Kauwaeranga judgment

This judgment of Chief Judge Fenton, delivered in the Native Land Court on 3 December 1870, presents something of a mystery to the student of New Zealand legal history. The judgment is referred to by the Solicitor-General in argument, and by North J. and T. A. Gresson J. in the judgments, in Re the Ninety Mile Beach [*1963*] *N.Z.L.R. 461. No source or other reference is given in any of these citations of the Kauwaeranga judgment, although North J. describes it as "very lengthy and erudite" (p. 471). The Kauwaeranga judgment had also interested F. B. Adams J. who, again without reference, had described Chief Judge Fenton's remarks as "impressive" (In re* Bed of the Wanganui River [*1955*] *N.Z.L.R. 419, 447). In summarising the Kauwaeranga judgment as a "rejection of a Maori claim to the absolute property in the soil of the foreshore", F.B. Adams J. had left undisclosed that the judgment had conceded everything* but *"absolute" property to the Maori claimants. Furthermore, editorial footnote 3 (concerning the* Whakaharatau *case) may show how late was Chief Judge Fenton's conversion to the more cautious position.*

A second puzzle lies in the omission of the Kauwaeranga judgment from the valuable compilation Important Judgments Delivered in the Compensation Court and Native Land Court 1866-1879, *published under the direction of the Chief Judge Native Land Court, 1879. Judge Fenton was still Chief Judge at the date of compilation.*

A final enigma is supplied by a note in contemporary Parliamentary Papers. On 10 January 1871, the Governor in New Zealand transmitted copies of the judgment to his Secretary of State in London (see App. J.H.R. 1871, A - 1, p.70). The Governor quotes Chief Judge Fenton's summary of the circumstances of the case and commends the proceedings as "additional proof of the care with which the Government, Parliament, and Courts of this Colony investigate the claims and protect the rights of the Maoris". A note follows: "Judge Fenton's Report on Kauwaeranga case printed as separate Parliamentary Paper". The writer of this note has been unable to trace that Parliamentary Paper.

A typescript copy of the Kauwaeranga judgment was found in the National Archives, Wellington, on file CLO 196/7. It purports to have been copied, presumably for Crown Law Office purposes, from the Hauraki Minute Book, *No. 4, p.236. The Minute Book itself (a microfilm of which is available in the National Archives), contains an off-print of the text of the judgment published in the* Daily Southern Cross, *December 10, 1870. The 'Southern Cross' text must have been approved by the Chief Judge since Judge Fenton sent copies of it to the Governor who relayed them to London under cover of the despatch previously referred to. That chain of events is established by the Governor's despatch itself.*

The final order of the court in the Kauwaeranga case was made on 23 May, 1871 and is found at p.259 of the Hauraki Minute Book, *No. 4. It entitled the applicants "... to the exclusive right of fishing upon and using for the purposes of fishing, whether with stake-nets or otherwise the surface of the soil of all that portion of the foreshore or parcel of land between high water mark and low water mark."*

The judgment is noteworthy for at least two reasons: first, it represents that line in New Zealand jurisprudence which regarded the Treaty of Waitangi as effective to create rights and obligations cognisable in some way in New Zealand courts. The contrary line is, of course, found in Wi Parata *v.* Bishop of Wellington *(1877), 3 N.Z. Jur. R. (N.S.) S.C. 72 and in Sir James Prendergast's dismissal of the Treaty as a "simple nullity". Whilst the writer of this note could not here treat the issues involved, it may be pointed out that, in the light of the adverse comment heaped upon the* Wi Parata *decision by the Privy Council in* Nireaha Tamaki *v.* Baker *[1901] N.Z.P.C.C. 371; [1901] A.C. 561, it is possible that, upon review, a coupling of the* Kauwaeranga *and* Tamaki *judgments may prevail over the* Wi Parata *dead-end. This estimate leaves open, of course, the manner in which the Treaty may be found to be cognisable. It may be, for example, that the Treaty is cognisable as an aid to the construction of domestic legislation on the now well-established principle that such legislation is presumed to accord with international obligations. However, that would be a modern approach, and Chief Judge Fenton appears to have simply assumed that the Treaty forms part of the 'bedrock' of the New Zealand legal system.*

Secondly, the judgment treats a question which promises to become a major problem for New Zealand jurisprudence in the years ahead: namely, the reconciliation of the concepts "rangatiratanga" and "sovereignty" as they appear in the Treaty of Waitangi. Chief Judge Fenton claimed to find in the writings, unspecified, of Vattel the concepts 'useful domain' and 'high domain' and sought to apply these to the Treaty provisions. The reference is presumably to Vattel's Le Droit des Gens, *Book II, para 83, in which the author employs the expressions 'haute Domaine' and 'Domaine utile'. The 'Motunui' Case (an* Application by Aila Taylor for and on behalf of Te Atiawa Tribe in relation to Fishing Grounds in the Waitara District*) before the Waitangi Tribunal involved similar considerations. The Kauwaeranga judgment might usefully be compared with the Waitangi Tribunal's findings of March 1983.*

For these, and general historical, reasons, it has been decided to reproduce the text of the judgment in full with the addition of ten numbered editorial notes.

The text provided is the 'Southern Cross' text, discussed above, which, presumptively, has Chief Judge Fenton's approval, of which the 'Crown Law' typescript appears to be a flawed copy.

A. Frame*

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Chief Judge Fenton: This is an application by Hoterene Taipari, and others, for a certificate of his title to a piece of land near Shortland, bounded towards the east by high-water-mark, towards the south by a line nearly at right angles to the shoreline commencing near the Kauwaeranga Creek, towards the north by a line nearly parallel to the southern boundary, and towards the west by a low-water-mark on the Waihou or Thames River. The land is covered by high-water of ordinary tides, but is left by the water as the tide recedes. It forms an extensive mudflat, and is not available for use as a highway by persons on foot when the waters have left it, except along a narrow margin near the shore.

The other facts as proved in evidence, are as follows:—

The land at Shortland abutting on the land claimed has been granted by the Crown, upon certificates of the Court, to the claimants and opposing claimants.

The land claimed has been possessed and used by the claimants and opposing claimants and the ancestors for generations, for fishing with stake nets, and as a preserve for curlews, and as a private ground for gathering shellfish (pipis).

