

CHAPTER 5. THE ENGLISH LEGAL INHERITANCE

5.1 Introduction

In its broadest sense law can be understood as a set of mechanisms and institutions that regulate the relations between people, and between people and things.¹ In the latter, an obvious concern of the law is the relations between people and the natural environment. Internationally, customary law in respect of rights to flora and fauna has existed for millennia. In England, the bodies of customary law existing in the various parts of the country were codified into what has become known as English common law. The common law of England has subsequently been modified by statute and by the courts.

It is agreed amongst various commentators and authorities that on the basis of New Zealand being a 'settled colony', English common law and statute law pertained in New Zealand insofar as it was applicable to the circumstances of the new colony.² A crucial issue, in the Wai 262 claim, therefore is the system of law that was imposed in New Zealand upon England's acquisition of sovereignty, and how that system of law treated rights to flora and fauna.

This chapter begins by setting out aspects of the English common law as they applied to such things as wildlife, timber and other plants, fisheries, and use rights to common property resources. This leads to a cursory discussion of aboriginal title and what residual rights to flora and fauna could endure once lands have been sold. The chapter then turns to looking at the ways in which common law has been modified by statute in England. This section will focus primarily on game laws; legislation that vested the exclusive right to hunt game in the landed gentry. It does not attempt to present a comprehensive summary of all English legislation affecting flora and fauna that was in existence in 1840. Reactions against the English game laws and related legislation are sometimes cited as a reason why landless rural labourers emigrated from Britain to New Zealand.³ New Zealand's early game legislation can, to some extent, be seen as having been defined in opposition to the English experience. This makes the English game laws particularly important to any attempt to understand the development of statute law pertaining to flora and fauna in New Zealand. The claim that the oppressive machinations of the game

1. G W Hinde, D W McMorland and Sim, *Land Law in New Zealand*, Wellington, Butterworths, 1997, p 1

2. *Ibid*, p 5. A number of sources and various case law are cited in support of this.

3. See for example Rollo Arnold, *The Farthest Promised Land: English Villagers and New Zealand Immigrants of the 1870s*, Wellington, VUP, 1981

laws were a reason why many Britons emigrated to New Zealand, will therefore, be briefly examined. The chapter concludes with a discussion of the applicability of English common law and statute law to New Zealand upon England's acquisition of sovereignty.

5.2 English Common Law

Under English common law, title to all land emanates from the Crown. An estate in land – the largest estate known to the law – is simply a bundle of rights that may be exercised in respect of the parcel of land over which the estate pertains.⁴ Under classical common law 'land' was held to include everything from 'the heavens to the centre of the earth'. This is expressed in the Latin maxim '*cuius est solum eius est usque ad coelum et ad infernos*'.⁵ This suggests that landowners had virtually unlimited rights to all that was below, upon, and above their land. However, as has been observed by the Privy Council, such a maxim was simply a statement of the prima facie rights of landowners, and something 'so sweeping, unscientific and impractical is unlikely to appeal to the common law mind'.⁶ Consequently, there are numerous exceptions to the principle that landowners own all that is above and below their land, and over recent centuries especially, the rights of landowners have been attenuated significantly by statute law in order to protect the public's interests.⁷

An important exception to the maxim is that the Crown has historically forbidden the occupation of certain natural resources in England, irrespective of whether they occur on private land or not, by virtue of its royal prerogative. Hence the foreshore and sea-bed; minerals such as gold and silver; wildlife such as swans and deer; and great fishes such as whales, dolphins, porpoises and sturgeon are vested in the Crown. Rights to use such resources can only be acquired by a royal grant being issued.⁸

4. Hinde et al, p 885

5. A Alston, T Bennion, M Slatter, R Thomas and E Toomey, *Guide to New Zealand Land Law*, Brookers, Wellington, 1997, p 4

6. *Commissioner for Railways v Valuer-General* [1974] AC 328 at 351B352, cited in Hinde et al, p 886

7. Hinde et al, pp 885–886

8. J H Baker, *An Introduction to English Legal History*, second edition, London, Butterworths, 1979, p 317

5.2.1 Wild animals

The rights that accrue to landowners in respect of wild animals on their property is an important exception to the principle that they own all that is above and below their lands. Under common law, there is a distinction made between domestic animals (*mansuetae naturae*) and wild animals (*ferae naturae*). Importantly, whereas domestic animals found on private

land are capable of ownership, no absolute property exists in wild animals so long as they are alive.⁹ As such, wild animals are not goods or chattels.¹⁰ In this regard it is noted in *Kenny's Outlines of Criminal Law* that wild animals 'straying at large form the most important of all classes of things that have no owner.'¹¹

Generally it is the case that ownership of living things relies upon a person having control over them. In *Halsbury's Laws of England* the various classes of rights that can exist in wild animals are explained as being 'qualified property' rights. Four types of these rights are detailed. A 'qualified property *per industriam*' arises when a person lawfully takes, tames or reclaims a wild animal. This right ceases if the animal regains its liberty. As such, a qualified property *per industriam* is an exclusive right to hold possession of a wild animal. A corollary of this qualified property is that a person taking a wild animal that is being held in captivity on another person's land can be prosecuted for theft.¹² Also a landowner holds the exclusive right to hunt and kill animals upon her or his land. This is known as a 'qualified property *ratione soli*'. Were a landowner to grant this right to another party, the grantee acquires a 'qualified property *ratione privilegii*' in the animals upon the owner's land. Such a grant is considered to be 'a licence of a profit à prendre that can only be validly granted or demised by deed'.¹³ Landowners also have a qualified property in the young of wild animals born on their land until such time as the animals are capable of running away. This is known as a 'qualified property *ratione impotentiae et loci*'.¹⁴ The special rights of property conferred as *ratione soli*, *ratione privilegii* and *ratione impotentiae et loci*, are exclusive rights to reduce wild animals into one's possession, or 'not so much an ownership as an exclusive right to obtain ownership'.¹⁵ Importantly these qualified rights of property are defeasible – if a wild animal is captured but escapes, it is deemed to be free and can be taken by another person.

Whereas only a qualified property exists in living wild animals, an absolute property exists in such animals if they are killed or die a natural death. Such a right vests in the landowners upon whose land the animals are, or persons to whom they have granted hunting rights. This is so irrespective of whether the landowner (or persons authorised to hunt upon their land) or trespassers actually kill the animals in question. An action can be taken against anyone infringing such rights.¹⁶ But as J H Baker observes in his *Introduction to English Legal History*, the 'precise distinc-

9. *Halsbury's Laws of England*, 4th ed, London, Butterworths, 1984, vol 2, p 84; decision of Gummow J in *Yanner v Eaton* [1999] 5 AILR (2000) 47, p 65

10. *Ibid*, p 84

11. Courtney Stanhope Kenny, *Kenny's Outlines of Criminal Law*, nineteenth edition, Cambridge, CUP, 1966, p 295

12. *Halsbury's Laws of England*, vol 2, pp 84–85

13. *Ibid*, pp 85–86. According to Hinde et al, a 'profit à prendre confers a right to sever and take from the service tenement some part of the reality of that tenement which is capable of ownership, for example, some part of the soil of the minerals, some of the natural products of the land, or the animals *ferae naturae* existing upon it.' Hinde, McMorland and Sim, p 650

