

## NOTE ON OWNERSHIP OF LAND

1. One reason which has been advanced in support of the claim that on Ocean Island the phosphate belongs to the community as a whole is that there seems to have been some form of communal right to take water (and stalactites for making fishhooks) from the banga bangas; the groups having customary rights to take water and stalactites from the banga bangas. The Judge finds this a less than compelling reason. So do we. Even in England the common law rule that ownership of land confers complete dominion over what lies below or above the land may be subject to local customary rights - for instance, a right to lay fishing nets.

2. It occurs to us that the true explanation lies in a more profound difference between English and Polynesian law. There are many suggestions (e.g. by Neill) in the correspondence that the general rule in Polynesia is that land is owned by the community. To this general rule there must have been some qualifications. Presumably any society would have to recognise individual or family rights of exclusive occupation of, e.g., houses. As we understand it, customary law in the Gilberts diverged from the Polynesian 'norm' in that these qualifications were more extensive and (at least on Ocean Island) permitted (a) individual rights of occupancy of the whole island and not merely house and cultivated land and (b) limited rights for individuals to dispose of their exclusive right of occupation inter vivos and by Will. But these

are qualifications engrafted onto a fundamental rule of community ownership.

3. If this is right the explanation of communal ownership of minerals may, we suggest, lie in the fact that customary rights as they developed on Ocean Island only conferred the right to (and the right in limited circumstances to dispose of the right to) exclusive occupation including (possibly) the right to collect loose phosphate. This individual right did not confer the right to destroy the surface by mining or to take minerals by subterranean working. Such rights could not have arisen by custom because there was no use for minerals. And the rule of communal property remains unless and to the extent to which it is varied by local custom.

4. On this view the customary rights to take water etc. from banga bangas merely exemplify the general principle of common ownership; they are not an exception to individual ownership.