

MISCELLANEOUS INFORMATION.

Resignations.

No. 1565. Constable Hart, George Henry. 20th November, 1914.

No. 1602. Constable Edwards, James. 20th November, 1914.

Long-service Medals awarded.

Medals for long service and good conduct have been awarded, in terms of Regulation No. 333, to the under-mentioned members of the Force:—

District Constable Coombe, Frederick.
District Constable Torr, Walter.

Memorandum.] Police Department,
Wellington, 26th November 1914.

List of Registering Authorities under the Motor Regulation Act, 1908, and the Distinguishing Letters and Numerals assigned to each.

The following memorandum from the Under-Secretary, Department of Internal Affairs, Wellington, is published for general information, and the list published in *Police Gazette*, 1914, page 374, is to be amended accordingly.

J. CULLEN,
Commissioner of Police.

(P. 14/368.)

Department of Internal Affairs,
Wellington, 24th November, 1914.

Memorandum for Commissioner of Police.

Motor Regulation Act, 1908.

I have to advise you that the letters "CF" and the numerals "1 to 500" have been assigned to the Clifton County Council as suitable distinguishing marks under the Motor Regulation Act, 1908.

J. HISLOP,
Under-Secretary.

LAW REPORT.

("New Zealand Law Reports," Vol. xxxiii, page 1065.)

[S.C. FULL COURT, WELLINGTON.—(STOUT, C.J., EDWARDS, J., COOPER, J.)—9TH, 30TH JULY, 1914.]

WAIPAPAKURA v. HEMPTON.

Fisheries—Maori Right to fish in Sea or Tidal Waters—Treaty of Waitangi—The Fisheries Act, 1908, Sections 54, 76, and 77.

The right of Maoris to fish in the sea or tidal waters is the same as the right of Europeans, and is governed by the Fisheries Act, 1908, and the regulations made thereunder. Maoris as such have no communal or individual rights of fishery, territorial or extra-territorial, in such waters.

A Magistrate's Court has jurisdiction to inquire whether by Maori custom or under the treaty of Waitangi any Maori right of fishery exists.

APPEAL from a decision of Alfred Crooke, Esq., S.M. at New Plymouth. The respondent, a fishery officer, seized the appellant's nets upon the ground that she was using the same unlawfully in breach of clause 3 of regulations dated the 19th of September, 1911 (N.Z. Gaz. 1911, Vol. ii, p. 2816), made under the Fisheries Act, 1908. The appellant, who was fishing in the tidal waters of the Waitotara River, claimed that she was using the nets in exercise of a Maori fishing-right, and that such right was saved from the operation of the Fisheries Act, 1908, by section 77, subsection 2, of that Act. The appellant sued the respondent for wrongful conversion of her nets. The Magistrate nonsuited the appellant upon the ground that he had no jurisdiction to inquire into the existence of Maori fishing-rights, which could only be ascertained by the Native Land Court.

Hutchen, for the appellant:—

Section 25 of the Native Land Act, 1909, relied upon by the Magistrate as vesting his jurisdiction, does not apply. It cannot be invoked until an Order in Council has been issued. Further, the ascertainment of a fishing-right is not the ascertainment of the title to customary land within section 90 of the Native Land Act, and the Magistrate had

jurisdiction to determine the existence of the fishing-rights and ought to have done so. Existing Maori fishing-rights are preserved by section 77, subsection 2, of the Fisheries Act, 1908. A fishing-right carries with it no right to the bed of the river—*Duke of Somerset v. Fogwell* (5 B. & C. 875; 29 R.R. 449); *Marshall v. Ulleswater Steam Navigation Company* (3 B. and S. 732, 745); *Goodman v. Mayor, &c., of Saltash* (7 A.C. 633); *Attorney-General v. Emerson* ([1891] A.C. 649)—and no such right was or is claimed by the appellant. The course of legislation leading up to the present section preserving Maori fishing-rights was as follows: The rights were recognized by the Fish Protection Act, 1877, repealed as to sea-fisheries by the Sea-fisheries Act, 1894, and the protection as to sea-fisheries was re-enacted by the Sea-fisheries Amendment Act, 1903, in which section 77, subsection 2, of the Fisheries Act, 1908, first appeared. As to the construction of statutes see *Wilberforce on Statute Law* (p. 264).