14. *Ibid*, p 85

15. *Ibid*, p 84; Kenny, p 295

16. *Ibid*, p 86

tion between the limited property of the freeholder in un-reclaimed wild animals or thing on his land, and the interest of the occupant or captor, caused long disputes.' He goes onto explain that in the past it was held that:

birds flying in the air belonged to no one, birds nesting in trees (and their eggs) belonged to the owner of the trees, and birds in a cage were chattels personal. Likewise, fish in a river belonged to no one, fish in pond belonged to the owner of the pond, and fish in a net or in a fish-monger's pipe or trunk were chattels personal. The worst problem arose when a bird or beast was reduced into possession by a poacher on another man's soil; eventually after centuries of disagreement the law gave such things to the tenant of the land.¹⁷

In their 1888 treatise *Possession in the Common Law*, Wright and Pollock observe that 'trespass or theft cannot at common law be committed of living animals *ferae naturae* unless they are tame or confined.'¹⁸ The key point here is that for larceny to be possible, there must be a pre-existing ownership in the objects that are taken.¹⁹ And as noted above, in the case of wild animals, such a right does not vest in the landowner unless the animals are already reduced into his or her possession through being killed or captured.

Once a wild animal is killed or dies, an absolute property is held to exist in it that vests in the owner or tenant of the land where the animal is. Therefore trespassers upon private land that slaughter wild animals can be charged with theft. *Halsbury's Laws of England* cites the example of poachers taking rabbits then selling them, noting that the landowner is able to take possession of the animals from the purchaser.²⁰ Interestingly, where a poacher chases game from one property onto another and then kills it, the property in the game is held to be in the poacher. Although this view of the law has been 'adversely criticised' in various cases, 'it has been received for so long that it is not now likely to be altered by judicial decision.'²¹

In relation to bees, *Halsbury's Laws of England* states that under common law they are treated as *ferae naturae*, there being no absolute property in them except as a result of reclamation. Hence if a swarm of bees settles on a person's tree, that person has no property in them unless they are hived. In the event that the swarm leaves the hive, the 'property continues so long as they can be seen and followed.'²²

17. Baker, p 317

18. Pollock and Wright, *Possession in the Common Law*, 1888, cited in decision of Gummow J in *Yanner v Eaton*, 65 [1999] 5 AILR (2000) 47, p 65

19. Kenny, p 297

20. *Halsbury's Laws of England*, vol 2, p 86

21. *Ibid*, p 86

22. *Ibid*, p 85

5.2.2 Plants and timber

The extent and nature of landowners' rights to flora growing on their land are difficult to determine. By virtue of holding the fee simple to a particular piece of land it seems that they have exclusive rights to use such flora in any manner that they see fit. However, with the exception of timber and trees, the law texts perused by the present author were generally silent on the precise nature and extent of landowners' rights in flora.

At common law, a distinction is made between timber (being economically useful trees) and other trees. This would appear to be in order to establish what is included in contracts for the sale of standing timber on a portion of land. Common law holds that throughout England, oak, ash and elm are timber if they are over 20 years old. Other trees can be timber according to the custom in a particular place – for instance, beech is deemed to be timber in Buckinghamshire and parts of Gloucestershire.²³ A large body of law exists concerning the rights of landlords in the event that they lease land upon which timber trees are standing. Generally this law confirms the rights of the landlord to the exclusive use and possession of such trees unless he or she has licensed the tenant to fell them. Tenants are, however, permitted to remove timber trees for fuel and the repair of buildings upon the property. Trees that are blown over are the property of the landlord, unless they are 'dotards' (presumably meaning old and infirm) in which case they are the property of the tenant.²⁴

So if trees are the absolute property of the landowner, it follows that this is also the case with all other types of flora. In the Irish case of *Regina v Foley* (1889), a trespasser was successfully prosecuted for larceny after he had cut grass on another person's property and returned two days later and removed it.²⁵ As noted above, for larceny to be possible, there must be a preexisting ownership in the objects stolen. What remains unclear to the present author is whether, like animals, the landowners' ownership of the grass only came about once the grass was cut, or whether the ownership pre-dated the cutting. If the latter is the case, this suggests that like timber trees, landowners have absolute property in all flora upon their land. But even if this is not the case, they clearly have an absolute and unfettered right to do what they want with both the flora and fauna upon their property.

23. *Halsbury's Laws of England*, vol 19(1), p 24

24. *Ibid*, pp 24–25

25. Kenny, p 301

5.2.3 Fishing rights

An important consideration in terms of landowners' rights in flora and fauna are what rights they enjoy to fisheries. At common law it is accepted that fishing rights emanate from the ownership of the underlying soil.²⁶ Importantly though, fish are considered to be the same as wild animals; there being no absolute property in them in their natural state. But as with wild animals there may be qualified property in them (essentially being rights to reduce them into one's possession), and once captured, fish become the absolute property of the person in whose rightful possession they are.²⁷

The Crown, by virtue of its prerogative title over the sea-bed and foreshore, controls fishing rights in all tidal waters. However, the public has a right to fish in all such waters.²⁸ This was not always the case however. Prior to the Magna Carta the Crown could grant to a subject exclusive rights to a fishery – a power it apparently exercised frequently. The King or Queen could also bar fishing and fowling in any arm of the sea or river until he or she had 'taken his [or her] pleasure there'. Today under English common law, however, the public's rights to sea fisheries can only be limited by an act of Parliament.²⁹

In contrast to tidal waters, the general public has no common right to fish in inland waters, even where they are navigable.³⁰ This is consistent with the principle that fishing rights arise from holding rights to the soil over which water flows (and reflects the fact that at common law, no one owns water as such). The only absolute property in lakes and rivers is in their beds, which is shared between riparian landowners *ad medium filum aquae*.³¹ In this way the owners of land abutting a river own the bed to the middle line of the watercourse, and have exclusive rights to fish in that part of the river. Where a lake is situated entirely within a single block of land, the landowner owns the bed exclusively and holds exclusive rights to the fish within it. In situations where several blocks of land abut a lake, title to the lake bed is shared *ad medium filum aquae* – that is the rights of each extend to the midpoint of the lake.³² Generally at common law swamps or wetlands are treated simply as land.

An important feature of the common law as it applies to fish is that fishing rights can be severed from the soil from which they arise. The fishery then becomes an 'incorporeal hereditament' (also known as an 'incorporeal fishery'); that is 'a mere right to take fish' rather than a right in the actual soil. Conversely a 'corporeal hereditament' (or 'corporeal

26. Law Commission, *The Treaty of Waitangi and Maori Fisheries/Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi*, Wellington, Law Commission, 1989, p 74

27. *Halsbury's Laws of England*, vol 18, p 275

28. *Ibid*, p 258

29. *Ibid*, p 258

30. *Ibid*, p 259

31. W Coulson and UA Forbes, *The Law Relating to Waters; Sea, Tidal and Inland*, Henry Sweet, London, 1880, p 98. For a full discussion of these matters see Alan Ward, *National Overview*, vol 2, Waitangi Tribunal Rangahaua Whanui Series, Wellington, GP Publications, 1997, pp 348–350; Waitangi Tribunal, *Whanganui River Report*, Wellington, GP Publications, 1999, pp 15–23; White, pp 2–8

