LX McK McKAY, C.C.. UNLAWFUL ASSEMBLY.

1 Folder Ma | McKAY, C.C. Unlawful assembly. 333,974

Due	Borrower's Name
30/9	A. Hockley
16/5/86	JC Derby
22/5/86	JC Derby
26/7/89	A. Davidson

Colin Charles

LEGAL WRITING C.C. McKAY

UNLAWFUL ASSEMBLY

1975

A. Introduction

The maintenance of public order is a function of the State and this function is carried out by the Police as an arm of the Executive which operates within limits largely prescribed by the legislature in statutes. Such a statute is the Crimes Act and specifically the provision creating the offence of "unlawful assembly" in that part of the Act denoted as "Crimes against Public Order". A clear statement as to the justification for the existance of this offence is seen in Goodall v Te Kooti (1):

> "I think the proposition of the respondent that any number of men may assemble to do any act that is not unlawful, irrespective of the consequences, is pushing the doctrine of individualism and of the obligation of individuals to the body politic to an irrational extent. A leading duty if not 'the' leading duty of a Government is to preserve the public peace and everyone has to sacrifice part of his individual rights and liberty for that object."

The offence as it exists today appears in s.86 of the Crimes Act 1961 as amended by s.3 of the Crimes Amendment Act 1973 i.e.:

> 3. UNLAWFUL ASSEMBLY - s.86 of the Principal Act is hereby amended by repealing subsection (1) and substituting the following section:
>
> "(1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any

common purpose, assemble in such a manner, or so conduct themselves when assembled, as to 'cause' persons in the neighbourhood of the assembly to fear, on reasonable grounds, that the persons so assembled -

'(a) Will use violence against persons or property in that neighbourhood or elsewhere; or

(b) Will, by that assembly, needlessly and without reasonable cause provoke other persons to use violence against persons or property in that neighbourhood:

Provided that no one shall be deemed to provoke other persons <u>needlessly and without reasonable cause</u> by (doing or saying anything that he is lawfully entitled to do or say.)'

(2) Persons lawfully assembled may become an unlawful assembly if, with a common purpose, they conduct themselves in such a manner that their assembling would have been unlawful if they had assembled in that manner for that purpose.

(3) An assembly of three or more persons for the purpose of protecting the house of any one of their number against persons threatening to break and enter that house in order to commit a crime therein is not unlawful.

(4) Every member of an unlawful assembly is liable to imprisonment for a term not exceeding one year."

Unlawful assembly as enshrined in the Crimes Act, has not yet attracted comprehensive discussion by academic lawyers, and the purpose of this dissetation is to identify the essential elements of the offence as it exists at the present time.

However, while pursuing that theme the major consideration in this paper will be an analysis of the 1973 amendment brought into existence by the "new" Labour Government with the then Minister of Justice, Dr. Martin Finlay, as midwife. This study will purport to show that the above amendment brought "no substantial change" in the law of unlawful assembly and that the motivation behind the amendment was simply political expediency.

Section three of the Crimes Amendment Act 1973 amended s.86 of the Crimes Act 1961 by repealing subsection one and substituting the above subsection. From 1961 until 1973 the offence of unlawful assembly appeared in this form in s.86 (1):

> "86. Unlawful assembly - (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that the persons so assembled -
>
> (a) Will disturb the peace tumultuously; or
>
> (b) Will, by that assembly, needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously."

My hypothesis that the new section was incorporated in the Crimes Act for reasons only of political expediency gains credibility in view of the circumstances, both socially and

politically which existed in 1973. Firstly social circumstances at that time were such that many people in N.Z. thought positive action was needed to control groups (gangs) of motor cyclists (or "bikies" which is the popular descriptive term). Such gangs, sometimes comprising up to one hundred or more persons were often seen meeting in the large cities with consequent near hysteria by the people living in those cities. People feared for themselves and their property. Captions such as "Knives, Chains and Bars in Gang Fight" (2), appeared often in the newspapers. Also at this particular time there was felt a need by some sectors of the community to place more power in the hands of the police to enable them to more effectively deal with the "bikie" phenomenon. The activities of dissenting groups such as H.A.R.T. reinforced this belief. Secondly, and not surprisingly "Law and Order" became a major election issue. In the Labour Party 1972 Election Manifesto under the heading of "Justice, Law and Order" it was unequivocally promised:

> "The first duty of a Government is to ensure the safety and protection of the community. Effective steps will be taken aimed at stamping out lawlessness." (3)

Clearly a course of positive action was envisaged and under pressure from Parliamentary Opposition members Dr. Finlay promised that:

> "All this will be done." (4)

Accordingly, the purpose of this legislation was to give the Police extended powers to meet a felt general need. But it also purportedly had a more precise purpose described by the Minister of Justice in the following words:

> "At the moment there is no appropriate reference to the fear of injury or damage to property the real danger in 'bikies' behaviour. Such an amend-

ment as that proposed will enable Police to step in while trouble was still brewing and before it boiled over - to intercept a gang on the way to its chosen battlefield or while, as so often happens, its members are fortifying themselves with Dutch courage." (5)

However, as later paragraphs will show, the enactment was merely window dressing. Perplexed by the near impossibility of extending the already extensive powers possessed by the Police at the time, political necessity forced the Government to pass the 1973 amendment.

B. Historical Development of the Offence of "Unlawful Assembly"

The elements of "unlawful assembly" as it exists today have resulted largely from an evolutionary process of the common law. These elements will be seen later, and an investigation of this "ancient offence" with its consequent development and lastly its codification is necessary for a better understanding of what exactly "unlawful assembly" is.

In the edition of Lambard's "Eirenarcha" of 1591 there occurs the title,"Of other breaches of peace, with a multitude; as by Riot, Route or other Unlawful Assemblie", the text states that apart from statutes "conventicles against the peace" were punishable in the same way as other trespasses i.e. as misdemeanours.(6) The genus seems to be "conventicles that bring manifest terror unto the subject" or as Stephens says (7) "these offences i.e. rout, unlawful assembly and riot all have the common thread that they are a danger to the presence of the tranquillity of the state". Thus "unlawful assembly" was recognised in the 16th Century as an offence in

that area of the lawrelating to public order. Also in the earliest recorded definitions of what constituted unlawful assembly, appears further the necessity for it to be "the company of three or more persons disorderly coming together; forcibly to commit an unlawful act". (8) These elements all remain in the law as it is codified today.

Another early writer of the 17th Century relies on Lambard in forming his definition and states that such an assembly is only unlawful if it be in terror or affright of the people (i.e. "in terrorem populi"). This definition that it must be an assembly which causes "fear" to people, not in the actual assembly, was developed further by Hawkins (9). Archbold (10) and Russell (11) seized upon that definition which is very similar to that of s.86 of the Crimes Act 1961. This definition was of an assembly of three or more persons who:

(a) For purposes forbidden by "law"; or

(b) With intent to carry out any common purpose lawful or unlawful, assemble in such a manner as to endanger the public peace, or give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it. (12)

In this definition (a) is open to criticism. It extends to any assembly to further an unlawful purpose and lacks the element of causing apprehension of a disturbance of the peace "tumultuously". Therefore, on this aspect the English common law definition is wider than that which is at present in the statute books in N.Z., for in N.Z. it is only an "unlawful assembly" when it is feared by reasonable people that the assembly will use or cause others to use violence against persons or property. It is submitted that it is

only (b) of that definition which pertains to unlawful assembly in N.Z. today, because the essence of the offence is the disturbance or possibility of the disturbance of the public peace.

In the early 19th Century decisions, in the U.K., they were usually founded on the basis that the assembly was unlawful because of sedition (13) or some purpose forbidden by law (e.g. a prize fight in which one spectator is guilty of aiding and abetting the two combatants in their assault upon one another (14)). In modern law the concepts of sedition and unlawful combination which appear above are less common and an agreement by three or more to commit an indictable fraud for example is most likely to be found to be a conspiracy (15), this is because many of these offences lack the basic ingredient of "in terrorem populi", essential now to come under the offence of unlawful assembly. Propositions about prize fights are autonomous in relation to unlawful assembly and even in the 19th Century the decisions distinguish between sparring matches and the extreme violence inherent in a prize fight, regarded as a breach of the peace, on a "res ipsa loquitur" basis.

As suggested above, from 1830 onward the Courts were laying increasing emphasis on the requirement of an "apprehension" of a "breach of the peace" (16). In 1839 in R v. Vincent apart from counts involving sedition, there was a count for unlawful assembly causing terror to subjects (on which the accused was found guilty). In this case the accused and several others met late at night in an old house to plan a poaching mission. When the police arrested them they had blackened faces and there were arms in the house. Alderson B. in that case said:

> "If a meeting from its general appearance and from all the accompanying circumstances is

calculated to excite terror, alarm and consternation, it is in general criminal and therefore unlawful." (17)

Also in R v Graham and Burns(18) Charles J. placed great emphasis in his direction to the jury on the "dangerous disturbance of the public peace" which may make an assemblage of persons unlawful even if its object is a lawful one. In this case a group of people were making a public protest about the imprisonment of the Irish leader O'Brien. Before the meeting took place a Magistrate had ordered a proclamation saying that processions or meetings in Trafalgar Square were not permitted because he had reasonable grounds of fearing that if any more meetings of the defendents organisation (called the "Metropolitan Radical Federation") were convened publically, violence and disorder might result. Such a meeting which took place was found to be an unlawful assembly.

