration, they were placated with the reply that the implementation of the division afforded ample flexibility to avoid the breaking up or sale of farms and businesses *(ee)*, a claim repeated by the Minister of Justice late last year *(ff)*. The claim is mystifying. How can a farm or business which is already fully committed in servicing existing liabilities be retained without denying the half share due to the departing spouse? Clearly, the Courts will do all they can to avoid the sale or dissolution of a farm or business. Yet the spirit of the Act seems to require that a spouse should not be indefinitely denied the opportunity to enjoy his or her share of the matrimonial capital. Take a case (and there are several known to the writer) in which a farmer has built up an equity of $100,000 in his farm over 20 years of mar-

riage. After servicing mortgages and other commitments, the farm provides only a modest income. The wife then leaves. What is the solution suggested by the Minister of Justice?

15 It is suggested that faced with this dilemma, the Courts have no choice but to order sale and division, albeit cushioned, as far as possible, by a lengthy period of grace in which all avenues of refinancing can be explored and, if necessary, sale undertaken on favourable terms. Nevertheless, the problem is not one which should be laid at the door of the Act. If one accepts the basic premise of the inherent equality of male and female contribution to the marriage partnership, it follows that each has contributed equally to the farm or business in question and each should be entitled to enjoy his or her share. If forced sale of that property is the only way in which that share can be realised, that is scarcely a criticism of the Act. It would be impossible to design any scheme of division which both retains the property for one spouse and gives half of it to the other.

(e) *Support of one spouse by the other*

16 The Matrimonial Property Act is principally concerned with the property consequences of contributing to the marriage partnership rather than the personal needs of the spouses following separation. The Act has, however, had two important effects on the subject of spouse support. First, it abolished the existing powers to award maintenance in a capital form. Secondly, it provides an impetus for reappraising the whole basis for requiring a husband to support his wife or ex-wife.

17 Where a wife receives property under the Act, this clearly affects both her need for periodic maintenance and the ability of her husband to provide it. That follows from an application of traditional maintenance principles which, in every case, require an assessment of the capital and income resources of both parties. Because of this, the interesting suggestion has been made that while matrimonial property issues remain unresolved, a wife should now be granted interim maintenance only *(gg)*.

18 However, there is as yet no sign that the "equal contribution of husband and wife to the marriage partnership" referred to in the long title to the Act suggests any similar equality in the responsibility to provide for oneself after breakdown of marriage. The approach which prevailed immediately before the new Act may be illustrated by *Robertson* [1977] 1 NZLR 273. In that case, a 47 year old wife without dependent children and able to earn had, in 1973, been awarded $45 per week maintenance against her real estate agent husband who then earned $12,000 per annum. Subsequently, the matrimonial property was divided and the wife received $7,000, most of which she invested. Over the ensuing three years the husband's income and assets increased. Coming before the Court for a second time in 1976, the wife was now awarded a capital sum of $10,000 and her maintenance was increased to $50 per week. There was no suggestion that she should, in the meantime, have adapted in whole or in part to financial independence. As has been customary in New Zealand, maintenance was approached in the same manner as if the separation had just occurred.

19 Two cases suggest that there has been no change in judicial approach since the new Act. In *Sears* [1977] NZ Recent Law 170, the wife had an existing maintenance order of $10 per week in her favour. Subsequently, in proceedings under the Matrimonial Property Act 1976, it was ordered that a beach cottage be sold, this resulting in an award of $13,400 to the wife. Notwithstanding that change in the circumstances of the wife, an application by the husband to have the maintenance reduced was refused, the court holding that "the jurisdiction granted by s 32 will only be exercised when the property order makes the maintenance order unjust". Similarly, in *Cross* [1977] NZ Recent Law 193 the wife had been receiving $15 per week maintenance from her husband in addition to maintenance for the children. Subsequently, she was shown to have a continuing association with another man. In an application by the husband to have the maintenance agreement cancelled, the court was concerned exclusively with the question whether the wife's new association had any bearing upon her need of support from the husband. Concluding that it did have some bearing upon it, the Court reduced the wife's maintenance from $15 per week to $10 per week, the maintenance payable to the children remaining unaffected. The real point is, however, that there was no suggestion that the wife had been separated from the husband long enough to acquire some degree of financial independence. Nor was there any suggestion that since the Matrimonial Property Act 1976, a greater degree of self-support is to be expected from separated or divorced spouses.

20 On the same note, it is interesting to see the guidelines recently promulgated by the Director-General of the Department of Social Welfare (30 November 1977) as to the basis upon which the Social Security Commission will compromise maintenance claims against husbands: the first $55 per week from husband's tax-paid income goes to his own living expenses, the next $55 per week to maintenance for his separated wife and children, and the excess over $110 is apportioned

two-thirds to the family and one-third to the husband. As with the Courts, it is apparently treated as immaterial whether the spouses are divorced or merely separated and whether their divorce or separation has been recent or a matter of distant history.

21 Oddly enough, the fact that maintenance may not now be awarded in the form of capital or property in New Zealand has tended to reinforce this notion of support as a permanent and continuing relationship between separated or divorced spouses. No longer is it possible to say in the context of support:

> "She should have the whole interest in this house, but we should recognise that it would be very difficult for her to obtain anything further from him. She should forgo any kind of future maintenance, lump sum or secured provision" *(hh)*.

New Zealand Courts lack the jurisdiction to make any such order. Nor can there be any legally binding arrangement pursuant to which the husband voluntarily pays a large capital sum in order to secure freedom from future periodic maintenance obligations *(ii)*.

22 In short, the improvement in the proprietory rights of wives has not been accompanied by any corresponding improvement in the support obligations of husbands when considering the fundamental principles to be applied. Certainly, in the majority of cases, the fact that the wife has more capital will be recognised when assessing her personal needs and, in turn, the quantum of maintenance required. There is, however, no sign of any change in the traditional principles on which support obligations are determined. To this extent, wives might be thought to have their cake and eat it too.

Further reform

23 In other circumstances, a good deal might have been said as to the desirable features of a regime for matrimonial property and support. In New Zealand it would now be idle to suggest any wholesale replacement of The Matrimonial Property Act 1976. In any event, the Act has achieved its principal objective. Property division is now based on a recognition of the equal contribution of husband and wife to the marriage partnership. Further reforms should be confined to (i) any essential amendments to the existing Act and (ii) reform in those areas which the Act does not purport to cover.

24 On that basis it is suggested that six problems now require legislative attention:

(a) The new Act contains a number of technical blemishes, particularly in the distinction between matrimonial property and separate property and in the treatment of matrimonial debts.
(b) The Act makes no provision for division of matrimonial property on the death of a spouse. Thus separated and divorced wives fare better than faithful widows.
(c) The Act makes no provision for division of property following de facto marriages. Most of the considerations which prompted the Act apply equally to de facto spouses.
(d) In the related field of spouse support, one statute should replace the duplication and inconsistency of the Domestic Proceedings Act 1968 and the Matrimonial Proceedings Act 1963.
(e) The rigid division of domestic property produces injustice in its disregard for unequal contribution.
(f) The improvement in the property rights of wives has left an imbalance when regard is had to the continuation of the traditional support obligations of husbands.
(g) Far from helping husbands, the abolition of capital maintenance has actually impeded the aim of limiting the duration of support obligations.

25 The first four of these are beyond the scope of this paper. Domestic property and spouse support require further discussion.

The domestic property division

26 The survey outlined earlier in this paper suggests that the arbitrary equal division of domestic property has produced injustice in some cases. This is scarcely surprising. Even in terms of effort in pursuing the objects of the marriage partnership, s 15 recognises the inequality which will inevitably occur in some cases. How much more obvious is the inequality where the domestic property has come from assets owned by one spouse before the marriage or from gifts or inheritances after it. The fact that such cases are commonplace, usually rules out the "extraordinary circumstances" safety valve in s 14. Indeed, the express contrast with the regard for contributions under s 15 (and with marriages of short duration under s 13), suggests that the Courts have been correct in their assumption that disparity of contributions alone was not intended as a ground for invoking s 14. These injustices have been compounded by the unnecessary complexity which the domestic property division entails.