32. White, pp 3–4

fishery') refers to the rights in the soil coupled with a right of fishing over it. An incorporeal fishery may be owned by a person who owns no land adjacent to the waterway in question. A fishery may also be vested in this way in the public.³³

5.2.4 Common lands

The common lands of England and Wales are privately owned lands over which certain members of the community have particular rights such as to graze stock; collect peat, turf and firewood; and to catch fish.³⁴ The origins of these commons predate the advent of the feudal and manorial systems of tenure.³⁵ Prior to this the majority of England was organised into self-supporting agricultural communities. The limitations of their technology were such that only a small proportion of the available land could be cultivated at any one time. The remainder or 'waste' were used for grazing and the gathering of fodder and fuel. As the population increased, the pressure placed on the waste lands by these activities increased, and by necessity the extent of the public's rights to them were limited and defined. When the Crown vested the fee simple of land in individuals and ecclesiastical bodies, creating the manors that survive to this day, the commoners' rights that they had previously enjoyed over the 'waste' lands were protected by the common law.³⁶

The lands to which rights of common attach are divided into two categories: 'common lands' and 'commonable lands'. The most usual type of common land is the 'waste' land or uncultivated parts of a manor. In such cases the lord of the manor is the owner of the soil and is entitled to all the benefits that it may bring, subject to the rights of the commoners. Another category of common land is land that is, or was formerly, part of a royal forest over which a monarch, in medieval times, granted certain common rights.³⁷ 'Commonable lands' are held in severalty during part of the year (that is used exclusively by the landowner) but are able to be used by commoners after the severalty crop has been removed. Because of the existence of severalty rights over commonable lands, they are said not to be waste lands of the manor in the way that common lands are.³⁸

A right of common is a right held by one or more persons to take or use some portion of that which another person's soil produces, and is similar to a *profit à prendre*.³⁹ Perhaps the most important species of common right is that of pasturage, of which there are six different types applying to

33. *Halsbury's Laws of England*, vol 18, pp 254–255

34. WG Hoskins and L Dudley Stamp, *The Common Lands of England and Wales*, Collins, London, 1963

35. *Halsbury's Laws of England*, vol 6, p 196

36. *Ibid*, p 196

37. *Ibid*, pp 201–202

38. *Ibid*, p 198

39. *Ibid*, p 197. A *profit à prendre* confers a right to sever and take from a tenement something that is capable of ownership such as minerals or the animals *ferae naturae* that exist upon it. Hinde, McMorland and Sim, p 650

different circumstances.⁴⁰ Turbary is another kind of common right that allows a person to remove turf or peat for their own fuel requirements from common land. *Halsbury's Laws* states that the maximum quantity of turf that can be annually removed can be specified.⁴¹ Common rights also exist in respect of stones and sand, and in some cases coal and certain other minerals.⁴²

A common right very similar in nature to that of turbary is the common of estovers. This right enables a person to take wood from certain forests and wooded areas for fuel and for building. It would seem, though, that timbers can only be taken for the purposes of repairing an existing building, not erecting a new one. With the exception of taking wood for such purposes, the right of estover is generally confined to taking saplings, loppings, and trees of little value (such as birch, willow, and alder). However, there are some instances where commoners have the right to take oak. Rights to take other plants such as gorse, heather, fern, bracken and long grass have been more recently established, although generally the right of estover does not extend to a right to take fodder for livestock. As with the common of turbary, the products of the common of estover must only be used on the commoner's property and cannot be sold or used elsewhere.⁴³

Another right of common is that of piscary. This is essentially a profit à prendre that enables a person to fish in another person's waters. The distinction between a common of piscary and a several fishery is important. The latter is not a right of common, but an exclusive right to fish in private waters that may even exclude the owner of the soil above which the fishery exists. A common of piscary cannot exist in tidal navigable rivers or in the sea because of the existence of public fishing rights which are predicated on the Crown's ownership of the sea floor. It seems that although many commoners with a right of piscary have historically sold the fish taken under the right, it is doubtful that they in fact enjoy a legal right to do so.⁴⁴ This limitation upon the right is similar to that which applies to the common rights of estover and turbary. Clearly the products derived from the exercise of common rights can only be used for the domestic purposes of the commoner and not sold.

The owners of lands that are subject to common rights are the absolute owners of such and may use the lands in any way they wish so long as it does not interfere with the commoners' rights. Importantly, landowners have the sole and exclusive right to shoot and take game upon their land,

40. For details of these see *Halsbury's Laws of England*, vol 6, pp 220–234

41. *Ibid*, pp 234–235

42. *Ibid*, pp 239

43. *Ibid*, pp 235–237

44. *Ibid*, p 237 (see fn 1)

this being an incident of their ownership of the soil. They may, however, grant to another person the right to hunt and take game as a profit à prendre.⁴⁵ Another important right that landowners enjoy, and one that historically has caused a great deal of conflict between them and commoners, is free warren – ‘the right to keep and maintain beasts and birds of warren within the precincts of manor or other place’. Technically, though, it is not a manorial right but a franchise emanating from a Crown grant.⁴⁶ The interests of the commoners in waste lands are protected by limitations being placed on the landowner’s ability to enclose such lands.⁴⁷ As discussed below, however, the enclosure movement saw commoners lose their rights in respect of large areas of common land.

5.2.5 Aboriginal title

The common law doctrine of aboriginal title is predicated upon the idea that a change in sovereignty does not legally displace pre-existing property rights.⁴⁸ In this way, when a colonising power acquires sovereignty over another nation, it acquires the *imperium* (the right to govern), but this does not automatically displace the indigenous inhabitants’ land ownership rights (*dominium*).⁴⁹ This is so even though the colonising power acquires an underlying or radical title to all lands of the colonised territory which in lands colonised by the United Kingdom, vests in the Crown.⁵⁰ The following section is largely concerned with how aboriginal title can be extinguished, and the possible ways that it can still be extant today.

The doctrine of aboriginal title holds that the ownership rights of indigenous peoples continue unless expressly extinguished either by statute or by voluntary sale or cession. A key feature of aboriginal title is that it exists independently of a Crown-granted title and is recognised at common law as an independent system of tenure that is not Crown-derived. In the landmark decision in the case of *Mabo v Queensland* (in which aboriginal title was recognised in Australia for the first time), Justice Brennan stated that the content of aboriginal title ‘has its origin and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.’ Consequently he was of the view that the ‘nature and incidents of native [or aboriginal] title must be ascertained as a matter of fact by reference to those laws and customs.’⁵¹

45. Ibid, pp 267–271

46. Ibid, pp 269

47. Ibid, pp 267–271

48. In some jurisdictions such as Australia aboriginal title is known as native title.

49. Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Auckland, Oxford University Press, 1991, p 97

50. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, pp 23–24

51. *Mabo v Queensland (No 2)*, (1992) 175 CLR 1, p 58, cited in *Yanner v Eaton*, p 62

An important related tenet of aboriginal title is that it is not limited to lands in actual 'occupation' of indigenous peoples, although this was claimed to be the case in the early years of the North American colonies. But despite such a view finding support in the Bible, as well as in the works of Vattel, Locke, Arnold and More, the argument that aboriginal title only existed over lands which indigenous peoples had by their labour and occupation established exclusive rights of ownership and control, has been soundly rejected by various courts.⁵² Thus aboriginal title includes the fishing, hunting, and foraging grounds of an indigenous people as well as their cultivations and sites of permanent habitation.⁵³ Paul McHugh goes so far as to argue that minerals and energy resources are a part of an aboriginal title, even where these resources were not a part of an indigenous people's pre-contact economy.⁵⁴

The fact that the nature of aboriginal title is defined by the customary law of the aboriginal peoples in question, but is recognised by the common law, has led some commentators to the conclusion that aboriginal title is a form of legal pluralism. In this view English common law and customary law are coextensive.⁵⁵ The interface between these two legal systems – especially the extent to which the common law legal system can accommodate or extinguish customary law – is very significant in terms of the rights indigenous peoples enjoy to flora and fauna.