That such use has been exclusive, other tribes having been kept off.

The New Zealand Government has endeavoured to deal with the claimants and others for the purchase of their rights in this land.

The Crown opposes the claim, on the following grounds:—

By the law of England, the foreshore belongs to the Crown, and can only be held by a subject by grant from the Crown, either existing or presumed by prescription. This seisin of the Crown is an incident of sovereignty. The sovereignty of the Crown in New Zealand must not be held to be founded on the Treaty of Waitangi solely, but upon settlement. That this incident of sovereignty has been consistently sanctioned and maintained by decisions of the Courts of England and by the Courts of the United States of America. That the Native Lands Acts do not affect the Crown; and that Maoris cannot own the foreshore according to their customs and usages, as such ownership would be in derogation of the prerogative of the Crown; and that the Court has, therefore, no jurisdiction to try the claim.

On behalf of the claimants, it is urged that the above arguments cannot apply to New Zealand, the relations between the Crown and the Maoris being strictly defined by the Treaty of Waitangi, and by that document only. That in England not only the foreshore, but all other land, belonged at one time to the Crown by right of the conquest made by William I.; that grants from the Crown are presumed respecting both classes of land alike, and that the foreshore remains in the Crown simply because, generally, it was of no use to anyone. Whereas, in England, all land was originally in the Crown, in New Zealand all land originally belonged to the Maoris. That the doctrines of feudalism can have no application to the lands of New Zealand, and that neither English law nor the Civil Law can be allowed to influence the rights of Maoris to lands which, in the words of the statute, they own according to their customs and usages. That the treaty took none of their territorial rights from the Maoris, but expressly guaranteed the

preservation of them as they were in 1840. These rights are not disputed over the main land, and they should not be disputed over land covered by the sea, if they can be proved to have existed. That the Goldfields Act, 1868, recognised these rights to a certain extent; the Shortland Seabeach Act, 1869, repeated such recognition; and that the Executive Government had made attempts to acquire them from the Maoris by purchase.

It is at once evident what a vast range of constitutional and international law the inquiry into this subject must embrace, and the Court feels that Parliament could never have contemplated that the Native Land Court would have to determine questions demanding so much research, and involving such great responsibility and such important consequences. Influenced by this thought, I endeavoured to induce the parties to agree to a formal judgment framed by arrangement in such a manner that resort could easily and immediately be had to the Supreme Court, where alone such grave matters should be decided. But the parties did not accede to this proposal, and this Court is therefore bound to give decision. Could the Court suppose that this decision would be final, it would content itself with simply expressing its opinion in the usual manner; but, influenced by the hope that it may yet be the wish — as the Court thinks it is the duty — of the parties to apply to the Supreme Court to review this judgment, it seems that due respect to that tribunal demands that this lower Court should not limit itself to a bare statement of the conclusions at which it has arrived, but should set forth the reasoning through which its decision has been arrived at.

The view taken by the counsel for the Crown of the origin and status of the sovereignty of the Crown in these islands forms the basis of the arguments on which the prerogative is urged as entirely inconsistent with, and utterly destructive of, all claims of this character. Our first endeavour must therefore be to determine the true basis of the sovereign authority, and at what date and under what circumstances it originated. And in pursuing this investigation the very fluctuating and contradictory character of the acts of State done by the English authorities will appear very clearly, and suffice to explain the anomalous position that the question has occupied, and the embarrassment and doubt which may be traced through the whole career of legislative and executive action respecting it.

The rules which have been recognised as international law, by which civilised nations or nations possessing an organised form of government may validly assert the right of acquisition of territories inhabited by savages, must, in Courts of Law, be deduced not simply from those principles of abstract justice which the Creator of all things has impressed on the mind of His creature man, and which are admitted to regulate in a great degree the rights of civilised nations whose perfect independence is acknowledged, but from those principles also which, partly derived from necessity, partly founded on force, have been acknowledged as good by civilised States, and in particular have been adopted by our own Government and given to us as the rules for our guidance.

The principle which all civilised States agreed to acknowledge as the law by which the right of acquisition, which they all asserted, shall be regulated as between themselves is, that discovery gave title to the Government by whose subjects or

by whose authority it was made, against all other Governments, which title might be consummated by possession (*Johnson* v. *McIntosh* Wheaton, "Reports of the Supreme Court, United States," vol. 8[1]). The relations which were to exist between the discoverers and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interfere between them (id.).

Acting upon this rule, Captain Cook, under a Commission from the Crown of England, in the year 1769, discovered, circumnavigated, and took possession of the Islands of New Zealand, in the name of His Majesty George III. This Act was performed in the most formal manner, and was published to the world. Tasman, the Dutch navigator, had previously sighted the North Cape, but it does not appear that he did any international act with the view of establishing a title.

In the year 1787 a Royal Commission was granted to Captain Philip, appointing him Captain-General and Governor-in-Chief in and over the territory of New South Wales and its dependencies. This territory was described in the Commission as "extending from Cape York, latitude 11.37 south, to the South Cape, latitude 43.30 south; and inland to the westward as far as 135. east longitude"; comprehending "all the islands adjacent in the Pacific Ocean within the latitudes of the above-named capes." Norfolk Island, Van Dieman's Land, and the islands of New Zealand as far south as Akaroa, are clearly within the prescribed limits.

In 1814 the Governor and Captain-General of New South Wales and its dependencies, acting on the representation of the Crown, by public proclamation declared New Zealand to be a dependency of his government, and by regular commission of dedimus potestatem appointed Justices of the Peace to act there. Amongst these were three Hokianga chiefs, aboriginal natives of the country — Ruatara, Hongi, and Korokoro. In 1819 Governor Macquarrie appointed other English magistrates in New Zealand, amongst them the Rev. M. Butler, a member of the Church Mission. These Justices, or some of them, exercised the authority bestowed upon them, by apprehending offenders and sending them for trial to the seat of Government in New South Wales.