27 In contrast, the division of the balance of the matrimonial property under s 15 has proceeded smoothly, both in its social objectives and at a technical level. If there are these difficulties

peculiar to domestic property division, why was it thought necessary to have it in the first place? There seem to have been four reasons.

28 First, there was the desire to control judicial conservatism. This may well have been justified following the Court of Appeal decision in *E v E* [1971] NZLR 859. At the time that the Bill was introduced, Parliament was not to know that the Privy Council would in *Haldane* [1976] 2 NZLR 715 return New Zealand to the more liberal path already suggested by Woodhouse J in *Hofman* [1965] NZLR 795. In any event, the above survey of decisions under s 15 suggests that a balanced recognition of respective marital roles is now assured. Accordingly, the rigidity of the domestic property division can no longer be justified on this ground.

29 The second reason was the desire for simplicity. It is true that in some cases the spouses possess only a matrimonial home and family chattels, and their advisers can without hesitation say "half each". Unfortunately, in the majority of cases changing values since separation, matrimonial debts, balance matrimonial property, separate property and implementation of the division make the appearance of simplicity an illusion. Ironically, the distinction between domestic property and the remainder of the matrimonial property is in no small part responsible for the complexities in the administration of the Act. In the majority of cases there is matrimonial property other than domestic property, even if this is limited to, say, money in a bank account. It is then essential to decide whether contributions to the marriage partnership have been clearly unequal. If that question must be answered, no time is saved by applying the result to a portion of the matrimonial assets only. On balance, the distinctive treatment of domestic property has not promoted simplicity.

30 The third reason was the desire for certainty. At least with the matrimonial home and motorcar, it might have been thought, the spouses would know exactly where they stood – half each. The record suggests otherwise. Value judgments frequently arise in such areas as the classification of a family asset, the apportionment of matrimonial debts between domestic property and other matrimonial property and ascertaining the extent of a homestead. More importantly, every domestic property division is potentially subject to the "extra ordinary circumstances" loophole in s 14. Unlike s 15, which involves exclusively the measurement of contributions, s 14 confers an unpredictable open-ended judicial discretion. The provision is a fertile and permanent source of litigation.

31 Finally, there is the intuitive feeling that the matrimonial home and family chattels have a special role in family matters and should therefore attract special treatment at law. Certainly that is so when dealing with the implementation of the division because domestic property has special significance for support. It is quite different, however, when considering the quantum of shares to be awarded in recognition of contribution to the marriage partnership. That is purely a question of value, unaffected by the characteristics of any individual asset. As has been said by a prominent Canadian commentator:

> "The intense preoccupation of English lawyers and legal writing in the past decade with the 'matrimonial home' has caused some surprise and mystification to lawyers in other countries who tend to think that English marital property law is all about whether the English married woman's cash or mortgage-bought home is or ought to be her castle . . . a civil lawyer would be likely to regard a regime of 'community reduced to the matrimonial home' as a very unbalanced and illogical design . . . it would be hard to find informed opinion in North America that such legislation is a worthy substitute for a comprehensive and balanced scheme of marital property law" *(jj)*.

32 What is now required is simple: repeal those provisions of the Matrimonial Property Act 1976 which designate domestic property as a subcategory of matrimonial property. The Act will function well without them.

Spouse support obligations

33 Broadly speaking the husband's role as pater familias carried with it both the enjoyment of superior property opportunities and the responsibility of support obligations. Husbands have lost their favoured property treatment. They still have the support obligations.

34 Periodic maintenance is unattractive to all who come in contact with it – husbands, wives, legal advisers and enforcement officers. Both spouses have an interest in securing their mutual independence as far, and as soon, as possible after a marriage has broken down. Periodic maintenance perpetuates a relationship which is emotionally dead. The husband resents paying off a dead horse for the rest of his life. The wife is encouraged to continue in a position of humiliating dependence. Because the maintenance rights and obligations continue to turn on the relative fortunes of the two ex-spouses, there is a disincentive to personal effort, and a motive for prying into the other's affairs. The machinery of payment and occasional communication which results provides a continuing opportunity for

friction. Whether they should or not, husbands inevitably form fresh associations and then struggle to support two families, to the ultimate benefit of neither. All these matters suggest the desirability of terminating inter-spouse support obligations as soon as may be feasible after separation.

35 If the lot of husbands is to be improved, what is to take the place of the maintenance and possession of their husbands' property upon which wives previously relied? To begin with, a wife who was previously awarded possession of her husband's house and an order for maintenance which he paid for from his share dividends, is clearly now better able to provide for herself if she finishes up the owner of that house and some of those shares under the Matrimonial Property Act. Secondly, the spouse with custody of dependent children must continue to receive maintenance for those children from the other spouse. Thirdly, it might reasonably be expected that wives who now receive equal property treatment on the ground that they are equal partners in marriage will do better than their predecessors in supporting themselves. No longer can the modern feminist reasonably argue that (in the absence of special reasons) she cannot make her own financial way in the world.

36 "Special reasons" for a wife's inability to provide for herself should not be overlooked: (a) in many cases there will need to be a period for adjustment to financial independence following separation, (b) in most cases a wife with custody of dependent children cannot be expected to undertake employment, particularly full-time employment and (c) with a lengthy marriage there may need to be recognition of a permanently reduced earning capacity as a result of prolonged substitution of domestic work for outside employment. These factors prevent the simple abolition of inter-spouse support obligations.

37 Where for the above reasons support is warranted in a particular case, there would be a distinct preference for finality and a division of capital, rather than indefinite continuity and a division of income. Admittedly, complete finality through the division of capital is a luxury which the majority of husbands cannot afford, but it is an objective to be pursued as far, and as soon, as possible. Even on traditional principles, maintenance in a capital or property form gives the Courts the flexibility to cater for a wife who requires capital to purchase a house *(kk)*, a husband whose resources consist of capital rather than income *(ll)*, a husband with unusual wealth *(mm)*, a particular need for security in a capital form *(nn)* and an estate which cannot otherwise be readily distributed *(oo)*.

38 More importantly, capital rather than periodic maintenance promotes the finality and independence referred to earlier. As the English Law Commission stated in 1969 *(pp)*:

> "It is our considered opinion that the courts should be more ready to award lump sums. We say this because the award of periodical payments very frequently give rise to difficulties of enforcement and tends to prolong what has proved an unhappy situation between the parties and to exacerbate their hostile feelings. A lump sum, on the other hand, avoids the difficulty of attempting to recover at intervals relatively small periodical payments and, being a judgment debt, can be enforced by bankruptcy proceedings. Furthermore, it enables the parties to start afresh without relics of the past hanging like millstones round their necks. . . . . we note that recent Court of Appeal decisions on this subject appear to show a greater readiness to award lump sums. We appreciate, of course, that unless there is some capital a lump sum cannot be awarded. But, if for example, the husband owns the matrimonial home we see no reason why, in appropriate circumstances, he should not be ordered to pay a lump sum which he could raise by charging the house. It is sometimes objected that a woman inexperienced in finance might administer a lump sum improvidently or in such a way as not to provide a hedge against future inflation. We are not much impressed with this objection especially in the present context where the woman in question will have a legal representative to advise her".

The remarks hold good in New Zealand. For those that can afford it, capital maintenance and finality hold all the advantages.

39 The result is as follows. The obligation to support children should continue unaffected. The obligation to support a spouse or ex-spouse should be limited. The outer limits should be (a) a period for adjustment to financial independence, (b) any period spent with custody of dependent children and (c) recognition of any permanently reduced earning capacity directly due to the marriage. Where inter-spouse support does qualify on those grounds, the Courts should be directed to promote the general objective of early financial independence between the parties to the extent that the resources of the parties may make that possible. Capital maintenance is generally to be preferred to periodic maintenance. Periodic maintenance should normally begin to reduce after a suitable period and then ultimately terminate.