McHugh describes two points of contact between the common law system and aboriginal title: where aboriginal title has been voluntarily extinguished; and where it has been affected by legislation.⁵⁶ According to common law, aboriginal title is held to be extant so long as it has not been extinguished by statute or by cession. A corollary of this is that rather than looking for recognition of aboriginal title in statutes, they should be screened for evidence that they in fact extinguished aboriginal title. An example of a statutory extinguishment would be when an act of Parliament vests the beds of rivers or the foreshore in the Crown, effectively precluding any viable territorial claim to such land by indigenous peoples. Another example would be where a statute states that customary title is unenforceable against the Crown.⁵⁷ Voluntary cessions occur when the aboriginal owners of the land sell or gift land. In extinguishing aboriginal title by the exercise of its sovereign powers, the Crown must reveal a clear and plain intention to do so, irrespective of whether the extinguishment is made by legislation or executive action.⁵⁸

52. McHugh, *The Maori Magna Carta*, p 132. McHugh cites the case of *Mitchel v United States* (1935), and extra judicial comments made in 1860 by the then Chief Justice of New Zealand Sir William Martin, in support of the view that aboriginal title is not limited to lands under actual occupation and cultivation.

53. *Ibid*, p 133

54. *Ibid*, p 133

55. Paul McHugh, 'Aboriginal Servitudes and the Land Transfer Act 1952', *Victoria University of Wellington Law Review*, vol 16, 1986, p 314

56. McHugh, 'Aboriginal Servitudes', p 323

57. *Ibid*, p 325

58. Justice RC French, 'Working with Native Title Act: the National Native Title Tribunal – Early Directions', 16 May 1994 (Paper held in Waitangi Tribunal Library, ref: v 727), pp 2–3

Another key feature of aboriginal title is that there can be territorial and non-territorial titles. A territorial title is an ancestral claim to the use and occupation of an area that it is so strong as to be analogous to an exclusive claim to ownership. A non-territorial aboriginal title 'will arise where the aboriginal claimants are precluded from asserting the fullest form of title to the land which, nonetheless, remains subject to some traditional right.' Such a title arises when residual rights continue to be exercised over land to which a territorial claim could not be sustained. An example would be where a piece of land has been sold but where the aboriginal vendors continue to take birds, flora, and fish.⁵⁹ Significantly then, a non-territorial title could endure even though the territorial title has been extinguished. McHugh refers to such a scenario as being a partial extinguishment as opposed to a full or complete extinguishment. He cites Canadian examples where although tribes ceded their lands to the Crown, they maintained their rights to hunt and fish on those lands. He argues that in the case of land that has been ceded, it is possible that rights to continue ancient practices such as accessing and using burial grounds and fisheries, and collecting medicinal herbs, could have a legal basis under the doctrine of aboriginal title, and that such rights may legally burden the title to such land.⁶⁰

Similarly McHugh argues that it is possible for a statutory extinguishment of an aboriginal title to be only partial in nature. In this regard he notes that the Crown's intention to extinguish an aboriginal title by statute must be clear and plain. Citing American case law he opines that regulating rights to flora and fauna by, for example, introducing licensing systems, does not extinguish the aboriginal rights to such resources.⁶¹

In relation to aboriginal titles over Crown land, McHugh concludes that where a complete extinguishment cannot be shown to have occurred, the land can be subject to an un-extinguished non-territorial aboriginal title. Establishing the precise nature of the aboriginal title in such cases would require detailed forensic and historical inquiry and analysis. He contends that the continued exercise of such rights, for example taking flora and fauna, would be a powerful sign of the existence of a non-territorial aboriginal title.⁶²

Of particular relevance to the issues raised in this chapter is an appeal heard in the High Court of Australia against a decision of a federal court convicting an aborigine for taking crocodiles in contravention of the Queensland Fauna Conservation Act 1974.⁶³ The charges against the ap-

59. McHugh, 'Aboriginal Servitudes' pp 320–321.

60. McHugh, *Maori Magna Carta*, pp 98, 136

61. *Ibid*, pp 136–137

62. Paul McHugh, 'The legal basis for Maori claims against the Crown', *Victoria University of Wellington Law Review*, vol 1, 1988, p 15

63. *Yanner v Eaton* [1999] 5 AILR (2000) 47

pellant, Mr Yanner, were originally dismissed but this decision was subsequently overturned by the Court of Appeal of the Supreme Court of Queensland. He then took an appeal to the Federal High Court. A major issue in the case concerned the ways in which native title rights to hunt indigenous fauna, being an incident of their aboriginal title, could be extinguished. This hinged on two key considerations. Firstly, whether all incidents of an aboriginal title were extinguished by a grant in fee simple of the land in question. And secondly, whether legislation that vested prescribed species of fauna in the Crown was a full extinguishment of aborigines' native title right to hunt those species. On the first question Justices Gleeson, Gaudron, Kirby and Hayne noted:

It is clear that native title in land is extinguished by a grant in fee simple of that land. As was said in the joint judgement in *Fejo v Northern Territory* 'it is extinguished because the rights that are given by the grant in fee simple are rights that are inconsistent with the native title holders continuing to hold any of the rights or interests which together make up the native title.' That is, native title is extinguished by the creation of rights that are inconsistent with the native title holders continuing to hold their rights and interests.⁶⁴

In relation to the second question, Justice Gummow noted that in the *Wik* decision⁶⁵ it was held that native title rights are extinguished where they are inconsistent with rights created by statute. The *Wik* decision states that if the native title right cannot be exercised without abrogating the statutory right, the statute extinguishes the existing right.⁶⁶ However, the court held that the Fauna Act conferred on the Crown 'less than full, beneficial and exclusive ownership' of crocodiles. Rather it held that what was vested in the Crown under the Fauna Act was no more than the aggregate of a series of rights of executive control designed to underpin the licensing system that the Act instituted (under which people could exploit fauna that was vested in the Crown).⁶⁷ The Court consequently overturned the earlier decision convicting Yanner.⁶⁸

Although the court found that the appellant's Native title right to hunt fauna vested in the Crown was not fully extinguished, the decision in *Yanner v Eaton* suggests that it could have been, were the Fauna Act constructed differently. Also the Court's comments that a fee simple for a piece of land precludes the possibility of a native title right existing over

64. *Yanner v Eaton*, p 56, citing *Fejo v Northern Territory* (1998) 72 AJLR 1442, p 1451; 156 ALR 721, p 736

65. *Wik Peoples v Queensland* (1996) 187 CLR 1

66. *Yanner v Eaton*, pp 70–71

67. *Ibid*, p 48

68. *Ibid*, p 47

the same land, sit somewhat uncomfortably with McHugh's thesis on non-territorial title, especially in respect of Crown land. Reconciling this apparent dissonance is beyond the skill of the present author, but it points to the fact that the law is far from settled where aboriginal title is concerned.