In 1879 in England the "English Criminal Code Commission" was set up to investigate the common law as it then was and suggested what parts ought to be codified. The Commission made a thorough investigation of unlawful assembly and found:

"The law was first adopted at a time when it was the practice of the gentry who were on bad terms with each other to go to the market at the head of bands of armed retainers. It was obvious that no civilised government could permit this practice, the consequence of which was at the time that the assembled bands would probably fight and certainly make peacable people fear that they would fight. It was whilst the state of society was such as to render this a prevailing mischief that the earlier cases were decided; and consequently the duty of

> not provoking a breach of the peace has sometimes been so strongly laid down as almost to make it seem as if it were unlawful to take means to resist those who came to commit crimes." (19)

This statement not only shows the recognition of the element of an "apprehension" of a disturbance of the peace as a necessary part of unlawful assembly but it was not at that time declared specifically in any decided case that an assembly may be unlawful if it causes persons in the neighbourhood to fear that it will needlessly and without reasonable cause provoke other persons to use violence against persons or property in that neighbourhood.

We have now seen what consituted the common law offence of unlawful assembly and how it developed. An early, but nonetheless, very important case was Beatty v Gillbanks, (20) decided in 1882. In this case members of the "Salvation Army" marched through the streets of Weston-Super-Mare knowing that they would meet forcible opposition from an opposing group called the "Skeleton Army". Clashes had occured before and it is apparent from the facts that the Salvation Army behaved quite literally in a martial manner and were ready to use necessary force. It was found by the Divisional Court that there was nothing in the Salvation Army's conduct when assembled together which was either tumultuous or against the peace. The Court on appeal held that the Salvationists, whose acts were thus lawful, could not be punished merely because others might react unlawfully.

The first reported case on this offence in N.Z. concerned the Maori Chief, Te Kooti, in the famous case Goodall v Te Kooti in 1890 and as such warrants a discussion. Te Kooti had decided to make a trip to the Gisborne district (to visit relatives) from further up north. When he arrived at Opotiki

his followers numbered some two hundred and fifty, which had grown to over six hundred four days later. He then proceeded towards Gisborne in the manner of troops in regular order. This was to the consternation of people in Gisborne where twenty years previous he had carried out a vicious massacre. Arms were not displayed but there was a widespread rumour that they were concealed. People of Tauranganui feared Te Kooti's approach and many settlers in his path left their homesteads. The Supreme Court held that the Magistrate's order that Te Kooti find sureties for the peace for six months, was bad. However, on appeal to the Court of Appeal, that Court upheld the order, finding that Te Kooti had been a participant in an unlawful assembly. The Court of Appeal found, that as a matter of fact, there was reason to fear not only that Te Kooti and his followers might disturb the peace, but also that, whatever they might do their conduct was likely in the extreme to provoke others to do so. The fact that those others would have been acting illegally did not matter. (21) It was also considered by the Court, immaterial that Te Kooti and his followers had the right to go to Gisborne if they wished. (22)

(These two cases are distinguishable and will be discussed later in this writing.)

From the discussion so far we can see that all the essential elements of what is unlawful assembly today were established by the year 1890. From 1893 to the present day the offence is seen in the statute book. Section 86 of the Crimes Act 1961 was introduced as a statutory offence in 1893 and was based upon the Report of the English Criminal Code Commission of 1879. No doubt when the 1893 Criminal Code Bill was before Parliament, members were still conscious of events in 1889, when Te Kooti was making his famous trek towards Gisborne. In the

Criminal Code Act 1893 the provisions relating to unlawful assembly appeared in sections 83 and 85. Section 101 of the Crimes Act 1908 consolidated these two sections into one without any change of wording. As this section then appeared is seen below:

S.101 Unlawful Assembly

(1) An unlawful assembly is an assembly of three or more persons who with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when assembled, as to cause persons in the neighbourhood of such assembly to fear on reasonable grounds, that the persons so assembled will disturb the peace tumultuously, or will by such assembly, needlessly and without reasonable occasion provoke other persons to disturb the peace tumultuously.

(2) Persons lawfully assembled may become an unlawful assembly if they with a common purpose conduct themselves in such a manner that their assembling would have been unlawful if they had assembled in that manner for that purpose.

(3) An assembly of three or more persons for the purpose of protecting the house of any one of their number against persons threatening to break and enter such house in order to commit an indicative offence therein is not unlawful.

(4) Every member of an unlawful assembly is liable to one year's imprisonment.

Section 101 of the Crimes Act 1908 was reinacted in s.86 of the Crimes Act of 1961 without any material alteration. Comparing s.101 with s.86 it is clear that "the only difference worth mentioning is verbal". (23) In s.101 (1) of the 1908 Act the words "without reasonable occasion" have been substituted in s.86 of the 1961 Act with "without reasonable cause". Furthermore the words "indictable offence" in the 1908 Act have been substituted with "Crime" in the 1961 Act. The conclusion which is drawn from this, is that the legal effect of sections 83 and 85 of the Criminal Code Act 1893, and of s.101 of the Crimes Act 1908 is the same as that of s.86 in the Crimes Act 1961.

C. The Offence Prior to the 1973 Amendment

It is necessary to briefly examine the offence of unlawful assembly as it existed before 1973. The offence was set down immediately prior to amendment in 1973 in s.86 of the Crimes Act 1961.

Firstly, we must have regard to the "external circumstances" of the offence i.e. the "actus reus". The mere assembly - the coming of being together - with the necessary intent constitutes the offence and the parties are then guilty of the offence punishable by up to one year's imprisonment. Brownlie says (24) "One may say that the 'actus reus' requires an assembling of three or more in such a manner as to give persons of ordinary firmness reasonable grounds to fear a breach of the peace."

In s.86 three or more persons must be present to constitute the requisite assembly. The nature of this assembly must be such as to "cause persons in the neighbourhood to fear on reasonable grounds". Not only must there be fear on the part of these persons, caused by the assembly in that neighbourhood but it must also be upon "reasonable grounds".

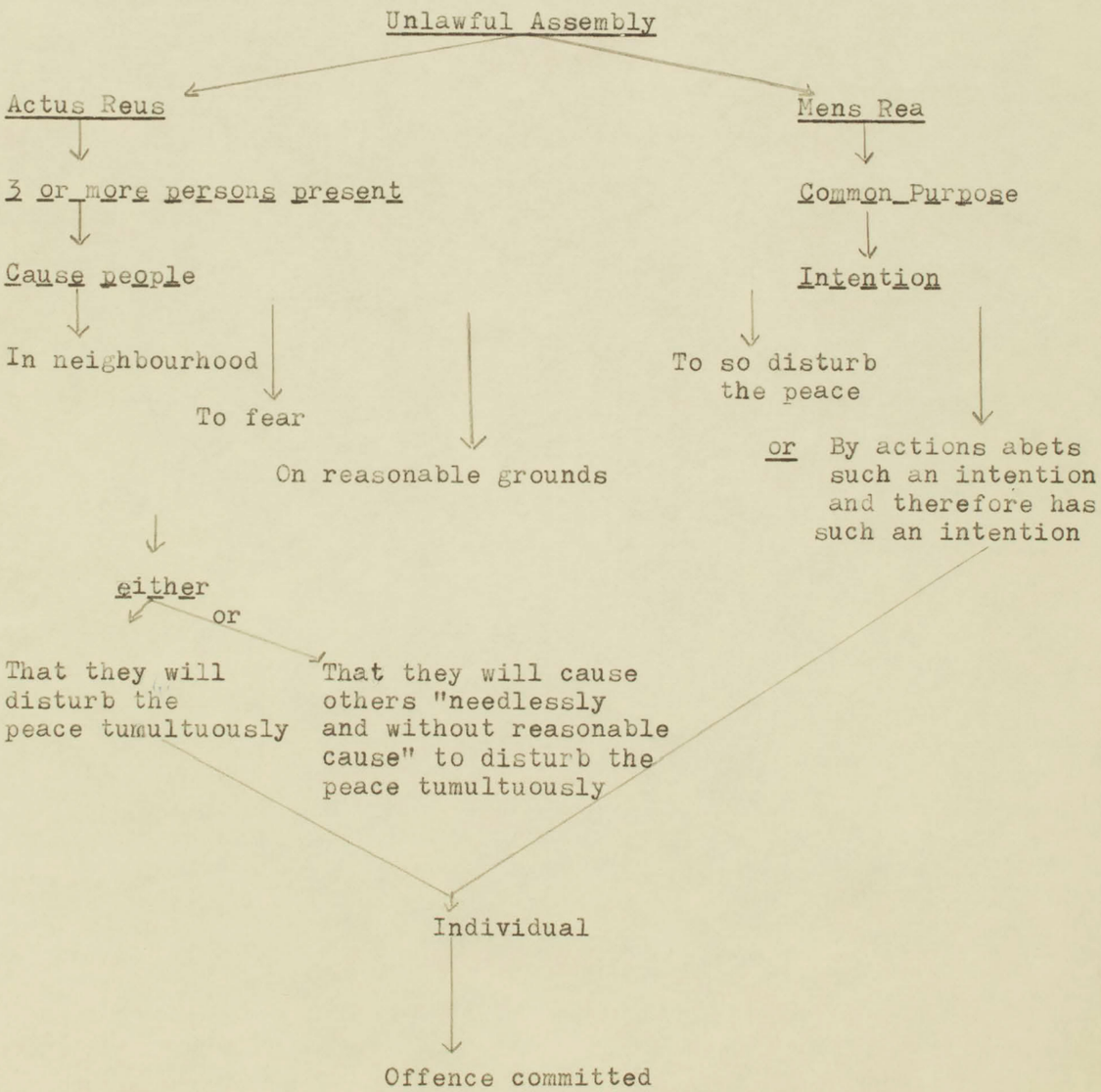
Another part of the "actus reus" is that the fear must be that the assembly will either -

(a) "disturb the peace tumultuously" themselves

or (b) will provoke others to do so "needlessly and without reasonable cause".