About 1822 a company was formed in the British Islands for the colonisation of part of New Zealand, and the purchase of a large tract of country was effected for the purpose. And during the whole of these periods, as well as subsequently, New Zealand was frequently visited by the Royal ships of war, which, to a certain extent, enforced the authority of the Crown, and administered or caused to be administered a sort of justice. Considerable numbers of the subjects of the Crown also settled permanently at the Bay of Islands and elsewhere, purchased land for themselves, and carried on a thriving trade, so much so that in the year 1836 no less than 151 ships visited the Bay of Islands. If the history of the transactions of the English Government and people ended here, it would seem that the undoubted title established by Captain Cook might be deemed to have been consummated by possession, and that the sovereignty of the Crown of England had been established by the acts of its own authorised officers, together with the unauthorised proceedings of its subjects, which would enure for its benefit.

1 *Johnson* v. *McIntosh,* 8 Wheaton 543.

On the other hand, however, we find statutory enactments which contain almost a recognition by the King, Lords, and Commons of Great Britain that New Zealand was not part of the British dominions.

The Act 57 George III., cap. 53, is entitled, "An Act for the More Effectual Punishment of Murders and Manslaughters Committed in Place not in his Majesty's Dominions." The preamble is — "Whereas grievious murders and manslaughters have been committed at the settlement in the Bay of Honduras, in South America, etc., and the like offences have also been committed in the South Pacific Ocean, as well on the high seas as on land in the islands of New Zealand and Otaheite, and in other islands, countries, and places not within his Majesty's dominions, by the masters and crews of British ships, and other persons who have for the most part deserted from or left their ships, and have continued to live and reside amongst the inhabitants of those islands, etc." The Act then provides for the punishment of offences so committed "in the said islands of New Zealand and Otaheite, or within any other islands, countries, or places, not within his Majesty's dominions, nor subject to any other European State or Power, etc."

The Statute 4 George IV., cap. 96, enacts that the Supreme Courts in the colonies of New South Wales and Van Dieman's Land may try offences "committed in the islands of New Zealand, Otaheite, or any other island, country, or place, situate in the Indian or Pacific Oceans, and not subject to his Majesty's or to any European State," if such offences are commiitted by British subjects.

The Statute 9, George IV., cap. 83, repeats that enactment in the same words adding only that the punishment for the offence shall be the same as if the crime had been committed in England.

On the 16th November, 1831, a letter to King William from 13 of the chiefs of New Zealand was transmitted to Lord Goderich, praying the protection of the British Crown against the neighbouring tribes, and against British subjects residing in the island, and stating their apprehension of a settlement being effected by the French, called in the letter "the tribe of Marion."

In consequence of this letter, Lord Ripon, on the 14th of June, 1832, despatched Mr Busby as British Resident, with credentials to the missionaries, partly to protect British commerce, and partly to repress the outrages of British subjects on the natives. His Lordship sent with Mr Busby a letter in which the King was made to address the chiefs as an independent people. Their support was requested for Mr Busby, and they were reminded of the benefits they would derive from the "friendship and alliance of Great Britain."

In the month of June, 1822, a bill was brought into the House of Commons for the prevention of crimes committed by his Majesty's subjects "in New Zealand, and in other islands in the Pacific, not being within his Majesty's dominions." This bill was rejected because Parliament could not lawfully legislate for a foreign country.

On the 13th April, 1833, the Governor of New South Wales, in obedience to Lord Ripon's orders addressed instructions to Mr. Busby, in which New Zealand

was expressly mentioned as a foreign country, and Mr Busby himself as being accredited to the chiefs. This document throughout assumes the independence of New Zealand.

On the 29th April, 1834, General Bourke, the Governor of New South Wales, transmitted to Lord Stanley a proposal from Mr Busby for establishing a national flag for the tribes of New Zealand "in their collective capacity"; and advised that ships built in the island and registered by the chiefs should have their registers respected in their intercourse with the British possessions. Sir R. Bourke reported that he had sent three patterns of flags, one of which had been selected by the chiefs; that the chiefs had accordingly assembled with the Commanders of the British and three American ships to witness the inauguration of the flag, at which Captain Lambert and the officers of H.M.S. "Alligator" were present. The flag was declared to be the "national flag" of New Zealand, and being hoisted was saluted with 21 guns by the "Alligator." On the 21st of December, 1834, a despatch was addressed to Governor Sir R. Bourke by Lord Aberdeen, approving all these proceedings in the name of the King, and sending a copy of a letter from the Admiralty, stating that they had instructed their officers to give effect to the New Zealand registers, and to acknowledge and respect the national flag of New Zealand.

Apparently in consequence of this letter of the Secretary of State, the British Resident, New Zealand, as he then styled himself, assembled as many chiefs as he could get together; and a *Declaration of Independence* was unanimously agreed to, and signed by 35 chiefs, fairly representing, as the Resident said, the tribes of New Zealand from the North Cape to the latitude of the River Thames. The instrument itself, and the despatch of the British Resident communicating it, are subjoined:—

"British Residency at New Zealand,
"Bay of Islands, November 2nd, 1835.

"Sir, — I have the honour to enclose herewith a copy of a declaration by the chiefs of the Northern parts of New Zealand of the independence of their country, and of their having united their tribes into one State, under the designation of the 'United Tribes of New Zealand'. In this declaration they entreat that his Majesty will continue to be the parent of their infant State, and that he will become its protector from all attempts upon its independence; and it is at their unanimous desire that I transmit this document in order to its being laid at the feet of his Majesty. — I have, etc.

(Signed) James Busby,
"British Resident at New Zealand.
"Mr. UnderSecretary Hay, etc.

"DECLARATION OF THE INDEPENDENCE OF NEW ZEALAND."

"1. We, the hereditary chiefs and heads of the tribes of the northern parts of New Zealand, being assembled at Waitangi, in the Bay of Islands, on this 28th day of October, 1835, declare the independence of our country, which is hereby constituted and declared to be an independent State, under the designation of the 'United Tribes of New Zealand.'

"2. All sovereign power and authority within the territory of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity, who also declare that they will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of government to be exercised within the said territories, unless by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled.

"3. The hereditary chiefs and heads of tribes agree to meet in Congress at Waitangi in the autumn of each year for the purpose of framing laws for the dispensation of justice, the preservation of peace and good order, and the regulation of trade; and they cordially invite the Southern tribes to lay aside their private animosities, and to consult the safety and welfare of our common country by joining the confederation of the united tribes.