5.3 The statutory modification of common law in England

While the common law has evolved through its interpretation by the courts, legislation has been passed that has extinguished or greatly modified common law rights. This section considers the ways in which common law rights over flora and fauna evolved over time in England. In particular it focuses on the game laws.

The earliest legislation in England that affected the rights of the general public to flora and fauna appear to have been the forest laws. Essentially these laws set aside large tracts of land (not necessarily forested) as royal hunting preserves to protect various types of game and their habitat. Areas under the forest laws were actually outside the purview of the common law, instead being subject to special prerogative regulation. It is estimated that in 1217, 35 percent of England was 'forest' administered under forest law.⁶⁹ The first forest laws appear to have been imposed by William the Conqueror after the Norman invasion of England in 1066. These laws were both alien and oppressive to the English population who found themselves prevented from hunting in the royal forests unless granted permission to do so by the monarch. William's successors expanded the ambit of the laws to further protect the flora and fauna of the forests.⁷⁰

It is little appreciated that the Magna Carta was not just an enumeration of 'liberties', but was also a delineation of 'forest' rules. When it was reissued in 1217 it comprised a 'Charter of Liberties' and a 'Charter of the Forest'. The latter forced much land that was under 'forest law' to come under the common law.⁷¹ Although prima facie the forest laws were a form of game law, they have been seen recently as 'imposing dramatic and effective restraints on the exploitation of natural resources', and that they attained 'a level of specificity reflecting a level of ecological sophistication seemingly lost in the European world until very recent times.' The sever-

69. Chris Besant, 'From the Forest to the Filed: A Brief History of Environmental Law', *Legal Service Bulletin*, vol 16, no 4, 1991, p 161

70. Baker, p 11; Hoskins and Stamp, pp 4, 8; PB Munsche, *Gentlemen and Poachers: English Game Laws, 1671-1831*, Cambridge, Cambridge University Press, 1981, p 9

71. Besant, p 160

ity of these environmental strictures though is evidenced in the demands contained in the Magna Carta's 'Charter of the Forest' for relief from the oppression of forest law.⁷²

5.3.1 Game laws

In spite of the draconian nature of the forest laws, they have attracted far less scholarly attention than the game laws of England as an imposition upon the rural working classes. The game laws that evolved from around the fifteenth century represent one of the most significant modifications of the common law pertaining to *ferae naturae*. In essence these laws, the cornerstone of which was the Game Act of 1671, vested an exclusive right to hunt game in those persons who met a minimum property qualification. This effectively gave the landed gentry the exclusive right to hunt game in England. The disenfranchisement of the rural working class was made all the worse for the fact that it was the gentry themselves, in their role as Justices of the Peace, who enforced the laws.⁷³

At the time the game laws were passed, the landed gentry justified them as being a necessary measure to prevent profligacy and idleness amongst the lower classes. They considered that such vices were inevitable were they able to spend their time hunting game rather than engaged in more productive and socially useful pursuits. In 1775 for example, S Purlewent wrote that the game laws were intended to 'prevent persons of inferior rank, from squandering that time, which their station in life requireth to be more profitably employed'.⁷⁴ But of course what Purlewent and his peers were more concerned with was preserving the class distinction between the landed gentry and the poor. As PB Munsche has written:

The Game Laws were born out of a desire to enhance the status of country gentlemen in the bitter aftermath of the Civil War. Their message was that land was superior to money, a blunt assertion of privilege which for a long time was accepted, or at least not openly contradicted.⁷⁵

This statement points to another dynamic that underpinned the game laws: the rivalry between the landed aristocracy and the urban bourgeoisie. In this regard, game was a key signifier of the status of the large coun-

72. Ibid, p 162

73. Munsche, p 1

74. S Purlewent, *A Dialogue Between a Lawyer and a Country Gentleman, Upon the Subject of the Game Laws*, 4th edition, 1775, p xi, cited in Douglas Hay, 'Poaching and the Game Laws on Cannock Chase' in D Hay and EP Thompson (eds), *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*, Penguin Books, London, 1975, p 190

75. Munsche, p 164

try landowners. Free access to game, especially if this resulted in it being bought and sold, would erode the sense of superiority that the gentry had over urbanites and the commercial classes.⁷⁶ In this analysis the game laws were less about the preservation of wildlife than the preservation of the social order.

But even so, it must be asked the extent to which the game laws were about ensuring the preservation of the game resource. Were there no game laws – which appears to have been what poachers and a large proportion of the rural population favoured – the animals that were targeted by hunters would have been put under potentially perilous pressure through over-hunting. On this point it is interesting to note that by the eighteenth century, wild boar had been hunted to extinction in England.⁷⁷ So obviously the landed gentry had an interest in the continued survival of game, but the key point is that rather than wanting to ensure the resource was preserved for all to use, their concern was that it survived and that they had exclusive rights to use it.

Not all hunting quarry, however, came under the auspices of the 'game laws'. The only species that they applied to were hares, partridges, pheasants and moor fowl; there being no operative property qualification for hunting wild ducks, foxes, otters, and badgers. There were, however, prescribed seasons for hunting ducks, but these appear to have been rarely enforced.⁷⁸ And by the eighteenth century, private property rights had effectively been established in rabbits and deer as a consequence of 'enclosure' (discussed further below).

Since the middle ages there had been property qualifications in England in relation to the right to hunt rabbits and deer. These made it illegal for those who did not meet the qualification to hunt these species, even on their own land. These qualifications were continued by the first actual 'game law' – the Game Act of 1605. This law stated that no person could take rabbits or deer unless they derived an income of over £40 from property that was worth over £200. But by the end of the seventeenth century, the right to hunt either animal was no longer contingent upon a property qualification.⁷⁹ As well as the property qualifications and the forest laws there were two other types of sporting privileges that existed prior to the passing of the 1671 Game Act: franchises granted by the monarch to hunt in particular places, and the privileges that were afforded to royal gamekeepers.⁸⁰

76. *Ibid*, p 166

77. *Ibid*, pp 163–164

78. *Ibid*, pp 3–4

79. *Ibid*, p 5

80. *Ibid*, pp 9–10

The Game Act of 1671 – the cornerstone of what Munsche called the ‘old game code’ – held that in order to hunt the species that came under it, a person had to either be a lord of a manor or derive a substantial income from landed property: £100 from a freehold estate, or £150 from land that was leased. In his essay on poaching and the game laws on Cannock Chase in Staffordshire, Douglas Hay estimates that in the mid-eighteenth century £100 represented approximately five to ten times the annual income of a rural labourer, and was 50 times greater than the property qualification for voting. These provisions remained in place for the subsequent 160 years after the Act was passed.⁸¹ As well as forbidding the hunting of game, the Act also prevented any person other than landed gentlemen from possessing guns, hunting dogs, snares, nets or game, and allowed the landed gentry to appoint their own game keepers.⁸² Especially in relation to the latter, Munsche considers that the 1671 Act constituted the transfer of the royal game prerogative from the monarchy to the landed gentry.⁸³