Conclusion

40 The Matrimonial Property Act 1976

sought to "recognise the equal contribution of husband and wife to the marriage partnership". At least in the division of property that goal has been achieved. Property is divided on a non-sexist basis. To return to the flippant title of this paper, husbands do get a fair share. So do wives.

41 Six problems remain. Of these two fall within the scope of this paper.

42 First, the equal division of domestic property unfairly penalises the spouse who made the sole or major contribution to it. It also produces unnecessary complexity and litigation. The special treatment of domestic property should be abolished.

43 Secondly, a husband's obligation to support his wife or ex-wife should be limited. The jurisdiction to award maintenance should be confined to (a) a period for adjustment to financial independence, (b) any period spent with custody of dependent children and (c) in deserving cases, any necessary recognition of a reduced earning capacity directly resulting from the marriage. The obligation to maintain children should continue unaffected.

44 In those cases where support following breakdown of marriage does prove to be warranted on the above principles, the courts should be directed to promote the general aim of early financial independence. The emphasis should be placed on maintenance in a capital and final form to the extent that the resources of the parties may permit that. This will, of course, require restoration of the jurisdiction to award capital maintenance, recently abolished by the Matrimonial Property Act 1976. Periodic maintenance should normally begin to reduce after a suitable period and then ultimately terminate.

(a) *Beeson* [1977] NZ Recent Law 89; [1977] Butterworths Current Law 273.
(b) Ibid.
(c) *L v L* [1977] Butterworths Current Law 638; see also *Robertson* [1977] NZ Recent Law 257.
(d) *Libischer* [1977] NZ Recent Law 230.
(e) *Foss* [1977] 2 NZLR 185 (Government valuation of homestead $10,000, private valuation $14,000, no appeal against government valuation therefore limited to the $10,000). *Beeson* supra (hearing to establish boundaries of homestead, adjournment to enable government valuation etc).
(f) *Campbell* (unreported, Ongley J, March 1977, Wellington D 253/73, M 164/74).
(g) *Walker* [1977] Butterworths Current Law 369, [1977] NZ Recent Law 141.
(h) *Libischer* [1977] NZ Recent Law 230.
(i) *Foss* [1977] 2 NZLR 185.
(j) *Castle* [1977] 2 NZLR 97, 103.
(k) *Dalton* [1977] Butterworths Current Law 941.
(l) *Robertson* [1977] NZ Recent Law 257.
(m) *Williams* (unreported, Wild CJ, 29 March 1977, Rotorua, M 19/75).
(n) *Beuker* [1977] Butterworths Current Law 490.
(o) *Jerome* [1977] Butterworths Current Law 938.
(p) See for example *Castle, Dalton, Robertson, Williams* and *Beuker* supra.
(q) *Williams* (unreported, Wild CJ, 29 March 1977, Rotorua, M 19/75; *O'Connor* [1977] Butterworths Current Law 792, *Stallinger* (No 2) [1977] NZ Recent Law 256.
(r) *Hollingshead* [1977] NZ Recent Law 256, *Jerome* [1977] Butterworths Current Law 938.
(s) Eg as in *L v L* [1977] Butterworths Current Law 638.
(t) Ibid.
(u) *Hollingshead*, supra.
(v) *Churcher* (unreported, Quilliam J, 1 April 1977, Wanganui, M 1/76).
(w) *Haddad* (unreported, Ongley J, 18 March 1977, Hamilton, GR 32/75).
(x) *Barton* [1977] NZ Recent Law 170; *Black* [1977] NZ Recent Law 202.
(y) *Hackett* [1977] NZLJ 316.
(z) *Turner* (unreported, Mahon J, 1977 Christchurch M 443/70).
(aa) *Sears* [1977] NZ Recent Law 170.
(bb) *Rountree* [1977] NZ Recent Law 324.
(cc) *Van Zanten* [1977] Butterworths Current Law 492.
(dd) *Foss* [1977] 2 NZLR 185, 190 (difficulties of implementing 60/40 farm division adverted to and, despite submissions already made by parties, question reserved). See also *Haddad* (unreported, Ongley J 18 March 1971, Hamilton, GR 32/75 – "it is difficult to devise a method of carrying this division into effect in a way that does not disrupt the husband's business or deprive the family of its living quarters" – business preserved by selling other property).
(ee) See, for example, the Minister of Justice, Mr Thomson, NZ Herald 9 December 1976.
(ff) Address to Women's Electoral Lobby 1977 reported *Council Brief*, August 1977.
(gg) *Hester* [1977] NZ Recent Law 291.
(hh) *Smith* [1970] 1 All ER 244, 246 per Lord Denning.
(ii) *Buckthought* [1977] 2 NZLR 223.
(jj) IFG Baxter: First Report on Family Property: A New Approach" (1974) 37 MLR 175, 176.
(kk) *Higgie* [1970] NZLR 1066.
(ll) *Von Mehren* [1970] 1 All ER 153, CA.
(mm) *Davis* [1967] P 185.
(nn) *Curtiss* [1969] 2 All ER 207.
(oo) *Long* [1973] 1 NZLR 379, CA.
(pp) *Report on Financial Provision in Matrimonial Proceedings* (Law Com 25) para 9.

MAORI AFFAIRS

PROTEST AND POSSESSION AT BASTION POINT — INTRUSION ON CROWN LAND

By Dr F M BROOKFIELD, *Associate Professor of Law in the University of Auckland.*

THE HAWKE CASE AND ITS BACKGROUND

In *Attorney-General v Hawke and Rameka (a)* the plaintiff sought an injunction to prevent the defendants from unlawfully occupying Crown land at Bastion Point at Orakei, Auckland. The first, second, third and fourth defendants (Messrs J P and G P Hawke and Messrs J and R Rameka) had been in admitted occupation of the land since early January 1977, together with a number of other persons *(b)*.

More particularly, the plaintiff alleged that four defendants' occupation of the land was "without right, title, or licence" and that it constituted a trespass under the Land Act 1948. The defendants for their part denied that the land was Crown land and claimed alternatively that, if it was, the conduct of the Crown in acquiring the land had been such that an injunction ought in equity to be refused.

The land in issue was about 60 acres in area, though apparently the effective occupation of the defendants extended not to all of it but, in Speight J's words, to "some acres". To have succeeded, the defendants would of course have had to show that the Crown's acquisition of the 60 acres or the part actually occupied was void or somehow tainted by unconscionable conduct. But in fact their occupation, precipitated by government proposals in 1976 to develop about 30 acres for subdivision and sale for private housing, was a protest against the Crown's acquisition from the Ngati-Whatua tribe of the 700 acre Orakei Block, which had taken place piecemeal late last century and in the first half of this (mostly in the second and third decades); the Defendants themselves being members of the tribe and the 60 acres a part of the Block. The judgment of Speight J was therefore directed, not to the specific legal issues affecting the 60 acres, but to the two-fold process of purchase and compulsory acquisition by which the portions of the Block passed to the Crown over the years (much of it to be developed or disposed of since for residential purposes). The judgment is then an appraisal of that whole process and, to some extent, of the policies behind it.

Speight J noted that "[n]o real attempt [had] been made by the Defendants to deny the Crown's legal title to the areas at present in issue, that is, the 60 acres". Certainly, insuperable difficulties were likely to have met any such attempt had it been made. For one thing, if the Maori owners who sold the 60 acres to the Crown had any ground for avoiding the transfers they had made, it was not open to anyone other than those owners' personal representatives or successors to dispute the Crown's title *(c)*. If the Defendants were within either of those classes, it would seem that only if the ground of avoidance were fraud or mistake discovered within the last twelve years would their own title to the land not have been extinguished *(d)*. On the other hand, if it were alleged that the Maori owners who sold had no title because the 65 year old decision of the Court of Appeal referred to below could be shown to be wrong, then, quite apart from the difficulties of getting that decision overruled today. The then Real Property Limitation Act 1833 long ago barred and extinguished the claims of any who were not bound by the decision.