"4. They also agree to send a copy of this Declaration to his Majesty the King of England, to thank him for his acknowledgement of their flag and, in return for the friendship and protection they have shown and are prepared to show to such of his subjects as have settled in their country, or resorted to its shores for the purposes of trade, they entreat that he will continue to be the parent of their infant State, and that he will become its protector from all attempts upon its independence.

"Agreed to unanimously on this 28th day of October, 1835, in the presence of his Britannic Majesty's Resident."

Lord Glenelg, in a despatch to General Bourke, dated 25th May, 1836, acknowledged the receipt of the Resident's letter and its enclosure, and after recapitulating the contents of the Declaration said: "It will be proper that the chiefs should be assured in his Majesty's name that he will not fail to avail himself of every opportunity of showing his good will, and of affording to those chiefs such support and protection as may be consistent with a due regard to the just rights of others, and to the interests of his Majesty's subjects."

Most of the foregoing facts and instruments are referred to in a memorandum transmitted by Lord John Russell to Lord Palmerston, on the 18th March, 1840, and Lord John Russell concludes the paper with the following words: "If these solemn Acts of the Parliament and of the King of Great Britain are not enough to show that the pretension made by this company (the New Zealand Company), on behalf of her Majesty (to the sovereignty of New Zealand), is unfounded, it might still further be repelled by a minute narration of all the relations between New Zealand and the adjacent British colonies, and especially by the judicial decisions of the Superior Courts of those colonies. It is presumed, however, that, after the preceding statement, it would be superfluous to accumulate arguments of that nature, and the rather because they could not be intelligibly stated without entering into long and tedious details."

The formation of the New Zealand Association, and afterwards of the New Zealand Land Company, compelled the Government of Great Britain either to acknowledge the sovereignty of the Crown over the New Zealand Islands, or

absolutely to disclaim it. At the time there is little doubt they were in a position, without embarrassment, to take either one course or the other. There was no question with any foreign power, and the natives would have made no resistance to a proceeding, the meaning and effect of which they were unable to comprehend, so long as it did not interfere with any of their material rights or interests.

The Government chose the latter course, and numerous despatches and declarations of her Majesty's Seecretaries of State, written at this period, are consistent in enunciating and maintaining the principle that New Zealand was regarded by her Majesty as a free and independent State in alliance with Great Britain.

Thus, on the 12th of December, 1838, Lord Glenelg wrote to Lord Palmerston, recommending the appointment of a British Consul at New Zealand, and, on the 31st of the same month, Lord Palmerston expressed his concurrence in the suggestion.

In reply to a communication made on the 29th of April, 1839, by Mr. Hutt, on behalf of the New Zealand Company, Lord Normanby, on the 1st of May, announced that "Her Majesty's Government could not recognise the authority of the agents whom the company might employ, and that if, as was probable, the Queen should be advised to take measures without delay to obtain a cession in sovereignty to the British Crown of any parts of New Zealand which were or should be occupied by her Majesty's subjects, officers selected by the Queen would be appointed to administer the Executive Government within such territory."

On the 13th of June, 1839, Lord Normanby wrote to the Lords Commissioners of the Treasury, stating that circumstances had transpired which had further tended to force upon her Majesty's Government the adoption of measures for providing for the government of the Queen's subjects resident in or resorting to New Zealand, and with that view it was proposed that certain parts of the Islands of New Zealand should be added to the colony of New South Wales, as a dependency of that Government, and announced that Captain Hobson R.N., who had been selected to proceed as British Consul, would also be appointed to the office of Lieutenant-Governor. A despatch, dated the 1st of July, 1839, from Lord Normanby to the Lords Commissioners of the Admiralty says:— "It having been deemed expedient by her Majesty's Government to establish some competent authority in the Islands of New Zealand, it has been determined that Captain Hobson R.N., should proceed thither, invested with the character of British Consul. The first object contemplated in making this appointment is to obtain from the native chiefs the cession to her Majesty of certain parts of those Islands which it is proposed should be added to the colony of New South Wales, as a dependency of that Government, when Captain Hobson should assume the character of Lieutenant-Governor."

The Treasury minute, which was made in consequence of Lord Normanby's letter, is dated the 19th of July, 1839, and sanctioned the advance of the funds necessary for the new undertaking, and concluded — "But Mr. Stephen will at the same time state to the Marquis of Normanby that, as the proceedings about to be adopted in regard to New Zealand, in the event of the failure of the anticipated cession of sovereignty and of the contemplated revenue, may involve further

expenditure from the funds of this country, beyond the salary of the consul already included in the estimates for consular services for the current year, my Lords have considered it necessary that the arrangement should be brought under the cognisance of Parliament; and they have therefore directed that a copy of their minute, giving the sanction now notified to Lord Normanby, shall be laid before the House of Commons."

The publication of this minute appears to have excited much interest in France, which up to that time had regarded New Zealand as a British possession. It was stated in evidence before the committee of the House of Commons, which sat in 1838, that the witness had seen no less than 40 French newspapers commenting upon the minute, and urging the French Government immediately to fit out an expedition to take possession of a country which was thus authoritatively declared to be still open to the enterprises of civilised nations. This step was ultimately taken, but too late.

On the 14th August, 1839, Lord Normanby wrote his instructions to Captain Hobson. The despatch is long, but a portion of it bears so directly upon the subject of our inquiry, and shows so clearly the ideas which were intended to be embodied in the convention with the natives of New Zealand which Captain Hobson was directed to make, that they may advantageously be extracted:

"The Ministers of the Crown have deferred to the advice of the committee appointed by the House of Commons in 1836, to inquire into the state of the aborigines residing in the vicinity of our colonial settlements; and have concurred with that committee in thinking that the increase of national wealth and power, promised by the acquisition of New Zealand, would be a most inadequate compensation for the injury which must be inflicted on this kingdom itself, by embarking in a measure essentially unjust, and but too certainly fraught with calamity to a numerous and inoffensive people, whose title to the soil and to the sovereignty of New Zealand is indisputable, and has been solemnly recognised by the British Government. We retain these opinions in unimpaired force, and, though circumstances entirely beyond our control have at length compelled us to alter our course, I do not scruple to avow that we depart from it with extreme reluctance.

