Crown is in force here unaffected by the Treaty of Waitangi or Native land legislation. Native customary title is limited by high-water mark, and does not include tidal waters. It is illegal for the Crown to make a grant that would interfere with the public right of fishing and navigation: Attorney-General for British Columbia *v.* Attorney-General for Canada ([1914] A.C. 153). There can, therefore, be no territorial fisheries in the sea. Apart from legislation the Treaty of Waitangi is merely a bargain binding upon the conscience of the Crown, and is not a source of legal rights. There is no legislation giving to the Maoris the right to fish in non-territorial waters. The only customary right recognized in the Native legislation is Native customary ownership of land. The Native Land Court has no jurisdiction to ascertain the title to incorporate hereditaments. The Fish Protection Act, 1877, section 8, corresponds with section 77, subsection 2, of the Fisheries Act, 1908, and is merely a saving clause and does not create rights.

Hutchen, in reply:—

If there were no non-territorial sea-fisheries section 77, subsection 2, was unnecessary. The rights conserved by that section are not necessarily legal rights, but fishing-rights exercised from time immemorial: May *v.* Belleville ([1905] 2 Ch. 605) *Cur. adv. vult.*

Stout, C.J., delivered the judgment of the Court, as follows:—

This is an appeal from a decision of Alfred Crooke, Esq., S.M., sitting at New Plymouth.

The respondent, a fishery officer, purporting to act under regulations made under the Fisheries Act, 1908, seized certain nets belonging to the appellant, and has refused to give them up. The regulation under which the respondent purported to act says, "Set-nets having an opening of not more than 3 ft. by 1 ft. 6 in. may be used for taking whitebait in the rivers and streams in the Counties of Clifton, Taranaki, and Egmont, but no person shall use any groyne, race, or lead in connection with such nets. No person shall use more than one set-net, and no person shall set a line of set-nets across any river or stream in the said counties."

These regulations are authorized by section 5 of the Fisheries Act, 1908, paragraphs (*a*), (*d*), and (*l*). This section and the subsections are as follows:—

"5. The Governor may, from time to time, by Order in Council gazetted, make regulations, which shall have force and effect either throughout New Zealand or only in such waters or places as are specified in the regulations, for any of the purposes following, that is to say:—

"(*a.*) Generally regulating sea-fishing in New Zealand:

"(*d.*) Imposing conditions and restrictions on the taking of fish, &c.:

"(*l.*) Fixing the minimum size, when wet, of the mesh in the square, or in extension from knot to knot, of nets and seines to be used in fishing; prescribing the mode of measuring the same; and prohibiting the use of nets or seines of all descriptions or of any specified description."

The appellant relied on section 76 and subsection 2 of section 77 of the Fisheries Act, 1908, which are as follows:—

"76. (1.) No Maori or half-caste habitually living with Maoris according to their customs shall be sued for any fine or forfeiture under this Part of this Act unless and until the authority of the Native Minister to take proceedings has been filed in the Court in which such proceedings are intended to be taken.

"(2). The aforesaid authority of the Native Minister may from time to time be signified by him to any person, either generally or specifically, and shall be valid if signified by telegraph or telephone message.

"77. (2.) Nothing in this Part of this Act shall affect any existing Maori fishing-rights."

The Magistrate held that he could not inquire as to whether the appellant had any right by Maori custom or under the Treaty of Waitangi, and that right, if any, must be found by the Native Land Court. In this respect he was, in my opinion, wrong. The Native Land Court has jurisdiction only to ascertain the title of Natives to land, and to grant a certificate accordingly. No special jurisdiction has been conferred on the Native Land Court to deal with "fisheries"—*i.e.*, fishing rights.

The case of Tamihana Korokai *v.* The Solicitor-General (32 N.Z. L.R. 321) only determined that where, as in that case, a Native claimed the ownership of the bed of a lake it was the duty of the Court to hear and adjudicate on such claim. The judgment of the Court was "that the Native Land Court can only be prevented from performing its statutory duty, first, under the Native Land Act; or, second, on proof in that Court that the lands are Crown lands freed from the customary title of the Natives; or, third, that there is a Crown title to the bed of the lake." The judgment of the Court was not, therefore, a decision that if fishing-rights existed these could not be proved in a Magistrate's Court.