From 1700 a mass of statutes were enacted that stiffened the penalties that could be imposed upon poachers that breached the game laws. A person could be fined £5 or imprisoned for three months for poaching; that is hunting game when ‘unqualified’. Munsche notes that although undoubtedly a large sum of money to a rural labourer in eighteenth century England, it was not necessarily un-affordable to an industrious poacher. By comparison, a person convicted of stealing an animal in which absolute property existed such as a domesticated chicken, could be whipped, imprisoned or transported, without the option of paying a fine.⁸⁴

After the 1770s a series of acts were passed that imposed ever harsher punishments upon poachers. Perhaps most notorious were the Night Poaching Acts. The first of these Acts, passed in 1773, doubled the standard fine for those who were caught poaching after dark, and imposed even harsher penalties upon repeat offenders. Night Poaching Acts of the early nineteenth century permitted offenders to be whipped, imprisoned, impressed into the armed forces, or transported.⁸⁵ Legislation passed in the nineteenth century gave the Police the power to search without a warrant any person suspected of poaching.⁸⁶ A key feature of the game laws concerned with preserving the status of the landed gentry was that they made it illegal to sell game.⁸⁷

81. *Ibid.*, p 9, Hay, p 189

82. Munsche, pp 13, 159

83. *Ibid.*, p 13

84. *Ibid.*, pp 159–160

85. *Ibid.*, p 160; Leon Radzinowicz, *A History of English Common Law and its Administration from 1750*, vol 4, Stevens and Sons Ltd, London, 1956, p 98

86. Poaching Prevention Act 1862, cited in Arnold, p 29

87. Hay, p 220

By the eighteenth century rabbit and deer, had become the private property of whoever owned the land upon which they existed. This came about as a consequence of 'enclosure' whereby landowners confined deer and rabbits, and bred and nourished them for the purposes of sport, or as a source of meat or fur. Because such animals therefore ceased to be wild, they acquired an owner who could seek restitution in the common courts if deprived of their property. Deer were subsequently omitted from the Game Act of 1671, and rabbits from the Game Act of 1692. Thereafter rabbits and deer were protected by statutes that prevented people hunting them without the permission of the person on whose land they were found. And those that did illegally take deer and rabbits were dealt with as thieves, which is to say very harshly indeed.⁸⁸ A person convicted of taking a rabbit from a warren could be imprisoned for up to three months and made to pay damages and the cost of prosecution. Those who took deer from a Royal park could be transported for seven years, or if the offence was committed at night, executed.⁸⁹

As well as further measures to protect game, around this time sanctions were introduced against persons taking flora from private land. In 1766 the vagrancy laws were extended to include 'pilferers who damaged, destroyed or took away logs, timber, or growing plants on private land.' A first offence could bring a fine of up to £20 and a third offence could result in transportation for seven years. Similar provisions were enacted to protect the woods of the Crown.⁹⁰

But despite the existence of sanctions that could be imposed against poachers, 'the poor ignored the war of words, reminded themselves that Genesis said the animals were made for man, and poached with passionate determination and courage.'⁹¹ Hay's study of the game laws and poaching on Cannock Chase shows an epidemic of poaching during the time the game laws were in force. Between 1750 and 1800 for example, over 800 people were prosecuted for poaching on the chase. As well as being prosecuted for poaching, it was also possible for people caught taking game to be sued for trespassing, which according to Hay, often resulted in a conviction. He records that there were numerous professional poachers and that violent encounters between poachers and gamekeepers were common. It is clear from his study that much poaching was undertaken in order to supplement an inadequate diet, not so that the poor could ape the gentry through appropriating their all important social currency.⁹²

88. *Ibid*, pp 4–5

89. Munsche, p 160

90. Radzinowicz, vol 4, p 21

91. Hay, p 190

92. *Ibid*, pp 193, 196, 202, 237. On the issue of poachers taking game to supplement an otherwise inadequate diet, see Radzinowicz, p 76

The unpopularity of the game laws is hard to overstate. Munsche considers that the:

vast majority of Englishmen did not believe that poaching was a crime. The game laws were patently unjust because hares, partridges, pheasants, moor fowl were, as one Bedfordshire farmer put it 'ordained from the beginning free for anyone who could overtake them'.⁹³

In his study on the emigration of English rural labourers to New Zealand, Rollo Arnold reports that hunger, as well as resentment of the game laws, drove many labourers to flout the law in England, quoting a man who told a select committee in 1873 that in his view game was wild and did not belong to any individual anymore than a thrush or blackbird.⁹⁴

By the early nineteenth century, the gentry's claim to special privilege was coming increasingly under fire. As well as the game laws, the protectionist corn laws and the distinctly unrepresentative electoral system were frequently being lambasted in the press. This was symptomatic of 'a pervasive, but far from universal, dissatisfaction with the landed oligarchy'.⁹⁵ It is agreed amongst historians that the game laws were 'harsh, unjust and generally indefensible'. They have variously been railed against as an 'instrument of terrible severity'; as a 'classic example . . . of class selfishness'; and for the fact that they 'spilt the blood of men and boys . . . for the sport of the rich'.⁹⁶

Part of English society's abhorrence of the game laws stemmed from the fact that they were often administered by the very same people who held exclusive rights to hunt game. Munsche observes that Justices of the Peace had an interest in seeing that the laws be enforced as most JPs in the late seventeenth century would have had the necessary property entitlement to hunt game under the Game Act of 1671. And by 1732 the property qualifications to be a JP and to have hunting rights under the game laws were identical. Consequently in upholding and enforcing the game laws, JPs were defending their own sporting privileges.⁹⁷ Generally Munsche concludes that there can be little doubt that the game laws were an example of 'blatant class legislation'.⁹⁸

An interesting feature of the game laws, and one that was instrumental in their decline, was that they disenfranchised not only the landless rural working class, but also the yeoman farmer who although owning his or her own property, generated insufficient income to meet the property qualification. Consequently some of the most outspoken opponents of

93. Munsche, p 6

94. Arnold, p 29

95. Munsche, p 164

96. Sidney and Beatrice Webb, *English Local Government*, vol 1, new edition, London, 1963, p 598; Holderness, *Pre-industrial England: Economy and Society, 1500–1750*, London, 1976, pp 43–44; J L and Barbara Hammond, *The Village Labourer*, London, 1948, p 184; all cited in Munsche, p 1

97. Munsche, p 161

98. *Ibid*, p 163

the game laws were the very people that should have been the supporters of the landed gentry: small free-holding farmers.⁹⁹ The game laws antagonised these people who usually would have been 'the first to support the defence of property and the conviction of thieves'. In this regard Hay has observed that the game laws blurred the lines between those who used the law in defence of property and those that suffered it.¹⁰⁰

Munsche noted in his treatise on the game laws that the 'gentry's identification with the game laws was complete.' Not only did they write them, benefit from them, defend them, and enforce them, but they also led the fight for their repeal.¹⁰¹ Just as concern about preserving the social order gave rise to the game laws, the same concern led to their repeal. By the nineteenth century opposition to the regime was such that several members of the gentry began campaigning for the reform of the game laws because they believed their existence was dangerous to the continued power and influence of the landed classes. The disdain of the lower classes for the game laws led to them resenting the privilege the gentry bestowed upon themselves, and was considered by the reformers to be eroding an otherwise healthy respect for society's 'natural' leaders. In short 'the reformers argued that if the gentry wished to preserve their position, they could not act in defiance of the feelings of the society they claimed to lead.'¹⁰²

The conservatives mounted a vigorous campaign in defence of the game laws, asserting that the gentry's monopoly on game was essential to the preservation of the 'natural' social order. As one conservative told the House of Commons, if the game laws were repealed, England would soon become what Napoleon had contemptuously asserted it to be: 'a nation of shop keepers'.¹⁰³ But despite such opposition the English Parliament in 1831 passed the Game Reform Act that repealed the property qualifications for hunting game. The Act also declared game to be the property of the person upon whose land it was found, and removed the legal distinction between species that were 'game' and those that were not. This created the possibility for the general designation of game to be applied to any species, and for poachers to be prosecuted for larceny – a crime that was punishable by transportation or even death under English criminal law. The repeal of the game laws also meant that game became a saleable item. Given that a black market for game had thrived under the game laws, it is hardly surprising that the poaching war continued once a legitimate market was created by the repeal of the old laws.