The Solicitor-General (J. W. Salmond, K.C.) and C. H. Weston, for the respondent:—

Section 77, subsection 2, is merely a saving clause and not an enacting clause. It creates no rights—it merely saves existing rights. The existence of the rights must be established independently of this Act. It is permissible to hold that no such rights exist notwithstanding this provision. As to the construction of a saving clause, see *Lord Advocate v. Hamilton* (1 McQ. H. of L. 46, at p. 55) and *West Derby Union v. Metropolitan Life Assurance Society* ([1897] A.C. 647, at pp. 652, 655). The saving clause does not mean a general exemption of Maoris from the Act. It does not preserve to Maoris the right to fish as they did before the passing of the Act. Before the Act the Maoris had, in common with the public, the right to fish in any waters. The clause only preserved to them proprietary fishing-rights vested in some hapu or tribe. That the Act applies to Maoris is shown by sections 17, 46, and 76. The seizure of the nets is authorized by section 9, subsection 1, paragraph (d) of the Act. With respect to the proprietary rights there are two questions: 1, What rights exist; and, 2, can they be recognized elsewhere than in the Native Land Court? 1. The rights are of two possible kinds—(a) a right to fish on their own lands, and (b) rights to fish on Crown lands. The first right is called a territorial fishery; it is merely a part of the general right of ownership. The other right is a non-territorial fishery: See *Coulson and Forbes on Waters* (3rd ed. 381); *Halsbury's Laws of England* (Vol. xiv., p. 572, par. 1266). This distinction is important in this case. The territorial fisheries of Maoris are of two kinds: those in respect of—1, freehold lands; 2, customary lands. The first class are undoubted and are preserved by section 77, subsection 2, and may be taken notice of by Magistrates' Courts.

[Stout, C.J.—The Act assumes that there are fisheries in tidal waters.]

Crown grant statutory orders vesting land in Maoris may include tidal waters. The second class of rights must exist—they are incidental to the customary ownership; but the question arises whether the Native Land Court has not the exclusive jurisdiction to take notice of such rights. I find great difficulty in supporting the view taken by the Magistrate that the Native Land Court alone can take notice of such rights. The right is a legal statutory right *prima facie*, and may be taken notice of in any Court. In this case the land abutting on the river was Native freehold land. If the Magistrate has no jurisdiction it must be excluded by some statutory provision. Section 90 of the Native Land Act, 1909, gives exclusive jurisdiction to the Native Land Court to make freehold orders in respect of customary land. Any Court may in an appropriate proceeding take notice of customary title. The opposite conclusion would paralyse the operation of this or other Courts where the question of title incidentally arose. If the question arose the Courts would then have to assume it was Crown land. Section 90 must be read with sections 91 and 92. There are dicta in *Tamihana Korokai v. the Solicitor-General* (32 N.Z. L.R. 321) which, apart from their context, would seem to decide that the Native Land Court has exclusive jurisdiction, but the exclusive jurisdiction given to the Native Land Court is an exclusive jurisdiction only on an application for a freehold order. Sections 84, 85, and 88 show that other Courts have jurisdiction to take notice of customary title. Section 84 of the Act of 1909, as amended by section 43 of the Act of 1913, would now be an answer where the claim was based on customary land, but does not affect the present action. As to non-territorial fisheries, it is clear that there can be no such rights in land over which the Native title has been extinguished by cession or otherwise. If ownership has been given up that includes their fishing-rights. The only land over which the Maoris never had any claim was land under tidal waters, and it is only in such waters that there could be non-territorial fisheries. The plaintiff's claim is for a non-territorial fishery in the tidal waters of the Crown. The land has belonged to the Crown since the Crown came to New Zealand. The principle that tidal waters belong to the