A much wider question has, however, been raised in this appeal. First, it is said that the Fisheries Act, 1908, creates no right of fishing in favour of Maori people; second, such a right as is claimed was not granted by the Treaty of Waitangi; and, third, if granted, the Legislature has not confirmed that grant. Subsection 2 of section 77 is a saving clause; it is not the grant of a right. There are several provisions in Part I of the Act that show that the Legislature acted on the assumption that Maoris have not absolute fishing-rights (see sections 17, 46, and 76). It is not averred that the appellant had any fishing-right save a right of succession by virtue of her ownership of land, to which it is admitted she has obtained a title in fee-simple, to fish in the sea, and that right was granted to her, if granted at all, by the Treaty of Waitangi. That treaty states, "Her Majesty the Queen of England confirms and guarantees 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 may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession; but the chiefs of the united tribes and the individual chiefs yield to her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf." How the treaty is to be interpreted is stated in Wi Parata *v.* Bishop of Wellington and The Attorney-General (3 N.Z. Jur. N.S. S.C. 72). Assuming that we are bound by that decision—though perhaps not by all the expressions used in the judgment—it is clear from the decision of the Privy Council in Nireaha Tamaki *v.* Baker ([1901] A.C. 561) that, until there is some legislative proviso as to the carrying-out of the treaty, the Court is helpless to give effect to its provisions. In Nireaha Tamaki *v.* Baker ([1901] A.C. 561) their Lordships of the Privy Council said that the Treaty of Waitangi would not of itself be sufficient to create a right in the Native occupiers of land "cognizable in a Court of law." In that case their Lordships relied upon the provisions of the Native Rights Act, 1865. We do not think that Act could have affected the question which we have now to decide, but it may be as well to observe that that Act was repealed finally by the Native Land Act, 1909.

Even if the Treaty of Waitangi is to be assumed to have the effect of a statute it would be very difficult to spell out of its second clause the creation or recognition of territorial or extra-territorial fishing-rights in tidal waters. There is no attempt in the Fisheries Act, 1908, to give rights to non-Maoris not given to Maoris. All have the right to fish in the sea and in tidal rivers who obey the regulations and restrictions of the Statute. This statute has not given, and no New Zealand statute gives, any communal or individual rights of fishery, territorial or extra-territorial, in the sea or tidal rivers. All that the Fisheries Act does is to regulate all fisheries so as to preserve the fish for all. There are concessions given, but these concessions are to Maoris, as appear in the sections already referred to, and do not affect the question to be decided in this case. Now, in English law—and the law of fishery is the same in New Zealand as in England, for we brought in the common law of England with us, except in so far as it has not in respect of sea-fisheries been altered by our statutes—there cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast. In the sea beyond the three-mile limit all have a right to fish, and there is no limitation of such general right in the regulations dealing with such waters. There is special legislation regarding extra-territorial waters the result of treaties, but that does not apply to us. In the tidal waters—and the fishing in this case was in this area—all can fish unless a specially defined right has been given to some of the King's subjects which excludes others. It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give such an exclusive right to the Maoris, but if it meant to do so no legislation has been passed conferring the right, and in the absence of such both Wi Parata *v.* The Bishop of Wellington (3 N.Z. Jur. N.S. S.C. 72) and Nireaha Tamaki *v.* Baker ([1901] A.C. 561) are authorities for saying that until given by statute no such right can be enforced. An Act alone can confer such a right, just as an Act is required in England to confer such a right unless some charter from the Crown prior to Magna Charta can be proved: See Halsbury's Laws of England (Vol. xiv, p. 574, pars. 1269, 1274). There is no allegation in this case that the land over which the tide flows belongs to the Maoris. The Maoris have land adjoining, but if so the Crown grant would be to high-water mark and would not include the land under the sea or tidal waters. In Mueller *v.* The Taupiri Coal-mines (Limited) (20 N.Z. L.R. 89) the Court of Appeal held that even the bed of a navigable river remained vested in the Crown and did not pass to grantees of land fronting the river.

Therefore, so far as sea-fisheries are concerned—and the question of fishing-rights on inland rivers adjoining Maori land is not before the Court—there must, in our opinion, be some legislative provision made before the Court can recog-