"The necessity for the interposition of the Government has, however, become too evident to admit of further inaction. The reports which have reached this office within the last few months establish the facts that, about the commencement of the year 1838, a body of not less than 2,000 British subjects had become permanent inhabitants of New Zealand; that among them were persons of a bad or doubtful character — convicts who had fled from our penal settlements, or seamen who had deserted from ships; and that these people, unrestrained by any law, and amenable to no tribunals, were alternately the authors and the victims of every species of crime and outrage. It further appears that extensive cessions of land have been obtained from the natives, and that several hundred persons have recently sailed from this country to occupy and cultivate those lands. The spirit of adventure having thus been effectually roused, it can no longer be doubted that an extensive settlement of British subjects will be rapidly established

in New Zealand; and that, unless protected and restrained by necessary laws and institutions, they will repeat, unchecked, in that quarter of the globe, the same process of war and spoliation under which uncivilised tribes have almost invariably disappeared as often as they have been brought into the immediate vicinity of immigrants from the nations of Christendom. To mitigate, and, if possible, to avert these disasters, and to rescue the immigrants themselves from the evils of a lawless state of society, it has been resolved to adopt the most effective measures for establishing amongst them a settled form of civil government. To accomplish this design is the principal object of your mission.

"I have already stated that we acknowledge New Zealand as a sovereign and independent State, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with her Majesty's immediate predecessors, disclaims for herself and for her subjects every pretension to seize on the islands of New Zealand, or to govern them as part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages, shall be first obtained. Believing, however, that their own welfare would, under the circumstances I have mentioned, be best promoted by the surrender to her Majesty of a right now so precarious, and little more than nominal, and persuaded that the benefits of British protection, by laws administered by British Judges, would far more than compensate for the sacrifice by the natives of a national independence which they are no longer able to maintain, her Majesty's Government have resolved to authorise you to treat with the aborigines of New Zealand for the recognition of her Majesty's sovereign authority on the whole, or any part of those islands, which they may be willing to place under her Majesty's dominion.

"ALL dealings with the aborigines for their lands must be conducted on the same principles of sincerity, justice, and good faith as must govern your transactions with them for the recognition of her Majesty's sovereignty in the islands."

Captain Hobson, in the same month, replied to this despatch and (amongst other things) calls Lord Normanby's attention to the absence of any distinction in his instructions between the North Island and the Southern Island, to the latter of which, the Declaration of Independence did not relate, observing "that it was obvious that the power of the Crown might be exercised with much greater freedom in a country over which it possesses all the rights that are usually assumed by first discoverers than in an adjoining State which had been recognised as free and independent." But as this inquiry has reference only to the Northern Island, it is not necessary to notice this distinction.

The last despatch which I will allude to was written by Lord John Russell on the 4th March, 1840, to John Thompson, Esq., who had asked for a charter of incorporation of a proposed New Zealand Agricultural, Commercial, and Banking Company. His Lordship said, "That as by a series of Acts of Parliament, as well as by the measures formerly taken by the Executive Government in this

country (England), the sovereignty of Great Britain over New Zealand is expressly disavowed, the Queen cannot be advised to grant any such charter."

More authorities might be quoted, but it appears unnecessary to strengthen the position that for many years, up to and including 1840, the King, Lords, and Commons of England have distinctly and absolutely disavowed all pretensions to the sovereignty of the New Zealand Islands, or to any dominion or authority over them. The sole origin, therefore, of her Majesty's dominion here, and the relation in which her Majesty is placed with the aborigines, both as to their political status and their territorial rights, must, subject to subsequent modifications, be looked for in the result of Captain Hobson's operations.

Early in 1840 Captain Hobson arrived in the Bay of Islands in H.M. ship "Herald" and to a large assembly of chiefs produced a convention, called by him a treaty, which was translated to them sentence by sentence by the Rev. H. Williams. After some deliberation, and at one time a doubtful contention, the instrument was accepted and signed there and then by "46 head chiefs, in presence of at least 500 of inferior degree." This document, known as the Treaty of Waitangi, is dated the 6th day of February, 1840; was announced on the 7th by a salute of 21 guns from H.M. ship "Herald"; and was subsequently signed by the majority of the leading chiefs of this island. It purports to be made by her Majesty with "the chiefs of the confederation of the united tribes of New Zealand", i.e. those who were parties to the Declaration of Independence, as well as with "the separate and independent chiefs who had not become members of the confederation." By Article I. the chiefs ceded to her Majesty absolutely and without reserve all the rights and powers of sovereignty which the said confederation or independent chiefs reespectively exercised or possessed, or might be supposed to exercise or possess, over their respective territories as the sole sovereigns thereof. By Article II. the Queen confirmed and guaranteed to the chiefs and tribes of New Zealand and to the respective families and individuals thereof the full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries, and other properties, which they might collectively or individually possess, so long as they might wish to retain the same in possession. By Article III. her Majesty extended to the natives of New Zealand her royal protection, and imparted to them all the rights and privileges of British subjects.

In a despatch to Governor Gipps, dated 17th July, 1840, Lord John Russell communicated to him the entire approval of her Majesty's Government of the measures which he had adopted, and of the manner in which they were carried into effect by Captain Hobson. All question of previous sovereignty being now removed, it remains to inquire what is the effect of this Treaty of Waitangi, which on the one hand fixed the sovereignty in the Crown, and on the other guaranteed to the natives all their lands, estates, forests, fisheries, and other properties.