Secondly, the section contained a "mens rea" element. There must be an "intent" present, to carry out a common purpose.

These are the elements which work to make up a conviction for the offence of unlawful assembly under s.86 of the 1961 Crimes Act. It could also be more clearly demonstrated by a diagram.



D. The Offence and the 1973 Amendment Examined

In this part of the dissetation I shall analyse what the law at present is relating to "unlawful assembly". Furthermore the question of what elements of the law were in fact changed by the 1973 amendment shall be discussed.

A glimpse at the factual situations where the offence of "unlawful assembly" has been recently applied (both under s.86 and under s.3 of the Crimes Amendment Act 1973) will show something of its practical nature.

R. v Aitken (1974) (25) was a case decided under s.86 (1)(a). The facts as found by the Court were as follows. Motorcyclists from all over N.Z., numbering about eighty, converged on a house on 29th December, 1973, at 71 Kerrs Road, Christchurch. During the day there was much movement to and from the premises by these people. Much alcohol was consumed during the day. In the late afternoon there was some fighting on the front lawn. A bottle was thrown by a person on the lawn which landed on the roadside consequently breaking. People living in Kerrs Road gave evidence that this gathering caused them to fear for themselves and their family's safety. Erratic fights continued on the front lawn between about 30 motorcyclists. At 7.00 p.m. the police sergeant observing the premises formed the opinion that an unlawful assembly had been constituted. At 10.00 p.m. the police surrounded the place, and with the aid of teargas arrested all the occupants. Each of these eighty arrested were convicted in the Magistrate's Court on the 14th February, 1974, upon a charge worded as follows:

> "That he was a member of an unlawful assembly who conducted themselves when assembled as to cause persons in the neighbourhood of Kerrs Road to fear on reasonable grounds that the persons so

assembled would disturb the peace tumultuously."

On appeal to the S.C. Macarthur J. held the accused had not committed the offence, as the prosecution had not proven satisfactorily that those arrested were on the premises at the relevant time i.e. two hours before arrest. R v Spring (1974) (26) is a recent S.C. decision of Roper J. decided under the new section. The facts of this case are interesting in that they show how, as in the above case, a potentially violent situation can be effectively prevented by the use of this provision. The accused were members of the "Devils Henchmen" motorcycle gang. They tried to gatecrash a party at 20 Eversleigh Street, Dunedin, at 1.00 a.m., 24th August, 1974. It was a private party for members of a football club. Some of the gang were armed and many wore German World War II helmets. They were refused entry to the party. Within a short time some members of the gang started to break windows in the house and then cars' windows parked outside. Some of the men in the party rushed out to try and disperse the invaders. There was a consequent pitched battle. The Court held that there had been an unlawful assembly.

These fact situations are indicative of just when the police will use this provision. The facts also show that the police use this section before a situation of "riot" occurs (although in the R v Spring situation the police would have been justified in applying s.87 i.e. the riot provision in the Crimes Act 1961.).

The offence of unlawful assembly is an independent offence which does not require that any breach of the peace or riot should have occurred. (The assembly will only become a riot under s.88 if it begins to disturb the peace tumultuously.) In R. v Vincent Alderson B. said:

> "I take it to be the law of the land that any meeting assembled under such circumstances as, according to the opinion of rational and firm men are 'likely' to produce danger to the tranquility and peace of the neighbourhood is an unlawful assembly." (27)

Brownlie calls this a "present tendency" (28) to create a reasonable apprehension of a breach of the peace. It is submitted that this is the correct view of the law. This is in conflict with Kenny (29) (or even Dicey who says that unlawful assembly must have present the above "present tendency" is doubtful (30)) who says that a decision as to a"future" act of violence is sufficient. Thus a meeting for unlawful purpose without such a "present tendency" to create a breach of the peace is not an unlawful assembly. That this is the state of the law (and always has been under codification) is seen from a literal reading of the amended section i.e. "Who ..... assemble in such a manner or so conduct themselves when assembled as to 'cause' persons ..... to fear ..... (a) 'Will' ....." An example on this point is that a meeting to plan a burglary is not an unlawful assembly as there is no present tendency to create a reasonable apprehension of a breach of the peace (assuming also that there is no actual disturbance either).

It is submitted that the statutory provision in requiring that the assembly should actually "cause" neighbouring persons to entertain one or other of the specified fears, the section is possibly narrower than the common law, which is satisfied if there is a likelihood that such fears would be aroused if the assembly proceeded in its purpose.

An area of confusion has in the past arisen also over the fact of the distinction between a riot and an unlawful assembly. Riot is set down clearly in s.87 and s.87 (1) saying "..... has begun ....." illustrates when an unlawful assembly is no longer such but has evolved into a riot. This distinction is very important as the maximum term of imprisonment for riot is <u>two</u> years as

compared to one year for unlawful assembly. The leading decision on what constitutes a riot is Field v Receiver of Metropolitan Police (31) where Phillimore J. said:

" There must be five elements present for the assemblage of persons to constitute a riot -

(i) At least three persons present

(ii) A common purpose

(iii) An intent to help one another by force if necessary against a person who may oppose them in the execution of their common purpose

(iv) Execution or inception of the common purpose.

(v) Force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage."

It is submitted that on a literal interpretation of s.87 element (iii) is not necessarily to be present in N.Z. for it to be a riot. In unlawful assembly only the first two elements need to be present (as well as of course, the requisite fear of resonable people on reasonable grounds). It is at point (iv) that the once "unlawful assembly" becomes a "riot" for the purposes of s.87.

A case which illustrates the fine distinction between a riot and an unlawful assembly is the Canadian case of R v Beattie (32) decided in the Manitoba Court of Appeal by Prendergast C.J.M. In this case a crowd of over three hundred people forced their way into the Manitoba City Hall. On the facts it was clearly established that the assembly had become unlawful as soon as the large crowd began to make their way to City Hall in a threatening manner. Prendergast C.J.M. said: (33)

> "Indeed with the rush of such a number of men 'kicking up an awful row' - I can see that there was decidedly at that moment ..... a tumultuous disturbance of the peace ....and consequently a riot."

The only reason the jury in the lower court didn't findthe accused guilty of a riot was on account of his youth and for some peculiar reason the Crown did not particularly press the count. This case is useful in demonstrating when an "unlawful assembly" can become a riot i.e. when the unlawful assembly begins to disturb the peace tumultuously.

The law remains the same on this distinction today as it did before the 1973 amendment. It is curious that Parliament has amended s.86 of the 1961 Crimes Act without giving attention to s.87 (1) which still reads:

> "A riot is an unlawful assembly that has begun to disturb the peace 'tumultuously'."

If the interpretation which Haslam J. in R v Hamilton (34) - to be discussed later - places on the meaning of "tumultuously" one can anticipate few difficulties arising out of the difference between the two sections. It might be argued that since s.87 (1) was not amended to read:

> "A riot is an unlawful assembly that has begun to 'use violence against persons or property'."

then Parliament regards "tumultuously" as meaning "use violence against persons or property". Or at least that the removal of the former for the addition of the latter would effect no material change in the law.

A further area of confusion between unlawful assembly and riot is evinced by Holdsworth (35) who along with other writers (e.g. Lambard and Dalton) believes that unlawful assembly is a preparation of riot which wants but execution. This view that an unlawful assembly is an incipient riot is analytically unsound. In many circumstances it may be true, but in other circumstances the participants in an assembly may have a "mens rea" quite inappropriate to an inchoate riot and yet there may be a sufficient apprehension of a breach of the peace resulting. In the former circumstances the participants would be determined to carry out a common purpose (lawful or unlawful) but in the latter circumstances everyone in the assembly may not be so determined or even have differing views as to the purpose:

> "Thus whilst there is some relation between riot and unlawful assembly in terms of a tendency to cause fear to the ordinary citizen the logical restrictions of the 'incipient riot' theory must be avoided." (36)

Before codification of "unlawful assembly" and "riot" a further difficulty of distinction occurred between "unlawful assembly" and "rout". "Rout" was in the area between unlawful assembly and riot. But it is submitted that rout is not important in N.Z. any longer, under the statute as it is a common law offence. Von Dazelson (37) says that rout could either be a riot or unlawful assembly under s.87 or s.86 respectively.

