

(b) There is some fairly strong evidence and material in support of the claim of the petitioners that the Whanganui-o-Rotu was at the time of the Treaty a fresh or brackish water lagoon and as such was "land" within the meaning of the various Native Ordinance and Acts. Upon the last occasion when the petition was before the Court the conductor for the Natives undertook to strengthen the evidence upon this crucial point by showing to the Court and counsel for the Crown various fresh water mussel beds *in situ* and the remains of various eel-weirs within the area under dispute. Possibly owing to the death of Mr. Raniera Ellison, this undertaking was not carried out, in consequence of which this report is made upon an incomplete case and possibly in the absence of telling evidence. The Court had inspected much of the area and noted an increasing impression of immaturity in the sea-shells and growths upon the mud and sand surface the further it got from the tidal channel under the Westshore bridge, and it seemed a natural thing to assume that such a state of affairs could occur (as petitioners' case says it has occurred) through the salt water of the sea being given permanent opportunity at some fairly recent date to dominate the fresh or brackish waters of the lagoon with the dual result of killing fresh-water growth of any kind and introducing in their stead salt-water fish, shell-fish, and that flatness peculiar to sea-water-lain sand. The deep drains in the area had uncovered large sea shells which it was thought may have been deposited there before the shingle barrier was formed, and covered up by mud deposited in the area by the streams converging there, after the barrier was formed. In the hope that this report would contain all available evidence of the character of the area in (say) 1840, the petitioners were requested to submit everything they had, subject, of course, to the right of cross-examination and rebuttal by the Crown and Harbour Board. As already stated, no further evidence has been adduced, although the petitioners have had ample time in which to do so, and the case must go on on the basis only of proven facts.

(c) If it could be proved that the area was land in (say) 1840, over which the Natives had a right to assert title by reason of the various Native Acts and Ordinances, and, assuming that the certificate of title in the Napier Harbour Board did not exist, it is possible that the circumstance of tidal waters being over the area for many years prior to the earthquake would not affect the Natives' right to the soil. In the case of *Carlisle Corporation v. Graham*, (1869) L.R. 4 Ex. 361; 38 L.J. Ex. 226; 21 L.T. 333; 18 W.R. 318, it is said :—

If by the irruption of the waters of a tidal river a new channel is formed in the land of a subject, although the right of the Crown and of the Public may come into existence and be exercised in what has thus become a portion of a tidal river or of an arm of the sea the right to the soil remains in the owner so that if at any time thereafter the waters should recede and the river again change its course leaving the new channel dry, the soil becomes again the exclusive property of the owner free from all rights whatever in the Crown or in the public.

(d) If the area in question was in the year (say) 1840 below mean high-water mark the question of Native rights over it becomes too involved to be dealt with adequately by this Court, or upon the case presented in these proceedings. It can be said, however, that the law has recognized the assertability of Native rights in the demesne lands of the Crown (*Nireaha Tamaki v. Baker*, 1901 A.C. 561, already quoted in full (paragraph 151). The Native Land Court, a special Court with land jurisdiction only was set up to adjudicate upon the rights of Natives under their customs and usages as against the title of the Crown. In some cases, as already shown, the Native Land Court has dealt with lands which lie below high-water mark and the Crown has to some extent recognized these orders by giving a limited title to Natives