Having, in the recent case of *De Hirsch* v. *Whitaker and Lundon*[2], inquired

2 *De Hirsch* v. *Whitaker and Lundon.* Judgment was delivered on 28 January 1870. See *Hauraki Minute Book* No. 3, p.185. The text of the judgment also appears as App. J.H.R. 1871, G-1. This judgment also concerned Kauwaeranga lands and may be that referred to as having been printed as a Parliamentary Paper (See introductory note).

with some minuteness into the subsequent legislation, it will not be necessary again to review the strangely fluctuating view of the character attached by the legislation of this colony and of England to the interests possessed by the aborigines in the wild lands of New Zealand under this compact. From the Land Claims Ordinance of 1841, to the impracticable Royal Instructions of 1846, and on to the Constitution Act, the views have constantly varied. The Native Lands Act, 1862, was the first effort of the Legislature to define and regulate the lands and estates of the natives under the Convention, and was the final settlement of two conflicting lines of interpretation, and indeed of thought. Its preamble recited the second article of the Treaty of Waitangi, and that it would greatly promote the peaceful settlement of the colony, and the advancement and civilisation of the natives, if their rights to land were ascertained, defined, and declared; and if the ownership of such land, when so ascertained, defined, and declared, were assimilated as nearly as possible to the ownership of land according to British law; and that, with a view to the foregoing objects, her Majesty might be pleased to waive in favour of the natives so much of the said Treaty of Waitangi as reserves to her Majesty the right of pre-emption, and to establish Courts, and to make other provision for ascertaining and defining the rights of the natives to their land. The Act of 1865, repealing that Act, was passed to provide for the ascertainment of the persons who, according to Maori proprietary customs, are the owners of land in the colony, and to provide for the conversion of such modes of ownership into titles derived from the Crown. These two Acts entirely coincide with the Treaty, and must be regarded as a complement of it.

I do not think the English Acts Act, 1858, affects the case; and the only other statute to which it is needful now to refer, as carrying out or modifying the treaty, is the Native Rights Act, 1865, which says, "Every title to, or interest in, land over which the native title shall not have been extinguished, shall be determined according to the ancient custom and usage of the Maori people, so far as the same can be ascertained." The question then is: (1.) Is this mudflat land in or to which the Maoris, in 1840, had any and what estate, title, or interest, or over which they exercised rights of ownership? And (2.) did the cession of the sovereignty of the Island to her Majesty have the effect of destroying such right or title if it previously existed?

In the previous case *(Whakaharatau*[3]*)* no proof was given in evidence of the exercise by the Maoris of any easement, or right of fishery, and the land was

3 The *Whakaharatau* decision of Judge Fenton is to be found at *Hauraki Minute Book* No. 4 at p.202 where Judge Fenton wrote in judgment:

> 'I therefore briefly state that I can find no reason or law which renders it incompetent for a Maori to have ownership of land covered by the sea at highwater, and considering the character of the English original occupation of this Island, the history and intent of the Treaty of Waitangi and the several statutes relating to the wild lands of the Colony and the Courts in England and in America on matters of this character, I am of opinion that the question of ownership of any portion of the foreshore by a Maori depends simply on a question of fact'.

It may be noted that in this judgment, given a few weeks before that in *Kauwaeranga,* Chief Judge Fenton had not yet formulated the policy reason which was to restrict the measure of property to be conceded.

claimed simply as land above high-water mark is claimed; and the judgment in that case was that the question of ownership of any portion of the foreshore by a Maori must depend simply as a question of fact, and as the claimants had not proved any facts showing ownership, or usufructory occupation, the claim was dismissed. In the case now before the Court, consistent and exclusive use of the locus in quo has been clearly shown from time immemorial. As far as the evidence goes, no persons except the claimants and their ancestors have, at any time, appropriated to their use this land, nor has the exclusive right of the claimants to enjoy it, as they always have enjoyed it, ever been disputed by anyone up to the present contention. That the use to which the Maoris appropriated this land was to them of the highest value no one acquainted with their customs and manner of living can doubt. It is very apparent that a place which afforded at all times, and with little labour and preparation, a large and constant supply of almost the only animal food which they could obtain, was of the greatest possible value to them; indeed of very much greater value and importance to their existence than any equal portion of land on terra firma. It is easy to understand then why the word "fisheries" should appear so prominently in the instrument by which they admitted a foreign authority to acquire rights of sovereignty over their country. The insertion of the word "forests", evidently a word of surplusage, and the application of the doctrine "noscitur a sociis", might afford ground for an argument that the word "fisheries" must be regarded as applying to franchises or easements in fresh-water streams; but I cannot think that the phrase should be so limited. I am of opinion, especially remembering the very clear and almost stringent nature of the instructions given to Captain Hobson, that it was the intention of both parties to the compact to guarantee to the aborigines the continued exercise of whatever territorial rights they then exercised in a full and perfect manner, until they thought fit to dispose of them to the Crown. The natives kept to themselves what Vattel calls the "useful domain" while they yielded to the Crown of England the "high domain". Moreover, in *Scratton* v. *Brown* (4B and C, 485[4]), with reference to the use of the word "forest", the same question of words of surplusage arise in the construction of the words "sea-grounds, oyster-layings, shores, and fisheries". Bayley J. said "The Deed purports to pass 'all that and those sea-grounds, oyster-layings, shores, and fisheries'. If it had conveyed the sea-grounds only, that prima facie would have operated as a grant of the soil itself. For, generally speaking, the soil passes by the word ground, as, by the word wood, the soil in which the wood grows passes. If the grantor had intended to pass a limited specific privilege and easement in the soil, and not the soil itself, he ought not to have used such comprehensive words, but words limited and restricted in their sense. But then the words oyster-layings are introduced, and it is said that from these words it is to be inferred that, by the words sea-grounds, it was intended to convey a privilege of laying oysters only," etc. But the Court would not allow the addition of the lesser words to restrain the effect of the word "sea-grounds", by which the soil was held to pass; and the learned Judge said:— "It appears to me that the deed does pass, not a mere privilege or easement, but the soil so far, at least, as the surface is concerned."

4 *Scratton* v. *Brown* (1825) 4 B. and C.485; 107 E.R. 1140.

The Court then is of opinion that the rights which these claimants and their ancestors, from the earliest times, exercised over this parcel of land, constitute a privilege or easement, which is included in the word "fishery" used in the treaty; but whether their possession of these mudflats was sufficient to make a title to the soil itself, will remain for inquiry.