We have now identified the offence of unlawful assembly and have seen the distinction which exists between it and offences of a very similar nature. This puts us in a better position to discuss its essential elements as they exist today and have always existed since its codification.

I. The Actus Reus

(a) "Three or More Persons"

All of the sections on unlawful assembly (including the Canadian provision on unlawful assembly s.64 (1) of the Canadian Criminal Code) have contained the requirement that "three or more persons" must be present to constitute an unlawful assembly. This of course must be capable of proof. According to "Smith and Hogan" (38) if three persons are assembled and two resolve to set upon the third this is not an unlawful assembly, but if there are four and three resolve to attack the fourth it is. (For the section says "three or more persons, who with ..... any common purpose".) In cases on this offence, throughout the common law countries, the number in such assemblies has varied from three to five thousand (39). It is clear that in an assembly which is unlawful, all those present need not be arrested or convicted (i.e. the assembly can be with persons unknown) to validate proceedings against those arrested. (e.g. Beach and Morris v R (40)) The practice in Canada has usually been to arrest the ring-leaders (e.g. R v Campbell (41)) or a perpetrator of violence (such as a stone-thrower). In N.Z. in R v Aitken all the participants were arrested - it is submitted that this "unusual" action was adopted by the police because of the unique nature of the "bikie" situation e.g. the communal nature of such gangs; the problems of identifying the ringleaders on the facts of this case; the arrest of a few would have been unlikely to have restrained the remaining number. Also, the fact that in gang conflict situations there is often two groups of three or more assembled with a common purpose.

(b) "Assemble in such a manner, or so conduct themselves when assembled"

These "two" elements remain in s.3 of the 1973 Crimes Amendment Act. A recent unreported case on these two distinct elements is R v Needham (42).(1975) This distinction is adequately illustrated by Mr. Justice O'Regan when he said:

> "It deals first with the unlawful assembly itself and then makes it an offence for that unlawful assembly, with intent to carry out any common purpose, 'to assemble' in such manner as to cause persons in the neighbourhood to fear..... I will not read the rest of the section. The second offence is such assembly with intent to carry out any common purpose, so conducting themselves 'when assembled', as to cause persons in the neighbourhood of the assembly to fear."

In that case the appellant was wrongly charged under the first limb when the findings of fact established all the ingredients of the second limb. (So the charge was amended under s.132 of the Summary Proceedings Act 1957 from saying "to assemble" to "when assembled".)

(c) Where the unlawful assembly may occur

It is submitted that there is no change at all in this part of the offence either. The law still remains that an unlawful assembly can occur anywhere (e.g. even on a moving vehicle (43)). The contention has been as to whether it can occur on private premises. It is clearly apparent on reading the section that

such a consideration is irrelevant. Many common law cases illustrate also that an unlawful assembly may occur on private premises (e.g. R v Vincent - the unlawful assembly of sixteen people occurred in a private house), also R v Aitken. In my opinion such a rule is based on sound logic - people's fear will hardly be lessened by the fact that the assemblage is lawfully on private premises. The police may also legally enter such premises to make arrests. Furthermore, under the rule in Thomas v Sawkins (1935) (44) stated by the Lord Chief Justice, a police officer may enter and remain on private premises when he reasonably believes that an offence (e.g. unlawful assembly) will be committed there if he does not remain present (Also cf s.317 Crimes Act).

(d) "Cause persons in the 'Neighbourhood'"

That the unlawful assembly must be the 'cause' of the requisite fear is obvious and needs no clarification being a question of fact in each case. The other element in this phrase is in the "neighbourhood". The persons put in fear must be in the "neighbourhood" of the unlawful assembly. The question arises as to what constitutes being in the "neighbourhood". Quilliam J. in R v Anderson (45) said that the word "neighbourhood":

"..... defines within reasonable limits the place in which each of the members of the assembly is shown to have been."

A more definitive statement was made by Lord Hailsham in D.P.P. v Kamara (1973) (46) wherein he said:

"... In those cases (unlawful assembly) 'in the neighbourhood' must be read in the context as the equivalent of 'those nearby'." Lord Hailsham then elaborated this further by saying that such persons in the "neighbourhood" means "... in the presence of innocent third parties". (47) Therefore, the people put in fear must be those in the near vicinity of the assembly. In N.Z., in the recent cases under s.86 (1) and the new amendment, the usual "neighbourhood" to be found to fulfill the requirements of this first part of the offence has been the street on which the assembly was situate (e.g. Drummond Street in Wellington in the unreported case of R v Hamilton (1973)).

(e) "Fear" *

The assembly must "cause persons in the neighbourhood of the assembly 'to fear'", on reasonable grounds that the people in the assembly will either s.86(a) or s.86(b). This same phrase has appeared in all the sections of our Crimes Act on unlawful assembly and so there can be no change in the law here. To have "fear" in its natural everyday understanding, is to feel uneasiness about an imminent danger to person or property. It is a feeling of apprehension.

In establishing this fear it has been the practice of Courts in N.Z. to have witnesses appear before them describing how they felt fear when the assembly gathered near them. e.g. Mr. Drophy in R v Aitken said the action of the motorcyclists in the house next door to his, caused him to feel apprehensive about the safety of his family and home. But from decided cases it is not necessary for the Courts to

call such witnesses e.g. Prendergast C.J.M. in R v Beattie (48) said:

"..... there was evidence given by persons present that the scene did not arouse in them such a feeling of fear and it seems that even if there had not been this direct evidence that matter of fear ..... would still be one that a jury could infer from the other circumstances."

Accordingly, the judge or the jury in the case of an unlawful assembly, can draw the inference from the facts of the case that the actions of the assembly would have caused people in the vicinity to "fear". Mr. Justice Quilliam was able to draw such an inference on the facts in R v Anderson (1974). Clearly the absence of any witness saying s/he felt the requisite "fear" is not essential to constitute the offence. This is in conflict with the view of Fisher J.A. who was a dissenting judge in the Canadian case of R v Patterson (49). He said that it is essential that there be such a witness otherwise the offence is not made out. (He drew his conclusion from reading s.89 of the Canadian Criminal Code which is worded similar to s.86 of the Crimes Act 1961.) Prima facie the section requires people in the neighbourhood to so fear. Also the appearance of witnesses in the neighbourhood having that fear, being required to be produced is more "just" to the accused as the participants in an unlawful assembly have only committed the offence if people in the neighbourhood have been in fact put in fear. What the judge or the jury infers to be fear in the circumstances may not have actually been. This would be a further "safeguard" against any abuse by the police of this section.

(f) "..... on reasonable grounds"

The "fear" which people have of the use of violence against persons or property "must be based on 'reasonable grounds'". The leading authority on what considerations must be borne in mind when applying this test is R v Vincent. In this case Alderson B. said:

"You will investigate all the circumstances under which the assembly took place - whether the individuals who presided and were present were so by previous consent or by accidently having met - and if they met by previous consent you will inquire whether they have met at unreasonable hours of the night - if they have met under circumstances of violence - if they have been armed with offensive weapons or used violent language - if they have proposed to cause class conflict or kill anyone."

Factors which have led court to hold that the fear was based on reasonable grounds may be summarised as follows. The way in which the meeting was held (i.e. turbulence of it); the time (if at night it is more likely to cause anxiety); the language used by participants in the assembly (e.g. statements like "I'll kill any son-of-a-bitch that takes a shovel up to go to work today" (51) would also on reasonable grounds cause fear in a person); carrying of inflammatory banner (52); the appearance of being drilled or actually drilled (53); consumption of alcohol by members of the assembly (54); even the wearing of a leather jacket, riding boots and German style World War II helmet (55) has been suggested as a reasonable ground to put people in fear. Obviously

these factors are not exhaustive.

Also these people who are put in fear on those grounds above must not be "timid" or "foolish" people but "firm and rational" men. (56) What constitutes "firm and rational men" will of course depend on what the judge or the jury conceives him to be. An example of when a "firm and rational" man is put in fear on reasonable grounds is seen in R v Harris & Ors (57). In this case S.P. Monaghan S.M. held that "firm and rational" men would not be put in fear on reasonable grounds by the lighting of a fire in the premises where the assemblage was, but they would be put in such fear when members of the assembly started ripping off their fence railings and violently resisted a fire crew which had come to extinguish the blaze.

(g) "Use violence against persons or property"

This phrase appears in (a) and (b) of s.3 of the Crimes Amendment Act 1973. This is the first explicit departure from the wording of the previous section which had put in the place of those words the phrase "disturb the peace tumultuously". It is submitted that the latter phrase as interpreted by the Courts prior to 1973 means no more or less than:

> ".....use violence against persons or property."

the words adopted in the 1973 amendment.

For an assembly to be unlawful it must fulfill the requirements already enumerated and it must also either (a) cause people in the neighbourhood of the assembly to fear on reasonable grounds that the

assembly will "use violence against persons or property" or (b) cause such people to fear on reasonable grounds that others will be provoked by that assembly to "use violence against persons or property."