99. *Ibid*, p 167

100. Hay, p 212

101. Munsche, p 6

102. *Ibid*, p 167

103. *English Parliamentary Debate*, 1st session, XL, col 374, cited in Munsche, p 167

In the conclusion to his history of poaching and the game laws, Munsche reconsiders what he portrays as being the orthodox view of the game laws amongst modern historians. He represents this orthodoxy as an indictment of the laws made up of three counts. The game laws:

were 'savage', or at least unjustifiably harsh; . . . they were enforced in a manner which made a mockery of justice; and finally, . . . they were an example of 'blatant class legislation' which took food from the poor in order to give sport to the rich.¹⁰⁴

In terms of the severity of the laws, he is circumspect in his conclusions, noting that punishments meted out under the game laws were in fact considerably less severe than those that could be inflicted upon persons found guilty of common theft.¹⁰⁵ Similarly he is very measured in his consideration of the view expressed by historians such as the Webbs that the game laws were 'grossly partial, selfishly biased and swayed by the considerations of their own class interest, even to the verge of corruption.'¹⁰⁶ Although he found little evidence of JPs trying poachers caught on their estates, and found examples of leniency on the part of others, he does stress the phenomena of indirect bias; the idea that JPs were upholding their general class interest if not actually convicting poachers who were stealing their game.¹⁰⁷ But concerning the claim that the laws were examples of class legislation, as noted above, Munsche was emphatic that they bestowed privileges upon the landed gentry at great cost to the rest of the rural populace.¹⁰⁸

This analysis leads one to question the extent to which the severities of the game laws (and principles of common law affecting game) were a factor in the decision of many landless rural labourers to leave England and emigrate to New Zealand. Although the game laws had been repealed before the official colonisation of New Zealand began, they had been replaced by a regime whereby game became the property of the owner of the land upon which the game was present. And as noted above, this meant that poaching continued almost unabated, and that those convicted of it received much harsher sentences than under the previous game laws.

There is some evidence from settlers' journals and private papers that the privations of the game laws and their successors were a factor in the decision of some Britons to emigrate to New Zealand. It is likely though that this sentiment was very much related to a wider distaste of the oligar-

104. Munsche, p 159

105. *Ibid.*, pp 159–161

106. Sidney and Beatrice Webb, *English Local Government*, vol 1, new edition, London, 1963, p 76, cited in Munsche, p 161, fn 7

107. Munsche, pp 161–163

108. *Ibid.*, pp 163–164

chical and non-egalitarian nature of English rural society. One New Zealand historian who has considered the motivations of English villagers who emigrated to New Zealand is Rollo Arnold. His book *The Farthest Promised Land*, a study of English villagers who settled in New Zealand, examines why so many forsook 'England's green and pleasant land' for 'the lonely emptiness of . . . treeless plains and the blackened ugliness of the bush-burn forest clearings'. Arnold considers that the key to that question 'lies in the conditions which led to, and the consequences that flowed from, the great Revolt of the Field which broke up English rural society in 1872 and stirred a score of counties to the core.'¹⁰⁹ The Revolt of the Field involved landless rural labourers organising themselves into unions and striking in order to secure better wages and working conditions from their employees. Although primarily related to the low wages and bad conditions, the revolt can be seen more generally as a reaction against class privilege of which the game laws had been a major tenet.¹¹⁰

In his discussion of villages in and around Lincolnshire from where many emigrants to New Zealand originated, Arnold speculates that villagers would have derived some vicarious enjoyment from witnessing the hunts and steeple chases that 'their betters' participated in. This leads him to comment that the 'zest with which New Zealand's English immigrants of the 1870s took up the colony's democratic opportunities for hunting and horse racing, surely needs to be viewed in the light of backgrounds such as this.'¹¹¹ Certainly a large number of the settler journals and diaries which inform his study make numerous references to the opportunities that existed in New Zealand for hunting without fear of sanction.¹¹² This leads Arnold to ponder in how many cases 'had the energy and initiative that led to emigration found earlier expression in poaching?'. He notes one immigrant who had previously been convicted for poaching, and another who celebrated the plenitude of rabbits that could freely be shot in New Zealand, and the fact that 'the policemen [do not] stop you when coming into town if your pockets are a bit bulky or you have a bag on your back'.¹¹³

But what of these celebrations of hunting in the new world? To what extent can they be seen as being an evidence of many rural villagers having left England in order to be able to enjoy such activities, away from the strictures of the English law as it applied to wildlife? It is clear from reading Arnold that in many cases settlers primarily celebrated the abundance of hunting quarry and the freedom to hunt for the fact that it

109. Arnold, p 18

110. Ibid, pp 29–35

111. Ibid, pp 142–142

112. See for example Arnold, pp 51, 127–128, 176, 195

113. Ibid, pp 198–199, 210

provided them with much needed food, more than for the sporting opportunity that it afforded them. But it must be remembered that often in England such people were seriously malnourished yet were denied the opportunity to hunt game for food. From the limited evidence perused it could be concluded that the game laws and what replaced them were a part of the general oligarchical nature of English rural society from which many immigrants to New Zealand were escaping, but that in themselves they were not attributable as a major cause of emigration.

Another factor that Arnold sees as contributing to the increasingly demoralised state of English rural labourers in the mid-nineteenth century was the enclosure of common lands by the lord of the manor that resulted in commoners losing their rights to use them. This usually involved special legislation being passed by Parliament. According to Arnold the enclosure movement of the eighteenth and nineteenth centuries affected something like a quarter of arable land in England. Although enclosure facilitated more efficient farming, and modern scholarship has shown that the process was not the mockery of justice that some have claimed, Arnold is clear that it did cause a 'destruction of much of the traditional culture of English peasant society.' He considers that with access to common lands, there was at least a limited opportunity for upward economic mobility. But enclosure meant that they were largely dependent on wage labouring. This dependence was accentuated by the decline in cottage industries as a result of the industrial revolution.¹¹⁴ It would seem that the erosion of the common rights of rural villagers was a factor that contributed to the decision for many to emigrate to New Zealand.