Before ascertaining the exact character of these rights, it will be well to examine briefly Mr. MacCormick's argument, that with the sovereignty of the Crown came all the incidents of sovereignty, all the common law of England, and all the eminent dominion which the doctrines of feudalism attach to the Crown in reference to land, to the extinction of all rights which, ordinarily appertaining to the prerogative, or to the jus privatum of the Crown, can only be in a subject by virtue of a grant from the Crown, or by prescription. I have left the question of the jus publicum, or public right of the King and people to pass and repass, both on the water and on the land, unnoticed, for that question may be more fitly decided by the Supreme Court in deciding the effect of the grant which will issue on the certificate of the Court. I would refer, however, in passing to *Attorney-General* v. *Burridge,* 10 Price, 350, and to *Attorney-General* v. *Parmeter,* 10 Price, 378[5].

In his argument Mr. MacCormick took from the text-books the doctrine that all colonies were held either (1) by conquest, (2) by cession, (3) by discovery and possession; and abandoning for this case, as a matter incapable of discussion, the two first, he founded his argument on the title of the Crown derived in the third method. The previous part of this inquiry has shown that the Crown, Lords, and Commons have frequently, and in the most absolute manner, disclaimed and repudiated any such title to the sovereignty of New Zealand. King William's letter to the Hokianga chiefs, Lord Normanby's instructions to Captain Hobson, and Lord John Russell's despatch to Mr. Thompson, written in March, 1840, in which he states that her Majesty declines to grant a charter because she has no sovereignty in New Zealand (the result of Captain Hobson's operations being then unknown in England) would alone forbid the sanction of any of her Majesty's Courts to the idea of this being a colony founded by discovery and possession — at least, so far as this island is concerned. This point has been already decided, and it is needless again to go over the ground. I may add, however, that as a fact, many of the colonies of the Empire have been originally founded by private individuals, who subsequently got charters or grants from the Crown, or in later days obtained Acts of Parliament. Thus, Barbadoes, originally discovered by the Portugese, was afterwards re-discovered by a ship of Sir William Courtine's returning from America, and was granted to the Earl of Pembroke. Instances are not wanting in which compacts somewhat similar to the Treaty of Waitangi have been made, sometimes accompanied with money payments, for the soil or even for the sovereignty. Thus, Sir Stratford Canning took possession in 1815 of Singapore, at that time belonging to the Malays, the subjects of the Sultan of Iahore; and in 1825 he bought the domain from the Sultan, for a

5 *Attorney-General* v. *Burridge* (1822) 10 Pri. 350; 147 E.R. 335. *Attorney-General* v. *Parmeter* (1811) 10 Pri. 378; 147 E.R. 345.

sum of money. There is probably no case of a colony founded in precisely the same manner as New Zealand, i.e., by contract with a race of savages, the Crown of England obtaining the sovereignty or high domain, and confirming and guaranteeing to the aborigines the useful domain, or the use and possession of all the lands. Vattel certainly speaks of Penn's treaty as if he had purchased sovereign right in Pennsylvania, as well as the fee simple of the soil, but I think the passage refers to what Penn thought himself that he had acquired rather than to the interpretation the Courts would put upon the transaction.

I do not think it necessary to inquire minutely whether all the incidents of feudalism attached to the soil of New Zealand immediately the Treaty of Waitangi was signed. There does not appear to me to be any reason for seeking for analogies and parallels, in the consequence of a proceeding which is itself without a parallel. The fundamental principle of the feudal doctrines is that all land is holden of some superior lord, originally with the view of keeping up a certain organisation for supplying fighting men, for the service of the lord or the king. And although the original cause of the foundation of feudalism has long since disappeared, yet the doctrine of tenure remains as the law of real property. But real property means land actually or by presumption held of or at some time or other granted by the Crown. Land owned by natives according to their customs or usages can in no sense be deemed subject to the same rules as real property in its technical sense. And we find the Legislature, in the Native Rights Act, 1865, directing the Supreme Court, whenever any such question arises before it, to send the issue down for trial by the Native Land Court. And this distinction is very clearly preserved in the Act under which the Court is now sitting. The interpretation clause says that "native lands shall mean lands in the colony which are owned by natives under their customs or usages. Hereditaments shall mean land the subject of tenure, or held under title derived from the Crown, or land before Crown grant, and land after Crown grant." The case of *Veale* v. *Bunn* (decided in the Supreme Court[6]) will therefore not assist our enquiry until it is decided whether this locus in quo is a hereditament, or in other words that it belongs to the Crown; but this point is the object of the enquiry, so that this process of reasoning would simply lead us round in a circle.

Nor will it avail to say, with Mr. Hesketh, that native land is allodium. I believe that allodium exists in some parts of the Shetland Isles at the present day, but I am not aware that our Courts have ever furnished any illustration of the laws which regulate it. Nor do I profess to be certain what would be the effect upon our case of declaring this land subject to allodium. It does not follow that the jus publicum of the Crown representing king and people would then have no existence. Thus a statute of Connecticut, 1838, declared that every proprietor in fee simple of lands "had an absolute and direct dominion and property in the same," and they were declared to be vested with an allodial title. And although Chancellor Kent states broadly that "feudal tenures have no existence in this country", yet the feudal fiction appears to have been preserved that the lands are held of some superior or lord; for the socage lands of the State of New York are, by an

6 The case referred to must be *Veale* v. *Brown* (1868) 1 N.Z.C.A. 152.

Act declared not to be deemed discharged of "any rent, certain, or other services incident or belonging to tenure in common socage due to the people of the State or any mean lord." And socage tenures are of feudal extraction, and retain some of the leading properties of feuds, being distinguished by a fixed and determinate service, which was not military from knight service. If an analogy must be had, the nearest resemblance to the characteristics of native land might, perhaps be found in the focland as distinguished from bocland of our Saxon ancesters.

But none of these speculations seem to the Court to be of much importance. The real question is a question of fact — Was the land now claimed, at the date of the Treaty of Waitangi, land or a fishery collectively or individually possessed by aboriginal natives? For, if it was, the full, exclusive, and undisturbed possession thereof is confirmed and guaranteed to the possessors by the Crown of England. And this fact is clearly proved. We must seek then in the Treaty itself for the true solution of our problem, and it only remains now to inquire whether the cession of the sovereignty of the island to her Majesty has the effect of destroying the Crown's guarantee. And the first idea that naturally suggests itself, is that this guarantee was the main consideration for the cession. And I do not see how one part of an instrument, of which the intention is clear, can be held thus to destroy another part, unless there is irreconcilable conflict. And here there is no conflict. In England, where the whole soil of the country fell to the King by conquest, and grants either exist or are presumed for all such as has left the Crown, whether above or below high-water-mark, large portions of the foreshore are owned in fee simple absolutely by private persons, and there are numerous instances of private holdings of maritime properties, such as oyster-beds, right of fishing with stake-nets, right of carrying away sand and shells, and even of cutting seaweed below low-water mark, and others, resembling the right under investigation.