What does "to disturb the peace tumultuously" mean? The authorities are clear as to its meaning. The most definitive statement on the meaning of the phrase as a whole is found in R v Hamilton in an oral direction to a jury by Mr. Justice Haslam. He said:

"....'to disturb the peace tumultuously'..... means the arousing of fear on reasonable grounds that by violence to persons or property that assembly would disturb the peace." (58)

That interpretation of the phrase was expressly adopted by Quilliam J. in R v Anderson, and also by E.G. Paterson S.M. in Police v Adlam. (59) In this case the accused were university students who had been charged with unlawful assembly after protesting about U.S. Military installations at Weedons and Harewood from 23rd to 25th March, 1973. There had been about thirty demonstrators in all. Rocks were thrown at Police and Air Force personnel, who were protecting the base from any attack which might be staged. Six to eight demonstrators broke down a fence line. Paterson S.M. found all the accused participants in an unlawful assembly.

In arriving at his decision he said that "tumultuously" means "agitated, movement, excitement and noise". This not only does not detract from Haslam J.'s

definition but it is exactly the same as that meaning given to the term by Lyell J. in Dwyer Ltd. v Metropolitan Police District Receiver (60) wherein he also said:

"In my judgement the word 'tumultuously' was added to 'riotuously' for the specific reason that it was intended to limit the liability of compensation to cases where the rioters were in such numbers and in such a state of agitated commotion and were generally so acting that the forces of law and order should have been well aware of the threat which existed ... (of) ... causing damage."

In can be seen in other recent cases in N.Z. before the 1973 amendment that Haslam J.'s definition was widely accepted as being the correct definition of the phrase "to disturb the peace tumultuously" (e.g. in R v Aitken the fear was clearly that of a possible use of violence against people or property; and in R v Adlam it was the likelihood and the actual commission of violence which the defendents were found to have committed which constituted the unlawful assembly.)

Conclusively, the courts understood the phrase "to disturb the peace tumultuously" to be nothing more or less than a fear that the assembly would "use violence against persons or property". The Canadian cases, which are decided under a section in the Canadian Criminal Code which is worded exactly like s.86 in the Crimes Act 1961 also support that proposition. In R v Patterson where the whole court was agreed that the assembly "initially" though excitement was abound no unlawful assembly had come

into existance. They formed the opinion that the assembly became unlawful when it became manifest that the assembly was determined to meet force with force (i.e. "use of violence against persons or property"). (61)

Hence the amendment here adds nothing new to the section. The equation then of the old term "disturb the peace tumultuously" with the new term "use violence against persons or property" is based on three grounds. Firstly, Haslam J. delivered his judgement in the Supreme Court which, of course, binds the Magistrates Courts where most unlawful assembly cases will be dealt with. Secondly, other cases beside R v Hamilton draw no distinction between the two terms. (e.g. the Canadian cases such as R v Pavelitch (62) decided in the Pontiac District Court of Quebec). Thirdly, also the logic of the situation of unlawful assembly must clearly mean that the fear the people will have will be of violence against themselves and others or damage to their property. (e.g. any type of intimidation is usually co-relative with a threat of violence). Von Dadelzon (63) then, it is submitted is correct when he says:

"In the light of the accepted interpretation of that 'old fashioned language' (which is how Dr. Finlay in the 1974 N.Z.L.J. is referred to 'disturb the peace tumultuously') I believe that the only real benefit achieved by its replacement is to make it more readily understood by the layman (apart from removing the word 'tumultuously' which some court clerks might find difficult to pronounce)."

The approach of the courts now on the new amendment still remains the same as it was on s.86 of the

Crimes Act1961 e.g. Police v Harris & Ors. (64). In this case on the evening of 9th February 1974 the occupants of number 66 Martin Street, Upper Hutt, arranged a party to which persons belonging to various motorcycle and car gangs were invited. At 8.50 p.m. the Lower Hutt Fire Brigade was called to extinguish a fire lit on the premises. There was no unlawful assembly formed at that time in G.P. Monaghan S.M.'s opinion. Large numbers arrived at 10.30 p.m. Later a second fire was lit. At 10.50 p.m. the firemen arrived to extinguish that fire and were met with resistance (abusive language and some bottles thrown). The unlawful assembly was held to have come into existance then. This case clearly shows that it is when the fear, on reasonable grounds, is that of the use of violence against property or persons then there is constituted an unlawful assembly. This is exactly the approach Macarthur J. in R v. Aitken adopted. Also the approach of Magee J.A. in R v Patterson is the same. He found that no unlawful assembly had been constituted when the crowd of people was fairly friendly and quiet and therefore no violence was manifested as likely to occur. People in the neighbourhood may have "feared abuse" being thrown at them or such like but they could not at that time be said to have a fear of the use of violence against them or their property.

But it is clear that Dr. Finlay and the Labour Government were not only motivated by a desire to "strengthen" the powers of the police in dealing with ugly gang situations by "adding" to their powers, but also to alleviate the problem that was thought to exist of "'uncertainty' about the meaning and extent

of the language used" (65). Haslam J. in R v Hamilton referred to "disturbing the peace tumultuously" as having "a sort of 'archaic ring' about it".(66) It was language which the English Criminal Commissioners had used back in 1879 and was in our 1893 Act, but it is submitted there was not, in 1973 prior to the amendment any uncertainty about the meaning of that phrase. The "meaning" and "extent" of the language was already "certain" before Dr. Finlay brought in the 1973 amendment in November. The English Courts had made a definition of what it meant in Dwyer Ltd. v Metropolitan Police District Receiver, etc. as already seen. Also, the Canadian Courts dealing with an identical provision in their Criminal Code had no difficulty as to its "meaning" and "extent". Furthermore Haslam J. in R v Hamilton gave a clear statement as to its "meaning" and "extent" which was adopted by the Courts in N.Z. The Police then would have been certain as to its meaning. Only laymen with no legal training would be aided in respect of "meaning" and "extent" of "to disturb the peace tumultuously".

If the purpose of the exercise was clarification of a statutory provision, it is strange in the light of the multitude of provisions existing where real confusion exists that the Minister of Justice should in 1973, select a provision that did not require it?

(h) "..... in that neighbourhood or elsewhere"

This is a new addition to the Section in s.86(1)(a) which says in fact, on a literal interpretation, that

the people in the neighbourhood who feel any fear, that fear can either be use of violence against their property or people in the neighbourhood, or it can be of such violence in some other area (i.e. "or elsewhere").

It was already implicit in all other sections on unlawful assembly in N.Z. that the fear could be of a tumultuous disturbance in that neighbourhood or elsewhere. No restriction was placed on the "fear" of where the tumultuous disturbance might occur.

The fact that there are no reported cases to date with an authoritative statement on this area of unlawful assembly shows that the courts have no need to decide the question and hence it might be argued that the addition to s.86 (1)(a) of the phrase "..... in that neighbourhood or elsewhere" is entirely "superfluous". People who are put in fear by a crowd, will have little doubt that even if the intention is clearly manifested that no violence will be used against persons or property in that neighbourhood, they would still be justified in having the fear that it will be, especially considering the fact that a crowd can very quickly evolve into an uncontrollable mob. (67)

II. The Mens Rea

(a) "Who with 'intent' to carry out any common purpose"

There must be an intent present. This "intent" is summarised by Smith and Hogan (68) as:

> "It must be proved (by the prosecution) that D. intended to use or abet the use of violence; or to do or abet acts which he knows to be likely to

cause a breach of the peace."

When for example, the likelihood of a disturbance of the peace depends on the display of a placard or banner everyman is not necessarily guilty of an unlawful assembly, but the particular man is so guilty of that offence if he has adopted the banner or with full knowledge of the existance of the placard or banner has given his co-operation and countenace of the assembly.

The intention is to carry out the "common purpose". It has long been established that this "common purpose" can be either lawful or an unlawful one. It may be unlawful either in the end to be achieved or in the means to be used to achieve that end. Consequently, if people have assembled together under such circumstances as are in fact likely to cause alarm to bystanders of "firm and rational" disposition the assembly will be an unlawful one, even though the original purpose for which it came together involved neither violence nor any other illegality. In R v Hunt (1820) (69) Bayley J. said:

> "You must look not only at the purpose for which they meet, but also the manner in which they come and to the means which they are using."

That the "common purpose" can be either "lawful" or "unlawful" is clear also from the plain language used in the section which says "'any' common purpose".

