CHAPTER 3

ENGLISH COMMON LAW AND THE OWNERSHIP OF PETROLEUM

3.1 The Common Law

Before the New Zealand Government passed legislation in 1937 creating the Crown's right to petroleum, ownership of that resource was determined by the common law. Two distinct bodies of law relating to the ownership of natural resources are relevant here. One relates to minerals and is summarised by the maxim *ad coelum et ad inferos*; the other, relating to underground water, is expressed within the doctrine of capture.

3.1.1 *Ad coelum et ad inferos*

Under common law, minerals generally belonged to the owner of the land in accordance with the maxim *cuius est solum eius est usque ad coelum et ad inferos* ('to whom belongs the soil it is his, even to Heaven, and to the middle of the earth'). Dating back to thirteenth-century Europe, this rule had become accepted doctrine in English law by the sixteenth century, and has been applied consistently by the New Zealand courts in determining the ownership of natural resources.[1] Minerals as an attribute of the land likewise belonged to the landowner. When the land was conveyed so, too, were the subsurface resources unless surface and mineral rights were deliberately and explicitly separated in the instrument of conveyance. The only exceptions to this rule, until the twentieth century, were gold and silver, which, as the 'most excellent products of the soil', were deemed to remain subject to the ownership of the Crown as the 'most excellent person in the realm' – an understanding which was formalised in the *Case of Mines* in 1567.[2] Since the 1930s, however, the *ad coelum et ad inferos* rule has been abrogated in New Zealand in respect of minerals deemed to be of particular importance. These include petroleum.

3.1.2 The doctrine of capture

The doctrine of capture is also pertinent to a consideration of the ownership of petroleum under common law. Petroleum, rather than remaining in situ like metals or coal, migrates,

1. Document A12, pp 23–24
2. *Case of Mines* (1568) 77 ER 472

flowing towards areas of low pressure such as drill sites.[3] Arguably, legal understandings developed with reference to underground migratory resources such as groundwater and underground brine might apply also to petroleum. Under the common law, a landowner is unable to prevent a neighbour from draining the waters from under his or her land, providing that the means of abstraction (pumps and drills) remain within the neighbour's property.

The question had not arisen in the New Zealand courts before 1937, and it is unclear whether the doctrine of capture applied to petroleum here when the Government's nationalisation of the resource made the issue pertinent to the question of the rights of permit holders, authorised by the Crown, rather than to the question of ownership per se.

Until 1937, the legal understanding of petroleum ownership in New Zealand was developing in accordance with the common law understanding of the ownership of subsurface minerals in general. Questions of migration and capture were not uppermost in the minds of legislators and administrators. Petroleum was treated as the property of the owner of the land and was governed by the ordinary property laws. When the land was sold, so too was the petroleum and any other subsurface resources.

3.2 Oil Leases

It was possible also for landowners to alienate petroleum to another party. The usual arrangement in New Zealand, as in the United States, was for landowners and oil companies to enter into 'oil leases' for a term of years. The first arrangement of this nature in New Zealand was an 1865 lease of land by the Taranaki Provincial Council; the land had been acquired as a result of the confiscation process and was leased to a privately syndicated company for the specific purpose of extracting oil. This practice continued into the 1930s. How many of these leases were granted is unknown, but it is clear that such arrangements went unquestioned, and were relatively common.

These pre-existing arrangements were an obstacle to any Government move towards nationalisation or regulation. On the very first step towards the setting up of a special regulatory regime for petroleum in 1911, it was pointed out that the Kotuku Oilfields Syndicate had 'obtained options over considerable areas of private land, and [had] covenanted therein to pay to the freeholders a royalty on all the oil produced'.[4] When the question of the Government's capacity to control the exploitation of petroleum was again under consideration in 1927, the district land registrar at New Plymouth reported to the Under-Secretary of Mines that 'quite a number of oil leases or grants to bore [had] in the past been granted in the district'. The longest of these would expire in 1936, clearing the way for the Government to

3. Document A12, pp 24–25
4. Sir John Findlay, 26 October 1911, NZPD, 1911, vol 156, p 1109

nationalise the resource with a minimum amount of complication.[5] Far less common than leasing for a term of years was the separate registration of petroleum title as a result of the outright sale of that resource by the owner of the land. There is evidence, however, that such arrangements were possible and the transfer of permanent title to the petroleum duly registered.[6]