But these difficulties did not have to be considered in the judgment. Instead, the broad question of the Crown's allegedly unconscionable dealings in respect of the whole Block is discussed against the historical background. Briefly summarised from the judgment that history is as

(a) Supreme Court, Auckland, 20 April 1978, Speight J. In dealing with Maori land legislation the present article is concerned only with the Acts that historically are part of the background (and, in the defendants' view, part of the foundation) of the case. No account of or comparison with later and present-day legislation is attempted.

(b) Initially the Attorney-General also sued the four defendants not only in their respective personal capacities but also together "as representing all persons trespassing on or using or occupying lands of the Crown at Bastion Point". But since an injunction could not be enforced against unknown and unnamed persons the proceedings against the defendants as representatives were struck out, with Crown counsel's consent.

(c) The defendants could not have succeeded by setting up the title of a third person: see eg *Allen v Roughley* (1955) 94 CLR 98 and note (s) below.

(d) See the Limitation Act 1950, ss 7, 18 and 28.

follows. The Orakei Block was Maori customary land, having been occupied by the Ngati-Whatua tribe (or their ancestors') since their conquest and seizure of the Waitemata-Manukau isthmus in the mid-18th century. in 1869 Chief Judge Fenton in the Native Land Court upheld the claim to the Block made on behalf of three particular subtribes by the Ngati-Whatua Chief, Apihai Te Kawau. Judge Fenton vested the land in him as trustee for 13 persons who, with their respective heirs, were to hold the land as tenants in common. The land was to be inalienable (in accordance with the law as it then stood) *(e)* and, the Judge apparently intended, would remain tribal land occupied communally by the 13 persons and their descendants in perpetuity. But (to put it baldly for the moment) the acquisitiveness of the European settlers in the developing colony and the desire of some or many Maori owners to sell caused the policy of imposing and keeping restraints on the alienation of Maori land to be greatly modified – and then largely abandoned. Changes in the legislation were made, one stage of which may be summed up by adapting Speight J's account of the effect of s 14 of the Native Land Court Act 1894: the section gave power to the Court to determine title and to vest it in individual persons or groups of persons, to partition land among individuals and to impose and to remove restraints on alienation. In relation to the Orakei Block, on applications heard in 1898, the Court partitioned it among 21 persons as successors to the original 13.

Then the Native Land Act 1909 removed all existing restraints on the alienation of Maori Land *(f)* and authorised its disposal by private sales subject to confirmation by a Maori Land Board or by the Native Land Court *(g)*. Many of the owners of the partitioned areas of the Orakei Block entered into private sales, purporting to invoke the new freedom. But the power to do so came in question, since the 21 had been beneficial owners at the time of the partition order and there was doubt whether the Court had jurisdiction to make partition orders in favour of persons who were not owners at law. Accordingly, the Solicitor-General took proceedings in 1912 to prohibit the Maori Land Board from confirming the sales, on the ground that the partition orders were void and the interests of the owners inalienable except by will *(h)*. The decision of the Court of Appeal in those proceedings *(i)* upheld the persons concerned as absolute owners with (subject to the Act) freedom to alienate. Then the Government, determined to prevent the evils of haphazard development that would result from private sales and also further to protect the owners from exploitation, blocked by Order in Council the sales already made under the 1909 Act and from 1913 began to acquire the Orakei Block. The Government's policy of acquisition was pursued successfully. By 1931 almost the whole Block had been acquired by private sales, except for a piece ten acres 30 perches in area, designated Orakei 4A2A, whose owners refused to sell. That remaining land was taken by proclamation for housing purposes in 1950.

On the question of the alleged bad faith of the Crown or of its servants, or agents the arguments of the Defendants were apparently directed to the changes in the law, especially in the Act of 1909 by which Maori land became generally alienable, and to the actions of Crown officers in negotiating the purchases. As to the first, Speight J remarked that "a Court cannot hold that Parliament in enacting laws of the land as it did in 1909 and earlier was acting in bad faith". Given accepted notions of the relationship between the Courts and Parliament he would indeed have been a bold counsel (had the Defendants been represented) who would have argued otherwise.

As to the negotiations between the Crown servants and the Maori owners, Speight J rejected the allegations of unconscionable dealing. The prices paid in the voluntary sales were low indeed if compared with the soaring values of later years. But Speight J remarks that "[w]ith one exception the Government prices eclipsed both the private offer and the Government valuation". The table of comparative prices which is set out in the judgment suggests that in some of the cases the higher price paid by the Crown may have been

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(e) For provisions then in force, authorising restrictions on alienation, see the Native Lands Act 1865, ss 28, 43 and 46, and the Native Lands Act 1867, ss 20 and 21.

(f) Section 207. See s 210 and note (h) below as to equitable interests.

(g) Section 217. Land owned by more than 10 owners was subject to special provisions: s 209.

(h) Equitable interests were generally inalienable, except by will, by virtue of the Native Land Act 1909, s 210. Speight J states the main ground of the Solicitor-General's case as "that the land was vested in the beneficiaries as trustees and was inalienable . . . ."

(i) *Solicitor-General v Tokerau District Maori Land Board* (1913) 32 NZLR 866 (Williams, Edwards, Cooper & Chapman JJ; Stout CJ dissenting). The majority held that the Court's power to make partition orders under the Native Land Court Act 1894, s 14, extended to beneficial owners. On the contrary view of the Chief Justice, the partition orders being void, the title to the Orakei land would have remained in the Trustee succeeding Apihai Te Kawau. Leave to appeal to the Privy Council was granted but the appeal apparently did not proceed.

partly explained by the inclusion of land additional to that agreed to be sold to the private buyer. In all, the total of the prices in the private sales was £48,817 for 389 acres 4 perches, to be compared with a total of £54,537 paid by the Crown for 475 acres 1 rood 7 perches. With the remaining sales to the Crown of course no such comparison is available. At all events the learned judge found no "evidence to substantiate allegations of chicanery in relation to the acquisition of the Bastion Point site. It was a Government enacted policy to acquire this land. It was carried out by what appears to have been open-handed negotiation".

With one notable exception all the sales were voluntary. The last acquisition, coming almost 20 years after the final completion of the voluntary sales, was effected by proclamation in 1950 in respect of the 10 acres 30 perches of Orakei 4A2A. This exception to the course of voluntary dealings leaves one with the impression that, if the negotiations were doubtless "open-handed", the hand was gloved in tougher stuff than velvet. Of course many land owners, Pakeha as well as Maori, unwilling to sell to the Crown, have had to submit to compulsory acquisition as did the 19 owners of 4A2A. But given the history of the whole block and its original inalienable status, the final touch of seeming ruthlessness was (one may comment) surely unfortunate.

Once Speight J had absolved the Crown's officers from the Defendants' charges of chicanery, the pursuit of government policy, even by compulsory acquisition, could scarcely be unconscionable conduct. It would have been impossible to attack the good faith of the Ministers of the Crown successively responsible. However, the inevitability of Speight J's findings in this respect should not obscure the real significance of the Defendants' protest against the social values behind the government policies and the loss (by means however proper in the light of those values and in the legal system based on them) of so much of the land that was to have been perpetually inalienable.

Speight J's judgment deals also with the 40 acre Papakainga land in the nearby Okehu Bay, which was partitioned among the same persons as was the Orakei Block and which was acquired by the Crown, part of it compulsorily in the Government's attempt at a final solution of the problem in 1950. Some of the Maori occupants were compelled to move against their will from what was their traditional residential land. Speight J was however disposed to accept that here too the authorities had acted in good faith in what they thought "was the best solution for the benefit of the people". The Crown's acquisition of the Papakainga can of course scarcely be legally relevant to the Defendants' occupation of part of the Orakei Block; but the Defendants' families had been among those who had had to leave the Papakainga and, as Speight J acknowledged, Maori discontent over it had continued, as had that over the Orakei Block.

