In the previous case (Whakaharatau) no proof was given in evidence of the exercise by the Maoris of any easement, or right of fishery, and the land was claimed simply as land above highwater 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 an 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 it 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*, 4 B. and C. 486, with reference to the use of the word "forest," the same question of the use 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 soon 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 to have used such comprehensive words, but words limited and restricted in their sense. But then the words *oyster-laying* 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," &c. But the Court would not allow the addition of these 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."

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 as well to examine briefly Mr. McCormick'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 *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.

In his argument Mr. McCormick 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 in the title of the Crown derived from 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 stated 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 to again 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 rediscovered 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