

Mr. Bell : The Court knew that all the people were not there.

Mr. Baldwin : Judge Wilson's evidence was that he was persuaded that all the people were there. At any rate, the matter is before the Appellate Court; but if Kemp honestly believed that all the persons who were necessary to give the land to him had given it to him, and if he were honestly of opinion that all the persons necessary to constitute a voluntary arrangement were present, and that he put that to the Court, then there was no fraud on Kemp's part. It is simply a question of Kemp being mistaken.

Mr. Bell : I am bound to say that Mr. Baldwin is misrepresenting me.

Mr. Baldwin : I am putting a supposed case, your Honours. I do not wish to be misunderstood by anybody. I do not say it is a fact that Kemp did obtain the order by fraud: I simply say, supposing such a case might happen. The point I wish to make is that under certain circumstances an order was made by Judge Wilson, and that order can be disregarded on the ground that it was not an order of the Court by reason of its being obtained in a fraudulent manner. I submit, further, that if by any reason it can be shown that the order under which the land was purported to be awarded by Judge Wilson was not an order of the Court, then the same result will apply. Our argument is directed to two points—First, that Kemp was constituted a trustee of this block by virtue of the statute. That point has been very fully elaborated by my friend Sir Robert Stout, and I do not profess to add anything to what he has said. The second point is that we are entitled to show by any means in our power that Kemp still remains a trustee of the block, either by virtue of resulting trust, owing to the circumstances connected with the title—

The Chief Justice : You are speaking of the whole block?

Mr. Baldwin : Yes, your Honour, including No. 14—or under an intended trust by the Court. My friend Sir Robert Stout contends that we are entitled to do this by showing, in fact, that Kemp was a trustee under the Act of 1867; that he held the position of trustee; that all the duties of a trustee were really upon him; and that Section 14 has never become validly vested in him beneficially. We put it on two grounds: First, that the Native owners never intended to give it to Kemp, and never did give it to him; and, secondly, that the Native Land Court never judicially awarded it to him for himself beneficially. Turning to this case about the survey, I will assume for the purposes of my argument—what I do not allege is the fact, but what I think is the fact—that the main point in the mind of the tribe was to set apart Block 11—that is to say, the whole of the land to the westward of the railway-line—for the tribe as a place of residence. As was pointed out in this Court in the case of Warena Hunia against Kemp, that is the place where the cultivations and fishing-grounds were, and the land upon which they lived; and I shall assume for the purposes of my argument that the important point to the tribe was having that piece of land on trust. Now, as far as the tribe knew, under the voluntary arrangement (if there was one) that land was vested in two trustees for the tribe. Your Honours have held in the case of Warena Hunia against Kemp that a trust under a certificate of title would be to administer the land on the same principle as a Native chief would administer the lands of his tribe. Surely, if that was what the Natives intended, I submit that any order that was made without jurisdiction, and which has the effect, if it is held to be conclusive, of vesting a considerable portion of that land (including a great portion of one of the large lakes or watering-places) in an individual for himself—I submit that that order, if made without jurisdiction, if made without the consent of the tribe, should not estop the tribe from ascertaining their rights as to the portion of land which is now included in Block 14; and it is a misapplication of terms to say that it is a defect of procedure in which Kemp is not concerned. Your Honours will see, on reference to the case, that the joining of this piece of land into Block 14 was the act of the surveyors, at the instance of Kemp and Warena Hunia—that the meeting of the difficulty in that particular way by the surveyors was the suggestion of Kemp and Warena Hunia. This is found on reference to a letter to the Chief Surveyor, Wellington. What we suggest is that it might very well, and to better advantage, have been provided for in another way; and, in any case, the tribes should have the right to object to it, as by law provided.

The Chief Justice : You are quite correct in stating that the letter shows that they suggested it.

Mr. Baldwin : I am going to read it. The letter says,—

“FRIEND,—

“Wanganui, 12th September, 1887.
“Greeting. This is with reference to the map of Horowhenua which Mr. Palmerston, surveyor, sent you, and also asking you to authorise it. The reason one part was taken to the Subdivision No. 14 was because there was no land to substitute for the 1,200 acres on that side opposite to the railway, and that is why it was removed alongside Te Rato to the westward. For this do you consent to these Europeans' map? You must also give those surveyors some money, because they did their work right. That is all.

“J. W. A. Marchant, Esq., Chief Surveyor.

“MEIHA KEEPA TE RANGIHIWINUI.

“WARENA HUNIA.

“Witness to signature of Warena te Hakeke Hunia—Donald McDonald, settler, Awahuri.

“Witness to signature of Meiha Keepa—George Cornelius Rees, licensed interpreter.”

They apparently instructed the surveyors to make up the plan in that way, and the surveyors did so. We must admit that the area had to be made up somehow, and there is no absolute reason, if validly made up, why it should not have been in this particular location; but when your Honours consider that it did deprive the tribe of a portion of this residential block, and a large portion of one of their big lakes, and that it was done without consulting the tribe in any way, but only at the instance of Kemp, who would be the person benefited—if the Court finds that it was made without jurisdiction, then I submit your Honours will find that the order was made without jurisdiction partly owing to the action of Kemp, and that any objection to saying that the order should be quashed on that account would be done away with.

The Chief Justice : This was something done without order. If the order was made, those who had to give effect to it gave a wrong effect to it.