Finally, his Honour dealt with (a) the Government's 1976 scheme for developing the Crown land at Bastion Point (part of the Orakei Block) which precipitated the protest of the defendants and others and their entry upon and occupation of that land and (b) the substituted scheme of 1978 which the defendants had declined to accept. The 1976 scheme receives the only sharp criticism which Speight J makes of the conduct of the Crown. Under that scheme, as already mentioned, almost half of the 60 acres would have been sold to private purchasers. Having regard to the Crown's original purpose of preventing haphazard private development, the learned Judge describes this proposal as "politically and socially inept" and the 1976 scheme as a whole as seeming "to lack any awareness of [Maori] sensitivity". However, he approves the substituted scheme of 1978 in which the area for private housing is reduced to 5 acres, and 22 acres is to be set aside for public reserve, 4 acres for a Youthline Hostel and about 29 acres vested in a Tribal Trust (together with a number of nearby rental houses) for Maori housing and reserves. The 1976 and 1978 schemes need not be considered further here except to say that Speight J's only doubt about the latter related to the proposed financial arrangements which would leave the Trust owing about $250,000 to the Crown. However Speight J was satisfied that the 1978 scheme was acceptable generally to a group of tribal elders between whom on the one hand and the defendants and their supporters on the other a considerable rift had apparently developed.

Speight J concluded that the land in issue – the 60 acres – was Crown land; that it was occupied without right, title or licence by the defendants; that there was no ground demonstrated to bar the Crown from relief on equitable grounds; and that an injunction should issue accordingly.

The judgment is sympathetic in tone to the defendants in its acknowledgment of the Maori sense of deep grievance over the Orakei and Papakainga land. Some may possibly criticise it for its assessment of the 1978 scheme (greatly improved though that is on the scheme of 1976 and of the degree of tribal support for that scheme. The present article however is concerned with two more general but fundamental matters, briefly these:

First, Speight J finds support for the policies of making Maori land alienable especially under the Native Land Act 1909 and for the Crown's

acquisition of the Orakei land, in some influential Maori opinion of the time and in the willingness of some owners to sell. But, with respect, legal restraints on alienation, in whatever context, are surely imposed for the benefit of future as of present owners; and the wishes of the latter and, in the present context, the approval or acquiescence of some distinguished contemporaries of the same race, must surely be a very limited justification for removing the restraints, especially in a case like the present. The point remains sound despite the beliefs of the time that the only hope for the Maori was to be Europeanised and that otherwise he was "doomed to extinction as a result of the clash of cultures" *(j)*.

Secondly, some criticism of the judgment may be based on a misunderstanding of the true scope of the learned Judge's inquiry – a misunderstanding encouraged by the nature of the proceedings and also by parts of the judgment itself where the policies of partitioning the land and removing the restraints are approved as (in effect) the only remedy for the

> "fundamental divergence between the communal ownership philosophy which was suitable for the Native owners provided they were not subject to outside influence and the pressures put upon the Government of the day by the Europeans to whom it had a political obligation".

One is left in no doubt that Speight J thought that the policies were adopted in good faith. Certainly, as the learned Judge shows, the specific policies were favoured by many responsible, influential and well-meaning people *(k)*. But behind the Native Land Acts was the dominant policy of breaking down Maori communal ownership and consequently the Maori social system *(l)*. So vast a destruction appears to have been intended and in a large measure resulted, that to say this policy was conceived in good faith is perhaps not to say very much, even allowing for the benefit of hindsight.

But in any event and with all respect, the complex motives and intentions of the legislators

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(j) W Parker, "The Substance that Remains", in *Thirteen Facets* (1978 ed Ian Wards) 169, 190. Maori opinion in favour of the passing of the Act of 1909 was largely led by James Carroll and AT Ngata, who were responsible for the development in the Act of the beneficial institution of incorporations of owners (Parker, loc cit, 174), which with some other apparently) countervailing provisions of the Bill may have lessened Maori opposition. The few Maori legislators were virtually silent in the debates except for the Hon W Pere who strongly criticised the Bill in the Legislative Council (1909) 148 NZPD 1334–1337) and for Carroll himself. See also note *(k)* below.

As to the Orakei Block, through the Court of Appeal decision of 1913 (note (i) above) the legislation had an impact on that land that Ngata certainly had not intended. "It must be remembered that this is Native land and communal land, and meant to be preserved as a dwelling place for the remnant of a tribe" (Stout-Ngata Report on the Orakei Native Reserve (Appendix to the Journals of the HR 1909 G–1P 3)).

(k) In ascertaining the background of and necessity for the Act of 1909, Speight J cites "Sir John (sic) Carroll, a distinguished figure in Maori affairs, in introducing the matter to the Legislative Council" as saying (1) that "a relaxation of the present restrictive provisions is made to meet the undoubted advances made by the Maori people" (1909) 148 NZPD 1101–1102); and (2) that the removal of restrictions was to enable the Maori "to divest himself of his trappings". His Honour also cited, as taking place in the Lower House, the eloquent attack by the Attorney-General Sir John Findlay on the "chicancery" of some of the settlers in acquiring lands from the Maori (ibid, 1272, 1343). (With respect, the two Ministers have been transposed: Sir James Carroll (as Native Minister) introduced the Bill in the House; Findlay introduced it in the Council). The second of the two statements attributed by Speight J to Carroll, as a contribution to the debate, would have come strangely from him and appears rather in the speech of J G Herries, Member for Tauranga, who favoured enabling "any Native [of sufficient education or ability] . . . to divest himself of the unfortunate laws that now govern the Maori people, *and to divest himself of all his native trappings* and to stand out a full-blown European" (ibid, HR, 1105–1106, emphasis added). An assessment of the attitudes and motives of the legislators, so far as it can be made, would have to take account not only of the principal speeches of Carroll and Findlay but also of – (i) strong criticism that the Bill did not go far enough in speeding the destruction of Maori communal ownership (Herries, ibid, 1106, and the Hon JD Ormond, ibid, LC, 1328–1331); (ii) GV Pearce's objection to the leasehold system as "making Maoris the landlords of white men" (ibid, HR 1110); (iii) the defence against Findlay's charges of settlers' chicanery that the Hon O Samuel felt called on to make (ibid, LC, 1333–1334); (iv) Findlay's own unfortunate impatience with the opposition of Wi Pere (ibid, LC, 1335–1336, 1342); and (v) the defeat without a division of T K Sidey's amendment that would have permitted a Maori to be president of a Maori Land Board (ibid, HR, 1155; see s 60 of the Act which provided only for European presidents of the three-member Boards). The speeches show real concern that the Maori should not be defrauded but otherwise only rare sympathy with them as Maori and some impatience for them to be Europeanised. Few of the legislators can have had any real understanding of the complexities of the position of which Professor I H Kawharu (referring specifically to the passing of the Act and its effects) has recently written: "For the majority of the Maori people there appeared to be little to relieve the gloom, and what little there was, was illusory": *Maori Land Tenure* (1977), 25–26.

(l) See eg N Smith, *Maori Land Law*, (1960) 12–13; Kawharu, op cit, 15–17, 22–23, 25–26, 80–83.

were surely not justiciable *(m)*. To repeat Speight J's words from a little later in his judgment – "a Court cannot hold that Parliament in enacting laws of the land ... in 1909 and earlier was acting in bad faith". Hence an important part of the case put by the defendants simply could not be adjudicated upon. That was inevitable; but it is also unfortunately inevitable that the public at large is likely to think that the Supreme Court has examined the whole of the protesters' case and decided against it. One may note Speight J's remark that the Attorney-General's application for an injunction had placed "in the hands of this Court a responsibility for making a pronouncement on moral issues and consequently in part relieves the Government of some of the adverse publicity that it might have attracted to itself had simple trespass procedures been taken". The procedure chosen by the Crown caused wider issues of intention and of policy to be considered than could really be judicially determined.