5.4 English law in New Zealand

Of major importance to the Wai 262 claim is the extent to which English statute and common law were applicable to New Zealand upon England acquiring sovereignty in 1840. Hinde et al state that the 'starting point for the development of New Zealand's land law was . . . English statute law and common law'. They note though that 'an early opportunity was taken of sweeping away some of the unwanted complexities of English law and that the subsequent development of New Zealand land law has not followed a course parallel to English law.'¹¹⁵ Of particular relevance to the

114. Ibid, p 20

115. Hinde et al, p 6

Wai 262 claim is what 'unwanted complexities' relating to flora and fauna were abandoned.

Generally it is agreed that a colonising power can establish sovereignty in a new colony by cession or conquest, or by settlement. Although as Hinde et al observe, the question is not free from doubt, English sovereignty appears to have been established in New Zealand by virtue of it being a 'settled' colony, in spite of the fact that Maori, by the Treaty of Waitangi, ceded their sovereignty to the Crown.¹¹⁶ In the case of a 'settled' colony, the immigrants brought with them both the common law and statute law of England. However, this law applied only insofar it was appropriate to the circumstances of the new colony. Consequently a principle of English common law was held to be the law of New Zealand if the principle was in existence in January 1840 and if it was applicable to the circumstances of the colony. On this latter point the Courts usually look to the problem which the English law was intended to address, and only if that situation existed in New Zealand, would the law be held to apply.¹¹⁷

Working from this assumption it seems likely that the common law precepts relating to wild animals were employed in New Zealand – that is, that nobody owned them but that landowners had an exclusive right to reduce such animals into their possession. That such relatively strong rights were afforded to landowners accords with the view that in the colonisation of New Zealand freehold ownership of land was of the utmost importance, and that consequently people enjoyed great freedoms to land that they acquired. As Tom Brooking has observed, in colonial New Zealand freehold title was believed to have 'the power to transform the environment as well as economic and social relations', and as such 'was considered to be special and almost magical'.¹¹⁸ In light of this, it seems likely that the rights of landowners would be even greater than in England, where for example, there were such things as common rights that limited the extent of landowners' rights.

Obviously such things as common rights that applied to particular places in England and that had arisen out of the customary use of such land, would be inapplicable to New Zealand. What is interesting though in regard to this category of right is the precedent that existed for accommodating the usufructary rights of persons with a longstanding history of using a particular area in the freehold title of the person who acquired it. This suggests a way in which Maori could have enjoyed ongoing use rights in land that they alienated. It is interesting to note that in his evi-

116. For an explanation of this apparent contradiction, see McHugh, *The Maori Magna Carta*, p 43

117. Hinde et al, pp 5–6

118. Tom Brooking, 'Use it or Lose it: Unravelling the Land Debate in Late Nineteenth-Century New Zealand', *New Zealand Journal of History*, vol 30, no 2, October 1996

dence to the 1838 Select Committee on New Zealand, the future Governor of the colony, Robert FitzRoy, stated that Maori who had sold land to missionaries in the Bay of Islands were not prevented from continuing to use it, enjoying 'the Right of Common as it were'.¹¹⁹ But rights of common were never admitted in New Zealand; perhaps because of the reverence with which freehold titles were regarded, and the desire to avoid some of the complexities that encumbered land titles in England.

Another issue concerning the applicability of principles of common law to New Zealand is the extent to which the Crown sought to enforce the prerogative rights it enjoyed in England. Certainly in New Zealand the Crown has historically asserted its prerogative rights of ownership of the foreshore and sea-bed, and this has generally been accepted by the Courts.¹²⁰ But other prerogative rights have not been asserted in New Zealand – most interestingly for this report being those in relation to certain animals and fish. As noted above, under common law swans, deer, whales, dolphins, porpoises and sturgeon are vested in the Crown by virtue of its prerogative rights. Although swans, deer and sturgeon do not occur naturally in New Zealand, dolphins, porpoises and whales do, and the present author is unaware of any evidence of the Crown making a claim to the ownership of these by virtue of royal prerogative. In *Baldick v Jackson*, a case involving the ownership of a whale caught in Cook Strait by Jackson but later reclaimed by Baldick, the issue of whether whales were 'Royal fish' was considered by the Supreme Court but soundly rejected. Instead, in accordance with the common law principle on *ferae naturae*, it ruled that whoever caught the whale acquired the ownership of it.¹²¹ Interestingly though there is evidence that Maori chiefs may have enjoyed proprietary rights to mega fauna such as whales. In his treatise on inter-tribal warfare in New Zealand prior to 1840, Percy Smith recounts how the Nga Puhi chief Hongi intended to punish Maori at Whangaroa for eating a stranded whale, over which, according to Smith, Hongi claimed 'manorial rights'.¹²²

Some idea as to how English statutes applied in New Zealand upon sovereignty being acquired by England can be gained from the 1845 English Acts Ordinance. The ordinance states that its purpose is to bring into operation within New Zealand new legislation pertaining to the administration of justice passed by the Imperial Parliament 'in like manner as Acts of Parliament passed before the establishment of the Colony are applied'.¹²³ In 1858 the English Laws Act was passed¹²⁴ in order to clear up

119. Evidence of Captain R FitzRoy, 11 May 1838, 'Report and Evidence of 1838 Select Committee on New Zealand', BPP, vol 1, pp 174

120. See Richard Boast, *The Foreshore*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), November 1996, pp 25–27

121. *Baldick and Others v Jackson* [1910] 30 NZLR 343

122. S Percy Smith, *Maori Wars of the Nineteenth Century*, Christchurch, Whitcombe and Tombs Ltd, 1910, p 129

123. s 2, English Acts Ordinance, reproduced in *The Statutes of New Zealand, 1842–1884*, vol 1, p 2

124. English Laws Acts were passed in 1854 and 1855, but these, like the 1845 Ordinance, only gave effect to legislation that had been passed in England since 1840.

doubts that existed at the time as to which laws of England applied to New Zealand. Section two of the Act stated:

The laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, shall, so far as applicable to the new circumstances of the said colony of New Zealand, be deemed and be taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly.

Prima facie this suggests that all English legislation applied to New Zealand, with the exception presumably of Acts where the problem with which they were concerned did not exist. Obviously this ruled out all local acts. But it remains unclear the extent to which legislation governing rights to flora and fauna was given effect to in New Zealand in the early decades of colonisation. Certainly the present author is unaware of any evidence of people being prosecuted under English acts for such crimes as poaching in the first decades of the New Zealand colony. In fact quite to the contrary, there is evidence of a large degree of tolerance on the part of landowners, both Maori and Pakeha, to people hunting and gathering upon their land and waters.¹²⁵ It would seem likely that in the first years of Government in New Zealand enforcing legislation regulating access to flora and fauna was a lower priority than other legislation concerning such things as taxation or criminal activity. And as is discussed in chapter 10 below, even when domestic animals protection legislation was passed in New Zealand, its enforcement was at best erratic; the Crown finding it nigh impossible to enforce it in many parts of the country due to lack of resources.

An important point that emerges from this consideration of English law is that under common law, there were a variety of ways in which rights could be held in land, and that there were alternatives to exclusive individual title. For instance historically, rights of common were held by members of the community and limited the rights of individual landowners. As a legacy of particular historical circumstances, such arrangements suggest that English common law was capable of better accommodating the customary rights of Maori, rather than making them subordinate to the rights of individual Pakeha landowners.

¹²⁵. See chapters 6 and 7 of this report.