In a situation where the police arrest people for being members of an unlawful assembly they are normally jointly charged as being members of such an unlawful assembly either under s.86 (1)(a) or s.86 (1)(b). The practice of the courts has been that the prosecution must prove beyond reasonable doubt that the individual arrested was a member and that he

had the requisite "intent", before a conviction can be entered. Under the present law (and as it has always been) such an individual can be proved to be a "participant" or an "aider and abettor". Mere presence is not sufficient. This is a safeguard against innocent bystandersbeing convicted, who may be arrested in a large melee. In R v Cesarone (70) the accused was convicted of being a member of an unlawful assembly in the court of first instance. But on appeal he was acquitted as the prosecution could not prove on the evidence that he was a "participant" or an "aider and abettor", the court holding that he was merely present as an idle and non-participating spectator. However, in R v Adlam (1973) (71) Monaghan S.M. was able to find on the evidence given that all the accused were "participators" in the unlawful assembly which occurred. He said:

> "It is clear that there is no direct evidence of individual demonstrators being identified as they were in action. (But it is clear that all were present as there were no other vehicle movements in the area in that time other than that of the demonstrators.) As I indicated earlier, these are not people who became parties by aiding and abetting - they were all participants."

This is in line with R v Flaws (72)

Where there is not sufficient evidence brought forward to show that the accused was a participator, then the prosecution must prove he was an "aider and abettor". This course of proving that an accused is a party to an offence is established under s,66 of the Crimes Act. The leading authority on what constitutes being an "aider and abettor" is R v Coney (73). The judgement of Mr. Justice Hawkins in that case is the one which is most commonly adopted by the courts on this area of the law. He said: (74)

> "..... some active steps must be taken by word or action, with the intent to instigate the principal or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures or silence ..... or he may encourage intentionally by expressions, gestures or actions intended to signify approval. In the latter case he aids and abets, in the former he does not."

This passage from the judgement above was adopted in the Supreme Court decision of Macarthur J. in the unreported case of R v Aitken (1974) and more recently by Roper J. in the unreported Supreme Court decision in R v Spring (1974) (75). In the latter case Roper J. after agreeing with the judgement above in R v Coney said:

> "What the Crown must prove is intentional or wilful encouragement." (76)

Clearly, also on this part of unlawful assembly the new amendment has brought about no change (R v Aitken was a case under the old s.86 (1)(a) and R v Spring was a case under the new amendment.)

Under s.86 (1)(a)(b) therefore, whether it be the new or old section the accused must have the "mens rea" enumerated above.

(b) The Second Limb of section three of the Crimes Amendment Act 1973

It is appropriate at this point to discuss the second limb of s.3 of the Crimes Amendment Act 1973 which says:

(b) "Will by that assembly, needlessly and without reasonable cause provoke other persons to use violence against persons or property in that neighbourhood."

Without this second limb of the offence it would be in the uncertain position that exists in this area of the offence of unlawful assembly i.e. where participants in an orderly meeting, procession or demonstration, are aware that they will or are ~~un~~likely to, encounter opponents who are prepared to breach the peace to intimidate the first group or otherwise to prevent or impede their progress or proceedings.

It is clear from a comparison of s.86 under the 1961 Crimes Act and that of s.3 of the Crimes Amendment Act 1973, the changes Dr. Finlay instituted. Firstly "to disturb the peace tumultuously" was replaced by "to use violence against persons and property" and these terms were suggested by the writer to be synonomous. Secondly, there has been added to the section "in that neighbourhood". It is this latter change which is now of interest, the question arising, does it change the scope of s.86 (1)(b) of the 1961 Crimes Act? My submission is that it does, but not in the sense of "strengthening" the powers of the police, but in fact "restricting" their power.

The phrase "in that neighbourhood" is very explicit and unambiguous and its very precision precludes a conviction for unlawful assembly where an assembly might provoke others to do violence "elsewhere". Thus for an offence to be committed under this part of the section the police will now have to establish that the assembly would be feared to cause others to do violence in the same "neighbourhood" as that of the assembly. (It is assumed that the "neighbourhood" in the phrase "..... cause persons in the 'neighbourhood' of

the assembly" in the first part of the section is the same "neighbourhood" as that in the phrase in s.86 (1)(b) "in that neighbourhood" and that the definition given to this term by Lord Hailsham in D.P.P. v Kamara pertains equally to both.)

An example of this restrictive (and unnecessary) distinction is as follows:

> A group of "Hells Angels" motorcyclists in Adelaide Road, Wellington, conduct themselves in such a manner as to cause people in Adelaide Road, Wellington, to fear on reasonable grounds that this group will "needlessly and without reasonable cause" provoke members of the "Devils Henchmen" motorcycle gang to smash up a house in Willis Street.

The group of "Hells Angels" could not be arrested under s.86 (1)(b) for unlawful assembly - however, they could have been under the old section as it contained no such restriction on where the fear of violence to persons or property could occur to find a conviction for unlawful assembly.

Another example of this narrowing of the scope of s.86 (1)(b) is to look at the facts of Te Kooti's case itself. Everyone knew at Opotiki (where Te Kooti was bound over) that Te Kooti and his followers were heading for the Gisborne district and was very unlikely to provoke others into "violence against persons or property" at Opotiki. It was at Gisborne that this was likely to occur. The people there were desperately arming themselves, readying themselves to carry out offensive (and defensive) reprisals against the Maori Chief who had massacred settlers in that area twenty years before. It was held in that case that Te Kooti was guilty of being a member of an unlawful assembly. If the present section had then been in force this could not have been

unless it could be shown that people in Opotiki feared that violence would be used, by others because of Te Kooti's presence, against persons or property in Opotiki. (or that s.86 (1)(a) was applicable)

This change to s.86 (1)(b) however will be of little if any practical effect. If the police can't act under s.86(1)(a) it would be credible that the people in the neighbourhood would have fear on reasonable grounds that others might be provoked into committing violence against persons or property in that neighbourhood. Thus not only does this addition to s.86 (1)(b) not "strengthen" the powers of the police but it is an "unnecessary" addition. The language of the previous section was clear enough as was the extent of operation of that part of s.86(1).

(c) The Proviso to Section Three of the Crimes Amendment Act 1973

Another new addition to s.86 (1)(b) of the 1961 Crimes Act is the proviso:

> "Provided that no one shall be deemed to provoke other persons 'needlessly and without reasonable cause' by doing or saying anything that he is lawfully entitled to do or say."

It is submitted that this proviso which wreaks of Finlay liberalism was unnecessary as it affects no change in the law of unlawful assembly. Dr. Finlay refers to the proviso as an "additional safeguard" and as an acknowledgement of "the right of peaceful and orderly demonstration". (77) * Both of those statements by Dr. Finlay are of course true but the effect of the proviso is neutral as regards a change in the law is concerned.

This is so because of two reasons. Firstly, that the interpretation by the courts of the phrase "needlessly and without reasonable cause" was wide enough to cover any situation which the proviso purports to cover and secondly the law as it exists at present does not as of right permit an assembly of people in a public place. In truth our so-called democratic freedoms are very limited. I will now look at these two propositions in turn.

To discuss my first proposition above it is necessary to look at the common law in this area. S.86 (1)(b) as it now and has always appeared (without the "in that neighbourhood" addition) is a codification of the decision of the Court of Appeal in Goodall v Te Kooti where the court adopted the view that an assembly is unlawful if there is a reasonable fear that others will be provoked. Williams J. in that case said: (78)

> "These cases, which were not brought to the notice of the learned Judge in the Court below are, I think, authorities for the proposition, which outside authority, seems to commend itself as common sense, that an assembly, to carry out a purpose in the abstract perfectly lawful, may be or become an unlawful assembly if that purpose either was, at the time of the assembly, or afterwards became, one, unable to be carried out without reasonable fear that it would result in a breach of the peace."

Williams J. commenting (79) on Te Kooti's arrest said:

> ".....it was wise because it prevented the persistence by himself and his followers in conduct which would almost inevitably have led to disturbances whose

extent and violence it would be difficult to estimate"

and he based this on the fact that: (80)

"Outside the fear caused by the history and character of Te Kooti and his actions and the numbers and reputation of his followers, there may have been desire for revenge, natural but illegal, created in the minds of many."

Seemingly in conflict with Te Kooti's case is Dicey's (81) view that a meeting which is not otherwise illegal does not become an unlawful assembly solely because it will excite violent and unlawful opposition and lead indirectly to a breach of the peace (the "problem" of causation then develops; however, if Te Kooti's case were followed it would be the initial meeting which would create the unlawful assembly - accordingly "mens rea" is not even to be considered on this interpretation of that case). Beatty v Gillbanks is largely a reiteration of what Dicey said above. In this case Feild J. said:

"What has happened here is that an unlawful organisation has assumed to itself the right to prevent the defendent and others from lawfully assembling together and the finding of the justices 'that the defendents were guilty of being members of an unlawful assembly' amounts to this, that a man may be convicted of doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority fo such a proposition" (82)

This may be compared to the counter statement by Williams J. in Te Kooti's case viz:

> "..... (this) is pushing the doctrine of individualism ..... to an irrational extent." (83)

In Goodall v Te Kooti Richmond J. (84) thought the decision of Beatty v Gillbanks might be inconsistent with the draft clause of the Criminal Code (i.e. s.86 (1)(b)), but both he and Williams J. were content to distinguish that case. Denniston J. citing the Irish case of O'Kelly v Harvey (85) regarded Beatty as wrongly decided.