THE LEGAL POSITION OF THE DEFENDANTS: MERE TRESPASSERS OR ADVERSE POSSESSORS?

By "simply trespass procedures" Speight J meant "proceedings under the Land Act or under the Trespass Act or in a variety of ways to obtain a peremptory order for eviction". That prompts a fuller consideration of the Defendants' legal position than their arguments required Speight J to give. Such further consideration need cause no impatience. It is important to ascertain clearly the position of the Defendants in the system against which they appear to have been generally protesting. That position may well be rather better than his Honour thought.

The most important of the possible proceedings that are referred to appear to be:

(1) Prosecution on the information of the Commissioner of Crown Lands for "occupying" Crown Land "without right, title, or licence" under s 176 of the Land Act 1948.

(2) Civil proceedings brought by the Commissioner in the Magistrate's Court under s 25 of the same Act, to recover possession of the land, on the ground that the Defendants occupied it "without any right, title, or licence".

(3) Civil proceedings by or on behalf of the Crown, under the general law, for recovery of possession on the same ground (if these are not impliedly replaced by those last mentioned).

(4) Prosecution under s 3 of the Trespass Act 1948, upon refusal to leave after due warning.

(5) Summary eviction (without any court order?) in exercise of the Commissioner's power under s 24 (1) (b) of the Land Act.

Since Speight J held specifically that the defendants were occupying the land without right, title or licence, it is clear that any of (1), (2) or (3) would have succeeded and, further, that the injunction was properly sought and granted to prevent a continuation of the technically criminal offence of unlawful occupation of Crown land.

Course (5), as well as being politically disastrous might have involved action possibly in conflict with the law against forcible entry, s 91 of the Crimes Act 1961. Understandably no attempt was made to use it against the defendants *(n)*.

However the fourth possible course of action, attracts the most doubt and difficulty. Can s 3 of the Trespass Act 1968 be used against squatters or adverse possessors – persons whose acts of trespass on the land have amounted to the taking of possession?

Possessory acts

First, there appears no doubt that the defendants and others with them had exercised possessory rights over the 60 acre block or at least a considerable part of it. Buildings had been erected or placed on it, including, in Speight J's words, "one quite substantial building". The land had been cultivated and crops grown. The defendants and their supporters had, it is understood, controlled entry on to the land. The Attorney-General's case against the defendants, upheld by the Court, was in part that they were in "occupation" of the land "without right, title, or licence". Only a particular difficulty, discussed and disposed of below, in any way impedes one from equating the "occupation" with "possession" in fact and law – unlawful possession, in relation to the Crown, no doubt, but possession nevertheless. It is true that in *McPhail v Persons, Names unknown* [1973] Ch 447, 456, Lord Denning MR suggested that squatters (in a residential property) did not gain possession since the owner never "acquiesced" in their presence *(o)*. But in the instant case the defendants were on the land

(m) If they had been justiciable in the unusually wide-ranging inquiry undertaken by Speight J, then to judge them merely by a test of good faith in the light of the standards of the time could scarcely dispose of the defendants' case.

(n) Although the removal of the buildings on the land that took place as part of the later action against the protesters remaining on the land was presumably effected under s 24 (1).

(o) But see M Albery, (1973) 89 LQR 458, 459, to

for about fifteen months. Whatever the spokesmen for the Crown said, by way of accusations of trespass or directions to depart it would be difficult to argue that there was not *in fact* acquiescence on its part in the Defendants' presence and occupation.

Lord Denning's dictum referred to above marked the Court's reluctance to infer possession as against the "true owner". The decision of the English Court of Appeal in *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1974] 3 All ER 575 shows the same reluctance (in circumstances in no way like the present) and indicates that the true owner is not dispossessed if the possessory acts of the trespasser are not inconsistent with the particular purpose for which the former has held the land. But where the "trespass effectually prevent[s the true owner] from using the land in any foreseeable way" *(p)*, it is clear that he has been dispossessed by the trespasser. On that test the defendants appear to have dispossessed the Crown during the period in question.

The case for saying so is even stronger when one takes account of one very recent and one earlier decision which emphasise the primary importance of possessory acts – of de facto possession – rather than of the possessor's having to demonstrate as well an intention on *his* part not inconsistent with the acts: *Treloar v Nute* [1977] 1 All ER 230 *(q)* and (where Crown land was in question) *Robinson v Attorney-General* [1955] NZLR 1230. In the latter case FB Adams J held too that the fact that the possessory acts involved offences under s 176 of the Land Act 1948 and its predecessors was no bar to their constituting adverse possession for the purpose of s 7 (1) of the Limitation Act 1950, so that the possession having subsisted for 60 years the Crown's title was extinguished *(r)*.

In the instant case the defendants were in possession a mere 15 months. But consequences of the adverse possession for however short a time are important. These (notwithstanding Torrens system habits of thought) would be that the defendants and any co-possessors had an estate in fee simple in the land and could maintain actions for trespass against third persons – against whom their title was good, though bad and precarious as against the Crown *(s)*.

The Crown and dispossession

There is however one difficulty against these conclusions. At common law the Crown could never be disseised or dispossessed, it being thought inconsistent with his royal dignity that the King should be so and have to sue for possession in his courts. The fiction is discussed and explained by Windeyer J in *Commonwealth v Anderson* (1960) 105 CLR 303, 318 et seq. Instead of bringing an action of ejectment, at common law the Crown proceeded by information for intrusion, the judgment upon which was that the defendant be amoved, not that possession be had. A consequence of the fiction was the doubt, recently referred to by Chilwell J in *Moore v MacMillan* [1977] 2 NZLR 81, 89, in quoting from the judgment of Williams J in *Waugh v Sheehy* (1888) 7 NZLR 81, 83:

> "*If* . . . an intruder [on Crown land] has a right of action for trespass, it lies on him to

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the effect that a squatter in occupation with intent to exclude the owner, generally obtains possession. If the true test in such cases is acquiescence on the owner's part then acquiescence may certainly be inferred from delay: *Clerk and Lindsell on Torts* (14th ed 1975), para 1322.

(p) [1974] 3 All ER 575, 591. Cf Reed J's judgment in the early instance of an unsuccessful claim to an adverse possessory title to part of the Papa kainga land in *Whatatiri v The King* [1938] GLR 379, 386–388.

(q) Noted PF Smith (1978) 41 MLR 204 "A check on *Leigh v Jack?*" For earlier discussion of the extent to which an *owner's* intention is relevant in determining whether he has been dispossessed, see J A Omotola, (1974) 38 *The Conveyancer* (NS) 172.

(r) In *Robinson's* (as apparently in the instant) case the land was not within those classes of Crown Land over which, by virtue of the Land Act s 172 (2), no adverse possessory title in derogation of the Crown's title can be acquired.

(s) Megarry and Wade, *The Law of Real Property* (4th ed 1975), 1006–1009; in the New Zealand context, see F M Brookfield, "Prescription and Adverse Possession" in *New Zealand Torrens System Centennial Essays* (1971 ed Hinde) 162, 163–165, 174–175. The principle was applied in favour of an adverse possessor of Crown land in *Jones v Sullivan* (1915) 23 DLR 843 (New Brunswick Supreme Court) but in that case the difficulty discussed below in the text was not raised. For a recent discussion of adverse possession of Crown land (in which that difficulty is referred to) see *Moore v MacMillan* [1977] 2 NZLR, 81, 89–92 where however, as Chilwell J held, the land as public road (now vested in the County Corporation) was protected by the Land Act 1948, s 172 (2) from an "occupiers" acquisition of possessory rights that would enable the exclusion of any members of the public from passing and repassing by virtue of the County's title. (Cf *Simpson v Knowles*, discussed below in the text). In the present case the land is apparently, not "held for any public work" nor has it "in any manner been reserved for any purpose", so that the Crown's title cannot be protected by s 172 (2). But, even if it were otherwise, the protection would not prevent possessory rights from arising as against persons other than the Crown. Since their rights would not be dependent on the title of the Crown, *Moore v MacMillan* would be distinguishable.

