On English authority, an exclusive fishery is usually called "several" sometimes "free," and a right in common with others is usually called "common of fishery" sometimes "free." A several fishery is usually a corporeal hereditament the owner being entitled to the soil under his fishery. It is not necessary that the fishery should be described as a several fishery. If it was a weir or something of that kind, it sufficed. In the absence of evidence to the contrary the owner of a several fishery is presumed to be the owner of the soil. In *Attorney-General* v. *Emmerson*, 1891 Appeal cases, page 649, a several fishery was established over a foreshore of the Naplain Sands in the estuary of the Thames. In that case a claim was made by the Crown to part of the foreshore of the sea against the Lord of the adjoining manor who was also in possession of a several fishery exercised *inter alia* by Kiddells. The House of Lords held that such a right raised the presumption that the freehold of the soil was in the owner of the several fishery.

The owner of a fishery has not of necessity a right to land on the shore above high-water mark without the consent of the owners of the freehold. In cases of grants to individuals it is often a question of construction whether the right to use the bank for the purpose of the fishery is impliedly granted and it appears to depend on whether it is necessary to the exercise of the fishery such banks should be used. The open enjoyment of a right of landing and drawing nets and of occasionally sloping and levelling the shore for twenty years has been held sufficient to warrant a Judge directing a jury to presume a grant of such right.

In the *Duke of Devonshire* v. *Pattinson and the Mayor, Aldermen, and Citizens of Carlisle* it is said that:—

> The fishery was then as now known and treated as a tenement distinct from the closes adjoining the river and the fact that the corporation had never for more than a century after the grant of 1767 set up any title to fish under this Deed or exercised any such right is a strong confirmation of our conclusion.

The conclusion was that grants of the land did not pass any interest in the bed of the river. In general, it can be said that in the conveyance of land bounded by river the *ad medium filum* presumption may be rebutted by proof of surrounding circumstances in relation to the property in question which negative the possibility of any conveyance boundary having been the intention and in that case it was held that, under the circumstances, the conveyance ought not to be construed as passing any portion of the river to the grantees.

Considering the use of the river by the Maoris, considering the river itself with its rapids and its numerous eel-weirs, it is, in my opinion, clear there should be no presumption that the bed of the river passed to the transferees of the land and that the owners of the weirs lost their right to the bed of the river. I wish it to be quite clearly understood, that I think that no other than a right recognized in English law need be claimed by the Maoris in their claim to the bed of the river as I think it clear that if Europeans had used the river in the same way and ownership were in European hands they would have made the same claim as now made by the Maoris. I set out, therefore, a statement by Mr. Justice Buckley in *Hanbury* v *Jenkins*, citing Lord Hale:—

> Fishing may be of two kinds ordinarily—namely, 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.

And then later on, referring to weirs, he cites Lord Herschell in *Attorney-General* v. *Emerson*, as saying:—

> I think they all have this in common that they are constructions or erections by which the soil is more or less permanently occupied and that it is this occupation of a portion of the soil which leads Lord Hale to say that they are "the very soil itself."
>
> Dealing first with the use of the word "wears," I should, from those authorities, come to the conclusion that the grant of the weirs is a grant, not of a mere right of fishing, but of a corporeal hereditament consisting of the soil on which the weir is constructed.