"I thing it very clear," says Lord Chief Justice Hale (De Jure Maris, 18, Hargreave's Law Tracts[7]), "that the subject may, by *custom and usage* or prescription, have the true propriety and interest of many of these several maritime interests, which we have before stated to be prima facie belonging to the King."

"Fishing may be of two kinds ordinarily, viz., the fishing with the net which may be either as a liberty without the soil, or as a liberty arising by reason of and in concomitance with the soil, or interest or propriety of it; or otherwise it is a local fishing, that ariseth by and from the propriety of the soil. Such are gurgites, weares, fishing places, etc., which are the very soil itself." In the case of the Abbot of St. Benedict, Hulm, it was held that "a subject may have a separate right of fishing exclusive of the King, and of the common right of the subject", and that "the right of the Abbot to have a several fishing was not a bare right of liberty or profit à pendre; but the right of the very water and soil itself, for he made weares in it — (1d.). And these rights may be in gross or appurtenant to a manor, as in teh case of *Blundell* v. *Catterall.*[8] The grantee in *Scratton* v. *Brown,*

7 Lord Hale, *De Jure Maris,* Chapter 5. Found, for example, in Moore S.A. *A History of the Foreshore,* 1888, p.370. The suit referred to was that between the Abbot of St. Benet Hulme and John Idayne for trespass on the Abbot's several fisheries in 1317. The case is discussed in Moore, supra p.145 and, of course, by Lord Hale.

8 (1821) 5 B & Ald. 268; 106 E.R. 1190.

with title derived from Lord of a Manor, had only as his own freehold the sea-grounds and a piece of adjacent land for a boat-house. Blundell was held to own the fishery, and the short to the exclusion of persons wishing to bathe, and he was Lord of the Manor.

Lord Talbot De Malahide has oyster-beds at Malahide, near Dublin, which he periodically lets out to persons for money rents. And accepting the principle that all properties, rights, privileges, or easements of this character are held to be derived from the King, for prima facie they are all his, yet immemorial several use having been proved, the Courts will presume the grant. And in our case the title is older, for the ownership was before the King, and the King confirmed and promised to maintain it.

I am therefore unable to see any conflict in the terms of this compact, but a clear and very intelligible description of rights, which were to be reciprocally ceded, acknowledged, and confirmed.

Returning then to the point, whether the right which is the subject of our inquiry comes under the word "land", which will warrant an order for the soil, or under the word "fishery", which must limit the Court to a privilege or easement — it is remarkable that the use to which this land has been immemorially put by the natives is exactly the same as that to which the shore at Great Crosby was put by Blundell, the plaintiff in *Blundell* v. *Catterall,* who had "the exclusive right of fishing thereon with stake nets, and of driving those stakes into the soil that they might support the nets". Still I am of opinion, though I do not hold the opinion without doubt, that, if the word "fishery" were not present in the Treaty, the word "land" would not suffice to support a claim in the natives to the foreshore of sufficient value to be turned into an absolute freehold interest in the soil, for a "fishery" will mean an interest of no higher character than a privilege or easement.

Bayly, J., said in *Scratton* v. *Brown*:— "I have already said that the grantee might have had either soil or the fishery, or the mere privilege of laying and taking oysters; or he might have taken the soil from the Crown by one grant, and the fishery by another."

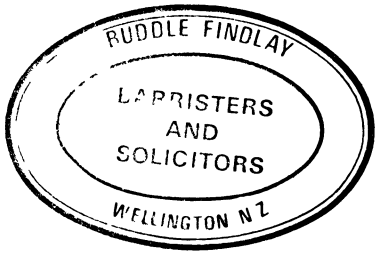
And I think that the Court, in deciding this, the first case of the kind that has occurred in the colony, is justified in allowing some weight to the consideration of the great public interests involved. I cannot contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the soil of the foreshore of the colony will be vested absolutely in the natives, if they can prove certain acts of ownership, especially when I consider how readily they may prove such, and how impossible it is to contradict them if they only agree amongst themselves. And I am not without precedent in allowing my mind to be influenced by such considerations. Best J. dissented from the rest of the Court in *Blundell's* case on the ground chiefly of the great public injury which would be inflicted. "I am fearful," said that learned Judge, "of the conseequences of such a decision" (that the public are precluded from passing except at particular places over the beach to the sea without the consent of some lord of a manor), "and, much as I dislike differing from the rest of the Court, I cannot assent to it."

The fact that the Government has been negotiating for the purchase of their rights is not needed to strengthen the case of the claimants, for it has appeared what rights the Government recognised, and they may be the same that the Court awards. I have made no allusion to the Goldfields Act, 1868, for the provision contained therein was limited to "the purposes of that Act", and the Shortland Beach Act 1859, simply kept things as they were, evidently to give time for Parliament to settle the question by legislation, which it has not done.

I do not wish to encumber the judgment, which is already too long, by referring to the questions that were raised before the Supreme Court in the case of *Crawford* v. *Le Cren*[9], for the sovereignty of the other islands would probably be found to rest on different acts of State; and moreover our case can be decided on other grounds. And I must again express my hope that a case of so much importance will not be allowed to rest on the opinion of any Court except that of the highest in the land. Lyttelton's maxim that "the honour of the King is to be preferred to his profit" has not been forgotten, but it appears to me that there can be no failure of justice if the natives have secured to them the full, exclusive, and undisturbed possession of all the rights and privileges over the locus in quo which they or their ancestors have ever exercised; and the Court so determines, declining to make an order for the absolute propriety of the soil, at least below the surface.[10]

9 (1868) 1 N.Z.C.A. 117.

10 The Crown Law typescript has garbled the final sentence in such a way as to render it unintelligible.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