> show this; that he is in such a position as in an ordinary case would be sufficient to maintain an action of trespass. That is to say, is he, apart from any question of title, in exclusive physical possession of the land he claims?"

The question indicated by the introductory "if" emphasised by Chilwell J is this: since, according to the fiction, the Crown could not be dispossessed, how could an intruder on Crown land exercise possessory rights such as the right to sue in trespass? The fiction was established in the common law in days when time did not run against the King in the bringing of actions; and it survived the enactment of both 21 Jac I c 14 *(t)* (under which, after 20 years, the Crown proceeding on information for intrusion was put to the proof of its title) and the Crown Suits Act 1769 *(u)* by which the 60 year adverse possessory title became available against the Crown. But, as learned judgments in the High Court of Australia in *Commonwealth v Anderson* suggest *(v)*, it is very doubtful whether the fiction survives into modern times when legislation generally assimilates the position of the Crown as litigant to that of a subject and specifically authorises the Crown to take proceedings for the recovery of land. In New Zealand see in both connections s 3 of the Crown Proceedings Act 1950 and as to the latter of them s 25 of the Land Act 1948 already referred to. Admittedly the Commissioner (not the Crown) is formally the plaintiff in proceedings under s 25 but the section refers specifically to the relief sought as "possession" and the assumption that the Crown has been dispossessed by the person who "without any right, title, or licence . . . is in occupation" of the land is clearly made.

There should then be no good reason today for denying the intruder on Crown land, whose acts would constitute the taking and maintaining of possession if the land were privately owned, the status of adverse possessor *(w)*. If so he can maintain an action for trespass against someone who intrudes on *his* possession or indeed prosecute that person under s 3 of the Trespass Act 1968 *(x)* if that person refuses to leave after due warning.

However, the question is whether adverse possessors are themselves liable to be prosecuted under the section (the answer to which on the arguments set out above will be the same whether the land is Crown land or privately owned). The answer, submitted with some confidence despite the apparent lack of direct authority, is that they are not so liable; for the reasons now appearing.

Mere trespass or adverse possession? Case for the distinction

(1) Liability to prosecution under s 3 accompanies liability to be sued for *trespass (y)*. It may be inferred that a person who is actually in possession, but wrongfully in relation to some other person, is not liable to be prosecuted under the section since the civil remedy against him is primarily an action for possession and mesne profits rather than damages for wrongful entry *(z)*.

(2) The construction of the Trespass Act 1968 as a whole suggests the same. The definition of "private land" in s 2 includes "any land, whether alienated from the Crown or not, of which any person is in actual occupation or in receipt of the rent or profits". Section 5 (disturbance of domestic animals), s 6 (discharge of

(t) For its application in New Zealand, see eg *Pearce v Boulton* (1902) 21 NZLR 464.

(u) The Nullum Tempus Act, in force in New Zealand till replaced by the Limitation Act 1950.

(v) 105 CLR, 316–318, per Menzies J; cf ibid, 321 et seq, per Windeyer J. It is true that the fiction was recognised by the Privy Council in *Emmerson v Maddison* [1906] AC 569 (not cited in *Commonwealth v Anderson)* but not in a context where modern legislation regarding the Crown as litigant was under consideration.

(w) The fiction should not be regarded as affected by the circumstance that under s 176 of the Land Act 1948 unauthorised occupation of Crown land is an offence. It was because of a similar provision that a squatter on Crown land in New South Wales was held unable to sue in trespass in *Hardy v Wise* (1856) 2 Legge 897 but the decision is difficult to reconcile with that of F B Adams J in *Robinson v Attorney-General* [1955] NZLR 1230 where possessory acts forbidden by s 176 were held to constitute adverse possession for the purpose of s 7 (1) of the Limitation Act 1950. The decision in *Hardy's* case was thought possibly to require reconsideration, by the New South Wales Full Court in *Bateman v Lashbrook* (1930) 30 SR (NSW) 478, 480.

(x) "Every person commits an offence against this Act . . . who wilfully trespasses on any place and neglects or refuses to leave that place after being warned to do so by the owner or any person in lawful occupation of the place, or any person acting under the express or implied authority of the owner or person in lawful occupation".

(y) *James v Butler* (1906) 25 NZLR 653, 661, where Cooper J had to consider the original predecessor of s 3, s 6 (3) of the Police Offences Act 1884 under which any person committed an offence who "wilfully trespasses in any place, and neglects or refuses to leave such place after being warned to do so by the owner or any person authorised by or on behalf of the owner".

(z) The distinction is to be maintained despite the origin of the action for ejectment as a species of action for trespass.

firearms) and s 7 (failure to shut gates) all create offences in relation to trespass on "private land" where the acts in question are done "without the authority of [the owner or] the occupier [of the land] or other lawful authority". From all this it seems clear that a person "in actual occupation" of land not alienated from the Crown – who might be an adverse possessor rather than a licensee – is in lawful occupation for the purpose of the sections and indeed of s 3 as well. This accords well with the common law doctrine of relativity of title; the title of one in exclusive possession is good – lawful – as against anyone but a person with a better title *(aa)*.

(3) It is proper and in accordance with general principle to construe s 3 against the background of the law of trespass and adverse possession, giving it no further operation than reasonably necessary and remembering that the adverse possessor was no mere wrongdoer at common law but had (as he still has) the protection of the possessory remedies against all but the "true owner".

(4) The matter may be clarified further by reflections based on *Simpson v Knowles* [1974] VR 190. There a construction company had been authorised by the Governor in Council, under statute, to construct a pipeline through a portion of Crown land (foreshore) which was reserved as a public park. The company fenced off the route of the pipeline. The defendants were successfully prosecuted before the Magistrate under the Victorian equivalent of s 3, for continuing to trespass on the enclosed area after being duly warned to leave. Norris J, reviewing their convictions, held in their favour (1) that the pipeline company had merely a licence from the Crown (and therefore no grant of possession) and (2) that the "de facto" possession (as Norris J described it) claimed by the company over the enclosed area could not support an action for trespass or the prosecution actually taken against the defendants, because of the statutory rights of access to the park enjoyed by the defendants as members of the public.

However, the point for present purposes is that but for those rights the defendants would have been trespassers and the convictions upheld. Now the possession wrongfully claimed by a mere licensee is no more lawful than that claimed by one whose entry on the land constituted a trespass. In both cases the unauthorised acts of taking possession are acts of trespass. And, surely, in both cases, once wrongful or adverse possession is taken, it is subsequent intruders who (and that in relation to the now established adverse possessors) are liable as trespassers for wrongful *entry*. Further, the trespasser or, better, the *mere* trespasser (being without possession), can usually abate his wrong simply by "leaving" – by physically departing (though remaining liable for any damage he has done); and prompt physical departure is all that is required of him to avoid prosecution under s 3 *(ab)*. The adverse possessor, on the other hand, if he is not himself dispossessed, cannot surrender possession merely by physical departure. The requisite intention must be there – shown, for example, by a delivery of keys in an appropriate case. Clearly a person may be in adverse possession of land without being always physically present on it. While (physically) away from it, can an adverse possessor be warned to "leave" and then prosecuted for failing to surrender the land? The answer, surely, is no. If it is, then the inappropriateness of using s 3 of the Trespass Act against adverse possessors, whether or not physically present on the land, is, it is submitted, obvious.

(5) The recent legal history and wider background of the matter provide further confirmation. (a) When wilful trespass first became an offence under s 6 (3) of the Police Offences Act 1884, and right through to subsequent enactments in s 6 (c) of the Police Offences Acts of 1908 and 1927 respectively, much land in New Zealand was under common law title (as modified by the deeds registration system) and therefore fully subject to the doctrine of adverse possession as the means by virtue of the Crown Suits Act 1769 or the Real Property Limitation Act 1833 *(ac)* of quieting defective titles. The Legislature is most unlikely to have intended that someone who had been in adverse possession of land for say a year less than the 20 then necessary to give him a good title under the latter Act could be turned into a criminal offender by refusal to "leave" on the warning of a person with a better title to the Land.