3.3 The Beginning of Regulatory Controls

The increase in exploration activity in the 1880s and the growing interest in mining in general resulted in the imposition of regulatory controls on petroleum exploration and recovery, but for 50 years the common law was left untouched. Initially, statutory law dealt with petroleum like any other mineral. No reference was made to its migratory quality, nor to any assertion of untrammelled Crown ownership of all such resources. Section 3 of the Mining Amendment Act 1892 amended the definition of 'mineral' to include 'petroleum and all other mineral oils', bringing petroleum exploration and recovery into the same licensing regime as that for hard minerals. But these provisions applied only to Crown lands. Royalties for petroleum were also established, as for hard minerals at the 'pit mouth'. These were set at the rate of 2 per cent to 4 per cent, but again this provision applied only to resources recovered on Crown land, and private landowners such as Ngāti Porou on the East Coast remained free to reach their own arrangements with regard to the payment of a portion of the value of any oil produced on their property. That basic understanding was repeated in legislative amendments in 1898, 1905, and 1908.

This regime came under challenge as imperial concerns deepened and in line with the general trend towards the regulation of the mining industry. Government control of exploration and development expanded in the following years, although it stopped well short of the complete nationalisation of the resource. There was a growing recognition that management systems for hard minerals were not entirely workable in the case of petroleum. Accordingly, the Mining Amendment Act 1911 set up a partially independent regime for petroleum and oil by removing them from the statutory definition of 'minerals'. The Governor was, however, still empowered to declare, by Order in Council, any of the provisions of the principal Act to apply, should the need arise. The Act also stated that, where the landowners had consented to the issue of a prospecting licence after the Act had come into force, compensation would not be payable in respect of the value of any oil or natural gas recovered from the land.[7]

A few years later, the Mining Act 1914 pointed to the Crown's increasing awareness of the strategic significance of oil. This legislation gave the Government a priority right of

5. Document A12, p 35
6. Ibid, pp 35–36
7. Mining Amendment Act 1911, s 2(1), (2)

purchase in times of emergency, as well as the capacity to take over the management of the entire operation of production in the event of war. The Mining Amendment Act 1919 extended the licensing regime to lands within private ownership (including those in customary title), but it still did not make any claim of Crown ownership of the resource itself. Nor was this basic adherence to the *ad coelum et ad inferos* rule disturbed by the consolidating Act of 1926. As of then, neither the vesting of the right to exploit petroleum in the Crown nor the outright nationalisation of the resource had been contemplated in New Zealand, despite steps towards the control of all oil exploration, including that conducted on private land.[8]

3.4 The 1927 Bill

A further extension of the rights of the State (and of licensees authorised by the State) at the expense of private property interests was proposed the following year. The intention was to attract investors who were otherwise 'much hampered in making individual agreements with thousands of settlers' by empowering the Government to proclaim lands open to exploration without the consent of the owners.[9] The grant of a licence conferred a right of access, and there was no requirement for the recipient to obtain permission from the owner of the surface to enter his or her land or to pay ground rent. Royalties, however, were still to go to the owner of the fee simple of the land and were set at a maximum of 10 per cent in the event of a payable oil discovery. These moneys (after deductions for administrative and other charges) would be paid into the appropriate fund in the case of Crown land, or into the Consolidated Fund in the case of private lands where the Crown had retained property in the minerals in them. Otherwise, they were to go to the landowner. In the case of Māori land, however, such royalties were to be paid to the Native Trustee for the owners, or other persons beneficially entitled to revenues from such land, whether it was freehold or still in customary title.[10] The 1927 Bill also repeated the 1914 provisions for Crown priority of purchase in times of emergency or war, notwithstanding any contracts already in existence.

Opinion was divided over the Bill. There was general approval of its security intentions and grounding in the notion of imperial defence, but there was also criticism for the interference with the private rights of landowners, the overriding of existing contractual arrangements, the level at which the royalty had been set, the obligations imposed upon licensees, and the discretionary authority given to politicians. For their part, Māori disliked the trust provision. Sir Apirana Ngata requested that the Bill be referred to the Native Affairs Committee, which reported that this clause should be amended to 'provide for payment to

8. Document A32, p 22
9. Joseph Coates, 20 October 1927, NZPD, 1927, vol 215, p 124
10. Document A12, p 52

such person or body as the Native Land Court may direct'.[11] The Bill failed partly because of these objections and partly because a worldwide glut of oil and the onset of the Depression created a context in which there was little urgency to promote oil exploration in New Zealand.[12] That attitude changed over the next 20 years, however, as a result of the deterioration in the international climate.

11. Ibid, p 55
12. Document A4(e), p 385