The Chief Justice: If you have only two possible grounds of action, and one is excluded—the judicial—then you have the other.

Sir R. Stout: There are three. The Judge may act without jurisdiction, on a wrong interpretation of the law. I go so far as to admit this: If he had chosen to say, "I find there has been a voluntary arrangement, and I find that all the parties were present," I would be bound. The Court did not make any finding to that effect.

Mr. Bell: In the case you quoted, of Hunia, the Court found on exactly the same evidence.

Sir R Stout: That point was not raised. Certainly, if Hunia had raised a voluntary arrangement he had no right to be there. On the contrary, if you refer to the evidence of Judge Wilson, he thinks that, if one or two people did not respond to his notice, then he could act on a voluntary arrangement in their absence.

The Court adjourned till the following morning.

THURSDAY, 4TH NOVEMBER, 1897.

The Court resumed at 10.30 a.m.

Sir R. Stout: There are only two or three points I wish to deal with. First, I want to say that there is no case I know of where a Judge is called as a witness and cannot be cross-examined and treated as another witness.

Mr. Bell: The Queen's Bench refused to allow Lord Penzance to be examined.

Sir R. Stout: The point is raised in question 14, "Can the Native Appellate Court disregard the evidence of Judge Wilson as to his recollection of what took place before the Court of 1886, and find contrary to that evidence, should it manifestly appear that his remembrance of what took place does not actually accord with what was done?" Then, the next question is, "14A. Where the evidence is conflicting, and depends entirely on oral testimony, is it open to the Appellate Court to receive and consider evidence in contravention of Judge Wilson's distinct recollection with regard to any proceedings before him at the Court of 1886?" Now, the question really turns on this: that if it manifestly appears that his recollection of what took place is inaccurate, is the Court still to accept his evidence? I say there is nothing to show that. In No. 5, Cox, it was held that notes could not be taken, and there are passages in "Taylor on Evidence" and Best dealing with this (see Taylor, 8th ed., page 109; Gibbs and Pyke, page 409; Queen *v.* Vervier, 12, Adolphus and Ellis, page 317). In the latter case the Judge had a distinct recollection, yet he was not allowed to amend the note, he not having made a note at the time.

Mr. Bell: I said in opening we did not contend a statement could contravene a record.

Sir R. Stout: But if his memory does not agree with what has been done, is the Court to accept that?

Mr. Justice Denniston: You mean that if his memory shows a defect on one point?

Sir R. Stout: The 14th question is not dealing with the record at all. It is independent of his contradiction of the record.

Mr. Justice Denniston: The question really is as to what took place in Court. You cannot say he is manifestly wrong.

Sir R. Stout: Yes, your Honour. I will read the question again [read]. Now, then, as to this question about the Judge's notes. I would further quote, The Mayor of Doncaster against Dey, 3, Taunton's Reports, page 362; Barber and Burt, 2, Queen's Bench Division, 437. In the latter case they did not assume that the Judge's recollection is to be called into the matter, but that they could deal with that question through no person who really could not speak as to what occurred. And what was said in the previous case is the same in the County Courts. If the Judges did not take a note of it, it can be proved *ali unde*. They could request him to do it, and if they did not, then it is the fault of the persons in the case. Take the case of King and Grant, on which my friend Mr. Bell chiefly relied. What bearing has that on the matter? Here is a Judge who is himself presiding *in Banco*, and they ask leave to contradict what the Judge himself said took place. I submit the Judge is in the same position as an officer of the Court, and the Court will not allow its officer to be contradicted by affidavits; but that is a very different thing to a Judge being put in the box. If he is called as a witness in a different Court it is a very different thing. This is the recollection of a Judge who had been Judge of a certain Court, but who had ceased to be, and had destroyed his notes (see Hargraves and Hargraves, 1st vol. of Greenleaf, section 166; "Best on Evidence," page 225). It is not what is evidence, but simply a question of practice that a Court will be bound by the report of a Judge who tried the case in dealing with the point whether there was ground for a new trial or not. My next point is as to this question 15, on which my friend relies. It reads,—

"Has the Native Appellate Court, exercising jurisdiction under 'The Horowhenua Block Act, 1896,' jurisdiction to inquire into the validity or otherwise of the proceedings taken by the Native Land Court in 1886 in respect of the making and issue of the orders in freehold tenure, except so far as may be necessary to ascertain whether the Native in whose favour an order was made was or was not a trustee?"

From my point of view it is immaterial how the question is answered, because your Honours will see that the last part of it does not put the question directly. No one disputes that the goal to be arrived at is whether there is a trusteeship or not I submit that if the Appellate Court asks these questions of the Supreme Court the Court surely ought to answer them. I put it to the Court that it does not matter to us whether the answer is "Yes" or "No," but the answer must either be in the affirmative or in the negative. The question put by the Appellate Court is this: "The goal that we are striving for is trust or no trust." Very well; they ask, can they exercise all the jurisdiction necessary to ascertain whether there was a trust or not? Now, if it becomes