However, it is submitted that Goodall v Te Kooti is reconcileable with Beatty v Gillbanks because s.86 (1)(b) contains the phrase "needlessly and without reasonable cause". This proposition is adequately summed up by this statement of Williams J. in Goodall v Te Kooti: (86)

> "Of course there may be cases in which the object to be effected was of a character to make its carrying out paramount even to the duty of preserving the peace. Persistence in it could not then be termed 'needless and without reasonable (cause)'. It is easy also to suggest extreme cases in which the carrying out of this principle may seem to lead to hardship and interference with individual liberty. In such cases it is obvious that the stress of public authority would be directed to suppressing such obstruction"

From this it can be argued that the defendents in Beatty v Gillbanks were not found guilty of being members of an unlawful assembly because it could not be said that others had been provoked "needlessly and without reasonable cause". Also adopting this argument it would be said that in Goodall v Te Kooti there could never be a reasonable occasion when a Chief with the reputation of Te Kooti, should incur a risk of a breach of the Queen's peace by visiting his relatives with

a train of three hundred men.

There are other ways that Goodall v Te Kooti and Beatty v Gillbanks have been reconciled. Brownlie (87) says:

> "The decisions turn partly on distinctions of fact and partly on the distinction of principle between decisions in which the presumption of intending natural consequences of acts is applied as one of law and decisions in which it is regarded more properly as a rebuttable presumption of fact."

That Beatty v Gillbanks can be distinguished from Te Kooti's case on the facts is clear. Richmond J. in the latter case said:

> "But it is unnecessary to the present purpose to question the authority of Beatty v Gillbanks. The attempted parallel between this Maori assemblage and the Salvation Army verges on the ridiculous. It is absurd to compare their case with the present. The leader of the Maori party might twenty years ago have been truly described as a blood-thirsty savage. He had committed in the district he was proposing to visit the worst atrocities of Maori warfare. At the same time he is intemporate in his habits - a Maori prophet and a drunken one to boot." (88)

Another means of showing that Beatty v Gillbanks is a decision which is still "alive and kicking" (i.e. reconcileable with such cases as Goodall and also Duncan v Jones (89)) is by "causation". It has been said: (90)

> "The element of causation there (i.e. Duncan v Jones) receives great emphasis in Lord Hewart's judgement and it is made abundantly clear that

> Mrs. Duncan was held to have 'caused' the disorder on the occasion of her previous meeting and was expected to 'cause' disorder again if she were allowed to speak."

There was above all, no suggestion whatever in the case that the disorder would have been caused by opponents of hers and it is clear that the divergence between Beatty and Duncan's case which Lord Hewart found so overwhelming lay quite as much in this peculiarity and the finding that Mrs. Duncan was not unwilling that the disorder should ensue, as in the circumstance that the charge against her was one of disturbing the peace and not of holding an unlawful assembly. Hence the question to be asked when deciding whether an assembly was unlawful in a situation like that enumerated in s.86 (1)(b), under the common law was whether the person/s had "caused" the effects produced by the intervening acts of the wrong doer. I submit, therefore, that had the law in England in 1882 been such as to allow the defendents in Beatty's case to be charged with obstructing the police as in Duncan v Jones, Field J. and Cave J. would have found that the police had operated on a party who could not reasonably have been expected to "cause" a breach of the peace and so had acted unlawfully.

Accordingly, Beatty v Gillbanks is a decision which still lives. It was not killed by the drafting of s.86 (1)(b) (either before or after the 1973 amendment) as seen by the discussion on "needlessly and without reasonable cause" and it is reconcileable with common law cases.

The discussion now focusses on my second proposition on this part of the amendment viz. the law as it exists at present renders the effect of the proviso, as a "safeguard" (of the exercise of "saying or doing anything that he is lawfully entitled to do or say" as not being an "unlawful assembly") to be entirely nebulous. The law at present does

not recognise the right of peaceful and orderly demonstration as it imposes so many restrictions on such demonstrations. There is very little an individual is lawfully entitled to do in group situations, pursuing a common purpose viz. a demonstration.

Both statute and common law restrict almost completely the mentioned group situation above (such as would constitute an unlawful assembly if not for the proviso). S.170 of the Municipal Corporations Act 1954 vests property in public streets in the corporation or borough having jurisdiction in the area in which the streets are situated. Under the same Act, under s.386 the corporation etc. has wide powers to make by-laws concerning use of and conduct on public streets and by s.199 of that Act certain offences are created in relation to obstructions upon and misuse of public streets. S.72 of the Transport Act 1962 also authorises local authorities to make by-laws relating to the regulation of traffic on streets within its jurisdiction. Here we thus see how the individual can be restricted in such group situations as demonstrations merely by the local body's arbitrary powers. There are still even further restrictions on this and most stem from the Police Offences Act 1927 and the common law. (91)

Section 3 (eee) of the Police Offences Act creates an offence of:

> "Without lawful authority or reasonable excuse obstructs any footpath, footway, or carriageway."

This is really a codification of the Common Law doctrine of the right to "pass and repass" on a footway for the purpose of travel. (92) Clearly as a general rule any use of a public street(which is where a demonstration is most likely to occur) for purposes other than for passing and repassing for the purpose of legitimate travel is a trespass against

the rights of the owning authority (i.e. the local body or corporation). If members of a demonstration on a public street, aren't arrested for trespass, because they don't have the consent of the local governing body they may be arrested for "obstruction" under s.3 (eee). An illustration of how "wide" this offence is, is seen in the judgement of Sir Samuel Griffith C.J. in Haywood v Mumford (93) where he said:

> "It was contended by the appellents that it was not sufficient that there should be a physical occupation of the street which diminished the space available for persons to pass and repass, but that it must also be shown that the public could not without substantial inconvenience go around the obstruction, and so, make that use of the street which a reasonable and not a churlish man might desire. In my opinion the term 'obstruction' as used in the Police Offences Act ..... includes any continuous physical occupation of a portion of a street which apparently diminishes the space available for passing and repassing, or which renders such passing or repassing less commodious, whether any person is in fact affected or not."

This reasoning was adopted in N.Z. by the Supreme Court in Stewart v Police (94). In that case the court found such an obstruction by a youth who sat against the wall of a building with his legs out over part of the footpath. Although there was still some eight feet of footpath (in width) still available for use by the public, the court held that by acting as he did the defendent appreciably diminished the space available for passing and repassing.

Furthermore, it is clear that:

> "A citizen's common law right to the use of public streets is confined to their use for the purpose of legitimate passage and does not extend to the holding of 'static' meetings, gatherings or demonstrations." (95)

The authorities are clearly in favour of the view that any static meeting on a highway (without the consent of the local authorities) is itself an "unreasonable use of the highway" - which needs to be found before any use of a highway becomes prima facie unlawful. As Lord Clyde in Alfred v Miller said: (96)

> "The right to use a public street for any of the public purposes to which it is dedicated as such is a public right, not a private one ..... (and) as I have already indicated, there is no such thing as a private right in any individual to make use of any public street for holding public meetings ..... it must be conducted under the many and serious restrictions which are imposed by the necessity of avoiding interference with other public uses ..... (and) it must be remembered ..... that of all the public uses to which public streets are legally dedicated, that of free unrestricted passage is the most important."

Hence, as far as static meetings go in public places it cannot be said that an individual is entitled to lawfully do anything. However, from Melbourne Corporation v Barry (97) there was identified a common law right that a "procession" is prima facie lawful in the sense that a right exists to proceed on public streets in a procession. But this does not give the individual in a group situation much scope of legal entitlement as the right to hold such a procession is not an

absolute right. It must be exercised "reasonably" (i.e. there must be no unreasonable obstruction of the public right of passage). As to what constitutes reasonableness here is not clear and is once again open-ended. Gibson J. in Lowdens v Keaveney (98) said:

> "And the reasonableness of the use, is to be determined by considering such factors as the occasion, the duration of the use, the place and the hour ....."

The conduct of those who take part in the procession is all relevant, and it may also constitute an unreasonable obstruction by the crowd or spectators it attracts.

My conclusion is that the addition of this proviso to the section serves no "legal" purpose whatever, in either of the instances shown above. But it can be argued that it fulfils a significant "political" purpose in that it showed specifically to concerned people that the Labour Government was not prepared to tighten up on law and order at the expense of "democratic" freedoms. It is this latter function which the proviso solely serves and no other.

E. CONCLUSION

It is established from the preceding discussion that the offence of "unlawful assembly" was not changed in its legal effect by the 1973 amendment. Of course, it may be cogently argued that Dr. Finlay did achieve one of his objects in the amendment viz. a clarification of the language used in the section (e.g. the replacement of the word "tumultuously"). But this in itself does little to increase or "strengthen"

police power nor indeed does it effect the promised improved law and order. Hence my conclusion is, that this amendment was a non-event and provided no new addition to the policeman's armoury. As suggested before, its only value was political not legal.

A very important point is however raised by the amendment and by Dr. Finlay's statements on it, i.e.:

> "An additional safeguard is contained in the proviso which says that no one shall be deemed to provoke other persons needlessly and without reasonable cause if he is doing or saying something that he is lawfully entitled to do or say. This specifically acknowledges the right of peaceful and orderly demonstration." (99)

The point raised can be framed in the form of a question:

> Is the offence of unlawful assembly as it is now contained in the Crimes Amendment Act 1973 "undemocratic" and if so, should it be repealed so as not to constitute such a disposition?