There is no need to suppose any change of intention of the Legislature in this connection in the subsequent enactments of s 6A of the Act of 1927 and now s 3 of the Trespass Act 1968; more especially as in respect of land under the widely prevalent Torrens system adverse possession after 20 years may become a source of good title, under Part I of the Land Transfer Amendment Act 1963.

(b) Under s 176 (2) of the Land Act 1948

(aa) See note (s) above.

(ab) Probably however the departure must be real, and not "merely colourable" (eg not followed by immediate return): *R v Price* (1897) 16 NZLR 81. I am indebted to Dr K A Palmer for discussion on this point.

(ac) In force in New Zealand until replaced by the Limitation Act 1950.

one commits an offence who "without right, title, or licence – (a) trespasses on, or uses or occupies lands of the Crown". In previous corresponding enactments, s 39 of the Land Act 1924, s 33 of the Land Act 1908, s 33 of the Land Act 1892 and s 26 of the Land Act 1885 "unlawful trespass" was an offence but there was no mention of use or occupation. Notwithstanding the change thus made by s 176 (2) of the Land Act 1948, Parliament made no similar change to the law of general criminal trespass when enacting s 3 of the Police Offences Amendment Act 1952 (No 2) (adding s 6A to and repealing s 6 (c) of the principal Act) or s 3 of the Trespass Act 1968.

The reasoning is admittedly not compelling but gives some support to the view here put forward that occupation is to be contrasted with mere trespass and that the latter alone is covered by the last mentioned section and by its predecessors.

Case against

However two considerations against that view remain to be examined. First, the law reports show two cases where, in appeals to the Supreme Court, it appears to have been assumed (though not decided) that a squatter could be liable to prosecution for wilful trespass under s 6 (c) of the Police Offences Act 1927, if he stayed after due warning to leave.

However the facts of the two cases *Goodfellow v Carson* [1947] NZLR 482 and *Archer v Archer* [1948] NZLR 350, leave it very doubtful whether the squatter or trespasser could really be said to have acquired possession. In *Goodfellow* it would have been a matter of reacquiring possession. The person concerned – the appellant – stayed in possession of a dwelling after her (determinable) life tenancy had ended on her remarriage. An order of possession was obtained against her and the ensuing warrant duly (as Fleming J held) executed by the bailiff and possession delivered to the owner. The appellant later returned to the premises, apparently breaking in to do so, and remained for about three months, maintaining an intermittent presence by avoiding all contact with the owner who tried on a number of occasions to warn her to leave. Her conviction on a charge of being found on premises without lawful excuse was upheld in the Supreme Court. (The possibility that she could have been properly charged with wilful trespass was rejected by Fleming J since the necessary warning could not be given). Counsel did not argue for her that her acts of trespass amounted to a resumption of possession and it would have been difficult in the circumstances to do so. In *Archer* a gratuitous licensee had his permission to occupy premises revoked one day and was prosecuted for wilful trespass the next – unsuccessfully, since no warning to leave was given. But the point for our purposes is that in a single day the trespasser could not have become an adverse possessor. In short, if as in Lord Denning's view some measure of acquiescence on the part of an owner is necessary before adverse possession is acquired in relation to him by a trespasser, that acquiescence was lacking in both *Goodfellow v Carson* and *Archer v Archer*. The fifteen month period of occupation by the Defendants in *Attorney-General v Hawke and Rameka* is a very different matter *(ad)*.

Secondly, it may be argued that a distinction between a mere trespasser who can be prosecuted and a trespasser in possession (or adverse possessor) who cannot is too hard to draw since it is often difficult to determine at what point acts of trespass have amounted to the taking of possession; and that the operation of s 3 of the Trespass Act ought not to be impeded by the introducing of difficulties of this sort.

There may be some merit in this objection but, if there is, it should be met by legislation amending s 3, making continued "occupation" after warning to leave an offence and not by straining the law as it stands. That is, if adverse occupation is really such an evil that it needs to be prohibited by the criminal law.

Conclusion

We conclude that the defendants in *Attorney-General v Hawke and Rameka*, as adverse possessors, were not liable to be dealt with under s 3 of the Trespass Act 1968, however properly prosecutions might have been brought under s 176 of the Land Act 1948 for occupation of Crown land without right, title or licence. The same conclusion applies also to their fellow protesters who would also be there either as adverse possessors in some cases or, in others, with the licence of those in possession. Since prosecution under s 176 (2) can only lie on the information of the Commissioner of Crown Lands or someone authorised, one may, on the dictum of F B Adams J in his consideration of s 176 and its predecessors, tentatively infer "that the provisions were intended rather as a remedy available to the Crown than for

(ad) Contrast also *Police v Walker* [1977] 1 NZLR 355 (CA) a case of "protest trespass", where the unsuccessful appellants had occupied a tent in Parliament House grounds but there was clearly neither acquiescence nor any sufficient occupation to support a defence of possession.

general public protection" *(ae)*. If the inference is correct there is an important distinction between the kinds of criminal liability under s 176 (2) and under s 3 of the Trespass Act respectively. The former section lacks any of the public order connotations that may perhaps attach to the latter.

Attorney-General v Hawke and Rameka and the history behind it illustrate well the importance of possession of land no matter how acquired, in a Maori and then in a Pakeha-dominated society, and the legal consequences that immediately or ultimately may accrue; and this in a context where the taking of possession which occasioned the case was itself a protest at loss of possession. In the mid-eighteenth century the Ngati-Whatua seized by force the land of the Waitemata-Manukau isthmus, part of which became the Orakei Block. As has been said (with some over-simplification), "the great rule which governed Maori rights to land was force" *(af)*. The developed legal system brought by the British Crown, immeasurably more advanced in providing collective security (but itself substantially imposed by occupation and superior force), like most such systems nevertheless had a place for the perfecting of titles to land originally based on wrongful seizure or acquisition or of which the fact of possession was the only evidence. Hence in 1869 the order in respect of the Orakei Block made in favour of Apihai Te Kawau and other Ngati-Whatua by Chief Judge Fenton, on the basis of actual occupancy. The Crown's own title to the parts of the Orakei Block acquired by transfer, if it could ever have been impeached, may have been perfected in law by long possession and the extinguishing of other claims. Finally the Defendants' taking of possession of the 60 acres in protest against the whole process by which 700 acres of originally inalienable land had been lost by the Ngati-Whatua gave them briefly as adverse possessors an estate in the land, which, it is submitted, put them out of the category of mere trespassers liable to prosecution for the public good under the Trespass Act.

Attorney-General v Hawke and Rameka was the culmination of grievances caused by the policies of legislature and governments, many of the grievances not justiciable and unlikely to have been concluded by a learned judgment which, however sympathetic, simply could not extend sufficiently to the issues of policy involved. The grievances are likely to be remedied today mainly not for legal reasons but because the policies which gave rise to them are seen to have been in some measure mistaken and unfair. Beside all this the matters of law involved are of comparatively little importance. But it is worthwhile to consider them to show both the importance of actual possession and occupancy and the true legal position of the protesters.

(ae) In *Robinson v Attorney-General* [1955] NZLR 1230, 1240.

(af) Judges Fenton, Rogan and Mair in the *Oakura* case, cited by Stout CJ in *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655, 665. Though tribal titles had other bases besides conquest: see W Parker, cited above, note (j), 170–171; Kawharu, cited above, note (k), 55 et seq.

CORRESPONDENCE

Sir,

Amnesty International

In connection with the feature story entitled "Am I my Brother's Keeper?" (NZLJ August 1) may I suggest that any reader sufficiently appalled by human rights violations in general, or concerning lawyers in particular, consider membership of Amnesty International's New Zealand Section? Enquiries are welcome to Box 3597, Wellington.

Yours sincerely,

Julian Gillespie
(Publicity Officer)

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