Firstly, it is necessary to discuss what is involved in the term "democratic". In common parlance this term means that the individual should have the "right" of free speech, which is not to be encumbered by restrictions as to where and how he may speak, i.e. his views should be capable not only of being voiced without fear of state reprisal but also should be capable of dissemination.

The desirability of free speech is clear, as evinced by Brandeis J. in Whitney v California (100) wherein he stated:

> "..... freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; the greatest menace to freedom is an inert people."

Minorities must rely on the streets and parks of their cities in order to disseminate their views effectively and unlawful assembly is an offence which makes this avenue of dissemination "risky" where sensitive issues are involved. The proviso has no effect of minimising this risk or of enhancing this avenue as an effective and lawful means of publicity or dissemination of opinions.

One may be satisfied that the police will be fair and frank and not manufacture their evidence, but the use of the offence raises fundamental questions about state or executive control over individual actions. Like:

> "S.30 of the Police Offences Act 1927 it can be used as a "catch-all" without the need to prove that the person charged has behaved "in a riotous, offensive, threatening, insulting or disorderly manner, or uses any threatening, abusive or insulting words". Perhaps one may feel that it is unjust that "potential disorder" should carry a heavier maximum penalty than "actual disorder". The offence of unlawful assembly has been called dangerous also in the allegation that "at present more pressure at the scene of an unlawful assembly may make any member of the public an unwitting offender whether through curiosity or chance". (101)

Weighed against the above arguments must be considered the purposes for the retention of the offence. Unlawful

assembly provides a means by which serious mob behaviour can be averted in its initial stages. Also the offence creates a means by which the police are able to arrest a person they know has committed some injury or damaged property but would not be able to prove a specific offence or act by that fear (e.g. such as assault, wilful damage etc.) Also it might be argued that such behaviour is so dangerous that strong deterrent measures aimed "specifically" at such behaviour are necessary. On this latter point, it can be argued that the utilitarian balance between level of enforcement and level of punishment for a given amount of deterrence is upset during large scale disturbances when police resources are overtaxed and that necessary adjustment in the deterrence equation are best made plainly and clearly by use of a specific serious offence rather than by making conduct during an unlawful assembly a circumstance of aggravation for offences such as assault or disorderly behaviour.

Thus unlawful assembly should be used as an offence of "last resort" and this is the approach the courts should adopt in relation to it. A proviso such as that in the 1973 amendment only safeguards undefined theoretical rights that exist in the mind of the idealist rather than in fact. But to the extent to which it reinforces belief in and legitimises those rights it does not serve a useful function.

BIBLIOGRAPHY

(1) (1890) 9 N.Z.L.R. 26, 58

(2) March 30th 1973 "Evening Post", 11

(3) 1972 Labour Election Manifesto, 6

(4) February 28th 1973 "Evening Post", 2

(5) February 28th 1973 " " 2

(6) Lambard, Eirenarcha (1591), 182-184

(7) Stephen's Commentaries on the Laws of England (21st ed.) 1950, Vol. IV, 135

(8) Lambard, ibid, 185

(9) Hawkins, Pleas of the Crown (7th ed.)(1795) 1 C.65 S.9

(10) Holdsworth, History of the English Law, Vol V, 198-199

(11) Russell, Russell on Crime, Vol. I, 256

(12) Brownlie, The Law Relating to Public Order, 37-38

(13) R v Vincent (1839) 6 C & P, 91; 173 E.R. 755

(14) R v Billingham (1825) 2 C & P, 234

(15) Smith & Hogan, Criminal Law (3rd ed.), 610, But see D.P.P. v Kamara (1973) 1 A 11 E.R. 1242.

(16) It is submitted that "breach of the peace" and "use of violence" in s.3 of the Crimes Amendment Act 1973 are synonomous.

(17) ibid, 755

(18) (1888) 16 C.C.C., 420; 428 note 8

(19) Stephen, History of the Criminal Law of England, Vol. 2, 386

(20) (1882) 9 Q.B.D., 308

(21) ibid, per Williams J., 51

(22) ibid, per Denniston J., 58-59

(23) Adams, Criminal Law and Practice in New Zealand, (2nd ed.), 216.

(24) ibid, 40

(25) Unreported decision of Macarthur J. in Christchurch Supreme Court 11.4.74

(26) Unreported decision of Roper J. in the Christchurch Supreme Court 17.12.74.

(27) ibid, 755-756

(28) ibid, 39

(29) Kenney's Outlines of the Criminal Law (19th ed.) edited by J.W.C. Turner, 413

(30) Dicey, The Law of the Constitution, (10th ed.) 271

(31) (1907) 2 K.B. 857, 860

(32) (1931) 1 W.W.R., 764. A case in point here which is also illustrative is R v Lebedoff (No.1)/(1950) Canadian Criminal Cases 115.

(33) ibid, 767

(34) Unreported direction to the jury by Haslam J. in the Wellington Supreme Court 6.3.73.

(35) History Vol. VIII, 325-326

(36) Brownlie, ibid, 39

(37) Unlawful Assembly, 1973, N.Z.L.J., 502

(38) ibid, 610

(39) Munday v Gill (1930) 44 C.L.R. 38

(40) (1909) 2 C.App.R, 1189, where Channell J. said at p.191: "There is no doubt that two persons only may be convicted of rioting with others."

(41) (1931) 57 Canadian Criminal Cases, 92

(42) Unreported decision of O'Regan J. 19.2.75 in the Wellington Supreme Court.

(43) R v Surpong and Frimpong (1957) 2 W.A.L.R. 242, Supreme Court of Ghana

(44) (1935) 2 K.B. 249

(45) Unreported oral judgement by Quilliam J. in the Wellington Supreme Court 26.3.74 at p.2

(46) ibid, 1248

(47) ibid, 1248

(48) ibid, 767

(49) (1931) 3 D.L.R. 267, 272

(50) ibid 755-756

(51) R v Farby and Dworkin (1931) 57 Canadian Criminal Cases 90, 91

(52) R v Hunt 1 State Tr.N.S. 171

(53) R v Hunt (supra)

(54) R v Aitken (supra)

(55) R v Spring (supra)

(56) R v Vincent (supra)

(57) Unreported reserved decision of G.P. Monaghan S.M. in the Wellington Magistrate's Court 11.7.74

(58) ibid p.2

(59) (1973) 14 M.C.D.1

(60) ibid, 980

(61) ibid, see the judgements of Middleton J.A. and McGee J.A.

(62) (1932) 58 Canadian Criminal Cases 285

(63) Unlawful Assembly - A Reassessment, 1974 N.Z.L.J. 190,191

(64) ibid

(65) Police and Public Disorder, 1974, N.Z.L.J. 10

(66) ibid, 2. This is why Dr. Finlay thought of it as "old fashioned language" when he referred to the phrase in the 1974 N.Z.L.J. at p.10.

(67) Alexander, Introduction to S. Freud, Group Psychology and Analysis of the Ego (Bontana ed. 1960)

(68) ibid, 611

(69) ibid

(70) (1958) 1 Criminal Law Quarterly 348

(71) ibid, 7

(72) Unreported judgement of the Court of Appeal delivered by Woodhouse J. 11.10.74. The Court accepted that to be a wilful participator in an unlawful assembly he had to be more than an idle spectator, with knowledge of the common purpose and assisting in it.

(73) (1882) 8 Q.B.D. 534

(74) ibid, 557

(75) Unreported decision by Roper J. in the Christchurch Supreme Court 17.12.74

(76) ibid, p.5

(77) ibid 1974 N.Z.L.J. 10

(78) ibid p.61 of report

(79) ibid p.62 of report

(80) ibid p. 61-62 of report

(81) supra

(82) ibid p.314

(83) ibid, 58

(84) ibid, 44

(85) (1883) 10 L.d. Ir. on appeal 14 L.R. Ir. 105

(86) ibid, 61

(87) ibid, 45

(88) ibid, 46

(89) (1936) 1 K.B. 318

(90) Keir and Lawson, Cases in Constitutional Law (5th ed.) 191, 194

(91) Only those offences which can effect members of a "peaceful" demonstration will be discussed and not such offences as assault, disorderly conduct (s.3D Police Offences Act 1927) which are necessary to prevent widespread violence to persons and property.

(92) Harrison v The Duke of Rutland (1893) 1 QB, 142, 152

(93) (1909) 7 C.L.R. 133

(94) (1961) N.L.L.R. 680, 681.

(95) R.A. Moodie, Submissions on Reform of the Police Offences Act 1927, 35

(96) (1924) S.C. 117, 120

(97) (1922) 31 C.L.R. 174 per Higgins and Isaacs J.J.

(98) (1903) 2 Irish Reports 82, 89

(99) supra

(100) (1949) 337 U.S. 104, 106.

(101) Von Dadelszen, ibid, 192. The approach of the courts in requiring proof of each alleged offender being "involved" in the assembly however lessens the chance of an innocent bystander being enmeshed.

LX McK McKAY, C.C. UNLAWFUL ASSEMBLY.